

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

Seller Beware: 5 Tips to Keep Bad Employment Practices from Holding Up a Sale

By Sarah Nash



Lawsuits and existing labor disputes are obvious impediments to the sale of your business. But short of these red flags, any number of ill-advised practices may slow down or even stop an acquisition from proceeding. Do not enter into serious talks about the sale of your company without first identifying and correcting poor employment practices. Follow these tips to avoid future headaches.

1

Ensure Employees Are Properly Classified

The Fair Labor Standards Act (“FLSA”) requires that non-exempt employees receive at least a federal minimum wage and overtime for time worked over 40 hours a week. The rules governing which employees can be exempted from these requirements are strict, with non-compliance having the potential to open a business to tremendous wage and hour liability. When a potential buyer sees that employees have been misclassified, this may give them pause before proceeding and may indicate other risky employment practices. Prior to a sale, companies should evaluate employee job duties and responsibilities carefully and on a case-by-case basis to ensure compliance with the FLSA.

Another widespread issue involving employee misclassification relates to improperly classifying employees as independent contractors. Simply because a worker is subject to a contract or because classifying workers as independent contractors is standard

industry practice does not mean that that worker is a non-employee under tax and labor law standards. The biggest factor in determining whether a worker is an employee boils down to a company’s control over that worker’s work product, direction, and financial success. If you have contractors who do not exercise independence in these areas, take another look to make sure they are properly classified.

2

Review Your Equal Employment Policies and Practices

Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, and national origin, and the Americans with Disabilities Act protects individuals with disabilities. State laws and federal contracting requirements may also oblige non-discrimination with respect to sexual orientation, gender identity, veteran status, genetics, and even height and weight. It is important to be familiar with the requirements where you operate and to capture these in well-drafted employee policies. Any complaints or pending claims will certainly be factored into a sale. The better your policies, the more you can reduce the likelihood of surprises as you get closer to a sale.

Do not forget to review your anti-harassment policies and non-retaliation policies while you are at it. In the #MeToo age, companies are even more diligent when it comes to ensuring that the companies they partner with have—and enforce—strong anti-discrimination and anti-harassment policies.

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3 Confirm That Your Handbook Is Compliant with State and Federal Leave and Wage and Hour Requirements

Federal and state laws impose a number of requirements when it comes to employee compensation and benefits. For example, depending on a company's size, federal law provides several classes of employees with job-protected leave. Meanwhile, more and more states and localities are also requiring that employers provide paid sick leave. How you describe compliance (or non-compliance) with these laws in your company handbook matters. By way of example, few laws exist that require that a company provide its workers with paid vacation. That said, in many states, where a handbook promises paid vacation, the company is obligated to comply with this promise or else face a potential wage and hour liability.

The evolving matrix of laws relating to employee compensation can be complex, but stiff penalties for violations make it important to understand how the requirements apply to your workforce. A handbook can be a helpful guide to knowing whether the company is in compliance, so be sure to review and update your handbook on a regular basis. A handbook or practices that demonstrate legal non-compliance will make a potential buyer question the deal, the purchase price, or, at very least, the strength of indemnification language in a purchase agreement.

4 If You Have a Unionized Workforce, Maintain a Healthy Relationship with Your Employees' Bargaining Representative

Employees who have unionized do not lose their unionized status simply because a company is sold. Assuming that business operations will continue in a substantially similar form (and that a majority of the workforce will remain employed), a buyer inherits the target company's bargaining obligations. In certain circumstances, the buyer may even end up bound by the same Collective Bargaining Agreement ("CBA") you signed.

To the extent possible, it is important to keep union relations positive and productive. When considering a sale, make sure to comply with your CBA provisions and to notify or coordinate with the union before making

any changes to terms and conditions of employment. A potential buyer is likely to shy away from the threat of a strike or unfair labor practice charges.

5 Make Sure Agreements with Key Employees Are Enforceable and Assignable

Often, the driving factor behind an acquisition is the information and trade secrets employees have acquired during their time with a target company. This appeal disappears if employees can simply leave the company at the time of sale and take their information elsewhere. To avoid having this risk dissuade a potential buyer, companies should review their employment agreements with key employees to make sure they have strong and enforceable non-disclosure, non-competition, and non-solicitation provisions. Be mindful that these provisions should be narrowly tailored to protect the business' interests and should have strong enforcement provisions. Non-compete requirements vary by state so, as always, it is important to review the specific law that applies to the agreement and working relationship. In some states, one bad term can undermine the enforceability of the entire provision.

Do not forget to draft the agreement in such a way that the rights and obligations may be assigned in the event of company sale. Omitting this broad assignment provision could prevent a future buyer from enforcing the agreement.

Whether a buyer is interested in purchasing the company assets or—if you are incorporated—the company stock, it is important to have all your ducks in a row when it comes to the above-listed employment practices.

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