

## Buyer Beware: COBRA Liability in Asset Sales

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**PRACTICES** Employee Benefits and Executive Compensation, Mergers and Acquisitions

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Buyers should be aware of potential COBRA liability in the context of corporate mergers and acquisitions (“**M&A**”) that are structured as asset sales. Specific regulations for COBRA continuation coverage in M&A transactions (the “**Rules**”) address which party must assume COBRA liability in an asset sale. While parties are free to agree on the allocation of the responsibility and liability for COBRA coverage in the asset purchase agreement, the Rules will control if the parties’ agreement fails or if this issue is not addressed in the purchase agreement.

In accordance with the Rules, the general rule for COBRA obligations after an asset sale is that, if the seller (or a member of its controlled group) maintains a group health plan after the sale, the seller has the obligation to make COBRA coverage available to “M&A qualified beneficiaries.” An M&A qualified beneficiary is generally defined in the Rules as a COBRA qualified beneficiary who experienced a COBRA “qualifying event” (such as termination of employment) prior to or in connection with the asset sale and either (i) who is a covered employee whose last employment prior to the qualifying event was associated with the assets being sold or (ii) whose qualifying event occurred in connection with the assets being sold. Buyers should be aware of the Rules, especially if the seller (and all members of its controlled group) ceases to provide group health plan coverage after the sale.

Specifically, the Rules provide that “[i]f the [seller] ceases to provide any group health plan to any employee in connection with the sale and if the [buyer] continues the business operations associated with the assets purchased from the [seller] without interruption or substantial change, then the [buyer] is a successor employer to the [seller] in connection with that asset sale.” In that case, the buyer’s group health plan would generally have the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries beginning on (i) the date the seller ceases to provide any group health plan to any employee or (ii) the date of the asset sale, whichever comes later.

Buyers in an M&A transaction should review the Rules and, as deemed appropriate, negotiate COBRA indemnification clauses in the purchase agreement.

The Rules specific to COBRA liability in M&A transactions are available [here](#).