

Change in Control

Labor and Employment Law
Issues in Mergers and
Acquisitions

Speaker



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Forms of Mergers

- Stock Purchase
 - Purchasing company can be the survivor
 - Target company employees not terminated
 - Purchasing company attains target company's benefit plans
- Asset Purchase
 - Target company terminates its employees
 - Purchasing company's discretion to hire terminated employees
 - Obligations under the National Labor Relations Act (NLRA) and other relevant employment laws must be considered

The Importance of Due Diligence

- Uncover any issues that could prevent a transaction from closing – liabilities and business failure concerns
- Learn about the target company's business
- Confirm the accuracy of the target company's representations and warranties
- Jumpstart purchasing company's integration strategies and planning for any possible costs and liabilities associated with integration
- Culture and intergration

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Steps for Effective Due Diligence

1. Send a Due Diligence Request List to the target company
2. Form an interdisciplinary Due Diligence Team
3. Thoroughly review and question the report completed by the Due Diligence Team

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Employee Benefits

- Will benefit plans be continued or assumed by purchasing company?
- How will compensation arrangements integrate?
- Any existing perks?
- Do any employees own shares in the target company?
- Any issues arising under ERISA or the IRS?
- Review target company policies and employee handbooks/manuals

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Employee Agreements

- Assumption clauses?
- Change-in-control or severance provisions of target company executives
 - Payouts?
 - New employment agreements?
 - Are you going to lose key players?
- Restrictive Covenants
 - Anticipate departures and potential competition issues
 - Take into consideration
 - Non-Competition Agreements
 - Non-Solicitation Agreements
 - Non-Disclosure Agreements
 - IP Rights Assignment

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Collective Bargaining Agreements and Unions

- Note any existing CBAs
 - Review for clauses requiring purchasing company to assume terms
 - Review for clauses requiring target company to disclose the potential merger
- Understand any current union activity
 - Strikes
 - Lockouts
 - Slowdowns
 - Claims filed with the National Labor Relations Board

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Other Contractual Obligations

- Identify and review target company's other contractual agreements
 - Independent contractor agreements, including consulting agreements
 - Temporary service provider agreements or leased employee agreements

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Discrimination & Reduction-In-Force Issues

- Review personnel records and policies
 - Any patterns indicating bias or discrimination?
 - Any data suggesting impact issues?

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Immigration

- I-9s and E-Verify
- Transferability of any target-company-sponsored work visas
- Foreign executives and immigration law issues
 - Temporary transfer of executive and technical personnel to the U.S. to assist with due diligence (pre-closing) and start-up (post-closing)
 - B-1 visa for business-related entry (up to 90 days)
 - Not required for personnel from certain countries
 - “VWP countries”

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Employment Policies & Practices

- Issues with target company's current policies and practices
 - Target company should audit wage and hour practice as part of due diligence
 - Ex: pay stub compliance, break issues, etc.
- Issues with target company's classification of employees vs. independent contractors
 - Consider Fair Labor Standards Act (FLSA) implications

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Workers' Compensation Matters

- Review workers' compensation policies
- Analyze number and substance of pending and concluded workers' compensation proceedings

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Personnel Issues

- Note any issues with personnel turnover or target company stability
- Analyze target company's
 - Reporting structure
 - Job titles
 - Scopes of responsibility

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Think Critically About the Terms of the Potential Merger

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Possible Requirements of the Purchasing Company

- Meet obligations to onboard employees
 - Consider using retention/transition bonuses
 - Negotiate which company will cover those costs
- Assist with the integration process
 - Build trust with new employees
 - Learn more about front-line employee operations
- Craft new employment agreements
 - Consider implementing additional non-compete agreements and other applicable restrictive covenants
- Determine liabilities
 - Consider who will be responsible for liabilities pre- and post-closing

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Possible Requirements of the Purchasing Company

- Create or modify benefit plans
 - Companies are free to contractually negotiate responsibility allocation under COBRA
 - If not negotiated, COBRA's "default" rules govern
 - Rules depend on the form of the merger (e.g., stock purchase vs. asset purchase)
 - Consider 401(k) Plan Transition
 - Obligations depend on the form of merger
 - Due diligence particularly important here for both companies

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"Successorship"

- In an asset purchase, the purchasing company may be deemed a "successor" employer where sufficient continuity of operations and workforce occurs
 - Totality of the circumstances analysis
 - Key factors:
 - Degree of work force continuity
 - Degree of business enterprise continuity
- Successors often incur a duty to bargain with unions of target company employees
 - Obligations determined by the NLRA
- Successor status will also affect purchasing company's liability for any target company unfair labor practices

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The Worker Adjustment and Retraining Notification Act ("WARN Act")

- Requires that certain employers give employees advance notice before they
 - engage in a "mass layoff" or
 - close a plant

The WARN Act

- "Mass Layoff"
 - Notice required for layoff affecting 500 or more employees at a single site in a 30-day period
 - Notice also required if, during the same 30-day period at a single site of employment, a merger will result in loss of
 - 1) 33 percent or greater of the active employees on site, and
 - 2) at least 50 employees

The WARN Act

- Plant Closing
 - The temporary or permanent shutdown of
 - a single site of employment or
 - one or more facilities or operating units within a single site of employment
 - resulting in employment loss during any 30-day period for 50 or more employees.

The WARN Act

- Location and timing of layoffs (e.g., before or after the merger) might dictate which company must give the WARN notices
- Many states have adopted mini WARN acts
 - In some states, mini WARN acts impose obligations differing significantly from the obligations created by the federal WARN Act

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Other Relevant Laws

- Title VII of the Civil Rights Act (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- Employee Retirement Income Security Act (ERISA)
- Labor Management Relations Act (LMRA)
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Immigration & Nationality Act (INA)
 - Including related statutes
- Occupational Health & Safety Act (OSHA)
 - Including other safety/health/environmental laws
- Any State or local employment laws

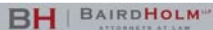
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Questions?

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Thank You!

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