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M&A AND IMMIGRATION

DEALS CAN AFFECT KEY WORKERS' VISA STATUS, YET IMMIGRATION COMPLIANCE REMAINS AN OFTEN OVERLOOKED ASPECT OF M&A DUE DILIGENCE

BY MARK IVENER

THE FOCUS OF MUCH PRE-MERGER DUE DILIGENCE IS on big-picture considerations, notably financial risk and analysis; however, most deals that falter or lose value following a merger do so because of finer details, such as human resources issues. This includes the frequently overlooked area of immigration compliance, which has become critical in today's global market.

Whether through a merger, acquisition, asset sale, stock sale, joint venture or spinoff, changes in corporate structure without adequate immigration due diligence can have serious repercussions as pivotal workers, essential to the corporation's success, are no longer valid "legal aliens."

For example: A French company has a U.S. division whose president is a French national here on an E-2 investor visa. (This type of visa is granted under commerce treaty provisions, where the foreign company makes a substantial at-risk capital investment in a bona-fide business in the U.S.) A U.S. company then acquires the French company. Post-deal, the president's visa is no longer valid because the company is no longer French-owned. Traveling on the visa could be classified as entry fraud or, at a minimum, unauthorized employment.

In another example, the president of a subsidiary of a foreign company is in the U.S. on an L-1A intracompany transferee visa. (This visa is issued to executives who have worked for a foreign company for at least one year before being transferred to a similar position with a U.S. parent, branch, subsidiary or affiliate company.) After an acquisition, the employing company is no longer a subsidiary. Therefore, the visa is no longer valid, making the employment unauthorized in the eyes of the U.S. Citizenship and Immigration Services, or USCIS, formerly the INS.

In addition to the headaches for their companies, both of these individuals may suffer long-term consequences of violating immigration rules. Visa applications ask whether the applicant has ever violated a previous status or committed a willful misrepresentation upon entry to the U.S.

Including immigration status and compliance as part of a comprehensive due diligence analysis can not only streamline the closing process, but also minimize the company's exposure to potential risk resulting from noncompliance with federal immigration regulations.

So what is the most strategic and organized way to go about acquiring the information? What data should you gather?

Proper due diligence should first include gathering a thorough list of all employees of the target company, verifying that all I-9s (the employment eligibility verification form) are duly completed. The immigration status of all nonimmigrant workers will need to be reviewed and—depending on the structural organization of the company post-deal—amended, or entirely new petitions will need to be filed with USCIS.

Companies should undertake a comprehensive analysis of ownership and structural changes. Changes in the company's name, tax ID number, job duties and other factors could immediately invalidate a foreign executive's employment authorization. It's critical to plan for these changes before the deal is done.

A new or amended H-1B, a category of visa for professionals who have a university degree, need not be filed if the nonimmigrant worker is employed by the same legal entity, defined under immigration regulations as "where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner." Other nonimmigrant visa holders, including O-1 (granted to people of extraordinary ability in the arts, athletics, sciences, education, business or motion picture or television industry) and TN visas (granted to Mexicans and Canadians under NAFTA), could fall under the "related or successor employer" umbrella, but they will more than likely be required to file new petitions.

The necessity of filing a new L-1 visa petition used extensively by multinational companies transferring qualified executive, managerial or specialized workers to U.S. company branches and affiliates or the parent company, hinges upon two factors: changes in the qualifying relationship between the U.S. enterprise and the overseas entity as well as changes in the capacity of employment of the worker. A similar analysis of the qualifying organizational structure post-merger must be conducted in E-1 and E-2 treaty visas as the "nationality" of the employer

as well as job classification determines the immigration status of the foreign worker.

When dealmakers think of M&A due diligence, immigration issues are not foremost on their minds; however, such issues can significantly affect the deal and the resulting value of the company. With market forces driving the rise in both the number of corporate reorganizations and the hiring of important foreign workers, companies would be well advised to address the immigration considerations of a deal far in advance of closing the transaction, preferably during evaluation and analysis. A thorough due diligence process should uncover and resolve early on visa and work permission matters of corporate executives and key workers, ensuring a smooth transition to the new company. ■

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