The Art of the Possible: Immigration Impacts of Corporate Changes

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When a U.S. company undergoes corporate restructuring, merger, acquisition, asset purchase, or spinoff, its employees who are foreign nationals in temporary work visa status, and their green card cases, may be affected. The art of what is possible in terms of minimizing the effort and expense necessary to retain foreign workers and preserve permanent residence cases in which the company has already invested money, time, and effort will depend on what visa status those workers hold, the phase of their green card process, and the nature of the corporate changes, but it may also depend crucially on when immigration counsel is informed. The consequences of not telling immigration counsel until after a deal has closed may be both costly and catastrophic to the company and foreign-national employees. However, this fact pattern occurs more often than not. Executives, bankers and corporate lawyers who handle mergers and acquisitions (M&As) may not inform or include immigration counsel or Human Resources in the planning process and may be unaware of potentially dire consequences to the foreign workforce until it's too late to avoid them.

PRESSING CONCERNS FOR FOREIGN WORKERS

The three most pressing concerns regarding the foreign workers are:

- May the new employing entity post-transaction continue to employ the foreign workers in their current visa status, and if so, what must be done to keep them?

- Will the new entity be recognized as a "successor in interest" by U.S. Citizenship and Immigration Services (USCIS) for purposes of PERM alien labor certification and immigrant visa petitions, to avoid starting the entire green card process over from the beginning?
- Should the new entity assume the predecessor's I-9 files, or reverify all foreign staff?[1]

With regard to the first question, namely, whether the new employing entity is able to keep employing the foreign workers, and what they must do about it, we divide those workers into three groups. These groups are prioritized by their nonimmigrant visa status:

1. The workers in H-1B, H-1B1 and E-3 status, who are covered by a U.S. Department of Labor (DOL) Labor Condition Application (LCA);
2. The workers in E-1, E-2 and L-1 status, whose continued eligibility hinges upon company ownership and control; and
3. All other nonimmigrants, such as F-1 students on Optional Practical Training, H-3 and J-1 trainees or interns, O-1 aliens of extraordinary ability, and TN treaty professionals.

Workers Covered by Labor Condition Applications

Timing of when immigration counsel learns about the corporate transaction is of paramount importance with respect to H-1B, H-1B1 and E-3 workers covered by LCAs, because there is a procedure whereby the new entity may avoid the expense and effort of new immigration filings for this workforce entirely, but only IF the documentation can be completed **before or on the date when the transaction closes**.

A labor regulation enacted in December 2000[2] permits adoption of existing H-1B employees (and by implication, all H-1B1 and E-3 employees as well) by the resulting new employing entity after a merger, acquisition, asset purchase or spinoff, etc. without filing new LCAs[3], if the new employer keeps a list of the affected foreign workers, and maintains in its public access files for each one a document:

- Listing each affected LCA by number and date of certification, [*not by worker name, as it's impermissible to put personal identifying information in public access files*];
- Describing the new entity's actual wage system applied to those workers;
- Stating the Federal Employer Identification Number (FEIN) of the new entity, whether or not it differs from the FEIN of the old entity; and containing
- A sworn statement by an authorized representative of the new employing entity who acknowledges the entity's assumption of all obligations specified in the LCAs filed by the predecessor, agrees to abide by DOL regulations that apply to LCAs, agrees to keep a copy of the sworn statement in the public access files, and make it available upon request to any member of the public or representative of DOL.

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[1] This article does not address the I-9 issues presented by M&A scenarios: see separate article by co-panelist Stacey Simon.

[2] 65 Fed. Reg. 80112 (Dec. 20, 2000), implementing changes dictated by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) to Documentation of Corporate Identity under 20 CFR §655.760

[3] 20 CFR §655.730(e), Change in employer's corporate structure or identity.

The sworn statement must attest that the new employing entity agrees to:

- Abide by the DOL's LCA regulations applicable to H-1B nonimmigrants.
- Keep a copy of the statement in the public access files of all H-1B [and H1B1 & E-3] workers transferred to the new employing entity from the predecessor; and
- Make the documents available to any member of the public or representative of the DOL upon request.

Note that this required sworn statement may raise serious liability issues for the new employing entity. If an audit of the LCAs conducted during due diligence reveals a pattern of noncompliance, such as pay discrepancies falling short of the offered wages stated in LCAs, or nonexistent public access files, the new entity may be better off filing new LCAs and amended petitions for all H-1B, H-1B1 and E-3 workers rather than assuming liability for the failings of its predecessor. Obviously, the size of the new entity and of its assumed foreign workforce also limit what is possible and the arithmetic of which solution makes sense: assuming the risk of a predecessor's LCA violations may be preferable to filing new LCAs and amended petitions for 60,000 workers.

If the deal closes before a full list of affected LCAs can be compiled, an appropriate representative of the new employing entity identified, a sworn statement prepared and signed, and all public access files amended, then the new entity has no choice but to file new LCAs and amended visa petitions for all such workers. This will have substantial internal and external costs, including time and effort by Human Resources to gather current data on all the affected workers, attorney fees and USCIS filing fees, and pay raises to meet current-year prevailing wages for all affected H-1B, H-1B1, and E-3 workers under an LCA.

If the predecessor does not yet have sufficient information about its successor entity to prepare a memo with sworn statement for the H-1B public access files, how are they supposed to have sufficient data to prepare and timely file LCAs and H-1B petitions on behalf of the new entity? USCIS typically exercises its discretion, treating amended petitions received in the 60 to 90 days following the close of a corporate restructuring as timely.

Workers Affected by Changes in Company Ownership and Control

Another urgent group of foreign workers to make provisions for before a restructuring, merger or sale closes are those who hold E-1, E-2 and L-1 visa status, who may lose such status abruptly as of the transaction closing date.

E-1 Treaty trader eligibility derives from the U.S. employer being principally engaged in substantial international trade with the treaty country,[4] and also depends on the company and the foreign worker sharing the same treaty country nationality.[5] In order for E-1 employees to maintain status, the ownership of the U.S. employer must remain at least 50% in the hands of nationals of

[4] INA §101(a)(15)(E)(i).
[5] INA §101(a)(15)(E)(i), 8 CFR §214.2(e)(1)(i).

the treaty country[6], and the company must maintain a level of international trade with the treaty country that still constitutes over 50% of its international trade.[7]

If a change in ownership leaves the treaty nationality of the company intact, it may still qualify, but will require amended petitions to USCIS or re-registration of the new corporate entity at a consulate if ownership of the U.S. entity shifts outside of the previously approved parent group or multinational enterprise. If a change results in workers being employed by any entity within the corporate group named in the original application, it is deemed a "non-substantive" change, and no action is required. Then, the only remaining concern upon renewal for the E-1 employees is whether the U.S. entity continues to sustain its level of principal trade with the treaty country.

E-2 Treaty investor eligibility derives from an individual or corporation which has the nationality of the treaty country investing a substantial amount of capital in the United States.[8] Since most criteria for E-2 eligibility relate to the nature and application of the initial investment, continued work authorization of E-2 employees depends only on maintaining the treaty-country nationality of the U.S. company, absent material changes in the nature of its business activities.

If the U.S. company will be sold or spun off to new owners who do not share the same nationality as the treaty country, all E-1 and E-2 employees will lose their status as of the transaction close, so it is critical to determine in advance which of those workers can be sponsored for other work visas, and which ones cannot and will have to return to the treaty country.

L-1 intracompany transferees derive visa eligibility from both the qualifying relationship between the employer in the United States and the entity(ies) where they previously worked abroad, and also from the executive, managerial or specialized knowledge nature of their jobs with the U.S. entity.[9] The relationship between the entities must meet one of the four regulatory definitions as a parent, subsidiary, affiliate or branch office.[10]

If the U.S. company is sold or spun off, the new employing entity must continue to have foreign subsidiary, parent or affiliate companies or branch offices doing business abroad in order to remain eligible to employ L-1 nonimmigrants. Per regulation at 8 CFR §214.2(l)(1)(ii)(G)(2), the employer must continue to do business in the United States and at least one other country for the duration of the foreign worker's stay as an L-1 nonimmigrant. However, the U.S. employer does not have to retain its relationship to the same entity abroad where the L-1 obtained their qualifying experience in order for the successor to be able to continue to keep employing the foreign workers in L-1 status, so long as their jobs are not substantially changed[11]. However, the new employing entity will need to file amended petitions to USCIS to explain the nature of any changes in approved relationships.[12]

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[6] 8 CFR §214.2(e)(3)(ii).
[7] 8 CFR §214.2(e)(11).
[8] INA §101(a)(15)(E)(ii).
[9] INA §101(a)(15)(L).
[10] As defined at 8 CFR §214.2(l)(1)(ii)(I) through (L), the entities must share common ownership and control, meaning that they have in common at least 50% ownership plus veto power. If an entity is a publicly traded company, control can be demonstrated by a less-than 50% owner that is the largest shareholder.
[11] *Matter of Chartier,* 16 I&N Dec. 284 (BIA 1977).
[12] 8 CFR §214.2(l)(7)(i)(C).

The question looming over any change in corporate structure or ownership for L-1A employees who were already approved for, or are in the process of, EB-1C sponsorship for permanent residence as a Multinational Manager or Executive by the U.S. company is, does the transaction sever the qualifying corporate relationship with the specific foreign entity where that worker obtained their experience abroad? If yes, other paths to residence may need to be pursued for that worker. USCIS policy guidance states that the worker remains eligible for EB-1C classification if a qualifying corporate relationship between their U.S. employer and the company where they got the qualifying experience abroad existed at the time such a petition was filed, and the relationship between the entities was maintained until that petition was adjudicated[13]. If such a petition is pending for a key executive when a major restructuring is under consideration, that could be a good reason to delay the transaction closing.

Other Nonimmigrant Workers

The remaining nonimmigrant workers are those not covered by an LCA, and for whom ownership and control of the employer are irrelevant to their continued status eligibility, but who may need documentation to address any changes in the name or FEIN of the authorized employer.

F-1 Students

F-1 students working under optional practical training will usually remain authorized to work because their employment authorization document (EAD) is not employer-specific, but any changes in the employer's name, FEIN or address will have to be provided to the Designated School Official and updated in the student's SEVIS record. Each student's current I-20 should be reviewed carefully to see if the endorsement approving practical training names the employer. If the employer is named on the I-20, and its corporate name has changed, then the designated school official should be notified to see if he or she will provide an updated I-20 endorsement adding the new corporate name. In general, school officials are reluctant to make any changes to an I-20 after the student's date of graduation. An F-1 in STEM OPT may need a new training plan (Form I-983) signed by the new employing entity and provided with a new employer letter to the DSO. Counsel must also ensure that the new employing entity is enrolled in E-Verify.

J-1 Program

The J-1 program sponsor designation comes from the U.S. Department of State (DOS) and is valid for intervals of five years at a time[14]. If the employing entity itself is the J-1 program sponsor and there is a change to its corporate name, address, majority ownership or control, financial circumstances or content of the program, the new entity must report all these changes to DOS promptly and in writing[15]. The sponsor may wish to re-designate the program so it can issue new Forms DS-2019 that reflect the new corporate data, but otherwise the approved Exchange Visitor program remains valid unless DOS actively withdraws its approval for the program designation.

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[13] *Matter of F-M- Co.*, Adopted Decision 2020-1(AAO May 5, 2020), PM-602-0177.
[14] 22 CFR §62.6(c).
[15] 22 CFR §62.13.

Even if a J-1 program is cancelled, the exchange visitors already admitted to participate in it will remain in valid status through the program dates on their Forms DS-2019, so long as their program-related activities are ongoing.

> "If the exchange visitor is currently engaged in activities authorized by the cancelled program, the participant is authorized to remain in the United States to engage in those activities until expiration of the period of stay previously authorized. The district director shall notify participants in cancelled programs that permission to remain in the United States as an exchange visitor, or extension of stay may be obtained if the participant is accepted in another approved program and a Form DS-2019, executed by the new program sponsor, is submitted. In this case, a release from the sponsor of the cancelled program will not be required."[16]

In many cases, the designated Exchange Visitor program sponsor will be an umbrella organization accredited by DOS, and not the employer itself. The Form DS-2019 reflects a program description that does not name the specific employer. If the J-1 sponsor is an umbrella organization and the program activities continue in full force, the J-1 alien is maintaining valid status. However, due to increased scrutiny of DOS-accredited program sponsors and J-1 Exchange Visitors through the SEVIS database, the program sponsor may require the new employing entity to execute an amended Trainee/Internship Placement Program (Form DS-7002), to reflect changes of name and entity, and to describe any changes in who will supervise the training.

Likewise, J-1 students and scholars with authorized practical training appear at first blush to be home free because they have work authorization without the need for an Employment Authorization Document, so their work authorization remains in force so long as they continue training in the field indicated on their Form DS-2019. However, in practice they too are monitored via the SEVIS database, which states where the approved practical training is authorized to take place, thus they may need to apprise the Responsible Officer of the J-1 program of any changes to the name, FEIN or address of the employing entity, and any changes to who will supervise their training.

O-1 Nonimmigrants

Continued eligibility for O-1 aliens of extraordinary ability is based primarily on the foreign worker's qualifications, but USCIS, U.S. Customs and Border Protection (CBP), and consulates do care about updating the name of the authorized employer or agent. Amended petitions are required "to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility."[17] O-1 nonimmigrants fall into three subgroups when an approved petitioner undergoes a restructuring, sale, or spinoff *if it changes the entity name.* O-1A workers will require an amended petition reflecting the new entity name regardless of whether the petition was filed by an agent or a direct employer, as they have no leeway to add new agents or employers. O-1B workers in the arts and entertainment require an amended petition if sponsored by a direct employer, or if the petitioning agent changes its entity name. O-1B artists and entertainers do not

[16] 8 CFR §214.2(j)(3).
[17] 8 CFR §214.2(o)(i)(D).

need to amend if one of their employers under an agent petition has a change of name or entity, as the regulation specifies: "In the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber."[18]

TN Classification

Eligibility for TN classification depends on employment in one of the 64 occupations listed in the USMCA Treaty Appendix, and does not depend on the structure or ownership of the employer, nor on an underlying petition to USCIS[19]. TN regulations require "immediate notification" of changes in the terms and conditions of employment which may affect eligibility[20], and provide for revocation on notice if the employer violates the terms or conditions of the approved application. The terms and conditions material to TN eligibility are whether the job is in one of the occupations enumerated at Appendix 2 to Annex 16-A of the United States-Mexico-Canada Agreement, and whether the foreign national has the required credentials for that job, as listed for each job at 8 CFR §214.6(c). A visa is only a procedural requirement for Mexican-national TN-2 workers.21 Accordingly, if the terms and conditions of the TN employment remain unchanged and the employer is a successor-in-interest to the original employer's immigration obligations, no documentation need be changed for the TN employees until extension of stay or travel and re-application at a border post for an additional period of admission. At that time, it would be appropriate for the employer's letter to explain any changes to the corporate entity. However, since a petition is procedurally required for Mexican TN-2 employees, followed by a visa stamp reflecting the name of the employer, amended petitions for those workers should be filed if the company name changes, even where this is not done for Canadian TN-1 employees.

SUCCESSOR IN INTEREST

After decades of absurd immigration policy limiting the definition of a successor-in-interest to entities which assumed "all of the rights, duties, assets and obligations" of the predecessor—based on a case involving a sole proprietorship[22]—USCIS finally came to its senses, and in August 2009, issued a policy memorandum[23] which has since been incorporated into its Online Policy Manual.[24] The policy applies specifically to Form I-140 immigrant visa petitions based on permanent alien labor certification, or PERM; and specifies the three relevant factors USCIS will consider to decide whether the new employer is indeed a successor in interest, namely:

1) The job opportunity remains the same;

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[18] *Id.*
[19] Letter from Jacqueline A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, to Mark Bravin (Sept. 10, 1993), *reprinted at* 70 Interpreter Releases 1573-1574, App. I (Nov. 22, 1993).
[20] 8 CFR §214.6(d)(5).
21 8 CFR §214.6(d)(1).
[22] *Matter of Dial Auto Repair Shop Inc.*, 19 I&N Dec. 481 (Comm. 1986, occasionally mis-cited as Comm. 1981)
[23] D. Neufeld, USCIS Memorandum, "Successor-in-Interest Determinations in Adjudication of Form 1-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)" (Aug. 6, 2009), AILA Doc. No. 09090362.
[24] USCIS Online Policy Manual, Vol. 6, Pt. E, Ch.3.

2) The new employer/successor meets the burden of proof, and can establish that all elements of eligibility, including ability to pay the offered wage by the predecessor, were met as of the priority date; and
3) For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the PERM application, the petition must fully describe and document the transfer and assumption of ownership.

If all three of these conditions are not met, the original labor certification cannot be used by the new employing entity, and PERM sponsorship must start over.

If all three conditions to prove successor-in-interest are met, then the timing concerns come into play in terms of what is required procedurally. If a PERM application is pending or approved, and a corporate entity name and FEIN change occurred while it was pending, or shortly after approval, then the successor may file the I-140 immigrant petition– assuming that the required documentation proving the transfer of ownership can be obtained within the 180-day validity of the certified PERM application. If an I-140 was already filed by the predecessor, or one has already been approved, then the new employing entity must file an amended I-140 petition to establish that it qualifies as a successor-in-interest.

However, what if the ETA 9089 has not been filed yet, but counsel and employer have already spent several months working on the PERM application when the corporate change occurs? Suppose the Prevailing Wage Request is pending with DOL, or the Prevailing Wage Determination was just issued and the employer is ready to commence recruitment efforts. Must you restart the PERM process for the new entity due to change in name or FEIN? Not necessarily, assuming a valid successor in interest relationship exists and can be documented. According to DOL FAQ Round 10 from May 9, 2007, "the employer must conduct recruitment using its legal name at the time of the recruitment. However, an Application for Permanent Employment Certification (ETA Form 9089) must be filed in the name of the employer's legal name at the time of submission." DOL's own guidance confirms that the company name indicated on the recruitment advertisements does not have to match the company name indicated on the ETA 9089. Therefore, if there is a corporate name change from recruitment until PERM submission, according to DOL "…the employer must be prepared to provide documentation – in the event of an audit – providing that it is the successor in interest…"

What does this mean in practice, especially considering the new FLAG-based ETA 9089 form which took effect June 1, 2023, and which imports all employer information from the ETA 9141? In a recent PERM application (submitted in July 2023 and certified in September 2024), the entity name and FEIN changed after the Prevailing Wage Determination was issued, and the advertisements and ETA 9089 indicated the new entity name and FEIN. As a result, the entity name and FEIN indicated on the Prevailing Wage Determination differed from those shown on the ETA form and advertisements. On the ETA 9089 form, the Employer Information in Section A was updated to reflect the details for the successor (including new name and FEIN). Additionally, a successor in interest argument was included in Section E – Job Opportunity and Wage Information (subsection 5 regarding additional conditions about the offered wage). The free form section was used to inform DOL of the corporate change and successor in interest relationship between the

predecessor and successor. Additionally, it is best practice to include a reference to DOL FAQ Round 10.

As indicated on the AILA practice pointer from April 23, 2021regarding successor in interest situations before PERM filing,[25] "the best guidance to date is what the DOL has raised in its FAQ" and that "practitioners have found that certifying officers appear to accept a detailed SII argument made on ETA Form 9089." However, since June 2023, the revised FLAG-based ETA incorporates by reference the job and company details contained in the Prevailing Wage Determination. Therefore, the new functionality of the FLAG system highlights and complicates the ability to modify details that may require updating or clarification at the PERM filing stage such as updating the entity name or FEIN.

While it is possible to make some updates and a successor in interest argument on the ETA 9089 (as was done successfully in this recent case), employers and counsel should anticipate a possible audit or even a denial. Note that despite the DOL FAQ mentioned above, there remains inconsistency in how DOL handles corporate changes. Additionally, the PERM regulations at 20 CFR §656 are silent regarding corporate changes and successor in interest determinations. Therefore, employers and practitioners are advised to proceed with caution and consider all options, including a backup PERM process for the successor, especially if there are timing issues such as an impending visa max-out date.

The Neufeld memo of August 2009[26] states that successor-in-interest analysis relates specifically to continued validity of an underlying labor certification by the predecessor, and that both EB-1B Outstanding Researcher/Professor and EB-1C Multinational Manager/Executive cases will require a new I-140 petition by the new employing entity.

The policy memo also discusses permanent portability under INA §204(j), noting that successor-in-interest analysis is not needed where the foreign worker has had an adjustment of status application pending for over 180 days, and will continue to be employed in the same or similar occupation. However, that provision only covers the lucky few whose priority dates already became current, and not the multitudes subject to decade-long immigrant visa quota backlogs.

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[25] "Practice Pointer: Successor-in-Interest Situations Before PERM Filing – What to Do When the Employer Undergoes Corporate Changes Prior to Filing PERM" (April 23, 2021), AILA Doc. No. 21042330.

[26] D. Neufeld, USCIS Memorandum, "Successor-in-Interest Determinations in Adjudication of Form 1-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)" (Aug. 6, 2009), AILA Doc. No. 09090362.

To Assume or Not to Assume Responsibility for Existing I-9s in the Face of Corporate Change

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Two Ways to Comply with I-9 Regulations When Corporate Change Occurs

In the current business environment, corporate changes including mergers, acquisitions, spin-offs, and stock/asset purchases are common, and may occur quickly. When such a corporate event occurs, and the new employer is deemed to be a "successor," the employer has the option of complying with I-9 regulations in one of two ways:

1. Consider acquired employees as "continuing employees," which includes accepting all existing I-9s completed by the previous employer and assuming the responsibility and liability for any errors on the existing Form I-9s; or

2. Treat the acquired employees as "new hires" and complete new I-9 forms for all employees (regardless of national origin or visa status in the United States)

Option 1

Establishing that New Employing Entity is a Successor in Interest

In order to exercise the option to consider all acquired employees as "continuing employees," it must first be established that the new employing entity is a "successor in interest."

Under 8 CFR §274a.2(b)(1)(viii)(A)(7) a "related, successor, or reorganized employer" is:

> an employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets.

In order to document that the new employing entity is a successor to the prior employer, the new employing entity must either have assumed all immigration rights, responsibilities, obligations, and liabilities in the contract or closing documents for the corporate event (i.e. mergers, acquisitions, spin-offs, or stock/asset purchases), or an Assumption Agreement can be executed by the new employing entity, which can be done after the closing of the transaction effecting the corporate change. The Assumption Agreement should also be placed into all Public Access Files for each H-1B and E-3 non-immigrant employee.

Due Diligence

Once it is established that the new employing entity is a successor, the proper due diligence must be completed to determine whether a Form I-9 has been completed for every employee hired after November 6, 1986, that the I-9s were prepared on a timely basis (section 1 completed on or before the first date of employment, and section 2 completed within 3 business days of the first day of employment), and that any errors on Forms I-9 are marginal to moderate (and correctable). When reviewing Forms I-9 prepared by the prior employer, it is important to review Forms I-9 for all terminated employees which are still subject to the retention regulations.[1]

Adopting I-9's from Previous Employer

If all of the foregoing questions can be answered in the affirmative, the successor employer may decide to adopt the I-9s from the previous employer, which means that the new employing entity accepts the obligations, responsibility and liabilities for all the existing Forms I-9 including any errors or omissions on those forms (technical and substantive), as the new employing entity will be liable for any fines levied on the adopted I-9s in the case of an audit by U.S. Immigration and Customs Enforcement (ICE).

In deciding whether to adopt the prior employer's Forms I-9, it is important to also review the I-9 flexibilities that were in place during the time of the COVID global health crisis to ensure that the previous employer did not avail themselves of flexibilities they were not entitled to and that they complied with the terms of those that they were entitled to utilize.

I-9 COVID Flexibilities

I-9 COVID flexibilities included a temporary deferral of the in-person verification requirements associated with Form I-9 beginning on March 20, 2020.

Such temporary suspension of in person verification only applied to employers and workplaces that were "operating remotely" *due to COVID*, (this came without a clear definition of work policy that constitutes remote work). This means that if an employer had a remote work policy in place prior to the COVID pandemic, or made the remote work policy (including hybrid remote work policies) permanent after the COVID health crisis resolved, the suspension of the "in-person verification requirements" did not apply to that employer, and if during the due diligence review it appears that the prior employer verified I-9 documents remotely, the prior Forms I-9 are not compliant.

The flexibility which permitted remote I-9 verification, carried a requirement that all employees onboarded using remote verification must report to their employer within three (3) business days of the resumption of "normal operations" for in-person verification. (the initial announcement came without a clear definition of resumption of "normal operations"). On April 1, 2021, one clarification was issued to say that resumption of "normal operations" means the return to non-remote employment on a "regular, consistent, and predictable basis."

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[1] When an employee is terminated, the employer must retain the terminated employee's Form I-9 for either three (3) years after their hire date or one (1) year after their termination date, whichever is later. See www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/100-retaining-form-i-9#:~:text=Federal%20regulations%20state%20you%20must,employment%20ends%2C%20whichever%20is%20later

After a series of extensions, the flexibilities granted in light of the COVID pandemic terminated on July 31, 2023, and employers were granted until August 30, 2023, to complete the 'in-person verification' for all employees who had been onboarded under the remote verification flexibility.[2]

Many employers remain out of compliance, having not completed the subsequent in-person verification after returning to in-person operations.

Employers that choose to retain the previous owner's completed forms should treat the individuals as employees who are continuing with no interruption in their employment status and have a reasonable expectation of employment at all times.

As noted above, this option to assume the I-9s of the preceding entity will result in the successor acquiring company inheriting all potential liabilities for errors and omissions made by the previous employer on the forms. When advising clients whether to assume the Forms I-9, it should be noted that DHS and ICE has reported that an average of 65-75% of a company's paper I-9s have technical and/or substantive errors. Common errors include paperwork errors (e.g., missing dates, missing signatures, or incomplete fields) or other technical violations such as using the wrong version of the Form I-9, or substantive errors such as acceptance of documents which fail to demonstrate identity or work authorization, or failing to complete a Form I-9 for a current or former employee.

Option 2

If the employer decides to treat employees of the successor company as "new hires," a new Form I-9 must be completed for *all* acquired employees, without regard to immigration status.

- Section 1 of the new Form I-9 must be completed on **the first day of employment or before.**
- Section 2 must be completed by the employer within three days of the **first day of employment.**

When not adopting the existing Forms I-9, and the new employing entity decides to treat the acquired employees as new employees the official effective date of the acquisition or the merger must be used as the hire date when completing Section 2 of the Form I-9, regardless of the acquired employees' original hire dates with the previous company.[3] The implications of this requirement is that if we, as practitioners, learn of a corporate change event from our client after the transaction has closed, and the new employing entity has not chosen to treat acquired employees as existing employees, then the date of hire on all of the new I-9s will be a date that has since past, and it is highly likely that the timely completion of the new I-9s will already be non-compliant, as Section 2 is not likely to be completed by the new employing entity within three days of the first day of

[2] For employers who are enrolled in E-Verify, the ability to continue to conduct remote I-9 verification was made permanent. (*see* Federal Register, published July 25, 2023) www.federalregister.gov/documents/2023/07/25/2023-15533/optional-alternative-1-to-the-physical-document-examination-associated-with-employment-eligibility

[3] www.uscis.gov/i-9-central/complete-correct-form-i-9/mergers-and-acquisitions

employment (unless counsel learns of the transaction immediately after its closing). In the case that such scenario occurs, a memorandum should be attached to each I-9 indicating the date the corporate change transaction closed, the date that it came to the attention of the new employing entity that the official effective date of the acquisition must be used as the hire date when completing Section 2 of the new I-9s, and that the necessary remedial compliance measures were taken as soon as practicably possible after the discovery was made.

Employers who voluntarily use E-Verify or are mandated to utilize E-Verify must also verify acquired employees in E-Verify.

Employers who choose to complete a new Form I-9 may do so before the merger or acquisition takes place as long as the employer has offered the acquired employee a job and the employee has accepted the offer.

Per 8 CFR section 274a.2(b)(1)(viii) and section 274a.7, employees hired on or before November 6, 1986, who are continuing in their employment and have a reasonable expectation of employment at all times, are exempt from completing Form I-9. If the employee hired on or before November 6, 1986, is not continuing in their employment or does not have a reasonable expectation of employment at all times, the employee becomes subject to the requirement to complete Form I-9.

PENALTIES

In 2024, U.S. Department of Homeland Security announced an increased fine schedule[4] in the Federal Register:

- I-9 Paperwork Violations: $281 to $2,789 per Form I-9
- Knowingly Employing Unauthorized Alien (First Offense): $698 to $5,579 per violation
- Knowingly Employing Unauthorized Alien (Second Offense): $5,579 to $13,946 per violation
- Knowingly Employing Unauthorized Alien (Third or More Offense): $8,369 to $27,894 per violation
- E-Verify Employers – Failure to Inform DHS of Continuing Employment Following Final Nonconfirmation: $973 to $1,942 per relevant individual employee

Per the above-referenced fine schedule, in a company with 2,000 employees, where technical violations are identified in 50% of the I-9s, the fines could be well over $2 million.

In cases where ICE identifies an intent to hire and employ workers without authorization, criminal penalties may apply (in addition to negative press), and as such, the acquiring company should perform the following due diligence when reviewing the acquired company's I-9s in order to assess whether the new employing entity should accept the liability of the existing I-9s or complete new Forms I-9 for all acquired employees:

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4 https://www.federalregister.gov/documents/2024/02/12/2024-02829/civil-monetary-penalties-inflation-adjustments-for-2024

- Compare payroll records for the past 3 years for existing and terminated employees to determine if a Form I-9 exists for every employee of the company under the I-9 retention regulations
- Review the accuracy of the completion of the Forms I-9
- Calculate the number of technical violations and the number of substantive violations
- Calculate the number of errors that cannot be corrected (i.e. Errors on Forms I-9 in Section 1 for terminated employees)
- Can the errors be explained in a memo to be attached to the I-9 as to mitigate the violations

Because creating new Forms I-9 for every acquired employee may be a very burdensome undertaking depending on the size of the acquired entity, the adoption of the existing Forms I-9 may be preferable regardless of the assumption of liability. Correcting any errors found on the former employer's I-9s will help mitigate potential civil penalties for technical or substantive violations that may be discovered later in the course of an audit. For any correction made on a Form I-9, a memo should be prepared and attached to the Form I-9, (retained in the personnel files) describing the corporate transaction, the effective date of the transaction, and the number of I-9 forms adopted because of the transaction, and the correction made, or the reason that a correction could not be made (for instance an error that is discovered in Section 1, where the employee is no longer employed by the company so a correction cannot be made).

The only current information available regarding the calculation of civil fines for non-compliance of Form I-9 regulations, can be found on the ICE website:

> To determine the base fine amount, the number of substantive violations/uncorrected technical or procedural failures and knowingly hire/continue to employ violations will be divided by the number of Forms I-9 that should have been presented for inspection. The percentage from this calculation is the violation percentage that will determine the minimum and maximum civil penalty base fine amount. This percentage may change depending on whether the offense being evaluated is the employer's first offense, second offense, or a third or higher offense.[5]

With the incoming Trump administration, we can anticipate an increased emphasis on labor enforcement by DHS and DOL in terms of employer-based audits, including I-9 audits. Given this expectation, a higher level of due diligence and scrutiny must be exercised in conducting internal audits prior to transaction close, and in determining whether to accept the liability and responsibility associated with accepting all existing I-9s completed by a previous employer and assuming the responsibility and liability for any errors on the existing Form I-9s.

[5] www.ice.gov/factsheets/i9-inspection