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Protecting Your Business Assets: Employment Risks In Corporate Transactions

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John Bogle, the founder of investment adviser Vanguard, warned against what he described as the "bias toward optimism" – a tendency to view corporate transactions through rose-colored glasses and a disproportionate reliance on numbers.

Bogle's guidance, outlined in his 2009 book "Enough. True Measures of Money, Business and Life," is worth considering as corporate transactions continue at a record pace in mid-2019. The recent merger and acquisition (M&A) activity tracks the predictions in Deloitte's 2019 M&A Trends Report. Still, about 40 percent of organizations surveyed in the Deloitte Trends Report did not generate the expected return on investment. As lawyers, we ask, "Why?" And then further, "What can we do about it?"

Buyers with an optimistic focus on the numbers have a tendency to overlook employment issues that may impact value and transition. Forward-thinking companies minimize M&A risks, in part, by adopting thorough employment-related due diligence review.

M&A deal-makers are wise to take at least these steps:

1. Ask good questions and thoroughly gather information beforehand
2. Use experienced counsel to review and analyze that information
3. Prepare for the transition, regardless of its form – from merger to shutdown

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Corporate lawyers' standard due diligence checklists usually demand a full accounting of a business. On the employment side, due diligence demands typically include the following:

- Lists of executives, employees, managers, and terminated employees
- Agreements related to compensation, duties, non-competes, intellectual property, and unionization
- Benefits summaries
- Charts of litigation history, including employment
- Employment claims – internal and external
- Internal investigation reports and summaries

Analyze

Of course, the purpose of this information is to properly assess risks and guard against them. Employment lawyers can help identify internal trends in unionization, EEOC charges, disability initiatives, or pay equity complaints. They will also analyze the data in light of changing laws and cultural shifts, with a recognition of social justice movements like #MeToo, #Pride, and #BlackLivesMatter.

Prepare

From the outset of deal negotiations, the buyer and seller must be on the same page about preparation for the post-deal transition. A consistent strategy on expectations and communicating those expectations to employees and other stakeholders can help reduce risks – legal and business – that often accompany corporate transactions.

Although never guaranteed, success is more likely if companies ask experienced employment counsel to review the due diligence materials and evaluate a target company, with an eye toward recognizing cultural and reputational risks. It improves the chances of merging cultures as well as companies.