

MERGERS + ACQUISITIONS: MITIGATING IMMIGRATION COMPLIANCE RISK THE PROS AND CONS

When companies intend to merge with or acquire another company, many [risk factors must be evaluated](#) prior to the transaction's execution. However, immigration compliance risk is not always on the top of that list. And, that could be a potentially costly omission.

Immigration Compliance: Why It Matters:

Immigration compliance risk comes in two primary areas; 1) Work-related visa risk, and 2) I-9 compliance risk. While not all U.S.-based companies use work-related visas, they all must comply with the I-9 laws and regulations. This summary focuses on the I-9 compliance risk during mergers and acquisitions.

There Are Only 2 Options:

The Department of Homeland Security (DHS) issued the following guidance outlining the two options for companies involved in a merger or acquisition related to I-9 compliance:

Employers who have acquired another company or have merged with another company may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as:

- *New hires, in which case employers must complete a new [Form I-9, Employment Eligibility Verification](#); or*
- *Continuing in employment, in which case employers must obtain and maintain the previously completed Form I-9.*

Each of these options has its pros and cons which should be evaluated by companies prior to executing the final deal. Below are several key points to consider when making this decision.

Option 1: Treating Employees as New Hires

Pros

Creating new I-9 forms allows the new employer to ensure that all I-9s are properly prepared. Additionally, in deals where one employer is enrolled in the government's E-Verify[1] program and the other is not, treating the employees as new hires allows the company to complete a new I-9 form and to run the employees in E-Verify to ensure consistency among all employees as well as to act as a fraud deterrent for possible unauthorized workers that were not previously run through E-Verify.

Cons

Depending on the size of the employee population, completing new I-9 forms can be a significant time commitment as well as a logistical challenge. While the I-9s can be completed prior to the merger or acquisition as long as a job has been offered and accepted with the new organizations, the company must ensure the following strict timelines for completion of the new I-9 forms: The employee must complete Section 1 no later than the first day of employment and; The employer must complete Section 2 within 3 business days of the employee's first day of employment.

Option 2: Accepting and Retaining Original I-9 Forms

Pros

Companies that choose this option will have significantly less work to take on during the merger or acquisition as no new documentation will need to be generated. It is still highly recommended that a full accounting of all I-9 forms that are required by law be accounted for as DHS has specific retention requirements. This retention requirement includes I-9 forms for all current employees as well as I-9s for former employees that fall within DHS' 3-year/1-year rule[2].

Cons

Employers that accept and retain I-9s from the prior entity assume all risk related to the completion of the legacy I-9s as well as the risk of any possible unauthorized workers. There are significant fines and penalties for I-9s that were not properly completed which can run into the thousands of dollars per I-9. In addition, with a large presence of fraudulent documents readily available to unauthorized workers, employers may find out too late that they have employees who are not authorized to work in the U.S. in their acquired workforce.

Why It Matters:

Sample Case Scenario #1

Company A acquires Company B and assumes the previously completed I-9 forms. One month later they are audited by U.S. Immigration and Customs Enforcement (ICE). While there were I-9 forms for all the employees from Company B, many contained substantive violations which resulted in Company A receiving a significant fine. Additionally, ICE issued a Notice of Suspect Documents for a significant portion of the Company B workforce as they had presented fraudulent documents resulting in the loss of 25% of the workforce within a 30-day period.

Sample Case Scenario #2

Company A acquires Company B and prepares new I-9 forms and runs the new employees through E-Verify. Company A was previously using E-Verify and Company B was not. Within a week of the E-Verify submissions 50% of the legacy Company B employees had Tentative Non-Confirmations generated which ultimately led to all of them having to be terminated when they became Final Non-Confirmations.

The Bottom Line:

As you can see from the examples above, both options can result in adverse outcomes for the new company. The best way to guide a decision and to identify these risks early on is to conduct immigration compliance due diligence. This type of due diligence involves engaging subject matter experts in I-9 compliance as well as document and identity fraud to conduct a review prior to closing the deal.

Immigration M&A due diligence involves assessing a company's I-9 compliance program to include a review of I-9 forms to ensure they are being prepared correctly, a review of E-verify case submission and results, and an employee identity and document fraud assessment.

[1] E-Verify is an Internet-based system that compares information entered by an employer from an employee's Form I-9, Employment Eligibility Verification, to records available to the U.S. Department of Homeland Security and the Social Security Administration to confirm employment eligibility.

[2] DHS requires employers to retain I-9s for former employees for 3 years from the date of hire **or** 1 year from the date of termination, whichever is longer.



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