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July 19, 2010

The growing patchwork of state E-Verify legislation continues to spread across the country. Several new state laws are poised to take effect this month. E-Verify is an Internet-based system run by the Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services ("USCIS") that allows employers to verify the employment authorization of their employees. The system confirms the authorization of workers by checking the information provided by employees on their Form I-9s against the records contained in DHS and Social Security Administration databases.

After federal efforts to pass comprehensive immigration reform stalled several years ago, employers have witnessed a drastic uptick in the number of states and localities willing to tackle immigration issues by mandating various measures, including requiring employers to use E-Verify. Employers failing to comply with E-Verify laws often face substantial penalties. Those penalties include monetary fines, suspension and debarment from contracting with state and local governments, and suspension and revocation of their business license. Given these significant consequences, employers should pay close attention to state and local legislative developments in this area.

Arizona's expansion of E-Verify

Arizona was one of the first states to mandate E-Verify compliance when it enacted the Legal Arizona Workers Act ("LAWA"), which went into effect on January 1, 2008. LAWA requires all employers in Arizona to use E-Verify to confirm the employment eligibility of their new hires. It penalizes employers who knowingly or intentionally hire illegal immigrants, by suspending or revoking their business licenses.

Immediately following its passage, LAWA was challenged on constitutional grounds by several human rights and employers' groups. The Ninth Circuit, however, upheld the law in *Chicanos Por La Causa v. Napolitano,* WL 4225536 (9th Cir. Sep. 17, 2008), finding that it was not preempted by federal legislation and did not violate the plaintiffs' due process rights.

On April 23, 2010, Arizona Governor Jan Brewer expanded LAWA when she signed into law SB 1070, more popularly known as the "Support Our Law Enforcement and Safe Neighborhoods Act." That new law is scheduled to take effect on July 29, 2010. SB 1070 impacts Arizona employers by amending LAWA in three main ways.

1. It requires all employers to keep "records" of each verification the employer conducts, for either the duration of the worker's employment or three years from the date of verification, whichever is earlier.
2. It establishes a class three felony for employers that fail to use E-Verify to confirm the employment eligibility of its workforce or fail to keep records of verifications.
3. It creates an affirmative defense for employers who are entrapped by law enforcement officers. But the law also permits law enforcement officers or their agents to use a ruse to conceal their identities when investigating violations.

Shortly after SB 1070 was enacted, several suits were filed challenging its constitutionality and seeking preliminary injunctions to prevent the law from taking effect. Most recently, the Department of Justice ("DOJ") filed suit on July 6, 2010 in federal court in Arizona for a preliminary injunction, arguing that SB 1070 is preempted by federal law and interferes with the federal government's ability to set and enforce immigration policy.

According to a DOJ statement, DOJ and DHS believe that immigration reform cannot be "solved by a patchwork of inconsistent state laws" such as SB 1070. Accordingly, the DOJ's suit may signify a shift in the federal government's stance such that it is more willing to challenge states that pass far-reaching immigration measures. So far, no judicial action has been taken on these suits, so Arizona employers should prepare for SB 1070 to take effect on July 29, 2010.

In addition, late last month, the United States Supreme Court granted certiorari in *Chamber of Commerce of the United States v. Candelaria,* No. 09-115, to determine whether LAWA is constitutional. Employers should watch for developments in this case. The Supreme Court is expected to hear oral argument on the appeal in the Fall of

2010.

Other states requiring employers use E-Verify

In addition to Arizona, several other states and localities recently passed or adopted laws requiring all employers to use E-Verify:

Utah: On March 31, 2010, Utah adopted SB 251, the Private Employer Verification Act, requiring Utah employers with fifteen or more employees to use a "status verification system" to confirm the employment eligibility of their new hires as of July 1, 2010. Employers may use other verification systems besides E-Verify to fulfill their obligations under the law, including other DHS-approved systems. This law went into effect on July 1, 2010 without legal challenge. SB 251 supplements Utah's existing requirement that employers participate in E-Verify before being awarded contracts with the state government.

Mississippi: The Mississippi Employment Protection Act currently requires employers with more than 30 employees to use E-Verify to determine the employment eligibility of their new hires. The law will further expand coverage to all employers in Mississippi on July 1, 2011. Employers who violate the law are subject to cancellation of their state contracts and debarment from state contracting for three years as well as revocation of their business licenses for up to one year.

South Carolina: Under the South Carolina Illegal Reform Act, by July 2010, all employers (regardless of size) must verify the work authorization of all new hires by either using E-Verify to confirm the employment eligibility of the employee or verifying the employee possesses a valid South Carolina driver's license. Employers who violate the law face tough penalties in the form of monetary fines, suspension, and even permanent revocation of the ability to employ workers in South Carolina.

Lancaster, California: Under Ordinance 934, employers must use E-Verify to determine the employment eligibility of their new hires.

Conclusion

As the number of state and local laws requiring the use of E-Verify continues to expand, employers should closely watch developments in this area to ensure that their hiring practices are legally compliant.

If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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