

Global HR Hot Topic

September 2010

Employment Due Diligence Checklist for International M&A Deals (Part 2)



Challenge:
Due diligence in international mergers and acquisitions too often overlooks many employment law issues lurking in overseas human resources operations.

This is the second part of a two-part discussion. The first part appears as our Global HR Hot Topic for August 2010.

- **Compensation and benefits.** Using a separate compensation/benefits checklist, check the seller's compensation philosophy, compensation/benefits "schemes" or plans, severance plans, retirement plans, bonus plans, and perquisites (like meals, housing, country clubs, and company cars). Check individual pension promises, special agreements, grandfather clauses, death/disability benefits, cafeteria plans, service awards, profit-sharing, savings plans, employee loans, and unusual expense reimbursements. Check compliance with local laws that mandate extra payments and benefits. Get an accounting of any transferring plans, and study funding: Unfunded, underfunded, and "book reserve" plans can raise huge problems.
- **Equity and loans.** Look at seller stock options, employee ownership programs, officer/director stock ownership, and employee ownership in affiliates and entities doing business with the seller. Also check into loans and guarantees to employees.
- **Employee insurance coverage.** Look at the employment-related insurance the seller provides, like employee life/health/accident insurance, hazardous duty/kidnap insurance, payments to state-mandated insurance funds (such as workers' compensation insurance), expatriate coverage, and "key man" policies naming the employer as beneficiary.
- **Performance management.** Study the seller's performance management system. Focusing on key employees, collect data on job evaluations, performance appraisals, and problem employees.

Pointer:
In an international deal, conduct targeted international employment due diligence using a thorough checklist.

Each monthly issue of Global HR Hot Topic focuses on a specific challenge to globalizing HR, and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case's International Labor and Employment Law Practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

For further information, contact:

Donald C. Dowling, Jr.
International Employment Counsel
New York
+ 1 212 819 8665
ddowling@whitecase.com

Oliver Brettle
Partner
London
+ 44 20 7532 2103
obrettle@whitecase.com

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

- **Labor organization relationships.** What labor organizations represent workers? Collect organizational data regarding in-house or company-sponsored labor organizations such as works councils, any “European Works Council,” company unions, health/safety committees, staff consultation committees, and ombudsmen. Collect meeting minutes and records memorializing labor disturbances and days lost to strikes.
- **Collective agreements.** Look at applicable collective agreements and “social plans” with employee groups. Go beyond trade unions and check agreements with works councils, worker committees, and ombudsmen. Get expired agreements with terms that still apply. Do any industry (“sectoral”) collective agreements bind the seller as a non-signatory? Does the seller participate in any multi-employer bargaining associations?
- **Individual employment agreements.** Look at individual employment contracts with employees, including agreements designated as statement of particulars, non-compete, confidentiality agreement, indemnification agreement, inventions agreement, and expatriate arrangement—or at least check these for key executives and look at form/template agreements for rank-and-file employees. Be sure to look at contracts with contingent workers (service providers like independent contractors, consultants, agents).
- **Employee consents.** Check individual employee consent forms. (In jurisdictions like the UK and Korea, employees may have consented in writing to work overtime. European employees may have consented to processing sensitive personnel data. Employees may have acknowledged a code of conduct or work rules in writing.)
- **Change in control.** Check change-in-control, golden parachute, and other transfer-related clauses in employment-related and agency agreements, including M&A-ratification provisions in any labor union contracts.
- **External agreements.** Do any external agreements (with third parties) limit HR flexibility? (For example, are there acquisition agreements from earlier deals that limit reductions in force? Has the seller signed onto any customer codes of conduct imposed on customers’ suppliers? Is the seller a government contractor that has taken on public-procurement obligations affecting HR?) Separately, look at outsourcing agreements with HR service providers like payroll providers, “temp” agencies, benefits providers, and whistleblower hotline providers.
- **Payroll.** Check the seller’s payroll processing compliance as to deductions, withholdings, reporting, compliance with mandatory payments to unions, and remittances to agencies including tax, social, unemployment, and housing funds. How is payroll issued? Are there any extra deductions (such as for charitable contributions or employee loan repayments)? Does the seller properly pay mandated benefits like premium-pay vacation, profit sharing, and thirteenth-month pay?
- **Wage/hour compliance.** Verify compliance with wage/hour laws, cap-on-hours laws, overtime payments, payments during business travel, and exempt-status designations.
- **Duty of care.** Get information on duty of care/safety/evacuation and other protocols such as for hazardous-duty work and occupational health/safety law compliance, including for expatriates.
- **Discrimination/harassment.** Verify compliance with local discrimination/diversity/harassment laws including laws on pay equity, affirmative action, mandatory training, and “bullying.” Verify compliance with the seller’s own discrimination/harassment policies: Many international discrimination/harassment policies go well beyond local laws.
- **HRIS.** Look into the seller’s employee data-processing and human resources information systems [HRIS]. Investigate transferability of HRIS and how HRIS complies with data protection laws. Has the seller made all required notices/communications to employees about HR data processing?
- **Powers of attorney.** Find out what powers of attorney employees, officers, and directors hold. These are particularly critical in Latin America, where there can be different levels of powers, some of which include the power to dispose of company assets.
- **Management oversight.** What controls does the seller’s headquarters use to monitor local management’s compliance with laws and corporate policies?

This is an excerpt from an article by Donald C. Dowling, Jr., “[Employment Law Toolkit for Cross-Border M&A Deals](#),” on the White & Case website.