

Important Considerations Regarding Business Sales/Purchases

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While the mechanics of handling a business sale or acquisition are fairly routine, the underlying issues that must be identified and addressed are typically far more critical.

BUYER'S CONSIDERATIONS

Choice of business entity is often the first decision a Buyer must make. There are fundamental differences between limited liability companies, corporations, and other entities, including significant tax differences as well as varying levels of manager and shareholder/member liability exposure. Finally, shares of corporate stock are generally not protected from an owner's outside creditors the same way an LLC membership interest is.

The basic structure of the transaction, i.e., stock purchase vs. asset purchase, is fundamentally important. Most often, Buyers prefer to acquire assets, goodwill, and non-compete agreements from the Sellers, whereas Sellers often wish to sell their stock rather than their underlying assets. Tax implications to both parties are usually the main concern; however, liability issues, third-party contractual issues, and licensing and regulatory issues also affect this decision.

Allocation of risk (known and unknown) and liability must be addressed in all business transfers. Indemnification provisions are not simply boilerplate and have important consequences if not dealt with properly.

Labor and employment issues should not be overlooked, for example, union contracts, qualified retirement plans, prevailing wage issues, etc.

Co-ownership and business succession issues should be addressed up front. Mergers involve a myriad of highly technical considerations. Finally, if an acquisition is the tail end of the Buyer's Section 1031 like-kind exchange transaction, several technical issues must be addressed.

SELLER'S CONSIDERATIONS

Many of the above issues are also important to Sellers, including some of the following:

Tax issues must be fully understood by the Seller — how the transaction will be taxed and whether there are better ways to structure the transaction to minimize entity-level and/or individual-level income taxes.

Assumption and/or allocation of liability between the parties may be critical to a Seller who anticipates that the Buyer will assume known and/or unknown liabilities and risks. Again, the indemnification provisions are critical in this area.

Co-ownership and/or succession must often be addressed in connection with the sale of a business.

The sale of a portion or all of an owner's stock to an Employment Stock Ownership Plan (ESOP) may afford the Seller significant tax advantages as well as ownership succession opportunities.

Section 1031 like-kind exchange advantages may be available to defer and/or eliminate significant taxes to the Seller. Often these opportunities must be planned for in advance of the actual sale.

Labor and employment issues may be critical to the Seller as well, at least in terms of understanding what exposure may continue for the Seller after the transaction is complete.

As you can see, the areas outlined above can be a minefield of potential problems if not properly considered and addressed in connection with the purchase or sale of a business.

If you are considering the purchase or sale of a business and you require expert representation, please contact us to schedule an appointment.

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