

Labor + Employment

An ALM Supplement • Spring 2010

An ALM Publication
Special Advertising Section

A Supplement to **THE AMERICAN LAWYER**
CORPORATE COUNSEL

Employment Issues in Canada/US Cross Border Transactions

The sale of a business inevitably involves issues relating to the effect of the sale on the employees of the vendor. When the sale is a Canada/US cross border transaction, legal advice relating to labour and employment is almost always required from both sides of the border. This brief summary of the applicable labour and employment principles established by statute and common law in Canada should be of some assistance to US counsel who provide advice and direction on such cross border transactions.

In Canada, unless the business conducted by the employer is considered a federal undertaking (in which case federal law applies), the employer/employee relationship is governed by the law of the province in which the employee works. Separate provincial statutes sets out certain guidelines to which the employer and employee must adhere.

Where the transaction involves the sale of the shares of a non unionized business, the employment of the employees of the vendor continues after the sale. There can be no unilateral change to the terms of employment; if however, the employee agrees to any such change, adequate consideration must be provided by the purchaser. An employee's employment can be terminated by the vendor prior to the sale or by the purchaser after the sale. However, the concept of "at will" employment is not recognized in Canada and the employer must provide the employee with appropriate notice of termination, or payment in lieu thereof and in some cases a statutory severance payment. If an employee's employment is not terminated prior to the share sale, the term of service of the employee is inherited by the purchaser.

Where the transaction involves the sale of the assets of a non unionized business the issues are more complex. In some provinces, the relevant statute permits the purchaser to choose those vendor employees whom it wishes to employ while in other provinces, the employment of the vendor employees is deemed to continue. In the former situation, the purchaser can decide as to which, if any, of the vendor employees it wishes to hire and can make an offer of employment on new terms. It is then the choice of the vendor employee as to whether he will accept the offer. If he does not accept the offer, he remains the employee of the vendor, unless and until his employment is terminated by the vendor. In the latter situation, since the employment of the vendor's employees is deemed to continue with the purchaser, there can be no unilateral change to the terms of employment.

With some exceptions, where the transaction involves the sale of the shares or assets of a unionized business, the purchaser will be bound by the collective agreement as though it had been a party thereto, subject to any declaration to the contrary from the relevant labour relations board.

As noted, this brief summary provides only some of the considerations that will come into play when a cross border transaction involves Canadian employees. US counsel are well advised to obtain Canadian labour and employment advice in the early stages of the transaction to ensure that clients are properly advised.

Please contact any member of the Aird & Berlis LLP Labour & Employment team for assistance.

OUTSIDE PERSPECTIVE

Eldon Bennett

416.865.7704

ebennett@airdberlis.com

Barbra Miller

416.865.7775

bmiller@airdberlis.com

Christopher Lloyd

416.865.3436

clloyd@airdberlis.com

Jennifer Heath

416.865.4636

jheath@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place, 181 Bay Street, Suite 1800, Box 754, Toronto, ON M5J 2T9 Canada

T 416.863.1500 F 416.863.1515 W www.airdberlis.com