

Buying Employees – What to Know

I'm not talking about "buying off" employees to stop them from doing something that may hurt your business. This is about buying employees when buying a business and the misconceptions that continue to exist when doing so. Whether you acquire an existing operating business through a share purchase or asset deal, if you agree to "rehire" or continue to employ the existing employees, you are buying them too. Whether the former business owner terminates their employment or not, gives them notice in advance or pays them some severance, the new owner cannot treat them as newly hired employees and restart the clock.

Under the *Employment Standards Act, 2000* (the "ESA"), employees who continue to be employed following the acquisition of a business are deemed to be continuously employed from their original hire date for purposes of termination. In plain English, regardless of any notice of termination given by the former owner or any employment contract signed with the new owner, each employee's term of employment is recognized from the date they started working for the former owner and not the acquisition date. It doesn't matter if the business name changes. It doesn't matter if they are being paid by a different entity. It doesn't matter if the employee is given a different job or job title.

The only exception is when there is a thirteen (13) week lag between the employee's last day of work with the former owner and the day the business is sold. Think Zellers' employees rehired by Target. Many were interviewed and rehired as "new" employees by Target after the sale of the Zellers' assets. Because Target spent several months conducting leasehold improvements on the Zellers' locations, all Zellers' employees were terminated when the Zellers' doors (sadly) closed. Many, many months later when Target opened, any former Zellers' employees who were rehired by Target began their start date on the opening date, long after the sale date. For purposes of calculating their notice of termination due to (unsurprising) bankruptcy proceedings, their former employment with Zellers will not be recognized because they are not deemed to be continuously employed by Target.

If you don't want to assume the liability for notice and severance of existing employees, you need to ensure there is a thirteen week delay between their termination (and actual not working) and their rehiring by you. If you are unable to do this, then do your due diligence. You need to review (and get) all employee files to know what type of employees you are buying: their performance, experience, age, length of employment and discipline history. Based on this information, the purchase price should be calculated to account for the amount of reasonable notice and severance payable to each employee you buy and attributable to their term of employment with the seller. In this way, the seller will have "paid" for its portion of liability related to any employee termination by you following the sale. If you see any bad apples following your due diligence, have the seller terminate their employment any time prior to the sale date.

Anyone you continue to employ can be treated as if they are "on probation" following the sale date. However, if you terminate them, you cannot treat them as if they are within the three (3) month "probationary" period under the ESA, during which time you can terminate without notice or pay *in lieu* of notice. Despite being "on probation", the employee is entitled to ESA notice and severance (if applicable), plus common law reasonable notice based on various factors, which must be calculated from their original hire date by the seller. Any term of "probation" meant to determine their suitability for continued employment with you, as the new owner, does not discount your obligation to pay them their notice entitlement upon termination.

Buying employees should not be taken lightly. Don't rely on the seller issuing termination notices to them if you plan to hire the employees in any capacity. Get a lawyer involved, who can calculate the liability you are assuming upon termination of the employees and to draft new employment contracts setting out the terms of probation and any other changes to their employment. For help in buying employees (or any other components of a business), contact your Chief Loophole Advisor at moira@wallacelaw.ca.