

LHINs and the Sale of a Business

The Power of a LHIN

Under Bill 36, the Local Health System Integration Act 2005, a LHIN can require health service providers that it funds to proceed with an integration of services which could include an order to:

- start to provide or stop providing a service,
- provide a certain quantity of a service,
- transfer a service or property from one location or entity to another.

The LHIN cannot require a health service provider to close or to change its fundamental corporate structure or amalgamate with another health service provider. But the Minister could order that it amalgamate or even just cease operations.

A health service provider is deemed to have the powers to comply with a LHIN integration decision or Minister's order, notwithstanding any other legislation, by-law, etc.

Section 2(2) defines "health service provider" as including:

10. A not for profit entity that provides community mental health and addiction services.

Sale of a Business

The integration of services or an amalgamation is likely to be seen under Ontario law as a sale of a business. When there is such a sale employees have certain rights and the vendor (the organization transferring the service) and purchaser (the organization receiving the service) have certain obligations and risks.

What happens if your staff, or the staff of the place they are transferred to, is unionized?

The Public Sector Labour Relations Transition Act, 1997 (PSLRTA) will apply to the transfer of all or part of a service under a LHIN integration decision or a Minister's order. It will apply to any amalgamation.

The PSLRTA provides a streamlined process for resolving labour relations issues, defining the new bargaining unit(s), determining the bargaining agent(s), protecting seniority rights, and negotiation of a

new collective agreement. It works in place of the Labour Relations Act, 1995.

The Labour Relations Act (LRA) would apply if the purchaser (i.e. the employer to whom the service was being transferred) was not a health service provider.

Under the PSLRTA or the LRA the Ontario Labour Relations Board would determine if employees coming to the purchaser would be absorbed into the bargaining unit of the successor, maintain their own separate union, or whether there would be a vote to determine the issue.

When a business is sold the purchaser "stands in the shoes" of the vendor and assumes virtually all the obligations of the vendor. The purchaser must comply with all the terms of the existing collective agreement. Of course, the purchaser can lay off employees.

What is a Business?

The definition of a business under the employment laws of Ontario is not dependent on whether the operation is for profit or not. The provision of health care services has been deemed to be a "business" in several proceedings.

What is a Sale?

Under the Employment Standards Act "sale" includes "leases, transfers or disposes of in any manner...". Other legislation is similar. The merger of one health service provider into another has usually been said to be a sale of a business.

What happens if none of the staff are unionized?

The situation here is much simpler. The receiving organization can hire whomever it wants to but it must be able to give an explanation for the failure to hire, which is not discrimination under the Ontario Human Rights Code. The terms of employment can be altered.

Section 9 of the Employment Standards Act

If the purchaser continues to employ an employee then it becomes responsible for the employee's seniority. In any subsequent termination it must pay based on the length of employment with the

vendor plus the purchaser. If the purchaser does not hire then the vendor is liable for termination and severance pay. This applies to union and non-union employees but collective agreements usually supply superior rights that override the ESA.

Common Law Notice

Any non union employee not hired by the purchaser is entitled to notice of the termination of their employment. Amounts paid under the ESA are deducted from this. Nonetheless the amount owing as notice usually exceeds the ESA amounts.

Section 146 of the Workplace Safety and Insurance Act

The Board holds the purchaser liable for any amounts owed by the vendor. The claims history of the vendor may lead the Board to increase the assessment and the purchaser would be obliged to pay that. The purchaser is liable to re-employ or accommodate an injured worker (section 41). This applies to union and non-union employees.

Ontario Human Rights Code

Since the “sale of a business” would involve the transfer of assets (rather than a share purchase) the purchaser is liable for any continuing situations of discrimination and accommodation. The vendor would be responsible for what occurred prior to the date of sale. This applies to union and non-union employees but collective agreements usually supply remedies for failure to hire (i.e. arbitration).

Pay Equity Act

Whenever employees transfer from one employer to another issues will arise about their pay equity. These may include the lack of pay equity plans at either the vendor or purchaser, the creation of new comparators, or an allegation that significantly altered circumstances should result in the plan being amended. This applies to union and non-union employees.

Conclusion

Whether you are the vendor (the one transferring the service) or the purchaser (the one receiving) and whether staff are unionized or not, there are a number of risks and obligations.