

# Labor & Employment Issues in M&A Transactions

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# Topics to Cover

**Initial Deal Considerations**

**L&E Due Diligence Checklist**

**Purchase Agreement Issues**

**Focus on Key Issues**

**Integrating Employees**

- ***Think about labor & employment issues early and often in a transaction.***
- Laws regulating the workplace and relationships with workers are constantly evolving.
- Unfortunately, in the U.S., the labor and employment regulatory framework is becoming increasingly patchwork, with numerous inconsistent laws at the federal, state, and local levels.
- Labor and employment issues are rarely “dealbreakers,” but if not addressed, they increase costs, compromise deadlines, and threaten successful integration.



# Polling Question

- **Have you executed a transaction in the last two years?**
  - **Yes**
  - **No**

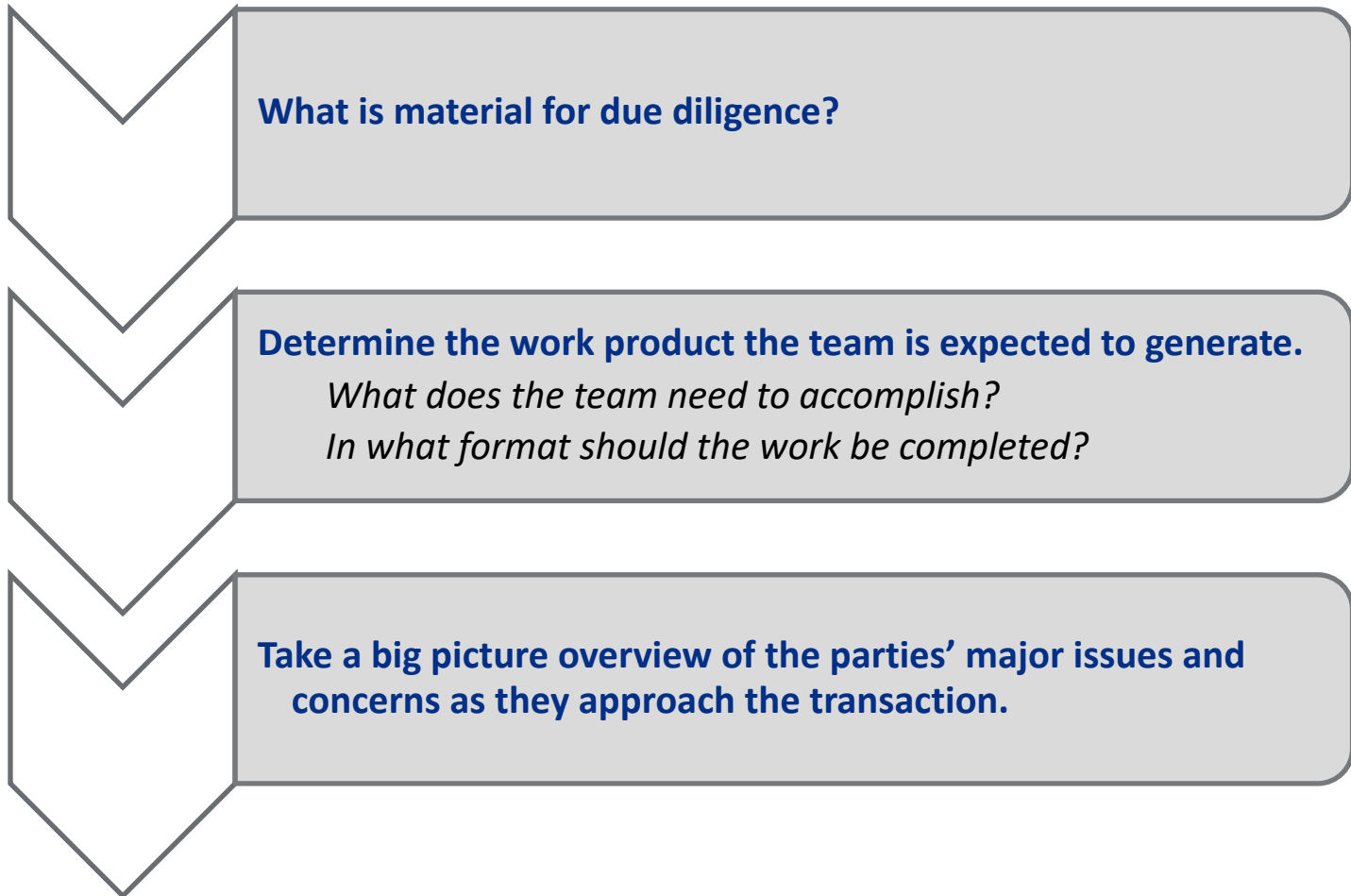
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# Initial Considerations

- **Organize your team.** Understand the divisions of labor between in-house counsel, outside counsel (if any), consultants (if any), and HR.
- **Establish clear deadlines.**
- **Confirm access to diligence data**, including background information.
  - Management presentations
  - Deal memos
  - Org charts



# Getting Started



## Asset Transaction vs. Stock/Equity Transaction

- **Asset Transaction** – Buyer generally can choose whether to assume Seller's plans, employment agreements and collective bargaining agreements; can avoid liability by not assuming (but potential for successor liability for certain types of liabilities).
- **Stock/Equity Transaction** – Buyer generally assumes the liabilities of the equity interest purchased.



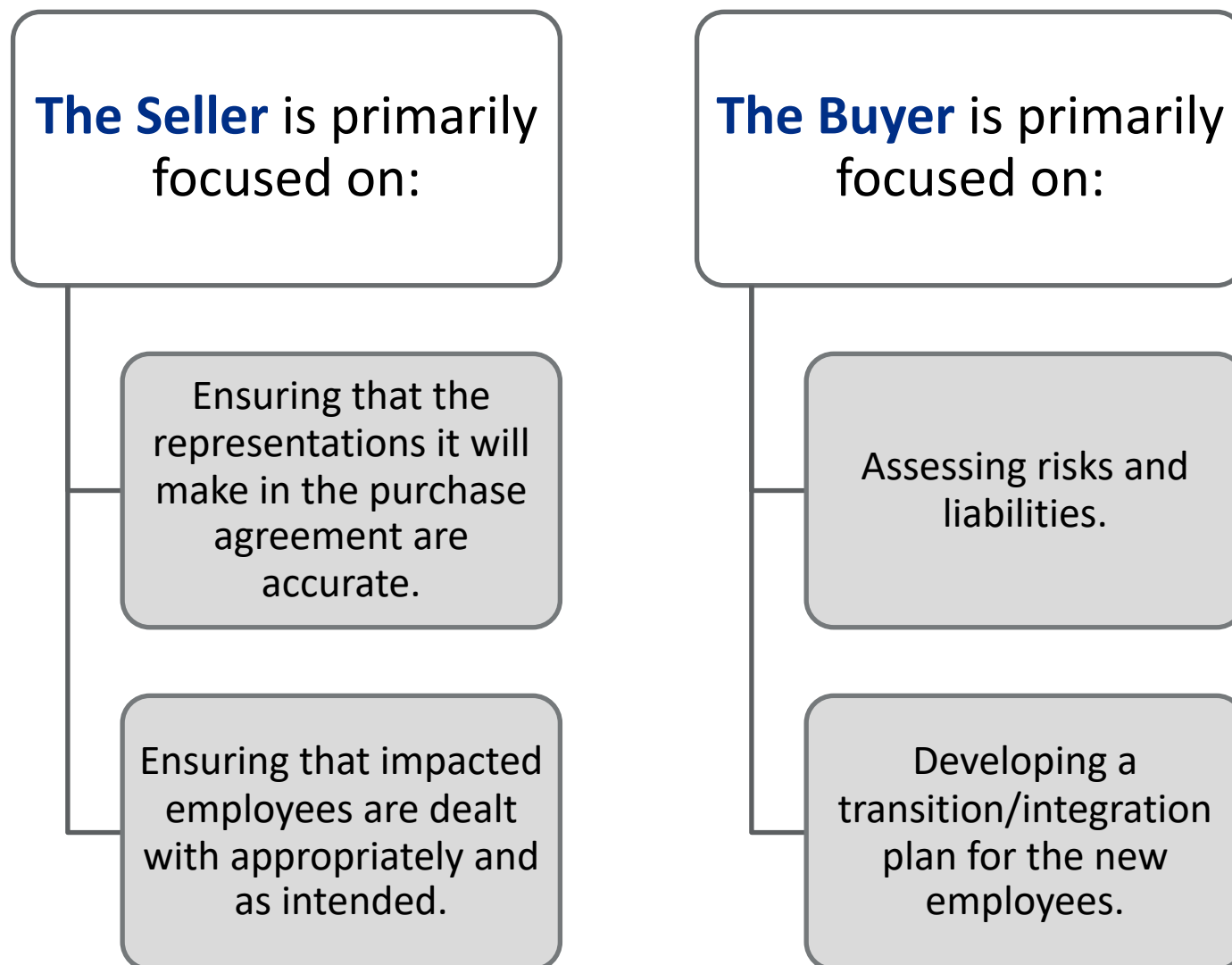
- **Focus on the primary purpose of the transaction.** That will help shape the extent and focus of diligence and the post-closing transition.
- **Consider** the seller's industry and identify the key L&E compliance issues that typically arise in that industry.
- **Consider** employment needs for the business after the transaction.



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# **L&E Due Diligence**

# The Diligence Process



## ○ Employee census data.

- How many employees?
- Where they work?
- Who is remote and what are their agreements?
- Exempt vs. non-exempt?
- Leave status?



- **Claims histories and existing investigations, litigation, grievances, and arbitrations.**
  - Any big-ticket litigation pending?
  - Any historical litigation trends that suggests risk of future litigation?
  - Any DOL or equivalent inquiries?
  - Any consent decrees or settlements?
  - Any workplace safety claims or investigations?
  - Any internal complaints?
  - Works comp claim issues?



- **Employment agreements.**

- Who has one?
- What are the key terms/continuing obligations?

- **Confidentiality/restrictive covenant agreements.**

- Are they enforceable?
- Do they sufficiently protect the purchased assets/business?

- **Employment policies, procedures, and handbooks.**

- Are key policies in place?
- Are the policies and procedures compliant?

- **Severance and bonus plans/arrangements.**

- What are the terms?
- Do buyer's post-closing plans create risk?
- Any change in control plans or agreements?

- **Benefits plans and programs.**

- Any retiree medical obligations?
- Any funding issues?
- Are pension plans involved?

- **Government contracts. (EO 11246)**
  - Affirmative action plans?
  - Audits?
- **Collective bargaining agreements.**
- **Immigration compliance (I-9s; visas; etc.).**
  - Review of seller's I-9s?
  - Do any employees require visa sponsorship that may be impacted by transaction?



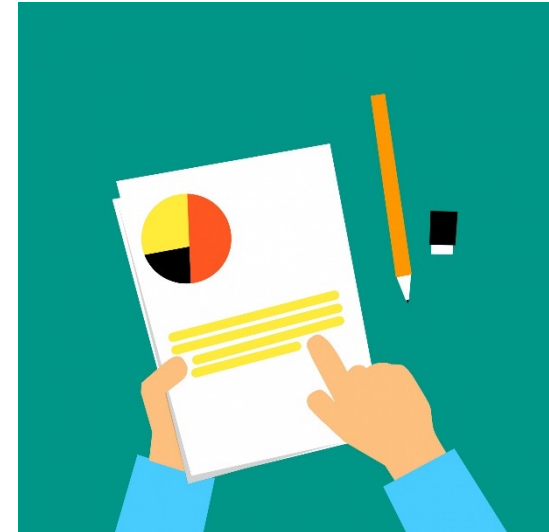
- **Wage and hour compliance. (29 USC 201 & State Law)**
  - Any clear misclassification issues?
  - Is overtime calculated correctly?
  - Compliance with unique state wage and hour laws?
- **Independent contractor/staffing company issues.**
  - Does the seller rely on staffing company employees?
  - Are the individual independent contractors correctly classified as such?

## ○ FCRA compliance. (15 USC 1681)

- Acknowledgement, consent, pre- and post-adverse action forms?
- Is the background check process otherwise compliant?



- **Diligence memo.**
  - Red flags or full summary?
  - Just an oral report?
- **Special indemnities.**
- **Reps and Warranties Insurance.**



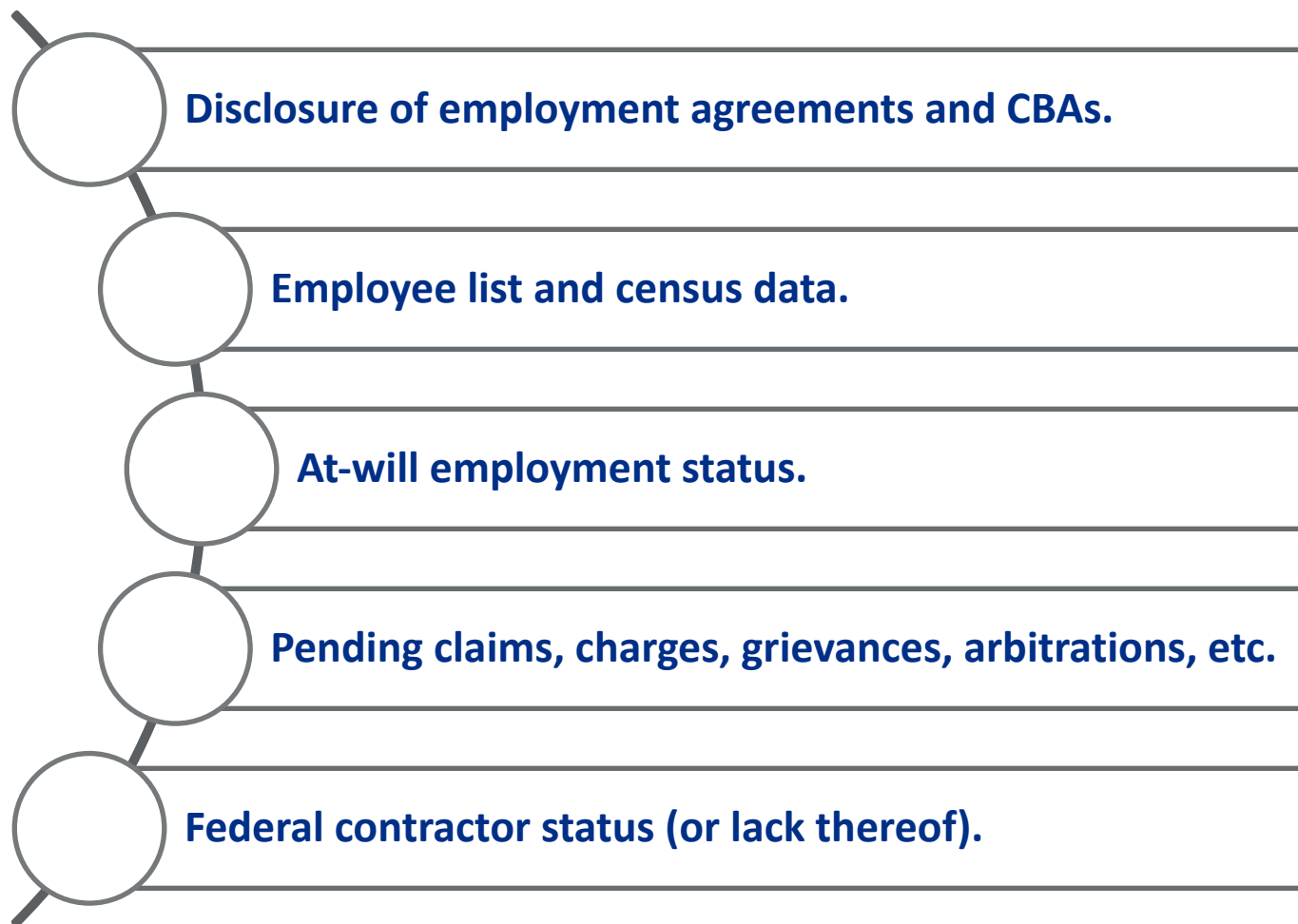
# Polling Question

- Which side of a transaction have you represented?
  - Buyer
  - Seller
  - Both

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# Purchase Agreement Issues

# Seller Reps and Warranties



- Material **compliance** with law.
- **Union organizing activities**; demands for recognition; strikes; lockouts; work stoppages.
- Proper **exemption** classifications and classification of **independent contractors**.
- **Immigration compliance** (I-9's).
- **WARN Act**: Employment loss disclosures.

## **Offer and acceptance process in asset deals.**

- Which employees will receive offers? And on what terms?
- When will they move from buyer to seller?
- What happens to employees who don't receive or accept offers?
- Allocation of pre- and post-closing employment liabilities.

## **Buyer's obligation to maintain employment of seller's employees and at what compensation/benefit levels.**

- For how long?
- On what terms?



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## Key Issues

# Polling Question

- **Does your organization have a dedicated HR M&A Project Manager?**
  - **Yes**
  - **No**

- **WARN – Worker Adjustment and Retraining Notification Act**
  - 60 days written notice in advance
  - Any “plant closing” or “mass layoff”
  - Focus is on “employment loss”
  - Have to deal with remote workers
- **Many states have “Mini-WARN Acts,” whose terms may have different requirements.**



## Sale Situations

- Stock deal may not involve employee terminations at all.
- In asset deals, ***technical terminations don't count if . . .***
  - There is a sale of all or part of the business and
  - Seller's employees are hired by the buyer as of the effective time of the sale.



## Sale Situations

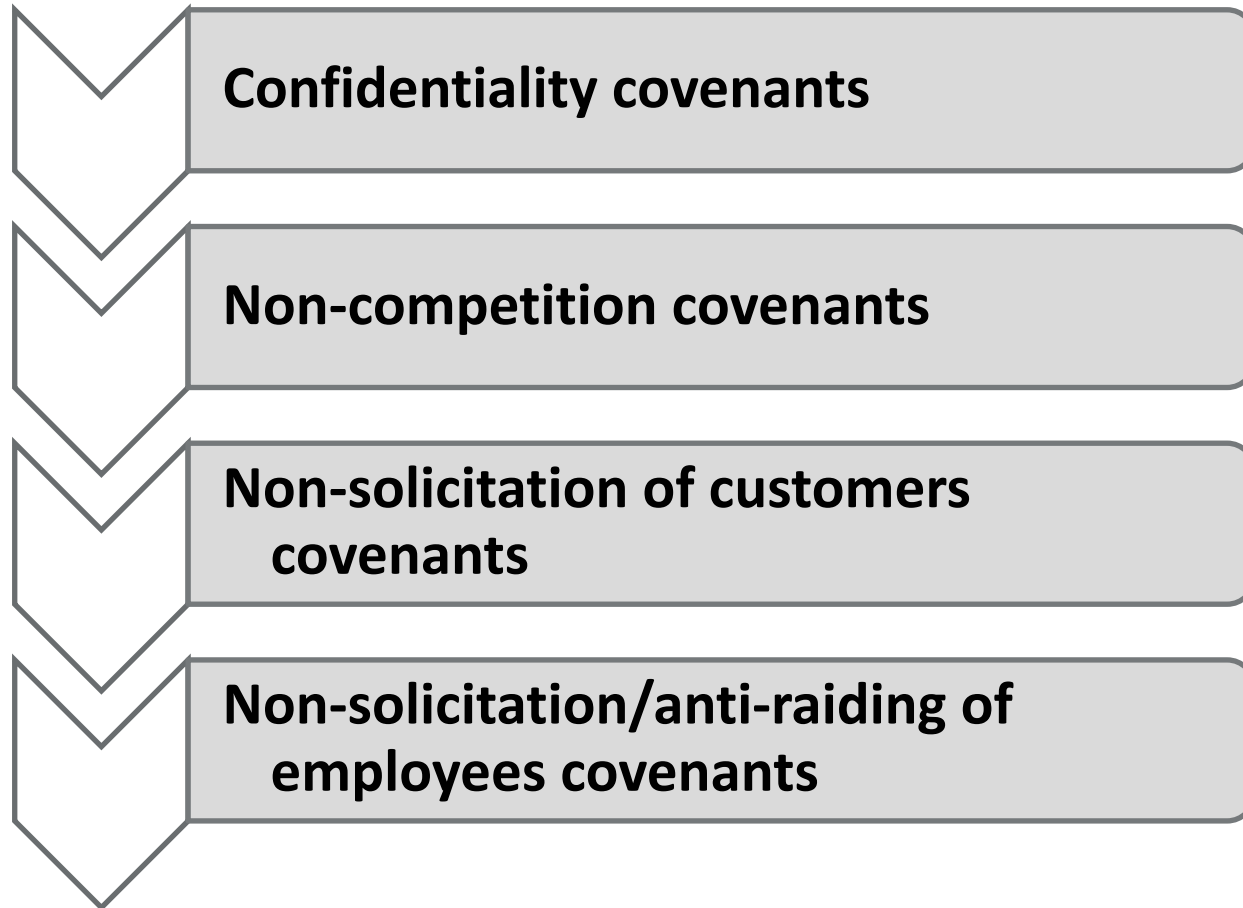
- Buyer and seller's allocation of WARN responsibilities:
  - Statute is not helpful here
  - Pay close attention to the 90 days *before and after* sale



## Sale Situations

- Deal-related WARN short list:
  - Address buyer/seller allocation of obligations
  - Use reps and warranties to address separations before and after sale
  - Address buyer's plans about seller's employees
  - Watch out for technical terminations which occur before and after closing

## The Basics



## Sale of Business Covenants

- Typically in purchase agreement or side letter.
- Restricted period typically runs from closing or end of earn out period.
- More deferential standard.



## Employee-Employer Covenants

- Typically in employment agreement or stand-alone agreement.
- Restricted period typically runs from termination of employment.
- Non-deferential standard; and in certain states unlawful altogether.
- Consider FTC proposed rule. (88 Fed. Reg. 3482 (Jan. 19, 2023))

## Buyer-Side Deal Considerations

- Analysis of existing employee restrictive covenants:
  - What are the terms?
  - Are they enforceable?
  - Do they adequately protect the business?
  - Are they assignable?



## Buyer-Side Deal Considerations

- Consider requiring additional employee restrictive covenants and/or amendments to already-existing covenants:
  - What are the terms?
  - What is the consideration?
  - When will they be executed?
  - Will they be a condition to closing?



**Traditional employment agreements**

**Retention agreements**

**Change in control agreements**

**Severance agreements**

## Buyer-Side Deal Considerations.

- Analysis of **existing agreements**:
  - What are the terms?
  - Are they market?
  - Are they assignable?
  - Should buyer require seller to terminate agreements and/or assume liability for significant payments thereunder?
- Consider requiring **additional employment agreements** for **key personnel**, particularly for those who are receiving deal consideration.



*If* employees are *represented by a union*, buyer should understand the scope of the representation, including obligations under a collective bargaining agreement.



## ○ Particularly important provisions:

- “Union” work and prohibitions on the use of contractors.
- Successors/assigns language.
- Jurisdictional provisions.
- Limits on plant closings/layoffs and recalls provisions.
- Required participation in multiemployer pension plans and withdrawal liabilities.
- Neutrality and card check agreements.



## For Buyer In An Asset Purchase

- **Union successorship:** what seller obligations does the buyer inherit?
  - Can buyer satisfy those obligations? If not, additional bargaining may be required.
- **Contract Successor:** active successorship clause in the CBA requires seller to require purchaser to assume the CBA as a condition of the sale.



## For Buyer In An Asset Purchase

- **Labor Law Successor:** Continuity of workforce and business controls in most cases
  - Discrimination in hiring is illegal.
  - Labor law successor must recognize the union.
  - “Perfectly clear successor” loses ability to unilaterally set new terms and conditions of employment.



## For Seller

- Active successorship clause requires seller to “put” the CBA to buyer as a condition of the sale.
- **Bargaining obligations:**
  - Decisional bargaining
  - Effects bargaining
- Notice obligation.



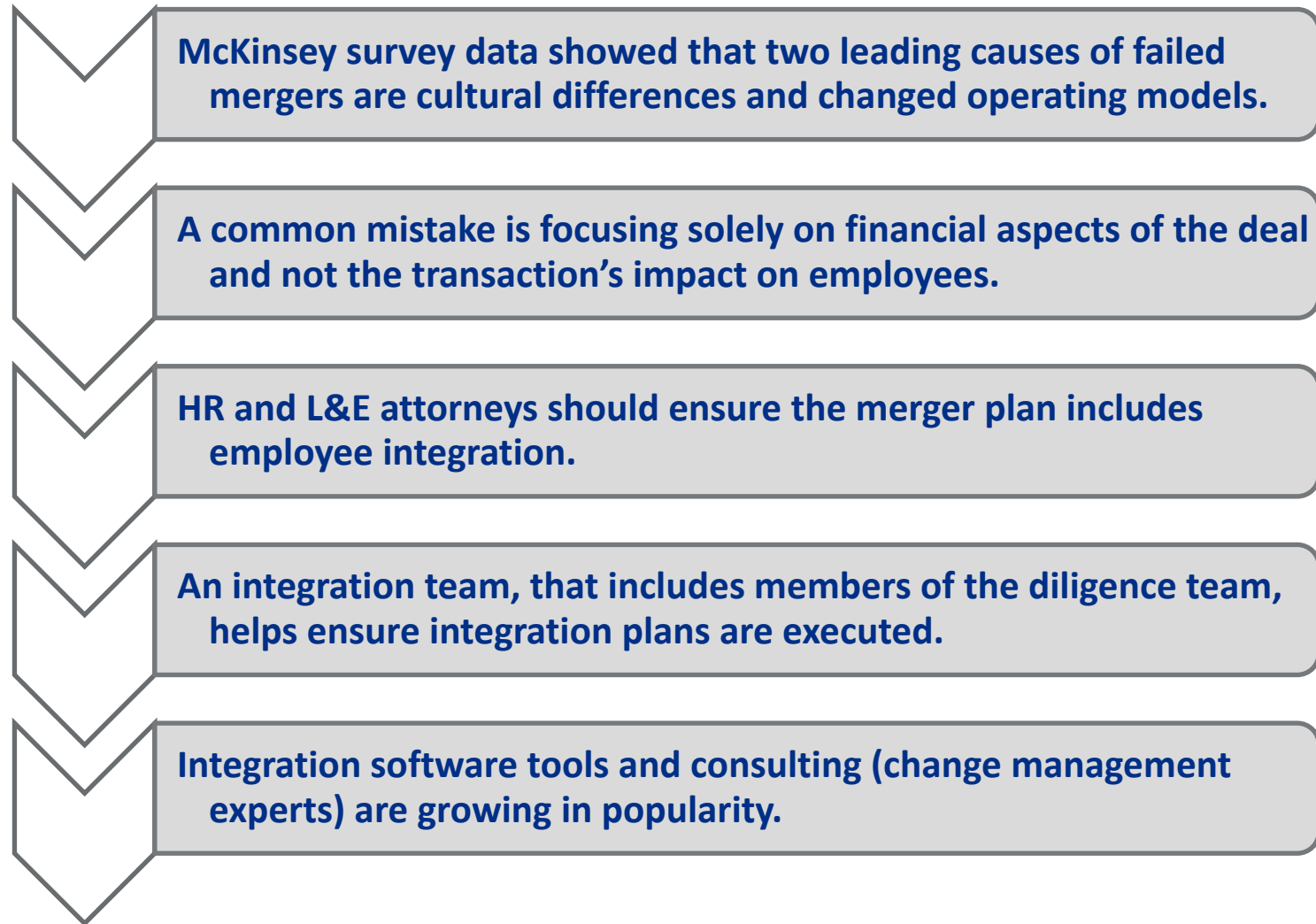
- Due diligence provides critical information on the **status of the work force**, including the percent of workers **potentially at risk of termination due to lack of work authorization**.
- **I-9s**
  - Analyze I-9 forms, completion and retention procedures, and E-Verify compliance under state and federal law.
  - Advise about options to inherit current I-9 documents or complete new forms upon closing.

- **Identify sponsored employees:** Verify compliance by reviewing petitions and document retention practices.
  - Determine impact on sponsored employees based on type of transaction (stock v. asset), type of visa, and any changes in employer, worksite, duties, etc.
  - Recommend actions needed to ensure continued compliance with sponsorship to reduce or avoid risk of interruption in employment where possible.

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# Employee Integration

# Importance of Integration



# Cultural Differences



- *If not managed properly*, changes like those below cause **stress** for employees and can lead to **discontent**.
  - New organizational structure
  - New reporting relationships
  - New compensation plans
  - New performance expectations
  - New technology
  - New processes and procedures



# Polling Question

- **What is your level of involvement in integration?**
  - **Heavily involved**
  - **Somewhat involved**
  - **Not involved**

# Communication is Key

- **Communicate with employees quickly.**
- Have **senior leadership** involved in the messaging but make sure **frontline managers** are knowledgeable.
- **Provide clear message on direction and strategy.** Why is this transaction good for the company and its employees?
- As much as possible, **provide information** about benefits, performance expectations, timetables for change, job eliminations (or lack thereof).



# Communication is Key

- Communications about benefits plans, compensation, labor agreements, layoffs, and related issues need Legal review.
- Offer training quickly to empower employees with knowledge and reduce stress.
- Encourage employees to participate in integration committees and taskforces as a means of staying informed and to have some ownership over the integration.
- Consider post-transaction pulse surveys to identify lingering employee concerns.

- **Roughly 30% of employees are deemed redundant in a merger.**
- Determine your plan for redundancies:
  - Identifying talent to retain.
  - What severance terms will be offered.
  - Some countries require severance.
  - Protect against discrimination claims.

# Questions?



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