ENSURING REAL “WIN-WIN” CROSS-BORDER MERGERS AND ACQUISITIONS
AMERICAN BAR ASSOCIATION, LABOR & EMPLOYMENT LAW SECTION
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REPRESENTING EXECUTIVES IN GLOBAL CHANGE IN CONTROL AND M&A TRANSACTIONS
KATHERINE BLOSTEIN, OUTTEN & GOLDEN LLP

1. Individual Employment Counsel Role

a. Employment counsel may be retained to represent an executive or team of executives of the seller through the transaction to:
   i. Ensure that executive(s)’ interests are represented by a party without a conflict of interest;
   ii. Perform due diligence—review all relevant agreements and documents dealing with the terms and conditions of executive(s)’ employment pre and post-transaction;
   iii. Review and analyze statutory rights of executive(s) assigned to work abroad;
   iv. Negotiate the terms and conditions of executive(s)’ retention or termination post-transaction.

2. Executive(s)’ Goals for the Transaction

a. Attorneys must be mindful of the divided loyalties their clients face while wanting to protect themselves financially and protect the company through a successful completion of the transaction.

b. Employee(s)’ needs include:
   i. Receiving all compensation and benefits triggered by the occurrence of a transaction;
   ii. Negotiating a retention/employment or a separation agreement to govern the employment relationship post-transaction;
   iii. Understanding all prior and future obligations to their employer regarding duty of loyalty, confidentiality, and other restrictive covenants;
   iv. Having a degree of control in terms of retention, leadership, and management;
   v. Ensuring a smooth transition of ownership and leadership.

3. Due Diligence by Executive(s)’ Counsel Prior to the Transaction

a. Collect and review all information available about the seller and buyer (or the two participants in the transaction) related to the transaction and their employment practices and policies.
b. Review all agreements, policies, and documents such as:
   i. Employment agreements or offer letters;
   ii. Change in Control, “golden parachute,” or retention agreements;
   iii. Loans or guarantees extended or agreed to by the client and the seller;
   iv. Incentive or bonus compensation, stock option, restricted stock, other stock
      incentive plans, or deferred compensation plans in which the client is a
      participant;
   v. Severance plans, policies, or arrangements;
   vi. Confidentiality, non-compete or non-solicitation agreements, or other
      restrictions that the client has signed or is subject to;
   vii. Employee handbooks, codes of conduct, or other written policies that govern
        the client’s employment;
   viii. In the event the client is an expatriate, all expatriate related benefits, policies or
        plans the client is a participant in and assignment letters, agreements, and/or
        local contracts;
      ix. Employee indemnification agreements or by-laws of the company.

   c. The attorney should research and review what agreements, plans and policies the buyer
      or the other company in the transaction offers to its executive team.

4. Types of Transaction and Executive Employment Issues

   a. Stock (Shares) Transaction— all of the outstanding shares of stock of the business are
      transferred from the seller to the buyer. The buyer in effect steps into the shoes of the
      seller and the operation of the business continues in an uninterrupted manner. Unless
      specifically agreed to, the seller has no continuing interest in, or obligation with respect
      to, the assets, liabilities or operations of the business. From an employment
      perspective, after the transaction closes, the employer is still the same entity so the
      executive(s)’ employment relationship may not change at the closing.

   b. Asset Purchase Transaction—the seller retains ownership of the shares of stock of the
      business. The buyer must either create a new entity or use another existing entity for
      the transaction. Only assets and liabilities which are specifically identified in the
      purchase agreement are transferred to the buyer and all of the other assets and
      liabilities remain with the seller. Ownership of the assets and liabilities and any related
      contracts must actually be transferred. In this transaction, the executive(s)’ employer
      will change on the day of the closing, so the executive(s)' counsel should negotiate his or
      her employment relationship with the buyer before the transaction is completed.

   c. Change in Control
      i. Upon the occurrence of the transaction (whether stock or asset purchase),
         executive(s) could be entitled to Change in Control benefits under the following:
           1. A free-standing Change in Control agreement provides executive(s) with
              an immediate pay-out upon the occurrence of a Change in Control;
2. An employment agreement with a single trigger Change in Control provision generally permits executive(s) to resign and receive Change in Control benefits for any reason once the Change in Control has occurred;

3. An employment agreement with a double trigger Change in Control provision generally requires the executive(s) to be terminated without cause or resign for good reason in order to receive enhanced Change in Control benefits.

d. Other Agreements
   i. Retention or Employment Agreement
      1. After a stock purchase, the executive(s) may also need the attorney to negotiate their ongoing relationship with the employer.
      2. In an asset purchase transaction, the attorney may want to negotiate for a better deal for the client if he or she is important to the transaction and has leverage to negotiate.

   ii. Separation Agreement
      1. In an asset purchase transaction, in the event the buyer plans to terminate the executive(s) after the closing, the attorney should negotiate the terms and language, including the release agreement and the restrictive covenants obligations.

5. Expatriate or Seconded Executive(s)

   a. Depending on where the executive(s) works on assignment, he or she may have rights under the country’s statutory employment rights, i.e. those under the acquired rights doctrine, vested rights depending on the length of assignment, etc.
      i. For example, an expatriate on assignment to Hong Kong or China would have to be subject to a local contract and under the countries’ laws, may be entitled to statutory severance upon the occurrence of a transaction.
      ii. If the expatriate is located in an acquired rights jurisdiction, an acquirer of the assets of a business may have to assume the seller’s existing workplace vested rights and obligations and that may include the expatriate executive’s vested rights.
      iii. If the expatriate has been assigned to multiple jurisdictions, he or she may have rights to pension and other benefits in various jurisdictions, which the attorney should be aware of prior to the transaction.

   b. Retaining local employment counsel to navigate the assignment country’s statutory laws and the expatriate’s rights to benefits is essential.

   c. The attorney has to ensure that if the expatriate is retained through the transaction, all expatriate benefits are transferred and memorialized in the retention/employment and/or a new assignment agreement.
6. **Tax Issues/Consequences**

a. If the transaction triggers change in control payments for the client(s), depending on the amount of the payments, they may be subject to the "parachute payment" tax under I.R.C. §§280G and 4999.

b. Counsel should be aware of I.R.C. §§280G and 4999 consequences and advise the client(s) to seek proper tax advice related to these issues. Retaining tax counsel or an accountant familiar with executive tax issues is key in these situations.
   
i. I.R.C. § 280G makes nondeductible for the employer any "excess parachute payment" paid to the employee. I.R.C. §4999 imposes a 20 percent nondeductible excise tax on the employee for receipt of any "excess parachute payment."
   
ii. A "parachute payment" is a payment contingent on a change in control where the sum of all payments contingent on the change in control equals or exceeds three times the disqualified individual's "base amount."
   
iii. "Base amount" is average W-2 compensation over five years preceding year in which change in control occurs. I.R.C. §§280G(b)(3)(A) and (d)(1) and (2). An "excess parachute payment," the amount subject to I.R.C. §§280G and 4999, is the excess of the amount of any parachute payment over the individual's base amount.

c. Counsel should also make sure that all employment or separation agreements comply with I.R.C§409A. In this regard, all employment-related or separation payments must be structured to comply with I.R.C§409A requirements regarding time and form of payments. When possible, such payments should be structured to avoid I.R.C§409A using exemptions allowed under the section (including but not limited to short term deferral and/or involuntary separation exemptions).

d. If the transaction includes a public company, counsel should be aware of the “specified employee” rules under I.R.C§409A and ensure that any separation payments made to clients who are “specified employees” comply with the requirement that any "separation pay" may have to be delayed for six months from the date of termination.

7. **Public Company Issues and Shareholder Approval**

a. If one or both of the companies involved in the transaction are public companies, the attorney for employee/executive(s) must be aware that under the Dodd-Frank Wall Street Reform and Consumer Protection Act and the American Recovery and Reinvestment Act of 2009 (ARRA), "golden parachutes" are subject to shareholder advisory votes that have to approve the compensation arrangements.
b. In a cross-border transaction, the attorney should consult with local counsel about possible local government regulation dealing with executive compensation limitations.

c. Even if the companies are private, the attorney must be sensitive to the fact that any Change in Control package or an exit package will be subject to shareholder scrutiny.

8. **Ethical Considerations for Attorneys Representing Multiple Employees in a Transaction**

a. Representing multiple tiers of executives that may not be getting the same or similar treatment in a transaction may present conflict issues. However, if the attorney plans to represent the whole executive team, he or she needs to ensure that the rules for joint representation are carefully followed and understood by each client.

b. If the companies involved in a transaction are in more than one jurisdiction, the attorney should find out what the rules of practice say about multiple client representation in these jurisdictions.

c. It is critical to follow the applicable disciplinary rules in order to avoid a conflict of interest or potential malpractice claim. The clients must be made aware that if a conflict or potential conflict arises, the attorney may not be able to continue representing one or all of them.

d. A joint retainer with the entire team should incorporate the applicable ethical rules of joint representation.