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# Employee Benefits Due Diligence in Mergers and Acquisitions

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When conducting due diligence in connection with a potential merger or acquisition, companies too frequently treat employee benefits as an afterthought. In reality, employee benefit plans are a common source of substantial hidden liabilities. Employee benefit specialists should be engaged early in the due diligence process to flag potential liabilities and craft appropriate workarounds.

Proper employee benefit due diligence can catch issues such as the following:

- Qualified plan defects. Any retirement plan that fails to meet the tax code's convoluted qualified plan rules is a ticking time bomb of potential liability. Careful due diligence can flag known qualification defects and advise appropriate steps to avoid inheriting any associated liability.
- IRS reporting failures. Many employee benefit plan sponsors fail to properly file required reports with the IRS, such as Form 5500 (annual return of an employee benefit plan) or Forms 1094-C and 1095-C (reporting offers of health coverage). Late filing penalties, which accrue each day, can become substantial over time, and unless proper steps are taken, this liability may pass on to the successor employer.
- Employer "pay or play" penalties. Companies that employ 50 or more full-time employees are subject to the Affordable Care Act's "pay or play" provisions, which impose substantial tax penalties if the employer fails to offer adequate health coverage to its full-time employees. Employee benefit specialists can help assess the risk of penalties and advise on appropriate representations and warranties to protect the successor employer.

Fortunately, most employee benefit-related liabilities can be avoided if caught early enough in the due diligence process. Once areas of potential liability are flagged, employee benefit specialists can advise on appropriate protective measures. Failure to engage employee benefit specialists early enough can result in inheritance of plan-related liabilities that in some cases may go on to infect the acquiring entity's own plans.

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