Table of Contents

Volume 1

CHAPTER 1. INTRODUCTION TO ACQUISITIONS AND DIVESTITURES

§ 1:1 Introduction
§ 1:2 —Team approach
§ 1:3 —Deal environment
§ 1:4 —Objectives of the parties
§ 1:5 Negotiations
§ 1:6 —Strategy
§ 1:7 — —Style—How tough to be
§ 1:8 — — —Dealing with a one-sided document
§ 1:9 — — —Reacting to comments
§ 1:10 — — —Always give reasons
§ 1:11 — — —Maintain control of the session
§ 1:12 — —Skills
§ 1:13 — — —Compromise
§ 1:14 — — —Hot buttons
§ 1:15 — — —Facilitating the agreement
§ 1:16 — — —Persistence
§ 1:17 — — —Make the other side a hero
§ 1:18 — —Timing
§ 1:19 — —Weaknesses
§ 1:20 —Organization—Preparation
§ 1:21 — —Identify and prioritize issues
§ 1:22 —Communications—Talking to management
§ 1:23 — —Disclosure
§ 1:24 The due diligence review
§ 1:25 —Planning stage
§ 1:26 —Personnel
§ 1:27 — —Lead attorney
§ 1:28 — —Accountant
§ 1:29 —Process
§ 1:30 Accounting considerations
§ 1:31 —Valuation
§ 1:32 — —Accounts receivable
§ 1:33 — —Inventory
§ 1:34 — —Intangibles
§ 1:35 — —Pension liabilities and other employee benefits

§ 1:36 —Solvency opinions
§ 1:37 —Accounting method
§ 1:38 Purchase price considerations—Ways of paying—Cash
§ 1:39 — —Debt securities
§ 1:40 — —Equity securities
§ 1:41 —Determining the price
§ 1:42 — —Earnout
§ 1:43 — —Balance sheet and inventory adjustment
§ 1:44 — —Covenant not to compete
§ 1:45 — —Employment contracts
§ 1:46 The documents—Who should prepare them?
§ 1:47 —Common documents
§ 1:48 — —Agreements with investment bankers
§ 1:49 — —Confidentiality agreements
§ 1:50 — —Letters of intent
§ 1:51 — —Legal opinions
§ 1:52 —Binding parties
§ 1:53 —Content
§ 1:54 — —The representations and warranties
§ 1:55 — —Commonly requested warranties—Warranties against material adverse changes
§ 1:56 — — —Liabilities
§ 1:57 — — —Compliance with laws
§ 1:58 — — —Product liability/litigation
§ 1:59 — —Indemnification provisions
§ 1:60 Privilege
§ 1:61 Substantive legal issues
§ 1:62 —Antitrust laws—Hart-Scott-Rodino considerations
§ 1:63 — —Practical advice
§ 1:64 —Securities laws
§ 1:65 — —Registration
§ 1:66 — —Disclosure
§ 1:67 — —Maintain confidentiality
§ 1:68 — —Short swing profits
§ 1:69 —Federal Reserve requirements
§ 1:70 — —Who is required to register
§ 1:71 — —Registration procedure and requirements
§ 1:72 — —Other requirements
§ 1:73 —Intellectual property
§ 1:74 — —Software—Ownership
§ 1:75 — — —Third-party software
§ 1:76 — —Documentation
§ 1:77 — —Types—Patents
§ 1:78 — — —Trademarks
§ 1:79 —Environmental laws
§ 1:80 —Labor and employment laws

§ 1:81 — —Employee benefit plans—Pension plans
§ 1:82 — — —Retirement benefit costs
§ 1:83 — — —COBRA compliance problems
§ 1:84 — — —Executive plans
§ 1:85 — — —Single employer plans
§ 1:86 — — —Multiemployer plans
§ 1:87 — —Collective bargaining agreements
§ 1:88 — —The Successorship Doctrine
§ 1:89 — —WARN Act
§ 1:90 —Successor liability
§ 1:91 — —Products liability
§ 1:92 — —Criminal liability
§ 1:93 —Fiduciary duties of officers and directors
§ 1:94 —Other legal issues—Bankruptcy law considerations
§ 1:95 — — —Disadvantages
§ 1:96 — — —Advantages
§ 1:97 — —Taxes—General rules
§ 1:98 — — —The tax rates
§ 1:99 — — —Expenses
§ 1:100 — —International law
§ 1:101 — —State tort law
§ 1:102 — —Uniform Commercial Code (UCC) Article 6: The Bulk Sales Act
§ 1:103 — —Computer issues
§ 1:104 Closing
§ 1:105 —Post-closing considerations
§ 1:106 —Failure to close
§ 1:107 Conclusion

CHAPTER 2. PREDEAL LEGAL CONSIDERATIONS

§ 2:1 Discussion outline of finders' agreements
§ 2:2 Buyer's form of finders' agreement (nonexclusive)
§ 2:3 Discussion outline of confidentiality agreements
§ 2:4 Form of confidentiality agreement
§ 2:5 Discussion outline for model letter of intent
§ 2:6 Buyer's form of letter of intent for auction process
§ 2:7 Discussion outline of model diligence checklist
§ 2:8 Form of diligence checklist
§ 2:9 Discussion outline of purchase price considerations
§ 2:10 Form of purchase price adjustment provision

CHAPTER 3. COMPREHENSIVE CHECKLIST: CONSIDERATIONS IN AN ACQUISITION OR DIVESTITURE

§ 3:1 Special situations

§ 3:2 Preliminary matters
§ 3:3 Personnel
§ 3:4 Board of directors and/or shareholder approval
§ 3:5 Compliance programs and business ethics
§ 3:6 Substantive legal considerations
§ 3:7 Corporate law and commercial/contract law issues
§ 3:8 Due diligence
§ 3:9 Negotiations
§ 3:10 Documentation
§ 3:11 Closing the deal

CHAPTER 4. PROTECTING THE DEAL: FIDUCIARY DUTIES OF DIRECTORS IN NEGOTIATING MERGER TRANSACTIONS

§ 4:1 Introduction
§ 4:2 —Lock-ups
§ 4:3 —No shop
§ 4:4 —Fees
§ 4:5 —Relief from poison pills
§ 4:6 Board action
§ 4:7 —Standard of judicial review
§ 4:8 — —Business judgment rule
§ 4:9 — —Entire fairness
§ 4:10 — —Enhanced scrutiny
§ 4:11 —Fiduciary obligations
§ 4:12 — —General duties
§ 4:13 — — —Care
§ 4:14 — — —Loyalty
§ 4:15 — —Sale or change of control
§ 4:16 — — —Aiding and abetting
§ 4:17 Injunctive relief
§ 4:18 Cumulative effect of protection measures
§ 4:19 Preserving the deal and its terms
§ 4:20 —Contract provisions
§ 4:21 — —Walk rights
§ 4:22 — —Fiduciary-out
§ 4:23 — —Go-shop
§ 4:24 —Statutes
§ 4:25 — —Exculpatory provisions
§ 4:26 — —Delegation
§ 4:27 — —Conflicts of interest
§ 4:28 —Procedures and practices

Appendix 4-A. Cases Addressing Protective Measure Provisions in Mergers and Acquisitions

Appendix 4-B. Collection of Sample Protective Measure Provisions

CHAPTER 5. DUE DILIGENCE REVIEWS IN MERGERS AND ACQUISITIONS

§ 5:1 Introduction
§ 5:2 Preparation—Identify priorities
§ 5:3 —Select personnel
§ 5:4 —Create a record
§ 5:5 Liability issues
§ 5:6 —Collusion
§ 5:7 —Insider trading
§ 5:8 —Securities fraud
§ 5:9 —Common-law fraud
§ 5:10 —Confidentiality
§ 5:11 —Fiduciary duties
§ 5:12 —Negligence
§ 5:13 —Covenants not to compete
§ 5:14 —Personal jurisdiction
§ 5:15 —Compliance with international regulations
§ 5:16 — —Data protection
§ 5:17 — —Export controls
§ 5:18 Procedures—Document request
§ 5:19 —Access to information
§ 5:20 —Seller's due diligence
§ 5:21 Scope
§ 5:22 —Legal and ethical conduct
§ 5:23 —Sources other than the company to be acquired
§ 5:24 —Privileged records
§ 5:25 Reliance
§ 5:26 —Failure to discover
§ 5:27 —Pre-closing disclosure
§ 5:28 Contractual provisions
§ 5:29 —Non-reliance clause
§ 5:30 —Integration or merger clause
§ 5:31 —Audits and financial information
§ 5:32 —Material adverse change clause
§ 5:33 —Modification
§ 5:34 —Representations and warranties
§ 5:35 Professionals and consultants

Appendix 5-A. Document Request (Short Form)
Appendix 5-B. Document Request (Long Form)
Appendix 5-C. Special Concerns for Intellectual Property

Bibliography

CHAPTER 6. THE SELLER'S DUTY TO DISCLOSE UNDER STATE TORT LAW

§ 6:1 Introduction

§ 6:2 Distinction between fraudulent concealment and other types of nondisclosure
§ 6:3 Seller's duty to disclose—In general
§ 6:4 —Materiality
§ 6:5 —Buyer's due diligence
§ 6:6 —Half-truths
§ 6:7 —Disclaimers
§ 6:8 —Representations and warranties
§ 6:9 Disclosure of environmental contamination
§ 6:10 Obligation of third party to disclose on behalf of seller
§ 6:11 Some suggestions for avoiding problems in merger negotiations
§ 6:12 Buyer's disclosure obligations to seller
§ 6:13 —Sandbagging
§ 6:14 Conclusion

CHAPTER 7. ESCROW AGREEMENTS

§ 7:1 Introduction
§ 7:2 Purpose
§ 7:3 —Price adjustments
§ 7:4 —Earn outs
§ 7:5 —Indemnification
§ 7:6 Establishing the account
§ 7:7 —Deposit of funds
§ 7:8 —Investment of funds
§ 7:9 —Earnings and dividends
§ 7:10 Agent—Appointment
§ 7:11 —Duties
§ 7:12 —Liability
§ 7:13 —Termination
§ 7:14 — —Resignation or removal
§ 7:15 — —Successor
§ 7:16 —Change of entity
§ 7:17 Release of funds
§ 7:18 —Entitlement
§ 7:19 — —Expiration
§ 7:20 — —Existence of claim
§ 7:21 — —Notice of claim
§ 7:22 — — —Delivery of notice
§ 7:23 — —Third-party claims
§ 7:24 — —Condition precedent
§ 7:25 — —Resolution of claim
§ 7:26 — —Earn-out
§ 7:27 —Distributions—Form
§ 7:28 — —Security
§ 7:29 Disputes

§ 7:30 —Resolution mechanism
§ 7:31 — —Arbitration
§ 7:32 — —Expert determination
§ 7:33 — —Litigation/interpleader
§ 7:34 —Releases
§ 7:35 —Counsel
§ 7:36 Conclusion

Appendix 7-A. Sample Escrow Agreement for Merger Transactions

Appendix 7-B. Escrow Agreements Available on EDGAR

Appendix 7-C. Escrow Agreement—Mesa Air Group Inc. (2025)

CHAPTER 8. PRODUCTS LIABILITY OF SUCCESSOR CORPORATIONS

§ 8:1 Introduction and overview
§ 8:2 Exceptions to the general rule
§ 8:3 —Express or implied assumption of liability
§ 8:4 —Consolidation or merger
§ 8:5 —Fraud
§ 8:6 —Mere continuation
§ 8:7 — —Traditional mere continuation exception
§ 8:8 — —Continuity of enterprise
§ 8:9 —Product line theory
§ 8:10 Duty to warn
§ 8:11 Statutory issues
§ 8:12 —Scope
§ 8:13 —Limitations of actions
§ 8:14 —Corporate dissolution
§ 8:15 —Statute of repose
§ 8:16 Successor products liability actions in bankruptcy
§ 8:17 Insurance coverage
§ 8:18 Conclusion

CHAPTER 9. CORPORATE COUNSEL'S GUIDE TO LETTERS OF INTENT

§ 9:1 Introduction
§ 9:2 —Reasons to use a letter of intent
§ 9:3 —Reasons not to use a letter of intent
§ 9:4 —Additional considerations
§ 9:5 Effects of a letter of intent
§ 9:6 —Legal principles
§ 9:7 —Intent of the parties
§ 9:8 —Parol evidence
§ 9:9 —Statute of frauds

§ 9:10 —Expiration
§ 9:11 —Merger provision
§ 9:12 —Estoppel
§ 9:13 Binding character
§ 9:14 —Cases that found no binding contract—Clear statement of nonbinding effect
§ 9:15 — —Use of exclusivity provision
§ 9:16 — —Use of cost allocation provision
§ 9:17 — —Courts applying *Teachers* factors
§ 9:18 — —Reference to more formal agreement
§ 9:19 — —Type of transaction
§ 9:20 — —Failure to state all material terms
§ 9:21 — —Agreement to agree
§ 9:22 — —Lack of consideration
§ 9:23 — —Conduct of the parties
§ 9:24 — —Unresolved contingencies
§ 9:25 —Cases that found a binding contract or a triable issue of whether there was a binding contract
§ 9:26 — —Statement of intent to be bound
§ 9:27 — —Provision for a more formal document
§ 9:28 — —Issue for the jury
§ 9:29 — —Sufficient terms provided
§ 9:30 — —Prior representations
§ 9:31 — —Consideration provided
§ 9:32 — —Contingent events
§ 9:33 — —Conduct of the parties
§ 9:34 — —Terms subject to later negotiations
§ 9:35 — —Joint letter of intent
§ 9:36 — —Mutual consideration
§ 9:37 The obligation to negotiate in good faith
§ 9:38 —Cases finding no duty to negotiate in good faith
§ 9:39 —Cases imposing a duty to negotiate in good faith
§ 9:40 —Fulfilling the duty to negotiate in good faith
§ 9:41 —Damages
§ 9:42 Tort claims
§ 9:43 Conclusion

Appendix 9-A. Checklist for Drafting Letters of Intent

Appendix 9-B. Sample Letters of Intent

Bibliography

CHAPTER 10. CONTRACTING WITH FINANCIAL CONSULTANTS

§ 10:1 Introduction
§ 10:2 Scope
§ 10:3 Qualifications

§ 10:4 Fees
§ 10:5 Status of the parties
§ 10:6 Indemnification
§ 10:7 Confidentiality
§ 10:8 Exclusivity
§ 10:9 Merger clause
§ 10:10 Financial reporting
§ 10:11 Termination
§ 10:12 Negligence

Appendix 10-A. Letter Agreement for Management and Financial Advisory Services

Appendix 10-B. Consulting Agreement

CHAPTER 11. ANTITRUST ISSUES IN ACQUISITIONS AND DIVESTITURES

§ 11:1 Introduction
§ 11:2 Premerger notification
§ 11:3 —Overview
§ 11:4 —Notification—When is notification required?
§ 11:5 — —Exemptions
§ 11:6 — —Can notification be avoided by manipulating the form of the transaction?
§ 11:7 — —Formal interpretations
§ 11:8 — —What information does the form require?
§ 11:9 — — —Model voluntary request form
§ 11:10 — —Notice to the acquired company
§ 11:11 — —Planning documents and the attorney-client privilege
§ 11:12 — —Disclosure of submitted documents
§ 11:13 —Waiting period
§ 11:14 — —Model timing agreements
§ 11:15 — —The waiting period in bankruptcy
§ 11:16 — —Second requests
§ 11:17 — —Statement of reason for noncompliance
§ 11:18 — —Investigation "clearance"
§ 11:19 — —Request for early termination
§ 11:20 —Enforcement actions
§ 11:21 — —Failure to file
§ 11:22 — — —Willful failure to file
§ 11:23 — — —Inadvertent violations
§ 11:24 — — —Constructive avoidance of filing requirements
§ 11:25 — — —Erroneous application of exceptions to filing
§ 11:26 — —Gun-jumping
§ 11:27 —Special rules—Unincorporated entities
§ 11:28 — — —Partnerships
§ 11:29 — — —LLCs

§ 11:30 — —Joint ventures
§ 11:31 — —Transfers of exclusive patent rights
§ 11:32 — —Foreign transactions
§ 11:33 —International considerations
§ 11:34 —States and private litigants
§ 11:35 Merger analysis
§ 11:36 —Overview of merger law
§ 11:37 —Analysis of horizontal mergers
§ 11:38 — —Injunctive relief
§ 11:39 — —Defining the relevant product market
§ 11:40 — — —The DuPont Test
§ 11:41 — — —The *Brown Shoe* Test
§ 11:42 — — —The *Kodak* Analysis
§ 11:43 — —The relevant "product" market in high-technology cases
§ 11:44 — —Defining the relevant geographic market
§ 11:45 — —The quantitative point at which a horizontal merger should be illegal
§ 11:46 — —Potential adverse effects of horizontal mergers
§ 11:47 — —Coordinated interaction
§ 11:48 — —Unilateral effects
§ 11:49 — —Other factors in horizontal merger analysis
§ 11:50 — — —Recent or ongoing changes
§ 11:51 — — —Degree of difference
§ 11:52 — — —Foreign competition
§ 11:53 — — —Ease of entry
§ 11:54 — — —Efficiencies
§ 11:55 — — —Failing-firm defense
§ 11:56 —Analysis of vertical mergers
§ 11:57 — —Potential competition
§ 11:58 — —The elimination of a disruptive influence
§ 11:59 — —Evasion of rate regulation theory
§ 11:60 —Special industry rules
§ 11:61 — —Hospital mergers
§ 11:62 — —Mergers in the defense industry
§ 11:63 —Post-merger challenges
§ 11:64 — —Statutes of limitation
§ 11:65 —Practical aspects of merger analysis
§ 11:66 — —Gathering the information
§ 11:67 — —Risk analysis
§ 11:68 — — —Legal risks
§ 11:69 — — —Business risks
§ 11:70 — —The opinion letter
§ 11:71 — —More practical observations—How to work with the guidelines in practice
§ 11:72 — — —Tactical considerations
§ 11:73 — — —Cutting a deal

§ 11:74 —Checklist for acquisition analysis
§ 11:75 — —Questions relating to the relevant market
§ 11:76 — —Questions relating to horizontal mergers
§ 11:77 — —Potential entrant mergers
§ 11:78 — —Vertical mergers
§ 11:79 —FTC and DOJ acquisition checklist
§ 11:80 —States and private litigants
§ 11:81 Preconsummation activities
§ 11:82 —Premerger information exchanges
§ 11:83 —Other activities
§ 11:84 Conclusion

Appendix 11-A. Merger Guidelines (U.S. Department of Justice and Federal Trade Commission—2023)

Appendix 11-B. Antitrust Guidelines for Business Activities Affecting Workers (Department of Justice and Federal Trade Commission)—January 2025

Appendix 11-C. Antitrust Guidelines for the Licensing of Intellectual Property (Dept. of Justice and FTC—2017)

Appendix 11-D. Antitrust Guidelines for International Enforcement and Cooperation (Dept. of Justice and FTC—2017)

Appendix 11-E. Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence (FTC—2018)

Appendix 11-F. Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Federal Trade Commission—Nov. 10, 2022)

Appendix 11-G. HRS Form: Tips for Avoiding Common Pitfalls (Federal Trade Commission—September 26, 2025)

CHAPTER 12. THE EXCHANGE OF CONFIDENTIAL INFORMATION IN NEGOTIATED ACQUISITIONS

§ 12:1 Introduction
§ 12:2 Confidentiality agreements
§ 12:3 —Creation of confidentiality obligation
§ 12:4 — —Types of agreements—Express
§ 12:5 — — —Implied
§ 12:6 — —Notice

§ 12:7 — —Waiver
§ 12:8 Confidentiality agreement—Creation of confidentiality obligation—Modification
§ 12:9 Confidentiality agreements—Provisions
§ 12:10 — —Term
§ 12:11 — —Definition of confidential information
§ 12:12 — — —Breadth of disclosure
§ 12:13 — — —Technical information
§ 12:14 — —Restrictions on use
§ 12:15 — —Exclusion
§ 12:16 — —Standards
§ 12:17 — —Return delivery/destruction of disclosed materials
§ 12:18 — —Representations and warranties (disclaimer)
§ 12:19 — —Disclosure
§ 12:20 — —Nonsolicitation
§ 12:21 — —Standstill provision
§ 12:22 — —Timing of proposals
§ 12:23 — —Remedies and enforcement upon breach
§ 12:24 — —Survival
§ 12:25 — —Most favored nation
§ 12:26 —Matters involving confidential information—Due diligence review
§ 12:27 — —Bid solicitation
§ 12:28 — —Unsolicited information
§ 12:29 —Scope of protection
§ 12:30 — —Absence of confidential information
§ 12:31 — —Public information
§ 12:32 —Acts constituting breach—Improper purpose
§ 12:33 — —Improper use
§ 12:34 — —Compliance review
§ 12:35 —Legal remedies
§ 12:36 Statutory protection of confidential information
§ 12:37 —Misappropriation of trade secrets—Definition
§ 12:38 — — —*Restatement of Torts*
§ 12:39 — — —Uniform Trade Secrets Act
§ 12:40 — — —Application of the UTSA versus restatement of torts definitions
§ 12:41 — — —Application
§ 12:42 — —Unfair trade advantage
§ 12:43 — —Confidential relationship
§ 12:44 —The Economic Espionage Act of 1996
§ 12:45 — —Definition
§ 12:46 — —Elements of the crime
§ 12:47 — — —Prohibited Acts
§ 12:48 — — —Intent
§ 12:49 — — —Knowledge

§ 12:50 — — —Burden of proof
§ 12:51 — —Penalties
§ 12:52 —Defend Trade Secrets Act
§ 12:53 Tax reporting implications of confidentiality agreements
§ 12:54 —Reportable transactions
§ 12:55 — —Confidential transactions
§ 12:56 — —Participation
§ 12:57 —Requirements
§ 12:58 — —Form 8886
§ 12:59 — —Records retention
§ 12:60 — —Participant information
§ 12:61 —Exceptions
§ 12:62 — —Determination by the commissioner of IRS
§ 12:63 — —Regulated investment companies
§ 12:64 — —Lease transactions

Appendix 12-A. Introduction and Practice Points

Appendix 12-B. Checklist for the Exchange of Confidential Information during Acquisition Negotiations

Appendix 12-C. Sample Forms

Bibliography

Volume 2

CHAPTER 13. MATERIAL ADVERSE CHANGE CLAUSES

§ 13:1 Introduction
§ 13:2 Material adverse change
§ 13:3 Scope
§ 13:4 —General clauses
§ 13:5 — —Significance of event
§ 13:6 — —Effect of other provisions
§ 13:7 —Known risks
§ 13:8 —Specific clauses
§ 13:9 —Carve-outs
§ 13:10 — —Limits
§ 13:11 — — —Disproportionate Effect
§ 13:12 — — —Underlying Causes
§ 13:13 — —Types
§ 13:14 — — —Announcement
§ 13:15 — — —Political Conditions
§ 13:16 — — —Economy or Markets
§ 13:17 — — —Industry

§ 13:18 — — —Laws
§ 13:19 — — —Loss of Employees
§ 13:20 — — —Accounting Principles
§ 13:21 — — —Acts under the Agreement
§ 13:22 — — —Seasonal fluctuations
§ 13:23 — — —Union activity
§ 13:24 — — —Performance forecasts
§ 13:25 — — —Stock Activity
§ 13:26 — — —Litigation
§ 13:27 — — —Natural disasters and calamities
§ 13:28 —Business prospects
§ 13:29 Termination
§ 13:30 Litigation
§ 13:31 —Cause of action
§ 13:32 —Burden of proof
§ 13:33 —Choice of law
§ 13:34 —Arbitration
§ 13:35 —Remedy
§ 13:36 Conclusion

Appendix 13-A. Sample Material Adverse Change Clauses

Bibliography

CHAPTER 14. CONTRACT ISSUES IN ASSET AND STOCK ACQUISITION AGREEMENTS: WARRANTIES, INDEMNITIES, BASKETS, CAPS, MATERIALITY, AND KNOWLEDGE

§ 14:1 Representations and warranties
§ 14:2 Indemnification

Appendix 14-A. Sample Agreement Provisions

CHAPTER 15. TRANSFER OF INTELLECTUAL PROPERTY IN ACQUISITIONS AND DIVESTITURES

§ 15:1 Introduction
§ 15:2 Basic legal issues
§ 15:3 Indemnification
§ 15:4 Antitrust
§ 15:5 Illustrative forms for the transfer of intellectual property (where technology can be clearly identified and transaction is not terribly complex)
§ 15:6 —Assignment of inventions and patents
§ 15:7 —Assignment of copyrights

§ 15:8 —Assignment of application for registration of a mark
§ 15:9 —Assignment of registration of a mark
§ 15:10 —Intellectual property license agreement
§ 15:11 —Security agreement: Trademarks
§ 15:12 —Security agreement: Patents
§ 15:13 —Security agreement: Copyrights
§ 15:14 —Debtor's representations re trademarks, patents, and copyrights
§ 15:15 Illustrative forms for a more complex deal (from spin-off of Agilent Technologies by Hewlett-Packard)—Master Technology Ownership and License Agreement between Hewlett-Packard Company and Agilent Technologies, Inc
§ 15:16 —Master Patent Ownership and License Agreement between Hewlett-Packard Company and Agilent Technologies, Inc
§ 15:17 —Master Trademark Ownership and License Agreement between Hewlett-Packard Company and Agilent Technologies, Inc
§ 15:18 —ICBD Technology Ownership and License Agreement between Hewlett-Packard Company and Agilent Technologies, Inc

Appendix 15-A. Antitrust Guidelines for the Licensing of Intellectual Property (Dept. of Justice and FTC—2017)

CHAPTER 16. PLANNING FOR THE PURCHASE OR SALE OF A CORPORATE BUSINESS: FEDERAL TAX ASPECTS

§ 16:1 Introduction—Cast of characters
§ 16:2 —The setting
§ 16:3 —The tax stakes
§ 16:4 — —P's objectives
§ 16:5 — —T's objectives
§ 16:6 — —Transaction patterns
§ 16:7 — —Taxable sale versus tax-free reorganization
§ 16:8 Tax-free reorganizations
§ 16:9 —Continuity issues
§ 16:10 — —Continuity of interest
§ 16:11 — —Continuity of business enterprise
§ 16:12 —Reorganizations requiring consideration to be voting stock of P—Stock-for-stock exchanges ("B" reorganizations)
§ 16:13 — —Stock-for-asset exchanges ("C" reorganizations)
§ 16:14 —Merger transactions—"Straight merger" of T into P
§ 16:15 — —Triangular mergers—Forward subsidiary merger

§ 16:16 — — —Reverse subsidiary merger
§ 16:17 — — —Other differences
§ 16:18 —Shareholder treatment ("boot" issues)
§ 16:19 Special problems in tax-free reorganizations—Getting cash to the T shareholders
§ 16:20 —Disposition of unwanted T assets
§ 16:21 Asset purchase taxable transactions—Asset purchase rules
§ 16:22 —Determination of aggregate basis to P
§ 16:23 — —Cash
§ 16:24 — —Assumption of liabilities
§ 16:25 — —Deferred purchase price
§ 16:26 Stock purchase taxable transactions—Generally
§ 16:27 —Section 338—General treatment of stock purchase as asset purchase
§ 16:28 — —Treatment of target corporation as a new corporation
§ 16:29 — —Definition of purchase
§ 16:30 — —Consistency requirement
§ 16:31 — —Section 338(h)(10). Buying a subsidiary from an affiliated group filing consolidated returns
§ 16:32 —Disallowance of losses on sale of subsidiaries
§ 16:33 Special problems in taxable transactions—Allocation of purchase price—Significance of allocation of purchase price
§ 16:34 — —Allocation of purchase price in stock acquisitions under § 338
§ 16:35 — —Allocation of purchase price in asset acquisitions
§ 16:36 — —Amortization of purchased intangibles under § 197
§ 16:37 — —Supporting allocations among assets
§ 16:38 —Asset sale: Should target be liquidated?
§ 16:39 —Installment sales. I.R.C. § 453
§ 16:40 Acquisitions of and by S corporations—Introduction
§ 16:41 —Taxable sales
§ 16:42 —Tax-free reorganizations—Statutory mergers. I.R.C. § 368(a)(1)
§ 16:43 — —Acquisition of target's stock in exchange for stock of the buyer or its parent. I.R.C. § 368(a)(1)(B)
§ 16:44 — —Acquisition of target's assets in exchange for stock of buyer or its parent. I.R.C. § 368(a)(1)(C)
§ 16:45 — —General problems of an S corporation as the buyer in a tax-free reorganization
§ 16:46 Preserving net operating loss carryovers—General
§ 16:47 —Operation of § 382
§ 16:48 —Other restrictions on use of net operating losses—Section 269
§ 16:49 — —Relationship of §§ 269 and 382

§ 16:50 — —The *Libson Shops* doctrine
§ 16:51 — —Consolidated return regulations
§ 16:52 —State and local tax considerations
§ 16:53 Joint buyer strategies
§ 16:54 Drafting the acquisition agreement

CHAPTER 17. FEDERAL INCOME TAX CONSIDERATIONS IN MERGERS AND ACQUISITIONS AND PUBLIC SECURITIES OFFERINGS: PRACTICAL ADVICE FOR THE NONSPECIALIST

§ 17:1 Mergers and acquisitions—General
§ 17:2 —Basic acquisition structures—Asset deal
§ 17:3 — —Stock deal
§ 17:4 — —Hybrids—Stock deal with a § 338(h)(10) election
§ 17:5 — — —LLCs
§ 17:6 — —Tax-free deals
§ 17:7 — —Forms of consideration
§ 17:8 —Selecting a structure—Reasons to prefer an asset deal
§ 17:9 — —Reasons to prefer a stock deal
§ 17:10 — —Reasons to prefer a stock deal with a § 338(h)(10) election
§ 17:11 — —Reasons to prefer a tax-free deal
§ 17:12 — —Choosing among the alternatives
§ 17:13 —Principal tax consequences of the structures—Asset deal
§ 17:14 — —Stock deal without a § 338(h)(10) election
§ 17:15 — —Stock deal with a § 338(h)(10) election
§ 17:16 — —Tax-free reorganizations
§ 17:17 — —Spin-offs
§ 17:18 —Some ancillary considerations—Documentation
§ 17:19 — —Choice of entity for the buyer; LLCs and partnerships
§ 17:20 Public securities offerings—General
§ 17:21 —Need for tax disclosure
§ 17:22 —Original issue discount
§ 17:23 —Discount and premium on tax-exempt bonds
§ 17:24 —Preferred OID
§ 17:25 —Significant modifications of debt instruments
§ 17:26 —Foreign offering issues—Outbound offerings
§ 17:27 — —Inbound offerings
§ 17:28 —Asset securitization

Appendix 17-A. Forms of Corporate Acquisitions

Appendix 17-B. Tax-Free Reorganization Summary

CHAPTER 18. PARENT'S LIABILITY FOR ITS SUBSIDIARIES

§ 18:1 Introduction and overview
§ 18:2 When the corporate "veil" may be pierced
§ 18:3 —The prevention of fraud
§ 18:4 —The "alter ego" exception—In general
§ 18:5 — — —Substance rules over form
§ 18:6 — — —The subsidiary as a "shell" of its parent
§ 18:7 — — —Mere unity of financial interest, ownership, and control not enough for alter ego
§ 18:8 — —The difference between tort and contract cases
§ 18:9 — — —Tort cases
§ 18:10 — — —Contract cases
§ 18:11 — —Inadequate capitalization
§ 18:12 — —Standing
§ 18:13 "Piercing the veil" for violations of statutory rights
§ 18:14 —The Worker Adjustment and Retraining Notification Act of 1988
§ 18:15 —The Age Discrimination in Employment Act
§ 18:16 —Civil rights in employment
§ 18:17 Economic realities test
§ 18:18 Parent liability for environmental violations of subsidiary
§ 18:19 —Supreme court sets standard in *Bestfoods*
§ 18:20 —Applicable law
§ 18:21 —Courts that have pierced the corporate veil
§ 18:22 —Courts that refused to pierce the corporate veil
§ 18:23 —Direct parent liability for environmental violations of subsidiary
§ 18:24 — —The early years: Parent liability as owner/operator
§ 18:25 — — —Actual control of subsidiary required for liability
§ 18:26 — — —Authority to control subsidiary's activities enough for liability
§ 18:27 — —Current view: Direct liability for operators
§ 18:28 — — —Applying direct liability: The distinction between owners and operators
§ 18:29 — — —Rejection of direct liability
§ 18:30 — — —Active participation and control
§ 18:31 — — —Significant management control imposes direct liability
§ 18:32 — — —Concomitant general authority or ability to control insufficient for direct liability: Actual control required
§ 18:33 — — —Liability requires more than authority to control

§ 18:34 — — —The distinction between operator liability and arranger liability
§ 18:35 — — —The impact of voluntary disclosure
§ 18:36 Assumption of subsidiary's duty by parent
§ 18:37 Some planning suggestions

CHAPTER 19. LIMITING ENVIRONMENTAL LIABILITIES IN TRANSACTIONS

§ 19:1 Introduction
§ 19:2 What are the legal issues to address in drafting environmental provisions?
§ 19:3 —Liability to the government and third parties
§ 19:4 —Mutual liabilities of contracting parties
§ 19:5 —Corporate protections
§ 19:6 —Agency protections
§ 19:7 Specific considerations
§ 19:8 The drafting framework
§ 19:9 —Definitions
§ 19:10 —Allocating liability
§ 19:11 —Representations and warranties
§ 19:12 —Covenants pending closing
§ 19:13 —Conditions precedent to closing
§ 19:14 —Post-closing covenants
§ 19:15 —Indemnities
§ 19:16 — —Scope of indemnity
§ 19:17 — —Time-warp damages
§ 19:18 — —Defining damages
§ 19:19 — —Who should be indemnified?
§ 19:20 — —Time limitations
§ 19:21 — —Indemnification mechanics
§ 19:22 — —Other indemnification tips
§ 19:23 Practical limitations on environmental provisions in contracts
§ 19:24 —Limitations on the provision's utility
§ 19:25 —Contractual remedies
§ 19:26 —The four types of contractual remedies relative to purchase and sale agreements: Specific performance, damages, rescission, and indemnity
§ 19:27 Using the law to manage the exposure
§ 19:28 —General enforceability of allocation agreements
§ 19:29 — —Statutes of limitation
§ 19:30 —What law applies to the interpretation of the agreements?
§ 19:31 —Insurance
§ 19:32 —Ineffective allocations—"As-is" clauses

§ 19:33 — —Liability under law not in existence
§ 19:34 — —Damages not specified
§ 19:35 — —Environmental damages not included in specified damages
§ 19:36 — —Insufficient notice
§ 19:37 — —Failure to abide by conditions precedent to indemnification
§ 19:38 — —Existence of better indemnification in other party's contract
§ 19:39 —Effective allocations
§ 19:40 — —"As-is" clauses
§ 19:41 — —Liability under law not in existence
§ 19:42 — —Damages not specified
§ 19:43 — —Releases of indemnification agreements
§ 19:44 — —Like facilities treated differently
§ 19:45 — —Unknown liabilities

Appendix 19-A. Sample Provisions and Drafting Concerns

CHAPTER 20. ALLOCATING RESPONSIBILITIES FOR ENVIRONMENTAL CLEANUP LIABILITIES THROUGH PURCHASE PRICE DISCOUNTS

§ 20:1 The need for an allocation mechanism
§ 20:2 Purchase price discounts
§ 20:3 Using purchase price discounts as a contractual allocation mechanism
§ 20:4 Conclusion

CHAPTER 21. ENVIRONMENTAL, HEALTH, AND SAFETY DUE DILIGENCE DOCUMENTS

§ 21:1 Environmental, health, and safety due diligence documents

CHAPTER 22. INITIAL ENVIRONMENTAL DUE DILIGENCE INFORMATION REQUEST

§ 22:1 Initial environmental due diligence information request

CHAPTER 23. STATE TRANSFER LAWS

§ 23:1 Introduction
§ 23:2 How state transfer laws affect the corporate transactions—Generally
§ 23:3 —Specific state transfer laws—New Jersey

§ 23:4 — — —Subject parties
§ 23:5 — — —Trigger of statute
§ 23:6 — — —General exemptions
§ 23:7 — — —Process
§ 23:8 — — —Violation and penalty provisions
§ 23:9 — — —Other provisions in ISRA
§ 23:10 — —Iowa
§ 23:11 — —Connecticut
§ 23:12 — —Oregon and Indiana
§ 23:13 — —Michigan and California
§ 23:14 — —Ohio
§ 23:15 Brownfields laws
§ 23:16 Conclusion

CHAPTER 24. EMPLOYEE RELATIONS IMPLICATIONS OF ACQUISITIONS AND DIVESTITURES

§ 24:1 Introduction
§ 24:2 Employer status
§ 24:3 —Single employer doctrine
§ 24:4 — —Common ownership
§ 24:5 — —Centralized control of labor relations
§ 24:6 — —Interrelation of operations
§ 24:7 — —Common management
§ 24:8 —Joint employer doctrine
§ 24:9 —Alter ego doctrine
§ 24:10 —Successorship doctrine
§ 24:11 — —Continuity in the workforce
§ 24:12 — —Continuity in business operations
§ 24:13 —Liberalized successor liability under employment statutes
§ 24:14 Employee status
§ 24:15 —Single bargaining unit
§ 24:16 —Accretion
§ 24:17 —Wage-and-hour classifications
§ 24:18 —Independent contractors
§ 24:19 —Borrowed employees
§ 24:20 Labor law obligations—Employment practices
§ 24:21 — —Collective bargaining agreements
§ 24:22 — — —Successors and assigns clauses
§ 24:23 — — —State successorship and severance statutes
§ 24:24 — —Duty to bargain
§ 24:25 — —Discriminatory hiring
§ 24:26 — —Employee pension plans
§ 24:27 — —Employee policies and benefits
§ 24:28 —Disclosure

§ 24:29 —Reduction in force
§ 24:30 — —Worker Adjustment and Retraining Notification Act
§ 24:31 — —Duty to bargain
§ 24:32 —Relocation
§ 24:33 — —WARN Act
§ 24:34 — —Duty to bargain
§ 24:35 Employee noncompetition agreements
§ 24:36 —Independent contractors
§ 24:37 Conclusion

Appendix 24-A. Antitrust Guidelines for Business Activities Affecting Workers (Department of Justice and Federal Trade Commission)—January 2025

Appendix 24-B. Antirust Red Flags for Employment Practices (Federal Trade Commission—2016)

CHAPTER 25. THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

§ 25:1 Introduction
§ 25:2 Covered employers
§ 25:3 —Counting employees
§ 25:4 —Laid-off and on-leave employees
§ 25:5 —Other factors in determining who is an employer
§ 25:6 —Parent companies, subsidiaries, and related entities
§ 25:7 —Lender liability
§ 25:8 —Individuals
§ 25:9 Triggering events
§ 25:10 —Employment losses
§ 25:11 — —Plant closings
§ 25:12 — — —Employer-initiated
§ 25:13 — — —Closure of distinct operating units
§ 25:14 — —Mass layoffs
§ 25:15 — —Counting rules for determining whether a plant closing or mass layoff has occurred
§ 25:16 — — —Only layoffs/terminations at a "single site" of employment are counted
§ 25:17 — — —Only employer-initiated terminations, long-term layoffs, and long-term reductions in hours are counted
§ 25:18 — — —Terminations that are excluded from the count
§ 25:19 — — —The aggregation of all employment losses
§ 25:20 — — —Rehirings
§ 25:21 —Sale or relocation of a business—Sale of a business

§ 25:22 — —Relocation of business
§ 25:23 Notice requirements—Notice to affected employees
§ 25:24 — —Affected part-time employees
§ 25:25 — —Affected employees at other sites
§ 25:26 — —Affected employees already on temporary layoff
§ 25:27 — —Employees who may, but are not certain to, lose their jobs
§ 25:28 —Notice to union representatives
§ 25:29 —Notice to state and local governments
§ 25:30 —Notice contents
§ 25:31 — —Notice to union-represented employees
§ 25:32 — —Notice to unrepresented employees
§ 25:33 — —Notice to state and local government officials
§ 25:34 —Method of delivery
§ 25:35 —Exceptions
§ 25:36 — —Unforeseeable business circumstances exception
§ 25:37 — — —Pandemic
§ 25:38 — —Faltering company exception
§ 25:39 — —Natural disaster exception
§ 25:40 — —Good faith
§ 25:41 — —Notice content regarding the exception
§ 25:42 Standing
§ 25:43 —Voluntary departure
§ 25:44 Jurisdiction
§ 25:45 Right to jury trial
§ 25:46 Class action
§ 25:47 Arbitration
§ 25:48 Penalties—In general
§ 25:49 — —Control and ownership of claim
§ 25:50 — —Calculation of penalty amount
§ 25:51 — —Statute of limitations
§ 25:52 — —Burden of proof
§ 25:53 — —Good faith effort to comply
§ 25:54 —Employee benefits
§ 25:55 —Offsets
§ 25:56 Class action
§ 25:57 Releases
§ 25:58 Arbitration
§ 25:59 Bankruptcy
§ 25:60 —Pursuit of WARN Act claim
§ 25:61 —Priority status of WARN Act claim
§ 25:62 Checklist
§ 25:63 —WARN Act jurisdiction
§ 25:64 —Defining mass layoffs and plant closings—Mass layoffs
§ 25:65 — —Plant closings
§ 25:66 — —Ninety-day rule

§ 25:67 —Employment losses as a result of the sale of a business
§ 25:68 —Notice obligations
§ 25:69 —Exceptions to the WARN Act's notice obligations
§ 25:70 —Contents of WARN Act notices
§ 25:71 —Penalties

Appendix 25-A. Employer's Guide to Advance Notice of Closings and Layoffs

Appendix 25-B. WARN Act COVID-19 Frequently Asked Questions

Appendix 25-C. Fact Sheet—The Worker Adjustment and Retraining Notification Act (Department of Labor)

CHAPTER 26. WITHDRAWAL LIABILITY IN CORPORATE TRANSACTIONS

§ 26:1 Introduction
§ 26:2 Overview of withdrawal liability
§ 26:3 Jurisdiction
§ 26:4 Complete withdrawal liability
§ 26:5 —Employers and common controlled groups
§ 26:6 —Obligation to contribute
§ 26:7 —Cessation of all covered operations
§ 26:8 —Effective date of complete withdrawal
§ 26:9 Partial withdrawal liability—Statutory provisions
§ 26:10 —Effective date of partial withdrawal
§ 26:11 Allocation formulas and relief provisions
§ 26:12 —Complete withdrawal liability—Actuarial assumptions and interest rates
§ 26:13 — —Calculation methods—Presumptive method
§ 26:14 — — —Modified presumptive method
§ 26:15 — — —Rolling-five method
§ 26:16 — — —Direct attribution method and other PBGC-approved methods
§ 26:17 — — —Paradox: Withdrawal liability under fully funded plans?
§ 26:18 — —Underfunded plans
§ 26:19 — —Allocation rules
§ 26:20 — — —*De minimis* rules
§ 26:21 — — —"Free look" rule
§ 26:22 — — —Twenty-year cap
§ 26:23 — — —Sale of assets limitation
§ 26:24 — — — —Evading or avoiding liability
§ 26:25 — — —Insolvent employer rules
§ 26:26 — — —Individual employer exemptions
§ 26:27 —Partial withdrawal liability—Calculation methods

§ 26:28 —Relevant case law
§ 26:29 Termination premium
§ 26:30 Bankruptcy
§ 26:31 Arbitration
§ 26:32 Successor liability
§ 26:33 Conclusion

CHAPTER 27. PARTIAL TERMINATION OF PENSION PLANS IN RIFS

§ 27:1 Introduction
§ 27:2 Statutory framework
§ 27:3 When does a partial termination occur?
§ 27:4 Background of *In re Gulf Pension* litigation
§ 27:5 Vertical partial termination
§ 27:6 —Factors used in calculating the number or percentage
§ 27:7 — —Vested versus nonvested employees
§ 27:8 — —Transfer to successor employer
§ 27:9 — —Turnover rate
§ 27:10 — —Relevant time period
§ 27:11 —Significant corporate event
§ 27:12 —Determining whether percentage is "significant"
§ 27:13 Horizontal partial termination
§ 27:14 Remedies for partial termination

CHAPTER 28. FIFTEENTH ANNUAL NATIONAL INSTITUTE ON EMPLOYEE BENEFITS IN MERGERS AND ACQUISITIONS

§ 28:1 Hidden plan assets and liabilities in mergers and acquisitions *Speaker: Thomas A. Jorgensen, Calfee, Halter & Griswold, Cleveland, Ohio*
§ 28:2 —Defined benefit pension plans
§ 28:3 —Nonqualified deferred compensation plans
§ 28:4 —Union contracts
§ 28:5 —Retiree medical and life insurance benefits
§ 28:6 —Severance benefits
§ 28:7 —Plan defects
§ 28:8 —COBRA benefits
§ 28:9 —Techniques for dealing with benefit plans
§ 28:10 Spotting hazards for qualified plan design and administration *Speakers: Pamela C. Scott, Towers Perrin, Valhalla, New York; Alan Tawshunsky, IRS, Washington, D.C.*
§ 28:11 —Same desk rule and Revenue Ruling 2000-27

§ 28:12 —Final § 411(d)(6) regulations
§ 28:13 Defined benefit plans *Speaker: Nell Hennessy, Aon Consulting, Washington, D.C.*
§ 28:14 Nondiscrimination testing and deduction issues relating to § 401(k) plans *Speaker: Taina Edlund, Deloitte & Touche LLP, New York, New York*—Nondiscrimination testing
§ 28:15 —Deduction issues
§ 28:16 Correcting defined contribution plan defects *Speaker: Seth Tievsky, Ernst & Young LLP, Washington, D.C.*
§ 28:17 Fiduciary duty concerns *Speaker: Thomas Hoecker, Snell & Wilmer, LLP, Phoenix, Arizona*
§ 28:18 Employee stock ownership plans *Speaker: Roger C. Siske, Sonnenschein Nath & Rosenthal, Chicago, Illinois*
§ 28:19 Union-negotiated plans *Speaker: Susan Katz Hoffman, Pepper Hamilton LLP, Philadelphia, Pennsylvania*
§ 28:20 Joint ventures *Speaker: Susan P. Serota, Pillsbury Winthrop, LLP, New York, New York*
§ 28:21 Issues relating to representations, warranties, and covenants *Speaker: T. David Cowart, Jenkens & Gilchrist, Dallas, Texas*—Overview
§ 28:22 —Panel discussion *Speakers: T. David Cowart, Nell Hennessy, Susan Katz Hoffman*
§ 28:23 Window and severance pay arrangements *Speaker: Priscilla Ryan, Sidley & Austin, Chicago, Illinois*
§ 28:24 Welfare benefit plan issues *Speaker: Diane J. Fuchs, Womble, Carlyle, Sandridge & Rice, PLLC, Washington, D.C.*
§ 28:25 Panel discussion of severance and COBRA issues *Speakers: Diane J. Fuchs, Priscilla Ryan, Alan Tawshunsky*
§ 28:26 Executive compensation issues *Speaker: Pamela Baker, Sonnenschein Nath & Rosenthal, Chicago, Illinois*
§ 28:27 Accounting issues *Speaker: Alan A. Nadel, Arthur Andersen, LLP, New York, New York*
§ 28:28 Panel discussion of executive compensation *Speakers: Pamela Baker, Alan A. Nadel, Susan P. Serota, Roger C. Siske*

Volume 3

CHAPTER 29. HEALTH AND WELFARE PLAN ISSUES (OTHER THAN SEVERANCE) IN MERGERS AND ACQUISITIONS

§ 29:1 Introduction

§ 29:2 Effective negotiation: A matter of due diligence—The purchase agreement
§ 29:3 —Concerns for buyers—Identification and assessment of liabilities
§ 29:4 — —Disclosures
§ 29:5 — —Determinations
§ 29:6 — —Special concerns
§ 29:7 —Concerns for sellers
§ 29:8 — —Special concerns
§ 29:9 —Concerns for buyers and sellers—Affected employees
§ 29:10 — —Types of welfare benefit plan liabilities
§ 29:11 — — —Accrued amounts
§ 29:12 — — —Claims incurred but unpaid prior to closing
§ 29:13 — — —Accrued portion of postretirement benefits
§ 29:14 — — —Latent conditions including occupational diseases
§ 29:15 — —HIPAA privacy and security compliance
§ 29:16 COBRA continuation coverage: Allocating responsibility in mergers and acquisitions
§ 29:17 —COBRA: General requirements
§ 29:18 — —Applicability
§ 29:19 — — —Group health plan
§ 29:20 — — —Small employers (fewer than 20) in an M and A situation
§ 29:21 — — —Giddens v. University Yacht Club Inc.
§ 29:22 — —COBRA eligibility—Qualified beneficiaries
§ 29:23 — — —Qualifying events
§ 29:24 — —Election—Occurrence of qualifying event
§ 29:25 — — —Election period
§ 29:26 — — —Federal health coverage tax credit
§ 29:27 — —Duration of COBRA coverage
§ 29:28 —Required COBRA notices
§ 29:29 — —General notice of COBRA rights
§ 29:30 — —Qualifying event notices
§ 29:31 — —Election notice
§ 29:32 — —Unavailability notice
§ 29:33 — —Early termination notice
§ 29:34 —Premium subsidy resulting from 2009 Economic Stimulus Bill
§ 29:35 — —COBRA premium subsidy
§ 29:36 — —Second chance to elect COBRA
§ 29:37 — —New notices required
§ 29:38 — —Amount of the subsidy
§ 29:39 — —Payroll tax credit
§ 29:40 — —Entities entitled to be reimbursed for the subsidy

§ 29:41 — —Employees eligible for the subsidy
§ 29:42 — —Electing a different coverage option
§ 29:43 — —Other continuation coverage
§ 29:44 — —Implications for employers
§ 29:45 —Two-month extension to COBRA subsidy
§ 29:46 — —Extended expiration date
§ 29:47 — —Extended COBRA subsidy period
§ 29:48 — —Retroactive COBRA elections
§ 29:49 — —Rebate for COBRA premiums
§ 29:50 — —New notice requirements
§ 29:51 — —Clarification regarding timing of eligibility
§ 29:52 —COBRA in corporate reorganizations: Background—Final regulations
§ 29:53 — —Guidance
§ 29:54 — —Cases
§ 29:55 — —Noncorporate entities
§ 29:56 — —Effective dates
§ 29:57 —COBRA in corporate reorganizations: Qualifying events
§ 29:58 —COBRA in corporate reorganizations: Allocation of COBRA obligations—General rule
§ 29:59 — —Default rule
§ 29:60 — —If no group health plan provided
§ 29:61 — —Multiple buyers
§ 29:62 — —Selling group qualified beneficiaries
§ 29:63 — —Indemnification
§ 29:64 —COBRA regulatory definitions applicable to business reorganizations—Covered business reorganizations: Stock and asset sales—Stock sales
§ 29:65 — — —Asset sales
§ 29:66 — — —Identification of the "selling group" and the "buying group"—Stock sale
§ 29:67 — — — —Asset sale
§ 29:68 — —The "M&A qualified beneficiary"
§ 29:69 — —Determining whether a sale is a qualifying event—Stock sale
§ 29:70 — — —Asset sale
§ 29:71 —Case law
§ 29:72 —Interaction of COBRA and FMLA—Qualifying events
§ 29:73 — —Calculation of maximum coverage
§ 29:74 — —Effect of state and local law
§ 29:75 — —Cost of complying with the information collection requirements of FMLA
§ 29:76 —USERRA health care continuation coverage
§ 29:77 —National Defense Authorization Act
§ 29:78 —Michelle's law

§ 29:79 Retiree benefit liabilities
§ 29:80 —Modification and termination of retiree benefits—Retiree claims
§ 29:81 — —Retiree benefits
§ 29:82 —Separate account rule and unrelated business income
§ 29:83 —Allocation of responsibility among the parties
§ 29:84 —Erie county case and implications—Facts
§ 29:85 — —EEOC reaction
§ 29:86 — —Medicare legislation
§ 29:87 — —General Dynamics Land Systems v. Cline
§ 29:88 —Medicare prescription drug benefit
§ 29:89 Plan disclosures and claims procedures
§ 29:90 —Summary plan descriptions—Background
§ 29:91 — —Effective dates
§ 29:92 — —General requirements
§ 29:93 — —Claims procedures
§ 29:94 — —Specific group health plan requirements
§ 29:95 — —COBRA provisions
§ 29:96 — —Insurer financing
§ 29:97 — —Maternity and newborn coverage
§ 29:98 — —ERISA rights statement
§ 29:99 —Summary of material modifications—General rule
§ 29:100 — —Additional requirement for group health plans
§ 29:101 — —Federally qualified HMOs
§ 29:102 —Claims procedures regulations—Background
§ 29:103 — —Effective dates
§ 29:104 — —"Reasonable" claims procedures
§ 29:105 — — —Claim for benefits
§ 29:106 — — —Additional requirements for group health plans
§ 29:107 — — — —Definitions—Claim involving urgent care
§ 29:108 — — — — —Claim for benefits
§ 29:109 — — — — —Preservice claim
§ 29:110 — — — — —Postservice claim
§ 29:111 — — —Additional requirements for disability benefit plans
§ 29:112 — —Consequences of failure to establish and follow reasonable claims procedures
§ 29:113 — —Timing of notification of benefit determinations
§ 29:114 — — —Extensions of time
§ 29:115 — — —Special rules for group health plans
§ 29:116 — — — —Urgent care claims
§ 29:117 — — — — —Notification
§ 29:118 — — — —Concurrent care decisions
§ 29:119 — — — —Preservice claims
§ 29:120 — — — —Postservice claims

§ 29:121 — — —Disability claims
§ 29:122 — —Appeal of adverse benefit determinations
§ 29:123 — — —Full and fair review
§ 29:124 — — —Additional appeal requirements for group health plans
§ 29:125 — — —Additional appeal requirements for disability benefit plans
§ 29:126 — —Timing of notice of benefit determination on review
§ 29:127 — — —Extension of time
§ 29:128 — — —Special requirements for group health plans
§ 29:129 — — — —Urgent care claims
§ 29:130 — — — —Preservice claims
§ 29:131 — — — —Postservice claims
§ 29:132 — — —Special requirements for disability claims
§ 29:133 — — —Multiemployer plan exception
§ 29:134 — —Preemption of state law
§ 29:135 — — —Litigation: Rush Prudential HMO, Inc. v. Moran
§ 29:136 — —Enforceability of plan reimbursement provisions
§ 29:137 — —Plan administrator has dual roles as both evaluator and payor of claims
§ 29:138 Electronic communications: Disclosure, record keeping and transaction standards
§ 29:139 —Use of electronic communication and record keeping technologies by employee pension and welfare benefit plans—Background
§ 29:140 — —General rule
§ 29:141 — —Participants eligible to receive electronic disclosures
§ 29:142 — —Record keeping
§ 29:143 —HIPAA: Standards for electronic transactions—Background
§ 29:144 — —Effective dates
§ 29:145 — —Effects on plan sponsors
§ 29:146 —HIPAA: Standards for security of electronic protected health information
§ 29:147 The Health Insurance Portability and Accountability Act of 1996 (HIPAA)
§ 29:148 —Background
§ 29:149 —Restrictions on preexisting condition exclusions—Preexisting condition exclusion
§ 29:150 — —Limits on preexisting condition exclusion periods
§ 29:151 — — —Late enrollees
§ 29:152 — — —Enrollment date
§ 29:153 — — —Waiting period

§ 29:154 — —Required notices—First notice of preexisting condition exclusion—General notice
§ 29:155 — — —Second notice of preexisting condition exclusion—Individual notice
§ 29:156 — —Reduction of exclusion periods
§ 29:157 — — —Periods of creditable coverage
§ 29:158 — — —Excepted benefits
§ 29:159 — — —Significant breaks in coverage
§ 29:160 — — —Prohibitions on preexisting condition exclusions
§ 29:161 — — —Certificates of creditable coverage—Timing
§ 29:162 — — — —Content
§ 29:163 — — — —Methods of calculating creditable coverage—Standard method
§ 29:164 — — — —Election of alternative method
§ 29:165 — — — — —Required notice
§ 29:166 —Special enrollment rights
§ 29:167 — —Notice of special enrollment
§ 29:168 — —SCHIP special enrollment rights
§ 29:169 — — —Premium assistance subsidy
§ 29:170 — — —Additional special enrollment rights
§ 29:171 — — —Notice to employees
§ 29:172 — — —Disclosure to states
§ 29:173 — — —Penalty for noncompliance
§ 29:174 —Nondiscrimination: Prohibiting discrimination based on health status—Background
§ 29:175 — —Effective date
§ 29:176 — —General requirements and applicability
§ 29:177 — — —Rules for eligibility
§ 29:178 — — —Uniform benefits: Treatment of similarly situated individuals
§ 29:179 — —Discrimination based on health factors
§ 29:180 — —Bona fide wellness programs
§ 29:181 — —Nonconfinement provisions
§ 29:182 — —Actively-at-work provisions
§ 29:183 — —Health Reimbursement Arrangements (HRAs)
§ 29:184 — —Source of injury rule
§ 29:185 —Benefits excluded from HIPAA requirements
§ 29:186 —HIPAA: Standards for privacy of individually identifiable health information—Background
§ 29:187 — —Effective dates
§ 29:188 — —Purpose
§ 29:189 — —Applicability
§ 29:190 — —General rule
§ 29:191 — —Protected information
§ 29:192 — —Obligations imposed on covered entities
§ 29:193 — —Permitted disclosures

§ 29:194 — —Employer health plans—Self-insured plans
§ 29:195 — — —Fully insured plans
§ 29:196 — —Special rules involving changes of legal ownership
§ 29:197 —HIPAA: Standards for security of electronic protected health information—Background
§ 29:198 — —Applicability
§ 29:199 — —Compliance dates
§ 29:200 — —General rule
§ 29:201 — —Security safeguards
§ 29:202 — —Employer health plan action steps
§ 29:203 — —Off-site use and remote access of ePHI
§ 29:204 — —Administration and enforcement
§ 29:205 —HIPAA: Civil penalties and complaints
§ 29:206 —National Provider Identifier (NPI)
§ 29:207 —Enhanced HIPAA privacy compliance and enforcement Web site
§ 29:208 —Health Information Technology for Economic and Clinical Health Act ("HITECH")
§ 29:209 — —Guidance
§ 29:210 — — —Data states and methods
§ 29:211 — — —Encryption
§ 29:212 — — —Destruction
§ 29:213 — — —Effective date
§ 29:214 — —Interim final regulations
§ 29:215 — — —Effective date
§ 29:216 — — —Securing PHI
§ 29:217 — — —Definition of breach
§ 29:218 — — —Breach notification
§ 29:219 — — —FTC rule applicable to noncovered entities
§ 29:220 Mental Health Parity Act of 1996
§ 29:221 —General requirements
§ 29:222 — —Aggregate limits
§ 29:223 — —Definitions
§ 29:224 — — —Aggregate lifetime limit
§ 29:225 — — —Annual limit
§ 29:226 — — — —Medical/surgical benefits
§ 29:227 — — — —Mental health benefits
§ 29:228 — — —Making the 1/3-2/3 determination
§ 29:229 — —Other plans
§ 29:230 — —Applicability—Group health plans
§ 29:231 — — — —Separate benefit packages
§ 29:232 — — —Health insurance issuers
§ 29:233 — —Exemptions—Small employers
§ 29:234 — — —Increased cost
§ 29:235 — —Required notices and disclosures regarding the increased cost exemption—Notice

§ 29:236 — — —Disclosure
§ 29:237 —Sunset date extension
§ 29:238 —Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008
§ 29:239 — —Interim final regulations
§ 29:240 — — —Aggregate lifetime and annual limits
§ 29:241 — — —Financial requirements and treatment limitations
§ 29:242 — — —Nonquantitative treatment limitations
§ 29:243 — — —Independent standards
§ 29:244 — — —Provision of benefits
§ 29:245 — — —Cost exemption
§ 29:246 — — —Insurers
§ 29:247 — — —Special parity rule applies to prescription drug programs
§ 29:248 — — —Applicability date
§ 29:249 Qualified medical child support orders
§ 29:250 —Generally
§ 29:251 —Required notice
§ 29:252 —National medical support notice
§ 29:253 —Compliance guide
§ 29:254 Newborns' and Mothers' Health Protection Act
§ 29:255 —General
§ 29:256 —Prohibitions
§ 29:257 —Exceptions and limitations
§ 29:258 —Notice requirements
§ 29:259 —Final regulations
§ 29:260 Women's Health and Cancer Rights Act of 1998
§ 29:261 —Coverage
§ 29:262 —Notice requirements—Contents
§ 29:263 — —Form and timing of notice
§ 29:264 — —Additional one-time notice
§ 29:265 — —Proposed legislation
§ 29:266 Cafeteria plans
§ 29:267 —Permitted election changes
§ 29:268 —Treatment of flexible spending accounts in the asset sales
§ 29:269 — —Fact patterns—Coverage continues under seller's FSA; Salary reduction continues under buyer's cafeteria plan
§ 29:270 — — —Coverage and salary reductions continue under buyer's plan
§ 29:271 — — —Analysis
§ 29:272 — —Observations
§ 29:273 —Automatic enrollment: Revenue Ruling 2002-27
§ 29:274 — —Fact patterns—Situation 1
§ 29:275 — — —Situation 2

§ 29:276 — — —Analysis
§ 29:277 —Suspension of Form 5500 filing requirements
§ 29:278 —2½ month grace period for flexible spending accounts
§ 29:279 —Guidance on electronic payment cards
§ 29:280 —Final regulations on dependent care expenses
§ 29:281 —Proposed cafeteria plan regulations
§ 29:282 —Amounts paid for diagnostic procedures and devices: Revenue Ruling 2007-72
§ 29:283 —Diet foods, meal replacements and dietary supplements
§ 29:284 —Preemption of state law
§ 29:285 —IRS information letters regarding medical care expenses
§ 29:286 —HEART Act FSA provisions
§ 29:287 Welfare fund arrangements
§ 29:288 —Welfare benefit fund tax rules—Limits on deductions
§ 29:289 — — —Welfare benefit fund
§ 29:290 — — —Qualified cost
§ 29:291 — — —Qualified direct cost
§ 29:292 — — —Qualified asset account
§ 29:293 — —Account limits
§ 29:294 — — —Exceptions
§ 29:295 — —Ten or more employer plans
§ 29:296 — —Collectively bargained welfare plans
§ 29:297 —Multiple employer welfare arrangements
§ 29:298 Genetic Information Nondiscrimination Act
§ 29:299 —General
§ 29:300 —Prohibitions
§ 29:301 —Exceptions
§ 29:302 —Confidentiality
§ 29:303 —Penalties for noncompliance
§ 29:304 —Interim final regulations
§ 29:305 — —Underwriting and impact on health risk assessments
§ 29:306 — —Medically appropriate determinations
§ 29:307 — —Collecting information prior to or in connection with enrollment
§ 29:308 — —Effective date
§ 29:309 — —HIPAA privacy proposed regulations
§ 29:310 Other issues—Corporate-Owned Life Insurance Policies (COLI)
§ 29:311 —Abusive use of life insurance and annuity contracts
§ 29:312 —Voluntary insurance arrangements
§ 29:313 —Consumer-Driven Health Plans (CDHPs)—Flexible Spending Arrangements (FSAs)

§ 29:314 — —Health Reimbursement Arrangements (HRAs)
§ 29:315 — —Health Savings Accounts (HSAs)
§ 29:316 — —Substantiation provisions
§ 29:317 — —COBRA continuation coverage
§ 29:318 —Definition of dependent
§ 29:319 —Domestic partner benefits
§ 29:320 —Association health plans
§ 29:321 —Applicability of new Code Section 409A to welfare benefit plans
§ 29:322 — —Discriminatory arrangements under Code Section 105(h)
§ 29:323 — —Special provisions for health plans under the final regulations
§ 29:324 — — —COBRA exemption
§ 29:325 — — —Special compliance rule
§ 29:326 — — —Payments of premiums on an after-tax basis
§ 29:327 —"Pay or play" legislation
§ 29:328 — —Maryland Fair Share Act
§ 29:329 — —Suffolk County, New York law
§ 29:330 — —Massachusetts Affordability Act
§ 29:331 — —San Francisco's employer health spending mandate
§ 29:332 —Mandatory medicare reporting
§ 29:333 —Bicycle commuting benefit
§ 29:334 —Excise tax reporting
§ 29:335 Health and welfare plan general due diligence document checklist

CHAPTER 30. DISCLOSURE OF MERGER NEGOTIATIONS

§ 30:1 Introduction
§ 30:2 Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 requirements
§ 30:3 Materiality
§ 30:4 Developments after *Basic, Inc. v. Levinson*
§ 30:5 —Private Securities Litigation Reform Act of 1995
§ 30:6 —Duty to disclose information
§ 30:7 —When the duty to disclose arises
§ 30:8 —Duty to update or correct prior statements
§ 30:9 —Reliance, causation, and materiality
§ 30:10 —"Forward-looking statements" and progress reports
§ 30:11 Contractual obligations
§ 30:12 Fraud
§ 30:13 Duty to disclose in connection with certain stock transactions
§ 30:14 —Issuance of new shares

§ 30:15 —Sale of shares in employee benefit plans
§ 30:16 —Right of first offer
§ 30:17 —Purchase of shares by the company
§ 30:18 SEC rules and regulations on disclosure of merger information—Rules
§ 30:19 — —Rule 165
§ 30:20 — —Rule 166
§ 30:21 — —Rule 425
§ 30:22 —Regulations
§ 30:23 Managing premature disclosure
Appendix 30-A. SEC Disclosure Rules

CHAPTER 31. CORPORATE COUNSEL'S PRIMER ON SEC RULE 145

§ 31:1 Introduction
§ 31:2 Rejection of the no-sale theory
§ 31:3 Transactions constituting sales
§ 31:4 —Reclassifications
§ 31:5 —Transfers of assets
§ 31:6 Transactions excluded from rule—Exempt transactions
§ 31:7 —Safe harbor
§ 31:8 —Change in domicile
§ 31:9 — —Application
§ 31:10 — —Extension
§ 31:11 Registration
§ 31:12 Resale restrictions
§ 31:13 —Sales by underwriters
§ 31:14 —Private sale
§ 31:15 —Nonregistered securities
§ 31:16 SEC rules governing mergers
Appendix 31-A. Text of Rule 145
Appendix 31-B. Form S-4 Registration Statement under the Securities Act of 1933

Bibliography

CHAPTER 32. CHECKLIST FOR PREPARATION OF REGISTRATION STATEMENT FOR MERGER OF TARGET WITH AND INTO ACQUIROR

§ 32:1 Checklist for preparation of registration statement for merger of target with and into acquiror

CHAPTER 33. SEVERANCE PAY PLANS

§ 33:1 Introduction

§ 33:2 Employee Retirement Income Security Act and the regulations
§ 33:3 Establishment of a plan—Absence of a written policy
§ 33:4 —Internal policy statements
§ 33:5 —Corporate contracts
§ 33:6 —Ongoing administrative scheme
§ 33:7 Termination or amendment of a severance plan before a reduction in force—Fiduciary duty
§ 33:8 —Employee Retirement Income Security Act notification and disclosure issues
§ 33:9 Interpreting plan language
§ 33:10 Denial of benefits
§ 33:11 Discrimination in severance pay
§ 33:12 Conclusion

Appendix 33-A. Sample Severance Pay Policies

CHAPTER 34. DISAPPOINTED BIDDER LITIGATION

§ 34:1 Introduction
§ 34:2 Contract rights in failed corporate acquisitions—Types of preliminary agreements and clauses
§ 34:3 — —Memoranda of agreement/understanding
§ 34:4 — — —The law of agency: Authority
§ 34:5 — — —Do you want a legally enforceable contract at this point?
§ 34:6 — — —"Subject to legal approval" clauses
§ 34:7 — — —"Subject to management approval" clauses
§ 34:8 — — —Minutes of meetings
§ 34:9 — —Standstill agreements
§ 34:10 — —Letters of intent
§ 34:11 — —Letters of confirmation
§ 34:12 —How courts approach preliminary agreements
§ 34:13 Tort remedies
§ 34:14 —Tortious interference
§ 34:15 — —With contract
§ 34:16 — — —Interference by third party
§ 34:17 — — —Actual breach
§ 34:18 — — —Knowledge of contract
§ 34:19 — — —Liability where no breach results from defendant's conduct
§ 34:20 — — —Contracts terminable at will
§ 34:21 — —With prospective business relations
§ 34:22 — — —Protected business expectations
§ 34:23 — — —Wrongful conduct by defendant
§ 34:24 —Fraud
§ 34:25 —Misrepresentation

§ 34:26 Aiding and abetting breach of fiduciary duty
§ 34:27 Antitrust claims
§ 34:28 Recovery of expenses
§ 34:29 Standing
§ 34:30 Jury trial
§ 34:31 Bankruptcy

CHAPTER 35. THE LEVERAGED BUYOUT AS A FRAUDULENT CONVEYANCE

§ 35:1 Introduction
§ 35:2 Applicable law—Statutes
§ 35:3 — —UFCA
§ 35:4 — —Text—Section 548 of the Bankruptcy Code
§ 35:5 — — —UFTA
§ 35:6 — —Comparisons of the fraudulent conveyance laws
§ 35:7 —Negligence and tort theories
§ 35:8 Form of transaction
§ 35:9 —Intercorporate guaranties
§ 35:10 —Dividends or corporate distributions
§ 35:11 —Collapsing separate transactions
§ 35:12 Elements of LBO challenges—Lack of good faith
§ 35:13 —Fair consideration
§ 35:14 —Financial condition following transfer
§ 35:15 —Foreseeability
§ 35:16 The duration of the transaction
§ 35:17 Creditor status
§ 35:18 Recovery against nonprincipal figures in the LBO
§ 35:19 Disposition of claim in bankruptcy
§ 35:20 Solvency letters
§ 35:21 Conclusion

CHAPTER 36. ARTICLE 6: THE BULK SALES ACT

§ 36:1 Introduction
§ 36:2 Bulk sales law: Three alternatives
§ 36:3 Former Article 6—The definitions in the former law
§ 36:4 — —Which transactions are subject to the law?—Transfer of assets requirement
§ 36:5 — — —Transfer in settlement or realization of lien or security interest is not within the Bulk Sales Act
§ 36:6 — — —Sales from inventory/stock requirement
§ 36:7 — —Construing the terms of the definition
§ 36:8 —Exceptions where compliance is not required
§ 36:9 —The substantive rule: Notification
§ 36:10 — —Compiling a list of creditors
§ 36:11 — —Notifying the creditors

§ 36:12 — —Notice compliance may not insulate buyer from related fraud claims
§ 36:13 — —Waiver of notice requirements may preclude status as good faith transferee under Bankruptcy Code
§ 36:14 —Statute of limitations
§ 36:15 —Waiver by acceptance of payment
§ 36:16 —Buyer's duty to see that creditors are paid (optional)
§ 36:17 —The tax law
§ 36:18 —Recovery
§ 36:19 Revised Article 6
§ 36:20 —The definitions in the revised law
§ 36:21 —Exceptions where compliance is not required
§ 36:22 —The substantive rule: Notification
§ 36:23 —Transferee's duty to see that creditors are paid
§ 36:24 —Liability for failure to comply
§ 36:25 —Statute of limitations
§ 36:26 Practical Application of the Bulk Sales Act—The Bulk Sales Act in practice—Agreements to waive application
§ 36:27 — —Difficulty in application
§ 36:28 Practical application of the Bulk Sales Act—The Bulk Sales Act in practice—Failure of the Bulk Sales Act remedy
§ 36:29 —When should the bulk sales law be used?
§ 36:30 Other sources requiring notification of bulk sales
§ 36:31 —Common law
§ 36:32 —Tax statutes

CHAPTER 37. MODEL ASSET PURCHASE AGREEMENT

§ 37:1 Introduction
§ 37:2 Asset purchase agreement

CHAPTER 38. RESTRICTIVE COVENANTS IN THE CONTEXT OF THE SALE OF A BUSINESS

§ 38:1 Restriction connected to the sale of a business
§ 38:2 —Types of contracts
§ 38:3 —Sale of a business
§ 38:4 — —Stock purchase agreements
§ 38:5 — —Franchise agreements
§ 38:6 Restrictions connected to the sale of a business—Sale of a business—Transfer of goodwill
§ 38:7 —Sale of business—Joint venture

§ 38:8 Enforceability
§ 38:9 —Choice of law
§ 38:10 —Forum selection clause
§ 38:11 —Party having right to enforce covenant
§ 38:12 —Reasonable
§ 38:13 — —Territorial scope
§ 38:14 — — —Express territorial restrictions
§ 38:15 — — —Statutorily prescribed area
§ 38:16 — — —Failure to provide territorial restrictions
§ 38:17 — —Duration
§ 38:18 — —Activities prohibited
§ 38:19 — — —Similar business activities
§ 38:20 — — —Advertising or soliciting
§ 38:21 — — —Recruiting employees
§ 38:22 —Public policy
§ 38:23 —Integrated transactions
§ 38:24 —Party to be bound
§ 38:25 Injunctive relief
§ 38:26 Modification
§ 38:27 —Divisibility
§ 38:28 —Vagueness
§ 38:29 Third parties
§ 38:30 —Nonowning and nonsigning party
§ 38:31 — —Covenantor not involved in competing business
§ 38:32 — —Interest in business
§ 38:33 — —Seller's employees
§ 38:34 —Signing but nonowning party
§ 38:35 —Nonsigning but owning party—Agent
§ 38:36 — —Corporate officer
§ 38:37 Termination
§ 38:38 Antitrust considerations
§ 38:39 Abandonment
§ 38:40 Sample restrictive covenants
§ 38:41 —Seller's covenant not to compete: General form
§ 38:42 —Seller's covenant not to compete—Another general form
§ 38:43 —Competition within neighborhood restricted
§ 38:44 —Competition permitted in part of restricted area
§ 38:45 —Competition restricted regarding certain products only

Appendix 38-A. State Laws on Restrictive Covenants

Appendix 38-B. Non-Compete Agreement

Bibliography

CHAPTER 39. AN INTRODUCTION TO TAX-FREE DISTRIBUTIONS (INCLUDING SPIN-OFFS, SPLIT-OFFS, AND SPLIT-UPS) UNDER § 355 OF THE INTERNAL REVENUE CODE

§ 39:1 Introduction and overview
§ 39:2 Tax-free distributions
§ 39:3 Reorganization of ownership
§ 39:4 —Types of transactions
§ 39:5 — —Spin-off
§ 39:6 — — —Pure
§ 39:7 — — —Reorganized ("D"/355)
§ 39:8 — —Split-off
§ 39:9 — —Split-up
§ 39:10 —Continuity of interests
§ 39:11 Requirements
§ 39:12 —Distribution of stock or securities
§ 39:13 —Device for distributing earnings
§ 39:14 — —Device factors
§ 39:15 — — —Pro rata distribution
§ 39:16 — — —Subsequent sale or exchange of stock
§ 39:17 — — —Nature and use of assets
§ 39:18 — — —Related function
§ 39:19 — —Nondevice factors
§ 39:20 — — —Corporate business purpose
§ 39:21 — — —Distributions by publicly traded, widely held corporations
§ 39:22 — — —Distributions to domestic corporate shareholders
§ 39:23 — —Nondevice transactions
§ 39:24 — —Examples
§ 39:25 —Active businesses
§ 39:26 — —Trade or business
§ 39:27 — —Active conduct
§ 39:28 — —Five-year threshold
§ 39:29 — —Examples
§ 39:30 —Relinquish control
§ 39:31 Limitations
§ 39:32 —Acquisition of stock
§ 39:33 —Excess principal
§ 39:34 —Acquisitions
§ 39:35 — —Part of a plan
§ 39:36 — —Successor or predecessor
§ 39:37 —Disqualified distribution
§ 39:38 Reporting requirements
§ 39:39 Third-party review

§ 39:40 State tax laws
§ 39:41 Conclusion

Appendix 39-A. Material U.S. Federal Income Tax Consequences of the Spin-Off of Vitesse Energy, Inc. by Jefferies Financial Group Inc.

Appendix 39-B. Material U.S. Federal Income Tax Consequences of the Spin-Off of MasterBrand, Inc. by Fortune Brands Home & Security, Inc.

Appendix 39-C. Section 355 Checklist Questionnaire Contents

CHAPTER 40. INTRODUCTION TO SPIN-OFFS

§ 40:1 Definition
§ 40:2 —Dividend
§ 40:3 —Transfer of assets
§ 40:4 —Not a sale of securities
§ 40:5 Description
§ 40:6 Types of transactions
§ 40:7 —Spin-off
§ 40:8 — —Pure
§ 40:9 — —Reorganized ("D"/355)
§ 40:10 —Split-off
§ 40:11 —Split-up
§ 40:12 Reasons for a spin-off
§ 40:13 —ConocoPhillips/Phillips 66
§ 40:14 —Lucent Technologies Inc./Avaya Inc
§ 40:15 —Fluor Corporation/Massey Energy Company
§ 40:16 Reasons for spin-off—Dean Foods Company/ TreeHouse Foods, Inc
§ 40:17 —Sara Lee Corporation/Hanesbrands Inc
§ 40:18 Structure of transaction
§ 40:19 —Multiple agreements
§ 40:20 —Shareholder information
§ 40:21 — —Proxy material and prospectus
§ 40:22 — —Information statement
§ 40:23 —Distribution of shares
§ 40:24 — —Set terms
§ 40:25 — —Transfer of ownership
§ 40:26 — —Retention of shares by parent
§ 40:27 —Initial public offering
§ 40:28 —Transfer of assets
§ 40:29 Risks
§ 40:30 —Risks created by the transaction
§ 40:31 — —Revocation of tax-free status

§ 40:32 — —Shareholder litigation
§ 40:33 — — —Breach of duties
§ 40:34 — — —Corporate waste
§ 40:35 — — —Fraudulent transfers
§ 40:36 — — —Breach of contract
§ 40:37 — — —Securities fraud
§ 40:38 — — —Violation of fiduciary duties
§ 40:39 —Risks to the subsidiary
§ 40:40 — —Financial information
§ 40:41 — —Conflicts of interest
§ 40:42 — —Relationship with customers
§ 40:43 — —Loss of economies of scale
§ 40:44 — —No existing market for shares
§ 40:45 — —Increased debt
§ 40:46 — —Replacement of corporate services
§ 40:47 — —Limitation on ability to pursue strategic transaction
§ 40:48 — —Sales of distributed shares
§ 40:49 — —Increase in borrowing costs
§ 40:50 — —Indemnification obligation to parent
§ 40:51 —Risks to the parent
§ 40:52 — —Fluctuation in shareholder base
§ 40:53 — —Loss of key personnel
§ 40:54 Employment benefits issues
§ 40:55 Consultants
§ 40:56 Insurance
§ 40:57 Conclusion

Appendix 40-A. SEC Staff Legal Bulletin No. 4

Appendix 40-B. Revenue Procedure 2024-24 (Internal Revenue Service)

CHAPTER 41. DOCUMENTING A SPIN-OFF

§ 41:1 Introduction
§ 41:2 Illustrative forms—Separation agreement between IAC/Inter ActiveCorp and Expedia, Inc

CHAPTER 42. DRAFTING LEGAL OPINIONS

§ 42:1 Introduction
§ 42:2 Customary practice
§ 42:3 —Applicable law
§ 42:4 —Duty to investigate: Reasonable reliance
§ 42:5 — —Factual issues
§ 42:6 — — —Certificates
§ 42:7 — — —Disclaimers

§ 42:8 — —Opinions of others
§ 42:9 —Limitations in the opinion
§ 42:10 — —Documents reviewed
§ 42:11 — —Assumptions
§ 42:12 — —Exclusions
§ 42:13 — —Qualifications
§ 42:14 Types of opinions—Common "closing" opinions
§ 42:15 — —Corporate status
§ 42:16 — —Stock
§ 42:17 — —Corporate power
§ 42:18 — —Corporate action
§ 42:19 — —No breach or default
§ 42:20 — —No violations of law
§ 42:21 — —Approvals and filings
§ 42:22 — —No litigation
§ 42:23 —Remedies opinion
§ 42:24 —Opinions in specialized contexts
§ 42:25 The legal opinion accord
§ 42:26 Reliance by third parties
§ 42:27 —Statutes of limitation
§ 42:28 —Duty of care
§ 42:29 —Ethical concerns
§ 42:30 —Disclosure of special relationship between attorney and client
§ 42:31 Checklist for drafting legal opinions—Whether to request an opinion
§ 42:32 —The substance of the opinion
§ 42:33 —Liability of the opinion preparer

Appendix 42-A. Sample Opinions

Bibliography

CHAPTER 43. NEGOTIATING THE ACQUISITION OF A "TROUBLED" BUSINESS: BANKRUPTCY AND REORGANIZATION ISSUES

§ 43:1 Introduction
§ 43:2 Acquisitions of a debtor under Chapter 11 of the Bankruptcy Code
§ 43:3 —Asset sales under § 363(b) of the Bankruptcy Code
§ 43:4 — —Requirements for approval
§ 43:5 — —The auction process and breakup fees
§ 43:6 — — —The business judgment test
§ 43:7 — — —The best interests of the estate test
§ 43:8 — — —The balancing of the equities test

§ 43:9 — —Bidders generally lack standing in the Chapter 11 case
§ 43:10 — —Prohibition against collusive bidding
§ 43:11 — —Sale free and clear of all liens, claims, and encumbrances
§ 43:12 — — —Successor liability for environmental claims
§ 43:13 — — —Successor liability under collective bargaining agreements
§ 43:14 — — —Successor liability and the acquisition of health care providers
§ 43:15 —Acquisitions pursuant to a plan of reorganization
§ 43:16 — —The plan of reorganization—Who may propose a plan of reorganization
§ 43:17 — — —Contents of a Chapter 11 plan
§ 43:18 — — —Adequate disclosure
§ 43:19 — — —Requirements for confirmation
§ 43:20 — — —Protection from successor liability for mass tort claims under a plan of reorganization
§ 43:21 — —Purchase of assets pursuant to a Chapter 11 plan
§ 43:22 — —Acquisition of the debtor through the purchase of debt or equity securities
§ 43:23 — — —Purchase of equity securities
§ 43:24 — — —Purchase of debt securities
§ 43:25 — — —Membership on creditors' committee
§ 43:26 General considerations—Funding a Chapter 11 plan
§ 43:27 —Timing
§ 43:28 —Appointment of a trustee, examiner, or mediator
§ 43:29 —Certain tax considerations
§ 43:30 Examples

CHAPTER 44. PURCHASE OF DEBTOR ASSETS THROUGH BANKRUPTCY

§ 44:1 Sale of estate property
§ 44:2 —Statutory mootness (§ 363(m))
§ 44:3 —Jurisdiction
§ 44:4 —Time for filing action
§ 44:5 Plan of reorganization
§ 44:6 Liens and interests
§ 44:7 Executory contracts
§ 44:8 —Assumption
§ 44:9 — —Duty to cure
§ 44:10 — —Timing
§ 44:11 —Assignment
§ 44:12 Collusive bidding
§ 44:13 Breakup fees
§ 44:14 Administrative expenses

§ 44:15 Taxes
§ 44:16 Reclamation claims
§ 44:17 —Administrative status
§ 44:18 The automatic stay
§ 44:19 Successor liability in bankruptcy

Appendix 44-A. Asset Purchase Agreement between Bed Bath Beyond Inc. and Overstock.com, Inc.

Appendix 44-B. Order (I) Approving the Auction and Bidding Procedures, (II) Approving Stalking Horse Bide Protections, (III) Scheduling Bid Deadlines and an Auction, (IV) Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief—Bed Bath & Beyond Inc.

CHAPTER 45. INSURANCE COVERAGE FOR CORPORATE SUCCESSORS

§ 45:1 Introduction
§ 45:2 Successor corporation's ability to use the insurance policies of the acquired corporation to deal with the acquired corporation's liability
§ 45:3 The successor corporation's ability to use its own insurance policies to deal with the acquired corporation's liability
§ 45:4 The successor corporation's ownership of property during the policy period
§ 45:5 Cases denying insurance coverage to successor corporations
§ 45:6 Insurance coverage principles when the successor corporation is vicariously liable for the conduct of the acquired corporation
§ 45:7 Conclusion

CHAPTER 46. EXPORT CONTROL ISSUES IN MERGERS AND ACQUISITIONS

§ 46:1 Introduction
§ 46:2 Summary of the U.S. Export Control Laws
§ 46:3 —The Export Administration Regulations (15 C.F.R. pt. 730 et seq.)—Introduction
§ 46:4 — —Commerce control list
§ 46:5 — —Dual use items
§ 46:6 — —End-use-based controls
§ 46:7 — —Reexports
§ 46:8 — —Software and technology
§ 46:9 — —Regulatory requirements for all exports
§ 46:10 — —Penalties

§ 46:11 — —Enforcement priorities
§ 46:12 —U.S. Sanctions Programs (31 C.F.R. Chapter V)—Introduction
§ 46:13 — —Countries covered
§ 46:14 — —Comprehensive sanctions
§ 46:15 — —Limited sanctions
§ 46:16 — —Extraterritorial application
§ 46:17 — —Entity-based sanctions
§ 46:18 — —Penalties
§ 46:19 —The Arms Export Control Act (International Traffic in Arms Regulations)—Introduction
§ 46:20 — —Regulation of defense articles
§ 46:21 — —U.S. Munitions List
§ 46:22 — —Software and technology
§ 46:23 — —Defense services
§ 46:24 — —Overlap with Export Administration Regulations
§ 46:25 — —Registration as a munitions manufacturer
§ 46:26 —The Arms Export Control Act (International traffic in arms regulations)—Registration as munitions broker
§ 46:27 —The Arms Export Control Act (International Traffic in Arms Regulations)—License certifications
§ 46:28 — —Sanctions
§ 46:29 —Other export statutes
§ 46:30 —Export compliance programs—Compliance systems
§ 46:31 — —Contents of compliance programs
§ 46:32 Export control due diligence review in merger and acquisition transactions
§ 46:33 —Due diligence under the Export Administration Regulations—Commerce control list
§ 46:34 — —Reexports and foreign products based upon U.S.-origin components or technology
§ 46:35 — —Information exports
§ 46:36 — —Foreign employees and deemed exports
§ 46:37 — —Joint venture partners, distributions, subcontractors
§ 46:38 — —End-use and end-user-based controls
§ 46:39 — —End-Use-based prohibited services
§ 46:40 — —Commerce Department sanctions
§ 46:41 — —Denied persons list
§ 46:42 — —Record-keeping requirements
§ 46:43 — —Export clearance procedures
§ 46:44 — —Export due diligence
§ 46:45 — —Export compliance program
§ 46:46 — —Export violations; evidence of violations

§ 46:47 — —High risk countries
§ 46:48 — —Computer system
§ 46:49 —Due diligence under the International Traffic in Arms Regulations—U.S. Munitions List
§ 46:50 — —Reexports and foreign products based upon U.S.-origin components or technology
§ 46:51 — —Exports of technology and software
§ 46:52 — —Foreign employees and deemed exports
§ 46:53 — —Joint venture partners, distributions, subcontractors
§ 46:54 — —Defense services
§ 46:55 — —Registration as munitions manufacturer
§ 46:56 — —Debarred parties list
§ 46:57 — —Record-keeping requirements
§ 46:58 — —Export clearance procedures
§ 46:59 — —Political contributions, fees, and commissions
§ 46:60 — —Brokers
§ 46:61 — —Export due diligence
§ 46:62 — —Export compliance program
§ 46:63 — —Export violations; evidence of violations
§ 46:64 —Due diligence under the U.S. Sanctions Laws—Business with sanctioned countries
§ 46:65 — —Limited sanctions
§ 46:66 — —Specially designated nationals
§ 46:67 —Due diligence under other export statutes
§ 46:68 Executing the transaction
§ 46:69 —Issues under Export Administration Regulations—Acquisition of U.S. target by foreign company
§ 46:70 — —Export licenses for transfers of certain assets to foreign buyers
§ 46:71 — —Export licenses for transfers of certain assets to foreign buyers: Assets outside the United States
§ 46:72 — —Assignment of export licenses
§ 46:73 —Transactions involving Munitions List items—Acquisition of U.S. target by foreign company
§ 46:74 — —Transfer of ITAR export licenses in an acquisition transaction
§ 46:75 — — —Step 1: Notification to Department of State
§ 46:76 — — —Step 2: Second notification to State
§ 46:77 — — —Step 3: Transfer of licenses
§ 46:78 — — —Step 4: Transfer of technical assistance agreements
§ 46:79 —Transactions with parties on the entities lists—Parties on OFAC entities lists
§ 46:80 — —Parties on DOC denied parties list and entity list
§ 46:81 —Transactions with countries subject to U.S. Sanctions Programs

§ 46:82 Post-acquisition issues—Deemed exports: Foreign target company—Post-acquisition integration
§ 46:83 — —Examples of transfers
§ 46:84 —Deemed exports: Foreign company acquiror—Post-acquisition integration
§ 46:85 — —Examples of transfers
§ 46:86 —Termination of business with embargoed countries
§ 46:87 —Adoption of export compliance program
§ 46:88 —Post-closing discovery of an export violation
§ 46:89 If an export violation is discovered
§ 46:90 —Ongoing violations
§ 46:91 — —Cessation of illegal activity
§ 46:92 — —Internal investigation
§ 46:93 — —Reporting of past violations
§ 46:94 — —Voluntary disclosure
§ 46:95 — —Consider action for breach of contract
§ 46:96 — —Compliance program
§ 46:97 —Past violations
§ 46:98 — —Conduct internal investigation
§ 46:99 — —Reporting of past violations
§ 46:100 — —Voluntary disclosure
§ 46:101 — —Consider action for breach of contract
§ 46:102 — —Compliance program

Appendix 46-A. U.S. Export Control Laws

CHAPTER 47. ACQUIRING A GOVERNMENT CONTRACTOR IN TECHNOLOGY-BASED INDUSTRIES: CRITICAL ISSUES FOR THE DUE DILIGENCE REVIEW AND ASSESSMENT OF RISK

§ 47:1 Introduction and overview
§ 47:2 When is a company a government contractor?—Recognizing a "government contract"
§ 47:3 —Subcontractors are subject to federal procurement law requirements
§ 47:4 Government contracts compliance issues—Transfers of government contracts—The anti-assignment statutes
§ 47:5 — —Novation requirements—Applicability
§ 47:6 — — —Procedures
§ 47:7 —Significant government contracts compliance issues
§ 47:8 — —Cost recovery, contract pricing, and accounting issues
§ 47:9 — —Contract pricing issues

§ 47:10 — —Representations and certifications
§ 47:11 — —Other unique elements of government contracts
§ 47:12 Government-related intellectual property issues
§ 47:13 —Patentable inventions
§ 47:14 —Contractor rights in technical data and computer software
§ 47:15 — —DOD rights in technical data
§ 47:16 — —Data rights under the FAR
§ 47:17 —Intellectual property issues raised by CRADAs and co-sponsored research
§ 47:18 Export control issues
§ 47:19 —Export Administration Act/Department of Commerce Export Administration Regulations
§ 47:20 — —Commerce control list/country chart
§ 47:21 — —Licensing
§ 47:22 — —Enforcement
§ 47:23 —Arms Export Control Act/Department of State International Traffic in Arms Regulations
§ 47:24 — —U.S. Munitions List
§ 47:25 — —Registration of manufacturers, exporters, and brokers—Manufacturers and exporters
§ 47:26 — — —Brokers
§ 47:27 — —Licensing requirements
§ 47:28 — — —Defense articles
§ 47:29 — — —Technical data
§ 47:30 — — —Brokering
§ 47:31 — —Manufacturing license agreements and technical assistance agreements
§ 47:32 — —Proposals to foreign persons
§ 47:33 — —Enforcement
§ 47:34 —Laws and regulations administered by OFAC, U.S. Department of the Treasury
§ 47:35 — —Prohibited destinations
§ 47:36 — —Prohibited end users
§ 47:37 —National security issues
§ 47:38 — —Exon-Florio
§ 47:39 — —Restrictions on release of classified information
§ 47:40 — — —DOD Industrial Security Program
§ 47:41 — — —DOE/Nuclear Regulatory Commission restriction on classified contracts
§ 47:42 Drafting considerations
§ 47:43 —Seller's representations and warranties
§ 47:44 — —Scope of seller's representations and warranties
§ 47:45 — — —Compliance with laws and contractual requirements
§ 47:46 — — —Litigation, claims, investigations, and audits
§ 47:47 — — —Intellectual property

§ 47:48 — — —Material contracts
§ 47:49 — —Qualification of seller's representations and warranties
§ 47:50 — —Survival of seller's representations and warranties
§ 47:51 —Covenants of the seller
§ 47:52 —Conditions to closing
§ 47:53 —Indemnities
§ 47:54 Basic government contracts and export controls due diligence document request
§ 47:55 —Government contracts
§ 47:56 —Export controls
§ 47:57 Conclusion

CHAPTER 48. POISON PILLS

§ 48:1 Introduction
§ 48:2 —Purpose
§ 48:3 —Support for rescission
§ 48:4 Definitions—Poison pills and chewable pills
§ 48:5 — —Sample: Chewable pill/permitted offer involving two classes of stock
§ 48:6 — —Sample: Chewable pill/independent board determines exempt offer
§ 48:7 — —Sample: Chewable pill/board evaluates qualifying offer
§ 48:8 — —Form: Sunset provision
§ 48:9 — —Redemption
§ 48:10 —Triggers
§ 48:11 — —Sample: Trigger
§ 48:12 — —Sample: Rights nullified; "acquiring person" defined
§ 48:13 —Flip-in and flip-over provisions
§ 48:14 — —Sample: Flip-in provision
§ 48:15 — —Sample: Flip-over provision
§ 48:16 —Dead hand, slow hand, and no hand provisions
§ 48:17 The law—Delaware cases
§ 48:18 —Drafting hints
§ 48:19 —Other states
§ 48:20 —Obligation to redeem poison pills
§ 48:21 The law—The Investment Company Act of 1940
§ 48:22 Shareholder bylaw amendments
§ 48:23 Securities considerations
§ 48:24 —Filings
§ 48:25 —Inclusion of shareholder bylaw proposals in proxy statements
§ 48:26 —Amendments to bylaws: Filings
§ 48:27 Poison puts

Appendix 48–A. Checklist
Appendix 48–B. Delaware Poison Pill Statutes
Appendix 48-C. Wesco International, Inc. Rights Agreement

Volume 4

APPENDICES

Appendix A. Materials from SEC Filings

Appendix A-1. Equity and Asset Purchase Agreement—Martin Marietta Materials Inc. (2023)
Appendix A-2. Agreement and Plan of Merger—Confluent Inc. (2025)
Appendix A-3. Agreement and Plan of Merger—Caesars Entertainment Inc. (2026)
Appendix A-4. Agreement and Plan of Merger between X Holdings I, Inc., X Holdings II, Inc., and Twitter, Inc. (2022)
Appendix A-5. Agreement and Plan of Merger between Rockwell Automation, Inc. and Plex Systems Holdings, Inc. (2021)
Appendix A-6. Stock and Asset Purchase Agreement—HanesBrands Inc. (2024)
Appendix A-7. Agreement and Plan of Merger—Altair Engineering Inc. (2024)
Appendix A-8. Asset Purchase Agreement between MiX Telematics North America, Inc. and Trimble Inc. (2022)
Appendix A-9. Asset Purchase Agreement between Verb Technology Company, Inc. and SW Direct Sales, LLC (2023)
Appendix A-10. Asset Purchase Agreement—Ascent Industries Co. (2025)
Appendix B. Summaries of Materials from SEC Filings
Appendix C. Illustrative Mergers and Acquisitions Forms

Table of Laws and Rules

Table of Cases

Index