Post-Acquisition Integration: Employee Harmonization – A Regional Comparison

Joy Frey
Senior Corporate Counsel – M&A Legal Integration at Salesforce
Midwestern M&A and Private Equity Forum - May 5, 2022

Employee Harmonization

- **Employees represent a key element in the post-acquisition integration strategy, and no acquisition can be considered a success where there is dissatisfaction and rapid attrition among the acquired employee population.**

- **M&A is becoming more and more global every day just and it is becoming common for acquired Target companies to be multinational organizations with operations in several countries. This makes the legal strategy of deals more complex as the relevant fundamental aspects of employment law can differ—sometimes significantly—across countries or regions, thus making a comprehensive employee harmonization plan difficult to coordinate.**

The following slides contain a summary of certain of the primary aspects of employment law in an M&A context across 4 geographic regions to help understand the differences and to underscore the importance of having a knowledgeable global team focused on these issues from the earliest stages of the deal in order to navigate the different paths necessary to achieve a successful employee harmonization in a multinational deal.

United States

Employee Harmonization in the United States

Employee Transfer

In the case of a forward merger of a target company with and into the acquiring company, target company employees would automatically transfer to the acquiring company. In the case of a reverse triangular merger, a direct acquisition or an asset purchase, as US employees are generally "at will" employees, a "fire and rehire" method is normally used in which the Seller pays out the employees final wages and any unpaid entitlements and the Buyer rehires the employees under new terms and conditions.

Notice/Consultation

Again, as most US employees are "at will" employees, there are usually no legally required notice and/or consultation requirements in connection with an employer change, downsizing, or change to the terms of conditions of employment (except in WARN situations or where contractually required such as collective bargaining for unionized employees).

The Worker Adjustment Retraining and Notification Act ("WARN") requires that companies with at least 100 employees provide advance notice to employees if they intend to terminate at least 50 employees of the company.

Terms and Conditions of Employment

New employers may impose new terms and conditions on acquired employees provided they do not violate any federal or state laws.

Data Privacy

Although federal and state privacy laws are becoming more common, there is currently no federal law against the transfer of employee personal data.

Europe

Employee Harmonization in the European Union

Employee Transfer

Post-acquisition mergers or business/asset transfers in many EU countries will likely trigger the "Acquired Rights Directive" (ARD), also known as "Transfer of Undertakings, Protection of Employment" (TUPE) whereby employees to be transferred will transfer automatically by operation of law.

ARD/TUPE can create complications with certain categories of employees such as contractors.

Data Privacy

In 2018, the EU General Data Protection Regulation ("GDPR") came into effect which imposes a higher standard of data protection compliance on companies with significant potential fines imposed in the event of a GDPR violation. The personal data of employees in EU countries is to be strictly guarded, with employee consent often required for the processing of such data. In the integration process, the acquiring company is likely to be the recipient of a large amount of employee data falling within the scope of data protection rules and a thorough and well-considered plan for the personal data processing in advance of the employee harmonization during integration.

Notice/Consultation

In many European countries it is common for medium and large sized companies to have a works council representing the employees of the company. In the event of an ARD/TUPE, such works councils must be either notified or consulted a reasonable amount of time prior to the transfer or the intended transfer depending on the laws of the relevant jurisdiction/s. In some cases, where a representative body does not already exist, one would need to be formed to serve in a consultative role prior to the intended transfer. Works councils and other representative bodies can have significant impact on the planned harmonization timeline of a given M&A integration.

Many European countries have strong pro-worker labor statutes and strict consultation requirements and selection criteria in connection with any downsizing or redundancy action taken by a new employer in the context or a merger/asset transfer which can also result in significant delays to the integration plans for a newly acquired company.

Terms and Conditions of Employment

In almost all EU jurisdictions, all employees transferred under the ARD/TUPE must receive equal or better terms and conditions of employment from their new employer.

Asia Pacific

Employee Harmonization in Asia Pacific

Employee Transfer

In the APAC region, with a few limited exceptions, automatic employee transfers do not exist, and the "fire and rehire" method is generally used in the case of post-M&A integration.

In some jurisdictions, certain termination payments to transferring employees can be avoided if the terms of employment offered by the new owner meet certain criteria.

Terms and Conditions of Employment

In most APAC jurisdictions, there is no legislation which protects employees' terms and conditions automatically (as in the EU). However, best practice is for the new employer to harmonize employment terms and conditions as soon as possible in the integration process. Harmonization will require each employees' consent and without such consent, certain changes to the employment terms such as salary to the detriment of the employee can constitute a breach of the employee's previous employment contract and/or be considered as constructive dismissal of the employee depending on the specific laws in the relevant APAC country.

Notice/Consultation

In almost every country in Asia, notice or payment in lieu of notice is required for the termination of the employment of transferring employees, and consequently, consent of the relevant employees is required in order to employ the "fire and rehire" approach.

Exceptions: In Indonesia, the regulations surrounding employee termination are so strict that in practice, termination by notice or payment is not allowed in most cases. Also, in Japan and China, notice or payment are acceptable provided that certain standards regarding the justifiability of the termination are met.

Many APAC countries, including Australia, Vietnam and China, have statutory consultation requirements that must be followed, whereas others do not. But best practice is to include consultation in the employee transfer plan given that the employees' consent to transfer is required. In some APAC jurisdictions, such as Indonesia and Australia, unions and/or employee representatives are required to be notified or consulted prior to the employment of the "fire and rehire" approach.

Data Privacy

Unlike the EU, there is no standard data protection program that has been put in place across APAC, and each jurisdiction has its own laws and regulations governing data privacy and protection which range from vary strict and almost GDPR-like (South Korea and Japan) to virtually non-existent (Vietnam, Thailand). China currently has no comprehensive scheme that it employs, however, it has been implementing more industry specific programs such as for banking, telecommunications, etc.

Latin America

Employee Harmonization in Latin America

Employee Transfer

In most Latin American countries (e.g. Chile, Argentina, Brazil, Colombia and Venezuela), **employees transfer automatically** in a merger. Employees generally receive a merger notification letter or employer substitution notice to confirm their transfer to the surviving entity.

In an asset sale, the method of employee transfer depends on the jurisdiction where the company/employee is located. Generally speaking, in most Latin American jurisdictions, in an asset sale, employees transfer either through employer substitution (where terms and conditions of employment remain the same) or fire and rehire.

Notice/Consultation

Most Latin American countries do not have statutory notice or consultation obligations for mergers or asset transfers (unless downsizing or reducing existing benefits or conditions apply). However, in certain jurisdictions (e.g. Brazil), industry-wide or regional labor unions do exist, and the post-acquisition integration may trigger notification or consultation obligations with the unions. It is important therefore to confirm the applicable collective agreements and their impact on the post-acquisition integration.

Data Privacy

Each Latin American country has its own specific data privacy and protection laws and regulations with some jurisdictions having significantly more protective or developed legislation than others. As a general matter, employee data privacy issues must be reviewed and adequately addressed when considering post-acquisition integration issues in Latin America. In most countries, though subject to jurisdiction specific components, prior authorization of the relevant employee is required to access and use of that individual's personal information.

Terms and Conditions of Employment

Harmonization of employment Ts&Cs can be a complicated aspect of M&A integrations in many Latin American countries, due to two conflicting concepts: (i) the requirement to transfer employees on the same terms and conditions of employment, (in the case of automatic transfer or employer substitution); and (ii) the equal pay principle, requiring equal pay for work of equal value. In certain countries, such as Argentina and Brazil, it is not possible to change Ts&Cs to the detriment of the employee, even with the employee's consent.

Certain Latin American countries also have equal pay for equal work principles which applies to both legacy and acquired employees. Thus, if one group of employees has beneficial terms, upon integration, the other group must be provided with those terms. This can have the unexpected result of the acquiring company having to provide more beneficial Ts&Cs to its existing employees to match acquired employees if they had more beneficial terms.

Thank you

Click to add text