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Planning for the Plans: Executive Compensation and Employee Benefit Plans in M&A Transactions

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Agenda

- Types of Transactions
- Planning and Diligence
- Pre- and Post-Closing Actions and Considerations
- Acquisition Agreement Provisions
- Defined Benefit Plan/Multiemployer Plan Considerations
- Executive Compensation Considerations

SECTION 01

TYPES OF TRANSACTIONS

Types of Transactions

- Stock Deal/Merger
  - *Entire entity*
  - *Acquisition of subsidiary of larger ongoing entity*
  - *Stepping into the shoes of target entity*
- Asset Deal
  - *Purchase of all, substantially all, or discrete assets of seller*
  - *Business deal with respect to employees and benefits – technical termination of employment*
  - *Successor liability concerns*
- Public vs. Private
  - SPAC transactions
- Direct Negotiation vs. Auction Process
- Representation and Warranties Insurance?
  - Buy-side policy (most common) – objective is to provide coverage against financial loss suffered as a result of a breach of the seller's warranties
  - Sell-side policy – objective is to provide coverage in the event that the buyer sues the seller for a breach of warranty or indemnity.

SECTION 02

PLANNING AND DILIGENCE

Seller's Planning

- Identify plans and agreements early in process
  - *Any change-in-control payments or benefits (e.g., vesting)?*
  - *Any compliance issues? Consider timing and possibility of potential corrections.*
- Best time to address issues is before a transaction process begins
- Planning opportunities will vary depending on timing
- Section 280G considerations
  - Partnership or corporation?
  - Public or private?
  - Is proposed acquisition a "change in control" within the meaning of Section 280G?
  - Timing of potential closing creates potential planning opportunities
  - Shareholder approval cleansing vote

Buyer’s Diligence

- Any plan or agreement could raise issues, but focus especially on big-ticket items
  - *Equity based compensation*
  - *Employment and change-in-control arrangements*
  - *Severance benefits*
  - *Bonus and retention arrangements*
  - *Pension and retirement plans (qualified and nonqualified)*
    - *Defined benefit plans*
    - *Multiemployer plans*
  - *Health and welfare plans and potential Affordable Care Act penalties*
  - *Retiree medical and other post-termination welfare benefits*
  - *Worker classification (e.g., contractor, leased employees, co-employment relationship)*
  - *ERISA affiliates…*
- Consider Covid-19 related changes to the workforce, compensation structure, or benefit plans
- If R&W insurance policy is in place, underwriting process will involve review of due diligence process and diligence report (buyer-side) or disclosure process (seller-side)

SECTION 03

PRE-AND POST-CLOSING ACTIONS AND CONSIDERATIONS

Key Seller Considerations

- Minimizing residual risk for plan related issues
- Transfer of Seller Plans Liabilities in Asset Deal
- Equity Treatment
- Replication or Continuation of benefits and comp (e.g., closing year bonus) by Buyer
- Partial Termination of Seller Plans
  - *Full Vesting*
- COBRA Event Considerations/Obligations: M&A Qualified Beneficiary
- Structure Specific Issues, like Transition Services, Plan Loans and Rollovers
- Credit for service with Seller
- Treatment of and conditions for Earnout consideration for Sellers/Employees

Key Buyer Considerations

- Resolution of Plan Noncompliance/Compensation and Benefits Issues
- Employee Communications
- Enrollment in Buyer Plans/Plan Integration
  - Termination of Certain/All Seller Plans
- Drafting of New Plan Documents or Plan Amendments
- Service Provider Agreements
- Professional Employer Organization (PEO) Arrangements
- Satisfy Any Applicable "Comparability" Standard from Purchase Agreement
  - *Substantially similar in the aggregate*
  - *Substantially similar to similarly-situated employees*

Other Buyer Considerations

- Notice Obligations
  - *General employee notice*
  - *PBGC reportable events*
- Anticutback Rules
- Nondiscrimination Issues
- R&W Insurance exclusions

SECTION 04

ACQUISITION AGREEMENT PROVISIONS

Representations and Warranties - General

- Generally Less Fulsome Representations in Asset Purchases relating to Plan Liabilities that may be Assumed
- ERISA Affiliates
- Materiality, Knowledge Qualifiers
  - *Notice to Buyer of known liabilities and other specific disclosures*
  - *Allocation of all financial responsibility*
- If the deal has R&W insurance, any unusual benefits related representations may raise red flags and require an explanation to avoid a policy exclusion

Representations and Warranties – Examples

- List of Plans
- Disclosure of Material Documents
- Compliance with Law, ERISA, the Code, and Plan Terms
  - *COBRA, ACA, and health plan issues*
  - *No late payments or other prohibited transactions/breach of fiduciary duties*
  - *409A compliance*
- Status of Current Favorable Determination Letter
- No Loss of Tax Exemption
- Use of Correction Programs: EPCRS or DOL VFCP/DFVCP
- Foreign Plans

Representations and Warranties – Examples (cont.)

- No Participant Claims (other than ordinary course)
- No Governmental Audits
- Proper Characterization of Workers
- No 280G Issues
  - *Disclosure of change of control benefits*
- Funded Status of Nonqualified Retirement Plans
- Plans May Be Amended Freely
- Accelerated Vesting, Increased Payments, Additional Benefits Triggered in Whole or in Part by the Transaction

Covenants - Examples

- Post-Closing Compensation
- Continuation/Assumption of Plans
  - Termination of plans
  - Merger of plans
  - Third-party agreements
- Replication of Plans and Benefits
- Hiring of Employees
- Eligibility for Buyer Plans
- Credit for Service with Seller
- Credit for Deductibles and Co-pays
- Responsibility for COBRA
- Asset Deal – Exclusion of Specified Liabilities
- No Third-Party Beneficiaries/No Amendment

SECTION 05

DEFINED BENEFIT PLAN/ MULTIEMPLOYER PLAN CONSIDERATIONS

Defined Benefit Plans
Potential Deal Pricing & Diligence Issues

- Funded Status of the Plan – employer's promise to pay a future steam of benefits under a formula (2% of final average pay X years of service), which is measured at a given point in time using actuarial assumptions
  - Inverse relationship between liabilities and interest rates:
  - Liabilities would be greater if measured on plan termination assumptions (e.g., with say 2% interest rates) than on ongoing plan funding assumptions (e.g., with say 7.5% interest rate assumptions)
  - Potential Purchase Price Adjustment?
- Controlled Group Liability – "Joint and several" among all controlled group members (i.e., generally, all trades or businesses connected through an 80% or more ownership chain with a common parent)
  - 1st Circuit Court of Appeals case held that a private equity fund is a trade or business and therefore jointly and severally liable for underfunded pension liabilities of its portfolio companies
  - On remand, the lower court ignored the chosen corporate form (investment of 70% by Fund III and 30% by Fund IV) and deemed a partnership to exist among the related funds rather than the entity formed below them
    - Although such decision was overturned by the 1st Circuit Court of Appeals, the court applied a multi-factor facts and circumstances test that leaves open the possibility that two private equity funds could be deemed to create a partnership in fact subject to the controlled group rules in a similar situation
- Reportable Events – PBGC "early warning" program
- Reps regarding whether a particular defined benefit plan is properly funded are generally excluded from a R&W insurance policy.
- PBGC options are limited.

Defined Benefit Plan
Purchase Agreement Considerations

- Representations and Warranties
  - All required contributions timely made
  - No unreported reportable events
  - Value of plan assets compared to liabilities (termination vs. ongoing basis)
  - No liability triggered in connection with the transaction or prior transactions under a separate "avoid or evade" statute
- Allocation of Unfunded Liabilities – Variations depending on whether deal structured as stock or asset deal and/or whether seller is disposing of its entire business or merely a subsidiary or division and will continue to operate as a going concern thereafter
  - Buyer assumes plan and all liabilities
  - Buyer assumes only assets and liabilities for transferring employees
  - Buyer does not assume the plan and makes no future commitments with respect to defined benefit plans

Multiemployer Plan Basics

- Plan Sponsored and Maintained by a Combination of an equal number of Trustees appointed by a Union and interested employers
- Collective Bargaining Agreement between an Employer and a Union Requires Contributions to the Plan
- Potential Major Issues:
  - Withdrawal liability
  - Controlled group liability
  - Escalating costs due to funding requirements
- Sale of Assets Exception
- Potential Successor Liability in an Asset Sale
- Representations relating to withdrawal liability are generally excluded from R&W insurance policies.

What is Withdrawal Liability and how is it triggered?

- An employer who ceases to contribute to a multiemployer pension plan must pay a proportionate share of the plan's unfunded vested liabilities, even where the employer has paid all contributions required to be made by it under the applicable CBA
- "Complete" withdrawal occurs when an employer either:
  - permanently ceases to have an obligation to contribute (the CBA expires)
  - permanently ceases the activity that required its plan contributions (sale of a business in an asset deal)
- "Partial" withdrawal occurs when there is either:
  - 70% or more decline in contribution base units over a designated time period
  - Ceases to have an obligation to contribute for fewer than all CBAs, but continues to work in the jurisdiction of the CBA or at the same facility, where the work is of the type for which contributions were previously required
- "Mass" withdrawal occurs when every employer leaves the plan

Does Withdrawal Liability Warrant a Purchase Price Reduction?

- One of the issues that all buyers and sellers in transactions where underfunded multiemployer plans are involved should consider is whether the underfunding should warrant a deal price adjustment, funds being placed in escrow or/or heightened indemnification protections
- Potential multiemployer pension plan liability in the event of withdrawal is not required to be disclosed in a company's financial statements by the FASB; therefore buyers often overlook the amount of such potential liability in setting the purchase price at the bid stage
- Valuation firms, such as Moody's, have put out guidance indicating that they treat withdrawal liability exposure as a debt-like item that negatively affects the valuation of a company
  - Buyer's follow suit and argue that withdrawal liability is a debt-like item, no different than the underfunding associated with a single-employer pension plan, and as an item that could affect marketability and valuation on subsequent sales
  - Seller's counter that the liability is only triggered if and when an employer "leaves" the plan, and therefore "mythical" for a going concern, and should not affect price

Quantification of the Financial Exposure - Generally

- The plan’s publicly filed funding information and due diligence disclosures are generally not sufficient to enable anyone to determine the employer’s actual withdrawal exposure with precision
- ERISA requires a plan to provide a contributing employer with a withdrawal liability estimate at least once per year upon request, but these usually take up to 6 months to satisfy so this rule is often only useful where a seller has requested an estimate in advance of sale/auction
  - Sellers sometimes argue that they haven’t / won’t request an estimate because it would “signal” the union that they are being sold; we generally view this as flawed reasoning b/c it is common practice for employers to make routine annual requests as a matter of good financial risk assessment
- Absent timely withdrawal liability reports, “back of the envelope” estimates must be done with applicable caveats (we do these routinely)

Factors affecting the quantification of withdrawal liability exposure

- There are multiple permissible methods for a plan to calculate withdrawal liability (e.g., total shortfall times the quotient of an employer's contributions to all employers' contributions over the past 5 years; pooling an employer's share of +/- in funding on an annual basis; allocation base on employer's employees)
  - Such methods may produce widely different results
- Mitigating considerations
  - If buyer intends to operate the business, liability won't be triggered immediately, so discounting may be appropriate
  - Not payable in a lump sum, so discounting may be appropriate
    - Annual payment cap based on employer's historical base units (e.g., hours worked) multiplied by the highest rate of contributions (e.g., $s per hour)
    - 20-year cap on payments (unless part of a mass withdrawal)
  - Payments are tax deductible
- Governmental relief programs will not mitigate potential employers' withdrawal liability

Successor Liability in Asset Sales

- Asset sale will generally trigger withdrawal liability because the “company” will cease to have an obligation to contribute to the multiemployer plan even if the buyer continues to contribute to the plan at the exact same level for the exact same employees post-closing
- 3rd, 6th, 7th and 9th Circuit Courts of Appeals have all held that successor liability can attach to an asset purchaser if it had actual or constructive notice of the withdrawal liability before acquiring the seller’s assets and there was a substantial continuity in the operation of the business

Sale of Assets Exception

- Asset seller can avoid triggering withdrawal liability upon a sale of assets if the buyer and seller agree to, and follow, the requirements of Section 4204 of ERISA, which requires the following:
  - Bona fide arm's length transaction between unrelated parties
  - Buyer assumes obligation to contribute for substantially the same number of contribution base units as the seller was obligated to contribute to the plan
  - Buyer timely posts a bond for a period of 5 years based the seller's historical annual contributions, unless an exception applies
  - Buyer must pick up the past 5-years of contribution history of seller (for purposes of determining liability of buyer upon buyer's subsequent withdrawal)
  - Seller must agree in the purchase agreement to be secondarily liable for the amount of the liability it would have otherwise incurred, but for Section 4204, if the buyer withdraws within 5 years and does not pay its withdrawal liability
  - If Seller liquidates all or substantially all of its assets within 5 years, it must post a bond based on the amount of withdrawal liability it would have otherwise incurred

Indemnification Considerations in a 4204 Transaction

- Sellers seldom agree to a purchase price reduction where 4204 is used for the following reasons:
  - Liabilities may never be triggered or, if they are, they are likely to occur in the future (seller never intended to withdrawal from the fund while they operated from the business and will argue that neither should the buyer such that the liabilities here are "mythical" in nature)
  - "Indemnification" provisions are more common here and, if agreed upon, may provide that if buyer incurs withdrawal liability in the future seller will be liability for the share of liability determined based the entire amount of the liability minus the liability the buyer would owe if it contributed to the plan on its own beginning on the closing date
- Indemnification provisions are typically included to allocate liability as a business matter in the event that withdrawal liability is triggered notwithstanding the attempt to Section 4204
  - If buyer fails to timely post a bond or contribute enough CBUs, Buyer is liable

Controlled Group Issues & Structuring Consideration

- Under ERISA, liability for underfunded pension plans is "joint and several" among all "controlled group" members (i.e., generally all trades or businesses connected through an 80% or more ownership chain with a common parent)
  - 1st Circuit Court of Appeals case held that a private equity fund is a trade or business and therefore jointly and severally liable for underfunded pension liabilities of its portfolio companies
  - On remand, the lower court ignored the chosen corporate form (investment of 70% by Fund III and 30% by Fund IV) and deemed a partnership to exist among the related funds rather than the entity formed below them
    - Although such decision was overturned by the 1st Circuit Court of Appeals, the court applied a multi-factor facts and circumstances test that leaves open the possibility that two private equity funds could be deemed to create a partnership in fact subject to the controlled group rules in a similar situation
- Private equity funds should consider partnering with unrelated minority investors or structuring their investments so that a target company with significant withdrawal liability exposure is not part of its or its other portfolio companies' controlled group

Potential Pricing Issues in addition to Withdrawal Liability

- Plans that are determined to be "critical" (65% or less funded) or "endangered" (less than 80% funded) status must adopt a rehabilitation or funding improvement plan that may require increased contributions and surcharges to improve plan funding
  - As part of the diligence process, a buyer should determine and assess the cost of pre-established future increases in contribution rates to underfunded multiemployer pension plans
- A plan's failure to satisfy its statutory minimum funding requirements could result in excise taxes and other hidden costs to contributing employers
  - At least one fund has language buried in its rehabilitation plan indicating that, upon withdrawal, in addition to statutory withdrawal liability, the withdrawing employer will, as a matter of contract, also owe an amount equal to its share of the minimum funding shortfall

SECTION 06

EXECUTIVE COMPENSATION CONSIDERATIONS

Treatment of Equity Awards

- Due diligence considerations
  - What does the plan require?
    - Single-trigger or double-trigger vesting
    - Consider treatment of performance-vested awards
  - What does the plan permit?
    - Unilateral right to cancel and terminate
    - Ability to cancel underwater options
    - Consent requirements; timing issues if notice is required
- Purchase agreement should accurately reflect the treatment of the equity awards

Treatment of Equity Awards– Assumption of Grants

- Awards remain in place, but the underlying shares and the exercise price (if applicable) are adjusted to reflect the transaction
- Assumption or substitution of <u>incentive</u> stock options must comply with Code Section 424 regulations
- Assumption or substitution of <u>nonqualified</u> stock options must comply with Code Section 409A regulations, which refer to certain regulations under Section 424

Treatment of Equity Awards – Cash-Out

- Cash-Out of Options
  - Stock option is cancelled for a payment made in cash or stock of the acquirer
  - Amount of the cash-out is typically equal to the intrinsic value ("spread") of the option at the closing of the transaction
  - Underwater options: generally cancelled for no consideration
- Cash-Out of Other Awards
  - Award is cancelled for a payment made in cash or stock of the acquirer
- Cash-out is generally a taxable event. Deferred consideration is generally taxed on an as received basis given cash method taxpayers.

Section 409A – The Basics

- Section of the Internal Revenue Code that generally applies to any arrangement that provides for compensation to be earned in one tax year, but not paid until a subsequent tax year
- Very broad applicability:
  - Executive deferred compensation arrangements and supplemental executive retirement plans (SERPs)
  - Certain equity awards
  - Severance arrangements
  - Annual bonus arrangements
- Failure to comply with requirements results in
  - Consequences to the employee
    - Immediate taxation on vested compensation
    - 20% penalty “additional income” tax
    - Interest penalty
  - Consequences to the employer
    - Potential penalties for failure to timely withhold or properly report

Section 409A – The Basics (cont.)

- Section 409A of the Code issues in transactions:
  - Equity grants
  - Earn-outs
  - Severance plans/employment agreements
  - Payment on a change-in-control

Section 409A – Due Diligence Considerations

- Equity grants
  - Determine whether “stock rights” are exempt from Section 409A of the Code
  - Exercise price must be at least equal to fair market value on grant date
  - Stock rights must be granted on “service recipient stock”
    - Common stock of the company that employs the grantee or a parent of such employing entity
  - RSUs and phantom stock awards must have Section 409A-compliant payment terms or meet an exemption from Section 409A

Section 409A – Due Diligence Considerations

- Severance plans/employment agreements
  - Review payment provisions
    - Look for differing forms ("toggles") of payment (installments before change-in-control and lump sum after change-in-control)
  - Good reason trigger
    - Look for weak "good reason" definitions and walk rights. Lack of notice/cure provisions.
  - Six-month delay for "specified employees" in public companies
  - Release timing issues
- SERPs and elective deferred compensation plans
  - Review payment provisions
    - Confirm permissible 409A payment events
    - Confirm whether amounts vest or are paid upon a change-in-control

Section 409A – Closing/Post-Closing Payment Considerations

- Treatment of equity awards
  - Earn out consideration will be subject to Section 409A if not payable within the short-term deferral period (generally payment within 2-1/2 months after the year in which the compensation vests.)
  - Earn out will generally comply with Section 409A if:
    - Paid on the same schedule and under the same terms and conditions as apply to the shareholder payments, and
    - Paid within five years after the change-in-control
  - If awards are subject to Section 409A, confirm that a change-in-control is a designated payment event
  - Option adjustment must be consistent with Section 409A
- Severance plans/employment agreements
  - Confirm that any change in the time or form of payment under new employment agreements does not run afoul of Section 409A's substitution rules
  - Confirm that any accelerated payment of "severance" does not run afoul of Section 409A's substitution rules

Section 409A – Change-in-Control Payments

- Payment on a change-in-control plan termination
  - Regulations provide special opportunities to terminate Section 409A arrangements pursuant to a change-in-control
  - Must terminate all plans of the <u>same type</u> for all participants experiencing a change-in-control
    - Note plan aggregation
  - Irrevocable action to terminate must occur within 30 days before or within 12 months following a change-in-control
  - All payments must be made within 12 months following the date of the action to terminate

Section 280G – The Basics

- Internal Revenue Code provision that applies to payments in the nature of "compensation" that are "contingent" on a "change-in-control" paid to a "disqualified individual" to the extent they exceed a specified threshold
  - 20% excise tax on the "excess parachute payment"
  - Loss of tax deduction to the employer
- 280G analysis typically performed as part of diligence
  - Consider whether any employment agreements or compensation plans address the impact of Section 280G

Section 280G – Key Terms

- "Compensation"
- "Disqualified individuals"
  - Officer (no more than 50 employees, or, if less, the greater of 3 employees or 10% of the employees),
  - More than 1% shareholder, or
  - "highly compensated employee" (highest-paid 1%, not to exceed 250 employees)
- "Contingent" on a "change-in-control"
  - Payment would not have been made absent the change-in-control
  - Arrangement entered into within one year prior to a change-in- control is presumed to be contingent on a change-in-control
  - Payment made as a result of an event that occurs within one year following a change –in-control is presumed to be contingent on a change-in-control

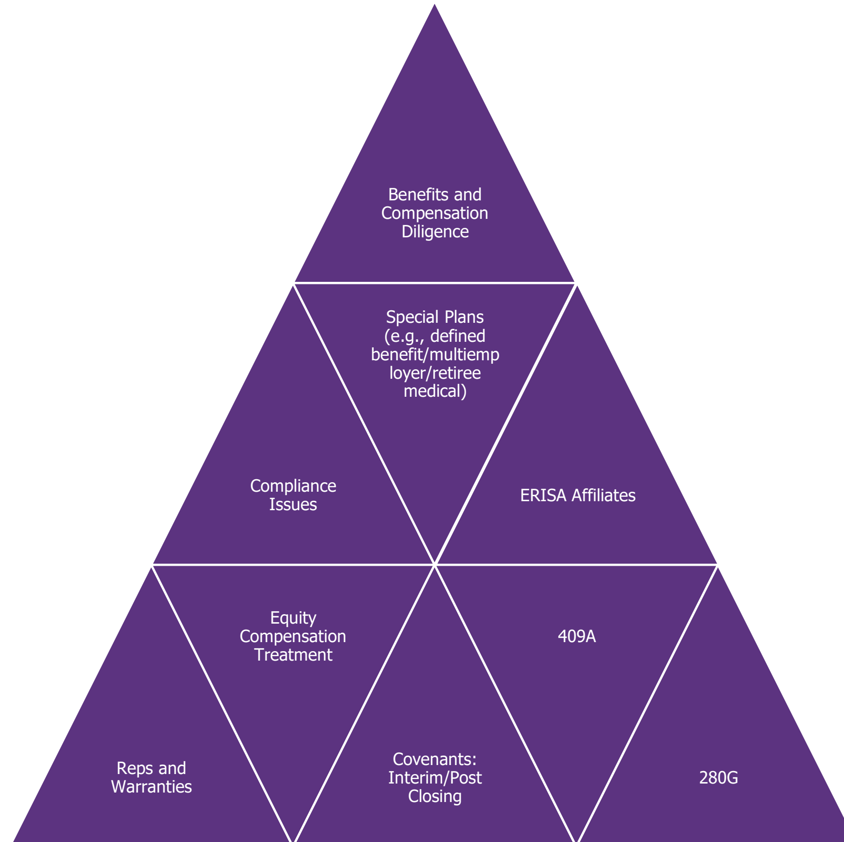
Section 280G – Calculation of the Excise Tax

- "Excess parachute payment"
  - If a disqualified individual receives payments on a change-in- control that equal, or exceed, three times such individual's "base amount," then
  - A 20% excise tax on all amounts in excess of one times the disqualified individual's "base amount"
    - Base amount is the disqualified individual's average annual W-2 compensation for the most recent five calendar years (or period worked, if less) ending in the calendar year prior to the year in which the change-in-control occurs

Section 280G – Exemptions

- Payments made by privately held companies when shareholder approval requirements are met
  - Payments must be approved by more than 75% of the disinterested shareholders entitled to vote immediately before the change-in-control
  - "Adequate disclosure" of all material facts regarding all material payments that otherwise would be parachute payments is provided to all persons entitled to vote
  - Payments must be contingent on the vote
    - "Waiver" of legal right to payments
- Section 280G of the Code does not apply to Subchapter S corporations

Key Takeaways from This Session



QUESTIONS?

Biography

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Austin S. Lilling focuses on issues relating to executive compensation arrangements and employee benefit plans. He regularly provides comprehensive counsel to senior executives, management teams, boards, key stakeholders, and employers on the design, negotiation, implementation, and administration of employment agreements; severance agreements; change in control arrangements; corporate and partnership equity and phantom equity compensation arrangements; qualified and nonqualified deferred compensation plans; welfare plans; retention; incentive; and other compensation and benefits arrangements. He has been listed in Chambers USA: America's Leading Lawyers for Business since 2021.

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Carly E. Grey counsels employers on employee benefit and executive compensation matters. She advises on qualified and nonqualified retirement plans, health and welfare plans, and executive compensation arrangements. She also counsels clients on the legal issues arising under ERISA, the Internal Revenue Code, the Affordable Care Act, HIPAA, COBRA, and securities laws. In addition to helping employers resolve day-to-day compliance issues, Carly advises on complex employee benefits and executive compensation matters.

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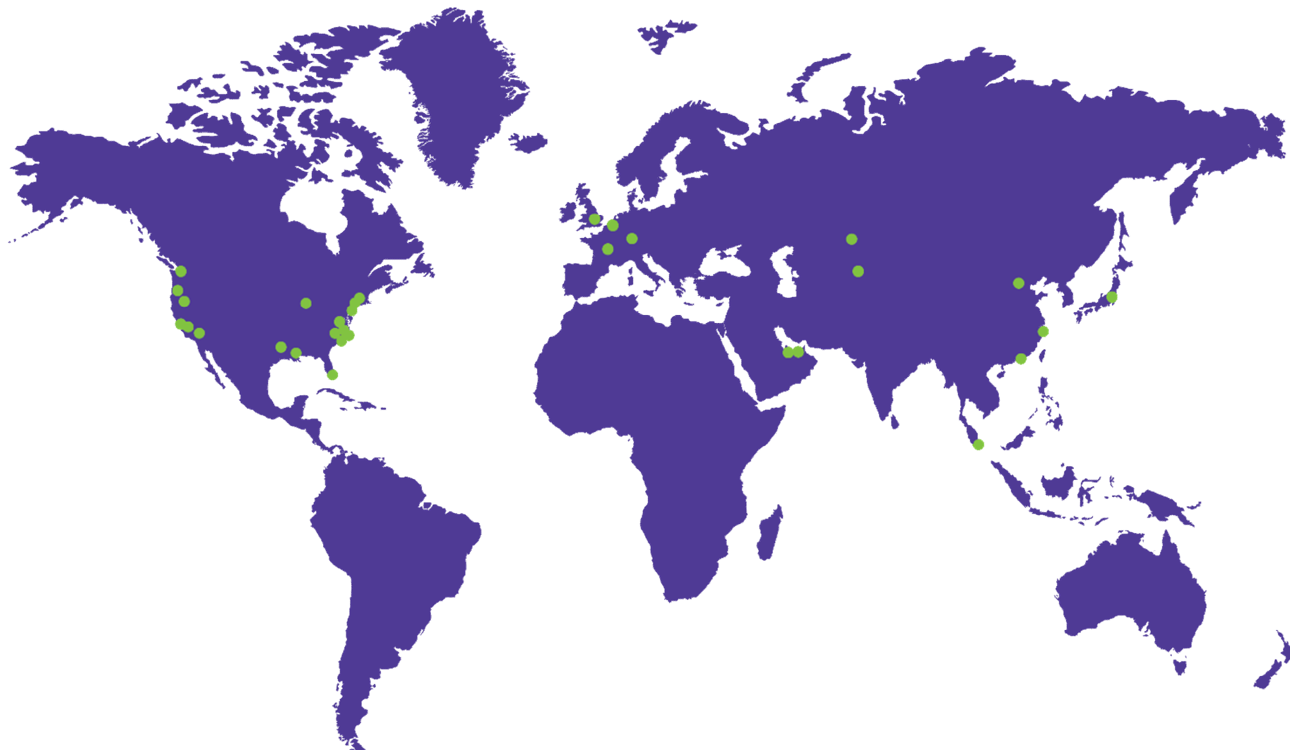

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