Breakout Sessions – Series 1

INTEGRATION FRUSTRATION!

HARMONIZING WORKFORCES IN M&A TRANSACTIONS

◆◆◆◆◆◆◆

Jonathan C. Wilson (Moderator) – Ogletree Deakins (Dallas)

Karen Ehlermann – Brink’s U.S.

Kevin J. Kinney – Ogletree Deakins (Milwaukee)

Stephanie A. Smithey – Ogletree Deakins (Indianapolis)
I. Employment Law Issues in Workforce Integration

Many companies pursue mergers and acquisitions with a primary goal of realizing organizational and financial efficiencies resulting from elimination of redundancies in both personnel and systems. In doing so, employers will want to keep in mind steps for minimizing liability.

A. Reductions in Force

A significant efficiency that results from many mergers and acquisitions is a reduction in the number of employees needed to operate the new organization. Reduction in force (“RIF”) decisions are based on any number and combination of factors, including job criticality, redundancy, geography, skills and abilities to perform the remaining and future work, performance, disciplinary records, seniority, and other factors.

RIF strategies can include terminations, plant closing, early retirements, and attrition. Preparation for any workforce contraction focuses on justification for the action, documentation of the justification, and communication to employees not only that a restructuring may be forthcoming, but the reasons for that action and opportunities, if any, for continued employment in different roles.

1. Compliance with Company Policies

Be familiar with applicable RIF, severance and retirement policies. Establish and prioritize selection criteria. Determine who will document and who will make individual selections. Ideally, a second manager should review initial selections. The selectors should receive training on potential liability risks. Ensure preservation of human resources data relevant to the selections through any data transition that may occur. Conduct an adverse impact analysis.

2. Compliance with ADEA/OWBPA

In 1990, Congress passed the Older Workers Benefit Protection Act (“OWBPA”), which amended the Age Discrimination in Employment Act (“ADEA”). The OWBPA limits the situations in which an employee who is 40 or older may waive or release claims under the ADEA. The OWBPA requires that a release of any right or claim under the ADEA be “knowing and voluntary,” which at a minimum requires the waiver to satisfy the following requirements:

- The release must be written in a manner calculated to be understood by the employee;
- The release must specifically refer to rights or claims arising under the ADEA;
- Future ADEA rights or claims may not be waived, only those claims that have arisen as of the date of the release;
- The employee must be advised in writing to consult with an attorney before executing the release;
- The release must be in exchange for valid consideration in addition to anything of value to which the employee is already entitled;
• In single employee termination situations, the employee must be given at least 21 days to consider the agreement;

• In the event the employer offers an “exit incentive” (voluntary) or other “employment termination program” (involuntary) to a group of employees (i.e., two or more employees), the employees must be given 45 days to consider the release; and

• The employee must be given the right to revoke the release within 7 days following its execution, which cannot be reduced or eliminated by agreement between the parties.

An “employment termination program” is a standardized formula or package of benefits that is available to two or more employees, while an “exit incentive program” typically is a standardized formula or package of benefits designed to induce employees to end their employment voluntarily. If the release in question is offered to the employee in connection with an exit incentive or other employment termination program offered to two or more employees, under the OWBPA, the employer must provide disclosures to employees who are age 40 and over, in addition to the 45 days to consider the release. The disclosures must contain the following information:

• The identity of any class, unit, or group of individuals covered by the program;

• The program’s eligibility factors;

• Any time limits applicable to the program;

• Job titles and ages of all individuals eligible or selected for the program; and

• Job titles and ages of all individuals in the same job classification or organizational unit not eligible or selected for the program.

A release that does not comply with the requirements of the OWBPA cannot bar a subsequent ADEA claim by an employee (assuming the agreement contains a severability clause, it likely will be deemed to effectively waive non-ADEA claims in most jurisdictions).

An employee who accepts payment in exchange for a release that does not comply with the OWBPA need not repay (no “tender back” is required) the payment to the employer as a condition to bringing suit under the ADEA. Therefore, a defective ADEA waiver is not valid when an employee elects to keep the benefits received when he or she executes the release. The regulations provide that an employer can recoup consideration payments made to an employee only after the employee successfully challenges the validity of the waiver and prevails on the merits of his or her ADEA claim, and then only at the discretion of the court. In such cases, the court may reduce the plaintiff’s monetary award by the amount of consideration the employee received for signing the waiver. Reductions are limited, however, to the amount recovered or the amount of consideration, whichever is less. In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual’s award can be reduced based on the consideration received by any other person. A growing trend is to seek a release of all claims other than age, thereby obviating the need to comply with the OWBPA. The clarity and documentation of the selection criteria remains important however for adverse impact analysis and defense of internal or external claims around the process.
3. Compliance with WARN Requirements

Under the WARN Act, at least 60 days before a “plant closing” or “mass layoff” (as defined below), an employer must provide written notice to every affected employee (or to the union representative of the affected employee) and to certain government officials. For government officials, the written notice must be given to the entity designated in the state where the closing or layoff is to occur and to “the chief elected official of the unit of local government within which such closing or layoff is to occur.”

In determining whether WARN notice must be provided, an employer must analyze whether there has been a “plant closing” or “mass layoff.” A plant closing is defined as “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more” full-time employees. A mass layoff is defined as a reduction in force at a single site of employment that results in an employment loss, during any 30-day period, of:

(1) 33% or more of the workforce (excluding any part-time employees) and 50 or more full-time employees (excluding any part-time employees); or

(2) more than 500 full-time employees (excluding any part-time employees).

The definitions of “plant closing” and “mass layoff” can be confusing. However, one helpful rule of thumb is: if fewer than 50 employees incur an “employment loss” at a single site of employment, it is not a mass layoff or a plant closing.

Not all employment terminations are counted in determining whether the numerical thresholds have been reached for a mass layoff or a plant closing. Employment loss is defined as (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period.

The term “affected employees” means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.

The term “part-time employee” means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

An employer also must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period will count together toward WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

Different rules apply to an employment loss in the context of a sale of part or all of a business. Because the WARN Act’s notice requirements only are triggered when employees
suffer “employment loss,” the technical termination of an employee’s relationship with the seller of a business does not constitute the “loss” of employment if it is followed by the commencement of an employment relationship with the purchaser.

Any plant closing or mass layoff occurring as part of, or contemporaneously with, a business sale must be preceded by WARN notice. Under the WARN Act, the seller is responsible for providing such notice for a plant closing or mass layoff that occurs before or on the “effective date” of the sale. This means that if the plant closing or mass layoff occurs before the effective date of the sale and the seller fails to provide WARN notice, the seller may be liable for this failure even after the sale of the business. In a stock purchase, the seller’s employees automatically become the buyer’s employees on the effective date of the sale. However, in an asset purchase, the seller usually terminates the employment of its employees as part of the sale itself, and then the buyer usually rehires some or all of those employees. In the asset purchase situation, the seller’s termination of employees usually occurs on or before the effective date of the sale.

Generally, if the business is sold as a going concern and the seller has no reason to believe that the buyer intends not to hire the seller’s employees, then the buyer, not the seller, is responsible for providing the WARN notice to the seller’s employees. Often, the buyer and the seller will have a provision in their asset purchase agreement dealing with hiring the seller’s employees. However, in circumstances where a business is not being sold as a “going concern,” or where the seller is otherwise aware that the sale of the business will result in a plant closing or mass layoff because the buyer does not intend to rehire the seller’s employees, then the seller will still have the responsibility to provide WARN notice to the seller’s employees. Accordingly, to avoid these obligations, sellers generally should not terminate their employees before the effective date of the sale and should require the buyer to indicate in writing that the buyer intends to hire all of the seller’s employees (or at least that the buyer will not fail to hire the seller’s employees due to a plant closing or massive layoff).

The WARN Act allows for reduction of the notification period in certain limited circumstances. Most notably the “faltering business” and “unforeseen business circumstance.” These exceptions nonetheless require as much notice as practicable.

B. Merge Human Resources Information Systems (HRIS)

Understand current technology before making decisions about how to handle human resources information systems. Do not assume that one of the existing systems is the best solution post-closing. Consider the effect of existing vendor contracts on transition timeline.

Review technical specifications and capabilities, security and access issues, terms of software licenses, cost of systems maintenance, hardware, software and technical support, and whether the HRIS system interfaces with other business systems, such as accounting, procurement, and sales incentive systems. Ask which employees use the systems, and how they do so. Consider how a particular HRIS could enhance or detract from the desired culture. For example, is HR information centralized or do managers and employees have access to at least some HR data? What HR information needs will be prioritized in the emerging culture?

Document how and what electronically stored information (ESI) is archived and/or purged. Preserve all ESI that is subject to an existing litigation hold or that is potentially relevant to threatened claims.
C. **Wage and Hour**

Mergers and acquisitions present significant risk and opportunity from a wage and hour perspective. The combination of two companies may illuminate disparate Fair Labor Standards Act ("FLSA") classifications of similar positions and/or disparate time tracking policies and procedures. Similar to the major changes proposed to the white collar regulations in December 2016, “harmonization” of job titles and time tracking policies and procedures following a merger or acquisition provides cover for changes necessary to bring the combined entity into compliance with the FLSA and parallel state law. On the other hand, RIFs that frequently accompany mergers and acquisitions may drive disgruntled employees to attorneys who would closely scrutinize wage and hour compliance.

Any major changes should be rolled out with training to the employees and their managers, who may not have experience working as a non-exempt employee or managing a non-exempt workforce. In addition, keep in mind that exempt classifications and wage and hour compliance are linked to compensation plans and performance assessments/evaluations, which should be modified to address the changes, e.g., mortgage loan officers in 2010. Notably, FLSA claims cannot be waived without court or department of labor approval. Consider factual representations in any release/severance agreements that would support an FLSA classification or conclusion that the individual has been for all hours worked.

An audit of worker classification is a critical component of due diligence. Post-closing, address problems identified during the audit and be sure no new liabilities are created during the transition. While there are different tests used under various employment and tax laws, there is overlap. Whether the company exercises control over the employee’s daily activities is a key factor, as is whether the employee is engaged in work that is in the company’s line of business and the manner by which the employee is compensated.

D. **Manage Employees who are on Leave (FMLA/USERRA)**

Frequently, employees on leave at the time of the acquisition are overlooked. Moreover, the resulting entity often has not established a specific plan to deal with requests on the part of the employee for restoration to active employment with a “new” employer. The combined entity also may find out that the acquired leave policies and procedures are out of compliance with the requirements of state and federal leave laws. For example, a smaller employer may not have been subject to the Family and Medical Leave Act (the "FMLA") but now is, or may have operations in a state that has specific leave requirements not covered by existing company policies.

E. **Attend to Safety Considerations (Prepare for Potential OSHA Inspection)**

A buyer of assets is not liable for penalties imposed on a seller for OSHA violations that occurred prior to the sale; the seller remains liable. A buyer of a recently-cited facility may, however be subject to re-inspection after the transaction closes and may be faced with costs associated with abating any violations.
II. Employee Benefits Issues in Workforce Integration

Employee benefits issues rarely, if ever, drive a corporate transaction. More often than not, the benefit plans, and any integration challenges they present, are an afterthought. Thorough diligence and careful collaboration with benefit plan administrators can avoid many common integration pitfalls and help ensure a smooth transition for employees.

A. 401(k) Plan Integration

Typically, one or both of the businesses involved in an acquisition sponsors at least one retirement plan, typically a 401(k) plan. Where both organizations sponsor separate 401(k) plans, there may or may not be reason to combine the plans, as opposed to keeping them separate. Combining or merging the plans is usually the preferred option for several reasons – but it raises a number of issues:

- **Plan loans** – In an asset sale, employees will experience a termination of employment, which creates a distribution event in the 401(k) plan but often also triggers an immediate deemed distribution of the outstanding balance of any open plan loans, along with an automatic offset of the outstanding loan amount. Both companies will want to review their plan loan provisions to determine what will happen to outstanding loans at the time of closing and consider amending those provisions to permit ongoing payment of loans to avoid a default or an automatic offset. Participants used to payroll deductions may be permitted to make monthly payments by check until the plan merger is complete. If the purchaser’s plan will accept outstanding loans as part of rollover contributions from the seller’s plan, or as part of a plan merger, both plan documents should be revised to reflect that.

- **Surrender charges** – It is not uncommon for 401(k) plan assets to be held in group annuity contracts or other vehicles that do not allow for full liquidity. It is important to determine whether participant accounts will incur a surrender charge upon termination of the plan or merger of the plan into the buyer’s plan. Any restriction on liquidation should be taken into account and communicated to affected participants.

- **Forfeitures** – A merging plan often holds participant forfeitures, usually due to termination of employment when their employer contribution accounts were not fully vested. Generally, plan administrators are required to use forfeitures within one year, whether by offsetting employer contributions, paying plan administrative expenses or allocating those forfeitures to plan participants. The plan document is required to address the use of forfeitures. In the event of a merger, all plan forfeitures should be allocated or used in accordance with the terms of the plan document prior to any plan merger to avoid an operational failure in the merged plan.

- **Identifying and correcting plan failures prior to merger** – When dealing with qualified retirement plans, it is extremely important to identify and correct any document failures or operational failures prior to merging the seller’s plans into the buyer’s plan. The IRS provides a voluntary correction program that permits plan sponsors to correct any document or administrative errors by making a filing and paying a fee that is based upon the amount of plan assets. These corrective
filings should be made before any merger, both to minimize the amount of the required filing fee and to prevent having any failures carry over to purchaser’s plan. In the case of a stock acquisition where the purchaser acquires the seller’s plan, the purchaser will want to seek assurances that the plan has no operational or document failures and that the seller will indemnify the purchaser for any that are discovered after closing. If any such errors are not discovered and corrected, upon examination of the plan the IRS can assess substantial sanctions on the plan sponsor in order to keep the plan qualified, in addition to the cost of fixing the errors.

- **Limits of 410(b) grace period (transition period)** – Qualified retirement plans are required to provide coverage to a nondiscriminatory classification of employees. This general rule is often known as the 410(b) coverage test and prevents plan sponsors from favoring highly-compensated employees in their benefit offerings. The Internal Revenue Code (“Code”) and U.S. Department of Treasury regulations (“Regulations”) provides a special extension of the Code Section 410(b) coverage and nondiscrimination testing rules for plans that are undergoing certain transitions or dispositions. Generally, plans must meet the Code Section 410(b) requirements as of the last day of each plan year. However, if an entity becomes, or ceases to be, a member of a “controlled group” (as is likely to occur during an acquisition or disposition), then the Code Section 410(b) requirements are generally deemed to have been satisfied during a transition period which (i) begins on the day of the controlled group change; and (ii) ends on the last day of the plan year following the plan year in which the change occurs. However, the special transition rule applies only if:

  - The plan satisfied the 410(b) requirements immediately before the change in the members of the controlled group; and
  - Coverage under the plan must not significantly change during the transition period (other than by direct reason of the change in the members of a group); or
  - Such other rules as may be set forth in Regulations.

This transition rule gives the purchaser some time to evaluate the benefits across the new controlled group and determine how to ensure nondiscriminatory benefit offerings are available going forward.

- **Spin-offs of company stock** – Many 401(k) plans of publicly-traded companies, particularly plans permitting employees to self-direct their investments, feature a company stock account as an investment option. If an acquisition is a stock sale, or if the selling company will otherwise cease to exist upon closing, then company stock held in participants’ accounts may also cease to exist. Prior to closing, the sponsor of the surviving plan will need to decide whether to trade in the old shares for shares of the acquiring company having comparable value (if any) or to liquidate the company stock fund altogether and permit participants to redirect their accounts into other investment options. If the selling company will not cease to exist, the purchasing company will need to decide whether the plan will continue to hold shares of the former plan sponsor after a spin-off that includes holding in company stock and if not, when the stock will be liquidated.
These issues present many challenges for plan fiduciaries that are required to act solely in the interests of plan participants and beneficiaries under ERISA’s standards. As a result, many plan administrators choose to engage independent fiduciaries to assist with decisions relating to the continued holding, forced sale, or liquidation of company stock.

- **When SOX blackout period notices are required; mapping, QDIAs** – The Sarbanes-Oxley Act of 2002 (“SOX”) requires the administrator of a participant-directed 401(k) plans to notify participants prior to the occurrence of any “black-out” period, which is defined as a period in excess of three business days during which the ability of the participant to take certain actions involving their accounts is temporarily suspended. A black-out period can occur when the 401(k) plan changes administrators, or during a plan merger due to a corporate merger, acquisition or similar transaction. Subject to strict penalties for non-compliance, plans must, with certain exceptions, notify participants no later than 30 days prior to the beginning of any black-out period.

Because of the vast number funds available to 401(k) plans, the merging 401(k) plan will most likely have a different investment fund menu than the surviving plan. In these situations, the investment fiduciary of the surviving plan will often attempt to match the existing funds with new funds in the same asset classes, having similar investment strategies, in a process known as “mapping.” The mapping process is a fiduciary function, requiring the individuals who are making the mapping decisions to act as prudent investment experts when doing so.

Another option is to permit plan participants to select among the new investment options, with undirected funds sent to a designated default fund. The Plan will designate a default fund for this and other purposes. If done correctly, the selection of a “qualified default investment alternative” (QDIA) will meet ERISA’s requirements as a safe harbor investment choice. These selections can require the attention of the purchaser’s plan fiduciaries that will make these decisions for the acquired plan and/or any merging or transferred assets.

**B. Mid-Year Health & Welfare Administration**

Depending upon the terms of the purchase agreement, several issues may arise relating to health and welfare benefits coverage for employees acquired in the sale.

- **Crediting deductibles, co-pays, out-of-pocket expenses** – Generally, enrollment and employee decisions to make coverage changes are made during an annual open enrollment period and, with certain exceptions, may not be made or changed mid-year. In the case of a merger, acquisition or similar transaction, it may not be feasible to wait until the next open enrollment to change coverage elections. The parties to the transaction should address how they will transition the health and welfare benefits of the employees, including whether prior elections will be honored through the end of the year, whether new elections will be made, and whether deductibles, co-payments, and out-of-pocket expenses will continue to be tracked for the year. The method determined should be well-documented and applied consistently, in a nondiscriminatory fashion.
**Issues relating to health FSAs** – the IRS has identified two options for handling an employee’s health flexible spending account (FSA) in the event of a merger or similar transaction:

- Coverage occurs under seller’s plan, but premium payments are made to buyer’s plan; or
- Coverage is transferred to the buyer’s plan.

The purchase or sale of the employer does not automatically create a qualifying event that would permit an employee to make a mid-year change in his or her flexible spending account election. Absent other circumstances that constitute an approved election change event, an employee’s annual election will remain the same for the duration of the calendar year under either of the options listed above.

**Dependent care FSAs** – The same rule applies to dependent care FSAs as well as to health FSAs (see above).

**Using transition services agreements to keep employees on the existing plan until mid-year** – If the seller will be continuing to provide services to support employees of the post-closing company, the buyer and seller often enter into a transition services agreement (TSA). The TSA generally sets forth the terms relating to the provision of services such as ongoing payroll and benefits services. TSAs may be relatively simple office administration services agreements, or they may be more comprehensive service agreements with defined service levels, variable fee arrangements, and data security and privacy provisions. The TSA will generally terminate upon the occurrence of the following year’s open enrollment period.

**Inadvertent/transactional MEWAs and related risks** – Generally, a “multiple employer welfare arrangement” (MEWA) exists when a single health plan provides coverage and benefits to two or more unrelated entities (i.e., entities that are not in the same controlled group). MEWAs are generally subject to ERISA, and are often subjected to greater scrutiny by the DOL, partly due to a perceived history of abuses. ERISA, which usually applies on the employer level, but may sometimes apply on a plan level, requires the annual filing of a form M-1, along with the usual ERISA requirements (e.g., filing Form 5500 and providing SPDs). To the extent that a seller continues to permit its former employees to participate in its health and welfare plans after closing but until the end of the year, there is some risk that the plans will become multiple employer welfare arrangements (MEWAs) for a short period of time. Self-funded MEWAs are subject to regulation by state as well as federal law and are prohibited in some states. As a result, in some transactions, it is not advisable to maintain a transactional MEWA.

**Creating “mirror” plans** – In most cases, where the arrangement exists for a very short period of time until the end of the year of the closing, the transactional MEWA presents limited risks. However, in situations where the TSA calls for the seller to provide benefits to former employees for a longer duration, the parties should consider having the buyer establish mirror plans and limit the seller’s role...
under the TSA to administrative services. In some cases, instead of transferring participants from the seller's plan to the buyer's plan, the acquiring entity may establish a “mirror plan” that has essentially identical features as those of the seller's plan. Normally, the mirror plan would only be in existence until the beginning of the next year following open enrollment.

C. Other Material Issues

- **Pension withdrawal liability** – If the target of an acquisition participates in a multi-employer defined benefit pension plan, then the parties should carefully evaluate the potential for withdrawal liability triggered by the transaction. Either a complete or partial withdrawal may occur when there is a permanent cessation of the obligation to contribute to the multi-employer pension plan. A sale of substantially all the assets of a company that contributes to a multi-employer pension plan automatically triggers a withdrawal unless the parties structure the transaction in accordance with Section 4204 of ERISA. In that case, the purchaser must agree to assume the collective bargaining agreement and agree to contribute to the pension fund for substantially the same amount of contributions as the entity it is acquiring. In a stock sale, the purchaser will acquire the contribution history of the entity it is acquiring, effectively transferring the contingent liability to the purchaser that may be triggered if the purchaser later withdraws from the fund. Any transaction that is designed to evade or avoid withdrawal liability is treated as void under the law. In addition, all and all members of its controlled group are jointly and severally liable for withdrawal liability. It is not uncommon for parties to a potential transaction to walk away from the table when a multi-employer pension plan (and the related contingent withdrawal liability) is involved.

- **Partial plan termination** – When company-initiated termination of employment affects a significant percentage of the participants in a retirement plan, a partial plan termination may occur. Generally, where 20 percent or more of the total number of plan participants lose their jobs due to an employer-initiated severance (including a severance resulting from a merger or acquisition), the law requires all “affected employees” to be fully vested in their account balance or accrued benefits as of the date of the partial plan termination, regardless of the plan’s vesting schedule. A reduction in the workforce associated with a business transaction may trigger a partial plan termination, and depending on the size of the plan, the resulting accelerated vesting can result in a significant liability. In most cases, the funds required to be vested are already contributed to the plan, but it is important to identify partial plan terminations quickly before individuals have cashed out their retirement accounts and incurred forfeitures that are allocated elsewhere.

- **Unfunded pension/PBGC liabilities** – If the selling company sponsors a significantly underfunded defined benefit pension plan, it could be subject to periodic minimum required contributions to the plan under Code Section 430. Assumption of an underfunded pension plan by a buyer not only results in assumption of the unfunded liability, but any minimum required contributions as well. In certain instances of more serious underfunding, as well as several other reportable events, the plan sponsor is required to notify the federal Pension Benefit Guaranty Corporation (PBGC).
• **Retiree medical issues** – If the merging company has a health and welfare plan that includes retiree medical coverage, it may not be possible to avoid contractual liability with respect to benefits payable to existing retirees. Even though health and medical benefits do not “vest” in the sense that retirement contributions do, a promise of ongoing, or even lifetime, coverage can be enforceable. Although amounts due under a retiree medical arrangement are, in most cases, unfunded, accounting rules may require the plan sponsor to reflect the future benefit liabilities on its corporate balance sheet. The amount of liability may be substantial, and many transactions have failed due to the potentially significant future benefit obligations to retirees.

• **409A failures** – The American Jobs Creation Act of 2004 added Section 409A to the Code. Generally stated, Code Section 409A applies to compensation that employees earn in one year, but that is paid in a future year (“nonqualified deferred compensation”). Many executive compensation agreements and/or severance agreements for example, are subject to Code Section 409A, and provide for accelerated payments due to a “change of control.” Nearly always, a merger, acquisition, disposition or similar transaction will have been defined in the employment or severance agreement to constitute a “change of control.” As such, the transaction will most likely trigger payments under such an agreement. If the agreement has not been recently reviewed and/or amended to comply with the Section 409A requirements, the triggering event can result in significant penalties and fines that apply to the recipient (not the company making the payment). These include:

- All compensation deferred for the taxable year and all preceding taxable years becomes includible in the recipient’s gross income for the taxable year, to the extent the compensation is not subject to a “substantial risk of forfeiture” and has not previously been included in gross income;
- Accrued interest is payable on the taxable amount; and
- An additional penalty of 20% is imposed on the amount of the deferred compensation which is required to be included in gross income.

Although these penalties are not directly imposed on the employer, it is usually the employer who will end up paying, because failure to gross-up the noncompliant payments to compensate for the tax-loss is likely to result in a lawsuit or similar action against the employer.
Integration Frustration! Harmonizing Workforces in M&A Transactions

Presenters
Karen Ehlermann (Brink’s U.S.), Kevin J. Kinney (Milwaukee), and Stephanie A. Smithey (Indianapolis)

Moderator
Jonathan C. Wilson (Dallas)

Agenda

- Workforce Integration Frustrations
- Benefits Integration Frustrations
Workforce Integration

- What will the new organization look like?
- How will you protect your investment?
- Can you harmonize the workforces?
- Are you realizing efficiencies?
- Have you minimized liabilities?

Shaping the Organization

- Defining the culture
- Managing transition
- Developing a post-closing communications strategy
Protecting the Investment

- Delivering on promises
- Retaining and attracting talent
- Developing and implementing comprehensive restrictive covenant strategy

Harmonizing the Workforces

- Job titles
- Pay grades/ranges
- HR policies and practices
- HRIS systems/data
- Benefits
Realizing Efficiencies

- Reduction in force
  - Compliance with Company policies
  - Compliance with ADEA/OWBPA
  - Compliance with WARN requirements

Minimizing Liabilities

- Wage and hour
- Immigration compliance
- Manage employees who are on leave
- Attend to safety considerations
Benefits Integration

- Have you anticipated common transition issues? Are you prepared to address?
- How do you handle material benefits challenges?

Common Transition Issues

- Assuming seller’s plans vs. creating mirror plans vs. immediate integration onto buyer’s plans
- Crediting past service
- Mid-year transitions
401(k) Plan Issues
- Plan loans
- Surrender charges
- Forfeitures
- Identifying and correcting plan failures
- Limits of Code Section 410(b) “grace period”
- Spin-off of company stock
- “Blackout notice”

Health & Welfare Plan Issues
- Crediting deductibles, co-pays, and out-of-pocket expenses
- Health FSAs
- Dependent care FSAs
- Using transition service agreements (TSAs) to keep employees on existing plan
Material Issues

- Pension withdrawal liability
- Partial plan termination
- Unfunded pension/PBGC liabilities
- Costly corrections
- Retiree medical commitments and liability
- 409A failures

Integration Frustration! Harmonizing Workforces in M&A Transactions

Presenters
Karen Ehlermann (Brink’s U.S.), Kevin J. Kinney (Milwaukee), and Stephanie A. Smithey (Indianapolis)

Moderator
Jonathan C. Wilson (Dallas)