



Sale of a Business: Employment, Labour and Pension Law FAQ

Q | What is the difference between an asset purchase and a share purchase transaction from an employment law perspective?

A | In a sale of shares, the employer does not change and the purchaser effectively steps into the shoes of the vendor. In short, the purchaser inherits all employment-related liabilities of the vendor including all collective bargaining (union) obligations.

In a sale of assets, the purchaser has two options; namely, the purchaser can offer employment to the vendor's employees, or, it may decide not to offer employment to all or some of the vendor's employees. In circumstances where the purchaser does not offer employment to the vendor's employees, such employees will be either terminated by operation of law on closing, or, will remain employees of the vendor if the vendor continues to operate as a going concern.

In the province of Quebec, pursuant to the *Civil Code of Quebec*, all employees employed in the sold business are automatically transferred by operation of law to the purchaser who is bound by the existing contracts of employment.

In addition, in an asset sale not all employment related liabilities of the vendor flow by operation of law to the purchaser.

Q | In an asset sale, what happens if the employees of the vendor are unionised?

A | If all or part of a business or undertaking is sold, leased, transferred or merged with another business or undertaking, the purchaser becomes the successor to and bound by any collective bargaining agreements applicable to the business and all obligations and proceedings thereunder as if it were party to the collective agreement.

There are subtle differences in each of the labour relations statutes in the common law provinces that address issues relating to the intermingling of the purchaser's and vendor's employees where one or both of the parties' employees are represented by a union, as well as whether or not the vendor's employees have

About Stikeman Elliott

Stikeman Elliott's mission has always been to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

As the firm has grown in prominence worldwide, we have remained true to our core values of: partnering with clients to ensure mutual success; finding original solutions grounded in business realities; providing clear, proactive counsel; recognizing that individual passion drives collective results.

Follow us



a choice to exercise rights they have against the vendor under its collective agreement rather than transfer to the purchaser.¹

Q | In the context of a sale of assets, does the purchaser have to make offers to all of the vendor's employees?

A | No. A purchaser of assets in the common law provinces is under no obligation at law to offer employment to the vendor's non-unionised employees. However, purchasers should be cautious in making decisions not to offer employment to ensure they do not inadvertently discriminate based on any of the prohibited grounds in applicable human rights legislation. If, for example, the purchaser excludes all employees on disability leave from receiving offers of employment, such could be subject to a claim of discrimination under human rights legislation.

In the province of Quebec, the purchaser automatically inherits the vendor's employees and is bound by the existing contracts of employment. As such, formal offers of employment are not necessary.

Q | Does a purchaser of assets have to offer employees the same terms of employment that the employees enjoyed with the vendor?

A | No. In the common law provinces, a purchaser is free to offer employment to non-unionised employees on terms of its choosing, subject to the terms of the purchase agreement. However, a purchaser should be aware that if the transaction constitutes a sale of business under applicable employment standards legislation, and the purchaser does extend an offer of employment which is subsequently accepted by the employee, the employees' employment is "deemed" to be continuous and uninterrupted by the sale and the purchaser must recognise each employee's period of service with the vendor (and any predecessors) for the purposes of seniority/service based rights

¹ Known as "Verrin Rights", unionized employees in British Columbia may exercise whatever rights they have against the vendor under its collective agreement rather than transfer to the purchaser in an asset sale.

under applicable employment standards legislation.

In the province of Quebec, the purchaser of assets is bound by the terms and conditions of the existing contracts of employment. If the purchaser makes a substantial change to an essential term or condition of employment, it could expose itself to a claim for constructive dismissal. In addition, the purchaser must recognise employees' past years of service with the vendor for the purposes of determining the employees' entitlements to service-based rights, including reasonable notice of termination.

What constitutes a sale of business is defined in the applicable provincial employment standards statutes, but typically includes the sale of all or part of a business (a division, for example) as well as other transactions in which a vendor transfers, leases or disposes of assets in any manner and can include an outsourcing of functions.

Q | Can employees in an asset transaction refuse an offer of employment from a purchaser?

A | Yes. Non-unionised employees in the common law provinces do not have to accept offers of employment from a purchaser and may refuse to be transferred to the new employer.

In the province of Quebec, employees will be automatically transferred to the purchaser. As such, Quebec employees cannot refuse the transfer to the new employer, subject to the purchaser providing the same or substantially similar terms and conditions of employment.

In Alberta, Ontario and Quebec, subject to the provisions of any applicable collective agreement, unionised employees cannot refuse a transfer if all or part of a business has been acquired, other provinces have varying rules².

² For example, in the province of British Columbia, in some cases, unionized employees may stay with the vendor when only a part of a business is being sold. Known as "Verrin Rights" unionized employees may exercise whatever rights they have against the vendor under its collective agreement rather than transfer to the purchaser in an asset sale.

Q | If employees refuse an offer of employment, are they entitled to severance?

A | In a sale of business in the common law provinces, if an employee is not offered employment or does not accept an employment offer from the purchaser, the vendor retains responsibility for termination liabilities. If the employee is not offered employment, then the vendor is responsible for all severance liabilities arising under statute, contract or at common law. If an employee is offered employment by the purchaser on substantially similar terms as the employees enjoyed prior to the transaction, the vendor could argue that the employees ought to have accepted the offer in mitigation of any common law wrongful dismissal damages. In Alberta and Ontario, an employee who does not accept a substantially similar offer from the purchaser and whose position is abolished as a result of the transaction is nonetheless entitled to their statutory entitlements³.

In the province of Quebec, if an employee refuses to continue his or her employment with the purchaser, the employee will not be entitled to severance, unless the purchaser does not provide the same or substantially similar terms and conditions of employment as those enjoyed by the employee with the vendor.

Q | Can a purchaser change terms and conditions of employment in a share transaction?

A | For unionised employees, a purchaser would have to bargain with the union for amendments to the applicable collective agreements. With respect to non-unionised employees, unless restricted by the terms of the purchase agreement, a purchaser can make changes to terms and conditions of employment following closing subject to individual written employment contracts prohibiting such changes and subject to the purchaser exposing themselves to claims of constructive dismissal if such changes

are material. It is important to note that if the purchaser changes any terms and conditions of employment after a share transaction, the employer must provide the employee with some form consideration in order to ensure that the changes are valid and enforceable.

Q | Are there any other liabilities that a purchaser of assets should be aware of when purchasing a business or part of a business?

A | Yes. In the context of a sale of assets, a purchaser may also be responsible for:

Complying with any outstanding orders issued pursuant to occupational health and safety legislation in respect of the purchased business.

Paying amounts owed by the vendor under workplace safety and insurance legislation.

Accrued vacation pay owing by the vendor to its employees. If employees are permitted to carry over vacation from year to year, significant vacation pay accruals may exist.

Complying with any pay equity plans established by the vendor and making any necessary pay equity adjustments.

Future severance and reasonable notice of termination. If the purchaser recognises service (which is market practice) or applicable legislation provides that service continues (as is the case for Quebec employees), they will inherit service for future severance and notice of termination calculations, which can, in Canada, be quite onerous.

Q | Are there works councils in Canada?

A | European style works councils do not exist in Canada. Unions have representation rights only if certified by a labour relations board or voluntarily recognised by an employer for a specified group of employees. Certification and voluntary recognition, other than in certain aspects of the construction industry, takes place at a municipal or facility level and not at a provincial or national level. A union has no right to represent employees other than those for which it was certified or voluntarily recognised. Subject to the provisions of any applicable collective agreements, there is no legal

³ In the province of British Columbia, if an employee refuses to accept a substantially similar offer of employment by the purchaser, the employee would be precluded from statutory termination entitlements under the *Employment Standards Act*.

requirement to advise or engage in discussions with a union representing employees of a business prior to a sale of all or part of that business.

Q | The employer sponsor of our pension scheme in the UK is not a fiduciary of the scheme. Is the employer sponsor of a pension scheme in Canada a plan fiduciary?

A | In Canada, most pension schemes must be administered by specified entities (typically, the employer, a pension committee, an insurance company, a board of trustees in the case of certain multi-employer plans, or certain other specified persons). Generally speaking, single-employer pension schemes are administered by the employer, and in such situations the employer will act in both a fiduciary capacity and a non-fiduciary capacity in carrying out its various obligations under the scheme and applicable legislation. Different rules apply in Quebec and Manitoba where many pension schemes must be administered by a pension committee.

Q | In an asset sale, what happens if the vendor's employees participate in an employer-sponsored pension scheme but the purchaser does not offer a pension scheme?

A | In the absence of a collective agreement for unionised employees requiring the continuation of a pension scheme or maintenance of a certain level of pension benefit, there is no requirement for a purchaser to offer participation in a pension scheme to the vendor's employees. However, in the common law provinces, if the purchaser does not offer comparable terms and conditions of employment, the vendor's employees may not accept the purchaser's offer of employment. If this results, the vendor may incur severance costs which it may seek to pass to the purchaser in the deal terms (e.g., through an indemnification for severance).

In the province of Quebec, employees will generally transfer to the purchaser automatically. As such, if the purchaser does not offer substantially similar terms and conditions of employment, the purchaser could be exposed to a claim for constructive dismissal. Therefore, as a practical matter, a purchaser will generally be obliged to offer employees participation in some form of equivalent retirement scheme, be it a formal pension scheme or other retirement savings vehicle.

Also, in some provinces, if the vendor offers a pension scheme but the purchaser does not, the applicable regulatory authority may have the discretion to declare the vendor's plan fully or partially wound up, and/or certain benefit enhancements may accrue to the employees all of which can be time consuming and costly. Should these issues arise, it would not be uncommon for the vendor to seek to pass such cost along to the purchaser in the deal terms.

Q | How long can a bonus payment be deferred without adverse tax consequences in Canada?

A | Under the Income Tax Act (Canada), payment of a bonus or similar compensation can be deferred, without adverse tax consequences, for up to 3 years from the end of the calendar year to which the bonus relates. For example, a bonus payment declared in 2015, in respect of an employee's services rendered in 2014, can be deferred to the end of 2017 without adverse tax consequences. If the terms of the bonus or compensation plan permit deferral beyond the three year limit, it may be considered a salary deferral arrangement (commonly known as an "SDA"), and subject to a particularly onerous set of rules that would render the benefit to be received under an SDA taxable to the employee (and deductible to the employer) in the year that the deferral arises and in every subsequent year until settlement in which the value of the award increases in value, not in the year of payment.

For more information, please contact your Stikeman Elliott representative or any lawyer in our Employment, Labour Group listed at www.stikeman.com.

 [Subscribe](#) to updates on a variety of valuable legal topics from Stikeman Elliott's Knowledge Hub.

This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at www.stikeman.com/legal-notice © Stikeman Elliott LLP
2017-04-30 DM 6752755