

Mergers, Acquisitions, and Consolidations: Managing Employment Tax Liability

By Dan Russo

Dan Russo provides an outline of the special employment tax considerations that are involved with a stock purchase, asset acquisition, or statutory merger or consolidation, emphasizing that the proper management of the applicable tasks and opportunities, from the due diligence phase through the post-implementation period, will ensure that all compliance obligations are met and all potential tax-saving opportunities are considered, at the federal, state, and local levels.



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As the economy has struggled in recent years, activity relating to mergers, acquisitions, and divestitures has been limited. However, as the economic climate begins to improve, we should expect to see an increase in these types of business activities, as well as an increase in companies consolidating and/or reorganizing their business operations in an effort to better address their current needs. While costs related to employment taxes do not drive decisions relating to these transactions, pre-transaction planning and post-transaction review of the available employment tax opportunities and reporting requirements can result in significant tax savings and help companies avoid penalty and interest assessments for untimely notifications and filings.

When these types of transactions take place, payroll departments for employers are impacted by these changes and are under great pressure to ensure the affected employees are seamlessly transitioned to their new employer(s), guaranteeing that they are paid correctly immediately following the transaction. This is understandably the departments' top priority.

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However, because of the typically short time frames provided to accomplish this priority, along with potential systems limitations and other impediments, the employment tax opportunities associated with these transactions are sometimes overlooked.

Mergers, acquisitions, and divestitures are often timed to be effective at the beginning of a calendar year, which makes management of reporting and compliance a little less difficult.

Transactions occurring in the middle of a calendar year or quarter, however, add a layer of complexity to the process with respect to Form W-2 reporting requirements, corresponding quarter-end and year-end filing procedures, federal and state successor wage base implications, and state unemployment tax rates.

When anticipating a transaction of this nature, there are several key federal, state, and local employment tax issues that should be considered and addressed:

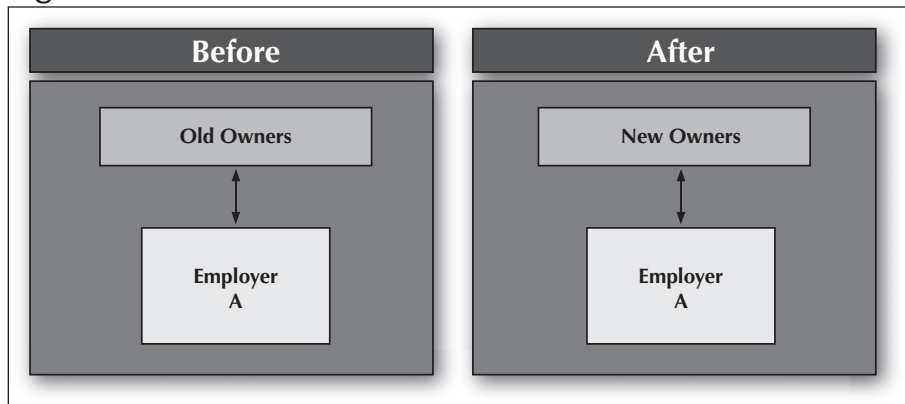
Employment Tax Compliance Considerations

- Registration for new state and local income tax withholding accounts and new state unemployment tax (“SUI”) accounts.
- Required status updates to state workforce agencies related to transfers of employees, unemployment experience, and common control provisions.
- Account closures for inactive state and local income tax withholding accounts and SUI accounts.

Additional Employment Tax Considerations When Transactions Occur Mid-Year

- Impact of transaction type (that is, stock, asset, and/or merger) on reporting Forms W-2, 941, and 940.
- Successor status provisions associated with Social Security (“FICA”), federal unemployment (“FUTA”), and SUI regarding impacts on taxable wage bases.
- State unemployment experience transfer considerations; mandatory versus optional; if optional, is the transfer financially beneficial.
- Required tax account reconciliations to match deposits to liabilities reported on Forms W-2 for

Figure 1.



certain mid-year transactions at federal, state, and local level.

The specific employment tax requirements associated with these transactions are often driven by the type of transaction involved. This article will outline those special considerations for stock purchases, asset acquisitions, and statutory mergers and consolidations.

Stock Acquisitions

In a stock acquisition, a buyer purchases the stock of a company, which then becomes a subsidiary, and the acquired legal entity remains intact (see Figure 1). Since there is no change in the acquired business, the employment tax impacts are minimal unless a subsequent reorganization (that is, a movement of employees and operations) of the acquired business occurs.

Considerations & Compliance

- Jurisdictions will require updates on changes in ownership, officers, and addresses.
- Federal/state wage bases and SUI tax rates should not be affected.
- May require payroll systems integration of potentially different pay cycles on employment tax liability/deposit dates.

Asset Acquisitions

In the case of asset acquisitions, a buyer purchases all or a portion of the assets of a company (but not the entire legal entity), which requires a transfer of operations to a different legal entity (see Figure 2). After the transaction, both parties continue to exist and the seller retains identity of the predecessor

Figure 2.

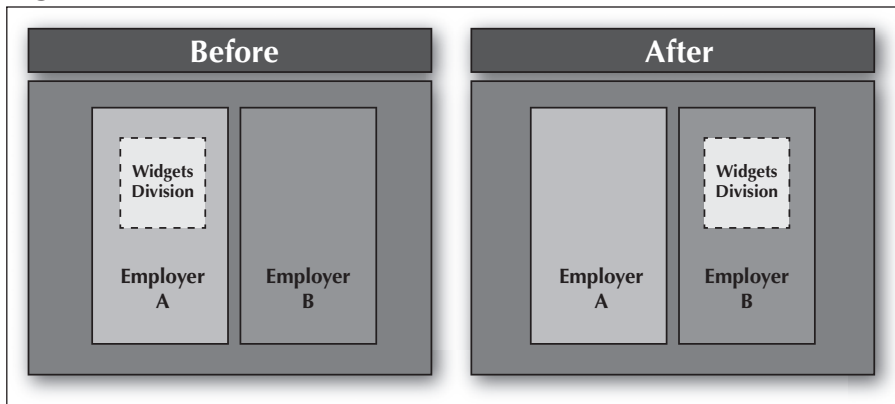
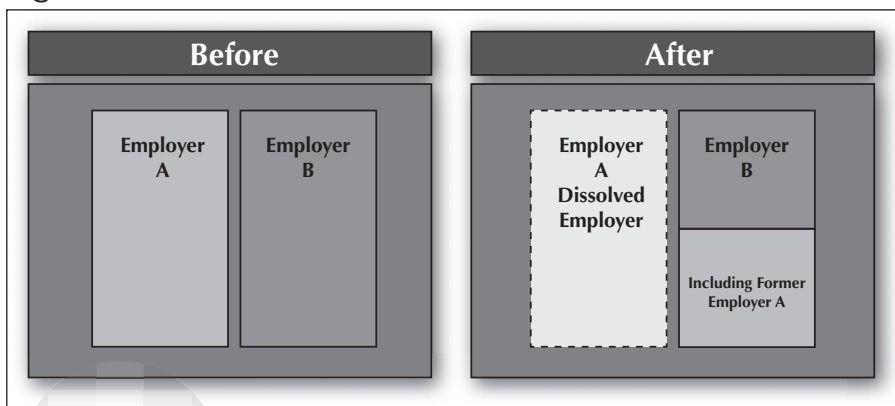


Figure 3.



company. The acquisition will include the transfer (in whole or in part) of assets (and often employees) to the successor.

Considerations & Compliance

- **Federal Compliance Impacts**—Choice between standard or alternative procedure for Forms W-2 compliance:
 - Standard Procedure—Form W-2 is filed by both the predecessor and successor for respective wages paid.
 - Alternative Procedure—Single Form W-2 is issued by the successor for the entire year (that is, wages from January 1 – December 31) and requires Forms 941 - Schedule D to reconcile any Forms 941/W-2 year-end discrepancies.
- **Federal Tax Impacts**—FICA and FUTA wage bases should continue if “successor” rules are met.
- **State/Local Compliance Impacts**—
 - SUI and state/local withholding tax accounts registrations and status changes.
 - SUI experience transfer applications.
 - Account closures.

State Tax Impacts—

- SUI experience transfer rules (optional/mandatory) dependent upon the state.
- State wage base continuation generally based on experience transfers (with some exceptions).
- Payroll systems integration of potentially different pay cycles on employment tax liability/deposit dates.

Statutory Mergers or Consolidations

Statutory mergers and consolidations result in the combination of two or more employers into a single employer, where dissolved employer(s) are merged out of existence, leaving only a single surviving employer (see Figure 3).

Considerations & Compliance

- **Federal Compliance Impacts**—Surviving employer *must file a single Form W-2 for the entire year* for all affected employees (that is, wages from January 1—December 31); Forms 941—Schedule D *are required* to reconcile any Forms 941/W-2 year-end discrepancies.
- **Federal Tax Impacts**—FICA and FUTA wage bases should continue.
- **State/Local Compliance Impacts**—
 - SUI and state/local withholding tax accounts registrations and status changes.
 - SUI experience transfer applications.
 - Account closures.
 - State/local Schedule D equivalents (as required).
- **State Tax Impacts**—
 - SUI experience transfer rules dependent upon the state.
 - State wage base continuation generally based on experience transfers (with some exceptions).
 - Payroll systems integration of potentially different pay cycles on employment tax liability/deposit dates.

Identifying Tax Savings Opportunities

The two employment tax areas that provide the best opportunities for yielding significant tax savings involve wage base continuation (that is, Social Security, federal unemployment, and state unemployment) and transfers of state unemployment tax experience (both total and partial).

Wage continuation on mid-year transactions in particular, especially for state unemployment tax purposes, can quickly result in meaningful dollars saved. For example, an employer with a state unemployment tax rate of 4%, in a state with a taxable wage base of \$7,000, would be able to take credit for taxable wages already reported by the prior employer, resulting in a tax savings of up to \$280 per employee.

Transfers of state unemployment experience also have the potential to provide tax relief from either side of the equation. The prior employer may have had little unemployment activity and therefore has “good” experience that could lower the rate applied to all employees of the surviving entity. On the other hand, the prior employer may have a very high unemployment tax rate assignment that could be lowered by combining its experience with that of the surviving entity. This would result in lower taxes being paid for those employees being transferred.

Timing Is Critical

Each state has its own specific requirements and, as always, the burden is on the employer to know all appropriate reporting deadlines. Missed deadlines are missed opportunities to save. Companies are also expected to understand when and how to make wage continuation or transfer of state unemployment experience requests and to know the detail required as supporting documentation for these requests. Keeping up with the changes, regulations, and deadlines can be daunting, which is why some employers choose to partner with employment tax specialists when coordinating mergers, acquisitions, and divestitures.

Additionally, with the passage of federal Public Law 108-295,

The SUTA Dumping Prevention Act of 2004, the compliance burden of reporting changes as a result of these transactions has expanded from a state unemployment perspective. And, with the adoption of conforming statutes and regulations, state unemployment workforce agencies have the ability to assess substantial penalties for noncompliance. State agencies have implemented measures through SUTA Dumping Detection Software to track employee movements between legal entities and to identify employers that are not compliant.

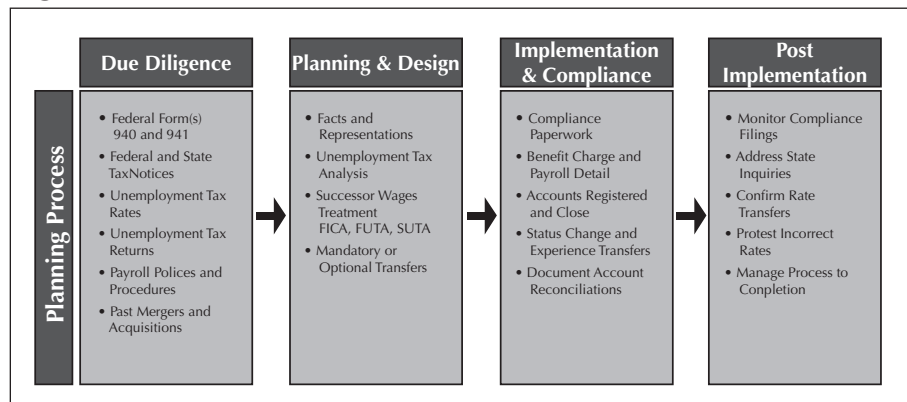
Also, under the Questionable Employment Tax Practices initiative, federal and state taxing jurisdictions have entered into Memorandums of Understanding enabling information to be shared among state agencies and with the Internal Revenue Service in an effort to enforce compliance.

Taking a Phased Approach

When determining payroll tax impacts and action items with respect to mergers, acquisitions, and consolidations, best practices include taking a phased approach to ensure that all objectives and requirements are met. A comprehensive employment tax review should follow the steps, as outlined in the Figure 4, paying special attention to the following:

- In many cases, an unpaid payroll tax liability becomes the liability of the successor company. Review the payroll tax payment history during due diligence.
- To mitigate any employment tax risk, *timely filing of compliance paperwork is mandatory*. State agencies have systems to track employee movements, and a failure to report could lead to delays in processing SUI tax rate transfers and/or substantial tax assessments.

Figure 4.



- Be sure to involve your payroll department **as soon as possible** to evaluate the risks, ease integration, and gather the information necessary to meet compliance obligations and to take advantage of any potential savings opportunities. Payroll teams are often not asked to be involved until Step 3.
- Payroll integration can be complex; allow time for the integration of potentially different pay cycles, employment tax liabilities, and deposit dates, and to upload the payroll history. Also, consider that system limitations may cause duplications of FICA, FUTA, and SUI taxable wage limits, making it important to acquire the documentation necessary for future tax refund opportunities.
- Acquisition agreements should address “Seller’s Responsibilities for Payroll Transition.” Include the information needs of the purchaser and ensure that the appropriate predecessor approvals have been secured.
- Do not lose sight of the post-implementation follow-up. Be sure to reap the rewards of your earlier efforts.

Managing the employment tax aspects of a merger, acquisition, or internal consolidation can be tedious, challenging, and intimidating under the best of circumstances. How do you ensure that all necessary tasks have been completed and no opportunities have been left on the table?

Regardless of the transaction type, companies should execute a thorough process that begins with a rigorous due diligence phase and follows through post-implementation periods. Adhering to a best practices approach will ensure that all compliance obligations are met and all potential tax opportunities are considered. By understanding the complex nature of compliance requirements and the available planning strategies, employers have the opportunity to minimize their tax liabilities and can be confident that they have avoided the risks associated with potential noncompliance exposures at the federal, state, and local levels.

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