

Key Legal Issues in Laboratory Mergers & Acquisitions



Christal L. Contini, Richard S. Cooper | Friday, December 27, 2019

Non-Compete Agreements

There's been a trend toward buyers seeking more comprehensive non-compete agreements for longer durations. For example, non-compete contracts have typically been set to 5-year terms, but we have seen an increase in buyers negotiating for 7-10 year terms. From the seller's perspective, you want to limit the scope as much as possible either to a specific geography and/or a specific type of testing that specifically relates to the business being sold (e.g., clinical, anatomic pathology, genomic testing). In addition, health systems selling their outreach labs need to be mindful of non-compete contract language that might limit their ability to make future acquisitions of physician practices that operate their own labs.

Contingent Payments and Earnouts

Sellers will want to minimize the portion of the purchase price they receive that's contingent on the performance of their lab while under the new owner's control. As a seller, you'll want full payment at the close of the deal. However, contingent payments, or earnouts, based on future performance are useful in situations where a lab is expected to dramatically increase its revenue in the future because of, for example, the recent addition of a new insurance contract or launch of a new testing service. As a seller, you'll want the terms that trigger a contingent payment to be as clear and specific as possible. And you'll want a process for resolving any potential disputes over the calculation of a contingent payment to be included in your deal contract. Finally, you'll want to avoid "all or nothing" contingent payments that are

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based on hitting a single volume, revenue or EBITDA goal. A tiered approach that pays, for example, 80% of the max payment if 80% of the volume or revenue target is met, can mitigate buyer-seller disputes.

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