

Buying a business? What is your employment law liability?

Are you buying a business? Do you want to continue the business with the same employees? Success of the business may be due to the efforts of its excellent employees and you as a buyer may want to continue their employment in the hopes of attaining continued success in the business. Alternatively, you may be buying an unsuccessful business with a view to, among other things, reorganizing its workforce to make the business more financially viable or profitable. In either scenario, what obligations, if any, do you have to the employees of the seller under the *Employment Standards Act* (“ESA”), if you continue their employment but later terminate their employment without cause?

Section 97 of the *ESA* is instructive in such cases. It states:

Sale of business or assets

- 97** If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Under section 97, if a buyer *continues* the employment of the employees *without any interruption*, the buyer will assume the role of an employer and be required to assume all of the obligations and liabilities of the seller *vis-à-vis* the employees under the *ESA* including, but not limited to:

- (i) any outstanding wages due to employees (including those that became due prior to the sale);
- (ii) statutory holiday based on the total number of days they worked for both the seller and buyer and the wages they earned with both;
- (iii) vacation and vacation pay based on the employees’ start dates with the seller;
- (iv) notice of termination or pay in lieu of notice under section 63 based on the employees’ past service with the seller;

It should be noted that one of the requirements for triggering section 97 of the *ESA* is a *disposition* of all or part of a business. While the *ESA* does not define the word “dispose” or any variation of it, the *Interpretation Act* defines it very broadly as follows:

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

Another important requirement for triggering section 97 is that the employee must be an employee of the business on the date the business is being disposed of by the seller. If the seller has already terminated the employee's employment in advance of the disposition of the business, even if only by a single day, then the buyer who subsequently offers employment to the employee will not be viewed as having continued the employee's employment. Instead, the employer will be viewed as having offered the employee fresh or new employment with a new start date for the purpose of the *ESA*. In such case, the buyer will not be saddled with additional liability associated with the employee's past service with the seller for calculation of, for example, termination notice, statutory holiday, vacation or vacation pay.¹

Therefore, as a buyer of a business, if you have, for whatever reason, decided to retain employees of the seller but you do not wish to assume associated liabilities of such decision then you should make it a term of your contract of purchase that the seller will terminate the employment of all its employees at least one day before the disposition of the business to you. You should also make it a term of the contract that the seller will pay its employees all outstanding wages, termination pay and any other obligations under the *ESA* at the same time.

Alternatively, if you wish to continue the employment of all employees without any interruption or if the seller is requiring you to do so, you may consider negotiating with the seller some discount in the purchase price of the business to offset, some or all, liabilities you are assuming in continuing the employment of the seller's employees. In deciding what amount discount you should ask the seller, you may want to consider any outstanding wages due to the employees (earned before the date of disposition and not paid); your increased obligations to the employees for statutory holiday, vacation and vacation pay; and your increased obligation to the employees for notice of termination or pay in lieu of notice; and any other related liabilities or obligations.

It is also important to note that while the discussion here mainly focuses on the buyer's obligation under the *ESA* for continuing the employment of the seller's employees at the time of purchasing the latter's business, there is also a potential common law obligation for severance you, as a buyer, may be assuming. For example, if you continued the employment of a long-term employee in her mid or late 50's who had, at the time you purchased the business, been in the employ of the seller for 20 years, but subsequently (may be a few months later) you decided to terminate her employment without legal cause, you will be exposed to a significant financial liability. While under the *ESA*-section 63- the maximum termination pay or notice you will be required to give the employee is 2 months, the employee will likely not walk away happily with only 2 months notice or wages. She will surely consult legal counsel who will indubitably inform her that she could obtain significantly more (possibly closer to 10 times that amount depending on various factors including her age, position at work, number of years worked including the time she worked with the seller). As with the alternatives you, as a buyer, have to protect yourself from liabilities and obligations under the *ESA* when continuing the employment of a seller's employees, you have the same alternatives to protect yourself from any common law severance obligations.

You may also consider negotiating with the seller, in advance, a term in your contract of purchase that holds the seller responsible for common law severance obligation for each employee you employ, if you dismiss him or her during the first year of employment after you take ownership of the business. You may also require the seller to deposit the full (or other negotiated) amount of the potential severance liability in escrow for you to draw on during the negotiated period and whatever balance is remaining at the end of the period to be returned to the seller. You may also employ the same option to protect yourself from any financial liability you assume under the *ESA*.



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¹ See Tekmo Industrial Design Ltd. dba Budget Brake & Muffler, BC EST #D170/03