

“Selected Employment Issues in Mergers & Acquisitions”

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Along with the many other issues that arise in a merger or acquisition, you must be careful to review the following employment-related issues:

Employment Agreements. Identify which employees have signed employment agreements. Review the terms, paying special attention to covenants not to compete, stock options, loans, compensation, and the duration of the agreements. Determine whether the agreements are assignable to the new entity.

Confidentiality, Assignment, and Noncompetition Agreements. Determine which employees have signed these types of agreements (if they do not have employment agreements already containing these provisions). Review the terms to ensure that they adequately protect the successor’s confidential business information and intellectual property. Draft agreements for any other employees who are in positions in which these agreements are necessary. Determine whether the agreements are assignable to the new entity.

Employee Policies, Manuals, or Handbooks. Review the policies to determine if there are any unusual or potentially problematic policies. Ask whether any issues have come up involving particular policies. Determine whether the policies have been consistently applied in the past, and develop an understanding of the Company’s past practices that may bind the new entity going forward.

Collective Bargaining Agreements. Determine whether the merger or acquisition may violate the collective bargaining agreement, or whether bargaining with the union about the effects of the corporate change is required. Review for other relevant terms.

I-9 Review. Determine whether the predecessor entity has maintained I-9 forms demonstrating that each of its employees is legally permitted to work in the United States. If the predecessor entity has also maintained supporting documentation for the I-9 forms, determine whether the entity has done so for all employees. You do not need to file new I-9 forms for the predecessor entity’s employees if the new entity continues to employ some or all of the predecessor entity’s work force, and the workers have a reasonable expectation of continued employment. Note that if you do not file new I-9s, you will be liable for any errors or omissions on the I-9s made by the predecessor entity, so you should review each I-9 for accuracy and completeness.

Nonimmigrant Workers. If the predecessor entity employs workers on employment-based nonimmigrant visas, and those workers will continue to work for the new entity, you must determine the following:

- Employees in H-1B status (i.e., professional workers in specialty occupations). You must determine whether an amended H-1B visa petition must be filed with U.S. Citizenship & Immigration Services (“USCIS”), which would include a new Labor Condition Application (“LCA”) filing with the Department of Labor to certify that the new entity will pay at least the prevailing wage for the position.

Generally, an amended petition is not required if the new entity (1) assumes all immigration-related obligations and rights of the predecessor company, and (2) the terms and conditions of the H-1B employment (such as job duties, wages, and work location) remain the same, such that the identity of the petitioner is the only change.

Similarly, a new LCA is not required if (1) the new entity assumes all obligations under the LCAs filed by the predecessor entity, and (2) the worker continues to perform the same job duties in the same work location. The new entity must document its assumption of the predecessor entity’s LCAs by placing a memorandum in each H-1B employee’s Public Access File documenting the assumption of LCA obligations.

If the predecessor entity terminates the H-1B employees, it is liable for payment of the costs for return transportation to each H-1B employee’s home country. The predecessor entity must also notify the USCIS of the termination of employment to avoid liability for the future payment of wages under the certified LCA.

- Employees in Other Nonimmigrant Statuses. For employees in other nonimmigrant statuses sponsored by the predecessor entity, such as nonimmigrants in E, L, or TN status, an amended petition is required to reflect the change in company ownership.

Workers’ Compensation and Unemployment Insurance. Review the predecessor entity’s experience rating for workers’ compensation (if the predecessor entity is a state-fund employer) and unemployment insurance. Under Ohio law, the target company’s experience rating for workers’ compensation and unemployment compensation insurance purposes is almost always transferred to the acquiring entity.

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