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Immigration Due Diligence in Mergers and Acquisitions

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By Richard Salamy

In a merger, acquisition or reorganization of any business, many important details and deal points are discussed, negotiated and incorporated into innumerable drafts of a definitive agreement. Yet one critical area, often overlooked by transaction lawyers, may have serious consequences to the acquiring company and its future employees — immigration law. If considered at all, immigration issues are relegated to second-tier concerns that, in the minds of the lawyers, can be handled after the closing. In many cases, however, "after the closing" is too late, and the acquiring company may find itself at the mercy of U.S. Citizenship and Immigration Services (USCIS) or worse, U.S. Immigration & Customs Enforcement (ICE), the enforcement bureau of the U.S. Department of Homeland Security (DHS).1 An acquiring company may also discover it has lost the services of key employees of the acquired company.

To uncover immigration-related issues in time to successfully resolve them, the prudent transaction lawyer should carefully consider these immigration issues well in advance of closing:

DISCUSS THE FORM OF ACQUISITION OR REORGANIZATION WITH IMMIGRATION COUNSEL

The acquiring company and its foreign national employees may face different issues depending on whether the transaction is a stock or asset sale or if the company is simply undergoing a reorganization.

CAREFULLY EXAMINE ALL USCIS FORM I-9s OF AN ACQUIRED COMPANY

By federal law, employers must verify the employment authorization of all employees, citizens and noncitizens alike, by completing a USCIS Form I-9 for each employee at the time of hire.2 Independent contractors are excluded. Examining the I-9s of the acquired company is important for two reasons. First, it provides the acquiring company with an overview of the acquired company's

workforce because I-9s include information about an employee's immigration status. Second, a review of the acquired company's I-9s will reveal whether the acquired company has diligently complied with federal requirements and its own internal I-9 policies, if it has any. This provides the acquiring company with an opportunity to consider whether it is assuming potential liabilities for noncompliance.

When reviewing an acquired company's I-9s, ask these six questions:

1. Does an I-9 exist for every employee of the company? Verify the I-9 records against the company's payroll records.

2. Have the I-9s been fully and properly completed?

3. Does the acquired company have a written I-9 policy? Is it being followed? Consider whether the acquired company's I-9 policies are consistent with the acquiring company's policies and whether there will be any difficulties in integrating the two systems.

4. If the I-9s contain errors, are they technical (which may be excused) or substantive (which may result in fines or imprisonment)?

5. What are the potential civil and/or criminal penalties?

I-9 Violations: These are sometimes considered "paperwork" violations because they are directly related to whether and how the I-9 is completed. The monetary penalty for an I-9 violation (either technical or substantive) is a minimum of $110 and a maximum of $1,100 per employee.3 Factors affecting the amount of the penalty within that range include: the size of the employer's business, the employer's good faith in completing the I-9, the seriousness of the violation, whether or not the employee was an unauthorized alien, and a history of any prior violations.4

Employing Unauthorized Employees: ICE may sometimes use I-9 violations, alone or together with other facts, to allege that an employer has hired an employee who is not authorized to work for that employer. These are more serious violations than "paperwork" violations because they are accompanied by higher fines and the potential for imprisonment. The civil and criminal penalties for employing unauthorized employees are:

Civil Penalties: First offense — a fine of not less than $275 and not more than $2,200 for each unauthorized employee with respect to whom the offense occurred before March 27, 2008, and not less than $375 and not exceeding $3,200 for each unauthorized employee with respect to whom the offense occurred on or after March 27, 2008. Second offense — a fine of not less than $2,200 and not more than $5,500 for each unauthorized employee with respect to whom the offense occurred before March 27, 2008, and not less than $3,200 and not exceeding $6,500 for each unauthorized employee with respect to whom the offense occurred on or after March 27, 2008. Third and subsequent offenses — a fine of not less than $3,300 and not more than $11,000 for each unauthorized employee with respect to whom the offense occurred before March 27, 2008, and not less than $4,300 and not exceeding $16,000 for each unauthorized employee with respect to whom the offense occurred on or after March 27, 2008.5

Criminal Penalties: If a person or entity engages in a "pattern or practice" of unauthorized employment violations, then the penalty is a fine of not more than $3,000 for each unauthorized alien, not more than six months imprisonment for the entire pattern or practice, or both.6

6. Should the acquiring company re-verify all the employees of the acquired company by completing new I-9s for them or may it simply assume responsibility for those employees by retaining the existing I-9s?

IDENTIFY ALL EMPLOYEES THAT ARE CURRENTLY IN AN IMMIGRATION STATUS THAT MIGHT REQUIRE ADDITIONAL FILINGS WITH THE U.S. DEPARTMENT OF LABOR (DOL) OR USCIS IN ORDER TO PRESERVE THEIR EMPLOYMENT AUTHORIZATION AND IMMIGRATION STATUS

Whether any additional filings need to be made with DOL or USCIS to preserve the immigration status of an employee of the acquired company will depend on the current status of the employee and where that employee is in the "immigration pipeline."

EMPLOYEES IN NONIMMIGRANT (*i.e.* TEMPORARY) STATUS

There are a variety of nonimmigrant visas that allow a foreign national to work in the U.S., but two common nonimmigrant visas are (a) the H-1B, for professionals whose positions typically require a bachelor's degree, and (b) the L-1, for executives, managers and specialized-knowledge personnel working for a company abroad and entering the U.S. to work for a company with a qualifying relationship (*i.e.* parent, subsidiary, or affiliate) to the company abroad.

H-1B Professional Status: H-1B visa petitions remain valid and amendments to those petitions are not required so long as the job performed for the acquiring company is substantially the same as the original job and the acquiring company qualifies as a "successor-in-interest," as discussed later in this article.7 However, a memorandum explaining the reorganization, merger or acquisition must be added to that employee's H-1B public access file. The acquiring company should have an authorized representative execute a sworn statement on behalf of the acquiring company expressly acknowledging the assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective Labor Condition Applications (each, an LCA) filed by the acquired company with the DOL. Unless the acquiring company chooses to file new LCAs and H-1B petitions, the acquiring company should not employ any H-1B employee until this statement is executed and made available in the H-1B public access file for that employee.8 If the location of the job or the position itself changes substantially, a new LCA must be filed with the DOL and posted at the new work site. The acquiring company then must file an amended H-1B petition.

Successor employers should also issue a letter to new H-1B employees who travel abroad to assist them in gaining re-entry to the United States. This letter should confirm that the company has succeeded the previous employer and that the terms and conditions of employment remain the same.9

L-1 Intracompany Transferees: L-1 visa petitions will remain valid as long as the company

abroad where the employee was originally employed is also acquired or the acquired company has an overseas branch and there is no substantial change in the capacity of the L-1 employee's employment.10

EMPLOYEES SEEKING PERMANENT RESIDENCY STATUS

Applying for and receiving permanent residency (a "green card") may take several years of waiting and require a variety of filings with three different government agencies: DOL, USCIS, and U.S. Department of State. Employees may be affected differently depending on what stage of processing they are in when the transaction closes. Generally, there are three stages in the process of becoming a permanent resident based upon an offer of employment in the U.S.: (a) labor certification with the DOL, (b) filing an immigrant visa petition with USCIS, and (c) consular processing at a U.S. consulate abroad, or, if the employee is in the U.S., applying with USCIS to "adjust status" to permanent residency.

Prior to Filing Application for Labor Certification: For most permanent residency cases, an employer must at-tempt to recruit a willing, available and qualified U.S. worker for the position he is offering to the foreign national. This process is called "labor certification." If a new employer is a successor-in-interest and the employee's job duties and location will not change, the new employer may utilize the recruiting efforts of the acquired company and file an application for labor certification.11

Pending Labor Certification: If the acquired company filed an application for labor certification after July 16, 2007 that is still pending, the acquiring company may not be substituted for the original employer.12 The pending application should be withdrawn and the new employer must submit a new application under its own name. The only alternative is allowing the application to be approved and trying to persuade USCIS at the I-140 petition stage that the acquiring entity qualifies as a successor-in-interest.

Approved Labor Certification: If the application for labor certification has been approved by DOL, then the acquiring company may be allowed to utilize the approved labor certification to support an immigrant visa petition filed with USCIS, but this issue is not clear. In the past, USCIS allowed employers to present evidence of successorship and proceed with permanent residency, but a recent amendment to the labor certification regulations has cast doubt on the continued success of this strategy.13

Approved Immigrant Visa Petition: If (a) an employment-based immigrant visa petition has been approved by USCIS for an employee and (b) the employee has filed an application to adjust status to permanent residency which application has been pending for more than 180 days, then the employee may commence employment with the new employer without the new employer filing a new I-140 petition.14 If immigrant visa petition is still pending or the application to adjust status has not been pending less than 180 days, the new employer will need to file a new immigrant visa petition.

INCLUDE ASSUMPTION OF IMMIGRATION LIABILITIES IN THE DEFINITIVE AGREEMENT

As mentioned earlier in this article, the continuity of immigration status and employment authorization will often depend on whether the acquiring company qualifies as a "successor-in-interest" in the eyes of the USCIS and DOL.

In permanent residency (*i.e.*, "green card") cases, a "successor-in-interest" occurs when:

"…the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change, such as a corporate restructuring or merger with another business entity, and the new or merged, or restructured entity *assumes substantially all of the rights, duties, obligations, and assets of the original entity."*15 (emphasis added)

However, at least some USCIS adjudicators are applying a more stringent standard and granting successor-in-interest status to an acquiring company only if it assumes all of the rights, duties, obligations, and assets of the acquired company.16

With respect to nonimmigrant visa petitions (such as H-1B nonimmigrant visa petitions), the test for successorship appears to require merely that the acquiring company assume the acquired entity's *immigration-related* assets and liabilities.17

In order to document the status of the acquiring company as a successor-in-interest, at least with respect to nonimmigrant visa petitions, a prudent lawyer might include a provision in the definitive agreement similar to this:18

"Effective on and after the Closing Date of the Transaction, (a) Seller shall cease to serve and Buyer shall commence to serve as the sponsoring and petitioning employer for petitions, applications and other filings with U.S. Citizenship and Immigration Services, the U.S. Department of Labor, or the U.S. Department of State (including any U.S. embassy or consular post) (collectively, the "Immigration Documents") requesting employment-based nonimmigrant visa benefits on behalf of or with respect to Seller's employees who are offered employment by Buyer, and (b), Buyer shall assume all immigration-related obligations and liabilities that have arisen or will arise on or after the Closing Date for such employees in connection with the Immigration Documents. By Seller and Buyer closing the Transaction and Buyer's hiring the Employees, Seller and Buyer intend for Buyer to be deemed the Seller's successor-in-interest for the purpose of U.S. immigration law."

Of course, this is only a sample. The precise language of any provision in a definitive agreement should be negotiated and drafted to fit the facts of the particular transaction, the status of the particular employees at risk of losing immigration status, and the current law and guidance with respect to qualifying as a successor-in-interest.

Immigration law is a sometimes Byzantine maze of statutes, regulations, policy guidance and field memoranda. This article has only provided a brief overview of certain issues that arise in a merger or acquisition of a company that employs foreign nationals. Ideally, immigration counsel would be brought in well ahead of closing to thoroughly evaluate whether any pitfalls exist for the acquiring company and how to preserve some of the most valuable assets of the acquired company – its

employees.

1. A detailed list of recent ICE investigations and prosecutions can be found at: www.ice.gov/pi/news/factsheets/worksite_cases.htm.
2. Immigration and Nationality Act (INA) § 274A(b)(1)(A); 8 CFR 1274a.2(b).
3. 8 CFR § 274a.10(b)(2).
4. INA § 274A(e)(5).
5. 8 CFR § 274a.10(b).
6. 8 CFR § 274a.10(a).
7. INA § 214(c)(10).
8. 20 CFR § 655.730(e).
9. Memo of M. Cronin, Acting Executive Associate Commission, Program, HQPGM 70/6.2.8 9 (June 19, 2001), reprinted in 78 Interpreter Releases 1108-17 (July 2, 2001).
10. 8 CFR § 214.2(l)(7)(I)(C).
11. PERM FAQ, Round 10 (May 9, 2007), available at www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-9-07.pdf.
12. 20 CFR § 65.11(b).
13. Id.
14. § 106(c) of the American Competitiveness in the Twenty-First Century Act of 2002 (AC21); See also BCIS Memorandum, "BCIS Guidance on AC21 Applicability to Concurrent Filings/Revoked I-140s" (August 4, 2003).
15. USCIS, Adjudicator's Field Manual (AFM) § 22.2(b)(5).
16. *USCIS Says 'All or Nothing': Latest Developments on Successor-in-Interest.* S. Ellison and P. Hejinian, AILA Immigration and Nationality Law Handbook 93 (2008-09).
17. INA § 214(c)(10).
18. Adapted from an excellent article by Angelo A. Paparelli, *Assuage Therapy: Enticing M&A Lawyers to Help with Immigration Successorship*, AILA Immigration & Nationality Law Handbook 39 (2007-2008 ed.).

Links

Richard Salamy's Bio

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