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Proskauer Benefits Brief: Cross-Border Asset Deals

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In this episode of The Proskauer Benefits Brief, partner David Teigman, senior counsel Nick LaSpina, and special international labor & employment counsel Nicola Bartholomew, discuss differences between asset sales in the US and the UK, with respect to transfers of employees. In short, there are significant differences that are not necessarily intuitive to US practitioners. In the US, parties will have commercial freedom to make offers of employment and negotiate terms, whereas in the UK employees will transfer automatically as a result of TUPE and a number of significant protections and obligations apply that will need to be factored into the deal. So be sure to tune into this informative discussion about employment and benefits issues in asset sales in the US and the UK.

David Teigman: Hello and welcome to The Proskauer Benefits Brief: Legal Insight on Employee Benefits and Executive Compensation. I'm David Teigman, Partner in the Employee Benefits and Executive Compensation Group at Proskauer and with me today are my colleagues, Nick LaSpina, who is a Senior Counsel in our Employee Benefits and Executive Compensation Group, and Nicola Bartholomew, who is Special International Labor & Employment Counsel in our London office. Welcome to you both.

Nick LaSpina: Good to be here.

Nicola Bartholomew: Great to be a part of this podcast.

David Teigman: Today, I wanted to talk about the differences between asset sales in the US and the UK with respect to transfers of employees. At a high level, I think it is important that we flesh out the US construct first and then we can move into the UK construct, which I understand is far different and not necessarily intuitive to US practitioners. With that, Nick, could you give us an overview of how employee transfers work in asset sales from a US perspective?

Nick LaSpina: Sure. In the US, the Buyer of the assets will effectively have a choice as to whether to employ the relevant employees or not. From the Buyer's perspective, this largely depends on the Buyer's assessment of which of the Seller's employees are essential to the operation of the business or assets that the Buyer is acquiring. While this is all subject to negotiation with the Seller of the assets, assuming that the Buyer and the Seller agree that certain employees will need to transfer with the assets, the Buyer will usually need to make a formal offer of employment to the employees and the employees will have a choice as to whether to accept the offer or not.

David Teigman: That all makes sense, and is basically the opposite of a stock sale in the US where employees transfer automatically if they are employed by the entity being sold. Nick, I'd like to drill down on some of the details regarding the separation from employment that the employees might experience from the Seller. For example, could you explain whether severance is paid to employees after their separation of employment from the Seller?

Nick LaSpina: That's a good question, Dave, and the short answer is: it depends. This is often a highly-negotiated point between the Buyer and the Seller because neither side typically wants to incur any severance costs. In the first instance, it will depend on the employees' existing rights with the Seller. That is, are the employees eligible to participate in a severance plan or another employment arrangement with the Seller (which, by the way, can include collective bargaining agreements if any employees are unionized) and does the arrangement provide for severance in the event of a separation from employment in connection with an asset sale? Unlike in many non-US countries, US employees are generally not entitled to statutory severance, and so these arrangements need to be carefully analyzed to determine what employees' rights may be. Also, if an employee accepts the new offer of employment from the Buyer, that could be viewed as a resignation from the Seller that does not entitle them to any severance benefits from the Seller. There is no canned answer to this question, and as I noted, this is often heavily negotiated. Even if not contractually obligated, the Seller may want to offer severance to its employees, particularly if the Seller will no longer need the employees after the closing of the transaction and wants to get a release of claims from the employees. Even in that case, the Seller may want the Buyer to pick up some or all of the severance costs.

One more point: an important thing for both Buyers and Sellers to keep in mind is that, even though severance is not generally a statutory construct in the US, there are rules that can require that employees be given a statutory notice period prior to termination, with damages available if the notice is not appropriately given. Some of our listeners have probably run up against these rules – the Worker Adjustment and Retraining Notification Act at the federal level (which we often refer to as "WARN") and similar "mini-WARN" rules at the state and local level. But that's a topic for another podcast!

David Teigman: Nick, there's a theme to what you are saying about the US construct. That is, aside from the WARN issues, lots of the points are negotiated between the Buyer and the Seller.

Nick LaSpina: That's exactly right.

David Teigman: Nick, could you also explain the rubric for a transferred employee's compensation and benefits in an asset sale?

Nick LaSpina: Sure, Dave. Leaving aside severance, an employee of the Seller will generally stop participating in the employee benefit plans of the Seller when the employee transfers to the Buyer. On the flip side, the Buyer, in many cases, will covenant to maintain certain levels of compensation and benefits for a certain period of time post-closing. Customary covenants include maintaining the base salary level of the employees for about a year after the closing as well as providing employee benefits that similarly situated employees of the Buyer receive for about a year post-closing.

David Teigman: Thank you, Nick. I want to now turn to the UK construct. Nicola, could you start by giving us an overview of the UK construct?

Nicola Bartholomew: Of course. The position is very different in the UK. Unlike in the US, the Buyer will not be free to choose whether it employs the target employees or not. In the UK, regulations known as TUPE[1] give significant protections to employees when their business changes hands by way of asset sale. Unsurprisingly, the underlying regulations are pretty complex and every transaction will differ slightly depending on the business. However, broadly speaking, the key effect of TUPE is that the employment of any UK employees who are wholly or mainly assigned to the business or assets being sold and any liabilities associated with those employees will transfer *automatically* by operation of law. As some of our listeners will be aware, this is known as a "TUPE transfer" and it will occur on closing of the sale. So, unlike in the US, there is no need or freedom to make offers of employment to transfer the desired relevant employees. Instead *any* employees who work in the target business will transfer by law to the Buyer with their existing terms and conditions of employment preserved. The only exception to this is where the Buyer wants to employ any employees who work for different parts of the Seller's business who would not be caught by TUPE.

What TUPE means is the Buyer essentially "*steps into the shoes*" of the Seller – it is as if the Buyer had always employed them. It is important to stress that any of the Seller's acts or omissions *before the transfer* will be taken on by the Buyer. For example, if there is an ongoing discrimination claim, this will transfer over. Because of this it is crucial that adequate due diligence is conducted to understand the existing terms and liabilities of the transferring employees in the UK.

As an aside, it is worth noting that as TUPE originated from a European Union directive, this automatic transfer principle also applies to assets sales involving EU countries, such as France and Germany. Whilst the UK has now left the European Union, TUPE remains in force in the UK.

David Teigman: Thank you, Nicola. That really is very different. But could the parties not simply contract out of TUPE?

Nicola Bartholomew: Unfortunately not. Parties cannot contract out of the application of TUPE or their statutory obligations under it. As a result, it is really important that the impact of TUPE is reviewed as part of the wider deal and then specifically addressed in the transaction documents. A key part of an asset sale with a UK nexus will, therefore, be the Buyer and Seller negotiating the apportionment of liabilities associated with the TUPE transferring employees.

David Teigman: Are there any other requirements or protections imposed by TUPE?

Nicola Bartholomew: Yes. TUPE imposes a number of requirements on the parties as well as affording employees significant protections.

A key requirement is a duty to inform and consult. Both parties need to provide certain information to employee representatives of its own affected employees before completion happens. In some situations the parties will also need to consult on any proposed measures or changes. I should stress that employee representatives can't stop a deal going ahead. However, individual employees can object to the transfer of their own employment, although doing so means their employment will be terminated without compensation. In the UK, there is no statutory timeframe for this process. In practice, the timeframe will depend on factors such as the number of employees involved and whether there are existing employee representatives. In addition to this, the Seller has a legal obligation to provide certain employee information to the Buyer at least 28 days before the transfer takes place. These information and consultation obligations will need to be factored into the overall deal timeline.

TUPE employees also have certain protections that they would not enjoy in a share sale. The ability to make contractual changes (both before and after the TUPE transfer) is limited. The Buyer will not have the freedom to harmonize the terms of acquired employees with those of their existing workforce. Similarly, employees are protected against dismissal as a result of the transfer.

David Teigman: That's quite restrictive. What are the consequences if parties fail to comply? _

Nicola Bartholomew: You won't be surprised to hear that there are several sanctions and penalties for failing to comply with the TUPE rules. These include an award of up to 13 weeks' pay for each affected employee for failure to inform and consult properly. So where there are a number of UK employees, this can represent a significant liability.

David Teigman: Thanks Nicola. This is really helpful. To bring our podcast to a close, what are the key takeaway for our listeners?

Nicola Bartholomew: I think it was once said that Britain and the US are "two nations separated by a common language[2]" and while there are lots of synergies between the US and UK employment regimes, we really do see the differences play out in a transatlantic asset sale. Whereas in the US the parties will have the commercial freedom to make offers of employment and negotiate terms, in the UK employees will transfer automatically as a result of TUPE and a number of significant protections and obligations will apply that need to be factored into the deal.

David Teigman: Nicola and Nick, thank you so much for this informative discussion about employment and benefits issues in asset sales in the US and the UK. As cross-border transactions continue to proliferate, these are important issues to keep in mind. Thank you also to our listeners for joining us on The Proskauer Benefits Brief today. Stay tuned for more insights on employee benefits and executive compensation, and be sure to follow us on Apple Podcasts, Google Podcasts and Spotify.

[1] *Transfer of Undertakings (Protection of Employment) Regulations 2006)*

[2] George Bernard Shaw

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