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HR & BENEFITS UPDATE

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Change, Change, Change!

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HUMAN RESOURCES

Our industry, like many others, recognizes the strategic opportunity of offering a wide range of products and services to customers in broad geographic locations, all while achieving economies of scale. Leveraging mergers and acquisitions (M&A) activity is a key tool to achieve that kind of growth in an accelerated manner. However, we often hear that M&A deals tend to underperform on their anticipated strategic and financial objectives because of "HR-related issues," such as talent drain, incompatible cultures, unclear communication and poor execution of integration goals.

Why are the soft issues so detrimental to the performance of a transaction? And what can HR do to anticipate and mitigate the people-related issues before and after the closing of an M&A transaction?

Traditionally, when an organization is assessing an M&A transaction, the focus is on financial and risk due diligence as well as the potential for value creation. Often, people-related issues aren't prioritized during the initial stages of assessment, and HR doesn't get involved until very late in the process, which results in a delayed understanding of the "soft issues" that can be troublesome throughout the integration phase.

HR's Role in M&A

One of the key roles HR plays is to assist management and employees to cope with change. Successful transactions get HR involved early in process and include, as part of core due diligence, an in-depth assessment of the financial impact of HR programs (benefits, compensation, etc.) for both employer and employee, as well as a cultural assessment of the target. An early understanding of the people-related aspects of the transaction will provide the information needed to anticipate pain points, develop communication and retention strategies, and think through integration planning. The diligence process provides a unique opportunity to consider the implications of a combined organization and to prepare for it.

Unfortunately, organizations often tend to underestimate the impact of change on the workforce — at every level of the organization. When an M&A transaction is announced, it tends to generate emotional responses in employees that can range from excitement all the way to fear and resistance. Employees from both organizations, nervous about change, may begin to consider their options and question the value proposition of their new situation. If management isn't prepared to address future strategy and direction, the likelihood of losing key talent and experiencing lower productivity and engagement is very high. That's why identifying and developing retention programs for key talent should be at the forefront of the diligence process.

Communication

Having a cogent and well-communicated employee strategy is the most effective tool to shape company culture and to successfully integrate employees into the new organization. Because culture is an organic process, understanding the unique dynamics and management style of the target will give management the insights needed to develop effective communication strategies that will reach employees in a manner that conveys thoughtfulness and minimizes the sense of uncertainty. Consistency, transparency and relevancy are the building blocks of a well-planned communication strategy that will foster trust and help manage the stress and other emotions that will inevitably be present during the announcement and integration phases of a transaction.

Compatibility

Another important consideration to keep in mind when dealing with cultural alignment is that there will always be unanticipated compatibility issues that will require a little patience, a sense of humor and business savvy to resolve. No matter how similar organizations may seem, there will always be a point of misalignment or contention. Undeniably, employees will be concerned about their employment, day-to-day activities, and the impact to their benefits and

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compensation programs. Transparency, to the extent that it's compliant and appropriate, goes a long way in minimizing conflict during the integration process — even when the answer is "we don't have a decision yet."

If the HR team is involved early in the prospecting and diligence process, they should be well-positioned to:

- Recognize and anticipate potential problems
- Counsel management on practical and sensitive solutions to change management and cultural alignment issues

Effective Integration

When resourcing an integration team, it's vital that the competencies and capabilities go beyond the technical aspects of the function. It should also involve talent that understands the business and has expertise in change management.

Managing the soft issues post-closing is easier when the diligence findings are shared, as appropriate, with the integration team and all messaging by all parties is consistent. Strong change management skills should enable the integration team to navigate the complexities of the cultural, operational and business alignment needed to successfully integrate and operate a newly acquired or merged organization.

Finding Balance

Another major challenge for acquiring organizations is balancing a positive message with the reality of achieving synergies and economies of scale. The way decisions are made and communicated sends a message to the overall organization about the values of management and the professionalism of the leadership team — which is part of why HR's role as an advisor is a strategic one that goes beyond compliance and execution. Influencing and coaching management to ensure that the right messages are delivered the right way – especially when communicating tough decisions – is a key deliverable for HR. Done right, it can bring credibility to the leadership team.

In the context of an M&A transaction, a lot of focus is placed on understanding and planning for a smooth transition of the target's workforce. Quite often, little attention is paid to the effect that a transition has on the existing workforce. Change is change for all employees, regardless of their place in the organization. The same level of careful planning, communication and transparency should be applied when dealing with existing staff to minimize the impact of the transaction on performance and productivity.

The Bottom Line

As a high-risk, high-reward growth strategy, the success of an M&A transaction most often lies on leadership's ability to set a vision that brings people together. Finessing the people-related aspects of a transaction – as hard as that can be – will ultimately determine the long-term success of the combined business. HR is uniquely positioned to advise and develop the strategic and tactical programs and processes needed to maintain stability during change, and to leverage the intellectual capital so that the combined business can rapidly realize its full potential.

Human Resources

We post jobs and include the minimum requirements for applying for vacant positions. Based on the job description and when applicable, we also ask for proof of training or coursework. This information is derived from the job description. In the past, the screeners were more liberal and screened in unqualified applicants who either did not meet the minimum requirements and/or did not attach the appropriate documentation. Moving forward, the employer has aligned and posted the jobs accordingly. Is the employer obligated to screen in previous applicants who were screened in from the past?

From an employment law standpoint and barring industry-specific qualification obligations, or implication under affirmative action and/or government contract compliance issues, we are not aware of any federal or state law that governs this particular issue. Most employers enjoy the discretion to determine qualifications and eligibility criteria for positions in their organizations. Employers are also typically free to establish lawful recruitment and hiring techniques and protocols designed to ensure that they are able to hire individuals who meet them (and ideally, are the most qualified for the position).

You indicate that the employer posts minimum requirements for applying for vacant positions and while proof of training or coursework or other qualification is ordinarily required, it appears that prior "screeners were more liberal and screened in unqualified applicants who either did not meet the minimum requirements and/or did not attach the appropriate documentation." The employer now seeks to correct this moving forward, such that individuals seeking employment in the future are subject to the more stringent requirement to show proof of their qualifications. The employer is certainly within its rights to make this adjustment.

Whether the employer must revisit prior applicants who were subject to the more lenient screening procedures is, again absent industry-specific or other regulatory requirements, generally up to the employer to do determine. If it does so, it may be that some individuals who were subject to the more lax screeners and became employees may lose their jobs on account of their lack of qualification — is the employer prepared for this consequence? If these individuals have not become employees yet, we are not aware of any obligation on the part of the employer to retain them in the hiring process if they do not meet minimum qualifications. On the other hand, if individuals who passed through the hiring process on account of the "more liberal" screeners are "grandfathered" in and allowed to continue with the recruitment process or remain employed (if they were already hired), there may be resentment among those who are or were held to the higher standards, and other issues associated with the fact that one or more people who did not meet minimum job qualifications became (and remained) employed.

This response assumes that the employment relationships in question are at will (i.e., not governed by an employment contract) and that there are no industry-specific regulatory requirements governing employee qualification (i.e., if the employer is a school district, for example, there may be specific hiring requirements for teachers that the employer cannot overlook). Based on these assumptions, the employer has discretion to decide whether to "grandfather" in the existing applicants (or employees) or to disqualify them from further consideration or employment.

The employer may also wish to consider whether the "more liberal" screeners would benefit from further training to ensure that they are consistent in their approaches and do not again "screen in unqualified applicants who either did not meet the minimum requirements and/or did not attach the appropriate documentation." If in doing so these screeners did not meet their own job obligations and/or violated employer policy, disciplinary action may also be appropriate, depending upon the applicable facts and circumstances.

Source: HR Risk Management HELPLINE for NFP Clients. www.nfphrhelpline.com. June 2017.

Should a Retirement Plan Implement a Fee Policy Statement?

RETIREMENT

For the client who may be concerned about fiduciary compliance, a fee policy statement may give comfort. Like all other fiduciary actions, the value of this statement is a function of how well it's written (not too loosely nor too tightly) and how consistently a plan sponsor actually describes/practices the process documented. So, a fee policy statement can potentially create problems in addition to mitigating them.

Having said this, assuming the plan is being managed prudently, the following process/documentation should suffice:

- Conduct a comprehensive live bid every three to four years (or sooner if circumstances warrant)
- Obtain an annual "second opinion" based on national normative data
- Ensure that the plan sponsor responds appropriately to the conclusions and maintains documentation

The recent attention to this issue is good in that, if interpreted properly, it will raise awareness. On the other hand, it also may create a bias for action that may not be beneficial.

A written fee policy isn't required and may not be necessary. It's sufficient to state in the Investment Policy Statement that the fiduciaries will take the necessary steps to ensure fees are reasonable. A detailed fee policy may set fiduciaries up for failure and limit their flexibility in determining how fees will be structured.

Plan fiduciaries should have a complete understanding of how much a plan is paying in total and to whom, and they should benchmark the plan periodically to ensure the fees are competitive. If the investments are sharing revenue, the fiduciaries should decide that this is appropriate and should understand who's receiving this revenue. All of this should be documented through reports and meeting minutes.

Compliance FAQ

May an employer satisfy its plan-related employee notification responsibilities by posting notices (such as an SPD, SBC, employer CHIP notice, HIPAA notice of special enrollment rights, etc.) on a company intranet?

Generally speaking, posting on the intranet by itself isn't enough to satisfy the DOL electronic disclosure rules. However, if employers take certain steps, an intranet posting could satisfy those rules. More on that below.

At a high level, the DOL rules basically say that an employer must use a method that's intended to result in actual delivery to recipients. For electronic delivery, employers can use email if the employee has email access as an "integral" part of their job. Integral means the employee uses a computer, has a work email address or is otherwise plugged in to electronic data or email throughout the day. That would include an employee who uses the computer often or has a work email address. However, for those that don't have email access integrally (such as warehouse workers, coal miners or truckers who are regularly outside the office), the employer must go further, requesting an email address from the employee and obtaining authorization from the employee to send plan (and other) communications to that email address. That means the employer must obtain an additional layer of consent from the employee (and that should be sent from the email where the employee agrees to receive the plan-related notices). So it's additional employer work for those that don't have regular email access.

In addition, when the email is sent to the employee with the notice, the employer must also explain what the notice is, note the importance of the notice, and advise the employer on their ability to access the notice in paper form (and how to obtain it). Additional language should also be included in the email with the notice (or with the link to the notice on the intranet).

If the employer wants to use the intranet, the employer will have to go through all those steps, plus add a note in the email stating that the notice is available on the intranet (and includes a link to it). So, while the intranet is an option, many employers just include the notice in the email (since the email has to be sent anyway). Some employers like the intranet approach and include the additional link to the intranet site. In short, it's possible to meet the DOL rules through intranet, but the employer needs to carefully consider the above general requirements as it works through its processes.

As far as a list of notices that an employer needs to distribute to employees, NFP has a white paper that outlines the various employee notification requirements for employers (it outlines when the notices should go out — upon hire, upon enrollment in the plan, upon termination, and ongoing). Please ask your advisor or account management team for a copy.

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