BUSINESS BRIEFS

Legal Developments Affecting Business

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SPRING 2014

BUSINESS SALES & ACQUISITIONS: A PRIMER

By Doug Alexander & Amy Geerhart

For many business owners, the culmination of a lifetime of building a successful business is its sale. For many aspiring business owners, the first step is to acquire an already successful business, with plans to continue to grow and expand it as time goes on. The sale and acquisition process can seem both exciting and daunting for buyers and sellers. Whether that process is in your immediate future, or years down the road, having a general understanding of the process in advance can help buyers and sellers prepare. This article briefly describes the steps typically involved in buying or selling a business, for both buyers and sellers.

Preparing for the Sale

For sellers, the process begins well before a buyer is found and the terms are negotiated. As a Seller, the time you want a buyer looking at your business is when it is strong and growing, your management team is excited and motivated, and your customer base is expanding. This holds true regardless of whether your business builds widgets, sells or services products produced by others, or provides professional services. Buyers want to purchase growing businesses, and growing businesses command a higher price. Thus, it makes sense for sellers to look ahead and consider when it will be a good time to sell. Sellers should plan for their exit in advance by meeting with legal and financial advisors to develop a strategy and time frame for a sale. Timing is a critical component in achieving the best deal as a seller. If you wait to sell until you are burnt out and running out of steam and the business results show it, you have waited too long and the sales price will suffer. The team of professionals needed to prepare for and work through a sale includes your CPA, an attorney experienced in selling businesses, and possibly a broker.

Similarly, buyers should prepare for a purchase by selecting their team of advisors to help identify the right time to make an acquisition and to help identify the right opportunities. A buyer's team will generally consist of an attorney, an accountant, and lender, among others. Often you can speed up the process by having established a banking relationship and making sure that your banker is on board with your plans to buy with the bank's help.

Letter of Intent

Once the business is ready for sale and a prospective buyer is found, the next step is to negotiate the terms of a Letter of Intent ("LOI"). The purpose of the LOI is not to create a binding agreement between the parties or negotiate all of the terms of the sale, but to set the framework for the deal so that the parties can ensure they are on the same page as the process moves forward. Usually, the buyer's counsel prepares the LOI and submits it to the seller for review and approval. If it is not acceptable, then the seller's counsel modifies the LOI for submission to the buyer.

The most important rule to remember for the LOI is that it should be non-binding for most terms. The purchase price, time of closing, included assets, and other substantive terms may be negotiated further after the buyer has completed his or her due diligence. The binding terms should generally be limited to those

In This Issue

regarding exclusivity in negotiations and confidentiality. The buyer will usually require that the seller commit to exclusivity, in that the seller will not negotiate with any other prospective purchasers once the LOI is signed and until the deal either closes or is abandoned. Both parties will also agree that they will not disclose any confidential information that they obtain to any other person or entity, and that they will not use any such information for any purpose other than to evaluate the proposed transaction.

Buyer's Due Diligence

Once the LOI is signed, the buyer has a limited period of time to conduct his or her due diligence. The exact amount of time will be agreed to and set forth in the LOI. Due diligence is a thorough and detailed investigation of the financial, legal and operational records of a business. During due diligence, the buyer will have access to most of the information critical to successful operation of the seller's business. Due diligence typically begins with the "Due Diligence Request" or a "Due Diligence Checklist" prepared by the buyer's lawyer. A buyer should be working with his or her lawyer and accountant in reviewing the information, which will include information relating to: corporate records, financial and tax records, corporate indebtedness, employment and labor matters, real property, personal property, contracts and agreements, supplier and customer information, legal compliance and pending or threatened litigation.

Sale Agreements

Once the LOI is signed, and the due diligence is completed, the buyer and seller will negotiate any remaining terms. The buyer's team and the seller's team will then work together to draft and complete all the necessary sale agreements. The number and complexity of the agreements depends on the structure of the transaction. The documents you may see during this part of the process include: Consent Resolution (approving sale), Asset Sale Agreement, Non-Competition Agreement, Sale of Personal Goodwill, Bill of Sale, Security Agreement, UCC Financing Statements, Assignments of Contracts, Consent to Assignments and Lease Agreements. These documents evidence the final written expression of the transaction, and will bind the parties once signed. While the buyer's lawyer and the seller's lawyer will be primarily responsible for drafting these documents, it is important to include the parties' other advisers in the review and negotiation process.

Closing

Once the sale agreements have been finalized, the buyer and seller will then close the transaction on a specific date agreed to in advance. It is usually best if an escrow agent is identified early on in order to facilitate a smooth closing for everyone. The escrow agent is a neutral party who will arrange for all of the sale documents to be signed, and calculate and coordinate for payment of any pro-rated expenses due under the agreements. The escrow agent will work with both the buyer and seller to obtain any additional information needed to finalize the details of the transaction, and will work with the lender to arrange payment of the purchase price. Interestingly, many times transactions are closed through the use of email and fax, with the parties never meeting face to face with the escrow agent to sign the documents.

Of course the foregoing description attempts to simplify what most often is a complex and lengthy process. Sales can close within a matter of a few weeks, but more typically take several months from the inception of the negotiations until the transaction closes. Most clients will buy or sell a business only once or twice during a lifetime. That is why having advisors who regularly assist clients with this type of transaction is important. Lawyers in the Business and Taxation practice group at Saalfeld Griggs handle many business sale transactions each year. A significant component of our work is handling business sales and purchases. We help clients avoid many pitfalls that can occur during a business sale or purchase transaction and that otherwise catch the unwary by surprise. If you would like assistance in buying or selling a business, or planning a purchase or sale, feel free to contact us.

Who's Yo Beneficiary? No, Really.

The Surprising Importance of Proper Beneficiary Designations

By Jeff Moore

Most of us have some form of a "beneficiary-designation asset," such as a life insurance policy, an Individual Retirement Account (IRA), a 401(k) or other retirement account, an annuity contract, or any other type of asset that permits the naming of a beneficiary to receive the proceeds or benefits upon one's death. But do you know who your beneficiary is on such an asset? Are you sure? Have you recently confirmed the designation with the custodian or financial institution? All too often our clients discover that what they *thought* was the case may not be reality after all. But even if the belief is confirmed as reality (whew!), the current beneficiary designation may not be the ideal designation for estate or tax-planning purposes (huh?). The unintended results may surprise you.

Former Spouse

For starters, consider a common divorce situation. The final divorce decree allowed you to retain, in full or in part, your individual retirement account. The decree further authorized you to remove your former spouse as the primary beneficiary in favor of your children (or any other beneficiary). Everything is set then, right? Not so. Just because the court decree *authorized* the change in the beneficiary designation, it does not mean that the beneficiary designation has actually changed. If no action is taken on your part to effectuate the change, it is possible that your former spouse could still be named as the primary beneficiary of the account benefits. Is that your intent? Most likely not. You need to update the "Change of Beneficiary Form" to reflect your current wishes.

Minor or Incapacitated Children

So let's continue with the divorce example above. You move forward with changing your primary beneficiary from your former spouse to your children equally. Each child will receive their fair share. You think nothing more of it. But if your children are minors they cannot inherit the benefits until they reach the age of majority. So now what? Because the children are minors, a court proceeding must be initiated to appoint a Conservator for your minor child. The initial process and appointment itself is cumbersome and expensive, but it doesn't end there because the Conservator must complete an annual report for the court as to the management and use of the funds. This annual reporting continues until the child reaches the age of 18. But for some clients, the fact that their child will receive all of the proceeds upon turning age 18 is the most concerning issue of all. Not only is there the concern of the child's own fiscal and emotional maturity at age 18, there is the concern of undue influence on the child by others.

The same issue is true for an incapacitated child despite the fact that such child is older than age 18. If the child does not have sufficient capacity to manage their own assets, it is possible that the Conservatorship for the child must continue for the life of the child or at least until the incapacitating condition terminates. In some cases, naming an incapacitated child as the direct beneficiary may actually disqualify the child from various government benefits such as supplemental security income.

Doesn't My Will Control?

Contrary to common belief, the provisions of your Will do not control the proceeds or benefits of your beneficiary-designation assets. The beneficiary designation on the contract will control who receives the benefits. Accordingly, simply because you named "my spouse and then my children" as the beneficiaries under your Will, it does not change the fact that you named your parents as beneficiaries under your life insurance policy long before your marriage and the arrival of your children.

On the other hand, if no beneficiary is named on the beneficiary-designation asset, it is possible that your estate (i.e., your Will—or the one the State writes for you if you failed to do your own) will become the default beneficiary of your assets. But this default designation could have totally unanticipated and surprising results, including a court probate for the benefits and the potential loss of significant income tax deferrals for retirement account benefits. For example, if an IRA account owner names his or her spouse as primary beneficiary and passes away, the surviving spouse can roll over the IRA into his or her own IRA and continue the same income tax deferrals over their own expanded life expectancy. But if the account owner failed to name a beneficiary, or simply designated "my estate", then the benefits may all be distributed within five years of death and the continued income tax deferrals lost.

Coordinating Your Beneficiary Designation with Your Estate Plan

If your estate plan is simply "my spouse then my children equally" then naming your spouse as the primary beneficiary and your children as the contingent beneficiaries may be a perfectly viable solution (or any other beneficiary designation that matches your distribution intentions). However, make sure that your intentions are what the contract designation provides. In addition, many contracts have a primary beneficiary named, but too often fail to name any contingent beneficiaries.

Furthermore, if you have implemented a Living Trust or an estate plan that includes estate-tax planning strategies such as a Bypass or QTIP Trust, and perhaps lifetime or age-limited trusts for children, then simply naming "spouse then children" or any other generic designation will not produce the desired results. For example, the Living Trust is typically named as the primary beneficiary of a life insurance policy. In cases where there are ongoing trusts for children, the Trustee of the separate trust share for a child is typically named as the beneficiary for any retirement or annuity benefits—not the child directly.

Conclusion

It is critically important to confirm your beneficiaries on beneficiary-designation assets. Determine if the current contract matches your current objectives. If not, we can help you update the beneficiary designations to match your estate and tax-planning strategies . . . and eliminate any undesirable surprises.

IT'S ALMOST TIME TO RESTATE YOUR RETIREMENT PLAN

By Randy Cook & Christine Moehl

IRS rules state that qualified retirement plans (e.g., 401(k) plans, defined benefit plans, etc.) must be updated periodically to reflect legislative and regulatory changes. Historically, retirement plan amendments were required whenever Congress or the Department of Treasury changed the tax laws affecting retirement plans. During years of heavy legislation, this sometimes meant multiple amendments in a single year, which of course can be costly to the employer. In addition, every few years the IRS would require that all retirement plans be "restated." A plan restatement is basically a complete re-write of the plan document to incorporate all of the individual plan amendments (both optional and required) that have occurred since the plan's last restatement.

Beginning in 2006, the IRS implemented a new, 6-year "restatement cycle" for most retirement plans. The new restatement cycle assures plan sponsors that they will only have to restate their plan documents once every six years, regardless of how active Congress and the Department of Treasury have been. Although interim "good faith" amendments to the plans are still sometimes required, the interim amendment process has been streamlined. There are two separate 6-year restatement cycles. One cycle is for "defined contribution" plans, which include profit sharing, 401(k), and money purchase pension plans. The other cycle is for "defined benefit" plans, which include traditional pension plans and cash balance plans.

We are now on the eve of the next restatement cycle for defined contribution plans. This restatement is called the "PPA Restatement". PPA is short for the "Pension Protection Act of 2006". Although this is referred to as the PPA Restatement, a whole host of other regulatory changes are also included in the restatement. In all likelihood, your retirement plan is already operating in compliance with PPA and the other regulatory changes. The PPA restatement will be a complete re-write of your plan document to incorporate the 100+ changes that have occurred since the last restatement. The PPA Restatement cycle is scheduled to begin on May 1, 2014.

Although plan restatements can be cumbersome, we like to think of them as presenting an ideal opportunity for plan sponsors to revisit plan design issues. Since the entire plan document is being re-written anyhow, why not examine optional plan provisions that may not be in your current plan? For example, during the last plan restatement cycle, several of our clients requested that "Roth" (i.e, post-tax) deferrals be added to the plan during restatement. Several others requested that participant loan provisions and/or hardship withdrawal provisions be added to the document. Still others asked that we include automatic enrollment. The list of options is endless. Actually, it's not endless, but there are a lot of options! All plan sponsors should take this opportunity to review their plan provisions to ensure the plan is meeting their needs.

If you are already in our "corral" of clients, you will receive a letter from us soon explaining the restatement process in greater detail. If you have questions in the interim, or if you are not in our corral of clients but would like to discuss using Saalfeld Griggs as your plan document provider, please contact a member of our Employee Benefits Practice Group.

Successors Liable for Wage Claims

By Trevor Findley

Recently, the Oregon Supreme Court issued an opinion that may have an impact on anybody who purchases a business in Oregon. In an opinion written by Justice Walters, the Court decided what a "successor to the business" means when the Oregon Bureau of Labor and Industries (BOLI) is seeking to recover amounts distributed for unpaid wage claims. Because of this opinion, anyone purchasing an existing business could be responsible for wages that the former owner failed to pay.

In *Blachana*, a property owner leased building space to NW Sportsbar, and sold NW Sportsbar the inventory and goodwill of the Portsmouth Club, which previously occupied the space. The owner of NW Sportsbar operated the business for fifteen months, using the names Portsmouth Club and Anchor Grill, selling food and drinks and offering live music and entertainment. During his brief operation of the restaurant, the owner of NW Sportsbar hired several employees, but failed to pay them. The owner failed to pay two individuals any wages in the final five months of the restaurant's operation and failed to pay two other employees any wages during their employment. The owner of NW Sportsbar was also behind in his payments under the terms of the lease and sale agreements. The owners then entered into a surrender and release agreement with the property owner to surrender its business assets, name, and goodwill to the property owner in exchange for a release of his obligations under the lease and sale agreements. The owner of NW Sportsbar then "left town" without paying those four employees.

The property owner, after receiving the surrendered assets, then formed a new limited liability company, Blachana LLC, with an assumed business name of "Penner's Portsmouth Club." The new LLC obtained all the necessary licenses and permits and began operation as a bar, including offering live music and entertainment, and later adding food under the name "Portsmouth Pizza and Pub." Blachana used most of the equipment and same beer vendor as NW Sportsbar, but used a different food vendor and did not hire any of the same employees. Blachana did not have common ownership or management with NW Sportsbar, however its LLC apparently continued the same phone number as used by NW Sportsbar.

BOLI ultimately paid the wage claims, and notified Blachana that it was responsible as a "successor to the business." Blachana contested the findings in an administrative hearing, and the BOLI commissioner affirmed, finding that Blachana "conducts essentially the same business as conducted by the predecessor." Blachana appealed the decision of the BOLI commissioner to the Oregon Court of Appeals, who reversed the finding because it agreed with Blachana's argument that it was "a separate corporate entity with no connection to NW Sportsbar." BOLI then appealed to the Oregon Supreme Court, which ultimately affirmed BOLI's initial finding that Blachana was a "successor to the business."

The Court engaged in an extensive analysis of common law successor liability and legislative intent. The legislature first enacted statutes pertaining to wage claims and enforcement of the right to make wage claims in 1931. According to the Court, the legislature "indicated an intent to include a broad class of successors." In determining whether a business should be liable as a successor, the Court examined the following nonexclusive list of factors, as set forth by BOLI:

- The name or identify of the new business;
- The location of the new business;
- The lapse of time between the previous operation and the new operation;
- The same or substantially the same workforce employed;
- Whether the same product is manufactured or same services offered; and
- Whether the same machinery, equipment, or methods of production are used.

Although not every factor was present in *Blachana*, the Court found that as to the two businesses, there was similarity in both the name and identity of the restaurant, both businesses were located in the same place, Blachana opened 47 days after NW Sportsbar closed, Blachana used most of the same equipment as NW Sportsbar, and both businesses offered the same services, including "food, alcoholic drinks, and music in a club atmosphere." Notably, however, the court did not consider whether the lack of any commonality of management or ownership should be considered as a factor against successor liability.

As a result of the Court's opinion, anybody looking to purchase a distressed business should pay close attention to the factors listed above to avoid potential liability for unpaid wage claims, or even other obligations that may arise as a result of the previous owner's actions. A buyer should closely examine the books and accounts of an existing organization during the due diligence period to identify any potential claims against the business as early as possible, and consider contacting BOLI. Traditionally, a sale of a business may include representations and warranties by the seller regarding potential liabilities, and indemnification clauses that would shift liability for such claims back to the seller. In the sale of a distressed business, however, enforcement of such measures against the seller is unlikely to occur, which makes the due diligence process much more important.

Health Care Reform Update

By Christine Moehl

The IRS and U.S. Department of Treasury recently issued regulations that provide guidance to employers that are subject to the "employer mandate" under the Affordable Care Act ("ACA"). The employer mandate is the requirement that large employers (those over 50 "full-time equivalent" employees, or "FTEs") either (1) provide group health coverage to 95% of their full-time employees, or (2) pay penalties. The employer mandate is scheduled to be effective in 2015. The most significant provisions of the recent guidance involves a one-year delay of the employer mandate for mid-sized employers (between 50 and 99 FTEs), provided that those employers meet certain requirements. The recent guidance also phases in the percentage of full-time employees that large employers need to offer coverage to in order to avoid paying penalties. In 2015, large employers must offer coverage to 70% of their full-time employees to avoid penalties. That percentage increases to 95% in 2016. Please contact a member of our Employee Benefits team if you require assistance in complying with the complicated and changing requirements of the ACA.

FIRM SEMINARS AND ANNOUNCEMENTS

We are pleased to announce that ***David Briggs***, ***Alan Sorem***, and ***Christine Moehl*** have become partners in the firm as of January 1, 2014.

> ***David Briggs*** practices Employment Law and Litigation. He counsels employers in the areas of employment law compliance, personnel manuals, employee agreements, contract disputes, and employer defense against employee claims. David assists medical and dental practices with employment matters and HIPAA compliance issues. David is currently President of the Marion County Bar Association, and joined the firm in 2006.
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> ***Alan Sorem's*** practice is focused on legal matters that involve Real Estate and Land Use. He advises property owners, business entities, banks, and trust companies in matters including sale agreements, leases, easements, development agreements, land sale contracts, loan and workout agreements, real property disputes, land use hearings, and local and state appeals. Alan joined the firm in 2006.
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> ***Christine Moehl's*** practice is limited to the Employee Retirement Income Security Act (ERISA), including both health plans and retirement plans. She assists public and private employers in all aspects of establishing and operating their employee benefit plans. She also counsels third-party administrators and investment professionals in ERISA compliance. Christine joined the firm in 2007.

Congratulations to our Land Use attorneys who achieved a great result for a client in the City of Salem's approval of ordinance 2013-04-SM. This ordinance paves the way for the next phase of the Bella Cresta Subdivision to move forward with development. ***Mark Shipman*** and ***Alan Sorem*** worked in conjunction with a local engineering firm on behalf of a local developer to obtain approval of a plat modification.

David Briggs will present a series of six Employment Law seminars for the Marion Polk Medical Society's membership throughout the year. The first seminar will be on March 19. Please contact MPMS for more information and registration. David will also present to the Chemeketa Strategic Small Business Management Class on March 4.

Christine Moehl of the Employee Benefits group will speak on Health Care Reform to the Oregon Banker's Association on March 12 and to the Marion County Inns of Court on March 20.

David Myers will speak to the Mid-Valley Tax Forum on March 18 on the 3.8% Net Investment Income Tax.

The firm is proud to support many not-for-profit organizations in the mid-Willamette Valley and their activities during the year. We hope to see you at these upcoming events:

- **Willamette Academy "Believe in Me" Benefit** – Join us for an evening of student success stories on March 14 at Willamette University's Putnam Center. For tickets: www.willamette.edu/go/believe. Willamette Academy reaches out to historically underrepresented communities by empowering youth who have the desire and potential to advance to higher education.
- **Equinox** – On March 22, the Eola-Amity Hills winemaking community brings together more than 25 wineries to give guests the opportunity to taste wines and discuss the vintage with key principals. For tickets: www.eolaamityhills.com
- **Medical Foundation of Marion & Polk Counties' 10th Annual Benefit for MedAssist and Project Access** – This benefit, to be held on April 25 at the Elsinore Theatre, provides more than 85% of the annual operating funds for the Foundation's programs. The featured speaker this year will be Soledad O'Brien, an American broadcast journalist, executive producer and philanthropist.