More Than Mere Loose Ends: Immigration Compliance During Mergers and Acquisitions

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Mergers and acquisitions are often complex transactions involving numerous parties and myriad moving parts. While the parties are understandably focused primarily on the economic aspects of the deal, immigration compliance is an issue that should not be overlooked. The issues related to employment transitions and assessing I-9 liability are best addressed early in the process to allow time to adequately address matters that arise.

Employee Transitions During the Merger or Acquisition Process

During a merger, acquisition or change of entity, employers must have a comprehensive plan to ensure that the employees transitioning to the new entity do not fall out of immigration status. Employers that fail to accurately assess their immigration needs risk business disruption or loss of key employees due to visa lapses. The following are considerations for employers retaining visa holders in the H-1B, TN, L-1 and green card categories.

- **H-1B**: The new entity must update all Public Access Files for employees continuing in the same employment. If the terms and conditions of employment will change after the transaction (i.e., new job duties or worksite location), the new entity must file amended H-1B petitions. Finally, a new employer should conduct an assessment of whether it is an “H-1B dependent” employer, which may trigger additional obligations.
- **L-1**: Because employees qualify for L-1 status based upon the qualifying relationship between the foreign and U.S. entities, a detailed analysis of the corporate transaction is necessary to determine whether the qualifying relationship survives or has been terminated.
- **TN**: As with H-1B employees, any change in the terms and conditions of employment must be accompanied by a new TN petition or visa. Employees continuing without change must update their employer information when an extension petition is filed.
- **Green cards**: For ongoing permanent residency applications, the new employer must determine whether it is a successor-in-interest to the former employer. If the new employer does not qualify as a successor in interest under the immigration regulations, it may be necessary to re-start the green card process on behalf of employees. Additionally, a new employer will have to determine the applicability of regulations allowing an employee to transition their application from the former employer.

I-9 Risk Assessment Before the Merger or Acquisition Deal

Due diligence is an important part of any financial transaction. Assessing risk is usually the predominant objective in determining a fair purchase price. Businesses are operating in an enhanced enforcement environment – the risks for noncompliance are real and are likely to be costly. Here are some important considerations for pre-deal due diligence:

- **Evaluation of Seller’s I-9 Compliance Culture**: This involves understanding how Forms I-9 have been completed and how they are retained, including determining whether security and record-keeping controls are compliant with regulations.
- **Conducting Audits of Seller’s Forms I-9**: The ability of the buyer to conduct an audit of the seller’s I-9s is crucial in assessing the value of the seller’s potential liabilities. Using external immigration experts to
assess I-9 compliance will help a buyer determine potential monetary fines or penalties and aid in the creation of post-deal I-9 compliance strategies.

- **Understanding Seller’s Compliance Regime:** In the event of I-9 audit by Immigration and Customs Enforcement, demonstrating a good-faith attempt to maintain compliance can factor heavily into the outcome of the audit, reducing potential fines. Buyers should examine a seller’s I-9 compliance policies, training and internal enforcement mechanisms in order to understand the seller’s overall compliance culture.

Immigration compliance does not have to be a complex process, even though the M&A process can be. Savvy buyers and sellers will utilize experienced immigration counsel to assess risk and mitigate liability throughout the merger or acquisition transaction.

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