NATIONAL RETIREMENT SERVICES, INC.

APRIL 2017 | NRS NEWSLETTER

BUSINESS MERGERS & ACQUISITIONS IMPACT TAX QUALIFIED RETIREMENT PLANS

As the Dow Jones Industrial Average hovers above 20,000, and the Federal Reserve hikes interest rates in anticipation of a possible business resurgence, business acquisitions and dispositions may be an ever-increasing part of the American business landscape.

These relatively common business transactions involve several considerations for the two parties acquiring or selling all or part of a business. One fairly significant consideration has to do with employee retirement plans to the extent that the buyer, the seller, or both sponsor tax qualified retirement plans. As discussed below, it is important to examine the provisions of any plan in effect and to determine the buyer's intention as to what retirement plan or plans (if any) will be offered to the seller's employees after the acquisition is completed. Depending upon the facts and circumstances, it may be important for the seller to take action with respect to their retirement plan *before* the business transaction is consummated.

Asset vs. Stock Sales

The two common types of acquisition for a corporation consist of either an *asset sale* or a *stock sale*. Partnerships and other types of business entities also engage in asset sales, but since there is usually no stock available, the acquiring business will most likely use other means to become the owners of the business entity being purchased. An *asset sale* consists of the buyer agreeing to purchase all or a specified portion of the seller's assets, including employing related employees. A *stock sale* consists of the buyer purchasing all the corporate stock, thus replacing the prior owners as owners of the corporation. The type of transaction selected by the buyer and seller has different results with respect to employee retirement plans.

According to the IRS, an *asset sale* without continuing the seller's retirement plan, results in severance of employment with the seller and employment by the buyer for all individuals affected by the sale. If a large enough group of employees have a severance of employment, full vesting in the seller's plan may be required for these and other terminated employees due to the "partial plan termination" rules. Also, the buyer and seller must not both be part of the same group of related entities. A *stock sale*, on the other hand involves acquisition of the seller's common stock so that the buyer becomes the owner of the corporation, including all assets and liabilities, and all employment contracts or arrangements.

Retirement Plan Impact

At least two retirement plan issues need to be addressed **before** an acquisition/disposition occurs. If an *asset sale* occurs, the acquisition results in termination of employment, which triggers the right to an immediate distribution in most retirement plans. Usually the seller terminates the plan if all employees leave their employment, resulting in the distribution of all plan assets. However, if the buyer does not wish employees to become immediately entitled to retirement benefits upon the asset acquisition, the buyer must either agree to continue the prior plan or merge the plan into the buyer's plan effective **on or before the date of the sale**. If a *stock sale* occurs when the seller has a 401(k) plan and the buyer sponsors a defined contribution plan, it may be necessary or desirable to terminate the 401(k) plan **before** the acquisition takes place. This is because tax law prohibits distributing benefits due to the termination of a 401(k) plan if the employer (determined at the time of the plan termination) maintains another defined contribution retirement plan during the period between the plan termination and 12 months after plan assets have been distributed. If the buyer terminates the plan after the acquisition, the existence of another defined contribution plan complicates the transaction. If the buyer wants its new employees to participate in its defined contribution plan, but does not wish to merge the seller's 401(k) plan into the buyer's plan, either:

(a) The acquired employees must wait at least 12 months after assets are distributed before entering the buyer's plan

Or

(b) The prior plan must be frozen instead of terminated so that no distributions are made before termination of employment, death, disability or retirement.

Other Retirement Plan Provisions Affected

Plan Eligibility and Vesting Provisions

Buyers in an *asset sale* are not required to recognize an employee's previous employment with the seller for either plan eligibility or vesting, but may do so voluntarily by a suitable plan amendment. Employees do not terminate employment when a *stock sale* occurs, so there is no interruption of their continuous service for retirement plan purposes.

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Plan Coverage Testing [IRC 410(b)]

The Internal Revenue Code ("IRC") provides a special rule permitting employers testing a plan for minimum coverage compliance to generally ignore certain employees during a "transition period" if they are employed as part of a business acquisition. The transition period is defined to begin on the acquisition date and to end on the last day of the first *full* plan year following the acquisition date. For example, suppose **Employer A** acquired **Employer B's** employees through an acquisition that occurred on March 24, 2016 and **Employer A** has a calendar year tax qualified retirement plan. **Employer A** can ignore employees who worked for **Employer B** when demonstrating compliance with IRC 410(b) minimum coverage requirements for both the 2016 and 2017 plan years. Starting in 2018, **Employer A** must include the former **Employer B** employees when determining minimum coverage compliance and may find it necessary to cover all or some of them in **Employer A's** retirement plan.

Blackout Notice

If, because of the business combination, one of the qualified plans realigns or changes its investments, an investment "blackout period" may occur. A blackout is a period of more than three consecutive business days during which the plan participants' right to change investments, request a loan, or receive a distribution is curtailed. Federal law requires that the participant receive advance notice of such a blackout, its reason, and its likely duration. The notice must generally be provided at least 30 days in advance of the blackout; but some exceptions apply. Penalties apply for a delinquent notice. The Department of Labor has provided a model "blackout" notice.

Participant Plan Loans after an Acquisition

If the seller's retirement plan has outstanding participant loans at the time of a disposition of assets and associated employees, it is sometimes possible to avoid the loans becoming immediately due and payable. This action is generally well received by employees who otherwise must pay income tax on any unpaid loans. The problem is avoided by transferring outstanding loans from the seller's plan to the buyer's plan. It may be necessary to amend either or both plans to accomplish this transaction.

APRIL 2017 | NRS NEWSLETTER

REMINDERS FOR APRIL

April 15 – Minimum funding requirements for defined benefit, money purchase, and target benefit pension plan years ended 7/31/16 must be met by April 15 to avoid excise taxes. An electronic transfer must be completed or a check mailed by this date.

April 17 – Pension Benefit Guaranty Corporation ("PBGC") premium filing due date for (pension plan related) premium payment year beginning June 2, 2016 to July 1, 2016.

April 18 – Retirement plan employer contributions are due to be deducted on employer tax returns due to be filed April 18, 2017.

April 18 – Form 5500 Series/8955-SSA – Forms that are on extension are due for the Plan Year ending 6/30/16.

May 1 – Form 5500 Series/8955-SSA – Forms are due for the Plan Year ending 9/30/16 that are not on extension.

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HOW ARE WE DOING? PLEASE COMPLETE THE NRS CLIENT SATISFACTION SURVEY!

We are grateful and thankful for the strong response to our Client Satisfaction Survey! In an effort to maintain high level client satisfaction, we need client feedback! The content of these replies will be sent directly to Executive Management. This survey takes less than 2 minutes to complete. To access the Client Satisfaction Survey, please click here.

As always, NRS truly values your continued business!

For more information or to request a proposal, please visit our website at www.NRServices.com**, or for sales support, please contact:**

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