

Mergers and Acquisitions and Compliance with Form I-9 Employment Eligibility Verification

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A merger or acquisition in the works means not only needing to determine whether any acquired foreign nationals (including key employees) will be able to transfer seamlessly into the new entity, but also what to do about compliance with the Form I-9 Employment Eligibility Verification.

For I-9 purposes, when an employer acquires new employees through a merger or acquisition, the employer has two options for employees who will be continuing with the new organization. The first option is to treat them as new hires and complete new Forms I-9 for all new employees. The second option is to treat them as employees continuing their employment with the related, successor, or reorganized organization and keep the previous employer's completed forms.

Verification of Identity and Employment Authorization

Regulations under the Immigration and Nationality Act provides:

an employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.

8 CFR § 274a.2(b)(1)(viii).

This section offers eight scenarios under which an individual would be deemed to be "continuing in his or her employment." For example:

An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable.

Additionally, 8 CFR § 274a.2(b)(1)(viii)(A)(7) defines a "related, successor, or reorganized employer" to include:

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.

As New Hires

If the employer decides to treat employees who will be continuing with the new organization as "new hires," new Forms I-9 must be completed for *all* acquired employees, without regard to citizenship or national origin status.

The Forms I-9 should be completed as follows:

- The first day of employment is the effective date of the merger or acquisition (or, in some cases, when employees move payroll or operational control changes).
- Section 1 must be completed by the new employee no later than the first day of employment. This section may be completed in advance if there is a signed offer letter in place.
- Section 2 must be completed by the employer within three days of the effective date.

In addition to completing new I-9 forms for all acquired employees, employers who are enrolled in and use E-Verify voluntarily or are required to by state law must also run all acquired employees through E-Verify.

Employers who are using E-Verify as required by the Federal Acquisition Regulation (FAR) E-Verify

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clause have one additional option. They may decide to verify (or reverify) their *entire* workforce. If the company chooses that route, then they have 180 days to create E-Verify cases for each non-exempt employee. If the company chooses not to E-Verify the entire workforce (but only the newly acquired employees or those assigned to a particular contract), then they have 90 days to create E-Verify cases for each non-exempt employee acquired.

Continuing Their Employment

If the employer decides to treat the acquired employees as continuing their employment, then the new employer takes over the former employer's Forms I-9 and, in so doing, accepts responsibility for any mistakes or omissions on those forms. In the event of an audit by Immigration and Customs Enforcement (ICE), the new company will be responsible for any mistakes or omissions in the old forms.

Before making this decision, the employer should review the acquired company's I-9 forms to ensure that Sections 1 and 2 were completed properly and on time. It should also ensure the documents originally presented by the employee were reviewed in person by the acquired employer's company representative to confirm the employee's identity and employment eligibility.

If the acquiring employer determines that many of the acquired company's I-9 forms need to be corrected, the acquiring company should complete new I-9 forms for all the acquired employees. The acquiring employer should not be selective.

On the other hand, if there are few errors on the acquired company's I-9 forms, then the acquiring company may choose to adopt the acquired company's I-9 forms. As the acquiring company will be liable for any errors or omissions found on the acquired business's I-9 forms, correcting the few errors will help reduce potential civil penalties for paperwork violations that may be discovered later.

If the acquiring employer has decided to adopt the acquired business's I-9 forms, a memo should be prepared and placed 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. In addition, an indemnity clause should be included in the acquisition agreement providing that the acquired entity would indemnify the acquirer for inherited Immigration Reform and Control Act-related violations.

Here are some questions to consider when deciding whether to adopt the former employer's Forms I-9:

- Has the new employer conducted due diligence of the I-9 forms?
- Do the I-9 forms appear to be compliant?
- Would this be a good opportunity to get into compliance?
- How large is the acquisition? How many employees are affected?
- Does the new company have the staff to handle the preparation of new I-9 forms?
- Can the new company easily incorporate the I-9 forms into its own system and procedure?
- Is the new employer using E-Verify voluntarily or obligated to do so by a FAR E-Verify clause?
- Would this be a good opportunity to review the employment eligibility of all employees and internally audit all I-9 forms?
- Does the acquisition involve employees who are members of a union or a collective bargaining unit? (Some unions will oppose completing I-9 forms and running their members through E-Verify upon acquisition.)

The Trump Administration's immigration enforcement and the uptick in ICE audits mean that how employment verification for newly acquired employees is handled is more important than ever to the smooth completion of a merger or acquisition. Jackson Lewis attorneys are available to help with I-9 due diligence processes and choosing the best strategy for your newly expanding company.

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