



Purchasing or Selling a Business? Be Strategic About Labour Liability.

August 2022 Employer Alert

When purchasing or selling a company, there are many factors that impact the purchase price and the terms of the purchase and sale agreement. One of the primary areas of consideration is in regards to the workforce. As a seller, you want to avoid unnecessarily triggering termination entitlements. As a purchaser, you want to avoid taking on excessive unpaid compensation (e.g. a years' worth of unpaid overtime pay), assuming overly generous employment terms (e.g. 15 weeks' vacation each year), and becoming liable for possibly significant termination entitlements (e.g. 2 years' termination pay for anyone dismissed). In fact, the potential termination liability is normally an area of key focus during a purchase and sale. As a purchaser and as a seller, with proper strategic steps, termination entitlement concerns can be avoided or addressed.

So why are termination entitlements rightfully such a concern? If an employee is dismissed, they are normally entitled to statutory termination entitlements under the *Employment Standards Act* and termination entitlements at common law (i.e. judge-made law). The *Employment Standards Act* entitlements are termination pay (capped out at 8 weeks), severance pay (applying only after 5 years of service and only where the employer's worldwide payroll is over \$2.5m per annum, capped out at 26 weeks), benefits continuance during the termination pay period, and vacation pay on the termination pay. Common law termination entitlements are normally more substantial than statutory termination entitlements and are based on a

Authors

Christine Ashton
905-940-0526
cashton@wvllp.ca

Our Employment/Labour Lawyers



Christine Ashton



Daniel Condon



Doug Langley



Shalinee Malhotra

consideration of various factors. For example, an employee with 20 years of service may be entitled to only 8 weeks' statutory termination pay, but entitled to 22 - 24 months' termination compensation at common law. As such, for a company with numerous long-standing employees, the potential termination liability can be very substantial.

As the purchaser, isn't it best if the employees are all fired by the seller and rehired by the purchaser? No. First, this will cost the seller a fair amount of money, which will undoubtedly impact the purchase price. Second, it does not put you, the purchaser, in a better position. When you rehire the employees, their termination entitlements will likely still be calculated by including their previous period employment, even though they have already received a termination payout. In particular, under the *Employment Standards Act*, unless there is a 13 week gap between periods of employment, their future termination pay entitlement will be calculated by including the previous period of employment. Further, no matter how long of a gap there is, the severance pay entitlement will always be calculated by including the previous period of employment. In regard to the common law termination entitlements, a judge is also incredibly likely to include the previous period of employment in determining future termination entitlements. As such, if several years after the purchase, the purchaser goes to dismiss a rehired employee, the original period of employment will still have an impact on termination liability. So having the seller payout termination entitlements will not get the purchaser any further ahead, in regard to employees to be employed by the purchaser.

As the purchaser, can't I avoid these termination entitlement concerns by doing an asset purchase (instead of a share purchase) and then hiring the employees? No. The *Employment Standards Act* has provisions regarding related and successor employers, to ensure that even where there is an asset purchase, the continuation of an operation is recognized. Similarly, despite it being an asset purchase, a judge is also incredibly likely to include the previous period of employment in determining future termination entitlements, where operations are

essentially continued. As such, the issue of termination entitlements is a live issue, whether the sale is an asset sale or a share sale.

So seriously, what can be done, as a purchaser or seller to address termination liability? Plenty.

If the purchaser is going to be taking on any of the seller's employees, the purchaser may use a new employment agreement to restrict the employees' termination entitlements to only their statutory entitlements or some other greater entitlement. As such, an employee with a termination entitlement of 24 months, can see their entitlement reduced to only 8 weeks. However, in order for the agreement to be enforceable, it will need to come with some new sufficient consideration (e.g. a signing bonus, a promotion, a new pension plan, etc.). The agreement should be carefully drafted to ensure enforceability, including explicitly confirming the new consideration, properly recognizing the past period of employment (where legally required), and containing a clear limiting termination provision.

If the purchaser is not going to be taking some of the seller's employees, the termination liability will need to be properly understood and strategically addressed. By strategically handling the matter, the liability may be substantially reduced or eliminated. For example, a discounted termination package may be accepted by an employee if it recognizes their desire to retire and will be paid as a lump sum payment. In addition, termination liability can be more cost-effectively addressed if the seller is able to provide some termination working notice to the employees, instead of it all being a termination pay out. Further, the purchaser or seller may be able to get an employee to agree to resign (instead of being dismissed), in order to accept employment with a different operation of the purchaser, seller, or otherwise. There are a wide variety of ways to strategically address termination concerns where the purchaser is not going to be taking some on of the seller's employees.

For more information or for assistance with handling the

workforce concerns further to a purchase and sale, please contact [our firm](#).

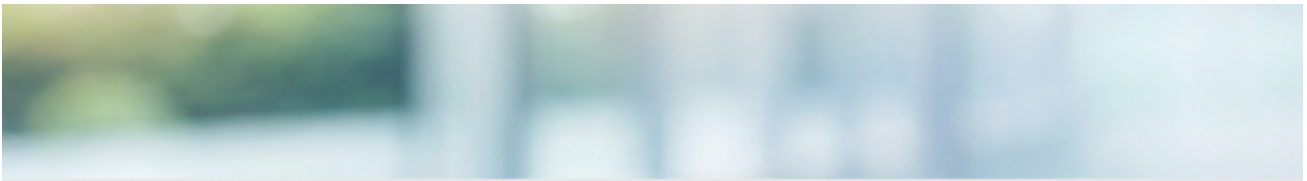
About Us

Our law firm is your strategic business partner.

For over 30 years, WV LLP has been a leader in business and tax law. Since its inception, WV LLP has been known for working strategically with our clients, using our knowledge and experience to provide prompt, practical and cost-effective solutions.

As a full service firm with over 25 lawyers, we are able to deliver practical, value-added legal services to address our clients' business needs. We recognize that there are many facets to a business and, as a law firm, we are ready to assist in all areas.

LEARN MORE



Our Legal Insights

Our law firm is here to keep you up to date in regards to legal developments and strategies.

We regularly host webinars, to ensure our clients are informed about the latest legal developments and strategies. We also have a library of on-demand webinars available for clients to view, at their leisure.

LEARN MORE

905.940.8700

information@wvllp.ca

60 Columbia Way, 7th Floor | Markham, Ontario | Canada L3R 0C9

This email was sent to << Test Email Address >>

why did I get this? [unsubscribe from this list](#) [update subscription preferences](#)

Wilson Vukelich LLP · 60 Columbia Way, 7th Floor · Markham, ON L3R 0C9 · Canada