THOMPSON HINE

Business Law Update

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Corporate

An Ounce of Prevention is Worth a Pound of Cure: Understanding State Franchise Taxes

By John D. Cottingham & Justin D. Tillson

While it may be true that the only things certain in life are death and taxes, knowing how to reduce your tax liability can certainly make paying taxes less dreadful. In many cases, determining a company's tax liability is complex, and is a task often left to accountants. However, in other cases, ordinary corporate actions can have an easily identifiable impact on tax liability. In particular, decisions ranging from awarding employee stock options to making certain capital expenditures can impact state franchise taxes. Keeping in mind how particular decisions might increase or decrease a company's tax burden can influence whether that decision might or might not be appropriate.

Franchise Taxes: What Are They?

Several, but not all, states impose a franchise tax on companies (typically corporations) for conducting operations in that state. Delaware, in which more than a million companies are organized, along with other popular states like New York, Illinois and Texas, all impose franchise taxes. The tax is generally based on a company's assets, equity or income, or some combination of the three, although this varies by state. Generally, a company is responsible for the payment of franchise taxes even if it had no profit for the relevant tax year.

Decisions Affecting Franchise Tax Liability

It might not seem obvious, but decisions as to whether or not, or when, to increase the number of authorized shares of stock or to issue dividends, or even decisions as to the location to maintain assets, could all affect a company's franchise tax liability. Of course, an increased tax burden is only one factor in making a business decision, but because the link between certain decisions and franchise taxes is not always intuitive,

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For more details on any of the topics covered in this *Business Law Update*, please contact the authors via the links at the end of each article or David R. Valz, editor-in-chief. For information on our Corporate Transactions & Securities practice, please contact Frank D. Chaiken, practice group leader.

companies should be mindful of these actions, and others, that have franchise tax implications to be sure they have weighed all of the benefits and risks.

Increase in Authorized Shares

Companies increase the number of their authorized shares of stock to allow for various transactions, including the award of stock options or warrants and the issuance of convertible debt. However, doing this can have an adverse impact on a company's franchise tax liability. In Delaware, for example, having more shares of stock authorized than are issued can increase a company's franchise tax burden. Additionally, because it might take several years for options to be exercised or debt to be converted to equity, the increased franchise tax burden will continue until the number of authorized shares and issued shares becomes equal.

Issuance of Dividends

Franchise taxes generally contemplate, at least in part, the value of a company's assets to determine its tax liability. As a rule of thumb, the more assets a company has, the higher its tax burden. Accordingly, the decision to issue dividends, and thereby reduce assets (capital), effectively reduces a company's franchise tax liability. In fact, some states specifically instruct companies to exclude any declared dividends from the calculation of their surplus, which is generally included in companies' assets. Thus, aside from other more traditional benefits a company might reap, a company can potentially reduce its franchise tax liability by issuing dividends.

Location of Assets

Many companies have physical locations or operations in several states; each state will likely have different franchise tax calculations and rates. Generally, states prorate franchise taxes according to the proportion of operations conducted in that state (based on things like revenue obtained in the state and assets located in the state). To the extent assets can be located, or revenue can be realized, in a state with a lower franchise tax or no franchise tax at all, a company can lower or eliminate its franchise tax liability.

Timing

The decisions discussed previously might each further impact franchise taxes based on when they are made. This is because franchise taxes are based on a snapshot of a company's relevant information at a certain point in time – generally the end of the calendar or fiscal year. The date on which certain actions take place can change the period in which the resulting changed franchise tax is levied. For example, it may make sense to delay from December 31 until January 1 a capital expenditure for the purchase of an expensive asset for an office in a state with a high franchise tax. Doing so would avoid including the asset in the entire year's tax base while only making use of it for one day (on December 31). Nonetheless, there might be competing business or other tax reasons which would make purchasing the asset on December 31 the more favorable decision, so all benefits and consequences should be considered.

How Much Is at Stake?

Every state's franchise tax is different. Several states do not cap the amount payable under their franchise tax regimes. Those that do can have very high caps: for example, Illinois has a cap of $2 million while Delaware has a cap of $180,000. Depending on the particular decision facing a company, the magnitude of the impact that the decision may have on its franchise tax liability can be great.

Conclusion

While people are generally familiar with the structure of income taxes (i.e., earning additional income will increase a company's income tax liability), the structure of state franchise taxes is less intuitive. Moreover, the information each state uses to calculate its franchise tax varies, making the issue even more complex. It is important to carefully consider how an otherwise innocuous business decision, seemingly unrelated to any tax implication, can impact a company's franchise tax liability. Doing so can result in meaningful tax savings.

With any questions, please contact John Cottingham or Justin Tillson.

Corporate Governance

Auditor Independence – The Framework

By Tammy P. Bieber

In the late '90s/early 2000s, a tightening of auditor independence standards caused many accounting firms to limit or eliminate their non-audit consulting practices. Recently, those firms have jumped back on the consulting bandwagon, a trend that has not gone unnoticed by the regulators.

It is the position of the Office of the Chief Accountant of the Securities and Exchange Commission (SEC) that:

> "[p]ublic companies have a responsibility to ensure that the auditors of their financial statements are independent, as do the auditors themselves… Ensuring auditor independence is as important as ensuring that revenues and expenses are properly reported and classified. If the auditor's independence is impaired then the company has not satisfied the requirement to file financial statements audited by an independent accountant."

Accordingly, and in view of the uptick in non-audit services offered by audit firms, companies need to understand the basics of auditor independence so as to avoid the situation where their independent auditor is no longer deemed independent or worse, the SEC comes calling. This first article of a three-part series provides an overview of the auditor independence standards and the standard setters. The next installment will outline the role of the audit committee in maintaining auditor independence, and the final piece will review relevant SEC enforcement actions.

The federal securities laws and the SEC rules promulgated thereunder require that financial information filed with the SEC be certified or audited by "independent" public accountants. According to the SEC, that independence requirement serves two public policy goals. First, it seeks to minimize the influence of external forces that could impact the auditor's judgment, thereby fostering high quality audits. Second, an independent audit promotes investor confidence in the integrity of the reported financial information.

Until 1997, the SEC was the sole independence standard setter. Discussions between the SEC, the American Institute of Certified Public Accountants (AICPA) and the major accounting firms in 1997 led to the formation of the Independence Standards Board (ISB). The ISB set the auditor independence standards but the SEC also retained its authority. During its existence, the ISB issued three standards. The first requires annual independence discussions with the audit committee, including disclosure of all relationships between the auditor and the company that might bear on independence and confirmation of the auditor's independence. The second relates to mutual funds and requires that an auditor be independent of the sister funds and all related non-fund entities in addition to the audited fund. The third standard set forth certain procedures to be put in place when an employee of an audit firm becomes employed by an audit client. To the extent not replaced by subsequent rulemaking, these standards remain in effect.

For a variety of reasons, including a general disagreement over the extent to which "independence in appearance" versus "independence in fact" should factor into the independence rules, the SEC promulgated its own independence rules in 2000 (which resulted in the ISB disbanding shortly thereafter) and again in 2003 in response to the Sarbanes-Oxley Act of 2002 (SOX). Those rules:

(1) prohibit relationships between certain members of the audit firm and the client;
(2) prohibit various non-audit services;
(3) address personnel issues, including audit partner rotation, employment of audit firm staff and certain compensation arrangements;
(4) require discussions with the audit committee; and
(5) mandate disclosure of the audit and non-audit services provided by the auditor and the associated fees.

The auditor must be independent both in fact and in appearance, such that an auditor is not independent if a reasonable investor would conclude that the auditor is not capable of exercising objective and impartial judgment. In making independence determinations, the SEC looks first to whether a relationship or the provision of a service:

(a) creates a mutual or conflicting interest between the accountant and the audit client;
(b) places the accountant in the position of auditing his or her own work;
(c) results in the accountant acting as management or an employee of the audit client; or
(d) places the accountant in a position of being an advocate for the audit client.

Following the creation of the Public Company Accounting Oversight Board (PCAOB) by SOX, the PCAOB adopted as its interim standards the AICPA's Code of Professional Conduct and the ISB's standards. Since that time the PCAOB has developed additional standards relating to contingent fees, tax transactions and audit committee communications, and has issued guidance applicable to certain rules. Because the PCAOB rules do not supersede those of the SEC, a public company auditor must follow the more restrictive rule. Finally, the AICPA has its own set of comprehensive independence standards applicable to all of its public members and has recently developed a conceptual framework for its public members to follow when no direct authority exists. That framework requires that the auditor identify threats to compliance with the independence rules, such as family relationships, familiarity and self-interest; evaluate those threats; and apply various safeguards.

As the preceding discussion demonstrates, the auditor independence framework is intricate and the rules are complex. Companies and their audit committees, therefore, need to have a basic understanding of the standards but should be cognizant of the complexity and should not hesitate to bring in outside advisors to untangle the independence web when necessary.

If you have questions, please contact Tammy Bieber.

Thompson Hine Earns First-Tier Rankings in Chambers USA

Thompson Hine LLP has been recognized for the 13th year in a row as a leading law firm in Chambers USA: America's Leading Lawyers for Business, which ranks lawyers according to technical legal ability, professional conduct, customer service, commercial awareness, diligence and commitment, based on interviews with clients and peers.

In the 2015 edition, Thompson Hine is named a top firm in 11 practice areas, three of which – Construction, Transportation: Rail (for Shippers) and Transportation: Road (Carriage/Commercial) – are ranked nationally: Banking & Finance, Bankruptcy/Restructuring, Construction, Corporate/M&A, Employee Benefits & Executive Compensation, Intellectual Property, Litigation: General Commercial, Natural Resources & Environment, Real Estate, Transportation: Rail (for Shippers) and Transportation: Road (Carriage/Commercial).

Mergers & Acquisitions

M&A Transactions a Natural Fit for Legal Project Management

By Frank D. Chaiken & Tony Kuhel

Let's face it: law firms are not usually thought of as hotbeds of innovation, especially when it comes to their service delivery and fee models. While increasingly clients expect their law firms to share certain transaction risks and establish a fee structure that encourages efficient delivery of legal services, most firms continue to bill on an hourly basis. Law firms have also been slow to adopt project management principles that were embraced by other professional services firms years ago. Since legal project management (LPM) and value-based pricing appear to represent a coming long-term shift in the lawyer-client relationship, rather than merely a fad precipitated by The Great Recession, law firms are beginning to reevaluate their service delivery and fee models to more closely align with their clients' expectations, interests and demands. M&A transactions are a natural place to begin implementing these strategies.

While every M&A transaction is unique, most deals progress through a fairly common lifecycle, and a process has evolved for buyers and sellers to evaluate, negotiate and ultimately document the risk allocation inherent in every deal. Lawyers, however, have historically been more focused on the uniqueness of their role in the deal than on developing ways to standardize certain aspects of the acquisition process. M&A lawyers finally are developing and refining process efficiencies that can help reduce overall costs to clients and allow lawyers to focus their time on appropriate tasks and provide the most value to clients. Measures such as implementing formal due diligence policies and procedures, developing standardized (but customizable) transaction documents, and forming and maintaining lawyer teams familiar with a particular client's needs and preferences are all ways to streamline involvement in the M&A process.

Process efficiencies, however, are not enough to satisfy the increasing demand for the efficient delivery of legal services. Law firms are now beginning to adopt project management principles to modernize their M&A practices. When done properly, LPM provides a framework to structure the delivery of legal services performed in the typical M&A transaction, but it's more than just a management

philosophy – it's a practical toolkit that helps lawyers and clients:

- Target and evaluate the uncertainties and risks that can impact the cost of an engagement;
- Create a realistic, detailed and reliable budget;
- See performance against budget during the full course of the engagement;
- Improve attorney-client communication; and
- Promote a meaningful post-engagement review of services provided during the deal, as well as ways to improve performance in subsequent engagements.

LPM commences at the outset of an engagement. However, since deals are often under way by the time lawyers are brought in, advance planning and preparation is critical. Law firms should ask about the deal's importance to the client's overall business objectives, the client's risk tolerance and the role of the client's internal team, all of which can impact scope and cost. Clients should express their expectations regarding staffing and timing. Law firms that effectively adopt LPM develop tools to facilitate these discussions and use what they learn as the basis for a project budget.

LPM can change how lawyers and clients budget for M&A engagements. Historically, most law firms have provided "back-of-the-napkin" fee estimates, complete with a laundry list of exceptions and assumptions, rather than a meaningful

budget such as businesspeople expect from nonlawyers. The fact is, law firms have access to a tremendous amount of data regarding the costs of M&A engagements. While the most active client may complete 30 deals in any given year, law firms with sophisticated practices assist with hundreds each year. If properly harnessed, data collected from these deals help firms create detailed, accurate budgets based on actual fees from prior transactions. By using a comprehensive set of task codes, law firms adept in LPM can aggregate their fee data and develop budgeting tools to systematically create detailed budgets based on actual experiences in prior transactions.

After the preliminary work of thoroughly fleshing out the transaction's details with the client and leveraging the firm's historical data, the agreed-upon, more precise budget can then be shared with both the internal and external teams to set expectations. When the key stakeholders have collaborated to create the budget and everyone on the team knows their responsibilities and timeframes, the entire engagement can be more efficient with less re-work and higher-quality output.

Unlike the traditional fee estimate, an LPM-based budget can be valuable during an M&A engagement, and not just at the outset. The relatively few law firms that have embraced LPM have developed systems to monitor performance against budgets, and they give this information to clients in real time. With these systems in place, lawyers and clients can identify potential cost overruns before they occur and avoid a situation that both lawyers and clients despise: the surprise bill. Comparing actual fees against budget following an engagement can also identify tasks where efficiencies can be gained, as well as those aspects of the transaction where a law firm is adding the most value. In each case, an LPM-based budget provides clients greater transparency regarding the nature and amount of legal services rendered.

While effective LPM can improve the delivery model for legal services in transactions, it does not always change how lawyers price their services. Value-based pricing has been used by investment bankers, accountants and other M&A professionals for decades, but most lawyers rarely deviate from the billable hour. They have been reluctant to stand behind their fee estimates by quoting a fixed fee, perhaps because they lacked tools to provide accurate, detailed and transparent budgets. For their part, clients may be uncomfortable with a fixed fee or other fee arrangement if they feel they are relying on law firms to understand how much legal work is required or how much it will cost, or if they believe a fixed fee encourages lawyers to cut corners or maximize profitability at the expense of quality and client service.

LPM provides law firms and clients with the tools to bridge this information gap. A law firm that has adopted an effective LPM program can be confident in the budget it helped develop and comfortable using that budget as the basis for a fixed fee or other value-based pricing arrangement. Similarly, pre-budget discussions and the transparency offered by performance monitoring and post-action reviews give clients the information they need to confirm their lawyers are spending time in a way that maximizes value and not profitability.

The LPM budgeting process also provides a foundation for discussion of more traditional value-based pricing arrangements in M&A transactions, such as broken-deal discounts and closing premiums, which, along with LPM, generally can be an effective way to align law firm and client interests.

Effective legal project management and value-based billing in M&A transactions can foster a "trusted adviser" attorney-client relationship by positioning lawyers to add value rather than simply acting as timekeepers who bill in six-minute increments. As the use of these strategies continues to develop and become more common, we should expect that clients will have increasingly higher expectations of their law firms, and will ultimately be more satisfied with the value of the legal services they receive.

With any questions, please contact Frank Chaiken or Tony Kuhel.

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International

Loan Amendments & FATCA

By Katherine D. Brandt & James C. Koenig

With so many foreign financial institutions and other foreign entities investing in U.S.-based companies through debt facilities, most loan agreements today contain specific provisions to deal with the Foreign Account Tax Compliance Act (FATCA). While the primary focus of FATCA is to force foreign lenders and other foreign entities to report certain information to the Internal Revenue Service, FATCA also imposes a 30 percent withholding tax on certain payments, including interest on loans (and beginning in 2017, repayments of loan principal), made by U.S. entities to foreign entities who do not comply with the registration and reporting requirements or do not fall within one of the available exemptions. Among the specific FATCA provisions included in most loan agreements are carve-outs of the FATCA withholding tax from the standard tax gross-up provisions and an obligation on the part of the foreign lenders to supply appropriate documentation to enable a borrower to comply with its FATCA withholding obligations.

FATCA withholding obligations began for U.S. borrowers on July 1, 2014. Loans and loan agreements that were outstanding on July 1, 2014 are considered “grandfathered” and not subject to FATCA obligations, so you may feel safe if your company entered into its loan agreement prior to July 1, 2014. If, however, an amendment to the loan agreement is entered into after July 1, 2014, and that amendment is considered a “significant modification” of the legal rights and obligations under the loan agreement, the loans and loan agreement lose their grandfathered status. There are certain “safe harbor” changes that are not considered significant modifications, but many changes to loan agreements do not fit easily into one of those safe harbors, which leads to uncertainty as to whether or not a particular change to a loan agreement will be treated as a significant modification for FATCA purposes.

As a result, in most syndicated deals, the administrative agent will not want to make the determination as to whether or not a particular loan amendment is a significant modification, but will instead leave that determination to the borrower. Two options to deal with this issue have started to arise during the loan amendment process: either the borrower agrees with the administrative agent that the loans and loan agreement do not qualify for grandfathered status (and they each agree to treat the loans and loan agreement as not qualifying) or the borrower agrees to indemnify the administrative agent for any losses or damages that may be incurred as a result of the administrative agent treating the loans and the loan agreement as qualifying for grandfathered status.

The second option should be used only in those cases where it is clear that the loan amendment is not a significant modification, as the losses or damages suffered by the administrative agent could be material. Deciding to indemnify the administrative agent is likely to be rare. In most cases, the first option will be utilized, in which case the borrower must insure that the loan agreement contains the FATCA-specific provisions mentioned above that will enable it to comply with its FATCA obligations and avoid the substantial 30 percent withholding tax. Even in those instances where the amendment is not considered to be a significant modification, we recommend adding the FATCA-specific provisions to your loan agreement, if they have not already been included, to avoid having to gross up a foreign lender’s payment.

If you have any questions, please contact Kathie Brandt or Jim Koenig.

EEOC

EEOC Issues Proposed Wellness Program Regulations

By Julia Ann Love

On April 20, 2015, proposed regulations and interpretive guidance from the Equal Employment Opportunity Commission (EEOC) were published in the Federal Register. The proposed regulations would amend regulations issued under the Americans with Disabilities Act (ADA) and provide guidance on how employers may provide wellness programs involving disability-related inquiries and/or medical examinations without violating the ADA. The proposed regulations, although similar to the final wellness program regulations issued under the Health Insurance Portability and Accountability Act (HIPAA), provide new and somewhat different requirements than those imposed on wellness programs under HIPAA. As a result, employers need to be familiar with the EEOC and HIPAA requirements as well as other laws impacting employer-sponsored wellness programs, such as the Genetic Information Nondiscrimination Act (GINA).

The proposed regulations were issued in response to sharp criticism of the EEOC's method of rulemaking in the courts and provide that a wellness program that includes a disability-related inquiry or medical examination will not be found discriminatory under the ADA if the wellness program is (1) reasonably designed to promote health or prevent disease, (2) voluntary and (3) confidential. Additionally, wellness programs offered as part of a group health plan must (4) limit the incentive offered and (5) satisfy certain notice requirements.

The following chart compares the proposed EEOC regulations and the final wellness program regulations under HIPAA.

Requirement	Final Regulations Under HIPAA	Proposed EEOC Regulations	Comments
Reasonable Design	Reasonably designed to promote health or prevent disease	Reasonably designed to promote health or prevent disease	• HIPAA requirement applies only to health-contingent wellness programs • EEOC proposed requirement applies to all wellness programs
Voluntary Participation	Frequency of opportunity to qualify: A health-contingent wellness program must permit an eligible individual the opportunity to qualify for the reward at least once per year	1. Employees are not required to participate 2. An employee who does not participate is not denied coverage under the group health plan or a benefits package under the group health plan 3. No adverse employment action is taken against an employee who does not participate	• HIPAA requirement applies only to health-contingent wellness programs • EEOC proposed requirement applies to all wellness programs
Confidentiality	No specific confidentiality requirement	Except as is necessary to administer the health plan, employee information obtained by the wellness program may be provided to the employer only in aggregate terms that do not disclose and are not reasonably likely to disclose the employee's identity	Employers may generally comply with the EEOC proposed requirement by adhering to the HIPAA privacy rules and making the certification required by the final HIPAA privacy regulations

Requirement	Final Regulations Under HIPAA	Proposed EEOC Regulations	Comments
Incentive Limits	Maximum aggregate incentive provided under all of the employer's wellness programs may not exceed 30% of the total cost of coverage of the level of coverage in which the employee is enrolled if any dependent can also participate in the wellness program; the maximum incentive is increased to 50% for tobacco-related programs	Maximum aggregate incentive provided under all of the employer's wellness programs may not exceed 30% of the total cost of employee-only coverage	• HIPAA limitation applies only to health-contingent wellness programs • EEOC proposed limitation applies to all wellness programs offered in connection with a group health plan
			• HIPAA limitation applies to the level of coverage in which an employee is enrolled if any dependent can participate in the wellness program • EEOC proposed limitation applies to the employee-only cost of coverage
			• HIPAA limitation increases to 50% for tobacco-related wellness programs • EEOC proposed limitation of 30% applies to any tobacco-related wellness program that involves a medical examination such as a blood draw
Notice to Employees	Health-contingent wellness programs must provide notice to employees of the availability of a reasonable alternative standard, including contact information for obtaining the alternative and a statement that the individual's personal physician's recommendations will be accommodated	Specific information about the wellness program, the employer's use of information obtained and the restrictions on the employer's disclosure of information obtained must be provided to employees	• HIPAA requirement relates only to reasonable alternatives applicable under a wellness program • EEOC proposed requirement applies to all wellness programs offered in connection with a group health plan

Planning for 2016

Although the EEOC's regulations are only proposed at this time, employers should take into consideration the potential impact of the proposed regulations as they prepare for 2016.

- Ensure that all wellness programs are reasonably designed to promote health or prevent disease, including providing feedback to employees or providing information back to the employer to design specific health programs.
- Review wellness program design to determine changes that may be necessary to comply with the EEOC's proposed voluntary requirement.
- Become familiar with the EEOC's proposed confidentiality requirements and determine what processes and procedures are needed to safeguard wellness program information.
- Review HIPAA certification and determine whether an update is required to ensure compliance with the EEOC proposed regulations.
- Review wellness program limits and determine whether adjustments are needed if the EEOC regulations are finalized as is.

Become familiar with the EEOC's proposed notice requirements and determine what processes and procedures are needed to provide required notice.

If you have questions, please contact Julia Ann Love or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

Asset Purchase

Ohio Business Transfers May Result in Higher Workers' Compensation Premiums

By Philip B. Cochran, M. Scott Young & Frank D. Chaiken

The Ohio Supreme Court recently held that a company that entered into an asset purchase agreement to purchase a temporary employment agency was, in fact, a successor-employer for workers' compensation purposes. Therefore, the workers' compensation premiums of the purchasing company would include the claims experience rating of the temporary agency and would be included by the Ohio Bureau of Workers' Compensation (BWC) when calculating premiums for the new company.

In *State ex. rel., RFFG, L.L.C. v. Ohio Bureau of Workers' Compensation* (2014), 141 St.3d 331, WTS Acquisition Corporation executed an asset purchase agreement with Ameritemps, Inc. WTS then transferred the assets to wholly-owned subsidiary, RFFG. In a form submitted to the BWC, RFFG stated that it purchased only selected vehicles, personal property, office leases, office locations and the right to contract with certain Ameritemps clients. The BWC found that RFFG was a full successor-in-interest pursuant to Ohio Administrative Code § 4123-17-02. RFFG protested the BWC's finding, arguing that it did not succeed Ameritemps in the operation of its business. Alternatively, RFFG argued that it should be considered only a partial, not a full, successor-employer. The BWC denied the protest, finding RFFG to be a full successor-in-interest.

The BWC rules state that a state fund entity (successor) which wholly succeeds another state fund entity (seller) in the operation of a business shall absorb the claims experience of the selling entity for purposes of workers' compensation premium calculation.

The Supreme Court affirmed the Court of Appeals' decision rejecting RFFG's argument that it should not be found to be a full successor-in-interest as it purchased "only a fraction of Ameritemps' offices, leases, former employees, and clients in less risky industries and merely used Ameritemps' name for marketing purposes." The Court relied upon the BWC's decision which stated that "a significant number of both clients and employees were retained by the successor. The business name remained the same, the business locations remained the same, the clients significantly remained the same and the employees significantly remained the same."

In structuring a purchase or reorganization agreement in Ohio, attention should be given to the workers' compensation claims experience of the state fund selling entity. The BWC rules state that a state fund entity (successor) which wholly succeeds another state fund entity (seller) in the operation of a business shall absorb the claims experience of the selling entity for purposes of workers' compensation premium calculation. A similar BWC rule applies to partial succession of a business. In such case, the claims experience of the portion of the business acquired by the successor-employer is absorbed by that purchaser.

All entity transfers of Ohio employers require BWC form U-118 to be completed and filed with the BWC. After it analyzes the nature of the transfer, the BWC notifies the successor-employer as to its decision on successor liability. It matters not whether the purchase agreement describes the transfer as an asset transfer (see RFFG, above). It is equally irrelevant to the BWC whether the purchase agreement contains a clause which states that the claims experience of the seller does not transfer to the purchaser. It should also be noted that courts generally disregard such clauses and rely upon the BWC's successor liability rule when the issue is litigated. The successor liability rules of the BWC state that the BWC, after appropriate fact analysis, shall decide if the purchaser either wholly or partially succeeds the operation of a business of another state fund entity.

Negotiations of a business transfer should always include an analysis of the seller's workers' compensation experience.

Most Ohio state fund employers retain the services of third-party administrators. A printout of the seller's in-experience claims can be obtained from the third-party administrator. The claim data can be analyzed by the purchaser's third-party administrator through an impact study, i.e., how much of a financial impact will the transferred claims experience have upon the purchaser's workers' compensation premiums.

Consideration should also be given to a post-closure remedy clause in the purchase agreement. This clause would be structured such that any increase in workers' compensation premiums directly related to the seller's claims shall be reimbursed to the purchaser by the seller. Furthermore, it is recommended that this reimbursement clause remain in effect until such time as all of the seller's workers' compensation claims are out of experience and are no longer impacting the purchaser's workers' compensation premiums.

Another consideration for negotiations of a purchase agreement is to require the seller to utilize its best efforts in the time prior to closure to settle all or at least the worst workers' compensation claims. Settlement would obviate the inclusion of such claims in the experience transfer.

Under BWC rules, a purchasing company can inherit the seller's claims experience even if the agreement is an asset purchase agreement. It should be noted that successor liability also applies to unemployment claims in Ohio. Furthermore, successor liability also exists in many states outside of Ohio.

For more information, please contact Phil Cochran, Scott Young or Frank Chaiken.

WHAT THE MARKET SAYS ABOUT THOMPSON HINE

Thompson Hine Recognized by Corporate Counsel as Innovation Leader for Third Year

Thompson Hine LLP has again been honored in every category for game-changing innovation in *The BTI Brand Elite: Client Perceptions of the Best-Branded Law Firms.* The firm was ranked among the top five law firms nationwide in the category "Innovation: Client Service Strategists" – those making changes other firms are not to improve the client experience. In addition, Thompson Hine was named one of 25 leading firms nationwide in the category "Innovation: Movers & Shakers" – firms delivering new services that others are not. Thompson Hine is one of only 26 firms nationwide recognized in all innovation categories.