
ONE FIRM
WORLDWIDE®
JONES DAY®

EMPLOYEE BENEFIT TRENDS IN MERGERS AND ACQUISITIONS

February 8, 2024

Presented by

Diana Defino, Jones Day
Maxie Elbin, Parker-Hannifin
Dave Kompare, Aon
Ellen Matisko, Nordson Corporation
Patrick Wallen, Sherwin Williams

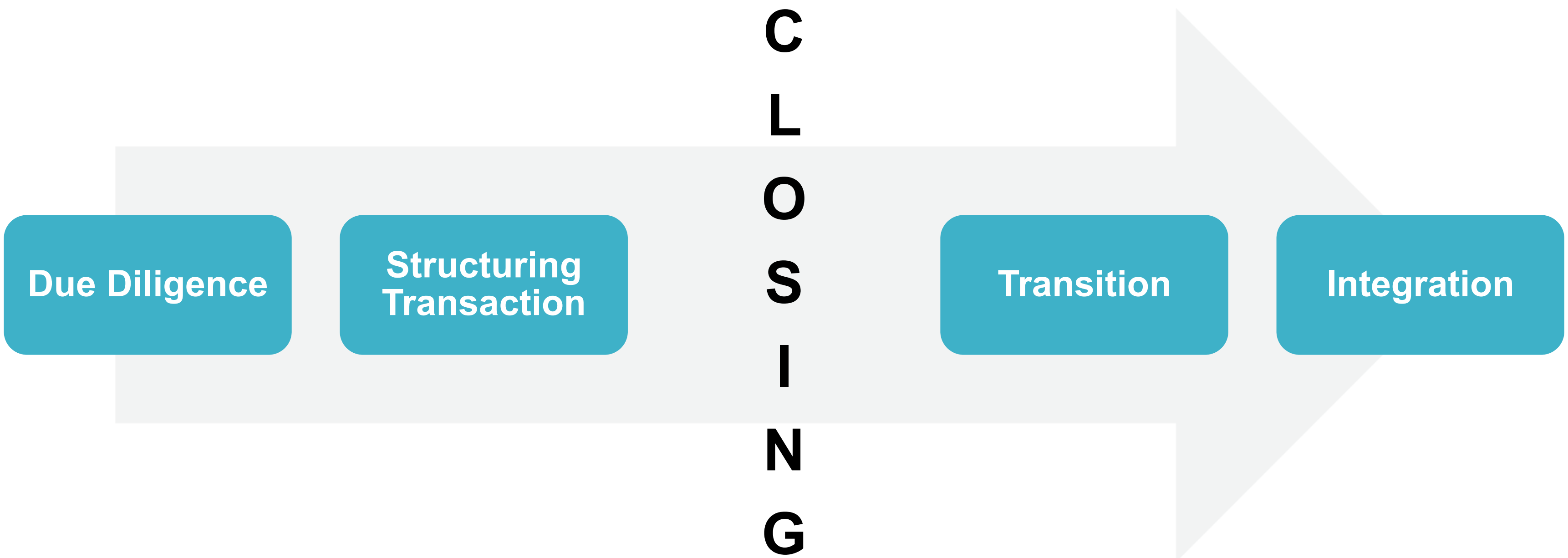
DISCLAIMER

Any presentation by a Jones Day lawyer or employee should not be considered or construed as legal advice on any individual matter or circumstance. The contents of this document are intended for general information purposes only and may not be quoted or referred to in any other presentation, publication or proceeding without the prior written consent of the authors, which may be given or withheld at the authors' discretion. The distribution of this presentation or its content is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of Jones Day.

M&A TRANSACTION OVERVIEW:
The Basics

- **Step 1**: Engage advisers (lawyers, consultants, accountants, etc.)
- **Step 2**: Due diligence (determine scope of review, including substantive areas, U.S. v. non-U.S., etc.)
- **Step 3**: Draft and negotiate transaction documents (purchase agreement, transition service agreement, employee matters agreement (if applicable), and other ancillary agreements)
- **Step 4**: Signing
- **Step 5**: Interim period: satisfaction of closing conditions
- **Step 6**: Closing
- **Step 7**: Post-closing integration

M&A TRANSACTION OVERVIEW:
Timeline



M&A TRANSACTION OVERVIEW:
Benefit Plan Due Diligence

Why is it important?

- Identify and evaluate legal ***risks*** and ***compliance*** problems
- Identify large ***liabilities***
- Impacts the ***purchase price*** and post-closing ***covenants***
- May impact rep and warranty ***insurance coverage***
- Helps client develop a plan for ***post-closing integration*** steps

M&A TRANSACTION OVERVIEW:
Transaction Documents/Structure

Stock Deal v. ***Asset Deal*** (and related benefit plan implications)

- Stock Deal: Buyer generally assumes all benefit plans as-is and plans remain unchanged (unless modified by Seller pre-closing or Buyer post-closing).
  - Purchase agreement must explicitly require termination of plans pre-closing if Buyer does not want to assume them.
  - Buyer can terminate plans post-closing, but consider issues such as successor plan rule for 401(k) plan distributions.
  - Note, however, that treatment may differ in a carveout situation in which a subsidiary is sold in a stock deal but participates in parent-level plans.
- Asset Deal: Buyer often does not assume Seller's benefit plans and must establish new ones (or transition employees onto existing Buyer benefit plans).
  - This can present timing issues for the establishment of new benefit plans in time for closing (which can be difficult for providers).
  - Buyers often ask for a transition services agreement ("TSA") to allow employees to remain on Seller plans for a period of time post-closing until new Buyer plans are established.

JONES DAY®

KEY EMPLOYEE BENEFITS DILIGENCE AREAS/ISSUES IN M&A TRANSACTIONS

Retirement plans

- Pension plan liability/funded status
- 401(k) plan administration
- ERISA/Code compliance
- Successor liability in asset deals
- Partial plan terminations

Health and welfare plans

- ERISA and COBRA compliance
- PPACA
- Code Section 125 issues
- Retiree medical

Executive compensation

- Equity awards
- Deferred compensation plans/arrangements
- Code Section 409A issues
- Incentive compensation and tax treatment
- Severance

Other employee/ HR matters

- Collective bargaining agreements
- Payroll
- Paid time off (“PTO”)
- Restrictive covenants
- Data privacy
- Insurance/service provider contracts

FROM THE LEGAL SIDE:
Recent Benefit Trends In M&A

1. Increased engagement of ***benefit plan consultants*** during the due diligence process to review benefit plans and analyze costs and assist with integration planning.
   - Benefit plan review by consultants overlaps with legal diligence review, although not entirely duplicative.

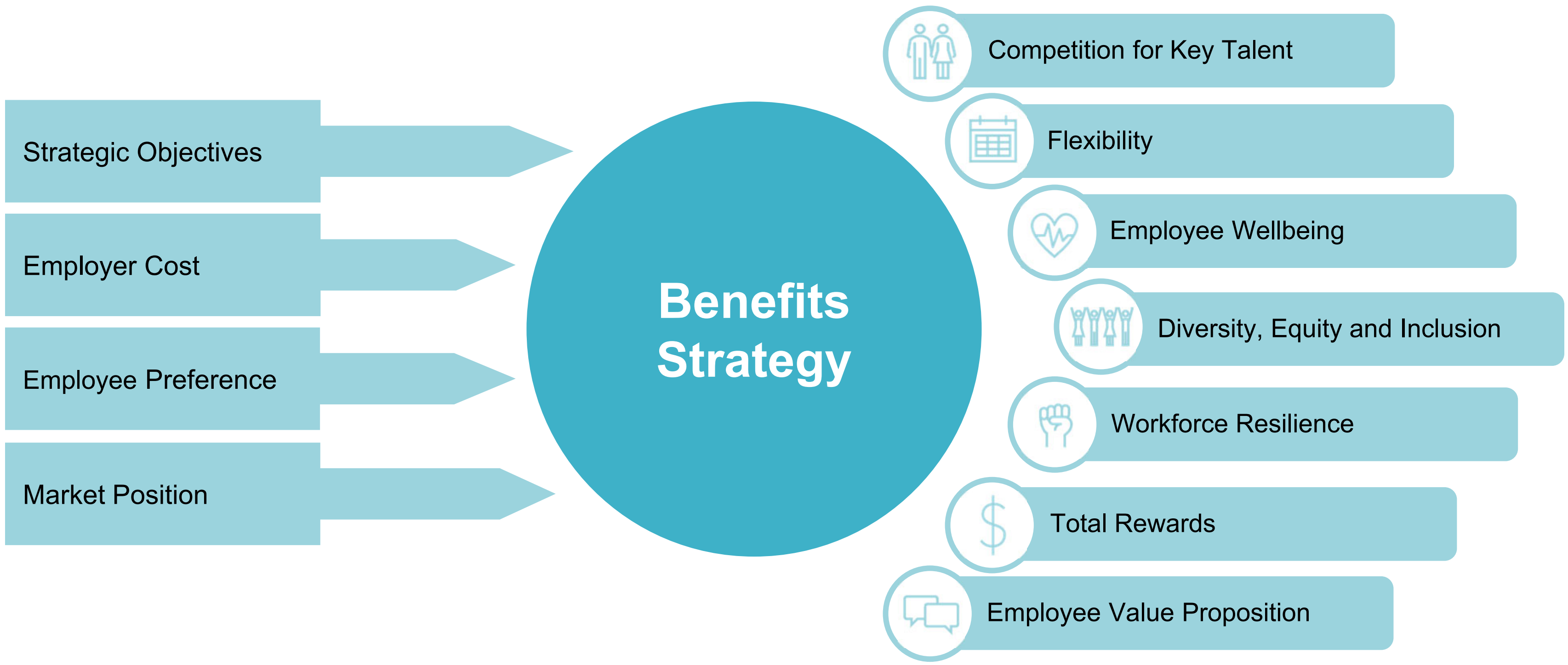
2. Increasing use of ***representation and warranty insurance*** ("RWI")
   - Typically results in an expanded scope/deeper dive of the diligence review.

3. ***Patient Protection and Affordable Care Act*** ("PPACA") compliance issues
   - Increased focus on PPACA compliance, including in the due diligence process and in the transaction documents (e.g., specific PPACA reps and warranties).

4. ***MEWAs*** (Multiple Employer Welfare Arrangement)
   - Created, for example, where business employees (in an asset deal) or subsidiary employees (in a stock deal) *continue to participate in a former parent's health plan* during a transition period after the sale (including through TSAs)
   - *State insurance laws* apply to fully-insured MEWAs and to self-insured MEWAs to the extent not inconsistent with ERISA
   - Special DOL reporting under ERISA §101(g) (*Form M-1*) (with exceptions)

5. Changing legal landscape for ***restrictive covenants*** (e.g., ***non-competes***)
   - States are increasingly restricting use of non-compete agreements (including through legislation and non-enforcement by courts)
   - Federal government seeking ban/restrictions on use of non-competes

RECENT BENEFIT TRENDS IN M&A
An Evolving World of Benefits



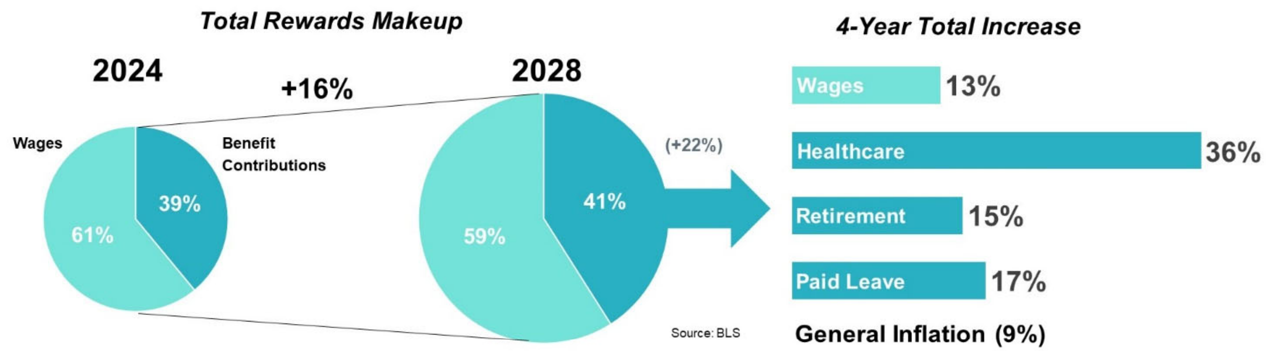
FROM THE CONSULTING SIDE:
Recent Benefit Trends In M&A

Trending Benefits Shaping M&A Considerations

Support Every Life Stage	Foster Holistic Wellbeing	Make It Personal
Caregiver Support (e.g., child & elder care)	**Expanded Time Away** (e.g., Wellbeing Days, Shut Down Week, Caregiver PTO, Sabbaticals)	**Employee Sensing** (e.g., business resource groups, surveys, focus & feedback groups)
Retirement Readiness (e.g., 1:1 financial advising)	**Financial & Emotional Wellbeing** (e.g., financial advisors, budgeting, digital & live therapies)	**Simplify to Engage** (e.g., white glove navigation, digital engagement applications)
Family Building (e.g., reproductive health, fertility, adoption)	**Live Life Well Accounts** (e.g., Life Planning Accounts, Specific Use Funds)	**DEIB Aligned** (e.g., workplace policy, resources, infrastructure)
Career Development (e.g., formal coaching, mentoring, tuition assistance)	**Flexible & Hybrid Work** (e.g., flex work, return to office incentives – healthy foods, events)	**Voluntary Benefits** (e.g., pet insurance, disability, perk platforms)

FROM THE CONSULTING SIDE:
Recent Benefit Trends In M&A

The Increasing Impact of Health Benefit Programs



Increasing Healthcare Trend Driven by a Multitude of Factors

- High-Cost Claims
- Contract Inflation
- Gene Cell Therapies
- Chronic Condition Prevalence and Complexity
- GLP-1 Drugs
- M&A Activity

RECENT BENEFIT TRENDS IN M&A
Benefit in M&A

Targets with Legacy Acquisitions

Targets with legacy acquisitions pose enhanced compliance risks, complexity, and added costs for integration

Pay Equity Issues

With increasing pay transparency and pay equity legislation, pay equity compliance is / will be an increasing concern

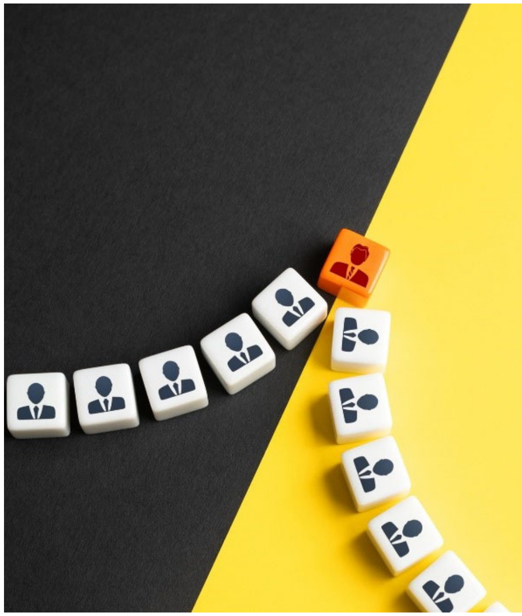
Negative Synergies

Targets in low margin industries or with below–market benefits may have lower cost benefits – resulting in incremental benefit costs if employees are transitioned to acquiror's benefits

As Much About Delivery as Design

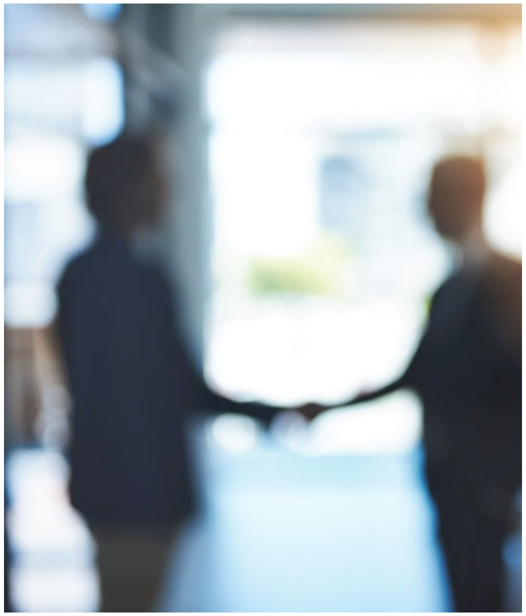
Benefit programs are increasingly complex with multitudes of point solutions – while not posing huge liabilities, these programs complicate integration and communication efforts

FROM THE PLAN SPONSOR SIDE:
Recent Benefit Trends In M&A



- Increase in the number of potential acquisitions including countries in which the company currently does not have operations (or has a very small presence)
- Increase in the number of asset deals
- “No less favorable” clauses in the employee covenant.

FROM THE PLAN SPONSOR SIDE:
Recent Benefit Trends In M&A



1. Identifying hidden/contingent liabilities
2. Discovery of the “unwritten” or “undocumented” administrative procedures during integration
3. Companies headquartered outside of the U.S.

WEB Worldwide Employee Benefits Network

FROM THE PLAN SPONSOR SIDE:
Benefit Plan Integration Issues

- Communication of benefits integration timeline to other areas of HR (i.e. payroll, talent/recruiting)
- Seller providing well above-market, unsustainable benefit offerings
- Acquiring employees who are transitioning from a small, family-owned business to a large matrixed corporation
- Ensuring alignment of all Corporate Functions
- Paid time off
- Unwinding potential compliance concerns

FROM THE PLAN SPONSOR SIDE:
Lessons Learned

1. Ensure you receive supporting documentation/records of government filings from prior years.

2. Meet with day-to-day HR/Benefits person from the acquired company as soon as possible after closing.

Questions?

JONES DAY®

One Firm Worldwide®