

Don't Overlook Labor and Employment Issues In Corporate Acquisitions



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The purchase or sale of a business can result in significant unintended costs to both buyers and sellers when labor and employment ("L&E") issues are overlooked.

General Rule. Under corporate law, an asset purchaser is not liable for the debts and liabilities of the seller with very limited exceptions. In a stock purchase, the opposite rule generally applies.

Special L&E Rule. In the L&E area, while the general rule is operative for an acquisition by stock, labor successor doctrines have developed which can make an asset purchaser liable for the L&E liabilities of the seller. Courts have identified three principal factors bearing on L&E successor liability: (1) the continuity in operations and work force of the successor and predecessor employers; (2) the notice to the successor employer of its predecessor's legal obligation; and (3) the ability of the predecessor to provide adequate relief directly. A 2013 federal appellate court case (*Teed v. Thomas & Betts Power Solutions*) illustrates how an asset purchaser unfamiliar with this special rule may find itself "holding the bag." A purchaser acquired the assets of a company in a distressed sale auction. The purchase and sale agreement deemed the sale "free and clear" of all the debts of the seller, including pending claims by a class of employees under the Fair Labor Standards Act. The employees joined the purchaser as defendant. The court acknowledged that the purchaser would not be liable for the debt under State corporate law. Nonetheless, by acquiring the company with knowledge of the claims and main-

taining it as an ongoing concern, the successor was held liable to the FLSA plaintiffs under federal successorship law where, as here, the predecessor could not provide relief. L&E counsel knowledgeable about the particular liability rules could have helped the buyer understand what it was acquiring, and priced the transaction accordingly.

Successorship and Unionized Workforces. In an acquisition of a unionized company, the purchaser generally assumes both the contract and the duty to bargain with the union where the transaction is structured as a stock purchase. In an acquisition by asset purchase, by contrast, the purchaser typically will not assume automatically the collective bargaining agreement, but will be obligated to recognize and bargain with the union if deemed a legal "successor." Hiring a majority of the predecessor's employees and continuing the predecessor's operations results in successorship. If a purchaser agrees to hire all employees under the existing terms of employment, it may be deemed a "perfectly clear successor" which will require it to bargain with the union and observe the terms of the existing contract unless and until an impasse in negotiations is reached. If the purchaser does not agree or otherwise commit to hire the incumbent employees, it may be able to establish its own initial terms of employment and hire on that basis. While a purchaser may not refuse to hire employees based on union affiliation, it may require applications for employment based on new terms and consider both existing employees and new applicants.

Notice to Employees. The federal Workers' Adjustment Retraining and

Notification Act ("WARN") requires covered employers (100 or more full-time employees) to provide 60 days advance notice of any certain business decisions that will result in an employment loss for 50 or more employees during any 30 day period. Employers that fail to provide notice will be liable for back-pay and benefits to employees denied notice. The seller is responsible for notice if the employment loss predates the sale. If the buyer agrees to hire the seller's employees, the seller has no WARN obligation because there is no "employment loss." However, the buyer will assume the WARN obligation if it subsequently initiates terminations that trigger WARN.

L&E Due Diligence. As the foregoing makes clear, no merger or acquisition should be concluded before L&E issues are reviewed and their implications are understood. In addition to the liability areas outlined above, substantial liabilities for unfunded or underfunded pension and retiree benefit plans may be assumed by a buyer deemed to be an L&E successor. Employment agreements of the predecessor require careful review, including for liabilities associated with deferred compensation, bonus, and incentive plans. Pending and threatened L&E litigation should be assessed. Without undertaking this review, the buyer may get "more than it bargained for" with regard to legal liability.

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