Oil and Gas Employment Law: Alberta/B.C. FAQ

Managing Employment Issues in the Context of M&A

Q | How are employees treated in a share purchase transaction, as opposed to an asset purchase transaction?

A | Where a business is acquired through a share transaction, an employee's employment remains unaffected and the acquirer (refers to a buyer of shares) takes on all employment-related liabilities of the target.

In an asset transaction, employment contracts are not automatically assigned to the purchaser (refers to a buyer of assets). However, the purchaser will typically offer employment to many, if not all, of the employees of the vendor on the same (or no less favourable) terms and conditions. The vendor is therefore responsible for the termination of any employees whose employment will not or cannot continue with the vendor. Employment standards legislation in most provinces deems the service of employees hired by the purchaser to be continuous for the purposes of the legislation (e.g. minimum statutory entitlements, including holiday pay, vacation, pregnancy and parental leave, and termination notice).

In unionized workplaces, successorship provisions in labour relations legislation ensure that collective bargaining agreements and bargaining rights are passed on to the acquiror or purchaser, provided that there is a discernible continuity of the business. In Alberta, subject to the terms of a collective agreement, unionized employees cannot refuse employment in the context of an asset transaction where there is a discernible continuity between the business of the vendor and that of the purchaser. However, in British Columbia, unionized employees have the right to choose whether they become employees of the purchaser or to treat the transfer as a layoff and exercise their rights under the applicable provisions of the collective agreement.

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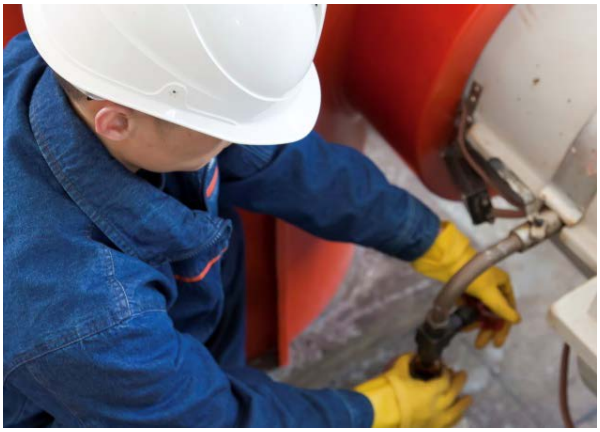
Q | What protection do employees have against dismissal?

A | In Canada, there is no concept of "at-will" employment. Employees who are terminated without cause are entitled to notice of termination or pay in lieu thereof (or a combination of the two) in accordance with employment standards legislation, as well as any contractual or common law entitlements. Reasonable notice at common law is generally determined with regard to a number of factors, principally the employee's age, years of service, position, compensation and likelihood of obtaining alternate employment. Reasonable notice at common law can be significant, potentially requiring as much as 24 months' notice or pay in lieu of notice (or more in some cases). However, employment contracts may waive an employee's entitlement to common law notice so long as the contract is properly drafted and does not attempt to contract below the statutory minimums.

In addition to the termination notice requirements, employment standards legislation in both Alberta and British Columbia impose additional obligations on employers in respect of group terminations (i.e., the termination of more than 50 employees within a prescribed period).

Q | Can a purchaser refuse to hire employees on leave?

A | While a purchaser of assets has no obligation to offer employment to all of a vendor's non-unionized employees, a purchaser should be careful not to "pick and choose" in such a way as to potentially expose themselves to a human rights complaint. For example, the failure to offer employment to employees on long-term disability leave might result in a human rights complaint.



Q | Can an employer change the terms of employment of 'acquired' employees?

A | Since an acquiror in a share transaction inherits the employment liabilities of the target, it risks claims of constructive dismissal if it unilaterally makes fundamental changes to the terms and conditions of employment. Accordingly, an acquiror that wants to alter the terms of an employee's employment, for instance by limiting an employee's common law termination entitlements, generally will offer the employee some fresh consideration for consenting to the change.

By contrast, a purchaser of assets can offer an employee employment on any terms it sees fit. Practically, however, a purchaser generally offers substantially similar terms in order to minimize the risk that the employee will reject the offer. Additionally, where a vendor will no longer carry on business after the sale of its assets, it is in its best interests to require the purchaser to offer substantially similar terms to its employees in order to reduce the vendor's exposure to termination entitlements in circumstances where the employee rejects the purchaser's offer of employment. Employees have an obligation to take reasonable steps to mitigate damages suffered in the event they are terminated by the vendor, such that the rejection of an offer from the purchaser on substantially similar terms will limit the vendor's exposure.

Both purchasers and acquirors are generally bound by the terms of a collective agreement to which the vendor or target was bound where there is a discernible continuity between the transferred or acquired business. An acquiror or purchaser would have to negotiate with the union for changes to the collective agreement. The acquiror or purchaser would also be subject to any pending applications for certification or termination of bargaining rights before the labour relations board.

Q | Are there other employment-related liabilities that a purchaser should be cognizant of when buying the assets of a vendor?

A | Yes. A purchaser may become responsible for the following:

- any outstanding orders issued pursuant to occupational health and safety legislation in respect of the purchased business;
- any amounts owed by the vendor under workplace safety and insurance legislation;
- accrued vacation pay owing by the vendor to employees; and
- future termination entitlements of employees.

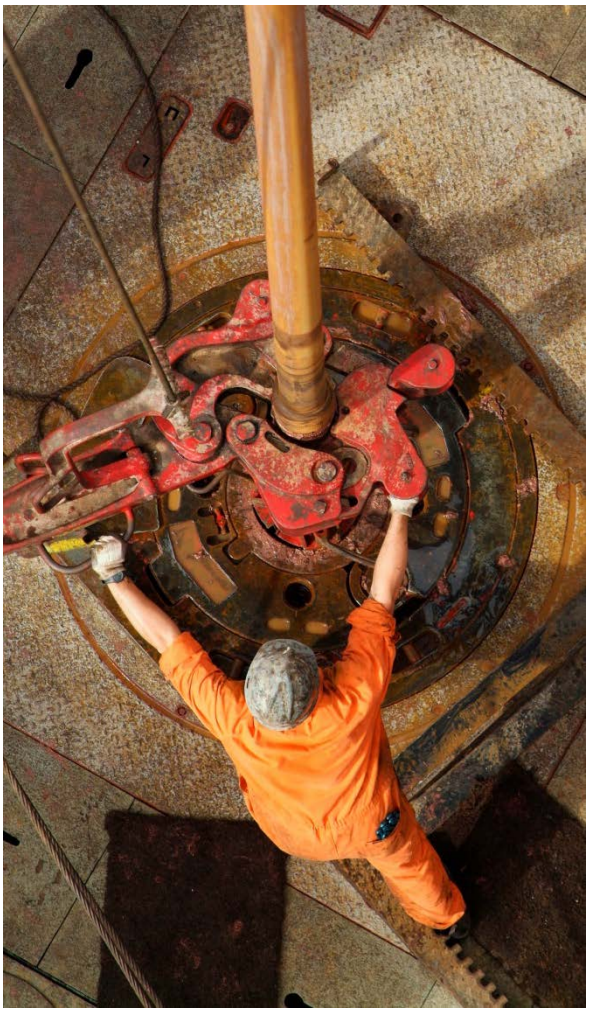
Q | How are pension plans treated in the context of mergers and acquisitions?

A | In the context of a share transaction, where a target offers its own single-employer pension plan, all assets and liabilities will remain with the plan and the funding obligations remain with the target. The acquiror cannot escape the pension obligations, so it should ensure that the target has met its duties in accordance with the terms of the plan.

With respect to an asset purchase transaction, various options exist for the purchaser. Absent a collective agreement requiring the continuation of a registered pension plan ("RPP"), there is no requirement for a purchaser to offer a RPP to the vendor's employees. However, where the purchaser does not offer a comparable RPP or alternate retirement plan, the vendor's employees may refuse to accept an offer of employment.

Options for addressing a pension plan include:

- offering a pension plan to the new employees, but assuming no pre-sale pension obligations;
- offering a pension plan which assumes the employees' pension liabilities for their past service with the vendor in exchange for a proportionate share of assets from the vendor's plan; or
- the assignment of the vendor's pension plan to the purchaser.



Q | Do employers have to inform or consult with employees regarding a transaction?

A | In Alberta, acquirors and purchasers have no statutory obligation to inform or consult with employees respecting a share purchase or asset purchase transaction. In British Columbia, employers have an obligation to inform and consult with an union regarding changes that are likely to have an effect on the terms, conditions or security of employment of a significant number of employees. Thus, a British Columbia employer generally should inform a union of a significant asset sale at least 60 days prior to closing, and thereafter meet in good faith with the union to produce an adjustment plan. Additionally, collective agreements or individual employment agreements in both Alberta and British Columbia may impose a notification or consultation requirements on employers.

Q | Do acquirors or purchasers face any privacy issues privacy issues regarding employee information?

A | Both federal and provincial legislation govern the collection, use and disclosure of personal information by private companies. Accordingly, these regimes affect the disclosure of personal information relating to due diligence and the closing of a transaction. Generally, consent of the affected individual is required for the collection, use or disclosure of information. However, there are business transaction exceptions in Alberta and British Columbia that address the exchange of personal information in the context of business transactions provided that certain conditions are met.

Q | Can an acquiror or purchaser obtain non-competition agreements from new employees?

A | In the employment context, Canadian courts are generally reluctant to enforce restrictive covenants on the basis that such covenants are an unlawful restraint on trade and this is particularly true with respect to provisions which restrict competition as opposed to provisions which restrict the solicitation of clients or customers. Moreover, Canadian courts will very rarely apply notional severance (or “blue penciling”) to restrictive covenants, and therefore to the extent that a restrictive covenant is found to be unenforceable they will not replace the unenforceable provision with one that is enforceable.

In order for restrictive covenants to be upheld, they must be reasonable and go no further than necessary to protect the employer's legitimate interests or risk unenforceability. In order to limit the chances of a non-competition covenant being found unenforceable, the temporal and geographical limitations as well as the definition of “business” being protected should be carefully considered and drafted to avoid covering more than is required to protect the employer's interests and creating ambiguity as to when the employee may be in breach of the provisions. Moreover, in relation to the non-solicitation of customers, such covenants should usually be limited to the solicitation of customers whom the employee specifically had knowledge of in order to reduce the likelihood of the provision being found unenforceable. In all cases, restrictive covenants should be considered on a case-by-case basis with respect to the necessary restrictions required to protect the employer’s legitimate proprietary interest with respect to the specific employee. 2 years tends to be the outer limit of what is considered reasonable for restrictive covenants and anything over 12 months may be at risk of being found unenforceable. Generally speaking, less is more when it comes to restrictive covenant drafting in Alberta and British Columbia.

In the context of a share transaction, if the employees are not already subject to restrictive covenants, an acquiror wishing to impose such restrictions must provide the employees with some actual, meaningful consideration beyond continued employment or the entitlements as a

result thereof in order to make such covenants valid and binding. In an asset transaction, the agreement to be bound by post-employment restrictive covenants could be made a condition of employment, in which case the employment itself would serve as adequate consideration for the restrictive covenants.

Managing Employment Post-Closing

Q | Can an employer impose mandatory drug testing or background checks on our employees?

A | Random drug or alcohol testing is only permissible in exceptional cases. Pre-employment or post-accident testing are permitted only in safety-sensitive positions. Indeed, the Alberta Court of Appeal has upheld mandatory pre-employment drug testing for applicants and new hires in safety-sensitive positions in the oil sands industry. However, the Supreme Court of Canada recently upheld an arbitration decision which found that a universal random alcohol testing program, whereby 10% of safety sensitive employees would be selected for testing every year, was unreasonable on the basis that the benefits of the program were disproportionate to its negative impact on the privacy rights of employees.

To the extent it is possible to impose pre-employment and post-accident alcohol and drug testing policies in the workplace, employers must consider the impact of human rights and privacy legislation. Alcohol and drug dependence and perceived dependence fall within the definition of "disability" in human rights legislation, with the result that an employer must show that a policy is a *bona fide* occupational requirement. This legal test can be difficult to meet. Additionally, privacy legislation covers the collection, use and disclosure of personal information and personal employee information, which includes testing under and results from drug or alcohol programs.

Employers may carry out pre-employment checks on prospective employees, with the employee's written consent, provided that the pre-employment background checks are to be used for determining whether the candidate will be able to fulfil the requirements of the position. Since background checks may reveal a broad range of information about a person, it is important to note that the employer cannot discriminate against a candidate based on one of the prohibited grounds of discrimination under human rights legislation, such as race, religion or gender. Further, in British Columbia, employers generally cannot refuse to hire a person based on the fact that the person was convicted of a summary or criminal offence where that offence is unrelated to the employment or intended employment of that person.

Q | How do I manage disabled employees?

A | Under human rights legislation, employees have the right to be free from discrimination on the basis of disability or perceived disability. Persons with disabilities have the right to equal treatment, including the right to an accessible workplace. Employers have a corresponding duty to accommodate disabled employees up to the point of undue hardship. This involves a case-by-case determination which considers various factors including:

- the financial cost to the employer;
- the creation of risks to health and safety; and
- disruption to the business.

Employers may be able to dismiss an employee for frustration of the employment relationship, but should proceed with caution in terminating a disabled employee as courts and tribunals tend to be sympathetic to the employee in such situations.

Q | Do Canadian jurisdictions recognize the concept of exempt/non-exempt employees?

A | Employment standards legislation contains provisions which specifically exempt certain occupations and classes of employees from overtime pay and other minimum standards. These categories are narrower in Canada than they are in the United States. Therefore, United States' employers should be careful not to characterize like positions in Canada as being exempt from overtime pay without first seeking advice. This is a critical concern given recent class action lawsuits in Canada with respect to unpaid overtime entitlements.

Q | What are the leave entitlements for pregnant employees?

A | In Alberta, employees who have been employed by their employer for a minimum period of time are entitled to take job-protected unpaid maternity and/or parental leave. There is no such minimum period in British Columbia. Where both maternity and parental leave are taken, the maximum combined leave is 52 weeks (maternity leave taken individually runs 15 weeks in Alberta and 17 weeks in British Columbia). Parental leave provisions apply to both natural and adoptive parents, and are up to 37 weeks. The employer must return the employee to employment following the leave, either to the job held prior to the commencement of the leave or to a comparable position if that job no longer exists. Employers may face liability under the statute and for claims of wrongful dismissal if they do not comply with these requirements.

Q | Can an employer send employee information to its head office outside of Canada?

A | Federal privacy legislation applies to all personal information collected in the course of commercial activities, but it does not apply to employee information of provincially regulated employers (which most employers are). Privacy legislation in Alberta and British Columbia applies to the collection, use and disclosure of personal information (including personal employee information) for provincially regulated employers operating in those provinces. Whether an employer can send employees' personal information to its head office outside of Canada must be reviewed with reference to the legislation in force in the province in which the organization carries on business, as well as the province from which the information is being transferred if it is a different province.

Q | Can an employer monitor an employee's emails, calls or use of employer devices?

A | Under privacy laws in Canada, employees have a reasonable expectation of privacy with respect to their personal information. However, an employee's reasonable expectation of privacy must still be balanced against an employer's right to manage the workplace, which includes the need to gather information for legitimate business concerns. Generally, an employer must obtain the consent of an employee in order to collect, use and disclose personal information, and then only to the extent reasonably needed for the purposes collected. However, employers may collect or use personal employee information without consent where:

- it is collected or used solely for the purposes of establishing, managing or terminating the employment relationship;
- it is reasonable to collect or use the information for the particular purpose for which it is to be collected or used; and

- prior to collection or use of the information, the subject individual is provided with reasonable notification of the collection or use of the information and the purpose for which it is being collected and used.

Accordingly, employers should be cautious in undertaking surveillance or monitoring of any kind, including device monitoring. Such programs should not be implemented without legal advice as there are many privacy law considerations in addition to other risks, such as the inadvertent interception of private communications by an employee without consent which is a criminal offence.

For further information, please contact your Stikeman Elliott representative or the following author:

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