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Employment and Labour Considerations When Buying and Selling a Business

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EMPLOYMENT AND LABOUR CONSIDERATIONS WHEN BUYING AND SELLING A BUSINESS

Introduction2
Transaction Structure.....3
Employment and Labour5
 Successor Employer5
 Termination..... 10
Occupational Health and Safety..... 14
Human Rights..... 15
Privacy 16
Workers' Compensation..... 20
Conclusion..... 21

INTRODUCTION¹

This paper discusses the important issues relating to employment, labour and related considerations (including occupational health and safety, human rights, privacy and workers' compensation law) that arise when selling a business through a share purchase or an asset purchase in Alberta. This paper does not address pension, benefits, intellectual property or immigration issues that also arise in these transactions.

Given that the employers involved in such transactions are in the private sector and are either provincially or federally regulated, this paper will discuss the key pieces of provincial and federal legislation that apply to these employers. Employers engaged in a "federal work, undertaking or business" are federally regulated and are governed by federal legislation. "Federal works, undertakings and businesses" include banking, radio and television broadcasting, telephone and cable systems, airlines, navigation, shipping and inter-provincial ferries, railways and road transportation. The following key pieces of federal legislation govern federally regulated employers in Alberta and will be discussed in this paper: the *Canada Labour Code*² ("CLC"), the *Canadian Human Rights Act*³ ("CHRA") and the *Personal Information Protection and Electronic Documents Act*⁴ ("PIPEDA").

Provincially regulated employers in Alberta are governed by provincial legislation. The following key pieces of provincial legislation will be discussed in this paper: the *Employment Standards Code*⁵ ("ESC"), the *Labour Relations Code*⁶ ("LRC"), the *Alberta Human Rights Act*⁷ ("AHRA"), the *Personal Information Protection Act*⁸ ("PIPA"), the *Occupational Health and Safety Act*⁹ ("OHS"), the

¹ The information provided in this paper is not legal advice and is provided for information purposes only.

² RSC 1985, c L-2 [CLC].

³ RSC 1985, c H-6.

⁴ SC 2000, c 5 [PIPEDA].

⁵ RSA 2000, c E-9 [ESC].

⁶ RSA 2000, c L-1.

⁷ RSA 2000, c A-25.5.

⁸ SA 2003, c P-6.5 [PIPA].

⁹ SA 2017, c O-2.1 [OHS].

*Occupational Health and Safety Code 2009 Order*¹⁰ (“OHS Code”) and the *Workers’ Compensation Act*¹¹ (“WCA”).

TRANSACTION STRUCTURE

The transacting parties to the sale of a business must carefully consider how their transaction is structured. Structuring a transaction as a share purchase or as an asset purchase determines whether the purchaser will assume the obligations and liabilities of the target business.

In a share purchase, the purchaser assumes the obligations and liabilities of the target business from the vendor. When the share ownership of the target business transfers from the vendor to the purchaser, the legal identity of the target business and its status as an employer remain unchanged.¹² As a result, when a share purchase closes, the employment of the target business’ employees is unaffected¹³ unless the vendor terminates their employment or the transaction triggers change of ownership provisions in their employment contracts. If the employees of the target business continue to be employed by the purchaser, the terms that governed their relationship with the vendor remain the same. After the share purchase closes, the purchaser can only make material changes to the terms of the employment relationship for non-unionized employees by negotiating the changes with the individual employees and by providing new consideration for the changes. If the purchaser makes any unilateral and material changes to the terms of the employment relationship, the employees could bring a civil lawsuit for constructive dismissal. To reduce this risk, the vendor will often want to include a term in the purchase agreement that the purchaser will continue the employment of the vendor’s employees on the same terms. If the employees are unionized, the purchaser will need to negotiate any changes to the collective agreement with the union.

Given that the purchaser in a share purchase assumes the obligations and liabilities of the vendor, the purchaser should undertake extensive due diligence early on in the transaction to ensure that it understands the operational, financial and other consequences of these obligations and liabilities. If the consequences of the assumed obligations and liabilities are not disqualifying, they may impact the purchase price or other terms of the purchase agreement.

¹⁰ Alta Reg 87/2009 [*OHS Code*].

¹¹ RSA 2000, c W-15.

¹² *Pattillo v Murphy Canada Exploration Ltd.*, 2001 ABQB 1070 at paras 19-21.

¹³ *Ibid.*