

Seller Beware! Know What Concerns Buyers

If you are planning to sell your business, be aware of one area that concerns more and more buyers: employee benefits. The buyer needs assurance to alleviate fears that he or she may inherit benefit-headaches created by the owner. And that owner could be you. Putting yourself in the buyer's place, take a look at the following potential trouble spots and plan now to minimize them:

Retirement Plan. The currently most popular retirement plan is an owner-sponsored 401(k) plan, to which employees contribute through their wages. In most cases, the buyer of a business will want to establish a new retirement plan and move into it the funds of those employees he or she choose to retain. This sounds like a simple matter, but the movement of funds under the requirements of a 401(k) plan can occur only when....

....there is documented "separation from service" instead of a mere transfer within the same business from one ownership to another. (This assumes the worker maintains the same job.)

....the previous owner's 401(k) plan is terminated and no substitute plan is set up.

....the buyer purchases an entire subsidiary from a corporation.

...."substantially all" of the owner's business assets are sold to the buyer. This last condition can be further complicated by confusion over the sale of assets. If the owner has kept the accounts receivable accrued through closing date, then not all of the assets have been sold.

All of these conditions must be met in order for the transferred employees' funds in the previous 401(k) plan to be moved to the new owner's plan. If the movement of funds takes place anyway, the IRS could disqualify both the old and the new retirement plans.

As you enter the process of selling your business, you can avoid this problem -- and unnecessary concern on the part of the buyer about such a problem in one of two ways: terminate your 401(k) plan before the business passes hands, or merge your plan into the new 401(k) established by the buyer.

Health Care Benefits. Many buyers prefer to take over the previous owner's employee health plan, at least until there is time to shop around for alternatives. The potential problem with this carry-over relates to any employees the new owner chooses not to retain. If the business has 20 or more employees, the health plan is most likely to be subject to "COBRA" rights, established under the Consolidated Omnibus Budget Reconsideration Act of 1985. Under this federal law, terminated employees may elect to purchase continued coverage for up to 18 months. Under certain conditions, these **COBRA** rights can apply to the new

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owner's health plan. The new owner would then be required to give the terminated employee and family members (if any were also covered by the terminated plan) notice of their right to continued coverage under the current plan. The election for coverage can be made even if the former employee or family members have existing (and perhaps expensive) health problems.

If you are thinking about selling your business now or in the near future, take a close look at your employees' health benefits plan from the buyer's perspective. Have you investigated the choices available in your region? **HMOs** are increasingly competitive; you may find one that levies less costly premiums, benefiting both business and employees. Whatever plan you have in place when you market your business, be prepared for buyers to demand a careful examination of your commitment to employees' health coverage.

Vacation and Sick Leave Benefits. Even if a business is sold for assets-only, the question of who is responsible for paying transferred employees' accrued vacation pay and sick leave can be left hanging in the air. The buyer may expect the owner to continue paying these benefits. The employees maintained by the new owner may feel that they are working for the same business and are due their accrued vacation time even after working for the new owner only a matter of days! To avoid a lose-lose situation, where the employees, new owner, and previous owner are all unhappy with the realities of this unclarified situation, both seller and buyer might discuss the potential problem as part of the sale negotiations.

Many of today's buyers, either on the advice of their attorneys or based on their own experience with the corporate world, will demand a careful examination of current benefits offered by the seller. The seller, with guidance from a professional business intermediary, can be prepared for this scrutiny and seek agreement about where the cost and responsibility of employee benefits should reasonably fall.