M&A &401(k): Where Fiduciary Oversight Often Goes to Die

By Ary Rosenbaum, Esq.

In the world of corporate mergers and acquisitions, attention is lavished on financial statements, contracts, intellectual property, real estate, and executive compensation. Armies of lawyers and accountants pore over every line item and clause, preparing due diligence binders thick enough to double as doorstops. But all too often, the company's 401(k) plan—the retirement vehicle that impacts every rank-and-file employee—gets left behind in the fog of deal fever. It's treated like an afterthought. A box to check, if that. Until the IRS or the Department of Labor (DOL) comes knocking, that is. I've been through this process more times than I care to count. I've worked with companies who thought they were buying growth and synergy but got a retirement plan compliance disaster as a side dish. And every time, the story is the same: no one paid attention to the 401(k) plan during the deal. When the dust settled, they realized they'd inherited fiduciary failures, top-heavy issues, missing audits, and angry employees. By then, the clean-up is ten times more expensive, and a hundred times more frustrating, than just doing it right in the first place.

Step One: Stop Ignoring the Plan

I get it. If you're a corporate executive or deal lawyer, you probably don't want to spend your valuable time reviewing vesting schedules or matching contribution formulas. But this isn't just a paperwork issue. This is about fiduciary liability, participant rights, and the potential for massive financial exposure if something goes wrong. Every 401(k) plan is a living, breathing legal entity governed by ERISA, and when one company acquires another, that plan doesn't just vanish. Its obligations, errors, and legacy follow it. If the acquiring company isn't careful, they step right into a trap of unintended fiduciary responsibilities, compliance problems, and—worst of all—employee distrust.

The Three Paths—and Their Potholes

In any M&A transaction involving two 401(k) plans, there are three primary paths:

1. Maintain Separate Plans: Sometimes done in the short term to avoid immediate complications, but it leads to administrative headaches and operational inconsistencies. The longer this dual-plan structure exists, the more likely it is to result in errors, like misapplied contributions, incorrect eligibility tracking, or inconsistent participant communications.
2. Merge the Plans: Sounds efficient, but requires careful review of both plan documents to ensure compliance with ERISA's anti-cutback rule and to harmonize plan provisions. Do both plans allow for loans? What about hardship withdrawals? What's the vesting schedule, and does either plan have grandfathered benefits? These questions must be answered before the merger occurs—not after.
3. Terminate One Plan: This can be the cleanest route administratively, but it's also fraught with regulatory landmines. If you terminate a plan, you must fully vest all participants, distribute assets properly, and ensure the plan passes compliance testing up through the date of termination. And you better not terminate a plan with the intent to merge employees into another plan if you want to avoid anti-abuse scrutiny from the IRS.

The Compliance Minefield

One of the biggest misconceptions I see is that companies think of the 401(k) plan like a bank account—something that can be transferred without much fuss. In reality, it's more like a trust with complex tax-qualification requirements. If the acquired plan failed its ADP/ACP tests in prior years, you may have to make corrective distributions or contributions. If the plan was late in filing its Form 5500s, you're now the proud owner of that filing delinquency—and the penalties that come with it. And let's talk about top-heavy testing, a term that still confuses even experienced HR folks. If the plan is top-heavy (i.e., it disproportionately benefits key employees or owners), and you don't provide the required minimum contributions to non-key employees, you're violating IRS rules. Those viola-

tions don't go away when ownership changes. They just become your problem. Same goes for protected benefits—things like early retirement options, subsidies, or specific distribution rights. Under ERISA's anti-cutback rule, you can't reduce or eliminate these benefits once they've been granted. If the acquired plan has provisions you didn't bother to check, you may be stuck with them for years—unless you want to walk into a class action lawsuit.

Plan Documentation: The Forgotten Files

During M&A due diligence, acquiring companies should obtain a full document package for the target's 401(k) plan. That means not just the current plan document, but every amendment, summary plan description, determination letter, and testing report for at least the past three years. And don't forget to review fiduciary meeting minutes, investment policy statements, and service provider agreements. Yet, in countless transactions, the buyer never even asks. The seller's HR team might send over a blurry PDF of a plan summary with a note saying "we think this is current." If that's the extent of your diligence, you're asking for trouble.

Who's Responsible? You Are.

Let's be crystal clear: once you acquire a company, you become a fiduciary of any 401(k) plan assets or obligations attached to it. That means you owe a duty of loyalty, prudence, and care under ERISA. If something goes wrong, if fees are too high, investments underperform, or benefits are mismanaged, you could be on the hook. Courts have shown little patience for plan sponsors who plead ignorance. And this responsibility extends to communication and education. If you're changing plans, merging accounts, or terminating the old plan, your employees need to know what's happening—and what it means for their retirement. Vague memos and confusing enrollment windows create a trust gap, one that can lead to complaints, low participation, or worse.

The Real Cost of Getting It Wrong

I've had clients pay hundreds of thousands of dollars in voluntary compliance correction programs because they failed to address 401(k) issues pre-closing. Others faced participant lawsuits or even DOL investigations for plan errors that could've been prevented with basic due diligence and competent legal guidance. Worst of all, I've seen companies damage their reputations—internally and externally—by mishandling the retirement benefits of their employees. A mismanaged plan merger sends a clear message: "We don't value your future." And that's a morale killer, especially when the corporate messaging is all about "synergy" and "shared growth."

My Fiduciary Checklist for M&A Deals

If you're thinking about an acquisition or merger, here's what I tell every client:

- Start the 401(k) review early, during initial diligence.
- Obtain full plan documentation—don't just rely on HR summaries.
- Review plan operations for compliance history, errors, or red flags.
- Compare key plan provisions—eligibility, vesting, match, loans, etc.
- Engage experienced ERISA counsel and TPAs—not just your M&A lawyers.
- Decide early: maintain, merge, or terminate? Then build a timeline.
- Communicate clearly and often with affected employees.
- Document every step—your fiduciary process matters more than your intent.

Final Thoughts

Mergers and acquisitions are about the future. But ignoring the 401(k) plan is a surefire way to drag the worst parts of the past into your next chapter. These plans matter. They're not just regulatory burdens—they're real money, real trust, and real futures for your employees. I've made a career out of cleaning up messes others ignored. Believe me when I say this: it's far better—and far cheaper—to get it right the first time. If you're not sure where to begin, start by asking the question most people forget: What's going on with their 401(k) plan? If no one knows, that's your biggest red flag. And if no one's asking, you already have your first fiduciary failure.

THE ROSENBAUM LAW FIRM P.C.

The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com