

Employment law issues for share acquisitions

Amidst reports of increasing deal activity in the market, here are some of the key employment law issues that should be kept in mind when considering purchasing the shares of another business in the UK.

When ownership of a business changes hands as a result of one business buying the shares of another, the seller remains as the employer. But where the sale of a business takes place by way of an asset purchase that falls within the scope of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which involves a change in the employer of the seller's employees, special protections are afforded to the seller's employees and additional obligations are imposed on both buyer and seller.

Due diligence

It is important for a buyer to fully understand a wide range of information relating to a seller's workforce. This is typically achieved by sending one or more detailed lists of due diligence questions. Relevant information relating to the seller's workforce includes the following:

Who are the employees?

It is critical for buyers to obtain a detailed understanding of who is employed (or engaged) by the seller's business and how they may be impacted by the acquisition.

Employment terms

All relevant employment terms should be fully understood. Key terms typically include (depending on the buyer's "materiality threshold", if any) those relating to notice periods, redundancy entitlements, salaries, bonus and commission arrangements, health insurance, permanent health insurance, share schemes and pensions. Understanding the seller's employment terms will help a buyer to assess the cost of "honouring" those terms and to identify, if there are any funding deficiencies.

Who are the key employees?

Buyers typically want more information relating to key members of staff or management, who are more likely to have enhanced entitlements, including entitlements that may be triggered by the acquisition itself or on dismissal. Such additional information typically includes information relating to notice periods, garden leave and post-termination restrictive covenants (in each case to help understand any business related risks and the related contractual protections that are in place and associated costs relating to any post-acquisition dismissals of senior employees) and details of any enhanced entitlements, for instance "deal bonuses", that may crystallise upon completion.

Redundancy/severance arrangements

Buyers should request details of any redundancy or severance related policies or schemes or individual entitlements, to understand any additional costs, should they choose to make redundancies following completion.

Employment claims

Buyers should have a full understanding of any existing or threatened legal proceedings by current or former employees, or indeed employee representatives, to understand what financial and non-financial litigation related risks may crystallise following completion.

Other risks

Other areas of risk that should typically be fully understood relate to any history of accidents in the workplace, any health and safety prosecutions or latent prosecutions or claims, any investigations by the Equality and Human Rights Commission and any history of bribery or corruption.

Immigration

Buyers should fully understand whether there is any history of illegal employment within the seller's organisation, not least because if found out by UK Visas & Immigration ("UKVI"), this could lead to criminal prosecutions against the seller or members of the seller's management, as well as the imposition of fines of up to £20,000 per illegal employee in civil prosecutions, or potentially unlimited fines in criminal prosecutions, on indictment, where knowing employment of an illegal worker has occurred.

Further, UKVI guidance indicates that if a share sale results in the controlling number of shares being transferred to a new owner, the seller's sponsor licence (if the seller has a sponsor licence) will be revoked and the new owner must apply for a new sponsor licence, unless they already have one, if they wish to continue employing any migrants that the seller employed.

Numerous other immigration requirements are triggered as a result of a share acquisition where the seller or any entity in the seller's group possesses a sponsor licence. If the seller's licence is revoked and the buyer does not accept responsibility for them and take the necessary steps for that to be possible, employees of the seller may have their right to live and work in the UK curtailed to 60 days.

Redundancies

Share acquisitions often lead to redundancies following completion. If a buyer proposes to make 20 or more redundancies at one establishment in a 90 day period or less, the collective redundancy scheme, provided for in the Trade Union and Labour Relations (Consolidation) Act 1992, will be triggered. The Secretary of State - currently for Business, Innovation and Skills - would also need to be notified in the prescribed way.

Obtaining suitable warranties and indemnities

Whilst a thorough due diligence process should give a buyer a good understanding of the target, protection in the form of suitable warranties and indemnities, in the share purchase agreement, should also be obtained.

Warranties can be described as contractual statements or promises by a seller regarding a particular state of affairs or circumstances within the seller's organisation. Breaches of warranties usually only give rise to a successful claim for damages if a buyer can show, in summary, that warranties were breached and that this resulted in a loss for the buyer. On the other hand, indemnities can be described as promises to reimburse buyers in respect of a particular type of liability on a "pound for pound" basis should the risk that is the subject of the indemnity ever

crystallise, and without the need for the buyer to show any loss. Indemnities may not, unlike warranties, be subject to a requirement to mitigate loss. For this reason, indemnities are generally preferred to warranties by buyers where particular risks are identified.

In practice, buyers' HR teams will often be more involved once completion has occurred, but the above-mentioned information will at least provide a flavour of some of the key employment issues that should be considered prior to share acquisitions.

Edward Wanambwa is an employment and immigration partner at Russell-Cooke LLP.

www.russell-cooke.co.uk