

# Labor, Employment, and Human Resource Issues in Merger Acquisitions

By Kenneth R. Gilberg, Esq.

**W**hile financial considerations are necessarily first priority when contemplating a merger and acquisition, issues concerning labor, employment, and human resources must also be considered in advance or the deal may encounter material post-closing problems. Merging the cultures of organizations generally takes significant time—usually 18 months or more—unless considerable effort is made to resolve the labor and employment concerns in the early stages of strategic planning and before closing.

Pre-Closing Due Diligence should at least include consideration of:

- pending or threatening employment litigation;
- service and labor contracts;
- qualified retirement plans;
- employee contracts (including union contract arrangements);
- personnel policies, handbooks, and procedures;
- executive service and compensation arrangements;
- owner and employee restrictive covenants, deferred compensation plans (including phantom stock and/or stock appreciation rights plans);
- Worker Adjustment and Retraining Act consideration;

- workers compensation claims and insurance arrangements (e.g., indemnity or self-insured plans);
- unemployment compensation obligations;
- employee disability claims and related company maintained insurance policies;
- OSHA reports;
- National Labor Relations Board charges and decisions;
- compliance with state and federal overtime laws;
- pending wrongful termination claims.

**Successor Liability Issues:** In a stock purchase, both known and unknown liabilities usually remain with the buyer, whereas in an asset purchase, the successor will generally not assume the liabilities of the seller in the absence of a contractual agreement to do so.

However, there are several theories of liability under which a successor may become liable for the liability exposures of the seller even in the absence of a contractually assumed obligation. Some of the scenarios include, business continuation theory for discrimination laws; defacto merger; and successorship to a unionized workforce. Often these issues turn on the continuity of the operations and the number of employees retained from the seller's workforce. These issues are complicated and require careful analysis and planning.

Work Culture Issues are often neglected in considering a merger or acquisition. These issues may include the wages and benefits of the various organizations, employment contracts, retention issues, layoffs, organizational structure and staffing, progressive discipline practices, human resource philosophy, hiring strategies, and most importantly, the integration of work cultures (for example, flexibility of work hours, the dynamics of supervision and review, functional integration, communication procedures, vacation procedures, expense reimbursements, etc.).

**Pre-Closing Audit:** An audit of the labor relations and employment law issues should be conducted prior to contract signing and a strategic plan prepared to alert senior management to potential material concerns, which impact upon the decision to pursue the transition.

**Training:** Supervisors should be trained to better communicate the inevitable anticipated changes to employees, and supervisors should be cautioned as to what they can and cannot say with regard to layoffs and terminations.

**Planning Point:** The involvement of human resource professionals and experienced labor counsel throughout the strategic planning, and deal negotiation and pre-closing communication process is essential to the success of mergers and acquisitions and should not be left to only post-closing attention. **njcar**

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