

The sale of a business will almost always involve the transfer of employees. Accordingly, it is important for each party to the sale to understand which employees will or will not be retained, whether termination pay is owed, if new employment contracts are necessary and what tax or statutory obligations the purchaser may be assuming.

The conclusions drawn in the above issues will depend on whether the purchaser is purchasing the **shares** or the **assets** of the vendor. Regardless of the type of transaction, proper due diligence with respect to employees is necessary to avoid unwanted surprises.

### **Understanding the differences between a Share Purchase and an Asset Purchase**

In Ontario, the rules governing the obligations to employees on the sale of a business largely stem from the Employment Standards Act, 2000 (the "Act"), the Agreement of Purchase and Sale, any existing employment contracts and the common law (determined by a judge).

#### **1. Share Purchase**

In a share purchase, because the corporate employer is unchanged, there will be no change in the obligations and liabilities attached to the business, including obligations to employees. If an employee is terminated as part of the share purchase transaction, termination obligations will remain with the business acquired, except to the extent these obligations are assumed and satisfied by the vendor pursuant to the Agreement of Purchase and Sale. Indemnity provisions are a matter for negotiation between the vendor and purchaser.

(In Ontario, termination pay cannot be less than the amount specified in the Act. If termination pay is not limited by contract, the courts may determine the termination pay owing to an employee based on the common law requirement of reasonable notice of termination or pay in lieu of reasonable notice. Courts typically award far higher amounts of termination pay than the minimum amount set out in the Act)

#### **2. Asset Purchase**

Subject to the Agreement of Purchase and Sale, in an asset purchase the purchaser can choose whether or not to offer employment to some or all of the vendor's employees.

Purchasers should be aware that if an employer sells a business and the purchaser employs an employee of the vendor employer, the employment of the employee would be deemed to be continuous for the purposes of the Act.

This means that if a transaction is considered a 'sale of a business' under the Act, that the purchaser inherits the prior service of the employee. Depending on the employee's length of service, this may significantly increase termination pay entitlements of the employee.

It is not always a given that an asset purchase qualifies as a 'sale of a business'. Some key factors in determining if a sale of a business took place includes analyzing: the value of the assets sold as a percentage of the business; whether the purchaser continues the same type of

operation as the vendor; and whether the purchaser continues at the same location as the vendor.

### **Do employees need to sign new employment contracts?**

In a **share transaction**, the employees will continue under the same employment contracts unless new contracts are entered into. A purchaser should be aware that it would need to provide fresh consideration to an employee in order for a new employment contract or any material changes to an existing contract to be enforceable. The promise of continued employment does not qualify as consideration.

In an **asset purchase**, employees who are offered employment will usually sign new employment contracts. A purchaser should be careful if it chooses to hire some employees and not others, to ensure it does not choose not to hire someone for reasons contrary to Ontario human rights legislation. Choosing not to hire someone due to a disability or another prohibited ground may give rise to a human rights claim by the employee.

As stated previously, if the transaction constitutes a sale of a business under the Act, the employee's employment will be deemed to be continuous and uninterrupted by the sale. The purchaser will be required to recognize the employee's length of service with the vendor under the Act.

### **What if an employee is not offered employment or refuses employment?**

If an employee is not offered employment, the vendor will be liable for termination pay owing unless reasonable notice of termination has been provided. For this reason, vendors negotiate for the inclusion of a term in the Agreement of Purchase and Sale requiring the purchaser to offer employment to all employees on substantially similar terms and conditions.

If a purchaser knows that it will not hire certain employees, it will want an indemnity or some allocation of costs for termination from the vendor.

If the employee refuses an offer of employment by the purchaser and the term and conditions of the offer were substantially similar to those provided by the vendor, the employee would likely have no common law claim for termination pay against the vendor or the purchaser. This is because the employee will likely be deemed to have failed to mitigate his or her damages by accepting alternative employment. However, the employee will still be owed his or her minimum termination pay under the Act.

### **General Employment Considerations:**

As part of the due diligence process, a purchaser should consider the following items early in negotiations:

- i) What employees, if any, will the purchaser wish to retain? Are there enforceable employment contracts in place and if so what are the terms of employment? It is prudent to gather a full list of all employees with their compensation, job title, length of service and status clearly outlined.

- ii) What party will bear the costs of termination of any employees? This will largely depend on whether the transaction is a share or an asset purchase. This issue can have a major financial impact.
- iii) Is there any accrued and unpaid vacation pay owed by the vendor to the employees? Will this be adjusted on closing?
- iv) Are there any outstanding employment liabilities of the vendor? This would require investigating if there are claims under various statutes such as the Pay Equity Act, the Occupational Health and Safety Act, the Employment Standards Act, 2000 and the Workplace Safety and Insurance Act, 1997.

Purchasing a business is a complex transaction. This article has only addressed some of the issues that need to be taken into consideration from an employment perspective. When considering selling or purchasing a business in Ontario, we recommend engaging legal counsel early in the process. This will help avoid unwanted surprises that may result in increased costs or unnecessary delay.

---

#### ***About Houser Henry & Syron LLP***

For over 75 years, Houser Henry & Syron has helped entrepreneurs and private companies of all sizes grow and prosper. We provide a range of business law services - from assisting with day-to-day legal requirements to providing strategic counsel on highly complex transactions. We are uniquely positioned to provide high-quality legal advice, tailored to the specific needs of our clients, at a reasonable price.