

M&A Nuggets: Laws Triggered by a Merger

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As part of due diligence, purchasers investigate whether selling targets are in compliance with the myriad of laws governing a target's historical business operations. Separate and apart from those laws, are laws that are actually triggered by a merger, that is, that would not apply but for the planned merger. Sellers and purchasers must be aware of these laws to determine whether they apply, and if they do, take steps to comply so that the merger is not delayed or prohibited. Here are four examples of laws triggered by a merger:

1. **The WARN Act, which stands for Worker Adjustment and Retraining Notification Act.** This law requires employers to provide the United States Department of Labor with at least 60 days' prior notice of any plant closing or mass layoff. The rule generally applies to employers with at least 100 employees when an event occurs that results in a layoff of at least 50 employees. Some states have their own version of the WARN Act. Any merger transaction that involves a plant closing or a mass layoff needs to be vetted to determine whether the WARN Act applies;
2. **The Hart Scott Rodino Act.** The purpose of this law is to allow the government a period of time to determine that a merger will not violate anti-trust laws. The Act requires notice to be given to the United States Department of Justice and imposes a 30-day waiting period before a merger of a certain size can occur. Generally, if the merger involves a target with a value greater than \$92 million or the purchaser and seller have assets or sales of at least \$184 million and \$18.4 million, the Hart Scott Rodino rules apply;
3. **Bulk Transfer Laws.** These are state laws that require a buyer of a business that sells inventory to notify creditors in advance of a business sale. Although the Bulk Transfer laws were uniform across all states, many states have eliminated their Bulk Transfer laws. In states with Bulk Transfer laws, it is common for the parties to a merger transaction to agree to waive compliance with the laws.
4. **Tax Elections.** Many significant tax issues arise in merger transactions. Some of these tax issues require agreements between the seller and purchaser and timely elections of tax consequences to be filed with the Internal Revenue Service. For example, the manner in which the purchase price is allocated in an asset purchase is usually agreed to and requires a common filing with the Internal Revenue Service. In a stock purchase, there is often an agreement to split the tax year into two short tax years, one tax year beginning on the first day of the year of the sale and ending on the closing date and the second tax year beginning on the day after the closing date and ending on the last day of the year in which the sale occurs. This split tax year agreement also requires a filing with the Internal Revenue Service.

It is crucial that the seller and purchaser understand which "triggering" laws apply to a merger, so that timely notice under the laws is given, and that closing will not be delayed because of non-compliance.

If you have any questions about this or any other M&A issue, please contact Glenn Solomon at gsolomon@offitkurman.com or 443-738-1522.
