BLOG

Employee Benefit Considerations in M&A Deals Part 2

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Despite building economic turbulence entering 2019, it looks to be another banner year for M&A deals due to ongoing, unprecedented capital access. As it remains the law of the land, enforcement of the Affordable Care Act (ACA) makes due diligence around employee benefit plans an often overlooked, but vitally important, process.

Since the passage of the ACA, most attention has focused on Applicable Large Employers (ALE's) – and for good reason In Part One of this series,   focused on liabilities associated with Code Section 4980H, commonly known as “Play of Pay,” that apply to ALE’s with 50 or more Full Time Equivalent Employees that either didn’t offer coverage or offered coverage that was unaffordable or didn’t provide minimal value. The other penalty ALE's need to consider is Section 6055 or Section 6056 reporting requirement violations s. Liabilities here can range from anywhere from $500K - $3MM-plus, making it very important that a buyer be able to verify coverage data, benefit elections, and compliance with reporting.

But buyers would be wrong to think there are no other liabilities associated with the ACA if the target is not an ALE. In actuality, for employers of all sizes, there are potential liabilities in two areas: Benefit Mandates and Notices.

The ACA made sweeping changes to employer sponsored group health plans with mandates on specific benefit provisions. For example, plans can’t have lifetime limits on health benefits, Pre-existing Condition Clauses, or cost sharing for preventative services. Although there is minimal risk in regards to fully insured medical plans, special attention should be paid to Grandfathered Plans. Grandfathered plans were in existence prior to the 2010 enactment of the ACA and as a result are not subject to many of the benefit mandates.

However, a plan could be easily be erroneously classified as grandfathered if the employer increased the contribution rate for premiums by more than 5 percent or increased co-pays by more than five dollars or a percentage equal to medical inflation plus15 percent, whichever is greater. Such a plan could be out of compliance for many years and subject to a $100 per- person per-day excise tax under Code 4780D.

Employers of all sizes have always had numerous notice/disclosure requirements and the ACA added two more; the Summary of Benefits & Coverage (SBC) and Notice of Exchanges.

The SBC must be provided to participants at designated times and must include specific content. There is a potential liability of up to $1,128 per day, per effected participant for failing to do so.

Exchange notices must be provided to all current employees and new hires. There are currently no penalties for failure to do so, however such failure may be a breach of ERISA fiduciary duties and thus subject to ERISA statutory penalties.

Additional diligence is required for self-insured plans as it relates to Patient-Centered Outcome Research Institute (PCORI) fees and Reinsurance Fees. For PCORI fees the employer must pay an excise tax calculated on the covered lives under the plan. Fees started at $2.08 per participant PY 2014-2015 and are currently at $2.39. Failure to pay this tax incurs the same penalties as not paying income or other taxes.

Self-insured plans were also subject to paying a reinsurance fee, which was was only applicable between 2014 and 2016. Since payment records must be kept for a minimum of 10 years, buyers should ensure these fees were paid. .

Pre-ACA, M&A diligence on employee benefit plans was generally a cursory exercise, but the Act's significantly increased potential liabilities relating to these plans could materially affect the profitability of any acquisition.

Since the ACA remains the law of the land, continues to evolve and will be so for the foreseeable future a much more detailed analysis of compliance, reporting, and covered employees should be the rule.

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