Legally Speaking

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Current Issues in Immigration Law

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How To Avoid Government Fines and Imprisonment in Corporate Mergers and Acquisitions

By Min S. Suh

Immigration issues often fail to receive appropriate attention when business executives and corporate attorneys are negotiating the details of pending corporate changes. Even inadvertent, seemingly innocuous oversights may draw government sanctions and place corporate officials at significant personal risk. For example, any corporate transaction that results in a foreign company losing control of the United States affiliate's employees may result in the affiliate jeopardizing its employees' immigration status. Further, the failure to notify the United States Citizenship and Immigration Services (USCIS) when transferring foreign employees between companies can subject a company to significant employer sanctions and render the foreign employees' visas immediately invalid.

In these situations, it is best when immigration attorneys have the opportunity to counsel companies regarding the complex and subtle substantive requirements and procedural process that are necessary to comply with federal immigration regulations.

Planning for Nonimmigrant Employees During Mergers & Acquisitions

Any foreign national seeking admission to the U.S., whether for leisure, business, study, training, or employment, must obtain the appropriate visa to engage in the intended activities. There are 19 nonimmigrant visa categories, and many have subdivisions of those visas. Not all 19 categories permit employment. With a few exceptions, a foreign worker must be "sponsored" by a U.S. employer in order to be able to obtain a visa.

Nonimmigrant visas that permit employment are employer-specific. Most of these visas authorize employment solely for a limited duration, a specific employer, and sometimes even for the employment locale. For example, if the H-1B visa was sponsored by Company A, Company B cannot employ the foreign worker unless the USCIS specifically authorizes that employment.

If it were originally contemplated as part of a transaction that the overall structure of the parent company's entity will change at the close of the transaction, the new purchaser likely will be required to file an amended application or petition on behalf of its foreign employees temporarily working for the subsidiary company in the U.S.

The following questions should be discussed and coordinated with immigration experts as part of the overall transactional planning:

1. Have the qualifying job duties under the L, E, and H visa categories changed?
2. Is there a substantial continuity of the business?
3. Has the successor company substantially assumed the rights, obligations, and liabilities of the acquired company?

If there is a substantial change resulting from the transaction, pre-merger planning and immigration due diligence can ensure the continued validity of an employee's status under the L, E, and H visa categories.

If a merger is contemplated, the acquiring company should identify all nonimmigrant employees of the target company it desires to retain. Further, the acquiring company should inquire as to any pending immigration-related litigation, including administrative complaints, appeals, and settlements involving the target business. In addition, the acquirer should obtain a copy of the employee contracts of all foreign employees and conduct an employment verification eligibility audit of all employees transferring to the surviving company. Failure to verify employment eligibility of transferred individuals may subject the new employer to per person fines for immigration law violations.

As part of the due diligence to be performed in an acquisition (whether of stock or the assets of a going concern) the purchaser must determine whether I-9 Employment Eligibility Verification forms exist for all employees. Under the Immigration Reform and Control Act of 1986 (IRCA), employers are required to verify the employment eligibility of any worker hired after November 6, 1986. While U. S. citizens and nationals are automatically

eligible for employment, they too must present proof of employment, and identify and complete the form.

Unauthorized Workers

An employer is permitted to refuse to hire and/or to terminate an employee who fails to produce the acceptable documents to prove employment eligibility. If a company discovers that one of its employees is not authorized to work, even if the individual has properly complied with the Employment Verification Procedure (e.g., produced acceptable documents to prove identity and eligibility to work, and properly complete an I-9 form), the employer risks severe governmental penalties for the continued employment of that person. Under IRCA, an employer has no affirmative duty to notify the government of the presence of unauthorized workers. However, IRCA provides for the imposition of criminal fines for harboring, and aiding and abetting illegal aliens in connection with unauthorized employment. For the first and second offense, fines maybe be imposed of up to $250,000 for individuals and up to $500,000 for organizations, and may include imprisonment for up to 10 years, for engaging in such activities for purposes of commercial advantage or private financial gain.

Following the events of 9/11, there's been renewed focus on enforcement, and federal prosecutors have increased considerably the level of the government's enforcement activity against employers for violating IRCA. The Department of Homeland Security and the Social Security Administration are under a temporary restraining order from implementing the final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." However, even without the Safe-Harbor Procedures, employers can face potential liability under the immigration law. Please see the August 2007 Immigration Practice Area Alert titled "Update On Social Security Administration No-Match Letters" for more information.

Although it is not necessary for an acquiring entity to re-verify the entire acquired workforce's I-9 Employment Eligibility Verification forms, it may nevertheless be prudent to do so, particularly given the government's increased level of scrutiny. However, should it elect to do so, the acquiring company must ensure that the re-verification process is done in an impartial and anti-discriminatory manner.

Reducing Risk

IRCA also imposes obligations upon companies that engage contractors and subcontractors to perform services, in some cases to the same extent as it applies to the company's own employees. IRCA likewise imposes civil and/or criminal penalties — and even debarment from qualification for federal contracts — if there is a determination of non-compliance. Some state contracts impose similar penalties including debarment, if there is a determination of non-compliance. There are a number of steps which a company may take in order to reduce the risk of a finding that it has "constructive knowledge" of the hiring of unauthorized aliens by its contractors and subcontractors.

For example, a company can obtain a certification from a contractor or subcontractor, under penalty of perjury, that it possesses properly completed I-9 forms for each of the employees hired by such contractor or subcontractor to perform services on the job site for the company. The contractor also should be asked to certify that none of its employees on the job site are unauthorized to work under IRCA. In addition, the contractor and subcontractor should be required to confirm its original certification, relating to its not knowingly hiring and/or employing unauthorized aliens, with each request for payment submitted under its contract with the company.

Alternatively (or even in addition to the foregoing), a company can require that each of its contractors and subcontractors agree to indemnify, defend, and hold it harmless for any penalties and damages, including reasonable attorney's fees, arising out of the contractor's or subcontractor's failure to comply with its obligations under IRCA relating to the knowing hiring and/or employment of unauthorized aliens.

Examining the I-9 forms of a target company's employees, before a merger, acquisition or similar transaction, is vital for two reasons. First, it provides a snapshot of the target company's workforce, including vital information on the immigration status of the target's workers, and the expiration dates of temporary work visas, employment authorization cards, and similar documents. Second, such an early examination provides the acquiring entity with an opportunity to assess the degree to which the target company has complied with its I-9 obligations, and to assess what, if any, potential liabilities or exposure might exist for noncompliance.

The number of foreign employees working in the U.S. in nonimmigrant visa categories is steadily climbing as more multinational corporations employ foreign workers temporarily or permanently from around the world. Consequently, it is imperative that immigration attorneys are involved in the overall transactional planning to advise of the possible immigration issues and consequences that corporate mergers and acquisitions have upon their foreign employees and the corporate transactions.

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Courts Step Into Immigration Debate When Administrations and Legislation Fail

By Robert S. Whitehill

Immigration has begun to use a new naturalization examination. By October 1, 2008, ALL immigrants applying for United States citizenship will encounter a test of their knowledge of U.S. civics, history, and government. The test has been redesigned to emphasize and promote common American values and to educate new citizens regarding how our government works.

One of the more misleading questions is: "What stops one branch of government from becoming too powerful?" The two choices are: "Checks and Balances" and "Separation of Powers." Frankly, in the immigration context, the answers are wrong. The correct answer should be the "Judiciary."

Courts of law are the place where many are going as state and local legislatures and federal and state administrations powerfully flex their muscles against illegal immigration. It means greater distraction, delay, and cost for employers and immigrants, since the symptoms of a problem are being treated rather than pursuing the cure for the root cause.

The New York Times recently reported on the court ruling that stopped a government strategy for immigration enforcement, the Social Security no-match program. The article states: "A federal judge has halted a reckless plan by the Bush administration to use Social Security records for immigration enforcement. This is good news, not just for the American economy, which would have been crippled by the attempt to force millions of undocumented workers off the books, but also for the untold numbers of innocent citizens and legal residents who also would have been victims of the purge."

The Social Security no-match program (described in detail in our *Alerts* of August 1, 2007 and October 5, 2007) has been enjoined (stopped or delayed by a court order). This is not to say that unscrupulous employers or illegal aliens can breathe a sigh of relief. That certainly is not the case. In fact, there are screaming headlines of immigration raids and incarceration of immigrants and citizens who violate the immigration law. Koch Foods and the Long Island gang raid debacle are just two recent examples.

Back to basic civics – Congress (Legislative) has been unable to enact legislation that addresses the issues that are posed by millions of undocumented workers and a broken immigration administration system. State and local legislatures have acted in this vacuum, and so has the administration (Executive). To the extent that state and local laws and actions by the administration overstep their legal and constitutional boundaries, the courts (Judiciary) will step in, as did District Judge Charles R. Breyer of the Northern District of California in the Social Security no-match case. In regard to mailing 140,000 no-match letters to employers concerning more than eight million workers, Judge Breyer – noting that the lack of match may be "based on SSA records that include numerous errors" – stopped the letters, ruling that "while a change in agency policy is not the concern of the courts, when there is such a change it must be in compliance with [the law]."

Similarly, Arizona's recently enacted the Legal Arizona Workers Act, which is touted as the strictest state immigration enforcement law in the nation, has been stopped by court action. Among other requirements, the Act would require Arizona employers to verify the employment eligibility of every new employee through a program known as "Everify." A joint program of the U.S. Department of Homeland Security and Social Security, Everify imposes heavy compliance burdens and carries substantial penalties for non-compliance on entities that contract with the State of Arizona. Scheduled to go into effect on October 1, 2007, Everify has been delayed since the legality of the act has been challenged in federal court in Phoenix.

At least until there is immigration reform, there will be lawsuits filed throughout the country challenging state and local immigration laws as well as over reaching by law enforcement.

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