Hiring talent in a competitive job market: What to know about engaging a PEO in Canada

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Professional employer organizations (PEOs) continue to gain traction as a common way for companies to test the waters in a new jurisdiction, and to hire talent anywhere in the world, which is valuable in what remains a competitive labour market.

What is a PEO?

A PEO can specialize in a broad range of services, from payroll, benefits, human resources, tax administration and regulatory compliance assistance. Businesses can engage PEOs to provide a complete suite of these services, or just a few depending on their specific needs.

However, in our experience, one of the most appealing services a PEO will offer is that of the employer of record (EOR). As the EOR, the PEO will essentially be the employer on paper. They will hire – sometimes even recruit - and enter into an employment agreement with talent, thus in theory taking on the legal responsibility for the employment relationship. For businesses not wanting to establish a presence in Canada, it is not surprising that this service would be tempting.

Practical considerations

Over the past few years, we have seen an increasing number of PEOs establish a presence in Canada, as well as new clients who are exploring Canadian opportunities for the first time. We have highlighted three practical considerations to keep top of mind when considering engaging a PEO.

1. Being employer of record is not absolute

As mentioned, one of the most appealing services offered by a PEO is that of the EOR. However, it is important to note that in Canada, a PEO cannot be used to circumvent an employer's legal obligations in common law provinces or the province of Québec. In other words, while the PEO may be considered the EOR or the employer on paper, the reality is that it is the PEO's client, the business, directing the employee in their duties and responsibilities. As such, having a PEO does not absolve the business from being

considered an employer under Canadian labour and employment laws. In fact, the business should anticipate those liabilities even if they are engaging a PEO as the EOR in Canada.

In the event litigation arises around the employment relationship, it is likely that the business will be held to be an employer (a deemed employer in Québec) when analyzing any legal obligations vis-à-vis the employee, such as the payment of termination-related entitlements, health and safety, pay equity and other statutory obligations.

In order to address these issues, it is important to carefully review the services agreement entered into with the PEO, particularly as it pertains to how these risks are addressed. It is common for PEOs to seek extensive indemnities relating to these liabilities – in other words, the services agreements often articulate that it is the business who will bear these liabilities. Additionally, we recommend obtaining independent legal counsel to review the employment agreement that the PEO proposes to enter into with the employee for minimum compliance, and to advise on what other steps might be taken to mitigate the risk of a business being deemed an employer in Canada.

2. Securities

Another technical challenge that may arise with a PEO surrounds the issuance of securities, particularly where the PEO has been retained as the EOR. When a business wishes to offer or grant stock options to an employee, it must consider the fact that it cannot do so through the PEO. Because of this, the issuance of securities of the company using the PEO's services is not a benefit the PEO would be able to provide.

In light of this, consideration should be given to how the business could offer or grant stock options to the individual. This includes contractual considerations, but there can also be tax issues or reduced benefits to the employee given that they are not receiving such stock from their employer of record, the PEO.

3. Intellectual property and other restrictive covenants

Finally, if the protection of intellectual property or other restrictive covenants, like non-solicitation or non-competition, are important to the business, we recommend paying close attention to how the PEO proposes to address these issues contractually.

As already noted, the business is a third party to the employment contract. As such, thoughtful consideration should be given to the provisions in both the services agreement with the PEO, and the employment contract between the PEO and employee, in order to ensure the business is properly protected.

Takeaways

Notwithstanding some of these technical issues, the use of PEOs can be extremely beneficial. Arguably, it allows businesses with the opportunity to explore whether doing business in Canada makes sense before committing to establishing a more durable presence. Additionally, the concept of outsourcing the employment relationship, as well

as the administration of that relationship by having payroll, benefits, tax and regulatory matters dealt with by the PEO, also allows businesses to focus on productivity, profitability and growth.

Get in touch

Having acted for PEOs who do business in Canada, BLG has considerable experience in this area, as well as for clients who are exploring the possibility of engaging a PEO for their business. If you have any questions about engaging a PEO, reach out to any of the authors or key contacts listed below.

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