

New owner, new work permits

Mergers and acquisitions can impact foreign workers who are in Canada under specific circumstances

BACKGROUND

Foreign workers in limbo

WHEN A company is bought by or merges with another company, a lot of things about the employer can change, even its name. These changes can have significant effects on employees, particularly those who are immigrants working in Canada under work permits. Many foreign workers have permits or agreements that relate to their specific employer and any changes in ownership or operations can have consequences on the validity of the permits and the ability of the workers to remain employed in Canada.

Employers who go through this type of transaction should be aware of how work permits are affected. Immigration lawyer Sergio Karas explains what employers should do if they have foreign employees working for them in Canada under Labour Market Opinions or transfers from foreign offices in the event of a merger or acquisition.

| BY SERGIO KARAS |

CORPORATE TRANSACTIONS such as mergers, acquisitions, restructurings and takeovers may result in immigration related consequences for foreign workers employed by merging or target companies. Where an entity merges, is acquired or is restructured, its foreign workers may require new work permits, depending on the specific situation. Failure to address this need can render their existing work permits invalid and put the employer in jeopardy, and subject to administrative penalties.

Human resources managers must be alert to the potential problems and take appropriate action to avoid them. In addition, after corporate transactions are completed, there should ideally be an audit of the status of foreign workers employed by the new company so it can take remedial steps, if

necessary.

Two types of foreign workers

In general, there are two types of foreign workers employed by Canadian companies that can be affected by corporate transactions and the consequences will be different in each case.

Workers who had a Labour Market Opinion (LMO) issued by Service Canada. LMOs allow Canadian employers to hire foreign nationals in a variety of occupations, after they satisfy Service Canada that they have made appropriate efforts to hire Canadians and have been unable to find workers with a comparable skill set. Employers must show the presence of the foreign worker will have a neutral or positive impact on the Canadian labour force. The LMO requires the employer to abide by its terms, which include approved wages and benefits, job location and specific job duties to

be performed. The conditions set out in LMO cannot be changed unilaterally by the employer.

Intra-company transferees. These are either senior managers, individuals acting in an executive capacity or persons with specialized knowledge of a proprietary nature, who are in Canada working for a company that is either controlled or related to a parent, branch or subsidiary of the same enterprise located in another country.

The specific characteristics of the corporate transaction, and the type of work permit will dictate the action that is required by the employer and the foreign worker.

Reflecting corporate changes in work permit for LMO worker

In cases where the foreign worker has an LMO, Citizenship and Immigration Canada considers whether the new employer can be seen to be “a successor in interest” to the previous employer that hired a foreign worker, or in the case of an acquisition, the same employer.

To establish a “successor in interest” relationship between merging or acquiring companies, the successor entity must demonstrate it has substantially assumed the interests, obligations, assets and liabilities of the original owner and continues to operate the same type of business. In some cases, this relationship may not exist because the acquiring company creates a “shelf corporation” and has no active business. A similar situation can

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LMOs require new permit with new corporate name

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arise when the assets or shares are transferred to a holding company.

Some determinants for the purposes of establishing whether an entity has assumed the required interests, obligations, assets and liabilities of the previous owner may include: whether the company has assumed the current assets; short- and long-term investments; property; plant and equipment; human resources; and intangible assets such as patents, licences, trademarks and software development.

For workers requiring LMOs, a new work permit reflecting the new corporate name of the entity must be obtained. Amongst other documents, an Application for Change of Terms and Conditions must be submitted to the immigration processing centre, together with a statutory declaration signed by an authorized officer of the corporation, attesting to the nature of the restructuring and successor in interest of the new entity, copies of press releases or announcements con-

firming the corporate change and any other document indicating an assumption of assets and liabilities. It is recommended an application be made as soon as possible after the completion of the corporate transaction and, in every case, within 90 days of the transaction.

International transfers within a corporation

Where the foreign workers are intra-company transferees, the critical consideration is whether the qualifying relationship between the Canadian and foreign company continues to exist after the completion of the corporate transaction. The original foreign parent, branch or subsidiary may cease to exist, but as long as there is another entity that has taken its place the relationship can subsist. The terms and conditions of the intra-company transferee's work permit will continue to be valid if the Canadian employer is still doing business either directly or through a parent branch, affiliate or subsidiary in another country to which

the employee can reasonably be expected to be transferred at the end of their assignment in Canada.

Under certain circumstances, joint ventures may also qualify as employers. Where this is the case, the intra-company transferee may apply to have her work permit renewed to reflect the name of the new owner and continue to work for the Canadian entity. Documentation that must be presented in order to obtain the change in the work permit may include a statutory declaration signed by authorized officer of the corporation attesting to the nature of the qualifying corporate relationship, corporate press releases or announcements confirming the change, and other documentation indicating the qualifying relationship. The application to change terms and conditions should be submitted as soon as possible to Citizenship and Immigration Canada, in order to avoid unnecessary delays.

Information required in LMO application

Employers are required to give the following information about themselves and foreign worker candidates, all of which could potentially change if an employer gets new owners or merges with another company:

- employer ID number (if applicable)
- Canada Revenue Agency business number
- employer name (name of business)
- business telephone number
- address
- date business started
- website
- principal business activity
- contact name (employer contact), telephone number, fax number, email
- number of Canadians/permanent residents employed in Canada
- number of foreign workers currently employed in Canada
- job title of job offered to foreign worker
- main duties of the job

Source: *Citizenship and Immigration Canada*



ABOUT THE AUTHOR

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