

Buying Unionized Companies: What Private Equity Firms Must Know & Do

Tuesday, October 4, 2011

Session Moderator:

David G. Barry, Managing Editor,
Dow Jones Conferences

Speakers:

Jeremy Rossen, Vice President, Human Capital, **The Gores Group**

Stan Lechner, Partner, **Morgan Lewis**

Craig Bitman, Partner, **Morgan Lewis**

SPONSORED BY:

Morgan Lewis

The Gores Group

- **Private equity firm focused on acquiring controlling interests in mature and growing businesses which can benefit from the firm's operating experience and flexible capital**
- **The Gores Group was founded in 1987 by Alec E. Gores and has acquired 80 companies worldwide with combined revenues in excess of \$15 billion**
- **The firm combines the operational expertise and detailed due diligence capabilities of a strategic buyer with the seasoned M&A team of a traditional financial buyer**
- **Sectors that Gores invests in include technology, telecom, business services, industrial, healthcare, media, and consumer & retail**
- **www.gores.com**

MORGAN LEWIS

- **Global law firm founded in 1873**
- **Has 1,300 attorneys providing comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries**
- **Morgan Lewis attorneys are committed to knowing and fully understanding each client’s specific business, industry environment, and legal concerns, with a focus on both immediate and long-term goals**
- **The firm’s international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington**
- **Morgan Lewis has one of the highest concentrations of East Coast lawyers of any one firm—including more than 700 lawyers combined in New York, Washington, D.C., and Philadelphia—as well as 250 lawyers in California and nearly 70 lawyers in Houston and Dallas combined**
- **www.morganlewis.com**

Topics To Be Covered

- **The business perspective**
- **The union perspective**
- **Threshold strategic issue**
- **Employee benefits**
- **Collective bargaining agreements and side agreements**

I. The Business Perspective

- **Why consider buying a unionized company?**
- **Similarities with other business deals**
- **Key differences:**
 - Potential layer of complexity
 - Duty to bargain in good faith with the union
 - Avoidance of labor disruption and strikes
 - Collective bargaining agreement (CBA)

II. The Union Perspective

- How do unions view private equity firms?
- Different union approaches
- Respect and relationships
- Impact on jobs and terms of employment
- Financial returns for pension plans
- Corporate campaigns

III. Threshold Strategic Issue

- **Does it make any difference in how a deal is structured?**
- **Stock purchase and consequences**
- **Asset purchase and consequences**
- **Prenegotiated deals with unions**

IV. Key Risk Factor: Employee Benefits

- How do you evaluate employee benefits and pension issues in such deals?
 - Hidden employee benefits liabilities
 - Defined benefit or defined contribution plans
 - Single-employer or multiemployer pension plans

Whose Plans?

- **Through bargaining or assuming a CBA, the parties will decide whether the employees will participate in:**
 - Company's generally applicable benefits plans
 - Company-sponsored collectively bargained plans
 - Multiemployer plans
 - Some combination of the above

How Are Multiemployer Plans Different?

- **Collectively bargained, jointly administered (board of trustees) plans, often organized by industry, union, and/or region**
 - Joint board of trustees, composed of union and employer trustees, has both settlor and fiduciary functions
 - Joint board of trustees makes major plan decisions, including benefits— in contrast to single-employer plans, where the company sponsoring the plan has discretion on plan design

How Are Employer Contributions Determined?

- **Funding/contribution requirements**
 - Contribution requirements
 - An employer's contribution obligation is established by the collective bargaining agreement
 - Employees may receive benefits for hours worked with several different employers during their careers
- **Multiemployer plans are required to meet minimum funding requirements**
 - At least 80% funded using plan actuarial assumptions
- **Additional requirements exist for "troubled plans," i.e., plans that are less than 80% funded**

“Troubled Plan” Funding

- **Troubled plans are placed into three new categories:**
 - “endangered status”
 - “seriously endangered status”
 - “critical status”
- **A multiemployer plan in one of the troubled plan categories must develop a plan to improve its funding within a certain period of time**
 - Funding improvement plans typically require a combination of contribution increases and benefits reductions
 - CBA’s must comply with these plans, including required contribution increases

Withdrawal Liability

- **ERISA, as amended by MPPAA, imposes withdrawal liability on employers that permanently stop contributing to a multiemployer pension plan**
 - An employer that withdraws must pay the plan a pro rata share of any unfunded vested liabilities
- **Withdrawal liability applied on a controlled group basis**
 - **Controlled group liability**
 - The employer includes all entities that are part of a group of trades or businesses under common control
 - The definition of “employer” applies to all withdrawal liability provisions for purposes of determining whether a withdrawal has occurred, computing the amount of withdrawal liability, and collecting withdrawal liability payments

Controlled Group Determination

- **Relationships and ownership/control thresholds**
 - Corporations, partnerships, and/or other unincorporated businesses
 - Parent-subsidiary relationship – at least 80% ownership
 - Brother-sister relationship – five or fewer individuals with 80% overall ownership and 50% identical ownership

Controlled Group Determination (continued)

- **Controlled group rules apply to entities that constitute a “trade or business”**
- **Investment fund’s status as a trade or business**
- **IRS rulings generally support a conclusion that an investment fund is not a trade or business**
- **In 2007, Pension Benefit Guaranty Corporation (PBGC) issued a contrary opinion, concluding that an investment fund is a trade or business; case law is unsettled**

Potential Risks/Liabilities to Participating Employers

- **Multiemployer defined benefit plans pose four potential problems:**
 1. Lack of control over plan design and timing of contributions
 2. Withdrawal liability/control group liability
 3. Minimum funding
 - Escalating costs due to faster funding requirements
 4. New FASB financial statement disclosure

V. Key Issues in CBAs and “Side Agreements”

- **Neutrality/card check**
- **Successorship clauses**
- **Job guarantees**
- **Wage rates**
- **Employee benefits costs**

V. Key Issues in CBAs and “Side Agreements” (continued)

- **Restrictions on plant closings/layoffs/relocations**
- **Severance**
- **Restrictive subcontracting provisions**
- **Defined benefit plans**
- **Multiemployer plans**
- **Retiree medical plans**

VI. Concluding Comments

- Opportunities
- Caveats
- Questions

Contact Information

- Dave Barry, Managing Editor, Dow Jones Conferences, can be reached at (508) 917-8266 or David.Barry@dowjones.com.
- Craig A. Bitman, Partner, Morgan Lewis, can be reached at (212) 309-7190, or cbitman@morganlewis.com.
- Stanley F. Lechner, Partner, Morgan Lewis, can be reached at (202) 739-5079, or slechner@morganlewis.com.
- Jeremy Rossen, Vice President, Human Capital, Gores Group, can be reached at (310) 209-3010, or jrossen@gores.com.ok!