

INSIGHT: Consider #MeToo Before You Buy Your Next Business

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No one wants to acquire a business and be stuck with a #MeToo scandal and the accompanying fall-out. Sidley Austin attorneys Margaret Hope Allen and Tiffanie N. Limbrick offer due diligence tips and spot red flags to help head off problems that can surface during merger and acquisition negotiations.

The #MeToo movement has had a profound impact over the last year, touching every industry and costing companies millions as they clean house. But have you considered its impact when negotiating your next acquisition or merger?

No one wants to acquire a business and be stuck with a scandal and the accompanying fall-out, including bad publicity, the cost of an internal investigation, and the potentially significant cost to remediate the issues.

This article discusses 10 items to incorporate into your diligence checklist to help ensure you are buying a business that strives to provide a harassment-free workplace. We identify potential red flags in the process.

Litigation and Complaint History

The best place to start is with the company's litigation and complaint history to identify any concerning patterns of harassment or ignoring complaints.

- Investigate litigation information for at least three years, including lawsuits, arbitrations, DOL proceedings, EEOC charges, pre-dispute settlements, insurance claims for employment claims and investigations, and hotline complaints, with a focus on wrongful discharge, discrimination, whistleblower, and harassment complaints.
- **Potential Red Flag:** Look for a pattern in the complaints. Is there a person or group of people who may be repeat actors in the complaints? What was the company's response? What repercussions, if any, did the alleged bad actor receive?
- Ask for internal reports or complaints alleging harassment, hostile work environment, or wrongful discharge and any subsequent investigations, even if these complaints did not lead to litigation.

- **Potential Red Flag:** No history of investigations into complaints can indicate a culture where employees view that the company does not take such allegations seriously, which may mean that there are undiscovered issues.

Culture

While not typically thought of being measurable, certain data can provide insight into whether the company's culture promotes respectful interactions among all employees.

- Get the statistics. Look at employee census data, including gender, race and ethnicity; disability; and sexual orientation. Break down the statistics by division as well as leadership roles.
- **Potential Red Flag:** A lack of diversity in the Board of Directors, C-Suite, or management may indicate potential issues.
- Look at turnover rates broken down by gender, race and ethnicity, disability, and sexual orientation. Focus on any segments of the company that have high turnover rates, particularly if there is a pattern tied to one of the diverse categories.
- **Potential Red Flag:** A high turnover rate for minorities and women in a particular division may indicate potential claims for a hostile work environment.
- Conduct a salary analysis. Compare salaries of comparable roles based on the diverse categories.
- **Potential Red Flag:** A pattern of disparate pay may indicate a risk of a future lawsuit.
- Review a sampling of internal documents, such as employee newsletters, an intranet, or internal social enterprise network. Are there resources or affinity groups for each of the diverse categories? Are diverse members of the workforce represented or recognized in internal communications? Also review external social media sites with an eye towards the company's treatment of its employees.
- **Potential Red Flag:** Look for indications of a toxic culture, such as inappropriate jokes or retaliatory conduct.
- Look at budgets, minutes, and expense reports related to retreats and other management, C-Suite, or Board meetings.
- **Potential Red Flag:** Expense reports for strip clubs, single-sex golf courses, or clubs that do not offer membership to certain races or genders may be "Exhibit 1" to a discrimination or harassment lawsuit in the future.

Risk Management

Written anti-harassment policies are integral to ensuring a harassment-free workplace. These policies should be in writing and easily accessible by all employees.

- Ask for all anti-harassment policies. Look for policies and procedures on handling complaints of harassment, hostile work environment, bullying, and retaliation. Analyze the system for reporting complaints. Determine whether there are multiple options for reporting complaints, including an anonymous reporting option.

- **Potential Red Flag:** Limiting the methods for raising a concern or not providing an anonymous reporting option (that is actually anonymous) can increase the risk for retaliation claims.
- Ask about training regarding implicit or unconscious bias, anti-harassment, and anti-retaliation policies. Similarly, ensure that those who investigate complaints are properly trained.
- **Potential Red Flag:** If the only training or discussion on harassment, retaliation, and discrimination issues is limited to a two-page document when the employee is hired, the company is risking potential litigation claims. Likewise, training should be mandatory at all levels of the company, including the C-Suite.
- Ask each of the C-Suite and other officers who make representations to shareholders and the government to certify whether they have been accused of discrimination, harassment, creating a hostile work environment, or retaliating.
- **Potential Red Flag:** If the officer cannot make the representation, consider conducting a discrete investigation into the complaint. If the officer refuses to make the representation or assist with an investigation, there may be a larger issue to consider.

A final note: An anti-harassment and anti-discrimination culture must come from the top. If the members of the C-suite in the target company are keeping you up at night with #MeToo nightmares, consider passing on the acquisition.

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