Snell & Wilmer

Immigration Issues in Mergers and Acquisitions

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Introduction

Given the current atmosphere in which the Department of Labor ("DOL") and Immigration and Customs Enforcement ("ICE") are monitoring, auditing and raiding companies, corporate clients must proactively and properly address I-9 compliance and foreign employees' visa issues whenever they merge with or acquire other companies.

I-9 Forms

Examining a target company's I-9 forms is necessary for two reasons.

1. Counsel must identify vital information about the target company's workforce such as expiration dates of foreign employees' nonimmigrant visas, employment authorization cards, and other immigration-related documents.

2. Counsel must review a target company's I-9 forms in order to give the acquiring company an opportunity to assess the degree to which the target company has complied with its I-9 obligations and to determine what, if any, potential liabilities exist for noncompliance.

Check Whether I-9 Forms Exist for All Employees

- A company must maintain an I-9 form for all employees hired after November 6, 1986.
- After the employment relationship is terminated, the I-9 must be retained either for three years after the date of hire or for one year after the termination date, whichever is later.
- The company must re-verify the employment authorization of rehires. Also, the company must complete a new I-9 form if the rehire returns to work more than three years after the original hire date.

Check Whether the I-9 Forms Are Properly Completed

- If there are errors on the I-9 forms, counsel must analyze the nature of the errors and determine whether a claim of good faith and/or substantial compliance can be made notwithstanding the errors.
- "Good faith compliance" is a defense to allegations of hiring unauthorized aliens.
- "Good faith compliance" may be established by demonstrating that the company has and follows I-9 policies ensuring that the company correctly and timely verifies employees' work authorization.

Assess Potential I-9 Liabilities

The federal government may impose the following penalties for non-compliance with I-9 regulations:

- Civil penalties for paperwork violations. Penalties for failure to fill out and maintain I-9s correctly can range from $110 to $1,100 per each defective I-9 form.
- Civil penalties for employment of unauthorized aliens. Penalties can range from $375 to $3,200 per alien for the first offense; $3,200 to $6,500 per alien for the second offense; and from $4,300 to $16,000 per alien for the third or subsequent offense. These penalties apply to the initial hiring and continued employment of an unauthorized alien.
- Compliance and remedial orders. Liability will depend on whether or not the target company is subject to any such orders.
- Criminal Penalties. Penalties may be imposed in cases involving a pattern or practice of I-9 violations. “Pattern or practice” means regular, repeated, and intentional activities. Criminal penalties can include fines of not more than $3,000 for each unauthorized alien, imprisonment of not more than six months, or both for the first and subsequent offenses.

Assess Potential I-9 Liabilities

In addition to these criminal penalties, recent ICE audits and raids have shown that the federal government can bring against companies additional criminal charges, including but not limited to:

- Felony harboring of unauthorized aliens;
- Encouraging unauthorized aliens to enter or remain illegally in the U.S.;
- Money laundering; and
- Criminal activities under the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

H-1B Temporary Workers

Several items involving H-1B workers must be reviewed during the due diligence analysis. Each of these areas is identified and explained below.

H-1B: Labor Condition Application (LCA) Files

- Determine whether public access files have been properly maintained for all H-1B employees. These files must be retained one year beyond the LCA period or, if a complaint is filed, until a determination is rendered regarding the complaint.
- Compare payroll records against the wage listed on the LCA form to verify wage compliance. Payroll records must be retained for a minimum of three years.
- Check the adequacy of other records in the LCA public access file, e.g., posting notices, actual wage memoranda, prevailing wage documentation.
- Confirm whether H-1B nonimmigrant workers have been provided with copies of the certified LCAs pertaining to their H-1B petitions.
- Assess potential penalties for noncompliance.
- Prepare DOL-compliant LCA acquisition memorandum.

H-1B Dependency

- H-1B dependent employers are subject to additional attestation requirements.
- Thus, it is important to determine:
  (1) Whether the target company is H-1B dependent, and
  (2) After the merger or acquisition occurs, whether the successor company will be H-1B dependent.

H-1B Dependency

An employer is H-1B dependent if it:

- Employs 25 or fewer fulltime equivalent employees, more than 7 of whom are H-1B beneficiaries;
- Employs 26 to 50 fulltime equivalent employees, more than 12 of whom are H-1B beneficiaries; or
- Employs at least 51 fulltime equivalent employees and employs a number of H-1B beneficiaries that is equal to at least 15 percent of the total number of fulltime equivalent employees.

Amended H-1B Petitions

Situations that require the filing of a new or amended I-129 H-1B petition include:

- A material change in the terms and conditions of employment.
- A change from one specialty occupation to another.
- A change in the place of employment to a location not covered by the LCA.
- A situation in which a new LCA must be filed.

L-1 Intra-company Transferees

To determine whether an amended L-1 petition must be filed, two fundamental questions must be answered.

1. Will a change occur in the qualifying intra-company relationship?
2. Will there be a change in the capacity of employment (i.e., from a specialized-knowledge to a managerial position or vice versa)?

If the answer to either is “yes,” an amended I-129 petition must be filed.

L-1: Blanket Petitions

- Foreign workers covered by Blanket L petitions can transfer from one named entity to another without the need for filing an amended I-129 petition, provided that they retain their original capacity as a manager, executive, or specialized knowledge professional.
- Amending a Blanket L petition to reflect changes in the list of qualifying entities will help the company avoid the need for filing amended petitions for individual L-1 employees.

E Treaty Traders and Investors

- With the E-1 and E-2 visa categories, the key issue is determining the nationality of the owners of the surviving entity.
- Unless the surviving entity shares the same treaty nationality as the individual E visa holder, eligibility for E treaty visa status will disappear.

Employment-based Green Card Cases: Labor Certification

- Mergers and acquisitions often result in layoffs and workforce restructuring.
- Any layoffs in the geographic area and occupational classification in which a green card applicant works may prevent the company from filing new PERM labor certification applications for at least six months after layoffs occur.

Employment-based Green Card Cases: I-140 Immigrant Petitions

The USCIS published a memorandum explaining that a successor employer may serve as the successor-in-interest to its predecessor's I-140 immigrant petitions if three criteria are satisfied.

1. The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification;

2. The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL, and;

3. For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Employment-based Green Card Cases: I-485 Adjustment-of-Status

- Section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2002 ("AC21") established the concept of "green card portability." This law provides that an approved I-140 immigrant petition for a foreign national whose I-485 adjustment-of-status has been pending for 180 days or more shall remain valid if the alien changes jobs or employers, so long as the new job is in the same or similar occupation described in the approved I-140 immigrant petition. In this scenario, the successor employer would not have to file a new PERM application or I-140 immigrant petition for the foreign employee, and the foreign employee would not have to file a new I-485 adjustment-of-status application.
- If "green card portability" applies, we must determine whether employees with pending I-485 applications have obtained Employment Authorization Documents ("EADs").
- However, if "green card portability" does not apply, the successor employer would have to start the employment-based green process anew.

Conclusion

- Mergers and acquisitions require due diligence not only in connection with corporate, business, and tax issues but also with I-9 compliance and immigration issues. Corporate counsel must notify immigration and I-9 compliance counsel as far in advance as possible of any merger or acquisition so that the client obtains complete advice about the consequences of any proposed corporate restructuring.