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How to avoid post-acquisition employment issues by optimizing your due diligence

One of the keys to a successful transaction is getting ahead of lurking employment risks

BY PAUL MANDELL (/AUTHOR/PAUL-MANDELL)
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Employment issues are among a GC's greatest challenges. These are heightened in the context of M&A, when despite due diligence, you may be surprised following the close by, hidden issues among your new workforce. One of the keys to a successful transaction is getting ahead of these lurking employment risks. However, to do so, your due diligence process requires more than a review of active litigation or threatened claims. Set forth below are a few tips to ensuring that you minimize post-close hassles by optimizing your employment-focused due diligence.

1. Understand the real relationships between the employees and the company

In evaluating current and potential risks, general counsel can fall into the trap of looking merely at the hard facts available in their due diligence. However, this practice can neglect some of the broader issues that represent the greatest post-acquisition risk. Wade Swanson, general counsel and deputy vice president of human capital at Bar-S Foods, cautions, "Although during an acquisition it is easy to get caught amongst the trees of, for instance, benefits and other compliance-related matters, we also have an obligation to assist our clients in keeping an eye on the forest of how organizational culture and other workplace environment-related issues may need to be addressed." By digging into the broader nature of the employer-employee relationships at the target company, you are more likely to spot the biggest labor-based risks that come with the deal.

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2. Look beyond matters of record

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Another risk for general counsel is the habit of relying upon a standard list of due diligence questions that cover the facts easiest to capture. James L. Morris, a seasoned employment law partner at Rutan & Tucker in Costa Mesa, Calif., highlights the importance of moving beyond the obvious issues to unearth looming risk, adding, "Don't become too enamored with checklists and conclude you've gotten your arms around all the employment issues just because you've checked off all the boxes on a list. Instead, look behind the 'matters of record' and try to ferret out threatened or anticipated claims, unresolved internal controversies and 'hot button' employment issues that are likely to arise for businesses like the one you're acquiring. Then drill down further on those. The goal, of course, is to avoid surprises."

3. Dig deeply into the employment agreements

In conducting due diligence, be mindful not merely of active or threatened litigation, but what guarantees the target has made to its employees. These guarantees can take the form of deal-based bonuses, salary increases or less common benefits. Moreover, they may exist beyond traditional contracts and lie in amendments to employment agreements and much less formal structures — e.g., e-mails or even conversations. To get a handle on these, you must perform a full review of employment contracts, including written amendments of every type. In addition, you must be sure to ask specifically about what may have been guaranteed verbally. While this last category may not necessary lead to enforceable employment rights, they can certainly create headaches after your transaction is completed.

Don't let yourself walk into a post-acquisition class action. Ensure that your due diligence is comprehensive, rather than limited to the questions on a standard due diligence checklist. Be sure that you spend time understanding the general relationship between the employees and the company, developing a sense of whether employees seem comfortable with their treatment, or whether there is a cancer quietly spreading among the team that could sabotage the operation in the future. Finally, make sure that you have a strong handle on what employees have been promised or can reasonably expect regarding compensation and benefits. You may experience a positive post-transaction experience without these efforts. However, as those GCs who have learned the hard way would tell you, the insurance of a comprehensive employment-focused due diligence effort is well worth the time and expense.

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