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Labour Strategies For The UK

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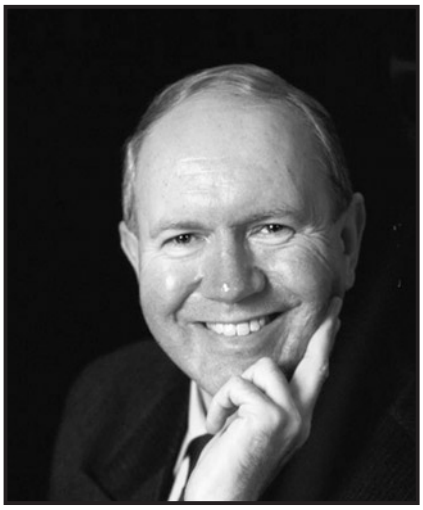
Know Your Market

Assuming that US strategies will translate to the UK is an error regularly encountered. The distinct history and legal regulation of employment relations in the UK holds numerous traps for the overseas investor, particularly in labour intensive industries with a history of unionisation, and there are special concerns where the sector has public service origins. The UK market is in effect an amalgam of British laws, EU regulation and, more recently, borrowed legislation that has at least superficial similarities to US laws, for example in the areas of disability and of union recognition. Yet, as with language, the similarities may deceive.

The UK market has also seen a massive shift over the last 30 years, moving initially from a traditional collective bargaining culture with high levels of union membership, to the world of market forces and individual contracts in the Thatcher years, now swinging back to a new version of the collective culture under the Blair Government fashioned this time by a mix of EU social policies (i.e. labour market regulation) and compromises with the British trade union movement to restore opportunities for union recognition and influence. Nonetheless, overall union membership in the private sector has hugely declined and remains below 20 per cent.



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While there are numerous examples of where investment in the UK can prove misjudged, or where a US parent company does not recognise the likely issues their subsidiary will face, the main concerns fall into a few quickly described categories.

Due Diligence

Many investors learn the hard way that they did not tick all the boxes on due diligence. The inadequacy of labour related due diligence often has a painful long term effect on financial returns. There is a natural reliance on the due diligence process to show up the big commercial issues and liabilities, often assuming labour issues can be managed later. In a labour intensive business, this is looking through the wrong end of the telescope. Expert due diligence on labour contracts, employment relations, structural dialogue, unionisation and levels of union membership to assess risks of unionisation, individual and collective liabilities, pensions and obstacles to change needs to be achieved. Transfer of Undertakings laws in the UK and the rest of Europe impose liabilities not dreamed of by some US businesses entering the UK market. There are due to be new rules in the UK on the Transfer of Undertakings by October 2005. Though in general reflecting existing case law, some of the changes will be new and could make the rules more likely to apply than in the past in some situations.

Talking To The Employees

There is a constant emphasis now in the UK and the EU generally on information and consultation. UK businesses with over 150 employees can now be compelled to set up what is in effect a domestic works council. Other smaller businesses will be caught in future. This creates obligations to inform and consult the employees, but pro-active planning can result in a structure more favourable to the company, and can keep a focus on

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the primacy of direct communication if desired. Any investment in the UK should therefore include checks on what exists to fulfil this role, the pressures to set up a suitable employee forum, and how it is actively managed.

There can be interesting cross-over with union collective bargaining agreements, which may co-exist with a staff forum in the same business. No examination of the labour strategy of a UK business should ignore its current or possible exposure to collective disputes.

Non-compliance with information and consultation obligations can result in heavy fines, and a UK subsidiary is not going to escape by pleading it was not told its parent company's plans.

In addition, there is a range of existing obligations to consult representatives of a workforce, for example on collective redundancies, transfers of undertakings, and health and safety matters. These different consultation obligations tend to point employers to the advantage of setting up a single standing body that is there to deal with issues quickly. US parent companies may under-estimate the work needed to carry out a down-sizing operation in the UK, and part of this is made easier by having a properly elected and mandated representative body.

Unionisation

Rights of mandatory recognition in the UK over the last 5 years have given the major unions opportunity to get back into businesses where they have been de-recognised or to enter new businesses which have never been unionised. Unlike the US the unions can sometimes get automatic recognition where they have a majority of members in the relevant bargaining unit. US owners should not therefore assume they will be given the opportunity to fight and win a ballot against recognition.

There are limited methods of preventing or hindering union recognition, usually needing a high degree of advance preparation and a period of building satisfactory alternatives. Unions rightly see their opportunity to step in and fill a void where the employer has no alternative consultation structure, and where the employer may under-estimate the low morale of its workforce.

Many UK businesses have excellent working relations with unions, and this can quickly be established on a thorough due diligence. If the relationship with the union(s) is not so good, then there may be trouble ahead.

Strikes

A fact of life in the UK is that strikes, or the threat of them, occur frequently in some industries. As employees have protection from dismissal for striking during a 12 week period, there is less risk for them in resorting to industrial action. Some union leaders are noticeably more ready now to resort to strikes as a legitimate weapon. Leaders of some principal unions are now more assertive of the strike option than were their predecessors in the early years of the Blair Government. Attempts to close unaffordable pension schemes have been a particular cause of industrial disputes.

It is surprising how few companies seem to make good contingency plans for strike action and similar crises. Also, few seem to take advice on labour strategy when considering corporate structures. Yet a timely review of how the business could be structured to minimise strike risk may in time save a lot of money, if not the entire business. So many corporate groups seem to be led towards amalgamating their businesses into one corporate entity without appraisal of its effect on bargaining unit structures, recognition bids, and secondary industrial action. The last mentioned area is a particularly good reason for not putting all the employees in one corporate pot, if there is a good commercial reason also for preserving a segmented corporate structure in which it may be harder for the union to spread a strike across different entities in the group. Generally, employees can strike only against their own employer not in support of trade disputes between other group companies and their employees.

Collective Bargaining

This is handled very differently from in the US. Generally collective agreements with unions are not themselves legally binding, yet some terms of such agreements will have legal effect by being effectively incorporated into the individual employment contracts. Thus, analysis of the existing terms and conditions of a workforce may require details of individual contracts, any collective agreements, and probably custom and practice. The norm in the UK is also for less rigorous and less well drafted collective agreements, leaving ample room for disputes about exactly what is meant to have legal effect as part of the employee's contract.

Solutions

Clarkslegal LLP is actively involved with US businesses who operate in the UK and European market, liaising with other professionals who also share transatlantic business and labour relations experience across the spectrum of human resource audits, crisis management, media relations and employee communications. There is a huge advantage in making the labour strategy an early part of any investment decision process, so as to know how good things really are in the workforce of the target business. Also, managing a successful restructuring will entail potentially a range of issues which will tax the most experienced of US investors.

Some useful mechanisms for changing terms, reducing headcount, managing union recognition disputes, managing the aftermath of major change and minimising expensive legal claims are there to be utilised. However, in many situations the new overseas owner of the business may be regularly one step behind the people obstructing change. This experience may sadly deter further investment decisions.

While the UK is far more regulated than a few years ago, and the effect of the EU on labour laws has been very forceful, the total picture is one of a thriving business economy that can reward investment if the new owner enters the market with eyes open, and a willingness to learn and operate within a set of rules that will be initially puzzling. The flexibilities of the UK labour market still exist, and some businesses have been highly successful at preserving those flexibilities, either in harmony with unions or despite adverse union strategies.

Formulating a comprehensive labour strategy, understanding the right levers to pull, and having a long term plan to build and maintain trust and confidence with the workforce should together give the best hope of long term success in the UK market and of minimising risks of damaging and expensive labour disputes.