

ASSET SALE

[If Acquired Company maintains more than one plan, complete this section for each plan.]

8. WHAT WILL HAPPEN TO PLAN AFTER PURCHASE?

- a. Acquired Company does not have plan.
- b. Acquired Company will retain plan. Assets will not be transferred to Buyer (other than by direct rollover or elective transfer). Plan may be terminated before or after acquisition.
- c. Acquired Company will retain plan but assets of transferred employees will be transferred to Buyer's plan.
- d. Buyer will take over sponsorship of plan.
- e. Acquired Company's plan will be merged into Buyer's plan upon completion of acquisition

[Note: The determination of many of the issues will depend on whether there has been a severance of employment as a result of the acquisition. For this purpose, a severance of employment occurs if employees are no longer working for the company maintaining the plan. Whether a severance of employment has occurred will often depend on whether Buyer will maintain the plan of the Acquired Company following the acquisition. This can occur if Buyer takes over sponsorship of the plan or accepts a transfer of assets from the Acquired Company's plan. If c., d. or e. is checked above, a severance of employment generally will not occur with respect to employees who transfer to Buyer as part of the acquisition, to the extent the plan assets of such employees are transferred to the Buyer's plan.]

9. WILL SERVICE WITH ACQUIRED COMPANY BE CREDITED FOR ELIGIBILITY AND/OR VESTING UNDER BUYER'S PLAN?

- a. Yes, service crediting is required since Buyer is taking over sponsorship of plan or is accepting a transfer of assets from Acquired Company's plan.
- b. Yes, although service crediting is not required because Buyer is not taking over sponsorship of plan, service with Acquired Company will be credited under Buyer's plan. For this purpose, service will be credited for:
 - Eligibility and vesting
 - Eligibility only
 - Vesting only
- c. No, service with Acquired Company will not be considered under Buyer's plan.

[Note: Where a severance from employment has not occurred, service with the Acquired Company must be credited for eligibility under the Buyer's plan. Thus, if #8.c., d. or e. is checked above, #9.a. should be checked since no severance of service would occur and service with the Acquired Company is required to be credited after the acquisition. If #8.a. or b. is checked, service is not required to be credited for eligibility. If Buyer wishes to credit service for eligibility, a plan amendment would be required under the Buyer's plan authorizing such service crediting.]

10. WILL EMPLOYEES OF ACQUIRED COMPANY PARTICIPATE IN PLAN MAINTAINED BY BUYER? [See #9 above to determine whether service with Acquired Company will count for purposes of determining eligibility under Buyer's plan.]

- a. Check this a. if Buyer is not taking over sponsorship of Acquired Company's plan and is not accepting transfer of assets from Acquired Company's plan.
 - 1. Will employees of Acquired Company participate in Buyer's plan under the current terms of the Buyer's plan?
 - i. Yes
 - ii. No
 - 2. Does Buyer wish to include the employees of Acquired Company in Buyer's plan?
 - i. Yes
 - ii. No

3. Will there be an amendment to the Buyer's plan affecting participation of employees of Acquired Company?

- i. No
- ii. Yes (describe amendment below)

b. Check this b. if Buyer is taking over sponsorship of Acquired Company's plan or Buyer is accepting transfer of assets from Acquired Company's plan.

1. Is eligibility under Buyer's plan different from Acquired Company's plan? [*This generally will occur only if assets are transferred to Buyer's plan or Acquired Company's plan is merged with Buyer's plan.*]

- i. Yes
- ii. No

2. If #1 is "Yes", will employees of Acquired Company participate under terms of Buyer's plan?

- i. Yes
- ii. No

3. If #2 is "No", will there be an amendment to the Buyer's plan affecting participation of employees of Acquired Company?

- i. No
- ii. Yes (describe amendment below)

[Note: If Buyer is maintaining a separate plan for the acquired employees, an amendment may be required to the Buyer's plan (and to the separate plan for acquired employees) to ensure acquired employees are not inadvertently eligible for the plan if the intention is to keep them in the separate plan which is being separately sponsored by Buyer.]

11. VESTING SCHEDULE UNDER BUYER'S PLAN.

a. Are employees of Acquired Company entitled to increased (100%) vesting in benefits under Acquired Company's plan?

- 1. No
- 2. Yes

[Note: If Buyer is maintaining the plan of the Acquired Company or is accepting a transfer of assets, there is no severance of employment so no additional vesting is required as a result of the acquisition. If Buyer is not maintaining a plan of the Acquired Company or accepting a transfer of assets (i.e., the Acquired Company continues to maintain the plan after the acquisition), a partial termination may occur which would require 100% vesting under the Acquired Company's plan. 100% vesting may also be required if the plan is terminated either before or after the acquisition.]



b. Check this b. if Buyer is taking over sponsorship of Acquired Company's plan or Buyer is accepting transfer of assets from Acquired Company's plan.

1. Is vesting under Buyer's plan different from Acquired Company's plan? *[This generally will occur only if assets are transferred to Buyer's plan or Acquired Company's plan is merged with Buyer's plan.]*

i. Yes

ii. No

2. If #1 is "Yes", what is vesting schedule under Acquired Company's plan?

3. If #1 is "Yes", will an amendment be made to the Buyer's plan to change the vesting schedule applicable to employees of the Acquired Company?

i. No

ii. Yes (describe amendment below)

[Note: An employee's vesting percentage may not be less than the employee's vesting percentage under the prior vesting schedule, with respect to all benefits accrued at the time of the amendment. In addition, if an employee has at least three years of service, and the new schedule would provide a lesser vesting percentage at any point in the future than the old schedule would at that time, the employee must be given a 60-day election period to decide whether to stay on the old schedule. If the employee elects to stay on the old schedule, then future increases in vesting continue to be determined under the old schedule. If the employee elects to shift to the new schedule, then future increases in vesting are determined under the new schedule.]

12. COVERAGE /NONDISCRIMINATION TESTING ISSUES

a. Is service/compensation with Acquired Company required to be counted for purposes of determining whether such employees are highly compensated employees?

i. Yes

ii. No

[Note: If service is required to be credited for eligibility under #9 above (i.e., because the employees have not suffered a severance of employment), such service (and related compensation) should also be taken into account to determine whether such employees are highly compensated employees with Buyer. If a severance of employment has occurred, such employees are treated as new employees and any service or compensation with the prior company can be ignored. Therefore, if #9.a. is checked above, i. should be checked under this #12.a. If #9.b. or c. is checked above, ii. of this #12.a. should be checked since service with the Acquired Company is not required to be credited.]

b. Will Buyer be utilizing transition rule for coverage testing?

i. No

ii. Yes

If Yes, insert date transition rule expires: _____ [date should be end of Plan Year following Plan Year in which acquisition occurs (see #2 above).]

[Note: Under the transition rule, the Buyer's plan is deemed to satisfy coverage during the transition period provided the Buyer's plan satisfied coverage immediately before the acquisition and coverage under the Buyer's plan is not significantly changed during the transition period other than by reason of the acquisition. Whether Buyer employees are covered under the Buyer's plan or not, the transition rule should be available as long as there is no other change to

the plan document, e.g., a change in plan benefit formula. Thus, any plans maintained by Buyer would be deemed to satisfy coverage without regard to the acquisition, provided there is no significant change in coverage such as an amendment to the contribution/benefit formula. Amendments to cover (or not cover) employees of the Acquired Company should not be a coverage change for this purpose since such an amendment would be as a result of the acquisition.]

13. ARE THERE ANY PROTECTED BENEFITS THAT MUST BE PROTECTED UNDER BUYER'S PLAN?

a. Check this a. if Buyer is accepting transfer of assets from Acquired Company's plan or is merging the Acquired Company's plan into the Buyer's plan.

1. Are there any optional forms of benefit (such as the right to certain forms of payment, in-service withdrawal options, timing of distributions, QJSA distribution options) that are different in the prior plan?

i. No

ii. Yes (describe any different optional forms of benefit that must be protected)

2. Will an amendment be required to the Buyer's plan to protect any optional forms of benefit from the prior plan?

i. No

ii. Yes (describe amendment below)

3. Are there different contribution formulas, accrual/allocation requirements or contribution types in the prior plan that need to be protected in the Buyer's plan?

i. No

ii. Yes (describe any amendment necessary under the Buyer's plan)

4. Are there any other rights or features (such as participant loans or right to direct investments) that are different in the prior plan that will be accommodated in the Buyer's plan?

i. No

ii. Yes (describe any amendment that will be made to the Buyer plan)

14. ARE ANY CONTRIBUTIONS OWED BY ACQUIRED COMPANY?

a. Check this a. if Buyer is taking over sponsorship of the Acquired Company's plan.

1. Are there any accrued benefits under the Acquired Company's plan that have not been funded?

i. Yes

ii. No

2. If so, will the Acquired Company be making contributions to fund benefits accrued prior to the acquisition?
- i. Yes
- ii. No

[Note: An employee accrues a right to a benefit when the employee has met the conditions necessary to be entitled to the allocation or accrual. If there are multiple conditions, then the benefit is accrued on the date when all the conditions have been satisfied (i.e., the latest of the dates each condition is satisfied). Thus, if a contribution under a defined contribution plan is allocated only if the employee is employed on the last day of the plan year, no benefit is accrued until the last day of the plan year, even if a minimum hours requirement for the allocation (e.g., 1,000 hours) is satisfied sooner.]

15. DISTRIBUTION ISSUES

- a. Are there any distribution options under the prior plan that must be protected/limited under Buyer's plan?
1. Yes
2. No
- b. If so, will the Buyer's plan need to be amended to protect/limit distribution options with respect to Acquired Company's employees?
1. No
2. Yes (describe any amendment necessary under the Buyer's plan)

[Note: When plans are merged or assets are transferred, the benefits so merged or transferred retain the character of the plan under which the benefits were accrued. For example, if money purchase assets are transferred, those benefits remain subject to the distribution restrictions applicable to money purchase plans.]

- c. Will distributions be made to employees of Acquired Company due to termination of employment or termination of the plan?

[Note: In an asset sale, a severance of employment will occur if Buyer does not take over maintenance of the plan and does not accept a transfer of assets. If Buyer intends to allow employees of the Acquired Company to take distributions, Buyer should not take over the Acquired Company's plan. However, if the plan is a 401(k) plan, deferrals may not be distributed upon plan termination once Buyer takes over the maintenance of the plan due to the successor plan rules.]



STOCK SALE

If Acquired Company maintains more than one plan, complete this section for each plan.

16. WHAT WILL HAPPEN TO PLAN AFTER PURCHASE?

- a. Acquired Company does not have plan.
- b. Buyer will maintain plan separate from Buyer's plan.
- c. Acquired Company's plan will be merged into Buyer's plan upon completion of acquisition.
- d. Plan is maintained by parent company. Parent company will continue to maintain plan. Assets will not be transferred to Buyer's plan (other than by direct rollover or elective transfer).
- e. Acquired Company will terminate plan prior to stock sale.

[Note: The determination of many of the issues will depend on whether there has been a severance of employment as a result of the acquisition. In a stock sale, employees generally continue to work for the same entity, so generally there is no severance from employment, regardless of whether Buyer will maintain a plan of the Acquired Company after the purchase. A severance of employment may occur, however, if the Acquired Company did not maintain the plan (e.g., the plan was maintained by a parent company) and Buyer does not take over the plan or receive a transfer of assets from the parent company plan. Thus, a severance of employment may occur if d. is checked under this #16. In addition, if Buyer does not wish to maintain the sponsorship of the Acquired Company's plan, it may be advisable to terminate the Acquired Company's plan before the acquisition occurs. For this purpose, a termination may occur even if the plan assets are not actually distributed until after the acquisition.]

17. WILL SERVICE WITH ACQUIRED COMPANY BE CREDITED FOR ELIGIBILITY AND/OR VESTING UNDER BUYER'S PLAN?

- a. Yes, service crediting is required since employees of acquiring company are working for same company after acquisition.
- b. Yes, although service crediting is not required because the acquiring company plan is maintained by a related employer and Buyer is not taking over sponsorship of plan, service with Acquired Company will be credited under Buyer's plan. For this purpose, service will be credited for:
 - Eligibility and vesting
 - Eligibility only
 - Vesting only
- c. No, service with acquiring company will not be considered under Buyer's plan.

[Note: Where a severance from employment has not occurred, service with the Acquired Company must be credited for eligibility under the Buyer's plan. Under a stock sale, the employees continue to work for the same company so service with the Acquired Company must be counted after the acquisition. Thus, if #16.a., b., c. or e. is checked above, #17.a. should be checked since no severance of employment would occur and service with the Acquired Company is required to be credited after the acquisition. #17.b. or c. may be checked only where the exception under #16.d. applies. If #17.b. is checked, a plan amendment would be required under the Buyer's plan authorizing such service crediting.]

18. WILL EMPLOYEES OF ACQUIRED COMPANY PARTICIPATE IN PLAN MAINTAINED BY BUYER? [See #17 above to determine whether service with Acquired Company will count for purposes of determining eligibility under Buyer's plan.]

- a. Check this a. if Buyer is not taking over sponsorship of Acquired Company's plan (i.e., #16.a., d. or e. is checked).
 - 1. Will employees of Acquired Company participate in Buyer's plan under the current terms of the Buyer's plan?
 - i. Yes
 - ii. No

2. Does Buyer wish to include the employees of Acquired Company in Buyer's plan?
 - i. Yes
 - ii. No
3. Will there be an amendment to the Buyer's plan affecting participation of employees of Acquired Company?
 - i. No
 - ii. Yes (describe amendment below)

- b.** Check this b. if Buyer is taking over sponsorship of Acquired Company's plan (i.e., #16.b. or c. is checked).

1. Is eligibility under Buyer's plan different from Acquired Company's plan?
 - i. Yes
 - ii. No
2. If #1 is "Yes", will employees of Acquired Company participate under terms of Buyer's plan?
 - i. Yes
 - ii. No
3. If #2 is "No", there be an amendment to the Buyer's plan affecting participation of employees of Acquired Company?
 - i. No
 - ii. Yes (describe amendment below)

19. VESTING SCHEDULE UNDER BUYER'S PLAN.

- a.** Check this a. if Buyer is taking over sponsorship of Acquired Company's plan (i.e., #16.b. or c. is checked).

1. Is vesting under Buyer's plan different from Acquired Company's plan?
 - i. Yes
 - ii. No
2. If #1 is "Yes", what is vesting schedule under Acquired Company's plan?

3. If #1 is "Yes", will an amendment be made to the Buyer's plan to change the vesting schedule applicable to employees of the Acquired Company?
 - i. No
 - ii. Yes (describe amendment below)

[Note: An employee's vesting percentage may not be less than the employee's vesting percentage under the prior vesting schedule, with respect to all benefits accrued at the time of the amendment. In addition, if an employee has at least three years of service, and the new schedule would provide a lesser



vesting percentage at any point in the future than the old schedule would at that time, the employee must be given a 60-day election period to decide whether to stay on the old schedule. If the employee elects to stay on the old schedule, then future increases in vesting continue to be determined under the old schedule. If the employee elects to shift to the new schedule, then future increases in vesting are determined under the new schedule.]

20. COVERAGE/NONDISCRIMINATION TESTING ISSUES

- a. Is service/compensation with Acquired Company required to be counted for purposes of determining whether such employees are highly compensated employees?
 - 1. Yes
 - 2. No

[Note: If service is required to be credited for eligibility under #17 above (i.e., because the employees have not suffered a severance of employment), such service (and related compensation) should also be taken into account to determine whether such employees are highly compensation employees with Buyer. If a severance of employment has occurred, such employees are treated as new employees and any service or compensation with the prior company can be ignored. Therefore, if #17.a. is checked above, i. should be checked under this #20.a. If #17.b. or c. is checked above, ii. of this #20.a. should be checked since service with the Acquired Company is not required to be credited.]

- b. Will Buyer be utilizing transition rule for coverage testing?
 - 1. No
 - 2. Yes

If Yes, insert date transition rule expires: _____ [date should be end of Plan Year following Plan Year in which acquisition occurs (see #2 above)]

[Note: Under the transition rule, the Buyer’s plan is deemed to satisfy coverage during the transition period provided the Buyer’s plan satisfied coverage immediately before the acquisition and coverage under the Buyer’s plan is not significantly changed during the transition period other than by reason of the acquisition. Whether Buyer employees are covered under the Buyer’s plan or not, the transition rule should be available as long as there is no other change to the plan document, e.g., a change in plan benefit formula. Thus, any plans maintained by Buyer would be deemed to satisfy coverage without regard to the acquisition, provided there is no significant change in coverage such as an amendment to the contribution/benefit formula. Amendments to cover (or not cover) employees of the Acquired Company should not be a coverage change for this purpose since such an amendment would be as a result of the acquisition.]

21. ARE THERE ANY PROTECTED BENEFITS THAT MUST BE PROTECTED UNDER BUYER’S PLAN?

- a. Check this a. if Buyer is merging the Acquired Company’s plan into the Buyer’s plan.
 - 1. Are there any optional forms of benefit (such as the right to certain forms of payment, in-service withdrawal options, timing of distributions, QJSA distribution options) that are different in the prior plan?
 - i. No
 - ii. Yes (describe any different optional forms of benefit that must be protected)



2. Will an amendment be required to the Buyer's plan to protect any optional forms of benefit from the prior plan?

i. No

ii. Yes (describe amendment below)

3. Are there different contribution formulas, accrual/allocation requirements or contribution types in the prior plan that need to be protected in the Buyer's plan?

i. No

ii. Yes (describe any amendment necessary under the Buyer's plan)

4. Are there any other rights or features (such as participant loans or right to direct investments) that are different in the prior plan that will be accommodated in the Buyer's plan?

i. No

ii. Yes (describe any amendment that will be made to the Buyer's plan)

22. ARE ANY CONTRIBUTIONS OWED BY ACQUIRED COMPANY?

a. Check this a. if Buyer is taking over sponsorship of the Acquired Company's plan.

1. Are there any accrued benefits under the Acquired Company's plan that have not been funded?

i. Yes

ii. No

2. If so, will the Acquired Company be making contributions to fund benefits accrued prior to the acquisition?

i. Yes

ii. No

[Note: An employee accrues a right to a benefit when the employee has met the conditions necessary to be entitled to the allocation or accrual. If there are multiple conditions, then the benefit is accrued on the date when all the conditions have been satisfied (i.e., the latest of the dates each condition is satisfied). Thus, if a contribution under a defined contribution plan is allocated only if the employee is employed on the last day of the plan year, no benefit is accrued until the last day of the plan year, even if a minimum hours requirement for the allocation (e.g., 1,000 hours) is satisfied sooner.]



23. DISTRIBUTION ISSUES

- a. Are there any distribution options under the prior plan that must be protected/limited under Buyer's plan?
1. Yes
2. No
- b. If so, will the Buyer's plan need to be amended to protect/limit distribution options with respect to Acquired Company employees?
- i. No
- ii. Yes (describe any amendment necessary under the Buyer's plan)

[Note: When plans are merged or assets are transferred, the benefits so merged or transferred retain the character of the plan under which the benefits were accrued. For example, if money purchase assets are transferred, those benefits remain subject to the distribution restrictions applicable to money purchase plans.]

- c. Will distributions be made to employees of Acquired Company due to termination of employment or termination of the plan?

[Note: In a stock sale, a severance of employment generally does not occur so employees are not eligible for a distribution upon termination of employment. However, an employee may incur a severance of employment if the plan is continuing to be maintained by a related employer to the acquiring company (see #16.d.). If the exception under #16.d. does not apply and Buyer intends to make distributions to employees of the Acquired Company, the Acquired Company's plan can be terminated. However, if the plan is a 401(k) plan, deferrals may not be distributed upon plan termination once the acquisition occurs unless the plan is terminated prior to the acquisition, due to the successor plan rules. Therefore, if Buyer does not intend to maintain or merge a 401(k) plan of the acquiring company, the Acquired Company 401(k) plan should be terminated before the acquisition occurs. For this purpose, a termination may occur even if the plan assets are not actually distributed until after the acquisition.]

Disclaimer

This checklist is designed to provide useful information in regard to the complex matter of mergers and acquisitions involving qualified retirement plans. ASC disclaims any implied or actual warranties as to the accuracy of the checklist any liability with respect to the material presented. The checklist is provided with the understanding that the ASC Institute is not providing legal, accounting or other professional advice. ASC recommends obtaining professional legal advice regarding any merger or acquisition.