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Arizona Edition

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Arizona Adopts New Law Clarifying Controversial Sanctions Statute, Imposing Other Obligations on Employers and State Contractors

By Steven G. Biddle and Michael J. Lehet

On May 1, Arizona Governor Janet Napolitano signed House Bill 2745 into law. The legislation makes several key amendments to the Legal Arizona Workers Act – a statute enacted nearly one year ago to combat the employment of undocumented workers in Arizona. In addition, the new law prohibits state government entities from awarding contracts or subcontracts to employers that fail to use E-Verify, the online employment eligibility verification program operated by the U.S. Department of Homeland Security. The new legislation also amends Arizona’s identity theft laws by penalizing employers that knowingly accept fraudulent identification information when determining employee work authorization. Finally, the law requires employers paying their workers in cash to comply with state income tax and unemployment and workers’ compensation laws.

Amendments to the Legal Arizona Workers Act

The Legal Arizona Workers Act (“the Act”), which took effect on January 1, 2008, prohibits Arizona employers from knowingly or intentionally “employing” an undocumented worker. Employers violating the Act face suspension of their business license for a first offense and license revocation for a second offense. The Act also requires Arizona employers to use E-Verify to confirm the work eligibility of employees hired on or after January 1, 2008. Employers have two defenses under the Act. First,

an employer’s business license may not be suspended or revoked if it can prove it complied in good faith with the federal Form I-9 requirements. Second, an employer is not presumed to have knowingly or intentionally employed an undocumented worker if it confirmed the employee’s work eligibility using E-Verify.

Shortly after the Act’s enactment, and several months before it took effect, various business groups filed a lawsuit claiming the Act violated both the Arizona and U.S. Constitutions. The federal district court ultimately upheld the Act and, although the business groups sought review from the federal court of appeals, that court has yet to rule and either affirm or overrule the decision.

Meanwhile, the state legislature has made several critical changes to the Act with House Bill 2745. The changes – which amend the Act effective immediately – include the following:

- The Act only applies to workers hired after December 31, 2007. As a result, an employer is not subject to business license suspension or revocation for employees hired prior to 2008.
- The Act does not penalize an employer with respect to out-of-state employees or require an employer to conduct E-Verify inquiries on out-of-state employees.
- The Act’s requirements apply only to employees and not those

properly classified as independent contractors.

- However, employers may not evade the requirements of the Act by knowingly or intentionally retaining the services of an undocumented independent contractor or an independent contractor that employs or contracts with undocumented workers.
- The Attorney General will create a form for individuals to use when filing complaints alleging violations of the Act. If the Attorney General or County Attorney receive a complaint on the prescribed form, they must investigate; if it is received in another format, including an anonymous complaint, investigation is optional.
- A business license subject to suspension and revocation is only for the location employing undocumented workers. If the employer does not hold a license at that location, all licenses held by that employer are subject to revocation or suspension.
- An employer does not lose its I-9 defense for isolated, sporadic, or accidental failure to fully comply with the Form I-9 requirements, provided it otherwise makes a good faith attempt to comply.
- In order to receive an “economic development incentive” – defined as any grant, loan, or performance-based incentive awarded after September 30, 2008 – from the state government, including political subdivisions, an employer must register for and use E-Verify.

The new law further amends the Act to create the “Voluntary Employer Enhanced Compliance Program.” The Program is open to all Arizona employers except those already on probation for violating the Act. To enroll in the Program, an employer must file an affidavit with the Attorney General, agreeing to perform the following in good faith:

- Confirm the work authorization of every new hire using E-Verify.

- Within 30 days after enrolling in the program, use the Social Security Number Verification Service (SSNVS) to verify, for wage-reporting purposes, the Social Security number of every employee not otherwise confirmed using E-Verify.
- After receiving a failed verification result from SSNVS, instruct the employee to resolve the discrepancy with the Social Security Administration (SSA) within 90 days.
- Coordinate with the employee to resolve any failed verification result within 90 days. The employer and employee may take additional time to resolve the failed verification result as long as they document their ongoing efforts and submit such information to the Attorney General. (The amendment is nevertheless silent on whether an employer could, or should, discharge an employee if the verification result is ultimately not resolved.)
- If requested, provide the Attorney General or County Attorney with documentation demonstrating the employer confirmed a particular employee’s work eligibility using E-Verify or the accuracy of the employee’s Social Security number for wage-reporting purposes using SSNVS.

Employers enrolling in the Program and complying with its provisions are not liable under the Act for knowingly or intentionally employing an undocumented worker.

Contracts or Subcontracts with State Government

In addition to amending the Act, the new law amends Arizona law on contracting with state government. Specifically, on or after September 30, 2008, state government entities, including political subdivisions, are prohibited from awarding contracts for services in Arizona to contractors or subcontractors not in compliance with the Act’s E-Verify

requirement. In addition, in any such contract, the contractor must warrant compliance with federal immigration law and the Act’s E-Verify requirement. If the contractor or subcontractor subsequently breaches this warranty, the contract is subject to termination. Furthermore, the contract must contain a provision stating the government entity retains the right to inspect all “papers” of a contractor’s employees working on the project to ensure compliance with the warranty. The contract also must include language that the government entity will establish procedures to conduct random verifications of employment records of the contractor or subcontractor to confirm compliance with the warranty. Although the amendment is unclear on this point, the E-Verify requirement is likely limited to employees of the contractor or subcontractor actually performing services in Arizona.

Criminal Liability Under State Identity Theft Laws

The new law also amends Arizona’s criminal code to prohibit knowingly accepting personal identifying information from one person knowing it belongs to another individual, and using such information for purposes of completing the Form I-9 for the person presenting the information. An individual or entity knowingly accepting the identity of another individual for hiring purposes is guilty of a class 4 felony punishable by up to two and one-half years in prison.

Employers with Cash Employees

Finally, the new legislation clarifies the obligations of Arizona employers paying their employees in cash or “under the table.” Employers with two or more employees that pay wages in cash to any employee must now comply with state income tax withholding and Arizona Department of Economic Security reporting requirements. These employers must also comply with state unemployment and workers’ compensation laws, including those provisions requiring contributions, premiums, and other payments, with respect to cash basis employees. If a court

finds a covered employer failed to comply with these requirements, it will order the employer to pay three times the amount of all withholdings, payments, contributions, or premiums owed, or \$5,000.00 for each employee for whom a violation was committed, whichever is greater.

Action Items for Arizona Employers

With these amendments in place, Arizona employers should continue to assess their operations to ensure compliance with state and federal law and to minimize any risk of liability. To that end, employers should take the following five steps, if they have not already done so:

1. Register for and begin using E-Verify for all in-state hires.
2. Perform an I-9 audit to ensure every current employee has a complete and accurate I-9 on file, and every former employee has a complete and accurate I-9 on file for one year after the date of termination or three years after the date of hire, whichever is later.
3. Determine whether participation in the Voluntary Employer Enhanced Compliance Program is appropriate. If an employer hired individuals in 2008 and did not use E-Verify for them when hired, the employer is prohibited from using E-Verify to confirm their work eligibility and is not protected from liability for these employees. By registering for the Voluntary Employer Enhanced Compliance Program, however, the employer may use SSNVS to confirm the Social Security numbers of the employees it did not confirm through E-Verify and benefit from the defense to liability made available by the amendment.
4. As necessary, train human resources personnel on proper completion of the Form I-9. With the state's current prohibition on knowingly accepting fraudulent information, it is vital that employers retain objective and trustworthy personnel to oversee the I-9 process with new hires.
5. Verify your business is in compliance with state income tax withholding requirements, reporting requirements to the Department of Economic Security, and state unemployment and workers' compensation laws, including if you have two or more employees and pay any employee in cash.

Like Arizona, several other states are enacting legislation prohibiting the employment of undocumented workers and/or mandating the use of E-Verify or similar electronic employment verification programs. To ensure compliance with all applicable laws, employers are encouraged to contact experienced employment or immigration counsel with any questions regarding state and federal statutes that may impact their operations.

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