

MERGERS & ACQUISITIONS



Considering employees during M&A

With acquisitions come people, and with them matters of salaries, severance, unions and other vendor and acquiror considerations

WHEN COMPANIES think about buying or merging with other companies, top-of-mind considerations are likely determining the value of the asset. What is the brand recognition of the asset worth in the

marketplace? Is the vendor's selling price fair? Has due diligence been done?

Before either party signs on the dotted line, however, it's worth considering the employees in the company or division

being purchased. An acquisition can mean assuming the costs of those employees; assessing their value to the business (and whether to keep them); and ensuring that valued employees move over to the acquiror. And a unionized workforce has its own unique set of considerations.

First things first

The first matter for an acquiror to decide "is what they need to do to run the business going forward," says Brenda Gosselin, a corporate and securities lawyer at Goodmans LLP in Toronto, whose practice includes M&A and corporate restructuring.

Lawyers must look at a client's big picture: who they are, what they are acquiring and what their vision is, "because that's ultimately going to drive how the deal is structured and then what gives rise to the various considerations."

Whether the deal is a share sale or asset sale affects an acquiror's responsibilities

COMMUNICATE WITH EMPLOYEES IN TARGET COMPANY



Smart companies present a united front in presenting sale news to employees



Counsel can review a Q-and-A for handing out at a town hall announcing the deal

toward the employees of the target company. In a share sale, in which a buyer purchases the shares of the target company and the assets and liabilities that go with it, the target's employees remain with the company, although they typically receive formal offers of employment by the acquiror. In an asset sale, a buyer will purchase certain assets of the company but not the entire company, and non-unionized employees need not be kept on.

For employees not being kept on — or who choose not to sign on — severance obligations arise for the vendor. For those who are offered employment, it must be essentially on the same terms as what the employee currently has — or better. Indeed, if the benefits offered by the acquiror aren't equivalent to those offered by the vendor, employees may have grounds to claim constructive dismissal.

Since it is the vendor that must pay severance to employees who will not continue with the acquiror, that may substantially affect the purchase price where there are very senior long-term or large-scale terminations resulting from a transaction, says Lauren Butti, a litigator at Goodmans, who deals with business

disputes, including in contracts and employment.

"Often you will see in the structure of the deal that there's a price adjustment for the fact that the liabilities triggered have to be paid for," Butti says.

In Quebec, no formal offer of employment needs to be made to employees of the target company by the acquiror, says Patrick Galizia, who practises employment and labour law with Norton Rose Fulbright Canada LLP in Montreal.

"If it's a share purchase agreement . . . employees simply continue to work for that new buyer. There's no offer of employment presented to them; we simply inform them of the new owner, based on sections 2096 and 2097 of the Civil Code of Quebec."

Potential liability associated with

Understanding the key terms of employment contracts of senior personnel is especially important, including incentive plans under which they are currently getting compensation, which may be affected and triggered by the sale, says Gosselin.

A vendor is bound by common law in severing an employee whose letter of offer simply indicates, say, a salary and a requirement to be bound by company policy; but what's considered a reasonable award under common law will change over time and jurisdiction, and "of late, age, and an older age, has become a more relevant factor," she adds. "Someone in their fifties may not be employable in the same way as they were in their thirties. Courts are starting to focus more on that."



"You want to understand the landscape of the entire workforce. . . . Whether you decide to take [employees] on or not, that gives a birds-eye view of the severance obligations."

Brenda Gosselin, Goodmans LLP, Toronto

acquiring the vendor's personnel includes the number of employees, each employee's length of service with the vendor, position duties and compensation, including their benefits, says Marni Outerbridge, a civil litigator and employment lawyer at SV Law in Guelph, Ont. Also, are there any current or threatened employment-related claims against the target company? Do employees have detailed contracts and, if so, what do they say?

"No matter how the deal is structured, whether that's an asset or shared [sale] deal, the disclosures are still going to be very important in order to assess employment-related liabilities," Outerbridge says.

Getting target employees on board

Retention bonuses and increases in salary may be offered to key personnel to bring them on board, "and all that attached to a condition that they will be staying with the company for a certain duration," says Galizia. Those contracts with higher-level personnel should be made pre-sale and include a restrictive covenant, he says.

And acquirors should start with good communication in retaining desired staff. Once the deal is signed and announced, the messaging by the acquiror and the target should present a united front, with town halls for employees attended by both vendor and buyer, says Gosselin.

MERGERS & ACQUISITIONS



“You stress in those letters of offer the benefits or conditions that [are] more favourable to them, that’s a plus for them by joining your company.”

Patrick Galizia, Norton Rose Fulbright Canada LLP, Montreal

“Having Q-and-As prepped in advance that everyone’s on side with will alleviate a lot of necessary concerns and questions” by employees and present a positive view of the acquisition; for example, one that is being made by a strategic buyer that will add value to the company rather than simply a financial investor.

Unionized workplaces

Under Ontario’s Labour Relations Act, among others, the purchaser inherits the state of play in a unionized workplace; if the collective bargaining agreement has expired or will soon, there are residual rights to negotiate.

Galizia advises negotiating with the union through the vendor, “saying, ‘if you don’t accept the following conditions,

we’re not buying the company.’ It’s not bad-faith negotiations, but a condition of the sale is that you’ll get working conditions favourable to you.”

Labour unions may be more inclined to negotiate if there is a long-term relationship with the target company and a desire to preserve jobs, says Butti. “But [negotiate] in advance, before the deal is made.”

Avoiding pitfalls

Outerbridge has seen cases in which the acquirer will insist on employees being terminated and paid by the vendor before being rehired by the acquirer, in the mistaken belief that the acquirer will not be responsible for entitlements accrued during the employees’ prior tenure.

SHARE SALE OR ASSET SALE?



Whether the deal is a share sale or asset sale affects an acquirer’s responsibilities toward the employees of the target company. In a share sale, in which a buyer purchases the shares of the target company and the assets and liabilities that go with it, the target’s employees remain with the company, although they typically receive formal offers of employment by the acquirer. In an asset sale, a buyer will purchase certain assets of the company but not the entire company, and non-unionized employees need not be kept on.

But the Employment Standards Act considers employment to be continuous in the event of a corporate sale, she says, “even if there’s been that termination and rehiring.” Unless there is a 13-week gap between the termination of employment by the vendor and reemployment by the acquirer, which Outerbridge describes as tending “to be functionally impossible,” employees who are terminated and paid by the vendor based on length of service and then rehired by the acquirer will still get credit for prior length of service, even if terminated later by the successor employer.

Finally, don’t overlook the personal side of personnel in an M&A.

“Jobs are very personal to people,” Butti says; employees take pride in their work and in the companies for which they work. Acquirors, therefore, need to pay attention not only to job roles, titles, salaries, pension and benefits but to the “soft” issues that affect culture, such as an employee handbook that doesn’t conform to Canadian standards.

“You want a happy workforce,” she says. “With that comes extra time to ensure policies are Canadianized; you then get a more all-encompassing buy-in.” **CL**