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Stefan Smith has extensive experience in employee benefits and executive compensation law. He works with both public and private entities to establish and ensure the continued compliance of tax-qualified defined contribution and defined benefit retirement plans, including 401(k)/profit sharing plans, traditional defined benefit plans, money purchase plans, employee stock ownership plans, and cash balance plans. In addition, Stefan assists with employee benefit matters arising during mergers and acquisitions and works with all forms of health and welfare plans and executive and equity-based compensation, including incentive and non-qualified stock options, restricted stock awards, stock appreciation rights, employee stock purchase plans, phantom equity, performance unit and bonus plans, SERPs and other excess benefit plans, and non-qualified deferred compensation plans.

Editor’s Note: This is one in a continuing series of Q&As with Locke Lord lawyers on key legal issues confronting companies engaged in industries that have national and global impact.

Impact of Determination Letter Program Depends on Final Guidance From IRS

What impact will the IRS announcement that determination letters will no longer be issued for individually designed retirement plans have on mergers & acquisitions, plan design and plan administration?

SS: Until the IRS releases final guidance on the future of the individually designed determination letter program, it will be difficult to assess what the impact on M&A, plan design and plan administration will be. The IRS may continue to issue limited determination letters under certain circumstances and a certification program may be established allowing sponsors to represent that a good faith effort has been made to comply with plan document requirements.

If, however, the determination letter program is discontinued and no other protection is granted, parties to M&A activity will have to place greater scrutiny on qualified plan document reviews during due diligence, strengthen representations, warranties and indemnification clauses in agreements, and weigh the risk of assuming individually designed plans following closing against the administrative and employee relations issues that may be created by pursuing plan termination. Plan design may be impacted when sponsors assess how customized provisions can be modified in order to better position their plans to fit within the parameters of a pre-approved document, such as a prototype or volume submitter plan, which brings the protection of an IRS opinion letter. The primary impacts on plan administration will be ensuring compliance with future document requirements and managing the annual Form 5500 plan audit process without being able to provide a plan’s independent auditor with a determination letter as evidence of compliance.