CLIENT ALERT

HR BLOG

企業再編とH-1Bビザの従業員への潜在的な影響

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COVID-19パンデミックによる財政難から、企業再編を検討している企業は多くおられるかもしれません。企業の合併、買収、スピンオフなどにおける多くの検討事項のなかで、経営者の頭の中で最後に思い浮かぶ問題の一つが、企業再編が外国人労働者に与える影響ではないでしょうか。最終的に組織再編をするかの決定にはビジネス上の理由が大きいかもしれません。しかし、企業は、H-1Bビザで働く労働者が就労ステータスを維持できるよう、必ず組織再編を行う前に、移民弁護士にご相談いただく必要があります。

企業再編が検討されているときに、労働者のH-1Bのステータスに影響があるかどうかの検討のため、企業の顧問弁護士はまず次の 2 つの質問をすべきです。

1. **クロージングするか？** 企業再編が発表されただけでは、外国人従業員の移民法上のステータスに法的に影響はありません。会社が対応する必要が生じるのは、実際に企業再編がクロージングしてからです。
2. **雇用主が変わるか？**すべての企業再編がH−1B労働者の移民ステータスに影響する訳ではありません。名前が変更される、株主が変更するという場合は、何のアクションも必要ないと思われます。[1]

上記の質問の答えがいずれも「はい」の場合、移民法上の措置をとる必要があるかどうかを判断するために、以下の追加の分析が必要です。

新しい雇用主は「包括承継者」か？

雇用主が「異なる」場合、会社の顧問弁護士が次に質問すべきなのは、新しい雇用主が「包括承継者」であるかどうかということです。「新雇用主が、従業員の元の雇用主の債権債務を承継し、雇用条件にまったく変更はない」という場合には、新雇用主は旧雇用主の「包括承継者」となります。[2]

新雇用主が「包括承継者」である場合、H-1B申請書の修正は必要ありません。

新雇用主が「包括承継者」である場合、H-1B修正申請書の提出は必要ありません。これは、企業再編が合併、買収、連結、スピンオフ、その他の事業体の再編を伴うか、また雇用主の連邦税識別番号（FEIN）に変更があるかを問いません。[3]

修正申請書の提出（およびその後の労働条件申請書（LCA）の提出）は必要ありませんが、企業は、企業再編後に新雇用主であることを認める文書を一般にアクセス可能な場所に保管することを求められます。[4] 当該文書には以下のすべてを記載する必要があります。

(1) 労働条件申請書（LCA）の番号と認証日

(2) 従業員に適用される賃金制度の説明

(3) 新雇用主の連邦税識別番号（FEIN）

(4) 「労働条件申請書（LCA）からまたはLCAにおいて行った認証のもとで生じるすべての義務・責任・約束を引き受ける」ことを新雇用主の権限ある代表者が宣誓する供述書[5]

権限ある代表者は、宣誓供述書の写しを一般にアクセス可能な場所に保管し、また労働省（DOL）またはその他当局からの求めに応じてそれを提出することに、明示的に同意しなければなりません。この文書は、組織再編が行われる前に、保管されなければなりません。

新雇用主が外国人労働者のH-1Bステータスを延長する場合はどうなるか？

新雇用主が、H-1Bビザの労働者を新規で採用したり、企業再編前に雇用されたH-1Bの労働者のH-1Bステータスを延長しようする場合、新雇用主は新たに 労働条件申請書（LCA）と H-1B 申請請願書を提出する必要があります。[6]

著者について

Alexandra Crandall は、ディキンソン・ライトのフェニックスオフィスの弁護士です。ビジネス移民法を専門としており、外国人労働力を維持するための移民法上の請願のお手伝いをしています。当事務所に入所前は、アリゾナ州控訴裁判所のジェニファー・B・キャンベル判事のロークラークを務めました。

[1] See, letter from Efren Hernandez III, Acting Director, Business and Trade Services, HQ 70/6.2.8 (June 7, 2001), AILA Doc. No. 01062832 (Posted June 28, 2001) referring to 8 CFR §214.2(h)(2)(i)(E). [2] INA § 214(c)(10); 8 U.S.C. § 1184(c)(10).
[3] 20 CFR § 655.730(e)(1).
[4] 20 CFR § 655.730(e)(1) ("Where an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the [FEIN]) . . . ").
[5] 20 CFR § 655.730(e)(1)(i)–(iv).
[6] 20 CFR § 655.730(e)(2).

HR BLOG

CORPORATE RESTRUCTURING AND ITS POTENTIAL IMPACT ON H-1B WORKERS

by Alexandra Crandall

Facing the financial distress caused by the COVID-19 pandemic, many companies may be contemplating corporate restructuring. With all of the considerations surrounding a corporate merger, acquisition, or spin-off, often the last item on an executive's mind is the impact of corporate restructuring on its foreign national workforce. While business motives may be at the forefront of the practical considerations in finalizing a precarious deal, corporate counsel should be sure to consult with immigration counsel in advance of any corporate change in order to preserve the immigration status of H-1B workers.

Before taking any immigration action to preserve the H-1B status of its workers in light of anticipated corporate restructuring, legal counsel for the company should first ask two questions:

1. **Will the deal close?** At the outset, it is important to note that the mere announcement of a corporate restructuring has no legal effect on foreign national employees. It is not until the deal actually closes that the company will need to take any action.
2. **Has the employer changed?** Not all corporate reorganizations require action to maintain the immigration status of H-1B workers. A simple name change or ownership change should not require any action at all.[1]

If the answer to both of the above questions is yes, then additional analysis is required to determine whether any immigration action is required.

Is the New Employing Entity a "Successor in Interest"?

If the employer is "different," then the next question that legal counsel for the company should ask is whether the new employer is a "successor in interest." The new employer is a "successor in interest" where "a new corporate entity succeeds to the interest and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner." [2]

If the New Employing Entity is a "Successor in Interest," No Amended H-1B Petition is Required.

If the new employer is indeed a "successor in interest," then the employer is not required to file an amended H-1B petition. This is true whether the corporate restructuring took the form of a merger, acquisition, consolidation, spin-off, or any other entity reorganization, even if there is a change in the employer's federal tax identification number.[3]

Rather than filing new H-1B petitions and accompanying Labor Condition Applications ("LCAs") after the corporate restructuring, the regulations require the employer to place a document in the required public access file acknowledging the new employing entity.[4] The document must state:

- the affected LCA number and its date of certification;
- a description of the new employing entity's wage system applicable to the employee;
- the federal employer identification number (FEIN) of the new employing entity; and
- a sworn statement by an authorized representative of the new employing entity expressly acknowledging the entity's "assumption of all obligations, liabilities and undertakings arising from or under attestations made" in the certified LCA. [5]

The authorized representative must explicitly agree to maintain a copy of the statement in the public access file and make the document available to the Department of Labor or any member of the public upon request. The document should be placed in the public access file **before** the corporate reorganization is finalized.

What Happens When the New Employing Entity Seeks to Extend its H-1B Workers' Status?

The new employing entity must file new LCAs and H-1B petitions when it hires any new H-1B nonimmigrants or seeks extensions of H-1B workers who were hired prior to the corporate restructuring.[6]

About the Author

Alexandra Crandall is an attorney at Dickinson Wright in Phoenix. She practices business immigration, successfully assisting employers with the preparation of immigrant and non-immigrant petitions to maintain their foreign national workforce. Prior to joining the firm, Ms. Crandall served as a Judicial Law Clerk to the Honorable Jennifer B. Campbell at the Arizona Court of Appeals.

[1] See, letter from Efren Hernandez III, Acting Director, Business and Trade Services, HQ 70/6.2.8 (June 7, 2001), AILA Doc. No. 01062832 (Posted June 28, 2001) referring to 8 CFR §214.2(h)(2)(i)(E).
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[5] 20 CFR § 655.730(e)(1)(i)–(iv).
[6] 20 CFR § 655.730(e)(2).