

When the Dealin's Done: Benefits Integration Following M&A Transactions



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What We'll Cover

1. What this presentation is not about
2. "When the dealin's done"
3. Communicating with employees
4. Cuing and coordinating vendors
5. A plan termination to-do list
6. A plan assumption to-do list
7. The power of a T&R schedule

What this presentation is not about

What this presentation is not about

- Things you can't control for that do matter
 - How the deal is structured
 - Nature of the seller (e.g., whole company vs. sub)
 - Nature of the buyer (e.g., strategic vs. financial)

What this presentation is not about

- Conducting due diligence
 - Requests/responses yield diligence reports and disclosure schedules

What this presentation is not about

- Negotiating deal terms
 - Covenants
 - Salary and benefits post-closing
 - Crediting prior service with seller
 - Crediting deductibles
 - Honoring seller's severance arrangement for a period of time
 - Terminating plans (401(k) and/or H&W)

“When the dealin’s done”

“When the dealin’s done”

- As a matter of law or contract, the plan for seller’s plans is set, and it is time for buyer’s HR/benefits team to get to work on integration
- Initial steps:
 - Determine what’s happened already
 - Request copies of documents (diligence report(s), deal document, disclosure schedules)
 - Talk to your benefits counsel for the deal

“When the dealin’s done”

- It may be that seller’s plans will be:
 - Continued
 - Terminated and/or
 - Assumed

Communicating with employees

Communicating with employees

- Coordination and timing
 - Parties should discuss how communications to seller's employees will be handled - who will speak on behalf of each party and when communications will be made
 - Parties will want to review and agree beforehand to any communications that are made, if not joint

Communicating with employees

- Representations
 - Parties should expressly agree that neither will make representations to employees about how the deal will affect benefits until that's been fully negotiated

Communicating with employees

- A fulsome set of Q&As might typically cover:
 - **General**
 - Whether seller's benefit plans will continue or terminate (come with, or stay behind)
 - Whether employees will be eligible to participate in buyer's benefit plans, and when coverage will be effective
 - When employees can make elections to participate in buyer's benefit plans
 - **401(k) Plan**
 - Whether contributions to seller's 401(k) plan will continue or cease
 - Whether employees can continue to direct the investment of their 401(k) account
 - What will happen to 401(k) loans
 - Whether/when employees can take distributions
 - **Health and Welfare Plans**
 - Whether co-payments and deductibles paid year-to-date will be applied to buyer's plans

Cuing and coordinating vendors

Cuing and coordinating vendors

- Timing
 - The earlier notice can be given, the better
 - But it may not always be possible to give advance notice to vendors (e.g., due to confidentiality issues, simultaneous sign and close)
 - Service agreements include notice deadlines but, in the end, sometimes all you can do is your best.

Cuing and coordinating vendors

- Parties should expressly agree about who will be responsible for notifying vendors.
- (If pre-closing, this would likely be the seller's responsibility.)

A plan termination to-do list

A plan termination to-do list

- Step 1: Determine the (anticipated) termination date
- Step 2: Contact the TPA for any necessary plan amendment
- Step 3: Prepare written consent terminating the plan
 - Step 3A: Decide whether to file for an IRS Determination Letter on the terminated plan

A plan termination to-do list

- Step 4: Coordinate with payroll to stop deferrals as of the termination date
- Step 5: Communicate with employees
- Step 6: Notify other vendors (e.g., investment advisor) of the plan termination

A plan termination to-do list

- Step 7: Distribute the plan assets
- Step 8: File the final form 5500

A plan assumption to-do list

A plan assumption to-do-list

- Step 1: Check 401(k) plan eligibility provisions, and coordinate coverage [**Pre-closing!**]
- Step 2: Before the end of 410(b)(6)(C) Transition Period, decide whether to (A) keep the 401(k) plans separate (Option 1) or (B) merge the 401(k) plans (Option 2)

A plan assumption to-do-list

- *If Option 1 . . .*
 - Step 3: Notify both TPAs that there are now two 401(k) plans in the controlled group
 - Step 4: Ask TPA to mock-up testing
 - Step 5: Amend seller 401(k) plan to reflect new plan sponsor and changes to governance

A plan assumption to-do-list

- *If Option 2 . . .*
 - Step 3: Put the two 401(k) plans side-by-side to analyze the similarities and differences
 - Step 4: Select surviving plan
 - Step 5: Select service providers for surviving plan

A plan assumption to-do-list

- Step 6: Hold regularly scheduled calls with service providers to coordinate conversion
- Step 7: Ask TPA to prepare plan document for surviving plan

The power of a T&R schedule

The power of a T&R schedule

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TERMINATION OF [PLAN NAME]¹

Target Acquisition Date: January 31, 2025

Plan Termination Date: January 30, 2025

Updated: October 29, 2024

LEGEND:

Acquirer	[Name of Acquirer]	Completed
Target	[Name of Target]	In Process
Target Counsel	[Name of counsel for target]	
SA	Smith Anderson, Benefits Counsel to Acquirer	
SK	Caryn McNeill and Kara Brunk	
RR	[Name of plan recordkeeper/custodian]	
TPA	[Name of third party administrator responsible for testing, plan document and 5506]	
Trustee	[Name(s) of trustee, if individual]	

ACTION	STATUS/PROJECTED COMPLETION DATE	RESPONSIBLE PARTY(IES)
Pre-Closing Actions		
1	Preparation of 401(k) plan determination letter request	[X days before closing] SA

¹ Pending receipt of the IRS determination letter, distributions of 401(k) assets will NOT be permitted. 401(k) assets will continue to be invested as directed by participants in the 401(k) investment options.

² Action And Timeline For Termination Of 401(k)_Dec

The power of a T&R schedule

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ACTION	STATUS/PROJECTED COMPLETION DATE	RESPONSIBLE PARTY(IES)
2	Identify the new 401(k) plan trustee	[X days before closing] Seller/Buyer
3	Discuss proposed resignations with current trustees	[X days before closing] Seller, [Counsel for Seller], RR, TPA and Trustees
4	Prepare proposed draft of written resignation letter for current 401(k) plan trustees	[X days before closing] [Counsel for Seller], SA
5	Prepare plan termination amendment shutting off the right to take distributions and naming new trustee	[X days before closing] TPA (SA to advise on content as needed)
6	Prepare and adopt Board resolutions terminating the 401(k) plan effective as of the day immediately prior to closing. Such resolutions shall freeze contributions and distributions (other than RMDs) and fully vest participant accounts as of the Plan Termination Date.	[X days before closing] Seller, [Counsel for Seller]
7	Share and discuss pre-closing participant Q&A and T&R Schedule with working group, including [Counsel for Seller], Seller, and TPA	[X days before closing] SA with input from Buyer
8	Route pre-closing participant Q&A to participants	[X days before closing] Buyer
9	Prepare and adopt Board resolutions: (1) accepting resignation of current trustees effective as of the Plan Termination Date; (2) confirming appointment of Trustee; and (3) approving related amendments to Plan Document and Trust Agreement (and/or ASA)	[X days before closing] Seller, [Counsel for Seller]

² Action And Timeline For Termination Of 401(k)_Dec

Questions?

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