CONSEQUENCES OF ECONOMIC AND CORPORATE CHANGES ON FOREIGN WORKERS

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The current economic situation and outlook for the immediate future has caused—and will continue to cause—many companies to reduce their operations or workforces, either temporarily or indefinitely. Economic forces have led other companies to change ownership or corporate structure through mergers, acquisitions, spin-offs, and so forth. These changes have highlighted often overlooked aspects of U.S. immigration law, giving rise to the question: What are the effects, under current law, of reductions in company operations and staffing levels or of changes in corporate ownership or structure on the company's sponsored foreign workers in the United States?

During periods of growth, sponsorship of foreign workers has been key to filling positions in technical capacities (such as research scientists, engineers, and computer systems analysts) or in management or professional positions (such as chief executive officers, senior human resource managers, attorneys, and accountants). Employers have used various visa classifications—the H-1B, TN (Trade included in the North American Free Trade Agreement), and L-1 Programs—to sponsor foreign workers.

However, in tough economic times, all too often, questions relevant to these sponsored foreign workers are not raised or even addressed until after the change has taken place, because no one making the decisions raised the issue or discussed it with the company's Human Resources Department or with outside immigration or employment counsel. Upper management should consider the effects of proposed company changes on its sponsored foreign workers—individuals who are often in critical positions in the company—well *before* the effective date of the change.

Temporary Layoffs and Plant Shutdowns

In the case of a temporary layoff or plant shutdown, where the employment relationship continues—that is, the employer's and employee's intent from the outset is to resume normal employment and operations after a relatively brief and definite period of time—neither the U.S. Citizenship and Immigration Services' (USCIS) nor the Department of Labor's regulations include provisions that prohibit the temporary layoff of employees in the TN, L, or E classifications. Such employees remain in valid nonimmigrant status

during the temporary break in employment, even if they are not paid. However, these laid-off employees must be considered and treated differently than those who have H-1B status are treated.

An employer can petition for temporary H-1B visa classification for positions that require the equivalent of a specialized bachelor's degree. H-1B status is generally valid for an initial term of up to three years; the status can be extended for up to an additional three years. H-1B status attaches to the foreign national employee, not to the employer, and the foreign national employee is subject to a six-year limit. The H-1B holder's legal spouse and unmarried children under the age of 21 may obtain concurrent dependent H-4 visa status; however, H-4 dependents are not permitted to work in the United States. It is sometimes possible to extend a worker's H-1B status in increments of one or three years past the sixth year if a sponsored foreign national is in the appropriate stage of the process required to obtain U.S. permanent residence.

The American Competitiveness and Workforce Improvement Act of 1998 made it unlawful to "bench" H-1B workers. An employer of an H-1B worker is required to pay that worker the full required wages due, in accordance with the applicable labor condition application (LCA) on file for that employee, even if that person is not performing any productive work. The only exception to this requirement is the case in which the nonproductive status of an H-1B worker is a result of factors that are not related to work—such as the H-1B worker's voluntary request for a temporary leave of absence for reasons that are not related to the job (for example, vacation, family or personal reasons, maternity leave, nonwork-related accident causing an injury that temporarily disables the worker, and so forth). Of course, the employer may be required to continue paying the worker even in such voluntary leave situations if pay is required during the temporary leave under the employer's benefit plan or other statutes—for example, the Family Medical Leave Act or the Americans with Disabilities Act.

The U.S. Department of Labor's (DOL) regulations make it clear that an H-1B worker must be paid the required wage, beginning on the date the worker "first makes him/herself available for work or comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination." 20 C.F.R. § 655.731(c)(6)(i). In addition, even if the H-1B worker has not made himself or herself available for work, approval of the H-1B petition automatically requires the employer to begin paying the worker the required wage 30 days after the H-1B worker is first admitted to the United States or, if the person is already in the United States, 60 days after becoming eligible to work for the employer. 20 C.F.R. § 655.731(c)(6)(ii).

In its commentary on the regulations, the DOL has expressly stated that the employer's obligation to pay H-1B workers is *not* excused (1) in the case of a plant shutdown, (2) during a period of required training or orientation at the inception of employment, or (3) because of the lack of a permit or license or any other work-related reason. Even if the H-1B worker agrees to work during certain periods without pay in an employment contract, the law still requires the employer to pay the wage that is required. Therefore, even though an employer may be free to shut down one or more plants, cease normal operations, and temporarily lay off the rest of the workforce without pay for economic or for other business reasons, the employer must continue to pay H-1B workers required wages during such unproductive periods.

Terminations

Nonimmigrants in General

First and foremost, employers should remember that, even though sponsored workers on H-1B or other work visas do not have a particular right to keep their jobs, these workers enjoy the same protections from targeted termination as U.S. workers do. Employers should always make certain that any intended adverse employment action complies with Title VII of the Civil Rights Act of 1964. Workers holding nonimmigrant visas are covered under the Title VII protection against discrimination on the basis of national origin. The Immigration Reform and Control Act of 1986 (IRCA) also prohibits discrimination on the same basis, specifically against individuals who have authorization to reside and work in the United States. There are two exceptions to the discrimination clauses: Under Title VII, the "bona fide occupational requirement" exception allows companies or government agencies to prohibit foreign workers for reasons of national security. Under IRCA, the "equally qualified" exception permits employers to prefer U.S. citizens over nonimmigrant workers when the two have equal skills. However, alleging discrimination on the basis of national origin may be challenging when the only commonality between a company's laid-off foreign workers is their status as non-U.S. citizens and not their country of origin.

Once the employment relationship is terminated, any nonimmigrant worker (such as those with E, H, L, and TN visas) is considered to be "out of status" and must either obtain authorized employment with another employer, change to some other legal status, or leave the country. Under the applicable regulations, there is no "grace period" within which the terminated employee may remain in the United States to seek other employment or wrap up personal matters, such as lease arrangements or disposition of property. (Foreign workers may be able to obtain special permission from the USCIS to remain in the country while pursuing a bona fide claim, but the process can be both lengthy and complex. In some cases, it may advisable to file for a B visa to wrap up personal affairs, or, as the case may be, to obtain special permission that permits making a claim against a former employer.)

The fact that the terminated employee may remain "on the payroll" by receiving severance pay for a month or more does not constitute continued employment. Once the employee ceases to provide services to the employer and no specific date has been set for the employee to return to work or there is no legitimate expectation that the employee will return to work, the worker may still be considered

out of status and may not be granted a valid status without leaving the United States.

The requirements for reporting terminations of nonimmigrant workers vary according to a worker's nonimmigrant status. There is no specific regulation requiring the employer of a worker who has either E or L status to report the termination of the worker's employment to the USCIS. The TN regulations, however, do require that the petitioner "immediately notify" the USCIS of any changes in the terms and conditions of employment, which may affect TN eligibility, and the regulations further provide specifically that "[i]f the petitioner no longer employs the beneficiary, the petitioner *shall* send a letter explaining the change(s) to the director who approved the petition," 8 C.F.R. § 214.6(d)(5)(i)(A). When an H-1B employee is terminated, USCIS regulations similarly require the employer to notify the USCIS "immediately." 8 C.F.R. §214,2(b)(h)(11)(i).

H-1B Workers

As noted above, according to current regulations, when an H-1B employee is no longer employed and providing full-time services (or part-time services, if the petition so provided) to the petitioning employer in accordance with the H-1B petition, the employer is required to notify the USCIS immediately; the USCIS will then revoke the H-1B status as of the date of the employer's request. Terminating an H-1B employee's employment without notifying the USCIS as required is not considered a bona fide termination and will subject the employer to a continuing obligation to pay the employee the required wage. This is the case even when the employer pays the terminated H-1B employee severance pay equal to the person's regular salary. Meanwhile, the terminated employee no longer has H-1B status and is obligated either to leave the country, to find another H-1B employer, or to apply for a change to another status. Although not required by the regulations, it is in the employer's interest to notify the DOL as well and request that the LCA be withdrawn in order to begin the one-year post-termination LCA record keeping requirement.

In addition, if the employer terminates the H-1B worker before the end of the period of authorized H-1B status, USCIS regulations require the employer to pay the employee's reasonable cost of travel back to the last place of foreign residence. 8 C.F.R. § 214.2(h)(4)(iii)(E). This requirement to pay travel expenses does not apply when the employee voluntarily terminates his or her employment.

Historically, employers, employees, and the government's immigration services have not always followed these obligations to the letter because of the needlessly harsh consequences of strict compliance. Although the regulations say that the employer should notify USCIS "immediately," some employers do not notify the USCIS at all. Many do notify USCIS, but they put off the notification for a month or two in order to give the employee a chance to find other employment. Often many H-1B employees do not want to leave the United States and they find another U.S. employer; consequently, those employees do not request payment of transportation costs. The USCIS has exercised its discretionary authority in a reasonable manner and typically permits a person to remain in the United States if the worker has found another employer to sponsor his or her H-1B status, or if the worker files an application to change nonimmigrant status within a short time after termination. However, the USCIS requires submission of pay stubs when there has been a change of employers in order to document continued employment up to the filing of the new employer's petition.

It is important to review and comply with the H-1B regulations because the penalties for not doing so can be significant. If the Department of Labor finds that an employer has failed to pay wages to an H-1B employee as required prior to a bona fide termination or during certain periods of nonproductive status, the employer may be subject to the following penalties:

- payment of back wages to any H-1B worker who was not paid in accordance with the LCA attestations,
- civil money penalties,
- disqualification from approval of nonimmigrant petitions filed by the employer for a period of time, and/or
- other administrative remedies as deemed appropriate.

What Options Are Available to the Employer and the Terminated Employee?

Options for Nonimmigrants

A nonimmigrant employee who has temporary worker status and is terminated may either find another employer willing to offer a position that qualifies for E, H-1B, or TN nonimmigrant status or other employment-based nonimmigrant status. As an alternative, the employee can file an application to change his or her status to B-2 (visitor) status while looking for work or apply for admission to a college or university and, if admitted, change to F-1 (student) status.

If the employee being terminated has H-1B status and the new employer's petition is to change H-1B employers, under AC21, the employee may commence employment with the new employer as soon as the H-1B transfer petition has been submitted to the USCIS.

A terminated employee can also leave the United States in order to minimize the risk of accruing time in the country without proper status. In many cases, the employee can still seek employment with a U.S. employer in an appropriate visa category while residing outside of the country. Once a new employer's petition has been approved, the person would need to undergo processing with the U.S. embassy or consulate.

Options for Prospective Immigrants

What happens if the terminated worker is in the midst of the process of applying for lawful permanent resident ("green card") status at the time of the termination? The answer to this question is very fact-sensitive and requires an individualized analysis.

The easiest case is the employee who (1) is already the beneficiary of an approved employment-based immigrant petition; (2) has a valid employment authorization document (EAD), in addition to or in lieu of maintaining

nonimmigrant status; and (3) has had an adjustment of status application pending for at least 180 days. In that circumstance, under § 106 of AC21, the person can simply change jobs or employers and continue to adjust his or her status, provided the new employment is in the same or similar occupational classification.

However, if the employee has only a pending application for labor certification filed by the terminating employer, the application is void when the worker is terminated. If the person is the beneficiary of an approved labor certification application and an approved employment-based (Form I-140) immigrant petition but has applied for consular processing or has an adjustment application that has not been pending for 180 days, the immigrant petition and the underlying certified labor certification application are void (unless the employer legitimately continues to intend to offer the position to the employee upon completion of the process of the immigration petition).

If the terminated worker has a valid EAD, he or she may immediately start working for a new employer. Losing one's job does not invalidate an EAD; only the denial of the application for adjustment of status has this result. However, the new employer will have to petition for some kind of nonimmigrant employment status for the person, if possible, because the EAD cannot be renewed. Again, the new employer should consider beginning the permanent residence sponsorship process as soon as possible. Depending on the circumstances, the foreign national may also be able to use previously approved immigration filings to obtain extended H-1B status.

In conclusion, identifying and complying with regulatory obligations can benefit an employer in the following ways:

- It minimizes the risk of undergoing costly government investigations and administrative proceedings.
- It reduces the employer's obligation to pay wages when no work is being performed by a laid-off or terminated employee.
- It maintains an employer's ability to use immigration sponsorship in the future.

Considerations Related to Immigrant Workers During Corporate Changes

Mergers, acquisitions, and other corporate changes have become a familiar fixture in today's economy. During these transactions, the immigration concerns and consequences often become secondary to other business considerations. However, failure to address these immigration-related issues may not only suspend the work eligibility and valid status in the United States of a company's foreign national employees but also force these employees to travel outside the country—to a U.S. embassy or consulate abroad—to rectify the situation, because foreign nationals are not allowed to change their visa status within the United States.

The immigration consequences of such business transactions are often very complex and far-reaching. During corporate restructuring, the transfer of each foreign national employee to the new entity should be strategically planned prior to the proposed merger or acquisition in order to avoid IRCA violations and other complications inherent in mergers and acquisitions.

Employers not only may be subject to steep fines for not having a valid Form I-9 for an employee on file but also may be subject to lawsuits from terminated foreign national employees for the company's failure to maintain the employee's valid work eligibility. Falling out of status significantly diminishes a foreign national's chances of gaining lawful permanent residence status in the United States and is, therefore, a major point of contention for foreign national workers.

With these risks in mind, the discussion below outlines some of the common issues related to immigration that should be take into account when a business is undergoing a corporate merger or acquisition.

Assuming I-9 Responsibilities Following a Merger or Acquisition

Under the Immigration Reform and Control Act, U.S. employers are required to verify the identity and U.S. employment eligibility of any worker hired after Nov. 6, 1986. The primary way for an employer to demonstrate compliance with IRCA is to complete Form I-9 within the designated time period. A successor corporation assumes the Form I-9 liabilities of the entity to be acquired. In acquiring a business, the new employer may rely on the I-9 forms completed by the previous owner/employer when an individual continues employment with a related successor or a reorganized employer, provided that the new employer obtains and maintains the previous employer records and I-9 forms as applicable.

Even though new I-9 forms should not be required, when there is a corporate change, the related successor or reorganized employer takes on the responsibility and liability in the ongoing Form I-9 process for new employees. The acquiring entity should test the I-9 compliance of the acquired company by conducting a sample audit of employees' I-9 forms. At the closing of the transaction, the acquiring company may also require representations and warranties regarding the condition of the I-9 forms of the company to be acquired.

Maintaining Proper H-1B Status Following a Corporate Restructuring

Most nonimmigrant or temporary visa classifications are specific to the employer, meaning that such a classification authorizes employment in the United States only with the petitioning employer. When a foreign national's employment is transferred to a new entity as a result of a merger, stock acquisition, asset acquisition, spin-off, or some other transaction, the "employer-specific" doctrine applies. As a result of the corporate restructuring, the new employer may be required to file an amended petition for a nonimmigrant visa with the USCIS (formerly the Immigration and Naturalization Service).

For H-1B employees, it is important to determine whether the USCIS considers the new company a "successor in interest" and whether the company has specifically assumed the immigration-related obligations and liabilities of

the company that originally sponsored the H-1B employee. In order to be considered a "successor in interest," the new company must "succeed to the interests and obligations of the original petitioning employer." With regard to H-1B employees, the obligations and liabilities refer to obligations and liabilities related to immigration, such as those related to the labor condition application (LCA) filing precertified by the U.S. Department of Labor and submitted as part of the Form I-129 H-1B petition filing with the USCIS.

If the new company is a successor in interest, there is no need to file an amended petition for each continuing H-1B employee. However, if the new company is not considered a successor in interest, the filing of an H-1B amended petition may be required and USCIS would expect it to be filed as soon as possible prior to the closing of the merger or acquisition.

A new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether the employer identification number has been changed, provided that the successor entity, prior to the continued employment of the H-1B worker, agrees to assume the predecessor's obligations and liabilities under the certified LCA, as observed by a memorandum to the public access file that is related to the H-1B application.

There are, however, instances when a new LCA may be required. Material changes in the employee's duties and job requirements and the relocation of the employee may require a new LCA. Therefore, if employees are relocated as a result of a merger, new LCAs may be required for H-1B workers. However, a simple change in a company's name will not require the filing of a new LCA. In addition, DOL regulations require that the new entity maintain information in the company's H-1B-related public access files concerning the assumption of the obligations related to immigration.

There is an exemption to the rule governing the requirement of filing a new Form I-129 by employers in cases of corporate structuring in which the new employer is a successor in interest that assumes the prior employer's interests and the obligations. If a new or amended petition is not needed, then the employer may simply wait until filing an extension petition for the employee to notify the USCIS of the change.

In the context of the H-1B category, determinations about successors in interest are based on a determination as to whether the new entity has specifically assumed the immigration-related obligations and liabilities of the original H-1B employer. The optimal successor in interest scenario is one in which the final corporate documents include an explicit statement concerning the assumption of all H-1B obligations by the new corporation.

Corporate restructuring may cause the employment relationship between the sponsoring company and the H-1B beneficiary to end prior to the expiration of the H-1B visa petition. In this case, under 8 CFR § 214.2 (h)(11)(i)(A), the employer is required to submit a letter of notification of the termination to the USCIS Service Center that approved the petition.

In addition to withdrawing the H-1B petition with USCIS, it is imperative that the employer also withdraw the LCA with the DOL. Until the employer formally withdraws the certified LCA, the employer will continue to be bound by the LCA's requirements related to wages, working conditions, strikes and lockouts, and notice statements. In addition, if the employee is terminated prior to the H-1B petition expiration date, the employer is required to pay for the employee's return transportation costs. As previously noted, however, the employee voluntarily terminates employment, the return transportation requirement is not applicable.

Another important consideration in the expedited withdrawal of approved U.S. employment authorization for terminated employees is the potential for visa fraud. Without the receipt of proper notification from the sponsoring employer, USCIS will have no way of knowing that the foreign national employee is no longer entitled to work in the United States, pursuant to the approved employment authorization. Consequently, the foreign national may continue to apply for the corresponding visa for their employment-based nonimmigrant category and use it to enter the United States. Entering the United States by means of a nonimmigrant visa for which there no longer exists an underlying qualifying relationship and/or petition constitutes visa fraud. For the company's protection, it is important to ensure that the company has completed its due diligence in reference to this matter.

The Effect of Mergers and Acquisitions on L-1 Multinational Managers and Executives

The L-1 visa classification is available to foreign nationals who work abroad for a company with a parent, subsidiary, branch, or affiliate located in the United States. Foreign nationals in the L-1 category are admitted to the United States as "intercompany transferees," who are coming temporarily to the United States to perform services for the U.S. company either in a managerial or executive capacity as an L-1A employee or with the specialized knowledge of the company abroad as an L-1B employee. To qualify for L-1 classification, the employee must have been employed abroad by the qualifying foreign entity on a full-time basis for at least one continuous year out of the last three years immediately preceding application for admission.

In the case of an L-1 classification, it is critical that the new employer demonstrate the same qualifying corporate relationship with a qualifying parent, subsidiary, branch, or affiliate abroad as the pre-transaction employer. The new entity must establish the necessary qualifying corporate affiliation or parent-subsidiary relationship, which is an essential requirement for obtaining an L-1 visa. The petitioner must show that there are still two entities—one in the United States and one abroad—and that the U.S. entity is appropriately related to a foreign company. There should also be no doubt that the foreign national who has L-1 status will continue to work in the appropriate managerial/executive (L-1A) or specialized knowledge (L-1B) capacity.

With regard to L-1 employees, it would be helpful for the purchase agreement between the two entities to stipulate, that, for example, to ensure a smooth transition after the merger or acquisition, the previous entity's L-1 em-

ployee must continue to discharge his or her managerial/executive (L-1A) or specialized knowledge (L-1B) functions for the new company for one year. Because the acquisition results in a material change to the company that originally sponsored the L-1 visa, the new entity should file a new or amended L-1 petition to establish both the new employer's eligibility as an L-1 company and the foreign national's continuing eligibility as an L-1 employee. Such an amended filing should be submitted to the USCIS within a reasonable time.

A difficulty arises when the L-1 employee being considered for the new entity never worked abroad for either the new employer or any of its affiliates abroad at any time. Therefore, the question is whether the foreign national continues to remain qualified for L-1 status after the merger or acquisition has been implemented. The argument has successfully been made that the foreign national should continue to qualify for L-1 status. It is certainly reasonable to allow essential L-1 employees who are already functioning as an essential part of the corporate establishment in the United States and who may have been among the key assets considered in the corporate change to continue in the same status. A well-crafted argument related to successor in interest in the L-1 context should allow a new company to simply assume all the rights and interests held by the merged or acquired company, including the rights and interests emanating from or inherent in the foreign national's prior employment abroad.

Similarly, because the successor in interest law, as previously outlined by the USCIS with regard to the I-9 and H-1B processes, allows a new company to assume the responsibilities of the merged or acquired company and to continue the visa process for any foreign national employee in the midst of seeking temporary or permanent status in the United States, the lawful employment of L-1 employees should generally be able to continue as well.

Effects of Corporate Restructuring on the Permanent Residence Process

Lawful U.S. permanent residents (LPRs) have U.S. employment status that is not specific to their employers, and these workers may change employers (or become unemployed) without filing an amended petition. Therefore, mergers and acquisitions do not affect LPR employees. However, foreign national employees who have pending employment-based permanent residence applications on file at the time of the corporate restructuring are significantly affected by material changes resulting in the restructuring process.

An application for U.S. permanent residence status sponsored by a U.S. employer generally consists of three steps. First, the employer usually must prove that, despite reasonable recruitment efforts, the employer has not been able to find a qualified U.S. worker to fill the position that will be assumed by the foreign national. This step, which is called the labor certification (or PERM) application, is handled through the Department of Labor.

Second, the employer must file a Form I-140, Immigrant Petition for Alien Worker, with the USCIS. After the Form I-140 petition has been approved, the employee proceeds to the third and final stage, where permanent resident status is actually conferred either through adjustment of status within the United States or consular processing at a U.S. consulate abroad. Assuming an immigrant visa number is available, if the employee is lawfully present in the United States, he or she will generally choose to file a Form I-485, Application to Adjust Status to Permanent Residence, in order to adjust his or her immigration status to the status of a lawful permanent resident with the USCIS from within the United States.

The Labor Department takes a liberal view when it comes to when a new labor certification petition must be filed. If, after an acquisition, a new owner remains the foreign national worker's employer and has assumed *all* the previous owner's obligations, the new owner should qualify as a successor in interest, and the pre-existing labor certification application will survive, assuming the position remains within the same area of employment.

With regard to the Form I-140 petition in LPR cases, USCIS has traditionally used a stricter version of the successor in interest theory and has permitted an employer to continue with the prior employer's petition only if the new employer has assumed all the prior employer's liabilities. Without a true successor in interest situation, a new Form I-140 petition may be necessary even when a Form I-485 application is already pending.

Foreign national employees who are the beneficiaries of an approved Form I-140 petition, have had a Form I-485 application on file for longer than 180 days, and have a valid unexpired employment authorization document issued through the Form I-485 process may not be required to begin the LPR process anew. Employees who are foreign nationals who meet all these conditions may use their EADs to "port" to the same position, or one that is substantially similar, with the same company or with an entirely different company without having to begin the LPR process anew.

Conclusion

Given the potential risks that can come with corporate restructuring, transition teams and corporate counsel should integrate immigration issues to the due diligence process and may wish to require warranties and indemnifications at the closing of the transaction. The best way to proceed with regard to any and all immigration-related matters following a corporate restructuring must be closely analyzed on a case-by-case basis.

In summary, when preparing for corporate changes, it would be prudent for employers to consider issues related to immigrant employees in order to minimize their liabilities; maximize the value of prior sponsorship efforts; and, most important, maintain the ability to employ key employees continuously. **TFL**

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