Member's Quarterly

Spring 2024 Edition

Feature

Mergers and Acquisitions

Make employees a priority

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Introduction

Understanding the nature of business transactions is crucial when assessing employee issues, especially regarding share purchases and asset purchases. The impact of these nuances can be significant for both employers and employees. Ensuring employees are well-informed about impending changes is essential, and various methods, such as guides and presentations, can be used to facilitate communication. This article explores the importance of a smooth transition for employees during mergers or acquisitions and some related legal ramifications to consider.

The Significance of Employee Transitions

In mergers and acquisitions, employment issues hold paramount importance as the success of the target corporation is often attributed to its diligent workforce. Employers should prioritize keeping employees informed about major changes. It may be prudent to consider methods like providing realistic previews of impending changes (both positive and negative), using suitable communication mediums that fit the culture of the organization, or sometimes even offering counseling services to employees having difficulty with the transition.

Legislative provisions, such as Section 5 of the Alberta *Employment Standards Code* and Section 46 of the Alberta *Labour Relations Code*, mandate the continuity of employment and control during corporate sales, transfers or mergers.

While statutory provisions like Section 5 of the *Employment Standards Code* stipulate that the minimum requirements of the *Employment Standards Code*, including termination pay obligations, be maintained throughout a corporate sale, lease transfer or merger, a purchaser can face much greater termination pay liability exposure under common law in the event that it is found to have carried out employee transitions or terminations inadequately. In this regard, it is quite typical for an employee's common law entitlement to be many times larger than their minimum entitlements under Employment Standards legislation. In addition to increased common law entitlements, employers can also face steep liability exposure if they are found to have acted in bad faith or without sufficient regard for their employees.

In the context of a unionized workplace, the practical effect of legislation similar to Section 46 of the *Labour Relations Code* is that any union certifications remain in effect and any collective agreement in place binds the purchaser/acquiring party ("…as if the collective agreement had been signed by that person"). Section 46 also contains a mechanism for an employer, union or affected employee to apply to the Labour Relations Board to determine its respective rights, duties and privileges. The Board is also authorized to determine the status of bargaining agents, union certifications and the status/effectiveness of any collective agreements in force. This latter function becomes important when two groups of unionized employees merge. In such a case, there can be questions as to which of two collective agreements bind the employees, or whether each group of employees continues to be governed by its former collective agreement.

Clearly, legislatures have recognized the need to ensure that employees are treated fairly when their employment is transitioned from one employer to another. However, ensuring a smooth transition is also

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beneficial for any incoming employer wishing to harness the full benefit of its acquired workforce.

Understanding Share and Asset Transactions

Share Purchases: In share purchases, the purchaser acquires the shares of a business, stepping into the seller's shoes. This type of transaction does not have an immediate effect on employees, but the purchaser assumes all existing employment obligations. Changes made by the purchaser after the acquisition, such as alterations to employment terms, become the purchaser's responsibility. Employment contracts, stock option plans and change of control provisions should be carefully reviewed to assess liabilities and potential employee concerns.

Asset Purchases: In asset purchases, the purchaser buys some or all of a business's assets. This transaction triggers a technical constructive dismissal, subject to employees' duty to mitigate their losses by seeking re-employment. The purchaser can offer employment on similar terms to minimize the seller's liability exposure. Specific nuances, such as credit for past service, must be considered. Proper novation or indemnities may be needed to clarify liability for severance payments if the purchaser terminates employees during the mitigation period.

Pre-sale Employment Considerations

Before closing the sale, several key issues regarding employees must be addressed. These may include handling employees absent due to illness or disability, evaluating the impact on employment benefits (e.g., pension plans, entitlements), and assessing potential risks related to disability benefits and human rights. Close collaboration between the seller and purchaser is crucial to determine which employees will be retained and which will be terminated, as well as establishing agreements on ongoing liabilities and severance liability risks.

Conclusion

In business transactions, prioritizing employee considerations is crucial for both legal compliance and fostering an efficient transition. Employees should be adequately informed about impending changes and employers must fulfill their legal obligations to maintain continuity of employment. Share purchases and asset purchases have distinct implications for employees. Careful assessment and planning are necessary to mitigate risks and ensure a seamless transition. By addressing pre-sale employment considerations and adhering to legal requirements, employers can protect themselves from potential liability and capitalize on the benefits of a well-managed workforce in post-transaction operations.

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