

# **STRATEGIC WORKPLACE LAW ISSUES IMPLICATED THROUGH MERGERS AND ACQUISITIONS**

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## **I. Introduction**

Historically, employment and personnel issues<sup>1</sup> had been given little attention during the diligence process when employers and investment groups contemplated acquisitions. Focus has shifted more recently, in large part because of the rise of wage and hour and equal pay class and collective action litigation; the emergence and increasing popularity of “Reps & Warranties” insurance products and the resulting scrutiny of employment law issues by insurers; and the broad application of successorship liability principles to employment matters in both asset and stock purchase transactions.

The aims of this presentation (between this paper and the accompanying PowerPoint deck) are to: (a) provide context for the due diligence process and relevant participants; (b) identify key liability issues and how to conduct meaningful, but measured, diligence to assess potential liability; (c) offer practical guidance regarding the purchase agreement and disclosure schedules; (d) identify key policies and practices that may create challenges when integrating the entities; and; (e) discuss steps that can be taken in the post-merger integration process to positively impact the assimilation of the acquired entity and its employees.

The primary audience for these materials and our presentations are buyers, investors, and prospective buyers, but many of the considerations discussed herein are equally instructive for your organization when it is considering a sale, a round of financing, or the divestiture of a business unit. By understanding the concerns of buyers, a seller’s (aka target’s) counsel can anticipate, address, and in some circumstances even remedy those concerns pre-acquisition, leading to a more successful sale.

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<sup>1</sup> For a comprehensive discussion of traditional labor and union issues implicated in acquisitions, please refer to the materials provided in connection with Steve Bernstein’s presentation, “Acquiring a Unionized Entity – Practical, Legal and Business Considerations.”

## **II. Asset Purchase vs. Stock Purchase**

### **A. General Characteristics And Important Distinctions**

Broadly speaking, mergers and acquisitions fall into two categories: asset purchases and stock purchases.

#### ***1. Asset Purchase Deals***

In an asset purchase deal, the parties determine just which assets of the seller are to be transferred to the buyer. This is, of course, the typical mechanism when only a portion of the seller's assets are being acquired (i.e., a unit, division, goodwill, and/or a specified universe of intellectual property, contracts, receivables, and the like). Even when the intention is to convey the entirety of the seller's operations and assets, however, the parties may elect an asset purchase, which can provide valuable tax advantages to the buyer. In addition, the buyer can try to carve out from the deal the assets it does not value and/or the liabilities it wants to avoid.

#### ***2. Stock Purchase Deals***

Simply put, a stock purchase transaction results in the buyer owning the entirety of the target, including all assets and liabilities. "Mergers" are similar to stock purchase deals in many respects but obviate the need to obtain certain stockholder approvals that might be a challenger in certain corporations.

#### ***3. Practical Impact For Employees***

The broadest distinction between asset and stock deals in terms of employee matters relates to employee status. In a stock deal, the employees of the target have no change of employer; in an asset deal, the employees technically separate from the target company, and are offered employment with the buyer.

Illustrative of just some practical consequences of this distinction: in an asset deal, the parties will need to determine how to handle accrued, unused vacation and PTO time for transferring employees; the buyer may need to determine whether restrictive covenant agreements between a competitor-target and its employees; might technically prohibit the buyer's hiring of certain employees(!); Immigrations and Customs Enforcement (ICE) gives the buyer of assets the option of accepting the previously completed Forms I-9 (as well as any liability stemming therefrom), or treating the employees as new hires and completing fresh I-9s (more work for the buyer, but better quality control); and most basically, the buyer must decide whether it intends to offer employment to all employees (if not, it must determine how to select employees for hire) and what levels of compensation/titles to offer.

## **B. Special Rules For Employment Liabilities**

In a *stock deal*, the buyer accepts all liabilities of the seller. Outside of employment liabilities, a buyer is largely able to control which known and unknown liabilities for which it will be responsible in an *asset deal*. Buyers will typically be exposed to non-employment liabilities only if (a) the buyer expressly or impliedly assumes the specific liability; (b) the resulting entity is considered a "mere continuation" of the seller (i.e., is simply a corporate reorganization, where the resulting entity maintains most/all of the same directors and shareholders, and the seller ceases operations); (c) the asset purchase is actually a *de facto* merger of the parties; or (d) the asset transfer is made for the fraudulent purpose of evading the seller's creditors.

With respect to key employment liabilities, however, there have developed much broader legal standards as to when a court would permit successor liability. In cases examining asset purchasers liable for pre-acquisition liabilities, a number of courts have permitted such claims to proceed under the Fair Labor Standards Act (FLSA) for wage and hour claims; the Family Medical

and Leave Act (FMLA); Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act (ADEA); the Occupational Safety and Health Act (OSHA); the Worker Adjustment and Retraining Notification Act (WARN); and the Employee Retirement Income Security Act (“ERISA”).<sup>2</sup>

While the tests applied by courts have varied by circuit and by the statutes at issue, the analysis essentially boils down to an acknowledgement that Congress did not intend for workers’ rights to be abridged through corporate transactions, and therefore, an “innocent buyer” may still be liable for the prior acts of the seller so long as the buyer knew or should have known of the potential claim prior to closing and there has been a substantial continuity of the business.<sup>3</sup> The likelihood of successor liability also increases when the seller is no longer in a position to fully resolve the claims – if the employee(s)/victim(s) would otherwise be left without a remedy.<sup>4</sup>

### **C. Why Does This Matter?**

Regardless of the structure of the transaction, when it comes to employment liabilities the buyer must conduct meaningful diligence. Of course, potential liabilities can be handled through various mechanisms – the parties can establish a substantial escrow for liabilities; the buyer can negotiate for protection through a strong indemnification; or the buyer may decide to purchase a Reps & Warranties insurance product (“RWI”), and then make sure that its counsel

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<sup>2</sup> *Herzfeld v. 1416 Chancellor, Inc.*, 2017 U.S. Dist. LEXIS 88732 (E.D. Pa. Jun. 9, 2017) (FLSA); *Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6<sup>th</sup> Cir. 2006) (FMLA); *EEOC v. Phase 2 Invs. Inc.*, No. 17-CV-2463, 2018 U.S. Dist. LEXIS 65719 (D. Md. April 17, 2018) (Title VII); *Dole v. H.M.S. Direct Mail Service, Inc.*, 752 F. Supp. 573 (W.D.N.Y. 1990), rev’d on other grounds, 936 F. 2d 108 (2d Cir. 1991) (OSHA); *Day v. Celadon Trucking Svcs., Inc.*, No. 15-1711 (8<sup>th</sup> Cir. July 5, 2016) (WARN Act); *Indiana Electrical Workers Pension Benefit Fund v. ManWeb Services, Inc.*, No. 16-2840 (7<sup>th</sup> Cir. Mar. 12, 2018) (ERISA).

<sup>3</sup> The Second Circuit Court of Appeals has identified six factors for determining whether to apply successor liability under the “continuity of enterprise” theory: (1) continuity of management; (2) continuity of personnel; (3) continuity of physical plant/location; (4) continuity of assets & liabilities; (5) continuity of general business operations; and (6) purpose of forming the successor. *Call Center Tech v. Grand Adventures Tour*, 635 F.3d 48 (2d Cir. 2011).

<sup>4</sup> *Steinbach v Hubbard*, 51 F.3d 843 (9<sup>th</sup> Cir. 1995).

is negotiating for comprehensive, specific, enforceable representations and warranties in the transaction documents.

Each solution to the liability problem, however, has consequences to the broader negotiation and cost of the transaction, which should be considered together with M&A counsel. No matter how the buyer seeks to limit its potential liability, however, the days of ignoring labor & employment issues in the diligence process are history. These issues matter in terms of legal liability, deal valuation (and evaluation), and post-acquisition integration of operations/policies/assets.

### **III. Diligence, Transaction Process, And Labor/Employment Review**

#### **A. Diligence And Transaction Process**

While it is beyond the scope of this presentation to dive into the nuts-and-bolts issues typically managed together with corporate M&A experts, it is crucial for in-house law departments and their labor and employment counsel to be informed about elements of that process. For our purposes, we pick up the process after the acquirer has developed an acquisition strategy, identified target(s), valued the target, and either progressed with negotiations or entered into an auction process. At such time, diligence commences.

##### ***I. Diligence And Reports***

The primary aim of employment diligence has historically been to identify key assets, obligations, and liabilities attendant to the acquisition of the target's employees and the contracts, laws, policies, and history that such acquisition brings. Such diligence is sometimes referred to as "hard" diligence, in contrast with "soft" diligence, which focuses on culture, management and other human elements.

Tools that aid in the diligence process, as further refined on an issue-by-issue basis (see Section III.B., below, identifying specific issues), and which the buyer will request through the diligence process, include data collections; litigation history; compliance and audit history; contracts and policies; logs of certain events and incidents; representative samples of wage statements, human resources files and operational materials (like time and travel records); and focused interviews with the target's management, legal, and human resources functions.

Upon completion of successive waves of the diligence process (i.e., as the target and its representatives respond to the buyer's various requests and the buyers reviews the documents and information provided), it is crucial to maintain an active list of matters that have been addressed by the target and your analysis of potential open issues and liabilities for those matters; as well as the requests that remain open and the risks associated with the matters contemplated by those requests. Upon completion of the diligence process the buyer should be able to form realistic conclusions about the target's level of compliance and the scope and likelihood of liabilities.

The review process and conclusions are reduced to diligence reports that impact the deal process as it moves forward. In extreme cases, such diligence may "kill" a deal or lead to it being restructured in some way(s); in other cases it may impact price or the amount of money placed into escrow to pay out liabilities for a period of time post-closing. In many cases, the information learned in diligence will impact the negotiation of representations and warranties included in the purchase agreement, as well as the disclosure schedules that identify material employee issues as well as exceptions/qualifications to those representations and warranties.

## **2. *Diligence: Representations And Warranties, And Disclosure Schedules***

When a transaction proceeds to the negotiation of a purchase agreement, that agreement will contain, among many other things, representations and warranties of the seller about its legal compliance in various matters, as well as disclosure schedules that may impact or create carve outs to the representations and warranties.

For example, a “rep” may state in an unqualified manner, that the seller is “in compliance with all wage and hour laws” or, more conditionally, that the seller is “in material compliance with all material wage and hour laws.” In the event that the rep is not nearly as unqualified, it might state that “other than as indicated on Disclosure Schedule XX, Seller is not a party to any material wage and hour litigation or governmental inquiries regarding payment of wages.” Disclosure Schedule XX would then identify the relevant litigation(s) and governmental inquiries.

These reps are incredibly important – because the buyer is relying on the reps in acquiring the subject assets/business, a breach by the seller may lead to a claim against escrowed funds, a claim against an R&W policy, or even a lawsuit. Depending on how the purchase agreement is drafted, even a false rep may not be actionable by the buyer. For example, if the purchase agreement contains a clause stating that buyer had access to diligence materials and to the extent it was or should have been aware of a risk during diligence, it proceeds at its own risk (this is sometimes called an anti-sandbagging clause). Regardless of the presence of such a clause, there may be limitations on the size of an escrow, or a significant retention amount in a RWI policy, so that even if a breach is actionable, the buyer cannot be made whole. Further, even if an action is feasible, litigation (as we all know) is anything but an efficient resolution model. The better model, in all but extraordinary circumstances, is to identify potential liabilities and negotiate with the seller based on what is learned in a comprehensive, targeted diligence process.



## **B. Labor And Employment Review: Liability Issues**

Because each acquisition is different, and the key areas of potential liability to be reviewed may vary from transaction-to-transaction, in this Section we are providing a comprehensive checklist/menu of issues that might be worth the expenditure of resources in the diligence process. Some issue, like compliance with wage and hour and overtime requirements, will always be in the foreground, but other issues may be prominent in one acquisition but not nearly as important as in another.

With endless budget and time, a buyer might conduct a searching inquiry into each menu item, but that is almost never the reality in the universe of acquisitions. Of course, the diligence process is rarely tantamount to an audit, so once the relevant subjects for review are identified, the level of detail in that subject review will be limited by various considerations, not the least of which are time, money and potentially competition for the deal. Nonetheless, it makes great sense to start the process with a comprehensive “menu” from which to commence a targeted review. Use a menu like this to focus your discussion with management and legal teams to identify the analyses that are most important to the deal at hand.

This menu is a starting point to focus the L&E review in any transaction (and to identify issues for R&W and disclosure statements, as well as providing crucial information to post-acquisition integration teams):

### ***I. Employment Agreements***

- Non-competition agreements, covenants not to compete
- Confidentiality agreements
- Trade secrets
- Non-solicitation agreements
- Patent, intellectual property agreements
- Ethics agreements
- Employment agreements
- Key employee retention

- Morals clauses
- Stock purchase agreements
- Executive compensation agreements
- Bonus agreements/plans
- Phantom stock purchase agreements
- Verbal agreements
- Severance agreements
- Arbitration agreements

## **2.     *Wage And Hour Compliance***

- Time keeping procedures
- Record keeping/retention requirements
- Classification issues
  - Exempt status
  - Non-exempt status
  - Independent contractors
  - Consultants
  - Temporary workers
- Overtime practices
- Overtime paid
- Exempt jobs (especially Administrative, computer)
- Accurate job descriptions
- Method of determination of regular rate
- Pay deductions for time off, discipline
- Federal law
- State law (more favorable to employees)
- Agreements with “workers”
- Agreements with vendors (placement firms)
- Actual job characteristics
- Third-party staffing issues
- Definitions of “employee/independent contractor”
  - Unemployment comp standards
  - Worker’s comp standards
  - Wages standards
  - Minimum wage—state and federal definitions
  - Overtime—state and federal definitions
  - IRS

## **3.     *Employee Files***

- Personnel files, location, access, contents, checklists
- Medical information files (confidentiality, access)

- I-9's (accurate, timely)
- Employment applications, past and present
- Compliance regarding arrest, conviction restrictions
- At will statement
- Background check materials

#### **4. Employee Claims And Litigation**

##### *a. Types of Claims*

- Discrimination: sex, age, race, national origin, religion, color, sexual orientation, veteran's status, disability
- Harassment (records of investigation, results, responses; constructive discharge claim, training, publication of policy, discipline, personnel file, other file records, complaint procedures)
- Retaliation: discrimination, worker's compensation, whistleblowing
- Workers' Adjustment and Rehabilitation Act (WARN)
- Wage claims
- Overtime claims
- Breach of contract
- Other wrongful conduct, torts
- Workplace violence (incidents, threats, responses)
- Agency investigations (DOL, DOJ, NLRB, EEOC, OSHA, etc.)
  - Pending charges
- Occupational Safety and Health Act claims
- Whistleblower claims
- Wrongful discharge

##### *b. Claims History*

- Date of claim
- Type, including informal
- Venue (state or federal agency, arbitration, mediation, state or federal court)
- Defenses
- Current status
- Docket
- Exposure, damages, reinstatement, injunctive
- Settlement status
- Evaluation, prospects
- Persons responsible for oversight
- Status of key witnesses
- Insurance coverage
  - Employment Practices Liability Insurance
  - Directors & Officers

- c. *Other Relevant Information*
- Unemployment compensation
- Challenges to U/C rate, rate experience
- Worker's compensation (internal, Industrial Commission, loss experience)
- Injury records (W/C, OSHA logs)
- Audit letters

## **5. Employee Benefit Plans**

- Welfare Plans
  - Group life, health, accident and disability
  - Retiree benefits
  - Cafeteria arrangements
  - HSA, HRA and similar arrangements
  - Insured and unfunded
    - Nondiscrimination compliance
    - Application and planning for Patient Protection and Affordable Care Act (PPACA)
  - Compliance with ERISA Title I
    - Disclosure
    - Documents
  - Information for all plans:
    - Carriers
    - Amount of premium paid by employees
    - Amount of premium paid by employer
    - Last two years claims data for medical
    - List of people on long-term disability and their diagnosis and prognosis
    - List of people on short-term disability, the first date of absence, diagnosis and prognosis
    - List of employees who are potential long-term disability cases
  - COBRA compliance
    - Coordination with PPACA
  - Compliance with PPACA
  - Qualified Retirement Plans
  - Defined benefit and/or defined contribution.
  - ERISA compliance
    - Coverage/participation
    - Nondiscrimination compliance
  - Operational compliance
  - Qualification status
    - IRS determination letters
    - Preapproved documents
  - If defined benefit:
    - PBGC filings
    - Funding status (AFTAP)

- Periodic Actuarial Reports
- Sponsor's Annual Reports (Form 5500)
  - Annual financial audits
  - Schedules
- ERISA Title I Compliance
  - Summary Plan Description
  - Summary Annual Reports
  - IRS/DOL audit status
- Effect of Structure of Acquisition
- Application to controlled group
- Carryover of tax attributes
- Prior Terminated Plans
  - Frozen or terminated
  - Tax attributes
  - Funded Status
- Method of funding existing plans
- Non-Qualified Arrangements
  - Stock purchase plans
  - Equity programs (restricted stock, stock options, SARS, phantom stock)
  - Deferred compensation in employment, consulting, and non-compete agreements.
  - Supplemental retirement plans and programs
  - Compliance
    - DOL reporting
    - 409A compliance
  - Effect of acquisition on adoption of plans.
  - Commitments to retirees
  - Actuarial consulting firm
  - Other agreements or promises (cars, club dues, etc.)
  - Short-term and long-term management incentive plans.
  - Severance pay plans.

## **6.     *Immigration***

- I-9 compliance (new completion, transfer and audits)
- Successor compliance issues
- Workforce authorizations
- Company-sponsored visa authorization (new petitions, amendments, transfers, and/or terminations)
- E-Verify compliance
- Notice and Audit history
- ICE/USCIS industry experience

## **7.     *Employment Policies And Procedures***

- Hiring practices, job postings
- Employment handbooks, past and current
- Employment/personnel policies and practices
  - sick time (accrual, pay-out upon termination)
  - vacation (accrual, pay-out upon termination)
  - leave time (incl. family/medical leave requirements, federal and state, if any)
  - short term disability
  - long term disability
  - holidays
  - harassment (sex, race, disability etc. combined)
  - internet
  - electronic communications
  - social media
  - attendance
  - call-in
  - severance
  - performance reviews
  - flex-time
  - telecommuting
  - overtime (including “safe harbor”)
  - educational reimbursement
  - substance abuse and testing
  - smoking
  - solicitation
  - bulletin board posting
  - timekeeping
  - at will (and records of acknowledgment)
  - arbitration (separate agreement)
  - breaks
  - probation
  - privacy
  - dress code
  - confidentiality
  - ethics
  - loyalty
  - non-competition
  - patents
  - EEO
- Supervisor manuals, procedures
- Posters
  - EEO

- Unemployment Comp
- Polygraph Protection
- FMLA
- OSHA
- Worker's Compensation
- Equal Pay
- DOL (state/federal)
- USERRA
- Others

## **8.     *Employee Leaves of Absence***

- FMLA leave (currently, within year, intermittent, partial, planned, expected date of return, documentation) (rolling or annual year) (contributions paid)
- Disability accommodation (employees with disabilities, requests for accommodations, accommodations provided, documentation)
- Leaves, personal (current, recent, planned, reasons, expected date of return)
- Short term disability (current, recent, planned, reasons, expected date of return)
- Long term disability (current, recent, planned, reasons, expected date of return)
- State leave laws

## **9.     *Employee Experience***

- Employee census data
  - Full-time
  - Part-time (define)
  - Temporary (if using an agency, examine “joint employer” issues)
  - Independent contractors
- Social media canvassing; corporate, general media, individual level
- Glassdoor and online employee experience sites
- Corporate conduct – brand and image
- EEO-I reports
- Absenteeism
- Turnover
- Holidays
- Vacations
- Perquisites
- Wages
  - Pay differences among men, women, minorities  
(federal and state Equal Pay Acts)
- Hours worked (full time, part-time, overtime)
- Overtime paid
- Other terms

- Injuries
- Accidents
- OSHA logs
- Positive drug tests
- Disciplinary suspensions
- Disciplinary probation
- Transfers
- Promotions
- Demotions
- Leaves
  - Injuries
  - Family
  - FMLA
  - Medical
  - Disability
  - Personal
  - Jury
  - Funeral/bereavement
  - Worker's compensation
    - Claims
    - Benefits paid
    - Settlements
    - Awards
    - Insurance policies
    - Premiums paid
    - Administration
    - Types of injuries, jobs, location
    - Illnesses
    - Return to work policies, programs
      - Vocational rehab
      - Ergonomic training, consulting
      - Light duty
      - other
- Training
  - Harassment
  - Disciplinary procedures, recordkeeping, legal issues
  - Safety
  - Other workplace training
- Training materials, manuals, records
- Agreements with training consultants, attorneys
- Apprenticeship, development programs
- Third-party staffing



- Terminations
  - Recent (1 — 5 years)
  - Plant closings (WARN obligations, state and federal; notices given)
  - Demographics (age, race, sex, national origin, disability, etc.)
  - Reasons for termination
    - Voluntary (reason)
    - Retirement
    - Discharge (reason)
    - Layoff
    - RIF
  - Unemployment compensation claims (claims history)
  - Severance payments
  - Separation documents (state requirements)
  - OWBPA compliance
  - Releases obtained
  - Releases rejected
  - Requests for personnel records
  - COBRA
  - Exit interviews

## ***10. Safety And Health***

- OSHA compliance (federal and state law equivalents)
- Safety audit
- Safety training
- Injury history
- Monitoring former citations
- OSHA reports

## ***11. National Labor Relations Act Compliance***

- Collective bargaining agreements
  - Side agreements, side letters
  - Memoranda of agreement
  - Freestanding agreements
  - Agreed practices or understandings
- Bargaining demands
- Proposals made by Union but not accepted in bargaining (history of bargaining)
- Proposals by Management but not accepted in bargaining
- Wage schedules
- Benefit schedules
- Work rules
- Apprenticeship programs

- Union representation efforts
- Employee opinion survey
- Election campaigns
- Elections, results
- Union cards
- Solicitation, visits, education
- Informal employee groups, demands, concerted action (walk outs, slowdown, petitions)
- Grievances, past, present, pending or threatened
- Dispute or complaints, responses
- Settlements of grievances
- Strikes
- Picketing
- Work stoppages, slowdowns
- Lock-outs
- Economic action
- Unfair labor practice charges
- Decertification efforts
- Arbitration awards
- Arbitration settlements, interpretations
- Obligations relating to M/A
- Notice to Union
- Bargain (over sale, over effects)
- Successors and Assigns clause—potential injunction preventing transfer
- Termination of agreement—notice to union and management association
- Successor issues
- Benefits triggered
- WARN obligations (state and federal)

## ***12. Government Contractors***

- Affirmative Action Programs (recent and current)
  - Minorities and Women
  - Disabled Veterans
- Goals, progress toward goals
- OFCCP audits, compliance agreements, EEO Surveys
- Self-identification forms
- Logs: applicant, hiring, promotion/transfer, termination
- Statement of compliance in subcontracts
- EEO-I reports

### **C. Labor And Employment Review: “Soft” Diligence Issues**

Soft due diligence typically refers to understanding the value of the human capital that is transferred to the buyer – the culture that exists at the target entity and depth of employee “buy in;” the impact of key employees and leaders; the programs and policies that yield benefits in productivity, morale and healthy communications; and other elements of the target’s practices and history that provide information about how the target gets the most out of its people in certain ways, and fails to do so in others. While these soft issues will not result in definite liability (as opposed to, say, a failure to pay XX hours of overtime to employees plainly misclassified as exempt from overtime laws), the issues shine light on the nature and quality of the target, and foreshadow future operational and integration success.

“Soft” employment issues require careful review of any documents that reveal culture and experience, the most obvious of such include performance evaluations, exit interviews, employee surveys and 360-degree evaluations, internal HR complaints, the details included in litigation documents, especially communications identified as relevant to claims in discovery, turnover and promotion data, and the like. If the buyer is willing to make its management and human resources professionals available to discuss information disclosed during diligence, it is incumbent upon the buyer to be prepared to ask incisive questions about details that illuminate the health of the target’s culture and to understand more about what incentives and values are most meaningful to the target’s employees.

To the extent that the buyer identifies potential issues regarding employee satisfaction, inconsistent application of policies or incomplete/haphazard employee performance documentation, such conversations are an excellent tool for understanding challenges and opportunities resulting from the acquisition. In some circumstances, these “soft” issues may also

bear on “hard” diligence issues – i.e., if employees complain about lack of opportunities, it may be an indication that a function might benefit from restructuring (not just resulting in just turmoil, but separations as well); or it may mean that employee satisfaction will diminish over time, as employees begin to feel frustrated after a certain amount of time in role.

Soft issues may also play an outsized role in terms of post-acquisition integration. Do the target’s employees love their “unlimited PTO policy” or sabbatical program? Does the target recruit talent in part based on social awareness and/or philanthropic opportunities? Is the environment highly structured or informal? And does the buyer intend to fold these new employees into its own policies, or allow the incoming employees to work under the rules to which they have become accustomed? All of these issues merit meaningful consideration and discussion, and in advance of the week before (or certainly after) closing!

#### **IV. Post-Acquisition Integration**

As a buyer conducts diligence, it makes sense to keep a running post-acquisition checklist, and importantly, to assign responsibility for the checklist items to specific team members or groups, so they can plan for the integration of the employees into the fold.

It is important to gather all buyer-side members of the post-acquisition integration (PAI) team to identify goals and supporting tasks, timelines for progress markers/completion, and a communication plan. As soon as practicable, the buyer must contact target-side stakeholders to help move forward in a cooperative and productive manner. Learning from the target’s management and human resources teams, a coordinated team approach can help the buyer avoid obvious mistakes and increase employee engagement and buy in. “Day 1” activities should be planned, communicated, and executed in a focused, intentional process.

Of course, there will be different paths forward depending on the health of the acquired organization, any RIF plans, and whether the acquisition is going to be operated as part of the integrated structure of the buyer, or to remain independently run in many respects, as a standalone unit. Key areas to explore most often include: policy integration, ownership and communication of changes; performance management processes; confirming appropriate agreements are in place on issues like restrictive covenants, equity awards and arbitration agreements; resolving issues of non-compliance identified in diligence; realignment of job duties, titles and reporting lines; building a liaison team to key functional areas, especially involving human resources, payroll and benefits; and training needs. Assess whether the acquisition will result in a force reduction, and develop a plan for carrying it out so as to avoid disruption as far as possible.

It is also crucial not to forget about executing against the purchase agreement, and the post-closing covenants and obligations contained therein. Determine whether potential liabilities become actual liabilities. Be aware of cut-off dates to make claims against escrow or the RWI policy.