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KEY CONSIDERATIONS

Key Considerations

- Which employees transfer and how?
- What transfers – benefits and pensions?
- Information and consultations obligations?
- Employee terminations in connection with the transaction?
- Share sale, asset sale, or a mixture of both?
- Transaction documents drafted to take into account differences in legal treatment of employees in each country
- Due diligence

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WHO TRANSFERS?

Which Employees Transfer?

- Much depends on whether an asset or share sale
- Four categories of employees could be impacted:
 - Employees of companies whose shares or stock is being acquired
 - Employees of businesses whose assets are being sold
 - Nonassigned employees – aren't employed by target company or by the seller of the business
 - Shared-services employees

Who Transfers – Germany

- Share Deal
 - All employees of the company whose shares are being acquired transfer automatically
 - Employment relationships continue without interruption
 - Temporary workers and independent contractors transfer automatically
 - Contracts continue without interruption
- Asset Deal
 - Employees assigned to the business whose assets are being sold transfer automatically
 - Employment relationships continue without interruption but with new employer
 - Other employees do not transfer automatically but will transfer if they accept employment offer from new employer
 - Temporary workers and independent contractors: subject to whether contract is assigned to new employer

Who Transfers – Russia

- Share deal
 - Employing entity does not change
 - Employment status continues without interruption
- Asset deal
 - Sale of company assets is not itself grounds for transfer to the purchaser
 - Employees could accept the offer of the purchaser or suggestion of the seller to be transferred to the purchaser
 - Transfer is effected as dismissal/new hire, no continuation of employment terms and benefits
 - If not transferred – the seller must continue to provide employees with work (buy new assets?)
- Independent contractors could be assigned if the deal terms so provide

Who Transfers – Brazil

- Share Sale
 - Automatic transfer of employees
 - Employment agreements remain unaltered
 - No termination rights for change of control
 - Outsourcing contracts remain in place
- Asset Sale
 - Transfer of business unit results in automatic transfer of employees and their employment agreements
 - Outsourcing agreements need to be renewed
- Outsourced Employees
- Shared-Services Employees

Who Transfers – US

- Stock Purchase
 - All employees transfer automatically
 - Employment relationship remains intact
 - No break in employment relationship; no loss of employment
 - Be mindful of any “change of control” or “good reason” potential termination and severance triggers
 - Independent contractor and third-party workforce remains intact
- Asset Deal
 - Employees only transfer if they agree to offer of new employment with “new” employer
 - Be mindful of any existing contractual successorship and assignment obligations
 - Be mindful of creating potential successorship obligations with unions
 - As discussed later, beware of potential bargaining obligations with unions
 - Independent contractor and third-party workforce subject to new contractual terms
 - Be mindful of any contractual successorship and assignment obligations

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WHAT TRANSFERS?

What Transfers

- Key issue is whether transaction is share or asset deal
- Share deal – buyer becomes owner of the employing company and will assume full responsibility for all employment liabilities
- Asset deal – in many (including all EU) countries an automatic transfer principle applies; buyer will assume responsibility for most liabilities
- Difficult for some buyers to replicate existing benefits
- Pensions

What Transfers – Germany

- Share Deal
 - Membership in employers' association and collective bargaining agreements
 - Works councils and works agreements
 - Employment contracts ("change of control" clauses)
 - All employment rights and liabilities, including pension liabilities
 - Adjustments where benefits cannot be replicated
- Asset Deal
 - Membership in employers' association does not transfer
 - Collective bargaining agreements will regularly continue to apply
 - Works council will transfer or new works council will be elected
 - Works agreements will regularly continue to apply
 - Employment contracts ("change of control" clauses)
 - All employment rights and liabilities, including pension liabilities (usually reflected in purchase price)
 - Adjustments where benefits cannot be replicated

What Transfers – Brazil

- Different treatment for share and asset deals
- Share deal – all employment agreements transfer and all past and future liabilities are transferred to buyer
- Asset deal – assuming business unit is transferred, the employment contract will transfer as well – full successor liability
 - Benefits need to be maintained (can be enhanced, but not reduced)
 - Pensions (some case law on pension adjustments)
- Economic group considerations

What Transfers – US

- Share Deal
 - All agreements and plans remain in place
 - Buyer becomes responsible for benefit plans maintained by seller
 - Continue seller plans as is
 - Terminate/freeze seller plans
 - Merge plans
- Asset Deal
 - Buyer generally will not take seller's plans
 - Can clone plans and accept transfer of assets and liabilities from seller plan for acquired employees

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INFORMATION AND CONSULTATION

Information and Consultation

- Significant variation from country to country in terms of
 - Obligations on employer
 - Financial penalty for getting it wrong
 - Less onerous if share deal?

Information and Consultation – Germany

- Share Deal
 - Information and consultation of target entity economic committee prior to signing
 - Where shareholders of such target entity change and this causes “change of control”; also in case of a tender process: information must include details on potential buyer and its intentions regarding future business activities, and implications for employees
 - Noncompliance may lead to administrative fine of up to €10,000
- Asset Deal
 - Information and consultation of seller entity and buyer entity economic committees prior to signing
 - Non-compliance: see above
 - Information and consultation of seller entity works council where sale involves separation of sold business from existing operation; implementation agreement and social plan (prior to separation)
 - Information and consultation of buyer entity works council where sale involves combination of acquired business and existing operation; implementation agreement and social plan (prior to combination)
 - Noncompliance: see above
 - Penalties in the event of premature implementation (prior to implementation agreement)
 - Information letters to transferring employees, including date or planned date of the transfer; reason for the transfer; legal, economic, and social implications of the transfer for the employees; measures envisaged with respect to the employees
 - To be provided ideally at least one month prior to the planned date of transfer
 - Employees may object to transfer within one month from receiving complete and correct information

Information and Consultation – Russia

- Generally, no information or consultation required
- If the deal terms set forth post- or preclosing dismissals and redundancies:
 - trade unions could be engaged if present in the target company
 - local employment authority is notified in case of mass dismissals
- If sale of assets implies change of employment contracts (compensation, working hours, other terms), two months' advance notice to employees

Information and Consultation – Brazil

- No particular differences between share and asset
 - No works council or union negotiations are triggered
 - The following remain unchanged:
 - Employment contracts (employment rights)
 - Collective bargaining agreements (union obligations)

Information and Consultation – US

- No equivalent of works councils; government notice only if WARN Act triggered
- If unionized workforce:
 - Stock Purchase: union continues
 - Asset Purchase: bargaining obligations triggered if (i) substantially continuing operations and (ii) hiring a majority of employees from unionized workforce
 - This triggers “successor” status
 - at a minimum, duty to recognize and bargain with the incumbent union regarding any changes in employment terms and conditions
 - If “perfectly clear” successor (e.g. union employees believe their status will continue unchanged), then may also be bound by prior CBA
 - To avoid this, consider limiting the number of unionized employees who continue (but beware of claims if discriminate against prior union status), and change terms and conditions of employment (but beware of derivative impact for doing so, such as potentially triggering WARN Act obligations)
- Be sure covenants require seller to allow reasonable access to employment information and provide updates regarding employment changes
- Be sure covenants limit “material changes” to employment terms between sign and close

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EMPLOYEE TERMINATIONS

Employee Terminations

- Are there restrictions on terminations connected to the transaction?

Employee Terminations – Germany

- Termination Protection Statute
- Share Deal
 - No additional statutory restrictions
 - Occasionally preexisting works agreement on additional termination protection (e.g., no terminations for business reasons for a certain period)
- Asset Deal
 - Terminations that occur “because of” the automatic transfer of employment are void (narrowly construed)
 - Terminations for other reasons remain possible
 - Occasionally preexisting works agreement on additional termination protection (as above)

Employee Terminations – Russia

- Termination due to change of shareholder
 - CEO and its deputies, CFO
 - other employees not automatically affected
- General requirements and procedure for dismissals if envisaged by the transaction terms
 - on general grounds specified by the Labor Code (redundancy, misconduct)
 - statutory benefits and compensations
 - local policies of the employer
- NOTE: there is no possibility of termination at will under Russian law

Employee Terminations – Brazil

- No at-will employment in Brazil
- Terminations will trigger severance payments, which may be substantial
- Mass layoffs may require negotiation with union according to case law
- Redundancies should be negotiated
 - Timing
 - Notice requirements
 - Allocation of severance costs
 - Employee selection
 - Communications

Employee Terminations – US

- General default is at-will employment
- Beware of executive employment agreements (change of control; good reason; or other termination, severance, or bonus triggers)
- If restructuring anticipated to address redundancies, etc., consider:
 - Will WARN trigger (e.g. mass layoff or plant closure triggers, requiring 60 days' notice to employees or pay/benefits in lieu thereof; requires 60 days' advance notice to government authorities and union representatives)
 - Which party maintains responsibility for potential WARN Act liabilities?
 - Who will handle the restructure (seller or buyer), and will costs be shared?
 - How are employees selected for layoff decisions (be mindful of potential adverse impact/discrimination)
 - Is there timing for an effective federal age release (requires 45-day review period, 7-day revocation period, and decisional unit information)
 - Control for employee communications (beware of misleading or inaccurate information, or false promises/assurances)

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DUE DILIGENCE & DRAFTING ISSUES

Due Diligence

- Diligence information is similar in most countries:
 - Identity of employing entities
 - Organization charts
 - Employment contracts/agreements for key employees
 - Pension plans, incentive plans
 - Trade unions, works councils, and employee representative bodies
 - Employee claims
 - Contractors and consultants
- Purpose of workforce diligence
 - Highlight liabilities in relation to employees
 - Need to reorganize the workforce
 - Need to harmonize terms and conditions
 - Information and consultation obligations

Drafting Issues in the Transaction Document

- Warranties/representations
- Operative provisions on transfer of employees
- Indemnities

Due Diligence and Drafting – Germany

- Due Diligence (highlights)
 - Termination protection (collective bargaining agreements, works agreements, individual arrangements)
 - Temporary workers (highly regulated, noncompliance may cause them to become employees of the business to be acquired)
 - Pensions (automatic transfer of liabilities in asset deal; accounting standards/valuation)
- Drafting (highlights)
 - Pensions
 - Compensation for assumed liabilities in asset deal: agree on actuarial assumptions and discount rates
 - Indemnification (alternative option)
 - Responsibility for employee information letters in asset deal; indemnifications for liabilities resulting from incomplete and incorrect information
 - Responsibility for employees objecting to transfer of employment in asset deal

Due Diligence and Drafting – Russia

- Due diligence – practical tips
 - Bonus payment provisions – may be vaguely drafted and lead to disputes with employees
 - Enhanced payments triggered by change of control or within a certain period after the change of control event – protection against dismissal by the “new” employer
 - Flaws and mistakes in the employment documentation – administrative liability for noncompliance
 - Use of seconded labor and migrant workforce
- General warranties on compliance with the Russian labor law requirements; no unfair labor practices or pending labor disputes
- Restrictive covenants are difficult to enforce in Russian courts

Due Diligence and Drafting – Brazil

- Due Diligence and Reps should provide appropriate assurances regarding:
 - Litigation and government audits
 - Labor claims
 - Employee and contractor classification
 - Compliance with employment agreements, CBAs, labor law, relevant policies, and Social Security and tax payments
- Covenants should address:
 - Compliance with employment agreements, CBAs, labor law, relevant policies, and Social Security and tax payments
 - Transfer of employee documentation

Due Diligence and Drafting – US

- Diligence and Reps should provide appropriate assurances regarding:
 - No recent, pending, or threatened litigation or agency audits
 - Union status and no unfair labor practices or labor disputes
 - No contractual obligations or transactional triggers (change of control, good reason, success bonuses, etc.)
 - Proper employee exemption classification under federal, state, and local law
 - Proper contractor classification
 - Materially compliant labor and employment practices (EEO, fair pay, harassment/discrimination, wage/hour, meal/rest, vacation/sick, immigration, background/hiring screens, lawful termination, disability, leaves, etc.)
- Covenants should address transfer of employees, any limits on continuing terms and conditions, WARN Act obligations, and limitation on material changes between signing and closing

Due Diligence and Drafting – Incentives and Benefits

- Diligence and Reps should provide appropriate assurances regarding:
 - Equity awards:
 - List of plans and awards
 - Granted in compliance with corporate law and legal compliance
 - Fair market value exercise price for options
 - Treatment of equity awards in transaction
 - Accelerated vesting triggers
 - Tax treatment
 - Benefit Plans:
 - List of plans
 - Disclosure of material documents
 - Compliance with law (ERISA and IRC) and plan terms
 - Timely contributions and satisfaction of funding requirements
 - Health plan considerations
 - Retiree medical obligations
 - No participant claims/litigation
 - No governmental audits or investigations

Due Diligence and Drafting – Incentives and Benefits (cont.)

- Diligence and Reps should provide appropriate assurances regarding:
 - Employment Agreements:
 - Post-employment obligations
 - Change in control bonus
 - Section 409A compliance
 - 280G parachute payments
- Covenants should address
 - Company action/employee consent for treatment of equity awards
 - Termination of plans and related notices
 - Shareholder approval and waiver of parachute payments

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ISSUES AFTER CLOSING

Issues After Closing

- Reductions in force
- Harmonization of terms and conditions

Issues After Closing – Germany

- Reductions in force
 - Economic committee information and consultation
 - Works council
 - Information and consultation
 - Implementation agreement and social plan (thresholds apply)
 - Collective dismissal notification
 - Termination Protection Statute
 - Notice periods
- Harmonization of terms and conditions
 - Bringing employees under the same collective bargaining agreement(s)
 - New works agreements
 - Harmonizing employment contracts requires each employee's consent (practically impossible)

Issues After Closing – Russia

- Postclosing restructuring of employment relations
 - may not always be possible – protected categories of employees
 - requires following a procedure and payment of compensations
- Changes of individual employment contracts – consent of the employee and/or advance notice to the employees
- Changes of the CEO – pay special attention
 - corporate steps and employment steps need to go in parallel
 - specific requirements if a foreign national

Issues After Closing – Brazil

- Maintain employment terms/conditions/benefits after closing
- Satisfy any CBA obligations
- Harmonize companywide policies
- Reductions in force should respect severance requirements for the life of the employment agreements that were transferred

Issues After Closing – US

- Limit changes to employment terms/conditions from sign and close
- Satisfy any bargaining obligations with unions, as applicable
- Manage proper employee communications
- Manage access to personnel data as necessary for employee transitions
- Consider whether any threshold employees must maintain employment
- Ensure transition of employees and appropriate documentation of same (consider continuing offer letters; consider release provisions)
- Ensure transfer of benefits and insurance coverage (if asset purchase, consider maintaining comparable terms to avoid termination triggers)
- Address any redundancies/layoffs; ensure legally compliant releases
- Ensure WARN Act compliance for any mass layoffs or plant closures

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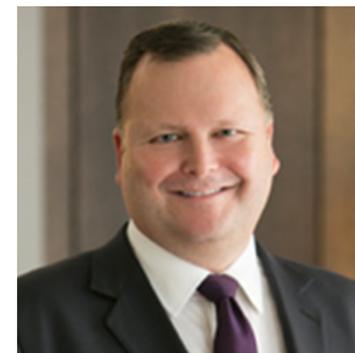


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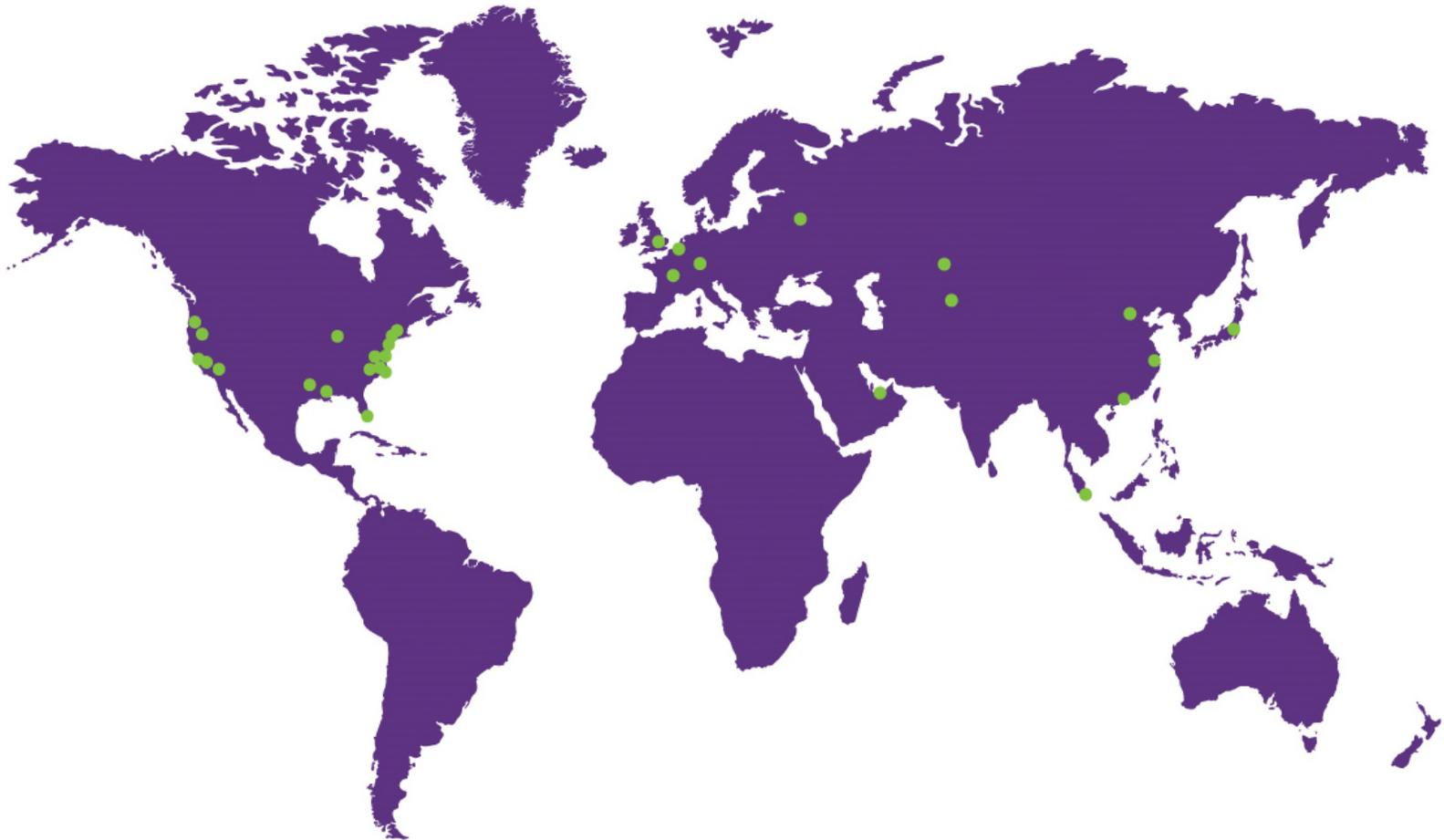
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