

Immigration: Buying Company? Don't Let "I" in Mergers and Acquisitions Be MIA

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In any merger and acquisition or other business reorganization, one critical piece should not be MIA: the consideration of immigration issues. If a purchaser ignores or postpones immigration issues until after closing, it can result in very serious consequences, ranging from losing critical employees to visits, fines or penalties from the **USCIS (United States Citizenship and Immigration Service)** or worse, from **ICE (Immigration and Customs Enforcement)**.

Immigration related issues should be addressed before closing, with time to correct any problems. A purchaser's due diligence should include:

- Understanding the type of transaction and the difference it makes in certain types of visas.
- Reviewing the acquired company's I-9s to find out if it has been complying with the law, if it has any foreign national employees and, if so, their immigration status. If the acquiring company is assuming the liabilities for I-9 violations it must know, at a minimum, if there is an I-9 for each employee and if the I-9s are completed correctly. So-called "paperwork" I-9 violations, which can occur even if the acquired company never employed a foreign national, carry penalties ranging from \$110 - \$1,100 for each employee. There are also significant civil and criminal penalties for unauthorized employment of foreign nationals.
- Identifying the immigration status of every foreign national the acquired company employs to determine what needs to be done to keep them employed by the new company. For example, a common visa, the H-1B, requires that the employee only work for the sponsoring employer. Even if the new company qualifies as a successor in interest -- and under some types of reorganization it may not -- there are steps to be taken to protect the right of a foreign national to work for the new employer and to easily travel. Another visa, the L, is used for the transfer of international company employees and only continues to be valid if the overseas company from which the employee came is part of the acquisition. If not, the new company cannot employ that person. In addition, some foreign national employees may be at various stages of the permanent resident process, the green card, and are being sponsored by the company to be acquired. It is critical that the issues surrounding that process be identified and addressed before the closing.
- Considering whether the issues of successor in interest and/or the assumption of immigration liabilities, to maintain the immigration status and employment authorization of the acquired employees, require inclusion in the terms of the controlling document.

Immigration issues are not second-class or post-closing issues. They need to be identified early in the acquisition process to assure that the new employer, on day one, post-closing, is not saddled with potential liabilities or does not lose valuable employees.

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