

Benefits Corner Office

Sealing the deal

Ensuring benefits success with mergers and acquisitions

BY PATRICK J. HARADEN

In most mergers, acquisitions or divestitures, benefits usually are one of the last areas to be evaluated. However, if not properly reviewed and considered, benefits could have major cost and employee relations consequences — perhaps even affecting the price of the transaction. Although all benefits programs should receive significant due diligence, COBRA, medical, dental, life and disability are the most pressing potential liabilities.

While the following provides general information, employers should consult with attorneys, accountants and benefits professionals, as appropriate, for specific advice and recommendations.

Don't let COBRA bite you

During any business reorganization — whether a stock or asset sale — if the seller maintains health coverage after the sale, it also must continue COBRA coverage to affected employees. The parties involved in such a transaction can appoint responsibility for providing coverage in a purchase agreement. However, if that party fails to meet its obligations under the contract terms, responsibility and liability revert to the party with the obligation under IRS regulations.

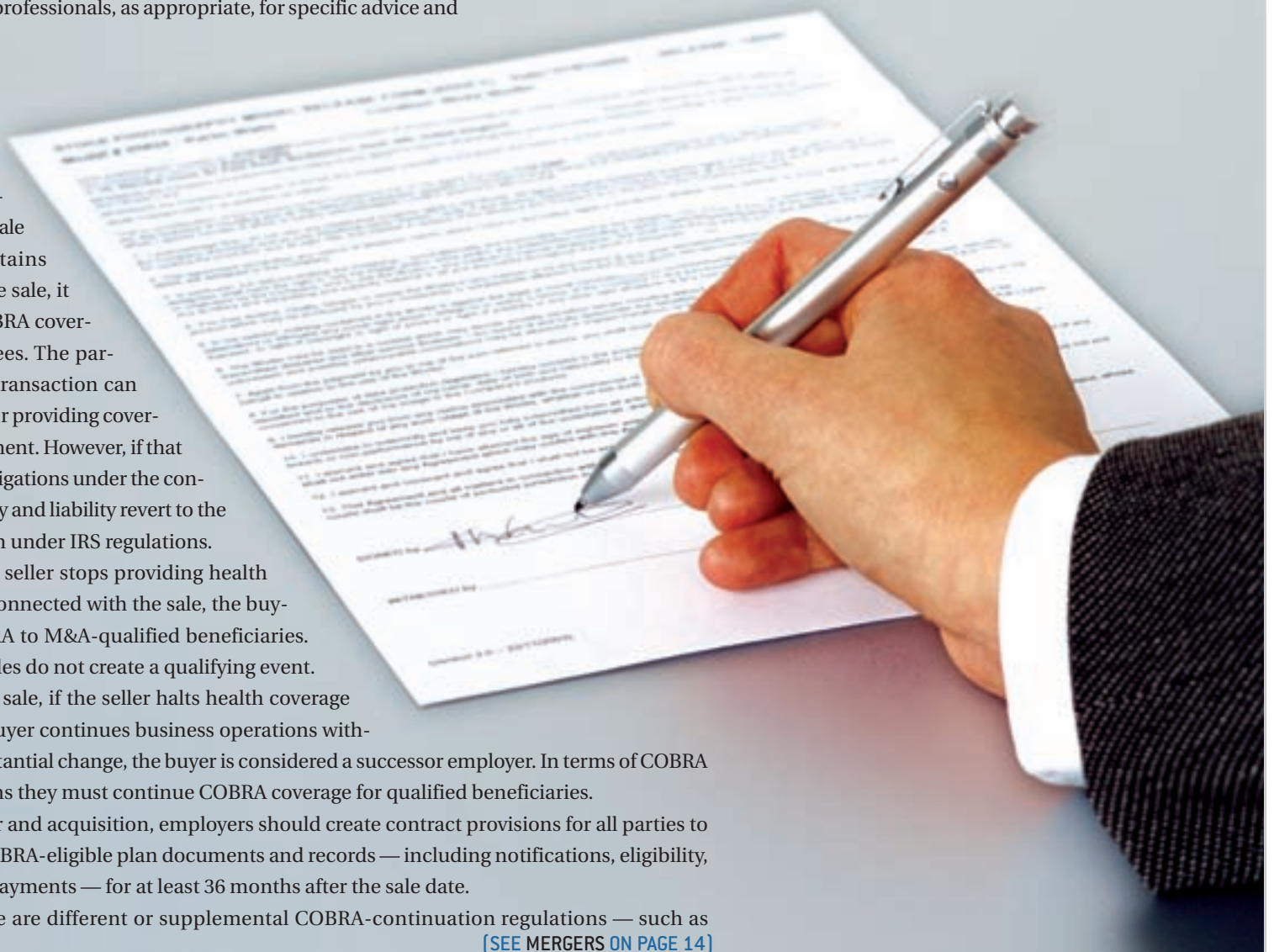
In a stock sale, if the seller stops providing health benefits to employees connected with the sale, the buyer must continue COBRA to M&A-qualified beneficiaries. However, some stock sales do not create a qualifying event.

Similarly, in an asset sale, if the seller halts health coverage to employees and the buyer continues business operations without interruption or substantial change, the buyer is considered a successor employer. In terms of COBRA responsibility, this means they must continue COBRA coverage for qualified beneficiaries.

In any type of merger and acquisition, employers should create contract provisions for all parties to access one another's COBRA-eligible plan documents and records — including notifications, eligibility, elections, waivers and payments — for at least 36 months after the sale date.

In states where there are different or supplemental COBRA-continuation regulations — such as

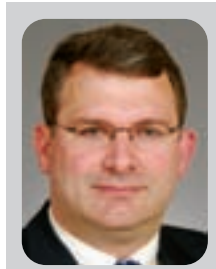
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Mergers

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Massachusetts and California — companies must address those responsibilities in addition to the federal COBRA obligations. Additionally, there are special rules and considerations regarding self-insured plans, or if the result of the transaction makes a previously exempt employer (one with 20 or fewer employees, for example) becoming a covered employer.



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Medical and dental considerations

When assessing medical and dental plans during an M&A, it is important to review all plans, including any existing “grandfather” provisions, retiree benefits (including FAS106 liabilities) and sev-

erance plans. This review should focus on coverage eligibility, employee contribution schedule, funding, contract provisions and compliance requirements, such as plan documents, Form 5500 filings and COBRA and HIPAA notices.

The biggest hidden cost or liability in medical or dental plans usually is found in self-insured plans. There are two main areas to review — reserves and stop loss claims. Reserves is the amount employers set aside when the plan was initiated to pay “run out” claims and administration. If a plan’s reserves are not adjusted each year for inflation, enrollment, plan design and difference in annual claim lag factors, the plan could be underfunded.

Reviewing annual reserve-setting calculations and factors should be part of the due diligence effort.

Regarding stop-loss claims, large claims may have been authorized and approved as part of a case management or precertification process, but not yet been submitted for payment. Such claims could later be rejected, subject to coordination of benefits, subrogation or retrospective audit. Claims also may be awaiting reimbursement from the stop-loss carrier. A listing of all open authorized and reinsurance claims should be reviewed by a benefits adviser. Pharmacy rebates, performance guarantee payments and other fees should also be reviewed for self-insured plans.

Life and disability

Areas to review in life and disability plans will depend on the plans retained and the structure of the M&A transaction. During the due diligence process, collect

a complete list of all employees and their employment or leave current status — disabled, leave of absence, vacation, sick, disability, military leave, FMLA. Most plans have “actively-at-work provisions” that do not cover participants unless they are actively at work on the effective date or on the day they first become eligible.

With any merger or acquisition, time is usually of the essence. When sufficient time is not available to review all of the documents or plans, the M&A team must work with the HR/benefits department and benefits advisers to ensure no unanticipated costs or issues that may affect the purchase price or create future liabilities arise. —**E.B.N.**

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