



Employment Considerations in Mergers and Acquisitions

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Mergers and acquisitions present many complex legal and business issues. One of the main issues to consider are the employees. This includes the hiring or firing of the seller's employees as well any potential employment liabilities.

Prior to a purchase, the buyer should conduct due diligence and request information about employment liability. This includes review of EEOC claims, wage audits or complaints, lawsuits, worker's compensation claims and/or recent terminations. Due diligence is important to assess all potential liability as it relates to the employees.

It should also be considered if the buyer or seller will accept liability for any claims that are asserted after purchase but involved incidents that occurred before the purchase. If either company has Employment Practices Liability insurance coverage, there needs to be a discussion with respective insurance companies to determine if there will be coverage for the claims.

Although most employees are at-will, the buyers should inquire about possible employment agreements. Any agreement will have a termination clause and potential penalties. It should also be determined if there can be assignment of agreements to the buyer. Another key issue to be considered are non-compete agreements with existing personnel. If there are no current non-compete agreements with key employees including salespersons, such agreements should be considered upon purchase.

If the buyer decides not to hire most of the existing employees and there will be a mass layoff, it needs to be determine if the WARN Act is implicated. The WARN Act applies if there is a layoff of more than 33 percent and at least 50 FT employees; loss of 500 employees or a shutdown and loss of 50 employees within 30 days. The federal law has specific mandates for what an employer must do in the event of a mass layoff.

Buyers who decide to interview existing employees for open positions should be wary of what information is learned from the seller. All the various discrimination laws apply to applicants so hiring decisions may not be made on the basis of illegal reasons such as age, religion, gender, etc. Likewise, an prospective employer may not retaliate for past actions.

I-9 forms are another consideration. It is best for the purchaser to complete a new I-9 for each employee hired rather than use the prior employer's forms and assume responsibility for any mistakes.

For employees not hired by the buyer, severance agreements should be considered to limit liability. The agreement should ideally have a release of liability for both the seller and buyer.

Due to the potential liabilities that arise in mergers and acquisitions with employees, the parties are well advised to thoroughly consider all legal issues and have a competent team of professionals.