Why HR should be involved prior to share acquisitions

Gathering workforce information before the sale completes could cut financial risks

Where the sale of a business takes place through the purchase of a company's assets, special protection is given to the employees involved if the sale involves a change of employer and falls within the scope of the Tupe regulations. When ownership of a business changes hands by one business buying the shares of another, the seller remains the employer, but it is still important for a buyer to fully understand a wide range of information relating to a seller's workforce for a variety of reasons.

In practice, buyers' HR teams can often be more involved once completion of the sale has occurred but, given the opportunity, HR teams can have a valuable input in working through the key employment issues that should be considered prior to share acquisitions.

Due diligence

The company acquiring ownership of the business should send the seller one or more detailed lists of 'due diligence' questions in order to find out:

- Who the employees are - it is critical for buyers to obtain detailed information on who is employed (and also, ideally, who is engaged as a self-employed contractor) by the seller's business and how they may be affected by the acquisition.

- What the employment terms are - all relevant employment terms should be fully understood, such as those relating to notice periods, redundancy entitlements, salaries, bonus and commission arrangements, health insurance, share schemes and pensions. Finding out about the seller's employment terms will help buyers assess the cost of honouring those terms, and identify any funding deficiencies.

- Which employees have enhanced entitlements - buyers should obtain information regarding those members of staff who have enhanced entitlements, including entitlements that may be triggered by the acquisition itself. Such additional information usually relates to notice periods, garden leave and post-termination restrictive covenants. The company buying the business needs to understand any risks and costs associated with post-acquisition dismissals of senior employees.

- What the redundancy/severance arrangements are - buyers should request details of any redundancy or severance schemes, or individual entitlements, so they know what the additional costs will be should they choose to make redundancies following completion of the sale.

Other risks

Buyers need to know of any existing or threatened employment claims by current or former employees, to guage the risk of legal proceedings following the sale. They should also check whether the seller has any history of workplace accidents, investigations by the Equality and Human Rights Commission, or any history of bribery or corruption.

Buyers should also find out whether there has been any illegal employment within the seller's organisation, because this could lead to civil and criminal prosecutions against the seller and potentially relevant members of the seller's management, as well as the imposition of fines of up to £20,000 per illegal employee. It is worth noting too that if a share sale results in the controlling number of shares being transferred to a new owner, the Home Office's stated policy is to revoke seller's sponsor licence (if the seller has one). If it is revoked, the new owner must apply for a new sponsor licence, unless it already has one, if it wishes to continue employing any sponsored workers that the seller employs.

Warranties and indemnities

While a thorough due diligence process should give buyers a good understanding of the business they are buying, protection in the form of suitable warranties and indemnities should also be obtained. Warranties are contractual statements made by a seller regarding a particular set of circumstances within the seller's organisation. Breaches of warranties can give rise to a successful claim for damages. Indemnities are promises to reimburse buyers on a "pound for pound" basis should the risk the indemnity covers ever crystallise, without the need for the buyer to show any loss.

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