

PURCHASING A BUSINESS IN CANADA? UNDERSTAND THE KEY ASSETS: YOUR NEW EMPLOYEES

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Purchasing a business in Canada often means becoming an employer of Canadian employees. Given the real potential of becoming liable for severance payments after acquiring a business in Canada, potential buyers would be prudent to consider the ways by which they can mitigate their exposure to such costs.

CONTINUOUS EMPLOYMENT

The first thing potential buyers need to be aware of is the deemed continuous employment provisions contained in provincial employment standards legislation (or federal legislation for certain industries such as inter-provincial transportation and telecommunications). Pursuant to that legislation, if an employer sells the whole or a part of a business and the buyer employs an employee of the seller, then the legislation imposes two important consequences. First, the employee's employment is deemed not to have been terminated. Second, the law deems the employee's employment history and obligations with the seller to be transferred with the purchase which will impact any subsequent calculation of the employee's length or period of employment. These legal consequences are important because it can significantly increase the amount of severance pay to which an employee can become entitled to upon dismissal, as discussed below.

INHERITING SEVERANCE OBLIGATIONS

Unlike the United States, Canada does not have 'at will' employment. Because the concept of at will employment is foreign to Canadian employment law, businesses with Canadian employees must not include at will employment concepts into Canadian employment agreements. In Canada, all employment conditions must comply with at least the minimum requirements provided in employment standard legislation. Some contracts will provide for severance entitlements which exceed the minimum obligations, to provide something closer to common law notice (discussed below). As a successor employer, the buyer should ensure

that individual employment contracts are carefully reviewed well prior to closing in order to be aware of the obligations that it will assume, particularly the obligations related to any future terminations of employment.

REASONABLE NOTICE

Where, however, the seller's employees have no written contracts containing severance provisions (or written contracts which are void or unenforceable for any of a number of reasons), employees in Canada (other than in the province of Quebec, as discussed below) are considered to have 'common law' entitlements. Canadian common law presumes that employment can only be terminated with 'just cause' (which is a high standard to meet, but a topic for another day) or upon the provision of 'reasonable notice' (or pay in lieu of reasonable notice). Reasonable notice is invariably greater than applicable provincial statutory minimums. What is reasonable is in the eyes of the judge, based on: the specific employee's age; length of service; nature of employment (i.e. skill level, managerial responsibilities, if any, and compensation); availability of alternative employment given existing market conditions; and any other factor the Court considers relevant (such as restrictive covenants which may hinder the employee's ability to readily secure comparable employment).

Unfortunately there is no formula for determining reasonable notice; as the judiciary puts it, determining reasonable notice "is an art, not a science." But more often than not, the Courts consider notice in terms of months, rather than weeks as used in minimum standards legislation. It has not been unheard of for employees to be awarded 24 or more months of reasonable notice or pay in lieu thereof.

In the province of Quebec, the law is based on civil law principles (similar to the State of Louisiana) rather than the common law. Pursuant to the Civil Code of Quebec, with or without written contracts, the reasonable notice obligation applies. Even if a period of notice is provided in a contract, a civil court could decide otherwise if it considers the notice to be "unreasonable" or insufficient in the circumstances.



In the rest of Canada, for buyers looking to limit this potential significant exposure, the positive news is that the presumption of reasonable notice can be rebutted if the transferred employees sign contracts which may address the issue of notice. That said, a buyer must be careful when taking on the seller's employees to not alter their existing terms and conditions of employment; otherwise, the buyer risks constructive dismissal claims.

CHANGING EMPLOYEES' TERMS OF EMPLOYMENT

A buyer must exercise care when planning to change any of the employment conditions that employees enjoyed at the time of purchase, including common law entitlements such as reasonable notice. The notion of constructive dismissal prevents employers from imposing unilateral fundamental changes to terms of employment in such matters as salary, benefits, working hours or relocation, without sufficient notice. For example, a reduction of 10% to 20% of the annual compensation an employee is entitled to will usually be considered as a fundamental change compliant in constructive dismissal.

The buyer needs to provide adequate notice for imposing a fundamental change to the terms of employment of those employees it takes over, or provide adequate consideration (such as a signing bonus) before instituting a change to a fundamental term or condition of employment.

OTHER OBLIGATIONS

So far we have largely focused on the purchaser's obligations as they relate to notice or severance. Some other key obligations that purchasers should consider are:

1. **Workers' Compensation:** Almost all Canadian employers are obligated to pay into provincial government workers' compensation schemes, regardless of whether they offer a similar private benefit;
2. **Overtime pay:** All employees are statutorily entitled to overtime pay, regardless of whether they are paid hourly or by salary (except in the province of Quebec where salaried employees are exempt), unless they fall into a specifically legislated exemption (such as the managerial exclusion);
3. **Privacy rights:** British Columbia, Alberta and Quebec have private-sector privacy legislation which protects the collection, use and disclosure of employees' personal information, and which allow employees to access any employer document which contains their personal information;
4. **Leaves of Absence:** Canadian mothers are

entitled to job-protected pregnancy leave for up to 17 weeks and both mothers and fathers are entitled to up to 37 weeks of job-protected parental leave. Provincial legislation also mandates other leaves, such as compassionate care leave, emergency leave and family responsibility leave, to name a few.

5. **Drug and Alcohol Testing:** Employees are generally free from pre-employment testing and random testing, even in safety-sensitive work environments, unless the employee or the workplace has a known drug or alcohol problem.

AVOIDING THE BAGGAGE

For purchasers wary about the prospect of becoming an employer in Canada and being bound by the terms and conditions of employment enjoyed by employees with the seller, the buyer may try to insist that the seller either terminate the employment of its existing staff pre-closing or agree to assume those costs associated with future termination. This is easier said than done: most sellers will be reluctant to incur the costs of terminating employees pre-closing only to have the buyer immediately re-hire them upon closing, particularly when those costs are contingent on terminations that may or may not happen at some time in the future.

BUYING A UNIONIZED WORK FORCE

The rules are somewhat similar when the seller's employees are unionized. A prospective buyer must realize that in addition to purchasing the assets or equity of the company, they will also inherit any union already in place, as well as the existing certificate giving recognition to the representative rights of the union, any proceedings being undertaken by a union to become certified, any unfair labour practice complaints in progress, and collective bargaining agreements in force between the parties. In Canada, this principle is known as the 'successor rights provisions' of the labour codes of every Canadian province. The purpose of these legislative rights is to prevent a buyer from refusing to recognize a union already in place or a union in the process of applying to become recognized.

Often, working conditions stipulated in a collective bargaining agreement are overlooked during the negotiation process leading up to the purchase of the business. Time and again, a buyer only pays attention to inherited working conditions of the collective agreement when it comes to starting to run the acquired business. The buyer may then be in a for a number of surprises regarding the costs attached to wage rates and upcom-

ing adjustments, benefit costs, or outstanding grievances that will have an impact on labour costs and the running of the business.

These unwelcome surprises can be avoided by the prospective buyer taking steps during the due diligence process to become fully aware of the current situation. The time to do so is before closure of the sale.



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