6 Main Workplace Immigration Considerations During M&A Transactions

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Whether your organization is involved in the purchase of a company, a merger of corporate entities, or the spinoff of a business unit into an entirely new company, an often-overlooked aspect is taking the proper steps to ensure continued immigration compliance for your organization and your foreign-national employees. But by prioritizing immigration during your next M&A transaction, you can ensure at least one aspect of your deal's success. This Insight presents a recap of the six main considerations you should take into account during such a deal.

Analysis Required for Employee Immigration Sponsorship and Recordkeeping

The immigration impact on an individual worker will vary greatly depending on the nature of the corporate restructuring that is taking place. In some instances, you must repeat all aspects of an employee's sponsorship, for both immediate employment authorization, and Lawful Permanent Residence purposes. In other situations, no action is needed whatsoever. This is all depending on what kind of transaction is being undertaken.

You must consider some basic questions in order to figure out the correct approach. Has an actual change in corporate structure occurred beyond a simple change in company name? Is the resulting entity a legal successor-in-interest to a prior entity? Was a transaction effectuated through a stock purchase, an asset purchase, or another sort of agreement? Ideally, you will have these questions answered — and necessary corresponding actions taken — before the close of a deal.

6 Main Considerations

Generally, an employer with foreign-national personnel must evaluate the following six categories of immigration sponsorship as part of M&A planning and due diligence:

1. **H-1B Nonimmigrant Employees**

   H-1B is a category of nonimmigrant visa and employment authorization allowing for the temporary employment of a professional worker in a role deemed to be a "specialty occupation" by U.S. Citizenship & Immigration Service (USCIS). You may suddenly find yourself with new H-1B employees by acquiring or merging with an existing business. Under the law, the resulting entity must sponsor all H-1B workers through a "New Employment" petition filing with USCIS

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Depending on the size of the employee population, this could result in thousands or even millions of dollars in associated costs.

This is avoidable, however, if you accept the rights, liabilities, and obligations of the preexisting H-1B sponsorship, as successor-in-interest. If the employees' roles, compensation, and work locations remain the same, all that a new employer must do is complete a special memorandum commemorating the transaction for inclusion in each worker's H-1B Public Access File. If the memorandum is placed into each file prior to the close of the deal, new sponsorship is not necessary.

2. **L-1 Nonimmigrant Employees**

L-1 is another category of nonimmigrant employment for workers who have transferred to the U.S. from an overseas office with a qualifying corporate relationship, such as a foreign affiliate, subsidiary, or parent company. Generally, employers must file amendments with USCIS for newly acquired employees who are present in the U.S. using an individually sponsored L-1 visa. There is no option to achieve this through the drafting of a memorandum, as is possible in the H-1B context.

Amendments may not be needed, for workers who have entered the U.S. pursuant to a "Blanket" L-1 petition, provided the acquiring entity updates its own corporate Blanket L-1 petition to include newly added qualifying entities. Situations will vary, and for affected workers, employers must review its existing Blanket L-1 petition approval in light of the specific nature of the corporate transaction, to determine whether any action is needed.

Another important consideration for L-1 workers relates to the scope of a corporate transaction. If an acquiring employer has only purchased the U.S. entity of a global organization but not the overseas offices, this may sever the qualifying corporate relationship used as the basis of an employee's L-1 sponsorship. In certain instances, an acquiring company's sponsorship and continued employment of affected L-1 workers will not be possible. In other cases, continued L-1 sponsorship and employment will indeed be possible, provided the acquiring employer can demonstrate that it maintains overseas offices, even if different from the entities with which L-1 workers gained their qualifying experience.

3. **PERM Labor Certification**

When an employer sponsors a foreign national worker for Lawful Permanent Residence (i.e., "green card") status, they must perform an initial labor market test to demonstrate the non-availability of U.S. workers. This application process, overseen by the Department of Labor, is commonly known as "PERM." It often requires months of advance preparation before an application is formally submitted.

The M&A implications for PERM candidates will depend on whether an application is still in process, filed and pending with the Department of Labor, or fully certified and approved. If you

process, [illegible] acquire a worker for whom the PERM process is already complete, in most cases there is no need to repeat any efforts. You can proceed to subsequent phases of the employee's green card sponsorship based on the predecessor entity's application. This will likely hold true for applications that are both filed and pending, and those that are approved.

On the other hand, if a PERM application is still in its preparatory stages and not yet submitted with the Department of Labor prior to the close of an M&A transaction, you must assess whether the application must be started anew.

4. **I-140 Immigrant Petitions**

   An I-140 is another application made in the sequence of an employee's green card sponsorship. It is intended to demonstrate their qualifications for the offered permanent role and the employer's own need for their services.

   An acquiring entity normally must file an amended I-140 to prove its successor in interest relationship with the original sponsoring employer. Such a filing will demonstrate to USCIS that you meet the conditions of the underlying PERM application in offering employment in the same or similar position and at the stipulated rate of pay.

5. **I-485 Applications for Adjustment of Status**

   This is the final application in the U.S. green card process. It is submitted by a sponsored employee as a request to convert their temporary, nonimmigrant status into Lawful Permanent Residence status. If an employee's I-485 has been pending with USCIS for 180 days or more, then the case becomes "portable" to another employer and is not limited to a successor in interest employer. In instances of I-485 portability, an applicant/employee must submit certain paperwork to notify USCIS of the change in employment. Aside for this, though, no steps in the process must be repeated.

6. **I-9, Employment Eligibility Verification**

   The I-9 process is required for all employment in the U.S. to ensure that a candidate is properly authorized to work. The Form I-9 is itself deceptively brief – only two pages – but these are accompanied by more than 50 pages of government instructions. It is very common for employers to maintain I-9 files that are incomplete, incorrect, or otherwise deficient.

   Where new employees are acquired due to M&A activity, you have the option of either assuming maintenance of the workers' existing I-9s (and related liabilities), or undertaking to complete new Forms I-9 for all acquired employees. The better of these options will depend on factors such as the size of the population acquired, the state of the existing Forms I-9s, and your tolerance to risk and cost.

   During due diligence efforts in advance of M&A activity, you must ensure that predecessor entities have maintained proper practices and recordkeeping. Any shortcoming in these areas

entities have maintained proper practices and recordkeeping. Any shortcoming in these areas can expose you to significant liability, or at the very least the administrative burden of reviewing and correcting incomplete compliance files.

Additional Considerations

All organizations maintain their own, unique policies and practices for employee immigration sponsorship and related compliance. After M&A activities have been completed, a successor employer must evaluate their corporate polies and try to blend, or even "grandfather" where appropriate, benefits provided by a predecessor entity to acquired workers.

An acquiring entity must also take steps to combine compliance practices and files — most notably for I-9s, and H-1B Public Access Files — into one coherent system. Ideally, you would conduct an internal audit in these areas either during pre-transaction due diligence or once a transaction is closed.

Conclusion

Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information on these topics. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Immigration Practice Group.

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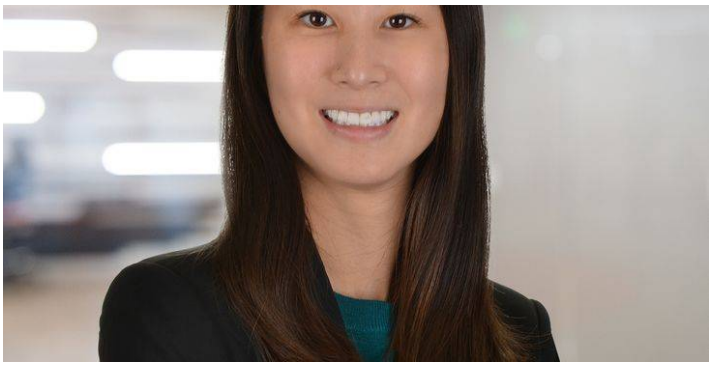

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