



white paper

“HIDDEN IN PLAIN SIGHT”: THE UNFORESEEN FORM I-9 LIABILITY INHERENT IN MERGERS AND ACQUISITIONS

This white paper will discuss the unique Form I-9 requirements in the mergers and acquisitions context and provide helpful tips to ensure Form I-9 compliance after a merger or acquisition.

It is no secret that 2021 has seen a surge in mergers and acquisitions, with deal value climbing to over \$121 billion in the first half of 2021. While many mergers and acquisitions result in increased profit through synergies in many administrative functions – Human Resources being one of them – mergers and acquisitions are a ripe target for regulators, including the Department of Homeland Security.

This white paper will discuss the unique Form I-9 requirements in the mergers and acquisitions context and provide helpful tips to ensure Form I-9 compliance after a merger or acquisition.

An employer must ensure that a Form I-9, Employment Eligibility Verification Form, is completed for each employee hired after November 6, 1986.¹ The employee must complete Section 1 of Form I-9 prior to the first day of work for wages.² The employer must physically inspect and complete the Section 2 certification within three days of the employee’s first day of work for wages.³

When an employer acquires a new employee through merger or acquisition, the employer has two options. The employer can opt to treat the acquired employees as existing employees and adopt the previous employer’s Forms I-9.⁴ Alternatively, the employer can treat each of the acquired employees as a new hire and complete an entirely new Form I-9 for each employee.⁵

¹ Form M-274 at § 2.0; 8 C.F.R. § 274.2(b).

² 8 C.F.R. § 274a.2(b)(1)(i)(A)(i). See also *U.S. v. Curran Eng’g Co., Inc.*, 7 OCAHO no. 975, at 17 (1997).

³ 8 C.F.R. § 274a.2(b)(1)(ii). See also *Curran Eng’g*, 7 OCAHO no. 975, at 17.

⁴ The regulations provide that “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 C.F.R. § 274a.2(b)(1)(viii). An individual is considered to be continuing in her or her employment with a successor corporation if “the employer obtains and maintains from the previous employer records and Forms I-9 where applicable.” See 8 C.F.R. § 274a.2(b)(1)(viii)(A)(7). A successor corporation is defined as “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.” 8 C.F.R. § 274a.2(b)(1)(viii)(A)(7)(ii).

⁵ See Form M-274 at § 7.0.

⁶ *Id.*

⁷ Katie Loehrke, *The Form I-9 is New – The Risk of Penalties for Noncompliance is Not*, The Business Journals (January 3, 2017, 7:20 a.m.) <https://www.bizjournals.com/bizjournals/how-to/growth-strategies/2017/01/penalties-for-noncompliance-on-form-i-9.html>; 8 C.F.R. § 274a.10(b)(2).

TREATING ACQUIRED EMPLOYEES AS CONTINUING IN EMPLOYMENT

If an employer elects to treat the acquired employees as existing employees and retain the previous employer’s Forms I-9, the new employer is liable for any defects or violations.⁶ According to United States Citizenship and Immigration Services, 76% of Forms I-9 have a defect that could result in an administrative fine ranging from \$230 to \$1,948 per Form I-9 for a first offense.⁷ As a result, the acquiring employer should devote considerable due diligence resources to reviewing the previous employer’s Forms I-9 for any defects or patterns of defects or violations. The acquiring employer should also review the previous corporation’s Form I-9 completion practices and determine whether the documents were physically examined in accordance with the regulations.

Some other considerations are:

- Whether this would be a good opportunity to get the Forms I-9 in question into compliance?
- Whether this would be a good time to conduct an internal audit of all employees?
- Is the new employer using E-Verify, either voluntarily or under state law or a condition of a federal contract?
- Can the new company easily incorporate the historical Forms I-9 into its own system?
- Does the new company have the staff to prepare a large number of new Forms I-9?





If, after all of these considerations, the acquiring company decides to adopt the prior employer's Forms I-9, a memorandum should be prepared and placed with the acquired Forms I-9 explaining the adoption, date of corporate transaction, and the number of Forms I-9 adopted. Further, corporate counsel would be wise to seek indemnification from the seller from any future fine related to adopted defective Forms I-9.

TREATING ACQUIRED EMPLOYEES AS NEW HIRES

If the acquiring employer elects to treat the acquired employees as new hires, the employer should be mindful that it must complete new Forms I-9 for every acquired employee.⁸ Failure to do so may give rise to an unlawful employment discrimination complaint under Section 274B of the Immigration and Nationality Act (INA).⁹

When treating an acquired employee as a new hire, the first day of employment is the effective date of the merger,

when payroll is moved, or the date of change in operational control. Section 1 may be completed at any time after an offer of employment with the successor corporation but before the end of the first day of work.¹⁰ Section 2 must be completed within three days of the new "hire date."¹¹ This provides an opportunity for employers to bring their Forms I-9 into compliance.

If the employer is enrolled in E-Verify, either voluntarily or through state or federal contract obligation, it must also run all of the acquired employees through E-Verify.¹²

CONCLUSION

While Form I-9 compliance is often overlooked during a merger or acquisition, failure to conduct due diligence and evaluate the acquired company's Forms I-9 can prove costly if errors are found. Further, failure to conduct an internal audit during a merger or acquisition is a lost opportunity to ensure compliance and consistency throughout your Form I-9 and E-Verify program. ■

⁸ See 8 U.S.C. § 1324b.

⁹ *Id.*

¹⁰ *Supra*, n.2.

¹¹ *Supra*, n.3.

¹² See USCIS Q&A, <https://www.e-verify.gov/about-e-verify/questions-and-answers?tid=All&combine=merger>.