Ready for a Sale? Part 1: Prepare Executive Compensation Arrangements and Employee Benefit Plans

A Practical Guidance® Article by
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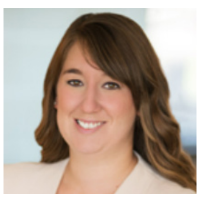

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This article is Part 1 in the "Ready for a Sale?" series, which is aimed at getting the human resources, benefits, and executive compensation functions of your organization ready for a potential sale or similar corporate transaction. In light of the active M&A market, we think this spring could be an ideal time for companies to evaluate the order of their executive compensation arrangements and employee benefit plans, particularly companies that are considering (or hoping for) a sale within the short-term future.

Part 2 is aimed at getting the human resources, benefits, and executive compensation functions of your organization ready for a potential sale or similar corporate transaction.

For many private companies, spring can be a time with fewer calendar year–driven HR projects. The push for audited financials, annual bonus and annual equity grant determinations, and payouts has subsided for many companies; open enrollment has not yet ramped up; and the holiday/end-of-year crunch is still a way off. Accordingly, this may be the perfect time to take stock of your executive compensation arrangements and employee benefit plans so that you are ahead of any issues that may arise in the context of an ultimate sale or liquidity event. We have heard from many clients that, once a deal is on the horizon, their internal resources are stretched very thin, so they appreciate any front-end planning that saves time once a deal is in the works.

This is Part 1 in a series of posts on how to ready the employee benefits/HR side of the organization for a sale. This post provides general guidelines, suggestions, and considerations for getting started on the deal process and getting organized. Subsequent posts will delve into substantive areas where early preparation will benefit your organization in the event of a potential sale. A little spring cleaning can be beneficial any time of the year!

Where possible, we have linked to past ML BeneBits posts for more detail and consideration on the below topics. Trust us, if your company enters a potential sale, there will be a day when all of your proactive efforts on the items below will pay off!

Getting a Jump-Start on the Process

Practical Tips

- Identify a point person (and potentially a backup person or team) responsible for the executive compensation and employee benefit plan workstreams in the deal.
- Begin compiling definitive copies of executive compensation and employee benefit plan materials.

The first area to consider is the process. Unlike many of the areas described below, this is generally not started until a sale is actually on the horizon or a company has already commenced the sale process. That said, from our experience, the earlier that a company starts thinking through process points, the smoother the entire sale process is likely to be.

First, consider appointing a person responsible for the executive compensation and employee benefit plan workstreams in the deal. This person would assemble and review documentation of executive compensation arrangements and employee benefit plan documents. This role is typically assigned to a senior HR employee or, for companies without an internal head of HR, it can be the chief financial officer, comptroller, or similar officer in charge of finance or accounting. If there are sensitivities with respect to individual employment agreements or other arrangements with the C-suite team, consider bifurcating the point people so that someone within management is responsible for executive compensation and someone in HR, accounting, or finance is responsible for the employer benefit plans.

Ultimately, the point person should be someone well equipped to "own" this workstream, including handling detailed questions from buyer's counsel in the diligence process as well as questions that may be asked by counsel for an insurance company providing representation and warranty insurance in the transaction.

Second, consider compiling the definitive copies of executive compensation and employee benefit plan materials. Often, one of the first steps of a potential sale transaction is that the proposed buyer (or one of its advisors) will provide the target company with a due diligence request list that includes a list of all agreements with employees and all benefit plans. Very often, even when a target company provides a potential buyer with the versions of agreements and plans it has readily on hand, the proposed buyer will continue to request versions of agreements that are signed by both parties and formal versions of benefit plan documents, insurance arrangements, and other documents.

To ensure you are well equipped to handle these requests, consider assembling fully executed copies of each agreement signed by both the employee and the company, and confirm that you have on file, or electronic access to, each of the employee benefit plan documents.

You can work with your outside legal advisors to confirm you have everything that will be needed for the eventual sale (or to support you in securing the correct versions of documents). Getting started on this process now will better prepare you for follow-up requests and the diligence process without creating additional strain on the company's resources.

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- Executive Compensation Issues in Corporate Transactions Involving Public Companies
- Retirement Plan Issues in Corporate Transactions

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Timothy J. Durbin is an associate with Morgan, Lewis & Bockius LLP, and advises public and private companies on a wide variety of executive compensation and employee benefits matters, both in ensuring compliance in the ordinary course of business and when engaging in corporate transactions, including M&A, spinoffs, initial public offerings, joint ventures, and restructurings. He regularly assists private equity clients with the negotiation of equity and cash-based compensation packages for executives of portfolio companies and advises public companies on compensation-related public disclosure rules, including drafting and reviewing their public filings.

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Carley Clark is a senior attorney with Morgan, Lewis & Bockius LLP and provides guidance to clients on the full spectrum of issues involved with employee benefits programs. Carley's focus is primarily in two areas within the employee benefits. First, Carley assists clients on structuring, designing, drafting, and administering executive compensation plans, qualified defined contribution and defined benefit plans, and nonqualified deferred compensation plans. Second, Carley focuses on fiduciary responsibility provisions, prohibited transactions rules and exemptions, and the management of employee benefit plan assets under ERISA and applicable state laws.