

**DEALING WITH EMPLOYEES IN BUSINESS ACQUISITIONS**

Payroll costs are typically among the most significant expenses of most businesses. Employees who have provided service to a business for a substantial period of time often represent a store of experience and a degree of loyalty that is difficult to replace. However, past service also represents a potentially large future liability in termination and severance costs if it is necessary to bring the employment relationship to an end. Careful planning and good negotiating strategies will help the purchaser of a business strike the right balance to achieve its business objectives.

**When Purchasing Assets...**

From the purchaser's perspective, one of the advantages of structuring an acquisition as an asset purchase, rather than a share purchase, is its ability to easily focus negotiations on which employees of the vendor it wishes to retain in the purchased business. Unlike a share purchase, where the purchaser acquires the entire business of the target corporation, including all of its employee relationships, the purchaser in an asset purchase transaction has the opportunity, subject to negotiation, to "handpick" the employees that it wishes to retain in the purchased business. However, it is not entirely a "free throw" for the purchaser, because excluding employees from the transaction will normally increase the vendor's liabilities and affect the vendor's valuation of the deal, either explicitly or implicitly.

In a carefully written asset purchase agreement, the purchaser should have no liability to the employees it chooses not to retain, and those employees can only look to the vendor for compensation relating to the termination of their employment. The careful purchaser and its legal counsel will require that, no later than immediately prior to the closing, the vendor terminate and pay all termination and severance pay, plus all common law entitlements, to those employees of the purchased business which the purchaser does not intend to retain.

Purchasers who decide to assume some, or all, employees after the closing should be aware of Section 9 of the *Employment Standards Act* (Ontario) which states:

"If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment."

In other words, if the purchaser retains an employee of the vendor at the closing of the transaction, all prior time spent by the employee with the vendor will be deemed to be time spent in the employment of the purchaser for the purposes of calculating the severance, termination and common law obligations of the purchaser. This can have the effect of creating some potentially onerous obligations for the purchaser, especially in connection with those employees who were employed in the purchased business by the vendor for a significant period of time.

There is a common yet mistaken, belief that if the vendor terminates the employees and pays their required termination and severance to the date of closing, the purchaser can essentially "reset" the employees' length of service and treat them as new hires with no past service. However, Section



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