Employee Benefits Due Diligence Request

Legal Alert

January 1, 2008

Marc Garber

The last issue of the *M&A Report* included an article addressing the employee benefit plans and considerations associated with acquiring a business. In this issue, we include a due diligence checklist setting forth the documents and information counsel to the acquiring company should request and review in order to prepare the necessary provisions of the acquisition agreements as well as to help the acquirer structure the employee benefit plans for the combined entity after completing the transactions.

I. QUALIFIED RETIREMENT PLANS: FOR EACH PLAN FOR THE LAST 3 YEARS:

- Describe the type of plan (defined benefit, 401(k) plan, etc.), list of benefit structures and plan features, and document the history of the plan (when adopted, IRS approval, dates amended, etc.).
- Provide copies of all plan documents and trust agreements, including amendments, and restatements.
- Provide all IRS and DOL submissions, IRS rulings, DOL Advisory Opinions, including audit requests and responses, along with governmental responses.
- Copies of all Summary Plan Descriptions (SPDs) and Summaries of Material Modifications, as well as all annual reports (with exhibits).
- Copies of all contracts with third party providers (TPAs, actuaries, investment advisors, etc.).
- Copies of discrimination testing results.
- Copies of all investment contracts, reports and employee disclosures regarding investment funds and vehicles associated with the plans.
- Provide all actuarial and investment reports, annual reports, including schedules.
- List any litigation and claims for benefits involving the plans.
- Actuarial analysis of current funded status of the plan determined on both a termination basis as well as on an ongoing basis.
- Copies of all agency curative filings related to plan document defects or operational failures as well as all governmental responses.
- Identify all multi-employer plans and request copies of all plan documents, joinder agreements, trust documents, annual funding requirements and a current trustee letter regarding partial or full withdrawal liability triggered by or associated with the acquisition.
- Trustee letter for multi-employer plans respecting receipt of payments for prior contributions due to the plan.

II. NON-QUALIFIED PLANS: FOR EACH PLAN FOR THE LAST 3 YEARS:

- Description of plan (e.g., top-Hat or 401(k) wrap-around), benefit formula and plan features, employees covered, funded status.
- Copies of all plan and trust documents, as well as amendments and restatements.
- Short form filing with DOL for "Top-Hat" type plans and other DoL filings for other types of plans.
- Copies of annual reports.
- All SPDs and other employee communications.
- If applicable, all employee election forms.
- Copies of all associated insurance and investment contracts.
- Schedule of benefits currently being paid (as well as those payable in the future).

III. WELFARE PLANS: (HEALTH, DENTAL, LIFE, DISABILITY, HEALTH SAVINGS ACCOUNTS, FLEXIBLE BENEFITS PLANS, ETC.) FOR EACH PLAN FOR THE LAST 3 YEARS:

- Copies of all plan documents, amendments and restatements.
- Copies of SPDs and other related employee communications.
- Copies of discrimination testing results.
- Schedules of benefits and features of each plan.
- Insurance and reinsurance contracts supporting each plan.
- 3 years' claim's experience.
- Identify claims in process, "shock loss" claims, estimate current and future costs and describe insurance contract coverage if business is sold.
- COBRA costs, procedures, COBRA documents, identify employees with COBRA coverage.
- Cafeteria and flexible benefit plan documents, employee election forms, SPDs, and employee communications, description of all benefits available under plan.
- Identify employees currently on disability and identify practices regarding determining disabled status.
- Premium charges - last 3 years of insurance quotes as well as premium comparison sheets for all coverages for the last 3 years.
- Describe retiree coverage, eligibility, classes of employees covered and types of benefits offered (e.g., life, health).

IV. PAYROLL PRACTICES: FOR THE LAST 3 YEARS:

- Describe pay periods.
- Contracts with third party payroll services.
- Describe practices related to holiday pay, sick leave, paid time off, wage continuation (short term disability).
- All employee communications.
- Terms of severance plans, all plan documents, SPDs and employee communications.

- Anticipated eligibility for severance if transaction is completed and identify amounts payable to each covered employee.

V. EMPLOYEES: FOR THE LAST 3 YEARS:

- Identify key employees, salaries, organizational charts.
- Copies of all employment contracts, severance plans or agreements and change in control agreements.
- Identify number of all full-time, part-time and temporary employees.
- Census data of employees (e.g., date of birth, Social Security number, date of hire and job classifications).
- Copies of all noncompetition agreements and other restrictive covenants.
- Copies of all employee handbooks, personnel manuals and all employee terms and handouts.