

SOUTH CAROLINA ILLEGAL IMMIGRATION REFORM ACT

The South Carolina Illegal Immigration Reform Act, signed into law by Gov. Sanford on June 4, 2008, changes the legal landscape for employers doing business in the State by imposing new employment verification requirements and establishing penalties for noncompliance. The new law also creates a new cause of action for wrongful termination if a business knowingly and/or intentionally terminates and replaces a legal worker with a worker not authorized to work in the United States.

Across the nation, similar laws passed by local and state governments are meeting constitutional challenges with varying results. Below is a summary of the main provisions of the new South Carolina law.

Verification Requirements

Under federal law, an employer must require all employees to complete an I-9 form within three days of hire. The I-9 confirms one's identity and employment eligibility; the employee can choose from a list of documents on the back of the form when presenting documents for examination by the employer.

The new South Carolina law does not alter employers' I-9 obligations. It does, however, add a layer of verification by requiring employers to either:

- Register and participate in E-Verify, the Internet-based system operated by the federal government that electronically verifies employment eligibility;
- Confirm that new hires possess or are eligible to obtain a South Carolina driver's license or South Carolina identification card issued by the Department of Motor Vehicles; or
- Confirm that new hires possess a license or identification card from another state where the requirements for obtaining the license or card are at least as restrictive as those in South Carolina.

A public employer doing business with contractors, including subcontractors and sub-subcontractors, must obtain written confirmation from contractors confirming their compliance with the verification requirements. Private employers must maintain a South Carolina employment license beginning July 1, 2009, in order to do business in the State. The license remains in effect as long as the employer complies with the Act, including the verification requirements.

Verification Dates. For employers engaging in "service contracts" (generally, those involving the physical performance of manual labor) with public employers (i.e., governments, public school districts, etc.), the new verification requirements begin Jan. 1, 2009, for businesses with more than 500 employees; July 1, 2009, for businesses with between 100 and 500 employees; and July 1, 2010, for all other businesses. These implementation dates apply to contractors, subcontractors, and sub-subcontractors.

For private employers, the phase-in period is slightly delayed, with implementation beginning July 1, 2009, for employers with over 100 employees, and July 1, 2010, for those with less than 100 employees.

Finally, for both public and private employers, the Act prohibits knowingly and/or intentionally hiring unauthorized workers, which is consistent with current federal immigration guidelines.

Penalty Provisions. There are penalty provisions for private employers who violate the verification provisions or intentionally and/or knowingly hire unauthorized workers. Penalties range from \$100 to \$1,000 per verification violation, but employers can avoid penalties if the violation is a “first offense” and the employer promptly remedies the problem within 72 hours of notification of the violation. Subsequent violations may result in heavier fines and paying a reinstatement fee for the license. Additionally, penalties for knowingly or intentionally hiring unauthorized aliens under the Act include license suspension and revocation, and/or payment of reinstatement fees. Under federal law, criminal penalties may also result if an employer has a pattern or practice of knowingly and intentionally employing unauthorized workers.

The Act also sets up a complaint system for any person to file a written, signed complaint alleging immigration violations, and the state Department of Labor, Licensing and Regulation (LLR) has been charged with investigatory authority. LLR can also initiate its own investigation for “good cause” and has the authority to proceed and involve the federal Department of Homeland Security if there are reasonable grounds to believe the employer has violated the Act. If there is “substantial evidence” of a violation, LLR must notify the federal Immigration and Customs Enforcement (ICE) as well as state and local law enforcement agencies, and must assess a penalty as described above.

Furthermore, the law provides for statewide, random auditing to ensure compliance with the Act and permits the auditor to enter any business “at reasonable times,” to question the employer and others, and to inspect and copy relevant business records.

Wrongful Termination Action

The new law also creates a wrongful termination cause of action for an employee who can prove his employer terminated the relationship and replaced him with an unauthorized worker.

The employee must file the action within 60 days and demonstrate that the replacement worker was not authorized to work in the United States at the time of replacement; that the employer knew or should have known of the worker’s immigration status; and that the employee was truly hired to fill the job. Remedies are limited to reinstatement, lost wages, and/or actual damages including attorney’s fees. The wrongful termination claim must be filed within one year from the date of the alleged violation.

Participation in E-Verify offers a “safe harbor” for businesses using the system and offers a defense against this type of wrongful termination action. This provision becomes law on or about Sept. 4, 2008.

Status of North Carolina Immigration Reform

North Carolina legislators have been attempting to pass similar statutory changes for several years, and the successful passage of the South Carolina law may spur lawmakers forward.

In the 2007-2008 session of the North Carolina General Assembly, a number of immigration reform bills have been introduced. These include, among others, the North Carolina “Illegal Immigration Prevention Act,” “Citizen Protection Act,” and “Security and Immigration Compliance Act.” In varying degrees, each of these North Carolina bills contains aspects of the new South Carolina law.

Some of the North Carolina bills would disallow any income tax deductions for compensation paid to illegal aliens, require verification of lawful presence to receive many public benefits, and provide for measures to facilitate the enforcement of federal immigration laws within the state. Additionally, certain employers would be required to participate in E-Verify. Some of the bills limit this requirement to government and government contractors, while others would extend it to all employers.

Executive Order Applicable to Federal Contractors

On June 6, 2008, President Bush signed an order amending Executive Order 12989 that in effect requires all federal contractors to use E-Verify. The amendment provides that federal departments and agencies may not enter into contracts with employers that do not use E-Verify to check the employment eligibility of: (1) all persons hired during the contract term by the contractor to perform employment duties within the United States; and 2) all persons assigned by the contractor to perform work within the United States on the federal contract. The amendment will become effective once clarifying and implementing regulations are published.

Conclusion

Given these developments, we recommend that over the next few months employers in the Carolinas review their I-9 records and conduct a self-audit in preparation for government audits. Personnel completing I-9 forms and hiring workers should be properly trained to understand the mechanics of the I-9 form and the importance of accuracy and completeness. Businesses should also become better educated about E-Verify and weigh the pros and cons of participating in the program. Finally, employers must keep a watchful eye on legal proceedings across the country as courts continue to render decisions on the constitutionality of immigration reform efforts.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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