Before an exit, founders must get their employment law ducks in a row

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Successfully selling a business has much to do with timing. For many entrepreneurs, it's the high-stakes end game where they cash out and reap the rewards of their efforts. At a certain point, when both buyers and sellers are working hard to close the deal, negotiations can move very quickly. If you're the seller, this is not the time to discover unanticipated problems in your business.

Distressingly often, these problems are related to employment. Inattention to employment issues can have a significant impact on deals — from preventing closings and reducing the deal value to altering the deal terms or significantly limiting the pool of potential buyers.

Fortunately, such issues typically can be resolved well in advance with a little forethought and legal guidance. It's important to get your employment ducks in a row long before you start planning your exit.

What follows is an overview of the three main categories of employment issues that can derail or delay a sale. For the most part, these assume an asset sale, but may vary in the case of a stock sale.

Compliance

By far the most significant problem is general employment law compliance. This means creating strong employment policies and practices that are documented, in place and operating long before you pursue a deal. The key area is wage and hour issues — timekeeping and payroll practices, worker classification issues (employee vs. independent contractor; exempt vs. non-exempt), meal and rest periods, PTO policies and payouts at termination.

It's also essential to have the correct policies in place with respect to discrimination, harassment, retaliation, and particularly, disability. You do not want a prospective buyer to discover at the 11th hour that you may have violated the Americans with Disabilities Act for years. This list is extensive. You should review and update your employee discipline and termination practices, and if you have employees in different states, ensure you're in compliance in all of them. Poor compliance, lack of policies or flawed practices mean potential liability exposure or expensive policy revisions and employee retraining — all of which can devalue your business.

Claims

Another potential exit IED is liability for employment-related claims, both actual and potential. This is related to compliance, as strong policies and practices help prevent claims. First, you should consider prioritizing resolution of current claims before seeking a buyer. Past claims and their resolutions are also a potential issue — lawsuits, government agency claims, attorney

claims, and internal complaints and grievances that have the potential to ripen into claims.

A buyer's concern with these can depend on how employees would transition following the sale — for instance if employees are terminated by the seller before the deal closes and rehired by the buyer, terminated by the buyer after closing, or transferred without any change in employment status from the seller to buyer. No matter what the transaction specifies, successor liability can exist as a matter of law.

Contracts

The final main area of potential problems to a sale is the agreements you may or may not have in place. Any buyer will want to inventory and scrutinize all the employment-related commitments you're bound to, beginning with restrictive covenant agreements such as noncompetes, nonsolicitations, confidentiality, nondisclosure, trade secret protection, assignment of inventions, and so on. Noncompete and nonsolicitation agreements are profoundly affected by the law of your specific jurisdiction and need to be carefully reviewed.

Other agreements important when selling include executive or other employment agreements. Consider if you have severance terms in place, particularly related to "change in control," compensation and benefits, and if they will survive a sale. See if you have additional obligations to employees, other than claims, that could transfer to the buyer by operation of law, or oral, implied or written contract. Do you have arbitration agreements or policy acknowledgments?

The lesson here is simple, but not always easy. When it comes to selling a business, weaknesses are costly and time is not your friend. By working with an employment attorney early, resolving issues and preparing for a sale long before you seek it, you and your business can reap significant benefits in the realized price, smoothness of the process and speed.

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