

Any M&A deal may require action on one or more of these People Pieces.



## M&A: THE PEOPLE PIECE The deal won't close without the financing; It won't succeed without the people.

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Whether it is a U.S. company or individual, or a foreign-owned company or foreign national individual acquiring a U.S. business, it is more likely than not that key employees are on a visa or in a work-authorized immigration status. Many employment-based visa types are specific to the employer. **Get a handle on it sooner rather than later; here's why.**

**Example 1: acquired key employee's status affected by the merger.** A U.S. company was acquiring another U.S. company. The deal was set to close on a Monday. They contacted me the Thursday before, just 4 days including a weekend. They had just realized a key scientist was on a visa. Sparing you the immigration details, the minute the deal closed, the newly created company would have a new EIN number, and would be a "new" employer. Their key scientist would be working without authorization, which would come back to haunt him, and potentially the company, later. We had to get him approved for the new employer over the weekend. With their HR person working very well and diligently with me through the weekend, we did it. He entered on Monday authorized to work for the new company. Warning!! That only worked so quickly because he's Canadian. Otherwise, it would have taken longer.

**Example 2: who will do the work?** A potential client had just acquired a commercial fishing company. I was explaining the requirements and timing for the H-2B seasonal worker status. He became very frustrated exclaiming, "I paid millions of dollars to buy this company!" In my own mind I was thinking, "who would spend millions of dollars to buy a company, with no clue how they were going to get the people to do the work."

**I-9's: know who the workforce is both for liability and getting the work done.** By now most companies should be aware they need to do an internal I-9 audit as part of due diligence in an M&A deal. Form I-9 is the form that every single employer is required to complete for every single employee, even if you know for a fact the employee is a born and bred U.S. citizen. That has been the law since November 1986.

Not long ago the government did an **"inflation catch-up"** raising the amount of the fines by **40 years-worth of inflation adjustment to the fines**. Needless to say, the fines have increased substantially.

**Stock purchase v. asset purchase, will the buyer be liable; the government has *reframed the rule*.** Whether a newly merged or acquired company will be liable for the I-9 errors of the prior company depends. Previously, government guidance was that if it is a stock purchase, then the succeeding company will be liable, but if it is an asset purchase, they may not be. In an asset purchase the agreement might state which liabilities the buyer is acquiring. So, this issue wasn't as concerning in an asset purchase in which the buyer was not acquiring the liabilities of the prior entity.

Now, government guidance has restated the two options as either: 1. treating all acquired employees as new hires and doing a new Form I-9 for every individual, or 2. treating all acquired individuals as continuing employees, in which case the successor retains the prior I-9s, and is liable for any errors or omissions.

In either I-9 scenario, employees' visa status may be affected by the merger or acquisition. The first example above is unrelated and a separate issue from the I-9 issue.

**A merger or acquisition may require any or all of the following important people pieces:**

- Transfer of executives or managers or someone with specialized knowledge from abroad to the U.S.,
- Amended visa for existing employees
- Preparation for timing and status applications for workers
- I-9 audit and/or changes

It is critical to work with an experienced business immigration lawyer to identify the specific needs in each deal well, well, ahead of closing in order for the transition to go more smoothly.

**The deal won't close without the financing, but it won't succeed without the people.**

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