

## **Employment Verification in South Carolina Is Your Business Prepared To Comply with the SC Illegal Immigration Reform Act?**

On June 4, 2008, South Carolina passed a comprehensive immigration law touted by many as one of the toughest immigration laws in the nation. Employers are greatly impacted and need to understand what lies ahead. Below we will focus on E-Verify – a ‘safe harbor’ and main component of the new law.

### Business type.

A business must first determine whether it qualifies as:

- a public employer
- a contractor (or subcontractor/sub-subcontractor)
- a private employer

Examples of public employers are cities, public school districts, etc. Although the term “contractor” seems fairly broad, the Act limits the definition to those businesses contracting with a public employer for the physical performance of manual labor where the contract value is at least \$25,000.00 over a 12-month period (or \$15,000.00 if the contract involves a political subdivision of the State). Private employers are those businesses that do not fall within one of the other two categories.

### Size and Compliance Time Frames.

On January 1, 2009, all public employers and contractors with at least 500 employees began complying with the Act. The law requires public employers to use E-Verify for all new hires, while contractors have the option to use E-Verify or comply with the license or identification rules described below for new hires. Contractors with 100 to 499 employees must comply with the law by July 1, 2009, and those with less than 100 employees must comply by July 1, 2010.

Private employers have the option of using E-Verify or complying with the license or identification rules as well. If a business has more than 100 employees, the employment verification provisions go into effect on July 1, 2009, while those with less than 100 employees have until July 1, 2010 to comply.

### Determining size.

For employers with multiple locations in South Carolina, determining the size of the business can be tricky. According to South Carolina Department of Labor, Licensing & Regulation (“SCLLR”) employee counts will be aggregated if the separate locations essentially operate as one entity (i.e. common control, same payroll, same Employer Identification Number (EIN), etc). If the entities are truly separate, they will be treated as separate entities for employee counting purposes.

### E-Verify vs. Driver’s License/Identification.

Under the SC law, contractors and private employers may either ‘E-Verify’ new hires or can examine a state driver’s license or identification card in order to confirm the employee’s authorization to work in the United States. This must only be done for new hires, and the option selected by the employer must be consistent across the board for all new hires.

Remember the SC employment verification provisions do **not** void the employer’s obligation to comply with the federal I-9 rules. Employers must still complete the I-9 form for all new hires within three (3) days of hire. The employer examines the original documents presented by the

employee, and then records the appropriate information in Section 2 of the I-9 form. Federal law prohibits the employer from requesting specific documents from List A, or Lists B and C from the employee.

If an employer elects to enroll in E-Verify in order to comply with the SC employment verification provisions ([www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify)), the employer enters the I-9 information into the E-Verify system which checks three (3) databases – Department of Homeland Security, Social Security Administration and Department of State to determine whether the employee is authorized for employment. The employer should keep a copy of the E-Verify result with the employee's I-9 file. E-Verify is a 'safe harbor' under the SC law, and the employer will not be deemed to have knowingly hired or continued to employ an authorized worker by relying upon an E-Verify result.

The employer can also examine the employee's driver's license or state identification card to confirm employment authorization. Some believe this approach is inconsistent with federal law which *precludes* the employer from requiring certain documents to complete Section 2 of the I-9 form. Under this compliance method, the employee must either possess or qualify for a state driver's license or identification card from South Carolina, or from another state listed on the LLR's website (**Note:** There are approximately 22 states currently listed on the LLR website).

#### Federal vs. State Compliance.

Employers should maintain separate records to demonstrate their compliance with federal and state immigration laws. One suggestion is to have an I-9 folder with the documents presented by the employer, and another folder with either the E-Verify result or a copy of the state driver's license or identification card presented by the employee. Employers should consider presenting only the "state file" during an audit or investigation.

#### Enforcement.

The SCLLR will enforce the employment verification provisions for private employers. On its website, LLR will publish a list of the industry classifications it intends to randomly audit in FY 2010 in the near future. LLR may also audit a business based upon a written and signed complaint submitted to its office or based upon 'good cause' that a violation has occurred. If there is substantial evidence that a violation exists, information may be shared with ICE (Immigration & Customs Enforcement) or state and local law enforcement authorities and a penalty may be assessed.

#### Penalties.

Under SC law, failure to verify a new hire's status as described above may result in monetary penalties ranging from \$100-\$1,000.00 per violation.

On July 1, 2009, all SC employers will be given a South Carolina employment license permitting them to hire and employ workers in the State. If the employment license is suspended or revoked, an employer may not hire and/or employ workers in SC. If an investigation reveals that an employer knowingly and/or intentionally hired or employed unauthorized workers, the employment license can be suspended or revoked.

Finally, criminal penalties can be assessed if the employer or agent of the company engaged in harboring, shelter, concealing, or other illegal conduct on behalf of an immigrant worker.

Conclusion.

The past 12 months, and mostly likely the next few years, will be a time of transition for employers as they learn to comply with new state and federal immigration laws. Employee verification is often a key component of these laws. Staying abreast of the changes will save business owners time and money – and in this economy, every penny counts.

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