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M&A ACADEMY MERGERS & ACQUISITIONS EMPLOYMENT ISSUES

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Agenda

- Deal Drivers
- Overview of Potential Employment Liabilities
- Due Diligence
- Union Issues
- Restrictive Covenants
- Integration
- Terminations and Restructurings
- Concluding Remarks

Deal Drivers — The Big Picture

- Employment Law for Deal-Makers . . .
 - Don't *buy problems* you don't want
 - Avoid *unwanted costs* for seller
 - Increase *deal value* for buyer and seller
 - Avoid *deal risk* for buyer and seller
 - Prevent *conventional employment* liability (reduction-in-force (RIF) discrimination claims, Worker Adjustment and Retraining Notification Act (WARN), etc.)
- Cornerstone: business objectives should drive employment issues, but you need to be able to identify them
- You won't get everything you want, so know the key business drivers

Stock Deals – Overview

- Buyer gets everything, good and bad
- Employee relationships remain intact
- Employment and labor contracts remain intact
- Union relationships remain intact
- Restructuring costs attach to business unless . . .
 - restructuring costs are reflected in purchase price, OR
 - some “seller-predecessor” continues to exist AND it agrees to pay restructuring costs

Stock Deals – Strategies for the Buyer

- Due diligence, due diligence, due diligence
- Representations and warranties by seller
 - No benefits violations or litigation except . . .
 - No legal violations or litigation except . . .
 - Representations on employee classification becoming more significant . . .
- Schedules supplied by seller
 - Pending lawsuits
 - Labor contracts
 - Executive employment contracts
 - Benefits plans
 - Severance and release agreement history – a hidden gem
- Indemnification by seller for . . .
 - Matters predating purchase
 - Violations of representations/warranties
 - WARN-related events

Asset Deals – The Good News

- Potential flexibility concerning employment and other contracts
- Seller's employment liabilities more likely stay with seller
- Seller's restructuring costs more likely stay with seller
- Potential flexibility concerning union agreements and relationships

Asset Deals – The Bad News

- Successorship – what employment obligations does buyer inherit?
 - among the most complicated issues in labor law
- What is test for “successor” status? (more bad news)
 - different types of duties/claims:
 - liability for seller’s discrimination or other unlawful conduct
 - duty to remedy seller’s unlawful conduct
 - duty to bargain with seller’s union
 - duty to arbitrate grievances under seller’s labor contract
 - duty to adopt seller’s labor contract
- Buyer can accidentally assume seller’s problems and liabilities
 - transaction documents are *not controlling* (assumed/excluded liabilities)

Asset Deals – Successor Liability

- Successor liability applies if a court determines it is “fair and necessary” to do so:
 - Concern is that failure to hold successor liable for unlawful employment practices of predecessor would leave the alleged “victim” without a remedy and encourage evasion of statutory obligations through ownership transfers
- Courts often focus on two main factors:
 - Continuity in operations and workforce
 - Ability of the predecessor to provide relief to the alleged victims
- Statutory Examples
 - FMLA, FLSA, Title VII
 - Courts generally focus on continuity in business operations and predecessor’s ability to provide relief
 - “Totality of the Circumstances”

Asset Deals – Successor Liability (contd.)

To mitigate successor liability exposure, buyers should:

- Determine level of exposure through detailed diligence
- Ensure reps and warranties state that employment liabilities, if any, are the sole responsibility of seller
- Ensure covenants restrict seller's ability to incur new liabilities prior to closing
- Consider adding an escrow, special indemnity, or other mechanism to recover any potential successor liability costs
- Quickly integrate seller's employees into organization to avoid absorbing any flaws in seller's practices

Asset Deals – Strategies for the Buyer

- Due diligence
- Seller's representations/warranties/covenants
- Seller's schedules
- Seller's indemnifications
- PLUS . . .
 - deal structure and business changes can potentially alter what buyer gets
 - more potential leverage in renegotiating contracts with seller's executives
 - more potential leverage in renegotiating union labor agreements

Buyer “Due Diligence” Requests

- Standard items
 - Employee lawsuits/agency charges pending
 - Benefit plans and SPDs
 - Comprehensive employee census
 - Employment agreements
 - Confidentiality, noncompetes, nonsolicitations
 - Employee handbooks
 - Arbitration Agreements
 - Exempt/nonexempt classifications/independent contractor reviews
 - Unions? Where?
 - Labor contracts
- What you also really want (current and past)
 - Internal complaints/issues
 - Government audits, investigations, and citations
 - Benefit claim appeals
 - Workers’ comp claims and expenses
 - Workplace accidents, other OSHA information
 - Employment applications, offer letters, turnover data, absenteeism, exit interview results
 - Separation or Severance Agreements
 - EEO-1 forms and affirmative action plans
 - Immigration I-9 forms for current employees
 - Visa overview
 - Prior handbooks, benefit plans, SPDs, etc.
 - Union-organizing attempts (past and pending)
 - All union memos of understanding, side letters, ratification summaries, etc.
 - Grievance, arbitration, NLRB charge history
 - Strike and work stoppage history
 - Contracts with staffing agencies

Large Exposure Issues

- The following have potential for large exposure to a **buyer**:
 - Termination and Change-in-control Obligations
 - Misclassification of Contractors
 - Misclassification of Employees
 - Labor Organizations and Representation
 - OSHA
- **Sellers** should also pay attention to these issues:
 - Resolving or limiting these issues prior to the transaction can increase sellers' bargaining power and limit the need for heavy negotiation over potential liability

Misclassification Liability

- Misclassification of service providers
 - A key area in nearly every transaction
 - Like each key area of liability, this impacts both buyer and seller and has implications in integration
- Two main types of misclassification:
 - Misclassification of independent contractors
 - Misclassification of employees for overtime purposes
 - Potential Red flag – none or very few nonexempt employees

Misclassification: Independent Contractors

- The key focus is whether an individual was properly classified as a contractor, consultant, or advisor rather than as an employee
- Potential repercussions for contractor misclassification:
 - Misclassified contractors could be entitled to retroactive participation in employee benefits
 - Payment of federal and state employment taxes and amounts that should have been withheld, including interest and penalties
 - Penalties for failure to contribute to state unemployment funds
 - Unpaid overtime or other wage-based claims (if the employee should have been classified as non-exempt)
 - State law major risk driver

Diligence of Independent Contractors

- **Independent contractor classification diligence:**
 - Buyer should request information such as lists of contractors with summaries of any services provided and service history
 - Buyer should also request copies of individual contractor agreements and related statements of work
 - As with overtime, consider requesting any self-audits or third-party audits of classifications as well as any recent agency audits

Misclassification: Overtime Exemptions

- Are employees properly classified as exempt or nonexempt for overtime purposes (FLSA/state law)?
- Potential repercussions for misclassification:
 - Liability for all unpaid overtime (may run back as far as three years in cases of willful violations)
 - Liability for withholding wages
 - Fines and penalties
 - Attorney fees exposure
 - Recordkeeping liability (e.g., where seller has failed to properly record employees' hours worked)

Diligence of Overtime Exemptions

Overtime exemption classification diligence:

- Request information on employees' salaries, classifications, job titles, job descriptions, classification policies, and similar documents
- Inquire as to classification methods and practices
 - Consider interviewing the decision maker
- Request internal and external self-audits of classifications as well as any recent DOL (or similar state agency) audits

Contracts

- Sources of Potential Contract Liability
 - Individual employment contracts
 - Employee handbooks
 - Oral contracts (real or alleged)
 - Collective bargaining agreements, side letters, memos of understanding, etc.
 - Implied and quasi-contracts
- Watch . . .
 - Family businesses
 - Retiree medical insurance or other retiree obligations
 - Culture clash (turnover, litigation, or both)

Union Issues

- If employees are represented by a labor organization, buyers must understand scope of representation, including obligations under existing agreements
- Such agreements may include information and requirements relating to areas such as:
 - Employee benefits and compensation
 - Promotions and demotions
 - Hiring and separation from employment
 - Grievances and related matters

Union Issues

For buyer (in an asset deal)

- Union “successorship” – what seller obligations does buyer inherit?
 - “Workforce majority” is controlling in many cases
 - measured against whom?
 - discrimination in hiring is illegal
 - Business continuity component is also relevant
 - “Perfectly clear successor” loses ability to unilaterally set new initial terms and conditions
 - REMEMBER: different “successor” test for each type of potential obligation
- Protect against “material changes” with deal pending
 - Seller’s labor contracts being renegotiated (check contract termination dates)
 - Significant grievance arbitration cases, other union litigation, and settlements
 - Ad hoc “side agreements” or “memos of understanding”
 - Seller management’s “mixed loyalties” problem

Union Issues

For sellers (and buyers in a stock deal)

- Labor contract obligations
 - Successors/assigns language
 - Limitations on sales, relocations, plant closings, and layoffs
 - Maintenance-of-benefits clauses and required participation in multiemployer pension plans (withdrawal liability)
 - Neutrality or card-check provisions
- Bargaining obligations
 - Decision-bargaining
 - Effects-bargaining
 - Closing-turned-into-something-else
 - Expiration of existing labor agreements
- Potential “runaway shop” claims (antiunion discrimination)
- Risks:
 - Status quo injunctions
 - Buy-it-back, put-it-back plus \$\$\$\$

International Issues

- Assemble team of knowledgeable lawyers for all relevant jurisdictions
- Organize tasks and documents by country as well as by other aspects of the deal
- Press for diligence from relevant foreign entities
- Pay attention to time tables for pre and post-closing tasks
- Much more extensive government regulation of individual employment relationships in many non-US jurisdictions
- Much more extensive government and legally required union and works council approvals required in many non-US jurisdictions
- Be aware of TUPE (Transfer of Undertakings (Protection of Employment)) and TUPE-like obligations and/or need for Three Party Agreements
- Watch for issues with multijurisdictional employees

Restrictive Covenants

- Non-Competition Agreements
 - Prevent someone from entering into a particular profession
- Non-Solicitation Agreements
 - Prevent someone from soliciting a company's clients or employees
- Confidentiality/Inventions Assignment
 - Restrict someone from disclosing or using a company's proprietary information

Restrictive Covenants in the M&A Context

- Relevance to Mergers & Acquisitions
 - Current agreements with a seller's employees
 - Proactive agreements with a seller's principles
- Variations by jurisdiction
- Sale of business vs. employment
- How to use and evaluate
 - Existing agreements with a seller's employees should be reviewed for enforceability and liability concerns (e.g. generally not enforceable in California and North Dakota)
 - Buyers should consider requiring sellers' key employees to execute restrictive covenants
 - At integration, consider whether to require employees to sign new confidentiality and inventions assignment agreements

Evaluating and Drafting Restrictive Covenants in the M&A Context

- Review key terms and enforceability items
 - Diligence reviews should focus on enforceability of restrictive covenants
 - Buyers should be aware of unenforceable restrictive covenants and apprised of the ramifications.
- Consider new restrictive covenants for key employees of seller
 - Reasonable agreements for senior managers who will transition to buyer
 - “Sale of Business” style agreements for former principals or key shareholders (these can be much broader in duration)

Integration – Employment Issues

- Who will be the employer post-Close?
 - Buyer? Sub? Continuation of Target?
- Will there be a termination of employment and rehire by buyer?
 - Be wary of potential WARN Act triggers and payout obligations
 - Will there be a payout of accrued wages/vacation?
 - Payout of wages, bonus, commissions, and other incentive entitlements?
- What agreements will be assigned over; what new onboarding documents will be utilized?
 - Executive employment agreements; offer letters; PIIA; arbitration agreements; handbook policies
- Cultural considerations and potential challenges
 - Reporting structures; job titles; scope of responsibilities; employment policies; shift in total company size

Integration – Employment Onboarding

- People you need . . .
 - New employment contracts
 - Adoption of seller’s employee contracts
 - Retention or signing/transition bonuses (whether paid by seller or buyer)
 - Consulting agreements (key seller employees, short-term buyer need)
 - Immigration issues, H-1B visa problems, intercompany transfers, etc. (especially with multinational companies)
- Protection you need . . .
 - Confidentiality agreements
 - Assignment of inventions
 - Nonsolicitation/hiring restrictions
 - Noncompete agreements
 - Special-need consulting agreements (e.g., cooperation by seller’s employees is essential to ongoing litigation, transitional training)
 - Immigration assistance concerning all visa and work authorization issues

Integration – Benefits Issues

- Structure of transaction may impact benefits treatment
- What will be the impact on employee benefit plans?
 - Will target plans be continued or assumed?
 - Will target plans be terminated and continuing employees moved to Buyer's employee benefit plans?
 - Will employee be offered credit for prior services with Seller?
- Benefits liabilities
 - Who will be responsible for liabilities pre/post-closing?

Integration – Benefits Issues (contd.)

- Maintaining different benefit packages vs. one platform for all employees post-transaction
- Consider employee benefit covenants
 - Maintain comparable/substantially similar benefits *or* same as buyer's similarly situated employees for a specified period
 - Consider whether any carve-outs from comparable benefits continuation are warranted (*e.g.*, equity compensation, defined benefit pension benefits)
 - Provide crediting of service to target employees (*e.g.*, seniority for severance and PTO plans) and maintain severance arrangements for a specified period, etc.
- Terminate pre vs. post post-closing
- Liabilities

Integration – Benefits Issues (contd.)

- Executive contract treatment
 - Upcoming expiration/renewal
 - Structural issues (*e.g.*, anti-assignment provisions in employment agreements)
- Equity treatment
 - Cash out vs rollover
 - Performance Awards
- Other Considerations
 - Efficiency
 - Administration
 - Costs

Retention Considerations

- Strategies to retain key employees
 - Executive Agreements
 - Bonus/Retention Plan
 - Transaction Bonus Agreements
 - Rollover of Equity
 - Non-compete Agreements and other post-closing restrictions
- 280G Considerations

Termination-Related Liabilities

- Contractual severance or similar benefits
 - Individual employment agreements
 - Severance plans
 - CIC agreements
- Statutory termination payments
 - Includes WARN and similar state law (e.g., NY and CA)
 - Can arise in the context of existing liabilities (e.g., seller conducted recent layoffs or plant closings but failed to comply with WARN)
 - Can also arise where buyer needs to reduce target's workforce

International Termination-Related Liability

- Statutory and common law severance for non-US employees:
 - Concept of “at-will” employment is largely nonexistent outside the United States
 - Local laws may require termination payments or lengthy notice periods (e.g., UK, Germany, The Netherlands)
 - These statutory (or otherwise mandated) termination obligations could be material and local counsel should advise regarding scope and implications of such obligations

WARN Notice Issues

WARN in General

- WARN – Worker Adjustment and Retraining Notification Act
 - 60 days written notice before . . .
 - any “plant closing” or “mass layoff”
- WARN problems:
 - Forget common sense
 - Notices must be written, with specific dates
 - Watch postponed separations/transactions
 - Exceptions are not true exceptions (exceptions, exemptions, and exclusions!!)
 - Many states have separate and different WARN-type notice laws

WARN Notice Issues

Sale Situations

- Stock deal may not involve employee “terminations” at all
- Potential liability in Asset Deals if buyers fail to hire a sufficient number of seller employees
- Technical terminations don’t count if . . .
 - There is a “sale” (all or part of the business), and
 - Seller’s employees are hired by buyer as of the effective date (time) of sale
- Buyer/seller allocation of WARN duties:
 - Statute is incomprehensible
 - Watch 90 days before and after the deal
- Deal-related WARN short list . . .
 - Address buyer/seller allocation of WARN obligations
 - Use representations/warranties to address separations before/after sale
 - Consider indemnification language
 - Address buyer’s plans about seller employees
 - Err on the side of issuing WARN notices
 - WATCH for “technical terminations” occurring before or after sale effective date

Restructuring

The Legal Framework

- Selected Labor Statutes:
 - NLRA, including possible successor liability
 - Labor Management Relations Act (LMRA), addressing breaches of labor contracts
 - WATCH: the “federal court injunctions can block deals” problem
 - Be wary of potential international works councils
- Selected Employment Statutes:
 - Title VII of the Civil Rights Act of 1964 (Title VII)
 - Age Discrimination in Employment Act (ADEA)
 - Americans with Disabilities Act (ADA)
 - Family and Medical Leave Act (FMLA)
 - Fair Labor Standards Act (FLSA)
 - Worker Adjustment & Retraining Notification Act (WARN)
 - Occupational Health & Safety Act (OSHA) and other health/safety/environmental laws
 - Employee Retirement Income Security Act (ERISA)
 - Immigration & Nationality Act (INA) and related statutes
 - State and local employment laws

Restructuring

Severance Pay and Waivers/Releases

- Read the severance plan (guidelines etc.)
- Amend the plan if necessary *before* workforce reduction
- Read all handbooks and individual contracts
- Consider an “ERISA-compliant” severance plan
- Watch “technical” sale-related terminations as severance triggers
- Preexisting severance plan – no WARN “credit”
- Releases (OWBPA):
 - 45-day review period required if “group” terminations (21 days otherwise)
 - 7-day revocation period
 - “group” terminations: need to disclose positions/age/eligibility factors list
 - other content requirements (advise employee in writing to consult attorney, etc.)

Restructuring

Who Does the Restructuring?

- Restructuring or RIFs by Seller . . .
 - May be done voluntarily by seller presale to attract buyer(s)
 - May be done voluntarily by seller to improve deal valuation
 - Buyers frequently force seller to do restructure or conduct an RIF because it . . .
 - *avoids or reduces potential buyer liability to sellers employees or union(s)*
 - *reduces risk that buyer will “overpay” for inflated business*
 - *avoids buyer severance and other RIF costs*
 - *mitigates WARN liability*
- Restructuring or RIFs by Buyer . . .
 - Seller refuses to restructure
 - Buyer does not believe restructuring by seller will be done right
 - Restructuring or RIFs too complicated to do pre-deal
- Related Options
 - Party not restructuring pays all or some costs (valuation adjustment, etc.)
 - Structure deal so that buyer only takes particular facilities (de facto restructuring)
 - Buyer effectively implements RIF by selective hiring (i.e., seller terminates all employees, and buyer only hires some of seller’s former employees)

Concluding Remarks

Employment Issues Summary

- Business objectives should drive employment strategy
- Use employment counsel (separate from benefits and deal counsel)
- Structure “due diligence” around operating plans (and get “due diligence” to buyer’s operations people)
- Realistically plan for and address union issues
- Coordinate buyer’s and seller’s announcements (communications are especially important to manage employee hiring, retention issues, union issues, and deal-related employment litigation risks)
- Timing considerations
 - 45 days – required for employee review of releases (group terminations)
 - 30 – 60 days or more – seller and/or buyer bargaining with any unions
 - 60 days – WARN notice period (if WARN notices are required)

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QUESTIONS?

Biography



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Michael D. Schlemmer counsels businesses on all aspects of their employment law needs including wage and hour compliance, discrimination and harassment, equal pay (such as compliance with California's Fair Pay Act), worker classification (including contractor and contingent workforce issues), workforce change, layoffs, disciplinary matters, performance management, disability accommodation, leaves of absence, intellectual property protection, arbitration provisions, and incentive plan development. In addition, a significant part of Mike's practice involves the handling of employment-related aspects of mergers, acquisitions, investments, and joint venture transactions.

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Patrick Rehfield focuses on matters related to executive compensation, payroll tax, and employee fringe benefits. He advises private and public companies on designing and implementing nonqualified retirement plans, equity compensation plans, and executive compensation arrangements. He also counsels publicly traded companies on reporting and compliance matters involving the SEC, with a focus on proxy and disclosure issues, executive compensation, and corporate governance. He advises public and private companies on employee benefit issues in mergers and acquisitions, including executive compensation matters for senior management.

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