Business Law Update

Winter 2019

Business Perspectives

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In this Winter 2019 edition of the *Business Law Update* we continue with the second and final installment of our article on M&A process efficiency. The new year began with several high-profile deal announcements, and we are seeing a robust transaction pipeline in our own practice. In a competitive deal environment we believe our focus on process and cost-efficiency will bring significant benefits to our clients. We also have our eyes on the horizon and are making sure we are prepared for any looming changes in the deal economy, such as a possible increase in the number of distressed company deals.

This edition also includes articles on a diverse array of topics of interest to business leaders: cautions in drafting employee severance agreements and new developments in employee benefits; national security review of cross-border transactions in the United States; and jurisdictional considerations in patenting new technologies.

We wish everyone a very prosperous and fulfilling new year.

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- Update: Opportunity Zones and Startup Tech Companies
- Preparing for the Next Generation of Actively Managed ETFs
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- SEC Proposes New Rule for Fund of Funds Arrangements
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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.

Mergers & Acquisitions

Organizing and Implementing an M&A Growth Strategy for Success: Optimizing for Predictability, Efficiency and Transparency – Part II

By William M. Schult, CPA* and Frank D. Chaiken, Esq.

To be successful in growth through M&A, companies, whether public, private or private equity-backed, need to consistently deploy a focused strategy and process-based approach. In this second article of a two-part series, we discuss some of the considerations, techniques and approaches that are critical to executing successful acquisitions. (Read Part I on our website.)

Deal Process: Due Diligence, Negotiations and Closing

Once the buyer becomes more comfortable with the valuation and financial performance of the target business, and the seller more confident that the deal can proceed on the proposed terms, the focus will shift into high gear and increasing levels of detailed work on the various due diligence and negotiation work streams.

A key question for both sides will be: Who's in charge? As in any effective undertaking, project leadership is a key element of success. Who is waking up every morning with the first priority of making sure that all the different tasks and objectives are on track? On the buyer's side this may be the CFO or corporate development officer, or sometimes an outside adviser such as an investment banker or lawyer. The target company usually has the biggest challenge in this regard, given the pressures of continuing to run a business and meeting multiple demands for information, most often using a skeleton crew in order to preserve confidentiality. It is important to establish a central information repository (such as a web-based "virtual data room"), and to coordinate requests for information to minimize duplication of effort. Clear lines of communication are essential.

Control of costs with external service providers can be a challenge. Asking providers to establish fee budgets for their services increasingly is a best practice in the transactional world. Law firms and other professional service providers likely have completed hundreds of similar transactions, and have data on the tasks and costs involved in deals of similar size, complexity and industry focus that should enable them to provide credible, achievable transaction budgets.

Traditional project management tools likewise are very helpful and essential for keeping things on track. We mentioned above the importance of an overall project time line in Part I of this article. Each separate work stream should be organized in a similar fashion, and coordinated with the others via the project leader. Key transaction management documents may include:

1. **A process flow chart.** This chart, possibly in Gantt chart format, illustrates the transaction's schedule and shows project milestones, status of project tasks, dependencies between tasks, etc.
2. **Transaction issues/negotiation list.** As due diligence is completed the parties always identify numerous issues to be discussed and resolved. Keeping track of these in a central "deal issues" list helps keep everyone focused on the open items.
3. **Checklist of items deliverable at closing and related tasks.** It is almost never too early start building this and working toward completion of the many tasks involved in conveying ownership of a significant business.

As due diligence continues in parallel with negotiation of the definitive deal documents, it is important to maintain the link between the pre-closing process and the closing and post-closing tasks. For example, it is a best practice to integrate the data-gathering effort around due diligence with the documentation of the transaction documents, especially the disclosure schedules to the purchase agreement, as well as any required notices or other closing checklist items.

Also, the buyer will develop a great deal of valuable, detailed information about the business in the course of the due diligence process that is critically important for the post-closing integration of the business. This will include information in increasing levels of detail about such critical areas as key personnel (and securing their potential future roles in the business); customers; technology; supply chain; assets (title, condition, gaps); compliance (human resources, environmental, health and safety, and other legal, regulatory, and contractual issues); and cost savings and growth opportunities.

Business Integration

We break down the integration process into five topics that must be addressed in every deal, to one degree or another. Each of these is a complex topic in and of itself, with numerous detailed considerations to be taken into account.

***Planning*.** As with any successful project, planning does not start after an acquisition has been completed, and it is always better to begin with the end in mind. Ideally, in the very early stages of the discussions and development of the rationale for the acquisition, the buyer will have formed a good idea of the key elements of the future integration of the business: products, services and technology fit, customers, supply chain and, very importantly, future leadership, among other important factors. Detailed planning starts in earnest when it becomes clear that the deal is moving forward. Of course, practically (and legally) speaking, the parties are not able to implement any such plans prior to closing.

Team. One of the most important decisions is the formation of the team charged with leading the integration. It is worth noting here that the integration of an acquisition cannot be assigned to just anyone who simply may have time or capacity. Like all significant corporate endeavors, it is often critical to assign the integration to a high performer and strong leader, usually one of the best people on the team. The leader and his/her team will begin the planning process by putting together templates of activities, often starting with things that may have to be done significantly before closing. These templates are often divided into various functions, e.g., accounting and finance, operations, HR, etc. Often companies can begin with templates used on prior deals, but it is important to note that each acquisition is different and the templates, time lines and activities may have to be tweaked for each deal. This is covered in more detail in the paragraph below on Intangibles. The plan developed prior to the acquisition should reflect, for example, the activities that have to be completed 30 days prior to Closing (C), at Closing, C+10, C+30, C+90, etc. The plan should be shared with all of the integration team members, the leaders that will manage the acquired and integrated business after the initial integration project has ended, and sometimes also with the sellers of the business, as they know their culture and capabilities better than the buyers.

***Leadership*.** Perhaps no other factor impacts the successful integration of an acquisition more than the selection of the leader and his or her team. The leader sets the tone for the integration, spelling out those issues on which the acquiring company can compromise, and those which may be non-negotiable. He or she provides guidance to the team and is also largely responsible for determining whether the integration is going smoothly, or whether a correction in course is necessary. At the end of the formal, structured integration, the leader will be called upon by the CEO and the board to show measurable results, which will be compared to the acquisition rationale prepared and approved at the beginning of the process.

***Execution*.** In larger companies and deals, there may be specialized acquisition integration teams, sometimes colloquially referred to as "SWAT teams," responsible for managing the integration. In smaller companies and deals, very often the leaders of a division or unit are called upon to manage the integration, alongside of their regular, ongoing responsibilities. In either case, managing an integration is like managing other large projects, which can be broken down into chunks of work organized along a time line. As in other projects, it is necessary to periodically review progress on the plan, usually on a weekly or bi-weekly basis. The team must balance competing priorities and objectives. It is critical to provide feedback to all team members and make adjustments to the plan when new information becomes available that may require change. As the execution of the integration is taking place, the "guiding light" should always be the original acquisition rationale that was approved prior to the consummation of the deal. The team must be focused on achieving these objectives in the most efficient manner, and preserving the value drivers that motivated the deal in the first place.

Intangibles. It is very important to remember a number of important, less tangible factors when working on an integration. Every deal is different. What worked in one deal might not work in another. An example might be the way a deal is announced. Some acquired companies want to discuss the acquisition in advance with customers or key employees. Some may not care to do that. The handling of the announcement and early days of the integration period can have a profound impact on the success of the transaction. The key is to be flexible enough to understand the needs of all stakeholders, and to adjust accordingly. Integrations are performed by human beings on the acquiring company team and on the acquired company team. People are different and can react differently to what can be a stressful process. Company cultures are different. All of these factors must be taken into consideration when planning and executing the integration.

Closing Thoughts

Any significant M&A transaction can seem like organized chaos at best and, at worst, just plain chaos. There are multiple areas of work going on in parallel at any given time, sensitive and emotionally charged business issues to resolve, and increasing pressures of time and sometimes competing agendas at different levels of the parties' respective organizations. When embarking on a deal the parties are well-advised to put in place a well thought-out project organization with appropriate support tools to manage the process, minimize disruption and maximize the chances of success.

Frank Chaiken leads the firm's highly regarded Corporate Transactions & Securities practice, which comprises more than 100 professionals who represent clients of all sizes across virtually every industry. If you have questions or would like to share your thoughts, please contact Frank at 513.352.6550 or Frank.Chaiken@ThompsonHine.com.

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Employment

Severance Agreements: One Size Does Not Fit All

By Nancy M. Barnes, Heather M. Muzumdar and Lindsay Nichols

Employers in all industries are familiar with the situation: a termination decision needs to be made quickly, and all the relevant documents for the termination need to be put together in short order. In situations such as these, it's easy to reach into the file cabinet, grab a severance agreement used in the past, dust it off, and figure it will work just fine. However, simply recycling old severance agreements for any termination that might occur is a practice that can expose employers to a good deal of liability or put them in a position where they pay money in exchange for a release that is not enforceable. Severance agreements need to be updated as laws change, and also need to be customized to the specifics of the situation and location at hand. As explained in more detail below, one "size" of severance agreement does not fit all situations.

Federal Law Considerations

Although not a recent change in the law, employers sometimes forget to customize a severance agreement based upon an employee's age. The Age Discrimination in Employment Act (ADEA) and subsequent amendment, the Older Workers Benefit Protection Act (OWBPA), protect employees over 40 years old from discrimination on the basis of age. The ADEA and OWBPA prescribe certain requirements to make a waiver of age discrimination claims valid, and those requirements can vary based on whether or not a group termination is occurring. Among these requirements is a specification that employers provide employees 40 years of age or older with 21 days to consider the agreement and seven days to revoke an agreement after execution; for group terminations involving employees 40 years of age or older, the time to consider the agreement increases to 45 days, with the revocation period remaining the same. Accordingly, recycling a severance agreement originally drafted for an employee under 40 years of age may omit key provisions for an employee who is over 40.

Employers should also be aware that recent regulatory developments can impact the phrasing and content of employment agreements. As one example, in its 2013-2016 *EEOC Strategic Enforcement Plan*, the U.S. Equal Employment Opportunity Commission (EEOC) indicated that it was going to take a new and aggressive approach to what it considers "overly broad waivers" and settlement provisions that impede an employee's ability to respond accurately to any request for information required by legal process or to cooperate with a governmental agency. As another example, the U.S. Securities and Exchange Commission (SEC) has recently taken an aggressive stance on severance agreements that prohibit former employees from contacting government regulators or accepting whistleblower awards in exchange for severance benefits.

In addition, recent Occupational Safety and Health Administration (OSHA) guidance has warned employers about the use of "gag provisions" which discourage employees from filing whistleblower claims reporting illegal or unhealthy safety policies; OSHA has indicated it will not approve agreements that contain these provisions. Accordingly, employers may want to review their agreements and clarify that if an employee waives his or her right to collect monetary damages in a lawsuit, that waiver does not extend to whistleblower claims.

Finally, the Defend Trade Secrets Act of 2016 requires that employers add specific wording in all employment-related documents governing trade secret and confidential information; this language explains that an employee will not be criminally or civilly liable under trade secret law if he or she discloses trade secret or confidential information to a governmental official or attorney for the purposes of investigating an alleged violation of law or if the information is filed under seal in a legal proceeding. An employer that fails to provide the mandated notice may not be awarded exemplary damages or attorney's fees in trade secret litigation against an individual to whom such notice was not provided.

State Law Considerations

In addition to federal law considerations, employers must also take into account the state and local laws of the jurisdiction of the terminating employee. While enumerating every state law variance is beyond the scope of the article, below are just a couple examples of traps that employers may fall into should they seek to recycle an agreement from one state without considering state law variations.

As one example, in Minnesota, to create a valid release of *any* type of discrimination claim, employees must be provided 15 days to revoke the agreement. Additionally, there are states that require state-specific language in severance agreements, including (but not limited to) Pennsylvania and California, in order to obtain a valid release of claims. Of particular note is that the required language in California was amended slightly as of January 1, 2019.

And in New York, the 2018 efforts of Governor Andrew Cuomo have resulted in an aggressive anti-sexual harassment law with strict requirements for employers' policies, training and the terms of severance agreements. With respect to severance agreements, New York employers are prohibited from requiring nondisclosure clauses in any settlement or release of claims if the underlying factual basis involves sexual harassment unless the complainant requests it. Even then, its inclusion is subject to further requirements: If included, the complainant must first be given 21 days to consider the decision to include the confidentiality provision, after which the employer must document the decision with an agreement signed by all parties. When this agreement is executed, the complainant then has seven days to revoke the decision. When this revocation period expires, the parties can enter into the severance agreement. The way in which the consideration/revocation periods run under the New York sexual harassment law differs from the ADEA and OWBPA, and so employers will want to pay careful attention should both laws be implicated in a severance agreement. Numerous other states are considering similar legislation to address non-disparagement and confidentiality in the context of harassment claims.

Conclusion

Because of the complicated nature of severance agreements, there is no such thing as a one-size-fits-all agreement. Each severance agreement used should be reviewed by legal counsel and customized to fit the specific situation at hand. Beyond state and federal law requirements, legal counsel can assist with creating a severance package as well, such as ensuring there is adequate consideration to support the release. If the consideration contemplated was already promised in a contract or policy, providing such benefits will likely not be adequate consideration.

If you have any questions, please contact Nancy Barnes, Heather Muzumdar, Lindsay Nichols or any member of the Thompson Hine Labor & Employment team.

International Trade

New CFIUS Law Mandates Reporting of Certain Transactions Involving Foreign Investment in U.S. Companies

By David M. Schwartz, Samir D. Varma, Scott E. Diamond* and John O'Hara**

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee headed by the U.S. Department of the Treasury authorized to review certain transactions involving foreign investment in the United States. CFIUS examines these transactions (e.g., mergers, acquisitions and takeovers) to identify and address any national security concerns arising from a foreign person acquiring control of a U.S. business. Historically, notifying CFIUS of such foreign direct investment has been voluntary, but parties to such transactions in recent years have increasingly sought CFIUS review and approval to receive "safe harbor," thus protecting the transaction from subsequent review or unwinding at a later date.

In August 2018, the U.S. Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA) (part of Public Law No. 115-232), which expanded CFIUS's authority. FIRRMA's passage was prompted by congressional concern that "the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national security … " The law authorizes CFIUS to conduct pilot programs under temporary regulations to address specific risks to U.S. critical technology that will inform CFIUS's efforts to develop final regulations to fully implement FIRRMA. The pilot programs will assess and address ongoing risks to U.S. national security resulting from two "urgent and compelling circumstances": (1) The efforts of particular foreign parties to obtain equity interests in U.S. businesses to affect certain decisions concerning, or to obtain certain information relating to, critical technologies; and (2) the rapid pace of technological change in certain U.S. industries. CFIUS has noted that foreign investors who may present national security concerns have become more sophisticated in structuring investments to obfuscate these concerns, using, for example, entities in other jurisdictions.

In a November 10, 2018 *Federal Register* notice, Treasury implemented one such pilot program that expands the scope of transactions subject to CFIUS review to include certain investments (including non-controlling investments) involving foreign persons and critical technologies related to specific industries. This pilot program makes effective FIRRMA's mandatory provision requiring that certain covered investments be reported for CFIUS review.

Pilot Program-Covered Businesses

Under this pilot program, a "covered investment" means an investment, direct or indirect, by a foreign person in a U.S. business, including any entity that produces, designs, tests, manufactures, fabricates or develops a critical technology that is: (1) utilized in connection with the U.S. business's activity in one or more of the pilot program industries; or (2) designed by the U.S. business specifically for use in one or more pilot program industries. This program currently only captures those businesses involved in the development or production of critical technologies. The U.S. government has selected 27 covered industries where "certain strategically motivated foreign investment could pose a threat to U.S. technological superiority and national security." The list of covered industries (relying upon North American Industry Classification System (NAICS) codes) can be found in Annex A to the previously-referenced *Federal Register* notice.

Critical Technologies

The pilot program defines "critical technologies" as:

- Defense articles or defense services included on the United States Munitions List (USML) set forth in the International Traffic in Arms Regulations (ITAR).
- Items included on the Commerce Control List (CCL) set forth in the Export Administration Regulations (EAR) and controlled for certain reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation or missile technology; or for reasons relating to regional stability or surreptitious listening.
- Specially designed and prepared nuclear equipment, parts and components, materials, software and technology relating to assistance to foreign atomic energy activities and under the regulatory authority of the Department of Energy.
- Nuclear facilities, equipment and material relating to export and import of nuclear equipment and material and under the regulatory authority of the Nuclear Regulatory Commission.
- Select agents and toxins regulated by the U.S. Department of Agriculture or by the Department of Health and Human Services.
- Certain controlled emerging and foundational technologies, likely including: artificial intelligence, augmented reality, automated machine tools and other robotics, additive manufacturing, autonomous vehicles, advanced battery technology, biotechnology and nanotechnology, hydrogen and fuel cells, integrated circuits, semiconductors and microelectronics.

Mandatory Notification, Timing and Penalties

Should a merger, acquisition, takeover or investment involving foreign persons fall within the scope of this pilot program, it is now mandatory to notify CFIUS. The involved parties have 45 days before the completion of the transaction to provide basic information regarding the transaction, its structure, the identity of the involved foreign person(s) and details on the voting interests to be obtained or the assets to be acquired. Once CFIUS receives this notification, a 30-day assessment period commences, during which: (1) the transaction can be approved; (2) CFIUS can direct the parties in the transaction to file a full written notice; or (3) CFIUS may initiate a unilateral review of the transaction if the parties are uncooperative or do not provide enough substantiating information. For any parties that do not comply with the mandatory notification requirement, a civil penalty may apply up to the value of the covered transaction (i.e., the value of the investment or acquisition).

With any questions, please contact David Schwartz, Samir Varma or Scott Diamond.

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Intellectual Property

Where Should I Try to Get a Patent?

By Larry D. Williams Jr., Ph.D.

At one time, corporate intellectual property budgets were large and not subject to heavy scrutiny. Those days are gone. Corporate leadership increasingly tightens the IP budget every year. One method for stretching the remaining IP budget is to focus the international patent portfolio on those jurisdictions that optimize IP investments. Each invention may have a different set of optimal jurisdictions. This article provides factors to consider when deciding on the appropriate jurisdictions in which to seek patent protection.

Why Not Obtain a Patent in Every Jurisdiction?

Although proposals for a unitary international patent system have existed for decades, no such international patent system currently exists. Therefore, a patent owner must separately apply for a patent in every jurisdiction in which patent protection is desired. This is expensive.

Many patent applicants who wish to obtain patent protection in various international jurisdictions use the procedures found in the Patent Cooperation Treaty (PCT). The PCT allows the patent applicant to file a single patent application that undergoes a preliminary, abbreviated examination and later serves as a basis for filing the application in many jurisdictions. Typically, this means filing a first patent application (the priority application) in a country, then filing the PCT application 12 months after the filing date of the priority application, and finally entering the national (or regional) stage within either 20 or 30 months of the filing date of the priority application. For most jurisdictions, therefore, the decision of which jurisdictions in which to pursue patent protection need not be made until 20 or 30 months after the filing of the first application disclosing the inventive concept.

The PCT procedure will not provide an "international patent" and is not a perfect solution for applicants wanting patent protection in all nations. Most nations are PCT contracting states. Indeed, as of December 2018, 152 of the roughly 195 nations of the world are PCT contracting states. This leaves roughly 40 nations not subject to the PCT. Of note for many applicants, Taiwan, with its large potential market, is not a PCT contracting state.

For many applicants, therefore, a target jurisdiction list must be prepared within 12 months of the filing date of the priority application. The remainder of this article explores the questions that must be asked to develop such a list.

Where Is the Potential Market?

Perhaps the most important question is where the inventive technology will find a market. A general lack of market may be due to one or both of: (1) the residents of the jurisdiction have no interest in the inventive technology and/or (2) the patent applicant does not have a distribution network in the jurisdiction. Presumably, the lack of a distribution network will be readily apparent to the patent applicant. Thus, the difficulty of this factor is determining whether the residents of the jurisdiction have any interest in the inventive technology. Various means exist for projecting the potential market for the technology, such as consumer surveys, competitive intelligence reports and demographic information.

Where Might Enforcement Efforts Be Successful?

Even if a jurisdiction has a huge potential market, a patent applicant may not wish to obtain patent protection there because of a known or perceived difficulty in enforcing a patent. Traditionally, China and India have fallen into this category. However, both jurisdictions have taken steps recently to modernize their patent enforcement regimes and patentees that have not enforced patents in these jurisdictions within the last decade might be surprised by the new enforcement mechanisms available.

An additional potentially large market is Europe. Enforcement mechanisms in Europe may soon become more streamlined if the unified patent and unified patent court (UPC) come into force. Currently, although a single prosecution allows for patenting in most European nations, a patent granted in the single prosecution requires validation in each individual nation to have any enforcement potential. Under the proposed unified patent and UPC, the patent applicant can opt to obtain a patent that may be enforced in an international court as to all jurisdictions that have ratified the UPC Agreement.

The UPC Agreement remains an unrealized proposal as of January 2019. Germany must ratify the UPC Agreement for it to take effect, and such ratification may be slow in coming due to a challenge to the UPC Agreement making its way through the German courts. Additionally, although Great Britain already ratified the UPC Agreement, it may not be able to participate after Brexit is finalized. Great Britain's continued participation in the UPC Agreement is one of many issues still to be resolved in negotiations between Great Britain and the European Union.

Additional Considerations

Many additional factors must be assessed when making the decision of where to pursue patent protection. For instance, a patent should be obtained where the patentee has a licensee or a potential licensee. One complication with this factor is that licensees and potential licensees are often not known at the stage of deciding where to pursue patent protection. As a result, a very careful analysis of key players within the industry of the invention should be conducted early in the patent process, perhaps even before filing the priority patent application. Many organizations employ competitive intelligence experts, and these employees should be key patent team members.

An additional factor is the location in which the invention is made. Many jurisdictions have export control-based filing requirements. For instance, any invention made in the United States must receive a foreign filing license from the U.S. Patent & Trademark Office before an application describing it may be filed anywhere else in the world. Other jurisdictions, such as China, require applications disclosing any invention made in that jurisdiction be filed there first and any other desired jurisdiction later. Export control-based filing requirements must be considered early in the process and may have a drastic impact on the planned filing strategy.

Conclusion

An early decision regarding an international filing strategy will help to optimize the IP budget. This decision must be made on a case-by-case basis, taking into account several factors. This article provided several key factors to consider and explained how a team of business and legal personnel may help to streamline the decision process.

Please contact Larry Williams with any questions.

Employee Benefits

Benefits Trends: Student Loan Repayment Programs

By Edward C. Redder

Late last summer the Internal Revenue Service (IRS) created significant buzz when it issued a Private Letter Ruling (PLR) that many in the industry view as signaling a new design trend for 401(k) plans: the student loan repayment program. The design considered in the PLR—company contributions to a 401(k) plan tied to repayment of student loans by participants—addresses a dilemma faced by many employees with college debt: pay down student loan debt **or** save for retirement.

The Need

The time is right for innovation. Employers are facing an increasingly tight labor market. At the same time, student loan debt is at historic highs. Americans owe more than $1.4 trillion in student loan debt, with the average class of 2017 graduate owing nearly $40,000. Searching for ways to help their employees, some employers have partnered with student loan consolidation companies to offer employees access to debt consolidation resources. Others, seeking to more directly address the competing demands together, have created student loan repayment programs within their 401(k) plans.

The Proposed Program

The program design considered in the PLR sought to equalize the treatment of employees saving in the 401(k) plan and those paying down their student loan debt. Participants who either contributed at least 2 percent of their compensation to the 401(k) plan **or** made student loan repayments equal to at least 2 percent of their compensation would receive a 5 percent employer contribution to the 401(k) plan.

The Ruling

The employer seeking the PLR posed a single question to the IRS: Would the proposed program violate the contingent benefit rule?

The contingent benefit rule—one of the myriad legal requirements that apply to 401(k) plans—prohibits a 401(k) plan from conditioning any benefit (other than matching contributions) on a participant's choice to either make or not make deferrals to the plan. Many in the industry were concerned that the proposed program would violate the contingent benefit rule.

The IRS quickly and succinctly dispatched with the concern: It ruled that the proposed employer contributions tied to student loan repayments did not implicate the contingent benefit rule because the payments were not conditioned on the employee making (or not making) contributions to the plan.

What Now?

While a welcome development, the PLR is not a blanket endorsement by the IRS of student loan repayment programs in 401(k) plans. The ruling did not address various other legal and practical issues potentially raised by the structure, including:

- nondiscrimination testing implications of the proposed structure, including the potential impact participation could have on other contributions (for example, participation could decrease matching contributions for the rank and file and negatively impact highly compensated employees).
- its incompatibility with a 401(k) safe harbor design (e.g., a design that automatically satisfies certain nondiscrimination testing requirements).

- the difficulties of administering the program. For instance, employers will have to consider how they will track and confirm student loan repayments, the burden of which is likely to fall to the employer rather than the plan's record-keeper.

Despite the need for caution, this new 401(k) plan design opportunity appears to be gaining steam. Both employers and industry groups are pursuing additional clarity and guidance that can generally be relied upon rather than one-off guidance. Similarly, a bill was introduced in Congress last year that would allow plan contributions tied to student loan repayments to be treated as matching contributions. Given the momentum, more employers may soon choose to offer this enhancement with their 401(k) plans.

Please contact Ed Redder with any questions.

Is Your Company Ready For ... What's Next?

Wednesday, February 13 – Dayton

7:30 - 8:00 a.m. – Breakfast & registration | **8:00 - 10:30 a.m.** – Program

Clients and friends of the firm are invited to an informative and interactive seminar designed to help companies move forward with their goals for the future. Our presenters will cover multiple topics, including:

- Getting your corporate formalities and compliance in order
- What to do now to maximize value for your business succession plan
- The importance of good contract terms and conditions and contracting practices
- Areas to consider "auditing" for best practices and why, including document management, trade secrets and confidential information, and contract provisions
- Your valuable intellectual property assets: copyrights, trademarks, patents and trade secrets
- Identifying, acquiring and protecting intellectual property in the United States and abroad

Our presenters:

- Roger H. Bora, Intellectual Property
- Christine M. Haaker, Business Litigation/Product Liability
- Jennifer L. Maffett-Nickelman, Corporate Transactions & Securities

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