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September 21, 2012

As an ongoing service to our clients, we are committed to keeping you apprised of developments in the law that may directly impact your business. As part of that effort, we wanted to share with you a recent article published in *The Deal Pipeline* by Doug Towns and Jessica Gallegos, attorneys in our Employment Litigation and Counseling Practice, regarding immigration issues in corporate acquisitions.

The Deal Pipeline®

The increasing importance of immigration issues in M&A

By contributors Doug Towns and Jessica Gallegos, Mazursky Constantine
Published August 29, 2012 at 2:00 PM ET

Companies and their lawyers are adept at uncovering potential risks and liabilities when analyzing targets for acquisition as part of the due diligence process. In fact, companies often conduct extensive due diligence and expend energy negotiating contractual provisions related to litigation, environmental and intellectual property issues. Unfortunately, immigration compliance is often treated as an afterthought in the due diligence review process, even by the most sophisticated companies. As immigration issues are rising to the forefront of public discussion and governmental enforcement efforts, this "bury your head in the sand" approach to immigration issues can result in large, unexpected liability for the acquiring company. Indeed, liability under federal immigration laws is not limited to intentional wrongdoers. Employers have been found liable for mere unknown record-keeping violations. Moreover, such liability may even extend to otherwise innocent companies that acquire predecessor companies that violated the law. As a result, immigration compliance and associated liability should be considered as part of a thorough due diligence review.

Under President Obama's direction, the U.S. Department of Homeland Security issued a memorandum outlining the administration's current approach to immigration enforcement. The memorandum instructed U.S. Immigration and Customs Enforcement agents to prioritize the prosecution of employers, owners and managers who hire unauthorized aliens. The memorandum signaled a significant departure from the enforcement approach taken by the Bush administration, which focused on the prosecution and deportation of

unauthorized aliens.

Obama's focus on employers is apparent from the enforcement statistics. Nationally, from fiscal year 2009 to mid-2011, ICE conducted I-9 audits against 4,000 companies. These audits can lead to substantial penalties. Civil fines range from $110 to $16,000 per incident. In fiscal year 2011, ICE conducted nearly 2,500 audits and imposed almost $10.5 million in civil fines for hiring violations and $7 million in fines resulting from Form I-9 audits. This is a significant increase from 2008, when ICE conducted only 503 Form I-9 audits and imposed under $700,000 in civil fines.

Far more than mere nuisance-level fines, liability for noncompliance with immigration laws can be substantial. For example, this year, ABC Professional Tree Services Inc. settled with ICE's Homeland Security Investigations for $2 million to avoid criminal prosecution. After discovering that about 30% of ABC's 2,500 employees were undocumented aliens, ICE found that ABC falsely represented on a significant amount of Form I-9s that its newly hired employees' authorization documents appeared genuine and then failed to take corrective measures. ICE agreed not to prosecute the company in exchange for $2 million, allegedly representing the amount of revenue that the company earned from employing illegal aliens.

Corporate lawyers and their clients are intimately aware of the risks associated with acquiring companies and merging employees into the purchaser's existing workforce. However, unlike some other areas of the law, even an "asset deal" may not shield a purchaser from liability triggered by a seller under federal immigration laws. In short, ignorance of a seller's immigration law violations will not necessarily protect a purchaser from the increasingly harsh sanctions of the federal government.

In light of this risk, it is important that companies and their lawyers consider immigration law when negotiating a merger or acquisition. At a minimum, the buyer should determine whether liability under the Immigration Reform and Control Act exists and consider steps to protect itself from liability, including the following:

Conduct an immigration compliance audit. As part of the due diligence process, the acquiring company should review the potential target company's immigration compliance history. This review should include an audit of the target company's I-9 Forms, copies of verification documents maintained with the forms, if any, and other company records that ICE would review in the event of a federal I-9 compliance audit. In addition, the review should include an inquiry into any previous immigration compliance issues faced by the target company, such as ICE sanctions or audits.

Correct minor errors. If the acquiring company learns that the predecessor company's I-9 Forms contain minor and isolated errors, such as a missing date, the acquiring employer should consider making corrections on the form once the deal is closed. However, any changes to the form must be initialed and dated, and there should be no attempt to conceal the changes made. If done incorrectly, alterations of the I-9 Form may cause the successor employer more problems than they fix.

Treat predecessor employees as new hires. Once the deal is closed, although not required, successor employers may treat predecessor employees as new hires and redo the I-9 verification process for all of the newly acquired employees. This is strongly encouraged if the I-9 audit revealed significant or pervasive compliance problems.

Seek indemnification. Acquiring companies should consider adding a provision to the acquisition agreement indemnifying the successor for any Immigration Reform and Control Act violations and creating a reserve for any violations found after the acquisition. However, this approach would not effectively protect the successor company, owners, managers or employees from criminal sanctions brought by federal authorities or the negative public-relations impact of employing unauthorized workers. Further, the reserve fund may be of limited effectiveness as some immigration law violations may not be discovered until years after the deal closes.

Immigration law compliance need not be a deal breaker. Immigration compliance,

however, should at least be considered during negotiations and included in the due diligence process given the risk of liability under the Immigration Reform and Control Act.

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