The Immigration Implications of a Mergers & Acquisitions Transaction

Buyer's Perspective and Considerations

BY NATHALIE GOTTSCHALK, ESQ.

So your client wants to acquire another company, has solicited your legal expertise in performing the due diligence and consummating the corporate transaction. The vetting process is the most important step you are undertaking on your client's behalf, as it involves issues in contract law, employment, intellectual property, financial and business law, to name a few. Immigration issues are seldom topics that corporate lawyers consider in a Mergers & Acquisitions (M&A) transaction, but they should not be overlooked (particularly given recent shifts in immigration policy). Current U.S. immigration laws pose certain challenges to small and big corporations thinking of merging or acquiring other companies. How do you anticipate immigration issues as part of due diligence activities connected to a typical M&A transaction?

Immigration issues will likely emerge when you are reviewing ownership structures and employment matters. Foreign nationals working in the U.S. are often highly skilled and essential to the continued operation of a business, and the acquiring entity is counting on retaining them. Sometimes, founders or corporate officers that the acquiring entity is locking into multi-year employment agreements are employed under the umbrella of specific visas.

Work visas are typically issued to a foreign national who is working for a specific U.S. entity, at a specific work location, for a determined period of time, and has a predetermined salary and job duties. If any of these terms of employment change, it could affect the employee's immigration status and eligibility to work in the U.S., and in extreme cases, the employee may have to leave the country immediately! Any corporate restructure or change in employment terms can also negatively affect the employer

continued on page 16

continued from page 15

The Immigration Implications of a Mergers & Acquisitions Transaction

if it fails to take steps to comply with immigration laws, exposing your client to government fines and causing serious work interruptions in all levels of its corporate hierarchy.

I-9 Compliance

The first step in determining to what extent the M&A transaction will affect the company's employees is to do a thorough examination of the I-9 and employment records of each employee of the acquired entity. Most foreign nationals will be affected in some way or another after the transaction is completed, so the first step would be to identify all foreign nationals. Some of them will have a work authorization, others a work visa. Once all those employees are identified, counsel determines which foreign employees would be affected by the change of ownership by asking:

- Are there any latent liabilities for technical or past violations by the entity?
- What is the extent of the acquiring entity's exposure to such violations?
- What are the corrective measures to limit or mitigate such violations?
- And is the purchaser willing to assume any liability or costs related to certain highly skilled workers, or should these costs be passed on to the seller?

Changes in Ownership Structures

Certain workers are eligible to work temporarily in the U.S. based on their country of citizenship, and nationality and ownership structure of the U.S. employer that sponsors them. For instance, an individual holding an L1 visa category (Intra-Company Transferees) can work in the U.S. if he or she holds an executive or manager position (INA § 101 (a) (44) (A)), or has some kind of specialized knowledge (INA §101(a)(15)(J)) needed for the U.S. employer. The U.S. employer must demonstrate that the employee has worked for a subsidiary, affiliate, branch or parent company of the U.S. employer abroad for at least one year within the last three years of applying for such a visa (see generally 8 C.F.R. §214.2(l)). In this situation, the employee's visa eligibility is dependent on the corporate relationship between the company in the U.S. and the entity abroad. If this corporate relationship is severed after a merger or acquisition, the employee's L status in the U.S. is therefore invalidated, and employees working under an L status must depart the U.S. immediately.

Ultimately, immigration law and compliance can no longer be overlooked by decision-makers when making an acquisition.

Changes in ownership can also affect those employees who are working in the U.S. on an E treaty trader or investor visas whose eligibility depends on the nationality of ownership of the company that sponsored them. E-1 or E-2 visas are given to executives, managers, supervisory employees or individuals possessing skills that are essential to the operation of the U.S. enterprise and are the result of treaties and bilateral agreements between the U.S. and qualifying treaty countries. 8 C.F.R. §214.2(e). If the U.S. employer is at least 50 percent owned by citizens of a treaty country, the employee may qualify for an E visa, as long as the employee has the same nationality of the treaty ownership (See 22 C.F.R.§41.51(a)(2) and (b)(2)). If the sponsoring entity merges or is acquired, one must consider the nationality of the new entity after the M&A transaction is complete. If the nationality of the entity has changed, all employees holding an E-2 or E-1 visa must depart the U.S. immediately.

Changes in Employment Terms and Conditions

As a result of an M&A transaction, changes in the workforce are inevitable, as your client is likely to restructure its departments and workforce to fulfill its needs and management styles. Therefore, any decisions to terminate/lay off, promote, demote, transfer, relocate or change the duties of a specific foreign employee must be carefully considered after determining his or her immigration status.

If the M&A transaction is only for the assets of the targeted company, certain long-time employees, managers, supervisors or individuals who have acquired essential skills or have a specialty occupation are usually considered an asset that the acquiring entity wishes to retain. However, acquiring these employees also requires assuming liability for any filed Labor Condition Applications (LCA), any prior violations of the targeted company, posting of notices, record keeping and many other compliance requirements related to immigration. The U.S. Department of Labor requires that the employer, as successor-of-interest, complies with posting notices, keeping records and maintaining a public access file in accordance with 20 C.F.R. § 655.730. It also requires the success-of-interest to attest that it will pay the employee at least the prevailing wage for the specific occupation in that region and that it will notify immigration authorities in the event of a layoff or termination of that employee. In case of a layoff or termination, the acquiring entity must pay the employee's travel expenses back home. See 20 C.F.R. § 655.731 – 655.734.

One category of employees to which the above requirements would apply are those holding temporary visas such as H-1B, reserved for professional employees in a specialty occupation (INA §101(a)(15)(H)(i)(b)(1)), nationals of Singapore and Chile working under a H1B1 visa and Australian nationals covered under a E-3 visa, a variant of H-1B workers (INA §101 (a)(15)(E)(iii)).

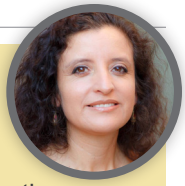
U.S. employers who employ foreign workers under the above visas are required to amend their application on behalf of the employee with the immigration authorities if there are substantial changes to the terms of employment that may affect the eligibility of the foreign worker to remain in the U.S. under that visa program. Those changes are likely to occur in an asset-based transaction.

For example, a change in the terms of employment takes place when the employee is assigned to work in a different location outside the metropolitan area that was initially disclosed in the LCA and certified by the U.S. Department of Labor. Another substantial change in the terms of employment takes place when the employer modifies the employee's duties from one occupation to another or if there is a substantial change in salary or worked hours that materially change the terms and conditions of employment from what was originally filed in the LCA and the H-1B petition.

Your client may also be required to file new visa petitions for employees with TN visas (NAFTA professionals see 8 CFR §214.6(c)) or L1 visas, as already discussed, as well as P and O visa categories, which cover athletes, artists, entertainers and individuals of extraordinary ability in the sciences, arts, education, business or athletics. 8 CFR § § 214.2 (p) and 214.2(o), respectively.

There is no clear-cut line as to what constitutes a substantial change in the terms of employment. Therefore, the best practice for counsel involved in M&A transactions is to protect its client by performing a pre-closing immigration due diligence. First, identifying the foreign national employees, then determining whether the acquiring entity will continue employing those employees and be willing to attest all conditions expressed in the LCA, if applicable, and finally determining whether any changes in terms of employment would require the amendment or re-filing of the non-immigrant or immigrant petition of each of those employees.

Ultimately, immigration law and compliance can no longer be overlooked by decision-makers when making an acquisition. The good news is that you are now aware of the possible immigration implications of merger and acquisition transactions and will be able to guide your client accordingly, ideally involving an experienced immigration law practitioner, if necessary. **NL**



NATHALIE GOTTSCHALK has her own law practice concentrating in the areas of corporate immigration law, including non-immigrant visas, employment-based corporate immigration and family-based immigration. She can be contacted at lawyer@gottschalk.us or at (702) 308-6805.

JAMS Las Vegas welcomes

Hon. Peggy A. Leen (Ret.)

United States District Court, District of Nevada

jamsadr.com/leen

JAMS Las Vegas
Resolution Center
3800 Howard Hughes
Parkway • 11th Floor
Las Vegas, NV 89169

Conducted 900+ settlement conferences and early neutral evaluations and handled case management, discovery and non-dispositive motions during 18 years on the bench; also litigated complex, multi-party matters as a trial lawyer for two decades

Known as an effective settlement judge with a firm grasp of the facts and applicable law; known for innovative approaches and ability to handle emotionally-charged, difficult cases

Available as an arbitrator, mediator, special master and neutral evaluator in disputes involving **business/commercial, civil rights, employment, insurance, intellectual property, personal injury/torts** and **professional liability** matters

Contact Case Manager Mara Satterthwaite at 702.835.7803 or msatterthwaite@jamsadr.com.

Local Solutions. Global Reach.™

JAMS®