



EBEC EXPO2024

Proskauer's Perspective
on Employee Benefits,
Executive Compensation
and ERISA Litigation

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People, Benefits, and Rewards: Navigating the Past and Planning for the Future in Mergers and Acquisitions

Justin S. Alex
David B. Teigman
Nicholas P. LaSpina

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Meet Your Presenters



Justin S. Alex

Partner
Washington, DC
+1.202.416.6816
jalex@proskauer.com



David B. Teigman

Partner
New York
+1.212.969.3440
dteigman@proskauer.com



Nicholas P. LaSpina

Senior Counsel
New York
+1.212.969.3185
nlaspina@proskauer.com

Charting our Course





***Past:* Identifying and Understanding Key Liabilities**

Past: Potential Benefits Liabilities

- Identify the Controlled Group
 - 80%+ common ownership, but many nuances
 - Potential joint and several liability
- Defined Benefit Pension Plans
 - Multiemployer plans and withdrawal liability considerations
 - Single-employer plans and funding/termination liability considerations
- Retiree Medical Liabilities
 - Funding and valuation
 - Ability to modify/terminate
- Multiple Employer Welfare Arrangements (MEWAs)
- Compliance review
 - Tax qualification
 - Fiduciary liability
 - ACA requirements

Past: Potential Executive Compensation Liabilities

- Economic exposure (value and noncompliance) vs. retention issues
- Equity (and Equity-Like) Awards – STOCK!
 - **Scope** – how deep into the organization are awards held?
 - **Types and Treatment** – what has the target issued? “Real” equity or “phantom” equity? How does it vest? What causes awards to “accelerate” (and what accelerates – vesting, payment, or both?)
 - **Optionality** – what possible outcomes does documentation allow? Cash-out? Forced rollover? Combination?
 - **Compliance** – diligence: tax, securities, corporate, labor
 - **Key Employees** – who needs to be retained, and what are they eligible to receive?
 - Common questions to ask for each potential executive compensation liability
- “Change-in-control”/deal bonuses

Past: Potential Executive Compensation Liabilities (Cont.)

- Nonqualified deferred compensation – “top hat” plans, deferral arrangements, supplemental executive retirement plans (“SERPs”)
 - Tax compliance
 - Funding mechanisms
- Employment Agreements and Severance Arrangements
 - “Single-Trigger” vs. “Double-Trigger”
 - Discretionary vs. fixed/contractual
 - What rights are triggered by what types of terminations?
 - What rights are present absent a termination?
 - Restrictive covenants?
- “Ordinary course” bonus programs

Past: Workforce Assessment

- Nature of the workforce
 - Unionized?
 - Mostly exempt?
 - Seasonal?
 - Typical turnover?
- Significant events related to employees
 - Work slowdowns, strikes, etc.
 - Recent layoffs?
 - WARN Act and mini-WARN Act liability?
 - Litigation
 - Governmental investigations
 - Reputational issues



***Present:* Structuring and Executing the Transaction**

Present: Understanding the Transaction

- WHO, WHAT, WHERE, WHY, WHEN, and HOW?
 - **WHO** are the parties?
 - **WHAT** is being sold and purchased?
 - **WHERE** is the business located? And **WHERE** in the corporate structure is the deal happening?
 - **WHY** is the transaction happening?
 - **WHEN** will the transaction close?
 - **HOW** is the transaction being effectuated?
- Once these questions are answered, take it one step further: what does the transaction mean for employees, compensation, and benefits?
 - Will employees and benefits automatically port over to the buyer? (Results may vary outside the U.S.!)
 - If not, will buyer assume existing programs, start new ones, or fold employees into its existing programs? Which employees will it hire?

Present: Key Transaction Documents

- Preliminary documents
 - Letter of intent
 - Term sheet
- Definitive documentation
 - Purchase agreement
 - Stock purchase agreement vs. asset purchase agreement
 - Change in control agreement
 - Retention agreement
 - Employment agreement
 - Release agreements (e.g., related to cash out of options)
- Disclosure documentation
 - Proxy or similar document
 - Form S-8

Present: Key Issues to Consider (Executive Compensation)

- Treatment of equity awards
 - Assumed, cancelled or substituted?
 - Vest or not?
 - What's required under the plan documents?
 - What treatment will work for the business?
- Nonqualified deferred compensation plans
 - Rabbi trust?
 - Funding requirement?
 - Opportunity to terminate
- Change in control payments generally
- Retention and incentivization
 - Consider whether any payments related to the transaction will create retention issues
 - How will the new company motivate employees after the transaction?
- Golden parachute tax considerations

Present: Key Issues to Consider (Employee Benefits)

- Transaction Structure
 - Asset sale or stock sale?
 - Carve-out?
 - Where are plans maintained in the corporate structure?
- Want/Need Existing Benefit Plans?
 - How will benefits be delivered on day one?
 - Treatment of 401(k) plan in stock sale
- Defined Benefit Pension Plans
 - PBGC Early Warning Program/potential Reportable Events for single-employer plans
 - Potential withdrawal liability for multiemployer plans
 - Application of ERISA Section 4204 to asset sales
- Transition Services Agreements
 - MEWA considerations
- COBRA

Present: Mitigating Exposure

- Representations and disclosures – diligence vs. protection
 - What can you learn?
 - Closing conditions and leverage
 - Remedy for breach
- Traditional indemnity and escrow vs. representation and warranty (“R&W”) insurance
 - What is covered?
 - How are damages determined?
 - Deductibles/retentions/caps?
 - “Sandbagging”
- Covenants to “fix” identified issues



Future: Moving Forward, Together

Future: Employee Integration

- What needs to be in place on “Day 1” to ensure a smooth transition?
 - New offer letters?
 - Payroll
 - Third-party providers
- “Soft” issues
 - Employee communication pre- and post-closing
 - Workforce continuity
 - Assuaging employee uncertainty – new employment agreements or severance arrangements?
 - *Attend the “Onboarding and Off-boarding in the C-Suite” for more!*

Future: Executive Compensation Integration

- Potential required maintenance of base salary/bonus opportunity for a period of time
- Equity plans (if assumed)
 - In a public company transaction, shares available for issuance only available for issuance to employees of acquired company
 - Different sets of plan terms and conditions
- Incentive compensation
 - New equity grants
 - New cash incentive program
- Harmonizing existing documentation
 - E.g., restrictive covenants

Future: Employee Benefits Integration

- Retirement Plans
 - Execute any actions taken in connection with transaction
 - Plan terminations, rollovers, trust-to-trust transfers, etc.
- Health and Welfare Plans
 - Treatment of YTD spend
 - Flexible spending accounts
- Service Provider Agreements and Insurance Contracts
 - Notice requirements; termination provisions
- Benefits Integration and Harmonization
 - Any applicable covenants in deal documents?
 - Merge/freeze/terminate plans?
 - Cost savings opportunities; run new RFPs?
 - M&A transition rules

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