



Acquisitions & ERISA

“Through the Eyes of a Former DOL Investigator”

Fiduciaries of ERISA covered plans often tell me they don't take their fiduciary responsibility too seriously because the likelihood of being investigated by the Department of Labor is minimal and the time it takes to completely fulfil their responsibility is time consuming and takes away from running the company.

What if I told you that when you get ready to sell your company, your level of adherence to ERISA could affect the final purchase price? During a merger or acquisition there will be a period where the acquirer will perform due diligence. It is during this time that an in-depth review of many aspects of your company will take place. The acquirer will audit your financials, review your operational controls and procedures, and look at your ERISA covered retirement plan. The last thing the acquirer wants to purchase is a liability or exposure to a federal investigation and potential future civil claims.

During the acquisition phase an acquirer such as a private equity group, will first submit a Letter of Intent. Letters of intent are used during the merger and acquisitions process to outline a firm's plan to buy/take over another company. For example, the letter of intent will disclose the specific terms of the transaction (whether it is a cash or stock deal). The letter of intent will typically outline the purchase price.

During the due diligence period, an acquirer will look for any opportunity to seek a price reduction and a poorly run 401(k) typically presents the opportunity. Obviously, ERISA is complicated and most due diligence teams don't have the expertise to audit a retirement plan so they hire outside consultants like ERISA SMART. A portion of our business is providing consulting services to private equity firms to support acquisitions.

Finding a violation is easy. In fact, the DOL finds violations in approximately 75% of plans they investigate. In 2013, the average plan assets restored/recovered by the DOL was approximately \$158,000. Based on that number, if you are selling your company at a 6 times multiple the price reduction could be over \$1 million. Our results have been much better we typically can find something during our review that serves as the basis for a substantial price reduction in the final purchase price.

In most instances, we find that those plans that have the biggest problems are those plans that don't have a retirement plan specialist as part of their plan management team. Most often they have hired a wealth management professional who is unfamiliar with ERISA, proper ERISA protocol and best practices.

As a fiduciary you might not care now, but trust me you will later when you receive less for your company because you failed to be responsible. Take a moment and consider the future implications of playing the odds that you won't be targeted by the DOL. Don't let your disregard of your fiduciary responsibility be the basis for devaluing your company.