

Corporate Restructuring & Immigration Compliance: Mergers & Acquisitions Checklist

To properly advise companies and their board of directors and effectively negotiate a corporate restructuring, merger and acquisition (M&A) or similar transaction, the due diligence process should include an early assessment of the targeted company's immigration compliance and foreign workforce status.

There are various forms of corporate restructuring. For the purpose of this checklist, we assume one of the most common scenarios: Company A acquires all of Company B, Co. B's employees become employees of Co. A, and Co. B ceases to exist.

The due-diligence checklists below will assist with this process and should be executed concurrently with engaging immigration counsel with experience in immigration business matters and corporate restructuring

Immigration-related Due Diligence checklist

- Confirm that transaction documents have a "Successor-In-Interest" clause for immigration purposes (*see recommended language below*) and facts to support this structure.
- Determine anticipated date of closing.
- Confirm the future FEIN associated with the foreign nationals sponsorship.
- Obtain a list of all employees who have employer-sponsored work authorization status (nonimmigrant and immigrant visa sponsorship): employees visa category, work authorization expiration date, job title, salaries, work locations.
- Conduct case-by-case legal analysis to confirm work eligibility of all impacted employees and identify actions to be taken to facilitate transfer of personnel.
- Determine visa portability of key personnel (e.g., certain L-1 visa holders).
- Confirm H-1B visa "max out" dates and determine whether the acquiring company may continue leveraging "Post-6th Year H-1B Extensions" for the employees, and plan petition timeline.
- Confirm each worker will continue to be paid a salary that is at least the amount reflected in LCA.
- Analyze all Public Access Files (PAFs for H-1Bs), assess compliance level and take action to bring to compliance, if required (e.g., obtain information for sworn statement re: PAF *see more below*)
- Prepare Corporate Change Memorandum and Sworn Statement to include in H-1B Public Access Files (*see more below about this critical document*)
- Review all PERM filings and recruitment audit files for all approved and pending PERM applications.
- Identify status of employer-sponsored immigrant visa petitions (e.g., EB-1, EB-2 and EB-3 filings), including PERM Labor Certification approval dates and I-140 and I-485 filing dates.
- Prepare and file, if necessary, nonimmigrant visa amendments with USCIS, if "material job changes" occur (ex: change in work location, material change in job title and duties)

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Sworn Statement for Public Access File

This sworn statement must be executed by an official of the new employing entity. In the sworn statement, the official on behalf of the new or acquiring company is accepting all obligations, liabilities and undertakings under the labor condition applications (LCA) filed by the predecessor/target employing entity.

The statement must be in place prior to the final execution of the agreement/deal. If this statement is not done in advance, the acquiring company must file amended H-1B petitions for all H-1B workers, resulting in spending a lot of potential time, money and energy.

The statement should include, among others a list of:

- Each affected LCA number and its date of certification,
- Wage system used, and
- Guarantee of compliance with all LCA obligations.

Agreement Provisions

- Successor-in-Interest** - Consider a provision establishing that “the acquiring entity agrees to assume all the rights, duties, obligations and assets of the acquired entity necessary to carry on the business.”
- Representation and Warranties** - Consider negotiating a provision establishing that the target company has complied with all laws, including I-9, antidiscrimination and immigration.
- Indemnification** - Consider negotiating a provision where one or both parties agree to compensate the other for harm or loss arising out of the contract including immigration compliance failures.

Successor-in-Interest

Restructuring documents should include a clause relating to the assumption of immigration-related obligations and liabilities to preserve the continuity of certain immigration benefits.

It is important to establish that the surviving entity (continuing employer) is a “successor-in-interest” for immigration purposes to preserve company-sponsored immigration benefits of some employees, including the ability to avoid amended H-1B petition filings, if desired, and in some cases to preserve permanent residence work that the predecessor has completed.

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USCIS takes the position that a new company is a “successor-in-interest” for purposes of the permanent residence process if:

- the job opportunity offered by the successor is the same as the job opportunity originally offered in the labor certification;
- the successor establishes eligibility as a successor-in-interest 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 the Department of Labor (DOL); and
- the successor’s I-140 immigrant petition fully describes and documents the transfer and assumption of the ownership of the predecessor entity.

Note, for I-9 purposes it is not required to establish that the surviving entity is a successor-in-interest. The regulations broadly define a continuing employer to include “an employer who continues to employ some or all of a previous employer’s workforce in cases involving a corporate reorganization, merger, or sale of stock or assets.”

I-9 Due Diligence Checklist

- Review target company’s Form I-9s and assess compliance level and take actions, as appropriate.
- Verify there is a complete Form I-9 for each employee, as verified against payroll records.
- Determine whether to complete new Form I-9s for all employees joining the acquiring company or to assume the liabilities and obligations of the target company.
 - If completing new I-9s for acquired employees, consider whether it will cause potential workforce disruption
- Confirm the existence and obtain a copy of written I-9 policies and procedures, system of review, quality control.
- Confirm the existence of regular I-9 training and education for HR staff and related staff.
- Understand the general onboarding I-9 process:
 - New hire completion
 - Retention/storage of forms
 - Reverification (where required)
 - Document destruction (when permitted)
 - Paper or electronic form I-9s
- Consider doing a sample-audit of I-9s (paper and/or electronic) to review completeness and accuracy.
- Review I-9 support documents that have been retained and quality of those documents.
- Check that target company I-9 compliance policies and procedures align with the acquiring company’s policies and procedures and make adjustments as needed.

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- Confirm if there are any foreign workers with pending offers of employment. If so, provide offer letter(s) and application documents.
- Confirm if the target company uses independent contractors. If so, obtain a general summary of how much control the target has over these contractors.
- Has the target ever been the subject of review/investigation/audit by any government agency ie U.S. DOL/PERM? USCIS? ICE? Or others? If so, provide dates of inquiries and summary of action.

E-Verify Due Diligence Checklist

- Confirm whether the target company is enrolled in E-Verify.
- Consider if the target company will operate in a state that requires E-Verify enrollment.
- Determine if the target company should be enrolled in E-Verify.
- Consider whether the target company is or will be a federal contractor.

If the target company is enrolled in E-Verify:

- Review the company's enrollment structure and E-Verify compliance practices.
- Confirm whether the target company is enrolled in specific work sites only or the entity as a whole.
- Evaluate the company's E-Verify compliance culture.
- Discuss if there have been Tentative Nonconfirmations ("TNC") and/or Final Nonconfirmations ("FNC"). Does the company have a process for dealing with these events?
- Has the company been the subject of USCIS Monitoring & Compliance Desk Reviews?

The above is only a general outline of considerations. There are many complex legal implications that evolve from corporate restructuring, mergers and acquisitions and related events that can impose substantial risk on buyers and sellers. Reach out to an experience immigration lawyer for legal guidance.

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