

Not Done Yet—Employee Benefits Plan Transition and Integration Decisions Continue After M&A Transactions Close

A Practical Guidance® Article by Patrick Rehfield and Carley Clark, Morgan Lewis & Bockius LLP



Patrick Rehfield
Morgan Lewis & Bockius LLP



Carley Clark
Morgan Lewis & Bockius LLP

The letter of intent has been executed. The due diligence is done. The purchase agreement is signed. The money has been wired. The deal has closed. You're done—back to business as usual! *Think again.* For the folks responsible for employee benefits matters, whether it be the CEO, CFO, comptroller, or human resources team, the real work after a merger or acquisition may be just beginning.

In most stock acquisitions (other than a carve-out transaction), the buyer is responsible for integrating the acquired company's employee benefits plans with its own. Even in transactions where the acquired company's employee benefits plans are terminated prior to, or in connection with, the closing, there is still work to be done to wind down the plans.

In asset acquisitions where the buyer does not acquire the seller's employee benefits plans, or in a carve-out transaction where the parent or seller's plans do not transfer to the buyer, the acquired employees need to be transitioned to the buyer's employee benefits plans. This transition is critical for employee retention; it can occur at the closing date or at a

later date if the acquiring company needs more time to effect the transition.

While there are various alternatives and variations to the above structures, including transition service arrangements that may cover acquired employees for a period following closing, we have compiled a high-level list of post-closing integration considerations with a focus on qualified defined contribution retirement plans and health and welfare plans.

Qualified Retirement Plans

- Does the buyer's plan need to be amended to allow rollovers, including the rollover of loan balances?
- Does the buyer's plan need to be amended to include or exclude the acquired employees from participation?
- Are any new plan documents or summary plan descriptions needed?
- Did acquired employees have a termination of employment due to a transaction that resulted in a distributable event? If so, what is the process for administering such distributions and the rollover of such distributions to the buyer's plan?
- Will loan repayments be triggered? Does the loan policy permit the ongoing payment of loans if the buyer's plan does not permit the rollover of loan balances?
- Will there be any changes to plan governance (e.g., plan administration provisions in plan documents, summary plan descriptions, and committee charters)?
- Does the acquired company need to execute a participation agreement? Must the buyer approve the participation of the acquired company?
- If account balances are being transferred from one plan to another, are notices and blackout periods required?

- Do any compliance matters or plan changes identified in the due diligence process need to be addressed?
- Will any service provider agreements need to be terminated, amended, or transferred to the buyer?

Health and Welfare Plans

- Are any new plan documents or summary plan descriptions needed?
- If target company employees become eligible to participate in the buyer's plan, how will enrollment be handled?
- Do any compliance matters or plan changes that were identified in the diligence process need to be addressed?
- Will any service provider agreements need to be terminated, amended, or transferred to the buyer?
- To the extent required by the post-closing covenants in the purchase agreement, have steps been taken to implement and administer the crediting of service for acquired company employees, waive preexisting conditions or eligibility requirements, and/or recognize expenses incurred for the purpose of deductibles and out-of-pocket limits?
- Will the buyer become an applicable large employer (ALE) following the closing as a result of the acquired employees? Will changes need to be made for compliance and reporting under the Affordable Care Act?
- How will any COBRA obligations be handled?

For most mergers and acquisitions, the hardest work—especially for buyers—often begins when the deal closes. The integration team must take action to evaluate and

address personnel matters and provide a smooth transition of employee benefits. Often this work will be initiated before the closing of the transaction and will continue until the employees and the benefits plans have been fully transitioned and integrated.

Morgan Lewis regularly partners with clients to support their integration efforts for a successful transition process and positive employee experience. Our practical approach and breadth of regulatory and technical knowledge—particularly in the context of post-acquisition integration—provide significant value for clients in planning, implementing, and managing transition processes. If you need assistance with post-transaction integration matters, please contact the authors or any member of our employee benefits team.

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Patrick Rehfield, Partner, Morgan Lewis & Bockius LLP

Patrick Rehfield focuses on matters related to executive compensation, payroll tax, and employee fringe benefits. He advises private and public companies on designing and implementing nonqualified retirement plans, equity compensation plans, and executive compensation arrangements. He also counsels publicly traded companies on reporting and compliance matters involving the SEC, with a focus on proxy and disclosure issues, executive compensation, and corporate governance. He advises public and private companies on employee benefit issues in mergers and acquisitions, including executive compensation matters for senior management.

Carley Clark, Senior Attorney, Morgan Lewis & Bockius LLP

Carley Clark provides guidance to clients on the full spectrum of issues involved with employee benefits programs. Carley's focus is primarily in two areas within the employee benefits. First, Carley assists clients on structuring, designing, drafting, and administering executive compensation plans, qualified defined contribution and defined benefit plans, and nonqualified deferred compensation plans. Second, Carley focuses on fiduciary responsibility provisions, prohibited transactions rules and exemptions, and the management of employee benefit plan assets under ERISA and applicable state laws.

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