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Employment and Employee Benefits Issues in M&A Transactions

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Employee Benefits Academy
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Scott's practice focuses on assisting businesses implement and maintain valuable executive compensation arrangements and employee benefits.

Scott is a member of the firm's Employee Benefits group, and has offices in Dallas and Atlanta. Scott works on all legal aspects of executive compensation and employee benefits, as well as ERISA litigation matters. His practice includes working with businesses to put in place and maintain executive employment agreements and deferred compensation arrangements, qualified retirement plans and health and welfare plans. Scott regularly advises clients on issues involving deferred compensation (including Internal Revenue Code Sections 409A, 162(m) and 280G). He also works with clients in designing and implementing cash balance plans and other qualified retirement plans, including traditional defined benefit pension plans and 401(k) plans, and in complying with the various welfare plan requirements, including the AA. Scott works closely with the fiduciary administrative committees of clients' benefit plans and helps them through the murky waters of ERISA's fiduciary requirements. He also advises on the employee benefit aspects of corporate transactions and financings.

Scott has significant experience in agency inquiries concerning employee benefit plans, including inquiries and audits by the Internal Revenue Service, Department of Labor and Pension Benefit Guaranty Corporation. He also regularly provides substantive support to ERISA litigation matters, including fiduciary breach litigation and retiree medical claims. Scott is also experienced in general governance matters and the securities aspects of employee benefits.

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Ryan represents employers and executives in labor matters and complex employment litigation and provides strategic labor and employment advice.

Ryan's labor and employment litigation experience is both broad and deep, and he is particularly skilled in defending employers against wage and hour class and collective actions. Ryan has been involved in over thirty-five of these cases, along with numerous other single plaintiff wage and hour matters, throughout the country. He has achieved success for his clients in many of these cases, including on the merits, in defeating class certification, and/or in successfully challenging plaintiffs' damages expert/calculations.

Ryan's litigation experience also includes whistleblower claims, Fair Credit Reporting Act (FCRA) class actions, ERISA actions, H-2B and J-1 immigration litigation, single- and multi-plaintiff discrimination and harassment litigation, and prosecution and defense of breach of contract and restrictive covenant litigation.

Ryan also routinely represents management in complex traditional labor matters in union elections, collective bargaining, strike contingency planning and execution, unfair labor practice proceedings, and arbitrations. Ryan has represented clients in dozens of union elections and has negotiated numerous collective bargaining agreements covering thousands of employees.

Initial Analysis of Transaction & Strategy

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- In preparing for a transaction, it is important to take a big picture overview of the major issues and concerns of the parties as they approach the transaction
- If possible, get the Human Resources team involved early in the process
- As a Buyer
  - Focus on the primary purpose of the transaction (e.g., adding new stand-alone business operations to an existing business; adding valuable assets to existing business; etc.) – these types of considerations can help shape the strategy for the deal, the extent and focus of diligence, and key issues to focus on during the negotiation of the deal, as well as in the post-closing transition
  - Consider the extent to which Seller's employment policies and benefit plans will be assumed and continued for affected employees
  - Consider employment needs for the business after the transaction
    - Employment considerations often create financial efficiencies and synergies for the transaction
    - Consider issues such as change in control and severance arrangements, vesting and distribution of benefits under equity and other incentive arrangements, and potential employment litigation

Initial Analysis of Transaction & Strategy

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- As a Seller
  - Will be required to fully disclose the employee benefits and employment policies in effect, as well as any known compliance risks
  - May desire to negotiate certain ongoing employment and/or benefits for its employees who will continue with the business following the closing of the transaction

Initial Analysis of Transaction & Strategy

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- Asset Transaction vs. Stock Transaction
  - Asset Transaction – Buyer generally can choose whether to assume Seller's plans, employment agreements and collective bargaining agreements; can avoid liability by not assuming (But potential for successor liability for certain types of plans)
  - Stock Transaction – Buyer generally assumes the liabilities of the equity interest purchased, including benefit plans, as a matter of law
    - Generally heightens diligence concerns/issues
    - Assuming Buyer also sponsors its own plans, heightens strategy and design issues for benefit plans going forward

Employee Benefits

The Diligence Process

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- See separate diligence checklist for detailed list of documents to review
- In the diligence process, the Seller is primarily ensuring that the representations it will be making are accurate, and that impacted employees are dealt with appropriately and as intended in the transaction
- In the diligence process, the Buyer has two primary objectives – (1) assess risks/liabilities; and (2) develop a transition plan for the new employees
- Assessing Risks/Liabilities
  - First Level – Identify any major items that could materially impact the transaction
    - Unions/Multiemployer Plans
    - Defined Benefit Plans
    - CIC Payouts/Equity
    - Retiree Medical
    - ACA Compliance
  - Second Level – Deeper dive into documentation and operational compliance issues that need to be addressed either pre-closing or in the post-closing transition
  - Assess items with potential financial liabilities and/or penalties (e.g., underfunded pension plans; failure to make timely IRS/DOL filings; failure to satisfy 401(k) plan testing requirements; failure to satisfy ACA requirements; etc.)

Defined Benefit Plan Issues

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- Funding requirements
  - Buyer should review the Form 5500, including the audited financial statements, as well as independent actuarial reports and annual funding notices to help determine funded status of the plan, and anticipated contribution requirements
  - Funded status of plan will vary for ongoing purposes vs. termination purposes due to different actuarial assumption requirements; if Buyer desires to terminate plan, should consider liability for funding on termination basis
  - Buyer should confirm that PBGC premiums have been timely paid, and that any required participant notifications regarding funded status have been made (e.g., annual funding notice)
  - Spin-off of plan assets and liabilities from Seller's plan to Buyer's plan
    - Buyer and Seller should work with their actuaries to help negotiate assumptions used in the spin-off, and to calculate transferred assets and liabilities
    - Plan amendment and communication to affected employees
    - Potential Form 5310-A filing with IRS
    - Potential PBGC reportable event under ERISA §4043
  - Plan amendment to significantly reduce future benefits
    - ERISA 204(h) notice requirement to affected participants – 45 days in advance; 15 days in advance if in connection with transaction
  - Reporting requirements – PBGC reportable event depending on the treatment of the plan going forward

401(k) Plan Issues

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- Should Buyer assume Seller's plan or terminate it
  - Stock deal – Buyer assumes unless terminated before close
  - Asset deal –
    - If Seller's business continues, Seller will likely continue its 401(k) plan, and affected employees will become covered under Buyer's 401(k) plan
    - If Seller's business does not continue, Buyer may want to assume Seller's plan for continuity, terminate to avoid potential liability for past issues, or merge into Buyer's plan for synergies
- Distribution to Seller's employees
  - Has "severance from employment" occurred
  - Plan termination – successor plan considerations
- Plan loans
  - Alternatives to avoid defaults of plan loans under Seller's plan
    - Allow rollover of plan loans
    - Plan-to-plan asset transfer including loans
- Annual contribution limit ($19,500 + $6,500 catchup for 2021) applies to all 401(k) plans in which an individual participates during the year; Buyer should be aware of contributions made under Seller's 401(k) plan if Seller's employees transition to Buyer's plan post-closing
- Will need to coordinate with third party administrator for underlying implementation/administration

Welfare Plan Issues

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- There are a number of types of welfare plan issues that could impact the transaction:
  - ACA compliance risks
    - 1094 and 1095 filings
    - Affordability analysis
    - 226J letters from IRS
  - COBRA obligations
  - Unfunded retiree welfare benefits
  - Accrued but unpaid amounts such as vacation leave or sick leave
  - Claims for healthcare or disability benefits incurred but unpaid prior to closing; these can include claims made prior to the closing (but not adjudicated and paid), as well as claims that have not yet been made for injuries or illnesses that occurred prior to the closing
    - "Claims made approach" generally allocates claims made prior to closing to Seller, and claims made after closing to Buyer
    - Sometimes parties agree that Seller will retain liability for benefits for treatment incurred prior to closing even if the claim is not made until after closing; often there is a cut-off date after which Buyer assumes responsibility for claims made after closing (e.g., 6 months)
    - Particularly if benefits are insured, the parties should consider the terms of their policies in agreeing to an allocation of liability

Welfare Plan Issues

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- Special COBRA considerations
  - COBRA regulations provide guidance on COBRA coverage for "M&A Qualified Beneficiary" (Reg. §54.4980B-9)
    - M&A Qualified Beneficiary:
      - Asset deal – A COBRA qualified beneficiary whose qualifying event occurred before or in connection with the transaction, and whose last employment was associated with the assets being sold
      - Stock deal – A COBRA qualified beneficiary whose qualifying event occurred before or in connection with the transaction, and whose last employment was with the acquired organization (Reg. §54.4980B-9, Q&A 4)
  - The regulations are structured to ensure that M&A Qualified Beneficiaries will receive COBRA coverage even if their former employer (Seller) ceases to exist or terminates its healthcare plans
  - The parties may agree among themselves as to which party will provide COBRA coverage to employees who are terminated in connection with the transaction. In the absence of an agreement, or if the responsible party breaches its contractual obligation to provide COBRA coverage, the regulations dictate which party is responsible to provide COBRA coverage

Welfare Plan Issues

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- COBRA (cont.)
  - The Seller's plan must provide COBRA coverage to Seller's employee's terminated prior to or in connection with the transaction (regardless of whether a stock or asset deal if the Seller (or a Seller controlled group member) continues to maintain a group health plan
  - If the Seller does not provide (or ceases to provide) group health coverage to any employee upon close or after the transaction, the Buyer's plan must provide COBRA coverage in a stock transaction, and, if the Buyer is a "successor employer", in an asset transaction. A Buyer is a successor employer if it continues the business operations associated with the purchased assets without substantial change
  - Practical considerations
    - If Seller continues health coverage for only a few employees, the provision of COBRA coverage for a large group of former employees affected by the transaction may be prohibitively expensive
    - Similarly, providing COBRA coverage to former employees of Seller who are not hired by Buyer may add additional, unforeseen costs to the transaction for the Buyer
    - If the Buyer's plan is insured, Buyer should ensure that the insurer will provide the COBRA coverage to Seller's former employees before Buyer agrees to do so
    - The party responsible for COBRA will need to coordinate with its COBRA administrator to ensure that necessary data regarding M&A Qualified Beneficiaries is provided for administration (if Buyer is responsible for COBRA, this will likely require cooperation from Seller)

Executive Compensation Issues

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- CIC payments and transaction bonus arrangements, accelerated vesting of equity awards and other executive arrangements, and potential severance liabilities, can have a material effect on the transaction

- 280G Golden Parachute Payments
  - 20% excise tax and loss of employer deduction for compensation expense on "excess parachute payments"

- 409A Deferred Compensation Arrangements
  - 20% excise tax for failure to follow complex (and not always intuitive) rules for deferring and paying nonqualified deferred compensation

Multiemployer Plan Issues

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- Multiemployer pension plans can cause significant liability in the form of withdrawal liability or ongoing funding obligations
- Complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute to the plan or permanently ceases all covered operations under the plan; partial withdrawal generally occurs upon a 70% contribution decline (measured over three years), a "bargaining unit takeout" or a "facility takeout"
- Upon withdrawal, plan trustees will determine withdrawal liability using a formula based on the plan's unfunded vested liability and the relationship of the withdrawing employer's contributions to aggregate plan contributions over a specified period (generally, the previous five years)
- Withdrawal liability extends to all members of the controlled group

Multiemployer Plan Issues

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- Stock deal – Buyer succeeds to Seller's obligations under the plan; no withdrawal as a result of the transaction; however, Buyer will have withdrawal liability if it later withdraws from the plan
- Asset deal – If the Seller ceases making contributions to the plan (e.g., because the employees covered by the plan have become Buyer's employees), Seller will generally have withdrawal liability (or there could be partial withdrawal liability over time as a result of the transaction)
  - The Buyer can, under a special exception in ERISA §4204, assume Seller's obligations under the plan and avoid Seller's withdrawal liability, but the parties must jump through certain hoops created by the statute, including express assumption of Seller's obligations under the plan and providing a bond (or other financial security) to protect against potential withdrawal liability
  - Under this exception, the Seller becomes secondarily liable for withdrawal liability if Buyer withdraws within five years after the transaction, and may be required to provide a bond if its assets are distributed within 5 years from transaction
- Special exceptions to withdrawal liability apply to certain types of industries – construction, entertainment, trucking, household goods moving and public warehousing

Successor Liability Issues

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- General rule
  - Purchaser of stock assumes liability under Seller's employee benefit plans
  - Purchaser of assets does not assume liability under Seller's employee benefit plan, unless Purchaser agrees to assume the liability
- Four general exceptions under which successor liability may be imposed in asset transactions
  - Express or implied assumption
  - De factor merger
    - Continuity of ownership
    - Continuity of enterprise
    - Dissolution of Seller
    - Assumption necessary for uninterrupted continuation of operations of Seller
  - Buyer is "mere continuation" of Seller (e.g., reorganization or restructuring)
  - Fraudulent transfer – purpose of transaction is to avoid liability

Successor Liability Issues

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- Expansion of Successor Liability in ERISA Context
  - A line of case law has expanded the normal doctrine of successor liability in the context of certain kinds of employee benefit plans if: (i) there is a continuity of business operations by the Buyer; and (ii) the Buyer had knowledge of the plan/liability
    - Multiemployer pension plan withdrawal liability - *Upholsterers' International Union Pension Fund v. Artistic Furniture,* 920 F. 2d 1323 (7th Cir. 1990)
    - Retiree medical plans – *Grimm v. Healthmont, Inc.*, 2002 WL 31459095 (D.Or., 2002)
    - Executive compensation arrangements – *Brend v. Sames Corp.,* 2002 WL 1488877 (N.D. Ill. 2002)

Avoiding Plan Amendments Through Transaction Documents

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- The parties to a transaction often negotiate certain types and/or levels of benefits for affected employees of the Seller (e.g., Buyer must maintain comparable level of benefits as in effect prior to the closing for up to 12 months)

- Care should be taken in the drafting of the purchase agreement to avoid creating permanent plan amendments or limiting the ability of the Buyer to amend its plans in the future

Benefit Plan Errors in Context of Transition

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- If the errors are discovered in the form or operation of any of Seller's plans, the parties should consider whether a correction is available under the IRS or DOL correction programs
  - EPCRS – IRS program which allows correction of various types of errors in qualified retirement plans
    - SCP - self correction
    - VCP – correction under form filing with IRS
    - Audit CAP – correction in connection with IRS audit
  - VFCP – DOL program which allows correction of various ERISA violations, including prohibited transactions and other breaches of fiduciary duty
  - Failure under IRC §409A – IRS has issued guidance on permissible corrections of documentation and operations violations of IRC §409A – Notice 2008-113, Notice 2010-6, Notice 2010-80

Preparation for Closing

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- Timing
  - Are plan amendments or corrective action necessary for compliance purposes?
  - Do new Buyer plans need to be in place at close?

- Contract Assumption – will existing administrative and insurance contracts be continued
  - Notification to administrators and carriers – well in advance of closing

- Transitional Services Agreement (TSA)

Post-Closing Transition

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- While transactions can be completed in weeks or certainly a few months, the post-closing human resources transition issues can often take years, particularly in large, complex transactions
- Issues include
  - Determining organizational structure and executive leadership
  - Determining ongoing benefits and compensation programs
    - Migrate Seller's employees to Buyer's plans
    - Terminate or merge Seller's plans into Buyer's plans
    - Amend Buyer's plans to incorporate aspects of Seller's plans
    - Amend any remaining Seller plans to adopt Buyer's internal governance and administration structure
    - Amend ongoing plans to ensure compliance with transaction requirements (e.g., service credit for Seller's employees
  - Communicating with employees
  - Transition data/records between various recordkeepers and vendors, and ensuring administrative systems are in place for post-transaction administration
  - Correcting administrative errors discovered either during diligence or post-closing

Labor & Employment

L&E Due Diligence Focus

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- Employee census data
- Claims histories and existing litigation, grievances, and arbitrations
- Employment agreements
- Confidentiality/restrictive covenant agreements
- Severance and bonus plans/arrangements
- Change in control arrangements
- Collective bargaining agreements
- Immigration compliance (I-9s; visas; etc.)

L&E Due Diligence Focus, Cont'd

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- Employment policies, procedures, and handbooks
- Wage and hour compliance; exemption misclassification issues
- Independent contractor/staffing company issues
- OSHA compliance and investigation history
- FCRA compliance (acknowledgement; consent; pre- and post-adverse action forms)
- State-specific compliance

Key L&E Purchase Agreement Provisions

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- Seller Reps and Warranties:
  - Disclosure of employment agreements and CBAs (typically in "material contracts" section)
  - Employee list and census data
  - At-will employment status
  - Pending claims, charges, grievances, arbitrations, etc.
    - Preferably with a 2 to 3 year lookback
  - Material compliance with law (if not elsewhere in the agreement)
  - Union organizing activities; demands for recognition; strikes; lockouts; work stoppages
    - Preferably with a 2 to 3 year lookback
  - Proper classification of independent contractors
  - Immigration compliance (I-9's)
  - WARN Act: Employment loss disclosures (90 day lookback)

Key L&E Purchase Agreement Provisions, Cont'd

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- Buyer Covenants:
  - Offer and acceptance process in asset deals
    - Which employees will receive offers? And on what terms?
    - When will they move from buyer to seller?
    - What happens to employees who don't receive or accept offers?
    - Allocation of pre- and post-closing employment liabilities.
  - Buyer's obligation to maintain employment of seller's employees and at what compensation/benefit levels.
    - For how long?
    - On what terms?
    - Severance for terminations?

Key Issue: Unions and CBAs

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- If employees are represented by a union, buyer should understand the scope of the representation, including obligations under a collective bargaining agreement.
- CBA's may include information and requirements relating to:
  - Compensation and benefits
  - Hours of work
  - Hiring requirements and separation from employment
  - Filing grievances and arbitrating disputes
  - "Union" work and prohibitions on the use of contractors
  - Successors/assigns language
  - Jurisdictional provisions
  - Limits on plant closings/layoffs and recalls provisions
  - Required participation in multiemployer pension plans and withdrawal liabilities
  - Neutrality and card check agreements

Key Issue: Union and CBAs, cont'd

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For Buyer In An Asset Purchase

- Union successorship – what seller obligations does the buyer inherit?
- Contract Successor: active successorship clause in the CBA requires seller to require purchaser to assume the CBA as a condition of the sale
- Labor Law Successor: Continuity of workforce and business controls in most cases
  - Discrimination in hiring is illegal
  - Labor law successor must recognize the union
  - "Perfectly clear successor" loses ability to unilaterally set new terms and conditions of employment

Key Issue: Union and CBAs, cont'd

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For Seller

- Active successorship clause requires seller to "put" the CBA to buyer as a condition of the sale.
- Bargaining obligations:
  - Decisional bargaining
  - Effects bargaining
- Notice obligation

Key Issue: WARN Act

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WARN Act in General

- WARN – Worker Adjustment and Retraining Notification Act
  - 60 days written notice in advance
  - Any "plant closing" or "mass layoff":
  - Focus is on "employment loss"

- Many states have so called "Mini-WARN Acts," whose terms may have different requirements

Key Issue: WARN Act, Cont'd

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Sale Situations

- Stock deal may not involve employee terminations at all
- Technical terminations don't count if . . .
  - There is a sale of all or part of the business and
  - Seller's employees are hired by the buyer as of the effective time of the sale
- Buyer and seller's allocation of WARN responsibilities:
  - Statute is not helpful here
  - Pay close attention to the 90 days before and after sale
- Deal-related WARN short list:
  - Address buyer/seller allocation of obligations
  - Use reps and warranties to address separations before and after sale
  - Address buyer's plans about seller's employees
  - Watch out for technical terminations which occur before and after closing

Key Issue: Restrictive Covenants

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The Basics

- Confidentiality covenants
- Non-competition covenants
- Non-solicitation of customers covenants
- Non-solicitation/anti-raiding of employees covenants

Sale of Business Covenants

- Typically in purchase agreement or side letter.
- Restricted period typically runs from closing or end of earn out period.
- Deferential standard.

Employee-Employer Covenants

- Typically in employment agreement or stand-alone agreement.
- Restricted period typically runs from termination of employment.
- Non-deferential standard; and in certain states (i.e., California) unlawful altogether.

Key Issue: Restrictive Covenants, Cont'd

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Buyer-Side Deal Considerations

- Analysis of existing employee restrictive covenants:
  - What are the terms?
  - Are they enforceable?
  - Do they adequately protect the business?
  - Are they assignable?
- Consider requiring additional employee restrictive covenants and/or amendments to already-existing covenants:
  - What are the terms?
  - What is the consideration?
  - When will they be executed?
  - Will they be a condition to closing?

Key Issue: Employment Agreements

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The Basics

- Traditional employment agreements
- Retention agreements
- Change in control agreements
- Incentive bonus agreements
- Severance agreements

Key Issue: Employment Agreements, Cont'd

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Buyer-Side Deal Considerations

- Analysis of existing agreements:
  - What are the terms?
  - Are they market?
  - Are they assignable?
  - Should we require seller to terminate agreements and/or assume liability for significant payments thereunder?
- Consider requiring additional employment agreements for key personnel.

Key Issue: Immigration

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- Due diligence provides critical information on the status of the work force, including the percent of workers potentially at risk of termination due to lack of work authorization
- I-9s:
  - Analyze I-9 forms, completion and retention procedures, and E-Verify compliance under state and federal law
  - Review relevant language in transactional documents and recommend changes to minimize client's liability in event of post-closing penalties or other damages
  - Advise about options to inherit current I-9 documents or complete new forms upon closing

Key Issue: Immigration, Cont'd

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- Identify sponsored employees
  - Verify compliance by reviewing petitions and document retention practices
  - Determine impact on sponsored employees based on type of transaction (stock v. asset), type of visa, and any changes in employer, worksite, duties, etc.
  - Recommend actions needed to ensure continued compliance with sponsorship to reduce or avoid risk of interruption in employment where possible

Next Month's Webinar

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Executive Compensation Academy

- Title: Training Course on Restricted Stock and Restricted Stock Unit Awards (Part 3 of 3)
- When: August 12, 2021
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET

Employee Benefits Academy

- Title: Basics and Update on IRS and DOL Correction Programs
- When: August 26, 2021
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET