

HR issues in the Purchase and Sale of a Business

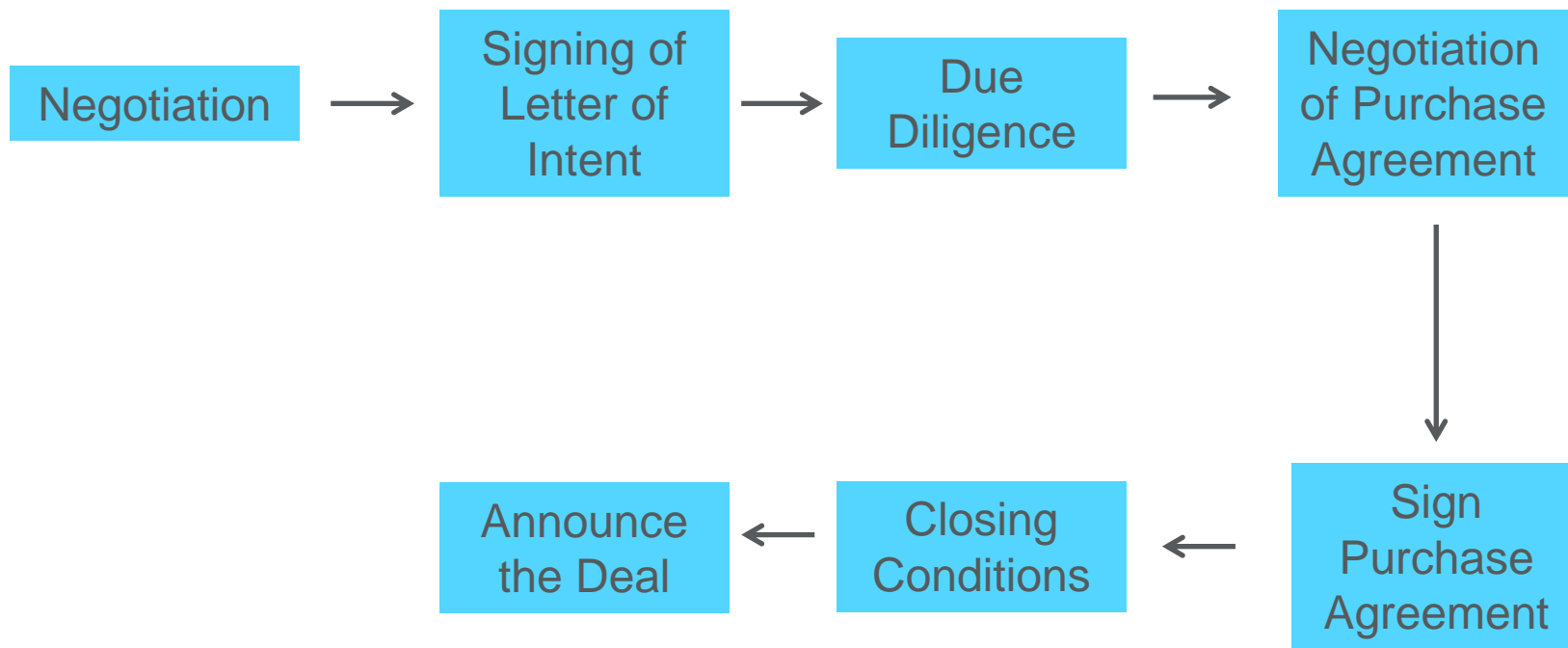
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Agenda

- The Making of a Deal
- Importance of Deal Structure
- 5 Key HR Issues
 - How does the Buyer know what its buying?
 - Should the Seller fire all the employees so that the Buyer can then rehire them?
 - How does the Buyer ensure confidentiality and ownership of intellectual property?
 - Can the Seller disclose employees' personal information to the Buyer?
 - How can the Buyer protect itself from competition by employees?

The Making of a Deal



Importance of Deal Structure

- Share Purchase
 - Legal identity of corporate employer does not change
 - Employees remain employed by the same employer and existing terms and conditions of employment do not change unless a positive steps is taken to have new agreements signed
- Asset Purchase
 - Legal identity of corporate employer changes
 - Contracts of employment are (generally) not assignable
 - Employees are dismissed by Seller unless they enter into new agreements with the Buyer – the Seller will be responsible for reasonable notice

Issue – How does the Buyer know what it is buying?

- Buyer Beware - Due Diligence Process
- Reps & Warranties – Particularly important if you are the Buyer in a share transaction
- Things to ask about:
 - Union? Certification Applications?
 - Employee List (age, years of service, position, compensation details, leave of absence, etc.)
 - Pension
 - Form of employment agreement / employee manual
 - Outstanding litigation
 - Compliance with HR laws (occupational health and safety; employment standards; pay equity; AODA; workers' compensation; human rights; labour relations)

Issue – Should the Seller fire all the employees and then the Buyer can rehire them?

- Continuity of employment
- New offers of employment
 - Not needed in a share transaction unless the Buyer wants to get the employees on new terms and conditions - if new agreements are required, Buyer must offer some sort of fresh consideration (e.g. signing bonus; better benefits)
 - In an asset deal, employee is free to turn down the Buyer's offer, in which case the Seller could be responsible for termination costs
- Duty to mitigate

Issue – How does the Buyer ensure confidentiality and ownership of intellectual property?

- Ensure all employees and contractors have signed proper confidentiality and intellectual property agreements and that they have done so before their start dates
- If there are no agreements, consider introducing these agreements in exchange for some form of consideration
- Confirm that the company is listed as the inventor of IP

Issue – Can the Seller disclose employees' personal information to Buyer?

- It is unclear whether the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) will apply to employee information collected, used or disclosed by provincially regulated employers in the context of a commercial transaction
- PIPEDA requires employees' knowledge and consent before their information can be used or disclosed
- Strategies
 - Non-disclosure agreement
 - Employee consent
 - De-identified employee information

Issue – How can the Buyer protect itself from competition by employees?

- Restrictive covenants – Non-Competition vs. Non-Solicitation
- Supreme Court of Canada has stated that restrictive covenants negotiated in commercial context are more likely to be enforced than restrictive covenants negotiated in employment context

Questions and Thank You

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