CARLTON FIELDS

Mergers and Acquisitions: Seal of Approval on Work Visas

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2019 is showing to be a strong year for continued activity in the mergers and acquisitions arena. There is an uptick from a year ago this time, and surveys on the corporate side and on the private equity side continue to be optimistic for more deal flows in 2019. Such corporate restructurings raise legal issues in the employment sector. Buyers in these transactions may fail to consider the immigration issues that arise as a result of a merger, an acquisition, or even a restructuring. The Form I-9 compliance is a key concern, as is the use of E-Verify.

Furthermore, it is important to note that the sale of a company may result in any of that company's foreign national employees on temporary work visas — specific to their employer, the location, or the particular position — to lose the ability to continue to work in the United States legally. Such a sale would lead to a loss of employment authorization and leave the employees in the United States in violation of their work visa status. Additionally, the new employer cannot legally have these foreign national employees on its payroll, as doing so would violate immigration laws. The new employer would have foreign national employees working in the United States without authorization and, thus, not in compliance with U.S. immigration laws. It is important to review the transaction to determine if it is a stock purchase or an asset purchase. A stock purchase is less likely to trigger a foreign national employee's loss of employment authorization versus an asset purchase, which is more likely to prompt a loss of employment authorization among foreign nationals following any type of corporate restructuring.

To avoid an illegal employment situation and a possible decrease in the value of the corporate transaction — both of which result in a bad outcome for the buyer — it is essential to conduct due diligence of all employment authorization issues before closing a deal.

Buyers should gather information and documentation, as listed below, before the closing of the transaction and consult experienced business immigration and employment counsel to review and develop a plan to maintain work authorization through the sale of the company:

1. A list of employer-sponsored employees, those who are dependent on the seller for authorization to work and reside legally in the United States and who may lose that work authorization if no longer employed by the seller.

2. A list of immigration cases currently in process, whether on a temporary work visa or in the process of seeking permanent residence (indefinite employment) in the United States via the U.S. Department of Labor (DOL), the U.S. Citizenship and Immigration Services (USCIS), or the U.S. Department of State (DOS). The most likely work visas buyers would encounter are as follows:
   a. E-1 and E-2 Treaty Trader and Treaty Investor Visas are premised on a treaty between the United States and the foreign national employee's home country. The U.S. company must be at least 50 percent owned by nationals of the foreign country, and thus a restructuring may render the E-1 or E-2 visa unavailable to the foreign national employee.

   b. L-1 Intracompany Transferee Visa is based on a qualifying relationship between the U.S. company and the foreign company for which the foreign national employee worked for one full year before the employee's transfer to the United States. If the corporate restructuring does not include the foreign company, then the L-1 visa may be lost.

   c. TN Professional Visa is premised on the North American Free Trade Agreement (NAFTA) provisions for temporary work visas for certain professionals to work in the United States for a specific employer, and thus any corporate restructuring would require a new TN application

   d. H-1B Specialty Occupation Visa is widely used for professionals working in the United States for a specific employer. To keep the foreign national employee whole in corporate restructurings involving a stock or asset purchase or hybrid arrangement, the buyer may need to step into the shoes of the seller and provide a sworn statement to accept the immigration obligations and liabilities of the seller. Otherwise, it is recommended that the buyer process a new H-1B petition for the foreign national employee. This is especially recommended where the buyer may make material changes to the H-1B employee's work site or job duties.

3. A listing of any foreign national employees working for the company under the H-1B visa and a copy of the corresponding Public Access File (PAF) for that H-1B employee.

4. A sampling of I-9 files for each and every location of the seller's work site and the copies of the supporting documents, if it is the seller's I-9 practice to keep such copies.

Gathering and reviewing all of the above documents, and developing a plan of action to maintain immigration compliance before any final corporate restructuring, will enable the buyer to protect itself. Today's administration is focused on audits, investigations, and enforcement. And with the continued rise of mergers and acquisitions, caution in due diligence of immigration matters will benefit both the buyers and their acquired workforce.

Related Practices

Immigration Planning and Compliance
International