

LABOR & EMPLOYMENT ISSUES IN HEALTH CARE M&A: FIVE CRITICAL ISSUES TO CONSIDER

Mergers and acquisitions in the health care industry present unique challenges that may not be present when undertaking similar transactions in other industries. Because of health care's highly regulated nature, parties may falter if a health care transaction is not reviewed and negotiated carefully with respect to the distinct concerns that health care presents. This article discusses certain key considerations related to the Labor & Employment issues in the context of such transactions.

Parties to health care mergers and acquisitions should be careful not to overlook the labor and employment components of the transaction – both from a legal and a practical perspective. If not appropriately considered and addressed during the planning and structuring of the transaction, these considerations can have costly consequences and significant impacts on the integration of new workforces following the transaction. Although there are a myriad of potential issues, each party to a health care transaction should be especially mindful of the following five items.

1. Compliance Issues and Successor Liability

Depending on several factors, including but not limited to the structure of a transaction, the buyer may be considered a “successor-in-interest” of the seller with regard to certain employment-related liabilities. It is, therefore, critically important for buyers and sellers to carefully consider potential successor liability issues.

Buyers should use the due diligence process to identify potential employment law compliance issues and appropriately allocate liability for employee claims relating to employer conduct prior to closing. In particular, buyers should closely review employee records, policies and procedures, paying special attention to those related to wage and hour practices which can result in significant liability in the event of a DOL investigation or a class or collective action litigation.

Buyers are also exposed to potential liabilities through pending lawsuits, settlements or administrative actions. For example, buyers must review any pending litigation as well as administrative charges filed with the Equal Employment Opportunity Commission or its state or local counterparts in order to appropriately allocate potential liabilities between the parties. Moreover, reviewing the claims – particularly in connection with a comprehensive review of the seller's employment practices, policies and procedures – may help identify the seller's non-compliance in high-risk areas such as wage and hour, discrimination, harassment or safety violations. Review of employment practices, policies and procedures can be especially important if the seller's human resources functions are being retained post-closing and/or if the buyer intends to hire all or a significant part of the seller's workforce. Employment counsel should be consulted to focus the inquiry and investigation during the due diligence process, to identify issues and areas of concern and to assist in structuring the deal to include representations from the seller regarding compliance with federal and state employment laws. Employment counsel can also assist in fashioning appropriate correction and remediation actions for identified concerns.

2. Employment Contracts

Identifying any and all applicable employment contracts at the outset of the transaction discussions is vitally important. This includes individual employment agreements and collective bargaining agreements if any unions are in play.

Buyers should pay particular attention to clauses that address contract termination rights, limitations on assignment that could affect the transaction and compensation structures. Provisions in employment contracts or benefit plans that provide for employee severance or vesting of benefits, or for executive benefits or payouts upon a change in ownership or control, can substantially affect a transaction. Buyers should also carefully review any applicable physician and executive non-compete or non-solicitation provisions, which may be contained in employment agreements or part of standalone restrictive covenant agreements or benefit arrangements. An identified need to re-negotiate any of these contracts or provisions should be addressed prior to the signing of the purchase agreement, or addressed through appropriate contingencies to the buyer's obligation to close, and potentially factored into the price.

3. Labor Agreements

There are critical issues that must be addressed early if any of the seller's workforce is represented by a labor union. Whether the buyer will ultimately be required to recognize the union, adopt any existing collective bargaining agreements or integrate the workforce into a new or existing bargaining agreement will depend on a number of factors, including the structure of the transaction, the terms of the collective bargaining agreement(s) and any communications directed to the unionized employees. The unexpected applicability of a new or existing collective bargaining agreement to the new or an existing workforce can frustrate the buyer's intentions in a number of ways, including the creation of barriers to the migration of the seller's employees to the buyer's job classifications, compensation structures and benefit plans. Failure to address these issues early in the transaction process could result in unexpected legal and financial liabilities, as well as operational and integration concerns.

4. Workforce Retention

The seller's employees can be one of the most valuable assets in a deal given their critical role in maintaining operations and organizational continuity post-closing. Determining which employees will be retained by the buyer is a fundamental aspect of almost every health care transaction and requires cooperation between the parties and the agreement of the affected employees. This includes both active employees and those who are on leaves of absence at the time of closing. Employees on statutorily protected leaves of absence related to family and medical leave, military leave or workers' compensation leave may have certain job restoration rights that must be honored after the transaction closes. Long-term disability leaves present their own complicated legal and practical issues that must be considered. In an effort to provide assurances regarding transition and integration, buyers should be careful to avoid unknowingly assuming additional responsibilities and obligations to employees on leave solely as a result of the transaction. Additionally, to the extent all or part of the seller's workforce is not retained by the buyer, both parties should consider potential state and federal WARN Act implications, including notice requirements and any related liabilities for non-compliance.

5. Accrued Paid Time Off; Accrued Accounts; Year-end Bonuses

Determining what will happen to seller employees' paid time off banks, such as vacation and sick leave, and which party bears the financial responsibility to keep employees whole after closing is another critical consideration for the parties. Similar issues arise in relation to health and dependent care "flex" account balances. The parties' options in these areas may depend on the structure of the transaction, each party's applicable policies and benefit plans, and the application of widely variable state and local laws. Lastly, responsibility for payment of "year-end" bonuses that are related to employee performance or productivity occurring both before and after closing should be specifically addressed. Missteps in this area can alter the value of the transaction and carry the risk of significant financial liability as well as operationally damaging employee morale and frustrating integration efforts.

Understanding the key labor and employment considerations in health care transactions is vital to a successful deal. Failure to appropriately address these issues can result in unanticipated liabilities, costs and operational disruptions. Any one of these threatens to scuttle a transaction following months of hard work or, potentially worse yet, result in buyer's remorse and new employee dissatisfaction that could have long-term ramifications to an otherwise successful business transaction. Hall Render's Labor & Employment Service Line has experience handling the labor and employment component of health care industry transactions. For more information on Hall Render's Labor and Employment services, click [here](#).

If you have any questions or would like additional information, please contact:

- [Jon Bumgarner](#) at (317) 977-1474 or jbumgarner@hallrender.com;
- [Mary Kate Liffbrig](#) at (720) 282-2033 or mliffbrig@hallrender.com;
- [Larry Coon](#) at (414) 721-0453 or lcoon@hallrender.com; or
- Your regular Hall Render attorney.

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Throughout 2020, Hall Render's Mergers & Acquisitions Service Line will be publishing a series of articles identifying important, and often unique, aspects of health care transactions that should not be overlooked. Ranging from Real Estate to Reimbursement, this series is designed to highlight key issues and considerations relating to niche components of health care transactions.

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