

# M&A ACADEMY

**How Labor, Employment & Benefits Specialists Can  
Add Value to Your Deal**

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# Agenda

- **Deal Drivers and Overview**
  - Potential Employment Liabilities
  - Successor Liability Standards
- **Due Diligence**
  - International Issues
  - Union Issues
  - Contractual Obligations
  - Employee Misclassification
  - Contractor Misclassification
  - COVID Considerations
  - #MeToo Considerations
  - DEI Considerations
- **Integration**
  - Benefits
  - Retention
  - Restrictive Covenants
- **Terminations and Restructurings**
  - General Liabilities
  - WARN Act
  - Severance
- **Concluding Remarks**

# Deal Drivers — The Big Picture

- Employment Law for Deal-Makers . . .
  - Don't *buy problems* you don't want
  - Avoid *unwanted costs* for seller
  - Increase *deal value* for buyer and seller
  - Avoid *deal risk* for buyer and seller
  - Prevent *conventional employment* liability (reduction-in-force (RIF) discrimination & sexual harassment claims, Worker Adjustment and Retraining Notification Act (WARN), etc.)
- Cornerstone: business objectives should drive employment issues, but you need to be able to identify them
- You won't get everything you want, so know the key business drivers

# Stock Deals – Overview

- Buyer gets everything, good and bad
- Employee relationships remain intact
- Employment and labor contracts remain intact
- Union relationships remain intact
- Restructuring costs attach to business unless . . .
  - restructuring costs are reflected in purchase price, OR
  - some “seller-predecessor” continues to exist AND it agrees to pay restructuring costs

# Stock Deals – Strategies for the Buyer

- Due diligence, due diligence, due diligence
- Representations and warranties by seller
  - No benefits violations or litigation except . . .
  - No legal violations or litigation except . . .
  - Representations on employee classification becoming more significant . . .
- Schedules supplied by seller
  - Pending lawsuits
  - Labor contracts
  - Executive employment contracts
  - Benefits plans
  - Severance and release agreement history – a hidden gem
- Indemnification by seller for . . .
  - Matters predating purchase
  - Violations of representations/warranties
  - WARN-related events

# Asset Deals – The Good News

- Potential flexibility concerning employment and other contracts
- Seller's employment liabilities more likely stay with seller
- Seller's restructuring costs more likely stay with seller
- Potential flexibility concerning union agreements and relationships

# Asset Deals – The Bad News

- Successorship – what employment obligations does buyer inherit?
  - among the most complicated issues in labor law
- What is test for “successor” status? (more bad news)
  - different types of duties/claims:
    - liability for seller’s discrimination or other unlawful conduct
    - duty to remedy seller’s unlawful conduct
    - duty to bargain with seller’s union
    - duty to arbitrate grievances under seller’s labor contract
    - duty to adopt seller’s labor contract
- Buyer can accidentally assume seller’s problems and liabilities
  - transaction documents are *not controlling* (assumed/excluded liabilities)

# Asset Deals – Successor Liability

- Successor liability applies if a court determines it is “fair and necessary” to do so:
  - Concern is that failure to hold successor liable for unlawful employment practices of predecessor would leave the alleged “victim” without a remedy and encourage evasion of statutory obligations through ownership transfers
- Courts often focus on two main factors:
  - Continuity in operations and workforce
  - Ability of the predecessor to provide relief to the alleged victims
- Statutory Examples
  - FMLA, FLSA, Title VII
  - Courts generally focus on continuity in business operations and predecessor’s ability to provide relief
  - “Totality of the Circumstances”



# Asset Deals – Successor Liability (contd.)

To mitigate successor liability exposure, buyers should:

- Determine level of exposure through detailed diligence
- Ensure reps and warranties state that employment liabilities, if any, are the sole responsibility of seller
- Ensure covenants restrict seller's ability to incur new liabilities prior to closing
- Consider adding an escrow, special indemnity, or other mechanism to recover any potential successor liability costs
- Quickly integrate seller's employees into organization to avoid absorbing any flaws in seller's practices

# Asset Deals – Strategies for the Buyer

- Due diligence
- Seller's representations/warranties/covenants
- Seller's schedules
- Seller's indemnifications
- PLUS . . .
  - deal structure and business changes can potentially alter what buyer gets
  - more potential leverage in renegotiating contracts with seller's executives
  - more potential leverage in renegotiating union labor agreements

# Large Exposure Issues

- The following have potential for large exposure to a **buyer**:
  - Labor Organizations and Representation
  - Misclassification of Employees
  - Misclassification of Contractors
  - COVID compliance and OSHA considerations
  - Sexual Harassment & Misconduct Liabilities in the #MeToo Era
  - Termination and Change-in-control Obligations
- **Sellers** should also pay attention to these issues:
  - Resolving or limiting these issues prior to the transaction can increase sellers' bargaining power and limit the need for heavy negotiation over potential liability

# Buyer “Due Diligence” Requests

- Standard items

- Employee lawsuits/agency charges pending
- Sexual harassment allegations/charges
- Benefit plans and SPDs
- Comprehensive employee census
- Employment agreements
- Confidentiality, noncompetes, nonsolicitations
- Employee handbooks
- Arbitration Agreements
- Exempt/nonexempt classifications
- Independent contractor classifications
- Unions? Where?
- Labor contracts
- COVID compliance and future impact

- What you also really want (current and past)

- Internal complaints/issues
- MeToo data
- DEI data
- Government audits, investigations, and citations
- Benefit claim appeals
- Workers’ comp claims and expenses
- Workplace accidents, other OSHA information
- Employment applications, offer letters, turnover data, absenteeism, exit interview results
- Separation or Severance Agreements
- EEO-1 forms and affirmative action plans
- Immigration I-9 forms for current employees
- Visa overview
- Prior handbooks, benefit plans, SPDs, etc.
- Union-organizing attempts (past and pending)
- All union memos of understanding, side letters, ratification summaries, etc.
- Grievance, arbitration, NLRB charge history
- Strike and work stoppage history
- Contracts with staffing agencies

# International Issues

- Assemble team of knowledgeable lawyers for all relevant jurisdictions
- Organize tasks and documents by country as well as by other aspects of the deal
- Press for diligence from relevant foreign entities
- Pay attention to time tables for pre and post-closing tasks
- Much more extensive government regulation of individual employment relationships in many non-US jurisdictions
- Much more extensive government and legally required union and works council approvals required in many non-US jurisdictions
- Be aware of TUPE (Transfer of Undertakings (Protection of Employment)) and TUPE-like obligations and/or need for Three Party Agreements
- Watch for issues with multijurisdictional employees

# International Termination-Related Liability

- Statutory and common law severance for non-US employees:
  - Concept of “at-will” employment is largely nonexistent outside the United States
  - Local laws may require termination payments or lengthy notice periods (e.g., UK, Germany, The Netherlands)
  - These statutory (or otherwise mandated) termination obligations could be material and local counsel should advise regarding scope and implications of such obligations

# Union Issues

- If employees are represented by a labor organization, buyers must understand scope of representation, including obligations under existing agreements
- Such agreements may include information and requirements relating to areas such as:
  - Employee benefits and compensation
  - Promotions and demotions
  - Hiring and separation from employment
  - Grievances and related matters

# Union Issues

## For buyer (in an asset deal)

- Union “successorship” – what seller obligations does buyer inherit?
  - “Workforce majority” is controlling in many cases
    - measured against whom?
    - discrimination in hiring is illegal
  - Business continuity component is also relevant
  - “Perfectly clear successor” loses ability to unilaterally set new initial terms and conditions
  - REMEMBER: different “successor” test for each type of potential obligation
- Protect against “material changes” with deal pending
  - Seller’s labor contracts being renegotiated (check contract termination dates)
  - Significant grievance arbitration cases, other union litigation, and settlements
  - Ad hoc “side agreements” or “memos of understanding”
  - Seller management’s “mixed loyalties” problem



# Union Issues

## For sellers (and buyers in a stock deal)

- Labor contract obligations
  - Successors/assigns language
  - Limitations on sales, relocations, plant closings, and layoffs
  - Maintenance-of-benefits clauses and required participation in multiemployer pension plans (withdrawal liability)
  - Neutrality or card-check provisions
- Bargaining obligations
  - Decision-bargaining
  - Effects-bargaining
  - Closing-turned-into-something-else
  - Expiration of existing labor agreements
- Potential “runaway shop” claims (antiunion discrimination)
- Risks:
  - Status quo injunctions
  - Buy-it-back, put-it-back plus \$\$\$\$

# Contracts – Severance, Change in Control, etc.

- Sources of Potential Contract Liability
  - Individual employment contracts
  - Employee handbooks
  - Oral contracts (real or alleged)
  - Collective bargaining agreements, side letters, memos of understanding, etc.
  - Implied and quasi-contracts
- Watch . . .
  - Family businesses
  - Retiree medical insurance or other retiree obligations
  - Culture clash (turnover, litigation, or both)

# Misclassification: Overtime Exemptions

- Are employees properly classified as exempt or nonexempt for overtime purposes (FLSA/state law)?
  - Potential Red flag – none or very few nonexempt employees
- Potential repercussions for misclassification:
  - Liability for all unpaid overtime (may run back as far as three years in cases of willful violations)
  - Liability for withholding wages
  - Fines and penalties
  - Attorney fees exposure
  - Recordkeeping liability (e.g., where seller has failed to properly record employees' hours worked)

# Diligence of Overtime Exemptions

## Overtime exemption classification diligence:

- Request information on employees' salaries, classifications, job titles, job descriptions, classification policies, and similar documents
- Inquire as to classification methods and practices
  - Consider interviewing the decision maker
- Request internal and external self-audits of classifications as well as any recent DOL (or similar state agency) audits

# Misclassification: Independent Contractors

- Were service providers properly classified as a contractor, consultant, or advisor, rather than as employees?
- Potential repercussions for contractor misclassification:
  - Misclassified contractors could be entitled to retroactive participation in employee benefits
  - Payment of federal and state employment taxes and amounts that should have been withheld, including interest and penalties
  - Penalties for failure to contribute to state unemployment funds
  - Unpaid overtime or other wage-based claims (if the employee should have been classified as non-exempt)
  - State law major risk driver

# Diligence of Independent Contractors

- **Independent contractor classification diligence:**
  - Buyer should request information such as lists of contractors with summaries of any services provided and service history
  - Buyer should also request copies of individual contractor agreements and related statements of work
  - As with overtime, consider requesting any self-audits or third-party audits of classifications as well as any recent agency audits

# COVID Impact on Employee Relations

- Consider how COVID may have influenced employee relations on a go-forward basis
  - *Where* will employees work?
    - All remote?
    - New engagements out of state/country? Will this trigger permanent establishment (tax), benefits, licensing, heightened reimbursement, classification, or wage/hour issues?
  - Contingency plans:
    - Future pandemic or other crisis management plans; ability to pivot quickly to alternative working relationships, client/customer engagements, etc.?
    - Derivative considerations -- school closures; increasing care of children/parents; relocation decisions; increased need for stable health insurance.

# #MeToo in the Deal Context

- Targeted #MeToo diligence and representations are critical to avoid being saddled with potentially negative PR repercussions, leadership disruptions, and tainting internal work culture and employee morale
- Ensure diligence covers all items that could uncover potentially material sexual harassment claims
- Evaluate liability associated with any concerning information
- Take appropriate action
  - Escrow
  - Indemnification
  - Reduction in purchase price
  - Abandon the deal???
  - Other options (e.g. exiting high-level executives with ties to harassment prior to closing)
  - Manage Public Relations



# #MeToo Diligence

- Ensure you are not inheriting undiscovered sexual harassment claims
  - Diligence should include extensive review of internal and external complaint records
    - Scrutinize HR investigations & internal emails
    - Focus on upper management
    - Interview Heads of HR & Compliance
    - Consider a cultural assessment
    - Review publicly-filed actions
    - Engage a background check agency to investigate

# #MeToo Representations

- Ensure purchase agreements contain adequate representations to protect Buyer against unknown sexual harassment claims (consider relevant statutes of limitation in applicable jurisdiction)
- **Sample Rep:** *Within the three (3) years prior to the date hereof, there has not been, or threatened, any allegation of sexual harassment or sexual misconduct against (i) any current or former director, manager, or officer of Seller, or (ii) any current or former Employee or independent contractor of Seller who, directly or indirectly, supervises or has managerial oversight over (or supervised or had managerial oversight over) any other current or former Employees or independent contractors of Seller and no event has occurred or circumstance exists that would serve as a reasonable basis for any such allegation of sexual harassment or sexual misconduct. Within the six (6) years prior to the date hereof, Seller has not entered into any settlement agreement related to allegations or threatened allegations of sexual harassment or sexual misconduct by any current or former director, manager, officer, Employee, independent contractor, or other service provider of Seller*

# #MeToo Seller Considerations

## What About Sellers?

- Sellers should do their own diligence to understand sexual harassment liabilities → some will be apparent (e.g. in the media), others will require investigation
- Adjust Buyer reps. to limit liability
  - Strike Rep. (this will raise Buyer suspicion and could jeopardize the deal)
  - Include Knowledge Qualifiers
  - Schedule any known matters and negotiate solution (escrow, purchase price, etc.)
  - **Do not attempt to withhold existence of known sexual harassment claims or allegations**

# General DEI Diligence and Integration Opportunities

- Diversity, equity, and inclusion have become increasingly important to many businesses, to enhance brand image, ensure a competitive and engaged workforce, and to address concerns from investors and the general public
- Assessing DEI during deal diligence can provide vital information for risk management and integration strategy, and can set the foundation for a successful DEI program post closing
- DEI related diligence: general DEI policies and strategies; anti-discrimination, anti-harassment, and other workplace conduct policies; workforce demographic diversity and representation at management levels; employee satisfaction analysis based on review of glass door, social media, etc.; pay equity review
- Integration services: equal pay analysis and guidance; crisis management and investigations; workplace cultural assessments; workplace training; enhanced and coordinated DEI strategies

# Integration – Employment Issues

- Who will be the employer post-Close?
  - Buyer? Sub? Continuation of Target?
- Will there be a termination of employment and rehire by buyer?
  - Be wary of potential WARN Act triggers and payout obligations
  - Will there be a payout of accrued wages/vacation?
  - Payout of wages, bonus, commissions, and other incentive entitlements?
- What agreements will be assigned over; what new onboarding documents will be utilized?
  - Executive employment agreements; offer letters; PIIA; arbitration agreements; handbook policies
- Cultural considerations and potential challenges
  - Reporting structures; job titles; scope of responsibilities; employment policies; shift in total company size

# Integration – Employment Onboarding

- People you need . . .
  - New employment contracts
  - Adoption of seller’s employee contracts
  - Retention or signing/transition bonuses (whether paid by seller or buyer)
  - Consulting agreements (key seller employees, short-term buyer need)
  - Immigration issues, H-1B visa problems, intercompany transfers, etc. (especially with multinational companies)
- Protection you need . . .
  - Confidentiality agreements
  - Assignment of inventions
  - Nonsolicitation/hiring restrictions
  - Noncompete agreements
  - Special-need consulting agreements (e.g., cooperation by seller’s employees is essential to ongoing litigation, transitional training)
  - Immigration assistance concerning all visa and work authorization issues

# Integration – Benefits Issues

- Structure of transaction may impact benefits treatment
- What will be the impact on employee benefit plans?
  - Will target plans be continued or assumed?
  - Will target plans be terminated and continuing employees moved to Buyer's employee benefit plans?
  - Will employee be offered credit for prior services with Seller?
  - Is target a newco and will it need new benefit plans?
  - Will there be a TSA or PEO in place?
- Benefits liabilities
  - Who will be responsible for liabilities pre/post-closing?

# Integration – Benefits Issues (contd.)

- Maintaining different benefit packages vs. one platform for all employees post-transaction
- Consider employee benefit covenants
  - Maintain comparable/substantially similar benefits *or* same as buyer's similarly situated employees for a specified period
  - Consider whether any carve-outs from comparable benefits continuation are warranted (*e.g.*, equity compensation, defined benefit pension benefits)
  - Provide crediting of service to target employees (*e.g.*, seniority for severance and PTO plans) and maintain severance arrangements for a specified period, etc.
- Terminate pre vs. post post-closing
- Liabilities



# Integration – Benefits Issues (contd.)

- Executive contract treatment
  - Upcoming expiration/renewal
  - Structural issues (*e.g.*, anti-assignment provisions in employment agreements)
  - Will “good reason” definition be triggered
- Equity treatment
  - Cash out vs rollover
  - Performance Awards (how are they treated/converted)
- Other Considerations
  - Efficiency
  - Administration
  - Costs

# Retention Considerations

- Strategies to retain key employees
  - Executive Agreements
  - Bonus/Retention Plan
  - Transaction Bonus Agreements
  - Rollover of Equity (investment in company)
  - Non-compete Agreements and other post-closing restrictions
  
- 280G Considerations
  - Will there be a change in control under 280G
  - Identify Dis
  - Buyer/seller/key employee issue

# Restrictive Covenants

- Non-Competition Agreements
  - Prevent someone from entering into a particular profession
- Non-Solicitation Agreements
  - Prevent someone from soliciting a company's clients or employees
- Confidentiality/Inventions Assignment
  - Restrict someone from disclosing or using a company's proprietary information

# Restrictive Covenants in the M&A Context

- Relevance to Mergers & Acquisitions
  - Current agreements with a seller's employees
  - Proactive agreements with a seller's principles
- Variations by jurisdiction
- Sale of business vs. employment
- How to use and evaluate
  - Existing agreements with a seller's employees should be reviewed for enforceability and liability concerns (e.g. generally unlawful in California, Minnesota, Colorado, Oklahoma, North Dakota, subject to exceptions)
  - Buyers should consider requiring sellers' key employees to execute restrictive covenants, to the extent legally permissible (e.g. under state laws, sale of business exceptions, etc.)
  - At integration, consider whether to require employees to sign new confidentiality and inventions assignment agreements

# Evaluating and Drafting Restrictive Covenants in the M&A Context

- Review key terms and enforceability items
  - Diligence reviews should focus on enforceability of restrictive covenants
    - Note increased hostility against restrictive covenants in states like California
    - Proposed federal rules (e.g. FTC, DOL) could extend onerous rules nationally
  - Buyers should be aware of unenforceable restrictive covenants and apprised of the ramifications.
- Consider new restrictive covenants for key employees of seller
  - Reasonable agreements for senior managers who will transition to buyer
  - “Sale of Business” style agreements for former principles or key shareholders (these can be much broader in duration, and can withstand generalized prohibitions on restrictive covenants)

# Termination-Related Liabilities

- Contractual severance or similar benefits
  - Individual employment agreements
  - Severance plans
  - CIC agreements
- Statutory termination payments
  - Includes WARN and similar state law (e.g., NY and CA)
  - Can arise in the context of existing liabilities (e.g., seller conducted recent layoffs or plant closings but failed to comply with WARN)
  - Can also arise where buyer needs to reduce target's workforce

# WARN Notice Issues

## WARN in General

- WARN – Worker Adjustment and Retraining Notification Act
  - 60 days written notice before . . .
  - any “plant closing” or “mass layoff”
- WARN problems:
  - Forget common sense
  - Notices must be written, with specific dates
  - Watch postponed separations/transactions
  - Exceptions are not true exceptions (exceptions, exemptions, and exclusions!!)
  - Many states have separate and different WARN-type notice laws

# WARN Notice Issues

## Sale Situations

- Stock deal may not involve employee “terminations” at all
- Potential liability in Asset Deals if buyers fail to hire a sufficient number of seller employees
- Technical terminations don’t count if . . .
  - There is a “sale” (all or part of the business), and
  - Seller’s employees are hired by buyer as of the effective date (time) of sale
- Buyer/seller allocation of WARN duties:
  - Statute is incomprehensible
  - Watch 90 days before and after the deal
- Deal-related WARN short list . . .
  - Address buyer/seller allocation of WARN obligations
  - Use representations/warranties to address separations before/after sale
  - Consider indemnification language
  - Address buyer’s plans about seller employees
  - Err on the side of issuing WARN notices
  - WATCH for “technical terminations” occurring before or after sale effective date



# Severance Pay and Waivers/Releases

- Read the severance plan (guidelines etc.)
- Amend the plan if necessary *before* workforce reduction
- Read all handbooks and individual contracts
- Consider an “ERISA-compliant” severance plan
- Watch “technical” sale-related terminations as severance triggers
- Preexisting severance plan – no WARN “credit”
- Releases (OWBPA):
  - 45-day review period required if “group” terminations (21 days otherwise)
  - 7-day revocation period
  - “group” terminations: need to disclose positions/age/eligibility factors list
  - other content requirements (advise employee in writing to consult attorney, etc.)

# Concluding Remarks/Summary

- Business objectives should drive employment strategy
- Use employment counsel (separate from benefits and deal counsel)
- Realistically plan for and address union issues
- Structure “due diligence” around operating plans (and get “due diligence” to buyer’s operations people)
- Think ahead regarding integration issues

# Key Takeaways from This Session

- Properly identify big picture employee-related exposure issues and allocation between parties
  - contractor misclassification, exemption misclassification, union issues, WARN Act, contractual severance, pension entitlements, #metoo, DEI
- Address benefits integration issues and contractual negotiations of same
- Identify union and international issues early; realistically plan for and address potential union and international issues
- Use strategic integration and restructuring models to maximize deal value
  - Utilize appropriate onboarding notices and documentation
    - Coordinate announcements to address hiring, retention, union issues, and deal-related employment litigation risks
    - Utilize restrictive covenants, when appropriate and legally permissible, to protect goodwill, relations, and IP
    - Retain appropriate talent; consider milestone retention structures to incentivize outcomes
- Anticipate potential timing issues (severance agreement review; WARN notice periods; potentially long notice, negotiation, and review periods if unions or international works counsels involved)



# Questions?

# Biography



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Michael counsels businesses on all aspects of their employment law needs including wage and hour compliance, discrimination and harassment, equal pay (such as compliance with California's Fair Pay Act), worker classification (including contractor and contingent workforce issues), workforce change, layoffs, disciplinary matters, performance management, disability accommodation, leaves of absence, intellectual property protection, arbitration provisions, and incentive plan development. In addition, a significant part of Mike's practice involves the handling of employment-related aspects of mergers, acquisitions, investments, and joint venture transactions. He is a co-leader of the firm's LGBTQ+ Lawyer Network.

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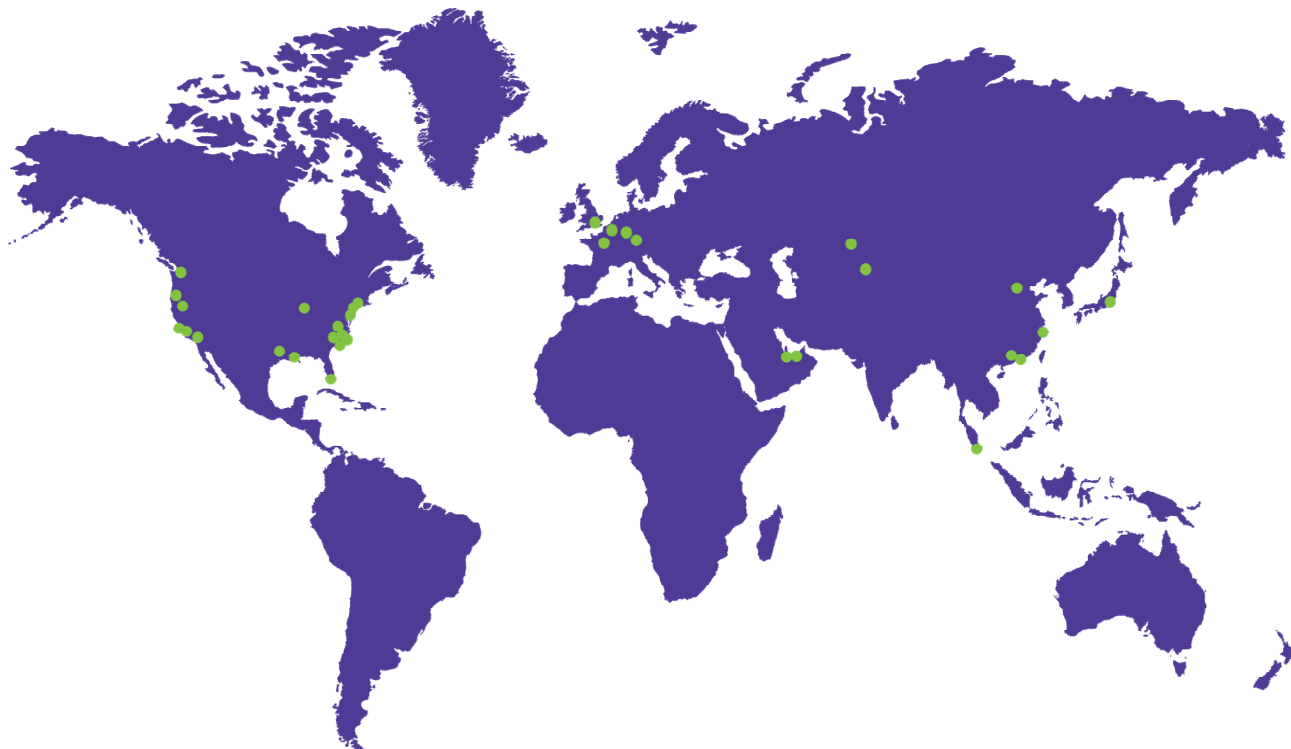
Patrick focuses on matters related to executive compensation, payroll tax, and employee fringe benefits. He advises private and public companies on designing and implementing nonqualified retirement plans, equity compensation plans, and executive compensation arrangements. He also counsels publicly traded companies on reporting and compliance matters involving the SEC, with a focus on proxy and disclosure issues, executive compensation, and corporate governance. He advises public and private companies on employee benefit issues in mergers and acquisitions, including executive compensation matters for senior management.

## Our Global Reach

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Asia Pacific  
Europe  
Latin America  
Middle East  
North America

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