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How To Hold On To Foreign Workers After A Merger

By **Melissa Maleske**

Law360, New York (February 8, 2016, 4:24 PM ET) -- A merger or acquisition can involve so many moving parts that immigration considerations often get lost in the shuffle. But attorneys say a change in ownership can raise a host of worker eligibility issues that may benefit from early attention. Here's what general counsels need to know.

When in-house lawyers catch wind of a merger or acquisition, they should begin thinking about the immigration consequences right away. Sometimes, a corporate ownership change has little effect on foreign national workers, but in other cases, they pay the price for their employers' lack of advance planning.

"Unfortunately, immigration is usually the last thing that is considered by corporate counsel when it comes to putting together an acquisition document," said Anthony Siliato, a partner at Meyner & Landis LLP. "Immigration counsel should be brought into the loop as early as possible."

Chad Blocker, a partner at Fragomen Del Rey Bernsen & Loewy LLP, advised clients not to lose sight of immigration when they're hit with a sea of new responsibilities.

"In an M&A, there are just so many considerations, and timing is often critical and crunched," Blocker said. "Acquisitions can happen very quickly. The talks can lead to a transaction closing in a matter of months, which can impact the company's ability to think through its obligations and make sure all of the relevant issues are covered."

To ensure you're looking out for your company's valued employees, take the following steps once you learn a merger is underway.

Keep Employees Informed

Foreign national employees will be highly sensitive to even the rumor of a change in ownership or corporate restructuring, Blocker said. When faced with concerned employees who are feeling vulnerable, it can help to be transparent with them to the extent possible.

"It's very important that employers get ahead of that when they hear a rumor — whether it's fact or fiction — and either quell those rumors or give assurances as soon as possible, confidentiality and privacy issues considered," Blocker said. "Whenever something appears in the press or there's a rumor flying, the visa holders will understandably freak out, and that affects work performance and also their life."

Blocker suggested that employers stay in close touch with impacted employees, creating FAQs or holding information sessions to talk about what's happening, and when, and what the impact will be on their temporary visa status and green card applications.

"There can even be travel implications," he noted. "If an H-1B employee is traveling very shortly after a transaction closes, it may be advisable for them to carry some additional documentation [to present upon re-entry]."

Address H-1B Holders

For the most common worker visas, H-1Bs, the process of dealing with an M&A can be fairly simple.

If the acquiring company prepares a corporate reorganization statement, in which they expressly assume the liabilities, obligations and undertakings of the H-1B employment, they're considered a successor in interest and do not even need to file an amended H-1B application with U.S. Citizenship and Immigration Services. But that's the best-case scenario.

"As long as the job isn't changing, the company can simply prepare the corporate reorganization statement and include it with the Public Access File," Blocker said, referring to the record the employer must keep on the H-1B employee.

Often following an M&A, the employees of the acquired company will see some changes — perhaps three individuals will now do the work that previously five did. If the role or duties of the employees materially change, the acquiring company would have to submit an amended H-1B petition to USCIS. It would also have to do so if the acquirer is not a successor in interest.

Assess Trickier Visas

In other visa categories, you're likely to run into more trouble, particularly when a transaction changes the nationality of company ownership. That may mean losing a valuable employee despite your best efforts.

"I have seen in many cases, there can be key employees who hold perhaps an E visa, perhaps an L visa, which depend on certain qualifying relationships or the nationality of the ownership," said Kevin McNamara, a member of Mintz Levin Cohn Ferris Glovsky and Popeo PC. "If that changes in a corporate transaction, those people might well be at risk, and all of a sudden, one of the main assets of that target company has been lost. They can't get work authorization, at least promptly, to work for the new entity."

For example, L-1 visas are given to individuals who worked for the company abroad before transferring to the U.S. to work for the same company or its affiliate, so if the U.S. branch of a global company is acquired by one with operations solely in the U.S., its L-1 employees would no longer be eligible for that visa.

There are some limited options for L-1 employees, such as resetting eligibility through a stint at an overseas location or affiliate, if one exists.

"If you are a multinational company, you can send the individual abroad to work for one year for an affiliate and then bring them back as an L-1," Siliato said. "But that doesn't really help in the short term. It displants not only the worker, but any family members."

Similarly, E-2 treaty visas are granted to foreign workers who are in the U.S. in a company based in a country with a treaty with the U.S., as long as they are nationals of the country they work for. So if a German company were acquired by a U.S. company, the German nationals in the U.S. on E-2 visas would be out of luck.

A long-shot option for certain employees is the O-1 category for extraordinary individuals,

Siliato said, but there's a high bar for who qualifies. USCIS specifies that they "must demonstrate extraordinary ability by sustained national or international acclaim."

In most cases, the only option is looking for a way to completely recategorize the affected employees — but that isn't a sure bet. Generally, the next option would be an H-1B visa, but given the cap, they're a crapshoot, according to Siliato.

Track Green Card Applications

Corporate changes can also affect employees who are seeking permanent residency. Depending on the stage and status of a green card application based on employment, the new employer may have to start the application process anew or turn to the Program Electronic Review Management system.

The PERM system requires employers to take a number of prerecruitment steps, including surveying the labor market to ensure that U.S. workers are not available for the job and that the foreign worker's employment does not adversely affect the wages and working conditions of U.S. workers. This can be a time-consuming process.

Siliato worked with an employee whose U.S. acquiring company did not acquire his foreign employer abroad, which required him to file a PERM application instead and put him on a much longer road to his green card.

"The PERM is a very cumbersome route to the green card," Siliato said. "It requires testing of the U.S. labor market [to see if there are qualifying U.S. workers who have the requisite qualifications to perform the job]."

But he also noted that there are regulations that allow certain multinational managers and executives to bypass the process, which can take up to 10 years normally.

The process would also need to start over if the acquiring company is not a successor in interest. So one way to solve many green card complications, along with ensuring that H-1B visas can be maintained without filing amended petitions, is by ensuring the acquiring employer takes on the responsibilities of the employment, including wage requirements.

"If the issues are seen before the deal is sealed, you may be able to restructure the agreement to include the transfer of certain liabilities that will help ensure that the buyer would qualify as a successor in interest," McNamara said. "If the visa issues are realized to be important enough, a more radical move would be actually restructuring the deal to help accomplish the maintenance of status for those key employees."

Give Early Notice

When workers lose their visas and cannot secure another type — perhaps because of the relatively small number of H visas the government issues annually — sometimes nothing more can be done. If that's the case, let the affected employees know as soon as possible.

There's no grace period for loss of a work visa, Siliato noted. The day an acquisition is complete, the employee and his or her family could be out of status immediately, so give them the opportunity to seek other arrangements.

"At least give notice to sponsored employees that upon the date of acquisition, the foreign nationals may no longer be of status, and if they do not have the option of working abroad for an affiliate, they should be seeking options with another employer," Siliato said.

--Editing by Christine Chun and Philip Shea.