
THE LABOR ASPECTS OF MERGER AND ACQUISITIONS TRANSACTIONS

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When talking about merger and acquisition transactions, the evaluation of the labor aspects by the parties is extremely important, especially for the successor of commercial activities.

That is because in the labor law area the so called labor succession¹ is a common consequence of corporate transactions.

The labor succession will occur whenever the successor company does not suffer changes in its purposes, preserving the employees in their positions and also providing the same services².

Its effects will include: a) the employee; b) the succeeded company; c) the successor company.

According to the doctrine and decisions of the courts, the employee enjoys full guarantee because the employment contract is celebrated between the employee and the organization and not

with the individuals who manage it³. That means the employee is bounded to the organization and not to the partners that are included in the bylaws or in the articles of association⁴.

The succeeded company will not have any joint or subsidiary responsibility due to the assumption by the successor of the role of the new employer⁵.

The successor company will suffer the major effects of the labor succession due to the fact that the company will remain responsible for current employment contracts and also for the terminated

³ NASCIMENTO, Amauri Mascaro. *Curso de Direito do Trabalho*. São Paulo: Saraiva, 2001. p. 680.

⁴ MARTINS, Sérgio Pinto. *Direito do Trabalho*. 16ª Ed. São Paulo: Atlas, 2006. p. 62.

⁵ Jurisprudential exception: OJ No. 225 (SDI 1, TST). CONCESSION AGREEMENT FOR PUBLIC SERVICE. LABOR RESPONSIBILITY. (New wording, DJ 20/4/2005). Signed the concession contract of public service in which a company (first dealership) grants to another (second licensee), in whole or in part by lease, contract or otherwise, in the transitional period property of their assets: I – in case of termination of the employment contract after the entry into force of the grant, the second licensee, in the successor condition, is responsible for rights of the employment contract, without prejudice to the responsibility of the first dealership for the labor debts contracted by the grant; II - In relation to the employment contract terminated before the term of the concession only predecessor will have the responsibility for employees' rights.

¹ The Consolidation of Labor Laws (CLT) conceptualizes labor succession in its articles 10 and 448, described below:

Article 10. Any change in the legal structure of the firm will not affect the rights acquired by employees.

Article 448. The change in ownership or legal structure of the company will not affect the employment contracts of their employees.

² GOMES, Orlando; GOTTSCHALK, Edson. *Curso de Direito do Trabalho*. 18ª Ed. Rio de Janeiro: Forense, 2007. p. 315.

contracts, before and after the succession covering all the labor rights⁶.

When it comes to responsibility it is common that questions and concerns regarding the validity and the effectiveness of the clause that establishes a guarantee between the parties involved arises.

The Labor doctrine is unanimous to state that contractual clauses arranged to limit the responsibility of the parties in the assumption that labor liabilities have no relevance to the Labor Law, because in light of the concept of the employer figure and of the principle that the employment relationship should be continuous, in addition to the Consolidated Labor Laws (CLT), there are rules that cannot be breached when a company is sold.

Outside the scope of Labor Law, once the sale of commercial establishment is completed, it was believed that, in principle, liability was not part of it. If only the establishment was negotiated, the debts were not transferred unless the parties agreed to the contrary that is with the consent of creditors, or the law. It was therefore necessary to insert a clause in the contract applying the responsibility for succession to the purchaser. Currently, according the Civil Code⁷, the purchaser of the establishment will succeed the alienator in the obligations duly accounted for.

⁶ JORGE NETO, Francisco Ferreira. *Sucessão Trabalhista*. Privatizações e Reestruturação do Mercado Financeiro. São Paulo: LTr, 2001. p. 121.

⁷ Article 1146. The purchaser of property responds for the payment of debts prior to the transference, if regularly recorded, continuing the original debtor jointly obligated for one year, starting for credits earned, as from publication, and as to others as from, the date of maturity.

Therefore, as a result of a civil contract, such clauses limiting the responsibility may eventually commit the purchaser and seller. However, its effectiveness will be restricted to that area and will not have, as mentioned above, any implication on the labor sphere as the labor succession is a matter of public order.

A delicate issue to be considered is the responsibility of members and former partners for labor and social security debts.

According to the Brazilian labor courts the disregard of legal entities to achieve assets of its partners and former partners is perfectly possible, in order to ensure the payment of the amount owed to employees⁸.

⁸ RESPONSIBILITY FOR LABOR AND SOCIAL SECURITY DEBTS - CIVIL CODE. Principle of disregard of the corporate entity. Continued execution against former partners of the company. Labor legislation protects the rights of the employee receiving the payments under the employment contract, due to the application of the principle of Legal Disregard. Therefore, if execution against the company or its current members remains fruitless, continuation of the execution against former partners is legitimate. TRT 2.^a Região. 2.^a T. Proc.: 20080715448. Ac.: 20080969911. Rel.: ROSA MARIA ZUCCARO. DOESP: 11/11/2008. LIABILITY OF PARTNERS AND FORMER PARTNERS FOR LABOR AND SOCIAL SECURITY DEBTS. CIVIL CODE RULES. LIABILITY OF FORMER PARTNERS. The withdraw, exclusion or death of a partner, does not exempt him, or his heirs, of the liability for previous social obligation, up to two years after the resolution of the legal entity is duly formalized, as well as, on the first two cases, for future debts and for term, until the annotation is not requested. TRT 2.^a Região. 3.^a T. Proc. 20080451149. Ac.: 20080969024. Rel.: ANA MARIA CONTRUCCI BRITO SILVA. DOESP:11/11/2008.

As a result of the content mentioned above on merger and acquisition transactions, it is critical to evaluate conducting a thorough *due diligence*, the labor liabilities of the company being acquired, usually under the assumption of great loss by the acquiring company.

The labor sector of Almeida Advogados has a team holding extensive experience and knowledge in labor issues related to mergers and acquisitions and is at your entire disposal to provide any clarifications about this matter.