

Payroll Issues in Mergers and Acquisitions

**A Presentation for the American Payroll Association,
Toledo Chapter, July 21, 2016**

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Overview

- Inherited experience for Workers' Compensation
- Overview of IRS guidance on qualifying as a successor employer for the purposes of W-2 reporting
- Acquired employees and health FSAs

Inherited Experience: Workers' Comp

- **General Rule:** Ohio's BWC generally combines the rate and liability of the predecessor and successor
 - Regardless of deal structure, in most instances
 - Factors considered:
 - Retention of employees, customers
 - Same industry, same location
 - Servicing of warranties
 - Retention of goodwill

Inherited Experience: Workers' Comp

- Notable Exception to the General Rule:
 - Transfer through an intermediary
 - *Valley Roofing v. Ohio Bureau of Workers' Comp.*
 - Initial transfer must be involuntary
 - Not an avoidance of other responsibilities

Inherited Experience: Workers' Comp

- New Rule – Effective 1/1/16
 - “To provide an unambiguous and predictable means for determining” the transfer of experience and liability
 - General rule still mostly the rule:
 - Use of factors set forth above

Inherited Experience: Workers' Comp

- New Rule – Effective 1/1/16
 - BWC will look at 4 new factors for exceptions
 1. Time between predecessor's termination of operations and effective date of purchase
 - a) Greater than 6 mos., no successorship
 - b) Less than 6 mos., BWC looks at relationship between predecessor and successor, unless buyer satisfies factors 2-4.
 - c) If family relationship, no consideration; automatic successorship

Inherited Experience: Workers' Comp

- New Rule – Effective 1/1/16
 - BWC will look at 4 new factors for exceptions
- 2. Material change in ownership
 - a) No association between buyer and seller
 - b) In case of change in partnership, owner's interest must be less than 1/3 before and 1/2 after change
 - c) If family relationship, no consideration; automatic successor

Inherited Experience: Workers' Comp

- New Rule – Effective 1/1/16
 - BWC will look at 4 new factors for exceptions
- 3. New governing classification
 - a) Change in operations significant enough to require reclassification of class code
- 4. Change in process and hazard
 - a) Either total change in operations or industrial pursuit, or
 - b) Totally new way of performing the work
 - c) Must be documented and may require site visit form BWC

Inherited Experience: Workers' Comp

- BWC Form AC-4
 - Allows purchaser/successor to request limited release of information about seller/predecessor
 - Shows successor outstanding liabilities and risk

Successor Employer for W-2 reporting

- Generally, employers withholding tax from employee wages must file quarterly Form 941.
 - 941s must be filed by the end of the month following the quarter.
 - Employers ceasing to pay wages must file a final Form 941.
- Employer must report wages and taxes withheld on Form W-2.
 - W-2s must be provided to employees by 1/31 following the year.
- *In theory*, at the end of the year, the amounts reported on the 941s should match the totals of the W-2s.

Successor Employer for W-2 reporting

- IRS Revenue Bulletin 2004-34 details reporting responsibilities when:
 - A successor acquires substantially all the property of a predecessor, and
 - In connection or immediately after the acquisition, employs individuals who were employed by the predecessor.
- There are two possible procedures for predecessor and successor to use to report.

Successor Employer for W-2 reporting

- Standard Procedure
 - Each files its own 941 and W-2s.
 - Predecessor files 941 for wages paid in the quarter in which the acquisition occurred
 - Successor files 941 for all wages paid after employees are hired by successor.
 - Each provides W-2 to employee and gov't for the wages it pays.

Successor Employer for W-2 reporting

- Standard Procedure
 - If it no longer required to pay wages after the acquisition, predecessor files 941 for the quarter as the final Form 941.
 - If final Form 941, must provide expedited W-2s to former employees not later than due date of final Form 941
 - Generally, the last day of the month after the end of the quarter.
 - Predecessor **MUST** keep copies of employee W-4 and W-5 on file
 - Transferred employees must provide successor with new forms.

Successor Employer for W-2 reporting

- Alternate Procedure
 - Predecessor and successor agree that successor assumes responsibility to provide W-2 to employees transferred.
 - Predecessor retains responsibility for any non-transferred employees, per standard procedure above.
 - If predecessor files final Form 941, must provide expedited W-2s per standard procedure above.
 - Successor W-2s must reflect wages and taxes from both predecessor and successor.

Successor Employer for W-2 reporting

- Alternate Procedure
 - Wages reflected on predecessor 941s will be reflected on successor W-2s.
 - Thus, neither predecessor nor successor 941 totals will match their W-2 totals.
 - Each can use Form 941 Schedule D to explain discrepancy.

Successor Employer for W-2 reporting

- Alternate Procedure
 - Predecessor Schedule D due either
 - Before the first quarter return of the following year if predecessor continues operation.
 - With the final Form 941
 - Successor Schedule D
 - Must include date of acquisition
 - Must include name, address and EIN of predecessor
 - Should be filed with the first quarter 941 return of the year following the acquisition

Successor Employer for W-2 reporting

- Alternate Procedure

- Forms W-4

- Predecessor must transfer all current W-4s to successor for transferred employees
 - Successor must deduct and withhold from wages per transferred W-4s

- Forms W-5

- Predecessor must transfer to successor any W-5s proved to predecessor by transferred employees

Acquired Employees and Health FSAs

- Flexible Spending Accounts allow employees to allocate pre-tax salary reductions to pay for out-of-pocket medical costs
 - Elections cannot be changed once made.
 - Entire amount of yearly allocation available on day one, to be funded throughout the remainder of the year.
- Absent other arrangements, when seller's employees are acquired by buyer, participation in seller's FSA would cease
 - Account forfeiture
 - Potential COBRA rights

Acquired Employees and Health FSAs

- IRS Revenue Rule 2002-32 allows relief for employees and employers with these two scenarios:
 1. Coverage under seller's health FSA with salary reductions under buyer's plan.
 2. Coverage and salary reductions under buyer's plan
- Both scenarios require that both predecessor employer and successor employer have a health FSA plan.

Acquired Employees and Health FSAs

1. Coverage under seller's health FSA with salary reductions under buyer's plan.
 - Seller has FSA and continues both business and FSA after selling portion of assets
 - Buyer has or creates FSA
 - Both parties agree to allow transferred employees to participate in seller's FSA for an agreed-upon period (usually remainder of plan year)
 - Salary reduction elections under seller's plan are honored by buyer's plan; reductions are transferred to seller's plan
 - Employees continue to submit to seller's plan for reimbursement

Acquired Employees and Health FSAs

1. Coverage and salary reductions under buyer's plan
 - Buyer agrees to cover transferred employees for remainder of plan year
 - Employee account balances (including negative balances) are transferred to buyer's plan
 - All claims for reimbursement for the entire plan year may be submitted to buyer's plan
 - Salary reduction elections are continued by buyer and contributions put into buyer's plan
 - No election changes may be implemented because the employee was continuously covered by a health FSA

Questions?

- If you have additional questions regarding today's presentation, please feel free to contact me:

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- Thank you!