

M & A Nuggets: The “KEIP”

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The Key Employee Incentive Plan (“KEIP”), has become common as a way to incentivize key employees. The KEIP usually allows key employees to participate in an exit transaction through the grant of a percentage of the net proceeds from the sale of the business. Many transactions are structured with potential post-closing payments through earnouts or other mechanisms. Acquirers do not want or accept responsibility for KEIPs and, therefore, require that the seller maintain responsibility for the KEIP post-closing. During the negotiation process, a significant amount of time is devoted to the KEIP. Instead of leaving it to the acquirer to react to and dictate how the KEIP will be handled, owners of target companies should have a plan developed. The plan will have as its objective achieving the same end result that the acquirer will eventually insist on. Here are the two most common ways KEIPs are dealt with:

1. Termination of the KEIP, with the only surviving provision being the payment of amounts that may be owed to the key employees in the future reducing the seller’s share of net proceeds, and
2. The transfer of any future responsibility under the KEIP to the selling owners.

When first developing a KEIP, it is important that the agreements that will memorialize the KEIP allow flexibility to achieve one of the results described above. By proactively dealing with the KEIP and having a plan in place, a target can lessen an acquirer’s concern about the KEIP and save both sides time and resources.