

Cross Your T's and Dot Your I-9s During an M&A Transaction

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In a merger, acquisition, or reorganization of any business, transactional lawyers have an obligation to review a critical area to avoid serious consequences to the acquiring company: immigration issues and, specifically, Form I-9s.

Federal law requires that employers verify the employment authorization of all employees, citizens and noncitizens alike, by completing U.S. Citizenship and Immigration Services (USCIS) Form I-9 ("Employment Eligibility Verification," revised July 17, 2017) for each employee at the time of hire. The form is used to verify an employee's identity and work authorization.

Examining I-9s of the acquired company is important for a variety of reasons, namely: (1) the information on the I-9 provides an overview of the acquired company's workforce; and (2) a review of the I-9 will reveal the acquired company's compliance with federal law and the company's internal I-9 policy and program, if any. This review will enable the acquiring company to determine if it is assuming potential liabilities for noncompliance resulting in severe monetary fines, and possibly criminal penalties.

The USCIS permits employers who have acquired another company or who have merged with another company to treat employees who are continuing their employment with the related, successor, or regionalized employer as:

- New hires, and thus the acquiring employer must complete a new I-9; or
- Continuing in employment, and thus the acquiring company must obtain and maintain the previously completed I-9.

Employers choosing to complete a new form may do so before the merger or acquisition takes place as long as the acquiring employer has offered the acquired employee a job and the employee has accepted the offer. The employee must complete Section 1 of the form no later than the first day of employment, and the employer or the authorized representative must complete Section 2 of the

form within three business days thereafter. Employers should enter the effective date of the acquisition or the merger as the date the employee began employment in Section 2 of the new I-9.

Employers choosing to keep the previously completed I-9 accept responsibility for any errors or omissions on those forms. Employers should therefore review each I-9 with the employee and update or reverify the employee's information as necessary and legally required. Typically, 50 to 70 percent of a company's paper I-9s have some kind of error. Common errors are either paperwork errors (e.g., no dates, no signatures, or incomplete forms) or technical violations such as using the wrong version of the form or failing to complete a form for a current employee.

On February 3, 2017, civil penalties increased for any violations, paper or technical, occurring after November 3, 2015. The civil fines can add up quickly now that the potential liability for paperwork violations can come with a price tag ranging from \$224 up to \$2,236 per violation where there is a pattern of such violations. In a workforce of 2,000 employees, where 50 percent of the I-9s have such violations, the fines could be well over \$2 million.

Due to these hefty fines, possible criminal penalties where there is intent to hire and employ workers without authorization, bad press, and a decrease in the value of the acquisition, the acquiring company should ask the following questions before the deal closure when reviewing the acquired company's I-9s:

1. Does an I-9 exist for every employee of the company? Check payroll records against the I-9s.
2. Have the I-9s been fully and correctly completed?
3. Does the acquired company have a written I-9 policy? Is there one that can be incorporated into the buyer's policy and applied uniformly across the new company?
4. If the I-9s contain errors, are they technical or substantive errors?
5. What are the potential civil fines or criminal penalties?
6. Should the acquiring company complete new I-9s or retain the old ones and assume liability?

Answers to all of these questions will help develop a plan to move forward and avoid severe liability. And depending on the results of the I-9 review, an internal audit of the I-9s may need to be conducted to correct error-ridden I-9s while the workforce is still accessible. Correcting I-9s while an employee is available is the soundest way to proceed. With the increase in both I-9 enforcement and the pace of corporate mergers and acquisitions, buyers should beware of potential I-9 liabilities before closing a deal.

Related Practices

Immigration Planning and Compliance International

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