

NEWFRONT

Mergers and Acquisitions:

H&W Employee Benefit Plans

2026 Edition



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Guide Topics

EB M&A: The ERISA World and the Corporate World Collide

Keeping employee benefits on the radar in an M&A process dominated by broader transaction concerns

- Employee benefits generally do not drive the transaction and are at risk of becoming an afterthought in some deals
- The corporate world is frequently caught off guard by the complexity of employee benefits law and the prominent employee relations issues caused by the transition
- In our sphere, it's important to at least highlight the key issues for consideration and prioritize them in terms of focus, budget, and communications
- With so many potential M&A considerations, the goal here is to highlight a few of the most important at the forefront that can be used to at least frame the discussion for some of the top-line items

Top Employee Benefits Mergers and Acquisition Issues for H&W Plans

1

Plan Design: Keep plans separate? Combine immediately? Combine later? EB terms in the purchase and sale agreement?

2

ACA Employer Mandate: Acquiring non-ALEs, the A Penalty with multiple entities, LBMM

3

ACA Reporting: Reporting multiple entities (ALEMs) on the Forms 1094-C and 1095-C

4

COBRA: Understanding “M&A qualified beneficiaries” and stock vs. asset deals

5

Health FSA: Terminate seller's health FSA or continue for the rest of the plan year?

01

Plan Design Issues

To Combine Plans?



Plan Design Issues – To Combine, or Not to Combine?

One of the first EB issues to address in any M&A transaction is whether the seller will join the buyer's health and welfare plans—and, if so, when?

Keeping Separate Plans – Less Common

Advantages

- Seller can remain with benefit plans it is comfortable with and were designed with its population in mind
- Minimizes disruption to employees

Disadvantages

- Doesn't foster corporate culture goals of uniting together as one business
- Extra administrative work
- Two sets of wrap plan documents, SPDs, SBCs, Forms 5500, communications, renewals, etc.

Combining Plan – More Common

Advantages

- Helps make the seller's employees feel as though they are part of the new buyer's organization
- Avoids duplicative compliance requirements and administrative work
- Can be delayed until appropriate time (e.g., end of plan year after closing)

Disadvantages

- Deductible carryovers can be hard to negotiate and administer
- Buyer's plan may not be best fit for seller's employees

Basic Plan Design Issues

Buyer Has Control of Plan Determinations

- Unless provisions in the purchase and sale agreement provide otherwise, the buyer will have total control of if/when the seller's employees will be eligible for the buyer's employee benefits plans
- Buyer could keep seller's employees on their existing plans forever, run the existing benefits through the end of the plan year, move them to the buyer's benefits as of the date of the close (or first of the month following), etc.
 - Standard new hire rules do not apply in the M&A context
 - Buyer can move seller's employees to buyer's plan whenever they see fit
 - Confirm with carrier (or stop-loss) whether there are any corporate transaction provisions that apply (e.g., re-rating)

What If It's a Carve-Out or Spin-Off?

- No issue with combined plans if entities remain part of the same controlled group
- Need to notify carriers, update wrap plan document/SPD, address ACA reporting
- Need to separate benefit plans if not in controlled group to avoid MEWA issues

Good Questions at the Outset to Establish the Deal Structure

1. Will all of the entities be part of the same controlled group?
2. Will the entities maintain separate EINs or be rolled into buyer's EIN?
3. If it's a merger or acquisition, is the transaction a stock or asset deal?



Compliance Cleanup After Combining

Don't Forget the Final Form 5500 for Seller's Plan

- The buyer will need to ensure a final Form 5500 is filed for the seller's plan if it is terminated (and the seller's employees move to the buyer's plan)
- This is often overlooked but Form 5500 penalties are steep!
- Failure to timely file a Form 5500 penalty is up to \$2,739 per day the filing is late (due seven months after termination of plan)
- Delinquent Filer Voluntary Compliance Program (DFVCP) provides a way to avoid penalties in certain situations (for a fee)

Plan Documents

- The ERISA wrap plan document and wrap SPD may include provisions addressing whether related entities are participating employers
- Make sure to review and amend/revise as necessary if seller will retain EIN
- Also confirm with all insurance carriers, stop-loss providers, and TPAs if any action needed to reflect the new participating entity(ies)

The Combined Plan: Moving Forward with Multiple EINs

- Often after an M&A transaction the seller will retain its EIN
- Multiple EINs can participate in the same plan benefits, under the same Form 5500, and governed by the same wrap plan document/SPD and policies
- Form 5500 will list the EIN and name only of the parent entity (the ERISA plan sponsor)
- Key is that all entities are in the same controlled group to avoid MEWA status
- Don't forget ACA employer mandate pay or play and ACA reporting issues for multiple EINs

Avoiding the MEWA Trap

Ensuring Controlled Group Status

All entities within an IRC §414 controlled group (regardless of how many EINs exist) may share the same health and welfare plan.* Offering coverage to an entity outside the controlled group would create a MEWA—and many thorny problems you want to avoid!

Parent-Subsidiary Group – More Common

A parent-subsidiary controlled group exists when one or more chains of corporations are connected through stock ownership with a common parent corporation; and

- 80 percent of the stock of each corporation (except the common parent) is owned by one or more corporations in the group; and
- Parent Corporation must own 80 percent of at least one other corporation.

Brother-Sister Group – Less Common

A group of two or more corporations, in which five or fewer common owners (who must be an individual, trust, or estate) own directly or indirectly a controlling interest of each group and have “effective control”.

- **Controlling Interest:** Generally, means 80% or more of the stock of each corporation (but only if such common owner owns stock in each corporation)
- **Effective Control:** Generally, more than 50% of the stock of each corporation, but only to the extent such stock ownership is identical with respect to such corporation

**Note: Employers should look to in-house counsel, outside counsel, or a tax adviser for assistance in determining §414 controlled group status.*



Avoiding the MEWA Trap

Why It Matters

General Overview of Controlled Group Status

IRS publication provides guidance on controlled and affiliated service groups: <https://www.irs.gov/pub/irs-tege/epchd704.pdf>

MEWAs Subject to Additional Filing Requirements

- MEWAs generally are required to file a Form M-1 with the DOL within 30 days of origination and annually by March 1 of each year
- Plans that fail to file may be subject to penalties of up to \$1,992 per day
 - Unlike Forms 5500, there is no DFVCP equivalent for late filers of the Form M-1
 - Forms M-1 filings are publicly available here: <https://www.askebsa.dol.gov/epds/>

Multiple States Prohibit Self-Insured MEWAs

- MEWAs do not enjoy ERISA preemption from state insurance law
 - Therefore, unlike non-MEWA ERISA group health plans that are self-insured, state insurance law can regulate self-insured MEWAs
- For example, California state insurance law has prohibited the creation of any new self-insured MEWA since 1995
 - See California Insurance Code §742.24(h)

02

ACA Employer Mandate

M&A Rules for Pay or Play



Applicable Large Employer Status: Calculation

An employer is an applicable large employer (ALE) in the current year if it employed (along with all members of its controlled group) an average of at least **50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year**. For purposes of determining whether an employer is an ALE, the employer must convert part-time employees into full-time equivalents.

- *Note: Special rules apply for seasonal workers and certain veterans.*

1

Calculate the number of **full-time employees** for each calendar month in the preceding calendar year. For purposes of this calculation only, full-time employee means those who worked at least **120 hours of service in a month**. (Note that for all other purposes under the employer mandate rules, full-time is 130 hours of service per month)

2

Calculate the number of full-time **equivalents** for each calendar month in the **preceding calendar year** as follows:

- Calculate the aggregate hours of service in a month for employees who are **not** full-time employees for that month (i.e., did **not** work at least 120 hours of service in that month).
- Divide the total hours of service from Step A by 120. The result is the number of full-time equivalent employees for the month.

3

Add the number of full-time employees and full-time equivalents obtained in Steps 1 and 2 for each month of the preceding calendar year.

4

Add up the 12 monthly numbers from Step 3 and divide the sum by 12. This is the average number of full-time employees (including full-time equivalents) for the preceding calendar year.

5

If the number obtained in Step 4 is less than 50, then the employer is not an ALE for the current calendar year. If the number obtained in Step 4 is 50 or more, the employer is an ALE for the current calendar year.

Applicable Large Employer Status: Examples

Example 1

Employer's controlled group averaged **43** full-time employees (including full-time equivalents) in 2025.

Result:

Employer is **not** an ALE in 2026

What does the result mean?

- Employer **is not** subject to the employer mandate (no potential §4980H penalties) in 2026
- Employer **is not** subject to ACA reporting (§6055/ §6056 via Forms 1094-C and 1095-C) for the 2026 calendar year that is reported at the beginning of 2027
- Note: §6055 reporting via Forms 1094-B and 1095-B will apply if the employer offered a self-insured medical plan

Example 2

Employer's controlled group averaged **55** full-time employees (including full-time equivalents) in 2025.

Result:

Employer is an ALE in 2026

What does the result mean?

- Employer is subject to potential employer mandate penalties (under §4980H) in 2026
- Employer is subject to ACA reporting (§6055/ §6056 via Forms 1094-C and 1095-C) for the 2026 calendar year that is reported at the beginning of 2027

Acquiring a Non-ALE: ACA Implications

Overview

- Employers averaging at least 50 full-time employees (including full-time equivalents) in **the entire controlled group** (all members!) over the prior calendar year are an Applicable Large Employer (ALE)
- Means all entities within the employer's controlled group are subject to the ACA employer mandate pay or play rules and the ACA reporting requirements

Subsidiaries and Related Entities

- Subsidiaries and related entities in an ALEs controlled group are referred to as ALE Members (ALEM)
- The controlled group is referred to as an Aggregated ALE Group
 - **Summary: An ALE with multiple EINs in the controlled group is an Aggregated ALE Group consisting of multiple Applicable Large Employer Members**

ALE Acquires Non-ALE Mid-Year

- The acquired entity (seller) becomes an ALEM as of close (arguably first of month following close)
- **This means that even if seller maintains its separate EIN, the seller is subject to:**
 - **Potential ACA employer mandate pay or play penalties; and**
 - **ACA reporting for the seller's employees.**

The ACA's Employer Mandate

§4980H Penalties

§4980H(a)—The “A Penalty” Aka: The “Sledgehammer Penalty”

- **Failure to offer MEC to at least 95% of that ALEM's full-time employees (and their children to age 26)**
- The A Penalty is triggered by at least one such full-time employee who is not offered MEC enrolling in subsidized exchange coverage
- **2026 A Penalty liability is \$3,340 annualized (\$278.33/month) multiplied by all full-time employees**
 - **30 full-time employee reduction from multiplier**
 - **Reduction is based on the ALEM's allocable share of 30 on basis of its number of full-time employees**

§4980H(b)—The “B Penalty” Aka: The “Tack Hammer Penalty”

- Applies where the employer is not subject to the A penalty
- **Failure to:**
 - 1. Offer coverage that's affordable;**
 - 2. Offer coverage that provides MV; or**
 - 3. Offer MEC to a full-time employee (where employer offers at a sufficient percentage to avoid A Penalty liability)**
- The B Penalty is triggered by any such full-time employee enrolling in subsidized exchange coverage
- 2026 B Penalty liability is \$5,010 annualized (\$417.50/month) multiplied by each such full-time employee who enrolls in subsidized exchange coverage
- Note that although the B Penalty amount is higher (\$5,010 vs. \$3,340), the multiplier is generally much lower (only those full-time employees not offered affordable/minimum value coverage who enroll in subsidized exchange coverage)

The A Penalty with Multiple Entities

Relevant Cites

Treas. Reg. §54.4980H-4(a)

(a) In general. If an applicable large employer member fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any calendar month, and the applicable large employer member has received a Section 1411 Certification with respect to at least one full-time employee, an assessable payment is imposed. ... For purposes of this paragraph (a), an applicable large employer member is treated as offering such coverage to its full-time employees (and their dependents) for a calendar month if, for that month, it offers such coverage to all but five percent (or, if greater, five) of its full-time employees...

Treas. Reg. §54.4980H-4(e)

(e) Allocated reduction of 30 full-time employees. For purposes of the liability calculation under paragraph (a) of this section, with respect to each calendar month, an applicable large employer member's number of full-time employees is reduced by that member's allocable share of 30. The applicable large employer member's allocation is equal to 30 allocated ratably among all members of the applicable large employer on the basis of the number of full-time employees employed by each applicable large employer member during the calendar month ... If an applicable large employer member's total allocation is not a whole number, the allocation is rounded to the next highest whole number. This rounding rule may result in the aggregate reduction for the entire group of applicable large employer members exceeding 30.

The “A Penalty” With Multiple Entities

“ALEM” Defined

- Subsidiaries and related entities with different EINs in an ALE’s controlled group are referred to as an “Applicable Large Employer Member,” or “ALEM”
- The controlled group itself is referred to as the “Aggregated ALE Group” (consisting of multiple ALEMs)

ALE Status is Aggregated, Penalties are Separated

- ALE status is an aggregated count among all members of the controlled group, but “A Penalty” calculations are siloed to each specific member (ALEM)
- **For employers with multiple corporate entities (generally multiple separate EINs) within the controlled group, the A Penalty will apply separately to each entity (ALEM)**
- Means the 95% test for the A Penalty applies to each ALEM independently
- If any ALEM fails to offer coverage to at least 95% of that ALEM’s full-time employees, the A Penalty applies to that ALEM
- The A Penalty calculation is based only on the full-time employees of that ALEM
- The 30-employee reduction will be a proportional amount based on ALEM size

The “A Penalty” With Multiple Entities

Example

- ALE Big Co. (1,000 EEs) acquires non-ALE Lil' Co. (40 EEs)
- Big Co. and Lil' Co. keep separate EINs and separate corporate entities

Result

- Lil' Co. becomes an ALEM subject to employer mandate as of the close
- If Lil' Co. fails to offer coverage to at least 95% of Lil Co.'s full-time employees in any subsequent month, Lil' Co. will be subject the A Penalty based only on the number of Lil' Co.'s full-time employees (Big Co.'s full-time employees are not part of calculation)
- 30-employee reduction will be a small proportional amount (in relation to overall controlled group number of employees, which is dominated by Big Co.)

Look-Back Measurement Method: M&A Complications

ALEs subject to the ACA employer mandate rules generally must apply either measurement method to determine employees' full-time status:

- The monthly measurement method is generally recommended for employers with all or almost all full-time workforce
- The look-back measurement method is generally recommended for employers with a significant population of employees who may fluctuate above and below 30 hours per week
- *These slides primarily address the LBMM because of the additional M&A-related considerations under that approach*
- *ALEs that utilize the MMM may avoid many of these complications*

There Are Two Different Measurement Methods:

1

The Monthly Measurement Method (MMM)

- Full details:
<https://www.newfront.com/blog/the-aca-monthly-measurement-method>

2

The Look-Back Measurement Method (LBMM)

- Full details:
<https://www.newfront.com/blog/the-aca-look-back-measurement-method>

The Look-Back Measurement Method – M&A Complications

IRS Notice 2014-49 Provides Transitional Guidance

- <https://www.irs.gov/pub/irs-drop/n-14-49.pdf>
- IRS says employers can rely on the notice “until further guidance is issued”

The Problem: Different Measurement Periods

- Big Co.’s plan year is July 1, and Medium’ Co.’s plan is calendar year
- When Big Co. acquires Medium Co., what measurement and stability periods apply for Medium Co.’s employees?
 - Medium Co. was an ALE with 150 employees prior to the deal, and therefore it already had its own measurement, administrative, and stability periods established

Seller’s Ongoing Employees in a Stability Period

- The employee’s status as full-time or part-time remains in effect until the end of that stability period
- At the end of the seller’s stability period, the buyer’s stability period applies
 - You include hours of service from the employee’s time with the seller prior to the deal

Seller’s New Employees NOT in a Stability Period

- Employee’s status as a full-time or part time employee is determined solely under the buyer’s measurement and stability periods
 - Would apply to new variable, seasonal, or part-time employees in an initial measurement period

Look-Back Measurement Method – M&A Complications

Ongoing Employees Example

- Big Co.'s plan year (and stability period) is July 1, and Medium Co.'s plan is calendar year
- Both Big Co. and Medium Co. use the look-back measurement method
- Medium Co. has 100+ ongoing full-time employees (those who have completed a full standard measurement period and are currently in the stability period as full-time)
- Big Co. acquires Medium Co. as of August 15, 2026

The Issue

Moving to Big Co.'s Measurement/Stability Period

- Medium Co.'s stability period runs from January 1, 2026 through December 31, 2026
- Big Co. just started a stability period from July 1, 2026 through June 30, 2027

Result Through End of 2026

End of Medium Co.'s Stability Period as of Deal Closing

- For the period of August 15, 2026 through December 31, 2026, Medium Co.'s 100+ ongoing full-time employees retain their status as full-time (i.e., they remain locked into full-time status through end of Medium Co.'s existing stability period at the time of the close)
- Medium Co.'s part-time employees will also remain part-time through December 31, 2026

Result in 2027

After Medium Co.'s Stability Period Ends

- Medium Co.'s employees' full-time status is determined under the Big Co. measurement period
- Big Co.'s most recently completed measurement period ran May 1, 2025 through April 30, 2026
- Medium Co.'s employees who worked full-time for that Big Co. measurement period are full-time for the remainder of the Big Co. stability period (January 1, 2027 through June 30, 2027)
- As of July 1, 2027, Medium Co.'s employees are fully transitioned to Big Co.'s measurement period

03

ACA Reporting

Forms 1094-C and 1095-C



ACA Reporting—Multiple Entities

Full Details: [ACA Reporting for Controlled Groups](#)

Separate Forms 1094-C for Each ALEM

- Where an ALE has multiple corporate entities in the controlled group, there is an “Aggregated ALE Group”
- Each “Applicable Large Employer Member” (ALEM) in that group (generally each subsidiary or related entity in the controlled group that maintains a separate EIN) must file a separate Form 1094-C
- Required because each ALEM is separately subject to the “A Penalty” analysis

Required Entries for Each ALEM on the Form 1094-C

- **Part II, Line 21:** Answer “Yes” to question “Is ALE Member a member of an Aggregated ALE Group?”
- **Part III, Column D:** For each month in which the controlled group existed, the “Aggregated Group Indicator” box will be checked
- **Part IV:** This section will be completed listing the names of the other related entities in the controlled group (the other ALEMs) and their EINs

Forms 1095-C Tied to Each ALEM

- Employees of each ALEM must receive a Form 1095-C with that ALEM’s name/EIN (cannot simply use the parent EIN for all Forms 1095-C)
- If an employee works for more than one ALEM in any month, the ALEM for whom the employee worked the most hours of service will report as the employer


ACA Reporting — Multiple Entities

12011A

Form 1094-C Department of the Treasury Internal Revenue Service	Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns Go to www.irs.gov/Form1094C for instructions and the latest information.	<input type="checkbox"/> CORRECTED	OMB No. 1545-2251 2024
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Part I Applicable Large Employer Member (ALE Member)

1 Name of ALE Member (Employer)		2 Employer identification number (EIN)	
3 Street address (including room or suite no.)			
4 City or town		5 State or province	6 Country and ZIP or foreign postal code
7 Name of person to contact		8 Contact telephone number	
9 Name of Designated Government Entity (only if applicable)		10 Employer identification number (EIN)	
11 Street address (including room or suite no.)			
12 City or town		13 State or province	14 Country and ZIP or foreign postal code
15 Name of person to contact		16 Contact telephone number	
17 Reserved			

For Official Use Only


18 Total number of Forms 1095-C submitted with this transmittal

19 Is this the authoritative transmittal for this ALE Member? If "Yes," check the box and continue. If "No," see instructions ☐

Part II ALE Member Information

20 Total number of Forms 1095-C filed by and/or on behalf of ALE Member

21 Is ALE Member a member of an Aggregated ALE Group? ☐ Yes ☐ No
 If "No," do not complete Part IV.

22 Certifications of Eligibility (select all that apply):

☐ A. Qualifying Offer Method
 ☐ B. Reserved
 ☐ C. Reserved
 ☐ D. 98% Offer Method

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and to the best of my knowledge and belief, they are true, correct, and complete.

Signature _____ Title _____ Date _____

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 61571A Form **1094-C** (2024)

ACA Reporting — Multiple Entities

120218

Form 1094-C (2024) Page 2

Part III ALE Member Information—Monthly

	(a) Minimum Essential Coverage Offer Indicator		(b) Section 4980H Full-Time Employee Count for ALE Member	(c) Total Employee Count for ALE Member	(d) Aggregated Group Indicator	(e) Reserved
	Yes	No				
23 All 12 Months	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
24 Jan	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
25 Feb	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
26 Mar	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
27 Apr	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
28 May	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
29 June	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
30 July	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
31 Aug	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
32 Sept	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
33 Oct	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
34 Nov	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
35 Dec	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	

Form 1094-C (2024)

ACA Reporting — Multiple Entities



Form 1094-C (2024) 120316

Page **3**

Part IV Other ALE Members of Aggregated ALE Group

Enter the names and EINs of Other ALE Members of the Aggregated ALE Group (who were members at any time during the calendar year).

Name	EIN	Name	EIN
36		51	
37		52	
38		53	
39		54	
40		55	
41		56	
42		57	
43		58	
44		59	
45		60	
46		61	
47		62	
48		63	
49		64	
50		65	

Form **1094-C** (2024)

ACA Reporting — Multiple Entities

600120

Form **1095-C** **Employer-Provided Health Insurance Offer and Coverage**
 Department of the Treasury
 Internal Revenue Service
 Do not attach to your tax return. Keep for your records.
 Go to www.irs.gov/Form1095C for instructions and the latest information.

☐ VOID
☐ CORRECTED

OMB No. 1545-2251
2024

Part I Employee **Applicable Large Employer Member (Employer)**

1 Name of employee (first name, middle initial, last name)		2 Social security number (SSN)	7 Name of employer		8 Employer identification number (EIN)
3 Street address (including apartment no.)			9 Street address (including room or suite no.)		10 Contact telephone number
4 City or town	5 State or province	6 Country and ZIP or foreign postal code	11 City or town	12 State or province	13 Country and ZIP or foreign postal code

Part II Employee Offer of Coverage **Employee's Age on January 1** **Plan Start Month (enter 2-digit number):**

	All 12 Months	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
14 Offer of Coverage (enter required code)													
15 Employee Required Contribution (see instructions)	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
16 Section 4980H Safe Harbor and Other Relief (enter code, if applicable)													
17 ZIP Code													

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 60705M Form **1095-C** (2024)

04

COBRA

M&A Qualified Beneficiaries



COBRA M&A Qualified Beneficiaries—Stock Deal

General Rule

- If the selling group ceases to provide any group health plan to any employee (and the termination of the seller's plan was in connection with the sale), the buyer's group health plan is liable for the COBRA coverage
- The buyer's group health plan has the obligation to make COBRA continuation coverage available to all M&A qualified beneficiaries with respect to that stock sale

Definition of a Stock Deal

- “A stock sale is a transfer of stock in a corporation that causes the corporation to become a different employer or a member of a different employer.”
- Continuing employees do **not** terminate from employment in a stock deal

M&A Qualified Beneficiaries

- Any COBRA participant whose qualifying event occurred prior to or in connection with the sale (and whose last employment was with the seller)
- **M&A Qualified Beneficiaries Include:**
 - COBRA participants already receiving COBRA coverage with seller's plan before the deal (i.e., existing COBRA qualified beneficiaries); and
 - Individuals who lose coverage under the seller's plan in connection with the deal (i.e., seller's employees who do not continue employment upon the acquisition by the buyer)

Buyer's Obligation to Offer COBRA if Seller Terminates Plan

The buyer's plan has the obligation to offer COBRA to all of the M&A qualified beneficiaries **as of the later of:**

1

The date the seller group ceases to provide a group health plan

OR

2

The date of the stock sale

COBRA M&A Qualified Beneficiaries—Stock Deal

Buyer's Obligation to Offer COBRA If Seller Terminates Plan

Example (Easy)

- Big Co. (1,000 EEs) acquires Medium Co. (150 EEs) as of July 1
- Medium Co.'s group health plan terminates as of the close
- At the time of the sale, Medium Co. has 14 COBRA qualified beneficiaries (whose qualifying event occurred with Medium Co.)
- Big Co. terminates 25 of Medium Co.'s employees in connection with the sale

Result

- The 14 existing COBRA participants under the Medium Co. plan are M&A qualified beneficiaries **with the right to continue the remainder of their COBRA maximum coverage period under the Big Co. group health plan as of July 1**
- The 25 Medium Co. employees who terminate employment in connection with the sale are also M&A qualified beneficiaries with **the right to the full 18-month maximum coverage period under the Big Co. group health plan**
- The Medium Co. employees who continue employment are not M&A qualified beneficiaries (they have no COBRA qualifying event)

COBRA M&A Qualified Beneficiaries—Stock Deal

Unusual Difficult Example

Example (Hard)

- **Medium Co. is part of a controlled group with Other Co.**
- Medium Co. and Other Co. both sponsor separate group health plans
- Big Co. acquires Medium Co. (but not Other Co.) as of July 1
- **Medium Co.'s group health plan continues after the close**
- At the time of the sale, Medium Co. has 14 COBRA qualified beneficiaries (whose qualifying event occurred with Medium Co.)
- Big Co. terminates 25 of Medium Co.'s employees in connection with the sale

Result

- The 39 M&A qualified beneficiaries (14 existing and 25 terminated upon close) **have the right to COBRA under Other Co.'s group health plan**
- Even though Medium Co. still maintains its plan, and even though Medium Co.'s employees were never eligible for Other Co.'s plan
- Reason is that Other Co. is part of the seller group and continues to maintain its plan
- Very weird result!

How to Avoid That Weird Result

- As part of the deal, the Medium Co. and Other Co. group could negotiate with Big Co. to have Medium Co.'s plan be responsible for COBRA for all M&A qualified beneficiaries
- **This would mean that Other Co.'s plan is not required to offer COBRA to the M&A qualified beneficiaries (unless Medium Co. fails to fulfill its contractual responsibility to offer COBRA)**

COBRA M&A Qualified Beneficiaries—Asset Deal

Definition of an Asset Deal

- “An asset sale is a transfer of substantial assets, such as a plant or division or substantially all the assets of a trade or business.”
- Continuing employees are **terminated from employment** and rehired by the buyer

Buyer Group Obligated to Provide COBRA if Successor Employer

- In an asset sale, the group health plan of the buying group is obligated to make COBRA available to M&A qualified beneficiaries if it is a “successor employer”
- **Buyer is a “successor employer” if:**
 1. The seller ceases to provide any group health plan to any employee;
 2. The cessation occurs in connection with the sale; and
 3. The buying group continues the business operations associated with the assets without interruption or substantial change

Successor Employer COBRA Timing

The successor employer’s group health plan has the obligation to offer COBRA to all of the M&A qualified beneficiaries **as of the later of:**

1. The date the seller group ceases to provide a group health plan; or
2. The date of the asset sale

COBRA M&A Qualified Beneficiaries—Asset Deal

M&A Qualified Beneficiaries

- Any COBRA participant whose qualifying event occurred prior to or in connection with the assets being sold (and whose last employment was with the seller)
- **M&A Qualified Beneficiaries Include:**
 1. COBRA participants already receiving COBRA coverage with seller's plan before the asset sale (i.e., existing COBRA qualified beneficiaries); and
 2. Individuals who lose coverage under the seller's plan in connection with the deal (i.e., seller's employees who do not continue employment upon the acquisition by the buyer)

No Qualifying Event Where Rehired By Successor Employer

- In an asset sale, continuing employees are terminated from employment with seller and rehired by the buyer
- The termination of employment is not a qualifying event if the buyer is a successor employer and the covered employee is employed by the buyer immediately after the sale (Note: There would be a qualifying event through seller's plan if the seller maintains its plan after closing)

Asset Sales in Connection with Bankruptcy Proceedings

1. An employer who purchases assets in sale that occurs in connection with a bankruptcy under Title 11 can still be a successor employer required to offer COBRA to all M&A qualified beneficiaries
2. Many employers don't consider this in a bankruptcy situation

05

Health FSA

Continue or Start Fresh?



Health FSA in M&A

Two Options for Seller's FSA:

1

Terminate the
Seller's FSA

OR

2

Continue Seller's
Health FSA
Coverage Through
End of Plan Year

Two Options for Seller's FSA

Option 1: Terminate the Seller's Health FSA

Default approach is to terminate the seller's health FSA as of the day prior to the closing. Then the employees who continue with buyer become eligible under buyer's health FSA as of the date of the close.

Advantage

- Employee can make a new election under buyer's health FSA for the remainder of the plan year (because they lost coverage under the seller's health FSA)
- Provides employees the opportunity to elect another full \$3,400 (2026 limit) under buyer's health FSA for the remainder of the plan year

Disadvantage

- Terminating seller's health FSA will likely result in many employees forfeiting contributions
- Employees will have no ability to submit claims for seller's FSA that are incurred after the date of termination (generally will have a run-out period after termination to submit claims incurred prior to termination)

Two Options for Seller's FSA

Option 2: Continue Health FSA Coverage Through End of Plan Year

This is the alternative approach to plan termination in Option 1. It allows the buyer to continue the seller's health FSA through the rest of the plan year in which the deal occurs—provided both health FSAs operate on the same plan year.

Approach 1

Coverage Under Seller's Health FSA with Salary Reductions Through Buyer

- The parties may agree to have the seller's employees continue to participate in the seller's health FSA through the end of the plan year in which the deal closes
- Buyer is responsible for taking employee contributions after the deal closes

Approach 2

Coverage and Salary Reductions Under Buyer's Health FSA

- Buyer may amend its health FSA plan to cover the seller's employees under buyer's health FSA for the remainder of the plan year in which the deal closes
- Seller's existing FSA elections and balances are rolled over to the buyer's health FSA
- Seller's employees submit all claims to the buyer's FSA (even those incurred prior to the deal but not yet reimbursed)

Reminder for Either Approach

- **No mid-year election change permitted under the health FSA because no eligibility loss**
- Employees therefore remain subject to their existing health FSA elections

Summary of Health FSA Options

Although we have formal IRS guidance addressing these options only in the context of an asset deal (IRS Revenue Ruling 2002-32), the IRS has informally stated that they should also apply in a stock deal. There are pros and cons to each approach.

Option 1

Terminate Seller's Health FSA

Terminate the Seller's Health FSA Prior to Closing

- Provide a run-out period for employees to submit claims incurred prior to the termination (typically 30-90 days)
- No claims incurred after the closing are eligible for reimbursement
- Likely will result in some employee forfeitures of contributions
- Employee gets a fresh election opportunity with buyer's health FSA

Option 2

Continue Health FSA Coverage Through the End of the Plan Year

Continue Elections and Balances

- **Through Seller's FSA:** Seller's FSA may be continued through the end of the plan year, with buyer responsible for taking contributions after the close
- **Through Buyer's FSA:** Seller's existing FSA elections and balances can be rolled over to the buyer's amended health FSA
- Employees remain subject to their health FSA election under seller
- Generally still preferred to avoid forfeitures

WRAP-UP

Takeaways



Mergers and Acquisitions – Top Five Issues for H&W plans

Note: This presentation does not address all aspects of M&A issues for H&W plans, nor does it address the due diligence process leading up to the deal. The employer's in-house or outside counsel is typically involved in a M&A situation.

1 Plan Design Issues	2 ACA Employer Mandate	3 ACA Reporting	4 COBRA M&A Qualified Beneficiaries	5 Health FSA in M&A
<ul style="list-style-type: none">Keep plans separate or move seller's employees to buyer's plan?Buyer has complete control of this decision and processOther Issues:<ul style="list-style-type: none">Remember the final Form 5500 if terminating seller's planReview plan documents and SPDs to update as neededAvoid creating a MEWA!	<ul style="list-style-type: none">ALE status is determined by full-time employee count in entire controlled groupAcquiring a non-ALE will trigger many new ACA requirements as of the closePenalties are determined on an entity-by-entity basis within controlled groupThe look-back measurement method adds higher level of complexity	<ul style="list-style-type: none">Each ALEM within the Aggregated ALE Group must file a Form 1094-CForm 1094-C needs to reflect controlled group status and list other entitiesThe Forms 1095-C for full-time employees are tied to each ALEM separately	<ul style="list-style-type: none">Rules differ slightly depending on whether the deal is a stock or asset saleBuyer generally has to offer COBRA to M&A qualified beneficiariesIncludes those on COBRA prior to deal and as a result of the dealKey Reminders:<ul style="list-style-type: none">Stock deals are more complex where the seller is part of controlled groupAsset deal rules apply to "successor employers" (even in bankruptcy)	<ul style="list-style-type: none">Two general approaches to handling the health FSA:<ol style="list-style-type: none">1. Terminate the seller's health FSA; or2. Continue health FSA coverage through the end of the plan yearPlan termination offers ability to make new elections, but comes at the expense of likely plan forfeitures from the seller's FSA (and unhappy employees)Continuation of the health FSA is generally the preferred approachCan be under seller's health FSA or elections/balances rolled to buyer'sIRS guidance doesn't officially address this option for stock deals, but informally they have suggested the same approach should be available



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Mergers and Acquisitions for H&W EB Plans

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