

IMMIGRATION LIABILITY CAN ARISE FROM MERGERS AND ACQUISITIONS

by ROBERT F. LOUGHRAN

In the current economic downturn, some Texas lawyers are helping their clients take advantage of opportunities to merge with or acquire another company. But counsel need to remember that acquiring another company's work force means acquiring liability for any faulty employment verification compliance practices of the acquired entity. Failure to prioritize immigration-related matters during due-diligence review can create significant problems for the surviving entity.

Mergers and acquisitions can affect the visas held by foreign national employees who work in the United States. They can also result in civil and criminal liability for the resulting company, its officers and its managers, should those individuals know about immigration-related legal issues and fail to take immediate action.

Several factors affect a company's immigration-related liability following a merger or acquisition, including change in corporate structure, the types of employment-based visas employees hold, and the stage of visa processing for those employees who have applied for a new or extended visa. Over the past few years the risk of criminal consequences, civil liability and media exposure has spiked should immigration-related compliance failures come to light.

In 1986, Congress passed the Immigrant Reform & Control Act, which created sanctions for hiring foreign nationals not specifically authorized to work in the United States. Certain corporate structural changes can trigger obligations to re-verify the employment authorization of one or more workers.



However, an exemption to the re-verification requirement exists for circumstances involving employees who are "continuing employment." An employer who continues to employ some or a previous employer's entire work force in the case of a merger may qualify for this exception. But to qualify, the successor entity must accept full responsibility and liability for all Forms I-9 completed by the predecessor employer.

This exception does not shield the new employer from civil or criminal liability associated with the historic Form I-9 violations acquired when accepting the pre-existing Forms I-9 of different predecessor employers. Therefore, lawyers should audit the employment verification records of all companies involved in an acquisition or merger to assess the level of compliance and to determine potential exposure to civil and criminal penalties. If gained in the early stages of a merger, such knowledge can help

lawyers structure certain aspects of the deal. It also may affect acquisition pricing.

According to an April 30 press release, Immigration and Customs Enforcement (ICE) will focus its resources in work-site enforcement to increase the imposition of criminal sanctions against employers who knowingly, either actually or constructively, hire or retain unauthorized workers. Company managers, executives and owners now have added incentive to ensure that Form I-9 verification and audits are properly conducted in the wake of increasing attention to work-site compliance. The April 30 release noted that the number of work-site immigration raids has increased, and more sanctions — criminal and civil fines and debarment (denying the employer's request for certain certifications, which excludes the employer for sponsoring employees with those visas) — are being brought against employers who hire unauthorized workers.

The release also noted that the number of administrative and criminal arrests associated with work-site enforcement has grown exponentially each year since the Department of Homeland Security and ICE were created in 2003. Since fiscal year 2002, the Immigration and Naturalization Service (part of which later became ICE) and ICE have made more than 5,000 administrative arrests for immigration violations and made approximately 1,000 criminal arrests in connection with work-site enforcement investigations during this period.

During these raids, ICE agents have arrested unauthorized employees and their employers. In a program summary released on March 25, ICE identified that its strategy has evolved into a practice of "working up the chain," which involves investigating

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work sites and detaining ground-level workers to collect evidence to build a case against higher level employees and, ultimately, the employer.

An ICE strategy paper published April 30 declared "ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire (or continue to employ) illegal workers in order to target the root cause of illegal workers." According to an April 30 ICE fiscal year 2008 fact sheet, more than 130 of the arrests made in 2008 included owners, executives, managers, supervisors, and/or human resources employees on criminal charges ranging from conspiracy to harbor illegal aliens for profit; harboring illegal aliens for profit; conspiring to commit document fraud; aiding and abetting document fraud; aiding and abetting aggravated identity theft; and bank fraud.

Sarbanes-Oxley Act

The Sarbanes-Oxley Act of 2002 requires employees of publicly traded companies to disclose information regarding practices that may violate any rule or regulation of the U.S. Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders, including immigration-related exposure. The act also obligates publicly traded companies to provide confidential procedures through which employees may express these concerns to a federal regulatory or law enforcement agency or someone

within the company with supervisory power or authority to investigate and discipline misconduct. Moreover, the act requires an articulated compliance regime from each corporation regarding its work-authorization verification.

Evaluating the employment authorization statuses of all employees and conducting an internal Form I-9 audit before a merger or acquisition uncovers outstanding liability. That permits lawyers to quantify liability and mitigate it to the fullest extent possible prior to the corporate change.

Lawyers should verify that an audit has occurred encompassing the Employer Eligibility Verification Form I-9 of each employee to evaluate the potential liability being acquired and to mitigate any errors to the full extent possible under the law. In today's global labor environment, where increased civil and criminal liability is at stake, Texas managers and their advisers must elevate the level of scrutiny applied to immigration compliance as part of the initial due diligence in any merger or acquisition. ■■■

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