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SALE OF A BUSINESS: PITFALLS AND IMPORTANT CONSIDERATIONS IN THE EMPLOYMENT STATUTES

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INTRODUCTION

Employment issues are almost always a major consideration in the sale or purchase of a business. Both vendor and purchaser are faced with a myriad of considerations arising from both statute and at common law. Most business persons today realise that rights of employees and a union in a unionized setting are protected when the business is sold or otherwise transferred. What may not be so well known is the obligations that arise in other pieces of legislation and the hidden costs that they can create for the unwary.

Perhaps the most important question to examine is the manner of the purchase and sale. Is it a share purchase, or an asset purchase? In general, share purchases or transfers do not create significant employment-related obligations. The employer of the employees, that is, the corporation, has not changed notwithstanding the change of ownership of the underlying shares. However, where there has been an asset sale, the treatment of affected employees is regulated by a surprising number of statutory provisions.

In this paper we have set out the relevant provisions from the applicable Ontario legislation. In conjunction with the "check list" of considerations set out in other material provided as part of this workshop, it is hoped this material will assist anyone examining employment issues that arise upon the purchase and/or sale of a business. In addition we have attempted to provide a brief commentary including some situations that are not dealt with clearly in the legislation or that otherwise cause difficulty.

EMPLOYMENT STANDARDS ACT

Legislation

- Section 12(1) **Related activities, etc., may be treated as one employer**
- Where, before or after this Act comes into force, associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings are or were carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, and a

person is or was an employee of any such corporations, individuals, firms, syndicates or associations, or any combination thereof, such corporations, individuals, firms, syndicates or associations, or any combination thereof, shall be treated as one employer for the purposes of this Act, if the intent or effect of the arrangement is to defeat, either directly or indirectly, the true intent and purpose of this Act.

Section 13(1) **Definitions** – In this section,

“business” includes an activity, trade or undertaking, or a part or parts thereof;

“sells” includes leases, transfers or disposes of in any other manner and “sale” has a corresponding meaning.

Section 13(2) **Continuity of employment** – Where an employer sells a business to a purchaser who employs an employee of the employer, the employment of the employee shall not be terminated by the sale, and the period of employment of the employee with the employer shall be deemed to have been employment with the purchaser for the purposes of Parts VII, VIII, XI, XIV.

Section 13(3) **Part XIV to be complied with** – Where an employer sells a business to a purchaser who does not employ an employee of the employer, the employer shall comply with Part XIV.

Section 13.1(1) **Successor employers** – This section applies with respect to the following types of services provided at a premises directly or indirectly by or to a building owner or manager:

1. The services must be related to servicing the premises, including providing building cleaning services, food services.
2. The services do not include,
 - i. construction,
 - ii. maintenance other than maintenance activities related to cleaning the premises, or
 - iii. the production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

Section 13.1(2) **Application** – This section applies if, on or after October 31, 1995, one employer begins to provide services at a premises replacing another employer who was providing the services.

Section 13.1(3) **Continuity of employment** – If the successor employer employs an employee of the previous employer to provide the services and the employee ceases to be employed by the previous employer as a result,

- (a) the employment of the employee by the previous employer shall be deemed not to be terminated for the purpose determining [sic] the previous employer’s obligations under Part XIV; and
- (b) the employee’s period of employment by the previous employer shall be deemed to have been employment by the successor employer for the purposes of Parts VII, VIII, XI and XIV.

Section 13.1(4) **Successor employer’s obligation** – If the successor employer does not employ an employee of the previous employer, the successor employer shall comply with Part XIV [termination and severance pay] in respect of the employee.

Section 13.1(15) **Definition** – In this section,

“**successor employer**” means the employer who begins to provide services at a premises replacing another employer who was providing the services.

Section 14 **Priority of claims** – Despite any other Act and except upon a distribution made by a trustee under the *Bankruptcy and Insolvency Act* (Canada), wages shall have priority to the claims or rights and be paid in priority to the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of \$2,000 for each employee.

Section 57(1) **Notice of termination** – No employer shall terminate the employment of an employee who has been employed for three months or more unless the employer gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
- ...
- (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

Section 57(2) **Idem** – Despite subsection (1), the notice required by an employer to terminate the employment of fifty or more employees in any period of four weeks or less shall be given in the manner and for the period prescribed in the regulations, and until the expiry of such notice the termination shall not take effect.

Section 57(3) **Information to be given** – Where so prescribed, an employer who is required to give notice by subsection (2),

- (a) shall provide to the Minister, in the prescribed form, such information as may be prescribed; and
- (b) shall, on the first day of the statutory notice period, post in the employer's establishment, in the prescribed form, such information as may be prescribed.

Section 57(6) **When notice is effective** – Despite subsection (2), the notice required under subsection (2) shall be deemed not to have been given until the date the completed form required under clause (3)(a) is received by the Minister.

Section 58(2) **Severance pay** – Where,

- (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
- (b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Section 58(4) **Amount of severance pay** – The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work week multiplied by the sum of,

- (a) the number of the employee's completed years of employment; and
- (b) the number of the employee's completed months of employment divided by 12,

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week.

Section 58(6) **Exceptions** – Subsections (2), (3) and (4) do not apply to,

(a) an employee who refuses an offer by his or her employer of reasonable alternative employment with the employer;

...

Section 58(9.1) **Sale of a business** – If an employer who sells a business within the meaning of section 13 purports to pay severance pay to an employee employed by the purchaser and if the amount paid at least equals the amount of severance pay to which the employee would have been entitled had he or she not been employed by the purchaser, the amount paid shall be treated as severance pay for the purposes of subsection (9).

Section 58.20(1) **Liability of directors** – The directors of an employer are jointly and severally liable for wages as provided in this Part if,

...

(b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;

...

Section 58.20(3) **Wages** – The wages that directors are liable for under this Part are wages, not including termination pay and severance pay as they are provided for under this Act, under a contract of employment, or under a collective agreement and not including amounts that are deemed to be wages under this Act.

Commentary

The *Employment Standards Act* (“ESA”) is the most important employment legislation of general application to consider upon the purchase or sale of a business. It applies to both unionized and non-unionized workplaces, although its application in a unionized environment may be changed or augmented by the provisions of any collective agreement in place at any relevant time. Unionized settings are beyond the scope of this paper but readers should be aware of the extensive provisions of the *Ontario Labour Relations Act* when considering a purchase of the assets or shares of any business that is or was unionized.

The ESA is the basic legislation providing minimum terms and conditions of employment for all employees in Ontario, except those employed in Federal works or undertakings (these

employees are covered by similar but not identical provisions set out in Part III of the *Canada Labour Code*).

Notice of termination, or pay in lieu of notice, as well as severance pay for qualifying employees are only the most obvious provisions of the ESA that must be considered upon the purchase and sale of a business. However, the Act has many other intricacies that apply to this situation.

The main provisions, as set out above, are sections 13 and 13.1. Section 13 is the general rule that applies to most transactions and stipulates that all employees hired by the purchaser are deemed, for the specific purposes set out in the section, to have been employees of the purchaser from the time that he/she commenced employment with the vendor. If the employee(s) are not hired by the purchaser, then section 13 requires that the vendor employer comply with the obligations set out in Part XIV of the Act (termination notice or pay and severance pay provisions).

Section 13.1 sets out a different successor employer regime as it applies to certain industries, particularly in relation to services that are provided to a building premises such as building cleaning services or food services. The reason for this separate regime is the historical transience of the corporate providers of these services to the detriment of the continuity of employment of the employees that perform those services. The separate treatment for these employees has undergone significant changes since its first introduction. The main differentiating characteristic of the current section 13.1 is subsection (4) which places the obligation for termination and severance pay on the purchaser, as opposed to the vendor.

The Act is based on the fundamental principle that the employees of a business cannot be sold along with the other assets. If their employment continues with the purchaser, their employment is deemed, by the ESA, to have been entirely with the purchaser employer. However, if the purchaser employer does not wish to employ any or all of the vendor's employees, or if the employees do not accept such employment, then the obligations for termination and severance pay are triggered. Not only are the vendor's and purchaser's intentions important, but the employees' decisions regarding acceptance of employment offered can be a major contingency to be considered in determining the potential liabilities upon the sale of a business.

The provisions which potentially expand the obligations of an employer with respect to termination and severance pay are triggered upon the termination of 50 or more employees within a four week, or six month, period. An employer terminating between 50 and 200 employees within a four week period must provide not less than eight weeks' notice, between 200 and 500 employees not less than twelve weeks' notice and more than 500 employees within a four week period must be provided with not less than sixteen weeks' notice. In addition, the notice of termination does not commence until the appropriately prescribed Form is filed with the Ministry [ss. 57(3) to (9)]. Given the potential of substantially long notice requirements, parties to such a transaction are urged to file the Form at the earliest opportunity. Filing is required before effective written notice can be provided to the

employees. We recommend that a Form be filed in every case where this is even a possibility that fifty or more employees could be terminated. Recall that any employee who does not accept employment with the purchaser will be deemed terminated and will count towards the requisite fifty triggering the section. If the Form is not filed until the closing of the transaction, prior notice given will not be effective thus creating extensive potential liability.

Severance pay is only payable if 50 or more employees are terminated within a six month period or if the payroll of the employer is \$2.5 million or more per year. This section can be tricky when a sale of business is involved. Firstly, an employee not entitled to severance with a smaller vendor may become entitled to severance once employed by a larger purchaser. Similarly, an employee may lose the right to severance if the purchase goes the other way and this fact may influence whether or not an employee accepts employment with the purchaser. Secondly, the plans of the purchaser may influence whether or not severance is payable. If 50 or more employees are terminated within a six month period and the terminations are a result of the "permanent discontinuance of all or part of the business" severance is payable. Therefore, the intentions and plans of the purchaser employer are vital to the obligations for severance pay that may or may not be created upon the transfer of the business. Terminations which occur after the transfer may affect ones that happened at the time of transfer or arguably before that time.

For example, a vendor and purchaser could agree that all employees will be offered employment with the vendor. However, some employees do not accept. Less than six months later the purchaser decides to downsize its operation. The total number within the six month period now exceeds 50. The language of the ESA is broad enough so that such a circumstance could attract severance pay obligations for all such employees.

Another potential minefield is entitlement to vacation pay. In a case in which our firm was involved, several employees claimed vacation pay from the purchaser employer. In this case, the purchaser had purchased the assets of the business from a receiver and hired the employees of the original employer (that had maintained their employment under the receiver). The Referee ruled that the receiver's role in this purchase was irrelevant and was a "conduit" acting in the shoes of the original employer and therefore, a sale of the business occurred between the original employer and the purchaser such that the relevant sections of the ESA applied and the corresponding obligations created. At the time of the purchase, the claimant employees had earned accrued vacation pay, but had not been paid it by their employer. Although section 13, in general, foists the obligations for termination and severance pay on the original (vendor) employer, the Referee found that section 13(2) governed, deeming that all past employment had occurred with the purchaser employer and, therefore, liability for vacation pay was solely that of the purchaser. The Referee went further and found that the purchaser was liable not only for vacation pay as set out in the Act, namely, four percent, but for vacation pay at the rate that had been paid to the employees by the original employer, even though that was at a higher rate than that paid by the purchaser.

The recently introduced sections 57(2.1) and 58(1.1) appear to be intended to reverse this result but it must be noted that these sections only apply to purchases from an insolvent vendor or a receiver. They do not apply in the normal course if a vendor becomes insolvent after the sale and vacation pay is owing to employees. This is another example of the detailed due diligence that must be undertaken by a purchaser prior to such a transaction.

Section 13.1 reverses the normal obligation for severance pay from the vendor to the purchaser. In most cases of course there is no “sale” within the common meaning of this term. One supplier takes over from another, usually as a result of the contract being put out to tender. Severance pay under the ESA normally is payable by employers with a payroll in excess of \$2.5 million to employees with five years of service or more. What happens when there is a purchase or transfer of a business in a service industry subject to section 13.1 when the vendor employer has a payroll in excess of \$2.5 million but the successor employer does not? The law currently mandates that the purchaser employer owes severance pay to the employee, despite the fact that its payroll does not exceed \$2.5 million. What happens, then, if the roles are reversed and the purchasing employer has a payroll in excess of \$2.5 million but the vendor employer does not? It appears that this is a circumstance where the employee may “win” both ways, although there is no decision on this latter issue.

Another area of concern to purchaser employers is the maternity and parental leave provisions of the ESA. The remedies available for breach of these sections are not restricted to the normal \$10,000 maximum for ESA violations. An employer can face significant exposure for the breach of these provisions. And a breach of these provisions can occur unexpectedly. Consider the situation of an employee that is on a leave of absence pursuant to her maternity rights under the ESA. The ESA guarantees that she will be reinstated at the end of her leave to her previous position, or a comparable one if the original position no longer exists. The obligations of reinstatement apply to a “related employer” as defined under s. 12. The caselaw establishes that where a corporation reorganized its structure and becomes a new corporate entity, the previous corporation and the new one are related employers and therefore liable for employees on maternity leave not reinstated after maternity leave due to the reorganization. One would hope that this interpretation would not arise in the normal purchase and sale transaction, however, one will be wise to ensure that the details of a particular transaction could not attract a “related employer” finding. Although the ESA does not specifically oblige the successor employer to comply with the maternity and parental leave provisions, failure to offer re-instatement to an employee on maternity leave, when employment has been offered to other employees not on such leave could well be interpreted as discrimination under the *Human Rights Code*. In our view the prudent approach is to treat such employees as being entitled to return to work for the purchaser once their maternity and or parental leave ends.

LABOUR RELATIONS ACT, 1995

Legislation

Section 1(4) **Same** – Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Section 69(1) **Definitions** – In this section,

“**business**” includes a part or parts thereof;

“**sells**” includes leases, transfers and any other manner of disposition, and “**sold**” and “**sale**” have corresponding meanings.

Section 69(2) **Successor employer** – Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

Section 69(12) **Power of Board to determine whether sale** – Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

Commentary

The primary importance of the relevant provisions of the *Labour Relations Act* are that any union or collective bargaining rights attach to the “work” and not the employer and any successor employer or purchaser is required to recognize those rights.

As indicated previously the extensive jurisprudence with respect to the application of these sections is beyond the scope of this paper. Suffice it to say that any hint of unionized rights at a business to be purchased requires utmost due diligence. In one rather famous case, a unionized grocery store had been closed and shut down for many months. A completely unrelated party acquired the location and opened a new grocery store under a new name. The

Labour Relations Board found that the facts of the case amounted to a sale of business within the meaning of the Act triggering bargaining rights for the Union and recall rights for the ex-employees. If the collective agreement were still in affect, the wages and other terms and conditions of employment would also still apply.

The language of these sections is very broad. It is important to note that the Ontario Labour Relations Board has the sole jurisdiction to make findings under these sections and the courts have shown great reluctance to overturn the Board's findings on these issues, or indeed any other.

OCCUPATIONAL HEALTH AND SAFETY ACT

Legislation

Section 1(1) **Definitions** – In this Act,

...

“Employer” means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

...

Commentary

There are few reported instances where issues under this legislation have affected the purchaser of a business. There are no specific sections in the *Occupational Health and Safety Act* (“OHSA”) that directly deal with successor employers. However, our experience indicates that inspectors are not usually concerned with change of ownership. An order of compliance will clearly not be affected by a sale of business. The purchaser will be looked to for redress for any violation of the OHSA.

At the very least, a purchaser will want to ensure that the OHSA has been complied with by the vendor employer and that the appropriate health and safety committees have been established and operated, and that the vendor is in compliance with all aspects of the Act and regulations. In one case in which our firm is currently involved, a longstanding practice which had operated with the full knowledge of the Occupational Health and Safety Branch was challenged by an inspector following an inspection which at least in part was triggered by the change in ownership of the plant. Notwithstanding the history in which the Ministry had been involved in establishing the practice in question, an order was issued to radically alter the practice at considerable expense to the purchaser.

There are many issues that are not answered by the existing jurisprudence. Many of them overlap with environmental issues and issues under the *Workplace Safety and Insurance Act*. For example, what if the vendor employer created an environmental hazard on the premises, but the effect on a worker's health did not occur until after the purchase? While it seems unlikely the purchaser could be liable for the acts of an unrelated vendor, it is not at all unusual to have individual employees charged under the Act. Thus a current employee of the purchaser could well be charged with violations occurring prior to the sale. In addition, OHS orders to clean up the workplace environment would have obvious cost implications to the purchaser.

For all of these reasons I would recommend a thorough inspection by a competent independent Health and Safety expert of any premises covered by the Act well prior to the closing of a purchase and sale transaction.

PAY EQUITY ACT

Legislation

Section 5.1(1) **Achievement of pay equity** – For the purposes of this Act, pay equity is achieved in an establishment when every female job class in the establishment has been compared to a job class or job classes under the job-to-job method of comparison or the proportional value method of comparison and any adjustment to the job rate of each female job class that is indicated by the comparison has been made.

Section 13.1(1) **Sale of a business** – If an employer who is bound by a pay equity plan sells a business, the purchaser shall make any compensation adjustments that were to be made under the plan in respect of those positions in the business that are maintained by the purchaser and shall do so on the date on which the adjustments were to be made under the plan.

Section 13.1(5) **Definitions** – In this section,

“**business**” includes a part or parts thereof;

“**sells**” includes leases, transfers and any other manner of disposition.

Commentary

Similar to the OHS Act, a purchaser will want to ensure that if a pay equity plan had been established, that it has been followed and complied with fully. The purchaser, as indicated in the relevant section above, will be required to comply with any plan requirements that were

to occur after the date of sale. Complications can arise if there was no plan. In such an instance the purchaser will be required to be in compliance with the Act on closing. The fact that there has been no complaint prior to the sale will not protect the purchaser if pay equity has not been achieved within the meaning of s. 5.1 and s. 8(2). It is thus crucial to establish that there has been a pay equity plan at the establishment and that pay equity has been achieved within the meaning of the sections mentioned.

However, there are further considerations. For example, consider the situation where the purchaser employer decides to amalgamate an aspect of the vendor's business and employees into an existing business. How will this amalgamation effect the relevant pay equity provisions? For example, will the organization's composition of job-type and gender change the "mix" sufficiently such that pay equity requirements are altered? If this were to occur and go unnoticed for any period of time, the purchaser could face substantial liabilities to redress the losses suffered by non-compliance with the Act.

WORKPLACE SAFETY AND INSURANCE ACT, 1997

Legislation

Section 146(1) **Obligations of successor employers** – This section applies when an employer sells, leases, transfers or otherwise disposes of all or part of the employer's business either directly or indirectly to another person other than a trustee in bankruptcy under the *Bankruptcy and Insolvency Act* (Canada), a receiver, a liquidator under the *Winding-Up Act* (Canada) or a person who acquires any or all of the employer's business pursuant to an arrangement under the *Companies' Creditors Arrangement Act* (Canada).

Section 146(2) **Liability of person** – The person is liable to pay all amounts owing under this Act by the employer immediately before the disposition.

Section 146(3) **Enforcement** – The Board may enforce the obligation against the person as if the person had been the employer at all relevant times.

Commentary

The Workplace Safety and Insurance Act ("WSIA") has undergone significant changes in recent years. One of those significant changes concerns the rights and obligations of a

purchaser employer. Now, a purchaser employer is liable to pay all amounts owing under the WSIA. In order to protect itself, the purchaser can obtain from the Workplace Safety and Insurance Board a purchaser's certificate, upon which the purchaser can rely to verify that there are no amounts owing by the vendor under the WSIA.

Section 148 gives the Board the power to "...develop policies governing the circumstances in which powers under ...s. 146 are to be exercised...". Although a purchaser can verify that there are no outstanding debts for which it will face liability, there does appear to be a gap in the current WSIA operational policies. Until recently, there was an operational policy that stated that: "When one employer purchases the assets of another employer, a new employer is created free of liability for the pre-existing assessment obligation of the former employer." This operational policy has been deleted. The new operational policy dealing with successor employer issues is now different and, likely, subject to a different interpretation. The above-noted section 146 deals with the potential obligations for assessments via a purchaser's certificate, however the gap that is created is in respect of the other rights and obligations under the WSIA. The former operational policy had been interpreted to suggest that a purchaser was a "new employer" entitled to a new number and record free of any other obligations. Since the deletion of that policy, the best view would be that the characterization of the purchaser employer could include an assumption of the previous employer's work record.

Also called into question is whether an employee's seniority re-commences upon purchase (as interpreted under the deleted operational policy) or is calculated from original commencement with the vendor employer. This is vital because an injured worker is entitled to continuation of employee benefits for one year while on WSIA leave and becomes entitled to reinstatement after he/she has one year's seniority. This interpretation creates questions vis a vis workers who are off on WSIA leave at the time of the purchase. Is the purchaser required to continue their benefits? Is the purchaser obligated to offer re-employment pursuant to Part V? In our view the safest approach is to assume the answer is yes to both of these questions. An independent reason for this view arises from s. 10(1) of the *Human Rights Code* and the definition of "handicap" which suggests that failure to offer "re-employment" or benefits to these individuals could be considered discrimination in appropriate cases.

However, this area of the law has not been explored by the WSIB since the deletion of the former policy. The former policy had been interpreted to suggest that because the WSIA did not have deeming "successor employer" provisions like, for example, the *Ontario Labour Relations Act*, the purchaser employer became a "new" employer of any employees it hires from the vendor employer as of the date of the purchase. It will be interesting to see how the WSIB will interpret the new policy and section in reference to re-employment obligations of a successor employer.

LONG-TERM CARE ACT, 1994

Legislation

Section 16(1) “successor employer” means a multi-service agency to which provision of a community service or a part of a community service has been transferred from a previous employer.

Section 17(1) The transfer of the provision of a community service or a part of a community service from a previous employer to a successor employer is deemed to be a sale of the business for the purposes of section 13 of the *Employment Standards Act*, section 64 of the *Labour Relations Act* and section 13.1 of the *Pay Equity Act*.

Section 18(1) If the provision of a community service or a part of a community service is transferred to a successor employer from a previous employer, the successor employer shall make reasonable offers of available positions to those persons who are in a continuing or a recurring and cyclical employment relationship and who are engaged in providing the transferred community service with the previous employer immediately before the successor employer begins providing the transferred community service or the transferred part of the community service.

Section 18(9) For the purposes of Parts VII, VIII, XI and XIV of the *Employment Standards Act*, a person employed by the previous employer who accepts a position offered by the successor employer is deemed to have been employed by the successor employer for the period during which he or she was employed by the previous employer.

Section 18(10) A person who declines a position as described in subsection (7) and (8) offered by the successor employer and who ceases to be employed by the previous employer is deemed, for the purposes of the *Employment Standards Act*, to have resigned his or her position with the previous employer.

Commentary

The above provisions have not been dealt with in any reported cases we have located. They are similar in some respects to the provisions of s. 13.1 of the ESA. It is notable that a person offered employment by the successor employer who refuses such employment is deemed to have resigned thus losing any right to notice or severance pay. It would appear this is the case regardless of any changed terms and conditions of employment associated with such offer, including greatly reduced wages.

These are substantial effects and should be seriously examined prior to the closing of a purchase and/or sale of a business effected by this legislation.

PENSION BENEFITS ACT

Legislation

Section 80(1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

(a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;

(b) is entitled to credit in the pension plan of the successor employer for the period of membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

(c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

Section 80(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

Section 80(11) In this section, "successor employer" means the person who acquires the business or the assets of the employer.

Commentary

There are important considerations arising out of the *Pension Benefits Act* ("PBA").

One of the more serious issues has recently been litigated and concerns the wind-up of a pension plan after the sale of a business. In this case, an employer with a pension plan for its employees sold its assets to a purchaser, who in turn hired most of the employer's employees and initiated a new pension plan. The purchaser then ceased business approximately two years after the purchase. The ceasing of business by the purchaser was interpreted by the Pension

Commission as the ceasing of business of the original employer, and thereby triggered the potential partial wind-up of the original employer's pension plan. Despite the fact that the original employer had personally ceased conducting business for more than two years, the subsequent cease by the purchaser created liabilities and obligations for the original employer unexpectedly, and beyond its control.

Another issue that should be seriously considered by trustees in bankruptcy is that the Ontario Court of Appeal has recently stated that a trustee in bankruptcy is an "employer" for the purposes of the PBA and is liable for the unfunded liabilities of the pension fund for the period of time that it is the employer.

CONCLUSION

This paper is not intended to be a definitive check list for all issues that can arise in a sale of business under Ontario's employment statutes. What we have tried to do is alert the reader to some of the more important issues that arise and to provide appropriate warnings of the more obvious potholes to avoid. Employment law in Ontario has been in a state of almost constant alteration for the last ten years. It is extremely difficult to stay on top of the myriad of changes that have occurred and how they interrelate with each other. We apologize in advance for changes or case law not included in this paper. Some of the existing case law is based on provisions which have changed since the decisions in question were rendered. It is not always obvious whether a principle from an older case will survive the changes.

In addition, the decision-makers in a number of instances have changed dramatically. Employment standards cases are now dealt with by the courts, by the OLRB and by arbitrators under collective agreements. Some of the earlier decisions and principles established by referees appointed under the old provisions may be overturned by the new decision-makers. The jurisdiction of the OLRB with respect to Occupational Health and Safety cases has expanded dramatically as appeals from orders of inspectors as well as other matters are now heard by the Board. The old Workers Compensation Appeals Tribunal has been replaced by a new tribunal with far less discretion to deviate from the policies of the WSIB.

Employment lawyers have always had to deal with lack of clarity on many issues including those involving the sale of a business. While this can create a certain amount of uncertainty, it also provides opportunity for fresh approaches, both for lawyers and decision-makers.

It is clear that employment issues need to be carefully considered prior to entering into an agreement of purchase and sale of a business. Because of the rapid changes in both substantive law and in those who interpret it have made it more difficult to give definitive opinions on many issues. A prudent approach is recommended. We hope that this paper will highlight some of the issues that could arise, but encourage parties to seek professional advice with respect to these issues *before* one is bound to an agreement.