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Arizona enacts the Legal Arizona Workers Act imposing new obligations on all Arizona employers. Effective January 1, 2008, any Arizona employer who knowingly or intentionally hires unauthorized employees may have their business license suspended and all Arizona employers must enroll in the federal government's Employment Eligibility Verification Program (EEVP), in order to confirm the work eligibility of all new hires.

Arizona Adopts Nation's Strictest Workplace Law to Assure Employees Are Authorized to Work

By *Bonnie K. Gibson and Michael J. Lehet*

On July 2, 2007, Arizona Governor Janet Napolitano signed into law House Bill 2779, the "Legal Arizona Workers Act," and, in so doing, imposed significant new obligations on all Arizona employers. The law takes effect January 1, 2008, although there is a strong possibility of an interim legal action to challenge Arizona's authority under federal law to regulate immigration. In addition, a special legislative session to provide needed funding and clarify obligations under the new law is under discussion.

The Act has two key features. First, it imposes a business license penalty against any employer who knowingly or intentionally hires unauthorized employees. Second, it requires all employers in Arizona to enroll in the federal government's "Employment Eligibility Verification Program" (EEVP), formerly known as the "Basic Pilot Program" in order to confirm the work eligibility of all new hires.

The Act, which passed the Arizona Legislature by large margins with strong bi-partisan support, was enacted against a backdrop of a threatened ballot initiative with draconian penalties for employers of unauthorized workers. The fate of the initiative is unclear as of this writing, but there is optimism that the quick passage of HB 2779 will stall the measure.

Business License Enforcement

The Act penalizes employers that "knowingly" or "intentionally" employ undocumented workers on or after January 1, 2008. An employer acts intentionally when it has the conscious desire or objective to hire

the undocumented worker. An employer acts knowingly when it hires an individual knowing the individual is an undocumented worker. An employer violating the Act may have its business license suspended for the first infraction or revoked for a subsequent violation. Unlike federal immigration laws, the Act does not provide for monetary penalties against employers.

Under the Act, the Attorney General or County Attorney must investigate any complaint alleging that an employer is knowingly or intentionally employing an undocumented worker. To that end, the Attorney General or County Attorney is required to verify the work authorization status of the alleged undocumented worker with the federal government. (As written, the statute allows for anyone to lodge a complaint.)

Based on the investigation, if the Attorney General or County Attorney determines the complaint is "not frivolous," the Attorney General or County Attorney will notify both the U.S. Immigration and Customs Enforcement (ICE) and the applicable local law enforcement agency of the investigatory findings concerning an allegedly undocumented worker. Additionally, the County Attorney will bring a lawsuit against the employer to suspend or revoke its business license.

If the court finds that the employer knowingly employed the undocumented worker:

- The employer must terminate the employment of all undocumented workers.
- Within 3 business days of the court's order, the employer must file a signed

affidavit with the County Attorney, stating the employer has terminated the employment of all undocumented workers and it will not knowingly or intentionally employ any undocumented worker. If the employer does not file the affidavit within 3 business days, the court will order the suspension of the employer's business license until the affidavit is filed.

- The employer is placed on a 3-year probationary period, during which it must file quarterly reports with the County Attorney on each new employee hired.
- The court may order the suspension of the employer's business license for up to 10 business days. When determining the suspension period, the court will consider the total number of undocumented workers employed by the employer, prior misconduct by the employer, the degree of harm resulting from the violation, the length of the violation, and the role of the employer's directors, officers, or principals in the violation.

If, on the other hand, the court finds that the employer intentionally employed the undocumented worker:

- The employer must terminate the employment of all undocumented workers.
- The employer must file a signed affidavit with the County Attorney stating the employer has terminated the employment of all undocumented workers and it will not knowingly or intentionally employ any undocumented worker. If the employer does not file the affidavit, the court will order the suspension of the employer's business license until the affidavit is filed.
- The employer is placed on a 5-year probationary period, during which it must file quarterly reports with the County Attorney on each new employee hired.
- The court must order the suspension of the employer's business license for at least 10 business days. When determining the suspension period, the court will consider the total number of undocumented workers employed by the employer, prior misconduct by the employer, the degree of harm resulting from the violation, the

length of the violation, and the role of the employer's directors, officers, or principals in the violation.

If a court determines an employer knowingly or intentionally employed an undocumented worker during the 3-year or 5-year probationary period, it must order the permanent revocation of the employer's business license.

The Act broadly defines license to include any certificate, permit, registration, approval, or other authorization required by law to operate a business in Arizona. Virtually every Arizona business is required to have a valid license. Thus, practically all Arizona businesses are at risk for license suspension or revocation under the Act.

The Act, however, provides three defenses for employers:

- If an employer can prove it verified the employment authorization of an alleged undocumented worker using the Basic Pilot Program, there is a rebuttable presumption that the employer did not knowingly or intentionally employ an undocumented worker. Because the presumption is rebuttable, it can be disproved by evidence to the contrary.
- If an employer proves it has complied, in good faith, with the federal immigration laws, the employer establishes a complete defense that it did not knowingly or intentionally employ an undocumented worker.
- An employer is not required to take action under the Act if it believes, in good faith, that such action would violate other federal or state laws. Although Arizona employers must comply with the Act, they must also ensure that their actions do not violate applicable anti-discrimination laws, including the Arizona Civil Rights Act and Title VII of the Civil Rights Act of 1964, both of which prohibit discrimination based on an employee's race, color, national origin, sex and religion.

The Employment Verification Requirement

The Act also requires all Arizona employers, no later than January 1, 2008, to participate in the federal "Basic Pilot Program," (or a succes-

sor program) that provides for the electronic verification of the identity and work authorization of newly hired employees. The Basic Pilot Program, now called the Employment Eligibility Verification Program (EEVP) is a voluntary program run by the Department of Homeland Security and its Citizenship and Immigration Service bureau that uses sophisticated computer analysis to compare information gathered from new hires with various government databases, including Social Security and immigration records. Arizona is the first state to require EEVP/Basic Pilot enrollment for all employers.

EEVP/Basic Pilot is different from the Social Security Number Verification System that many employers use to support their payroll system. Use of that system for payroll purposes will not satisfy the Act. EEVP/Basic Pilot requires the employer to enter into a written agreement with the DHS, which includes these primary obligations:

- a promise that every new employee's Social Security number and immigration ID will be run through the program within 3 days of hire;
- a promise not to use the system for pre-screening;
- advance notice to employees that the employer participates in the program;
- notation of a unique DHS generated PIN number on or with the I-9 of each new employee;
- in the event of "non-confirmation" a 10-day appeal process, during which the employer must allow the employee to continue to work.

Additional information about EEVP/Basic Pilot is available at <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>.

Multi-state employers can enroll nationwide or limit enrollment to Arizona hiring facilities only. Although the Act does not explicitly limit its scope to Arizona facilities and/or Arizona employees, employers outside of Arizona are not required to comply with the Arizona statute.

Notably, the statute does not include any enforcement mechanism for an employer's failure to enroll in EEVP/Basic Pilot, and failure to

enroll does not directly threaten an employer's business license. But employers that do not enroll will likely face additional scrutiny if they are investigated for violating the Act or in the event of a federal audit.

Steps to Take Now to Prepare for January 1, 2008

Since Congress amended federal law to minimize penalties for I-9 violations, I-9 compliance has not been at the top of the employment law compliance checklist. However, with tough Arizona penalties less than six months away, now is the time to jumpstart compliance efforts. Simple steps include: (1) an audit of current I-9's to remedy problems and to ferret out work authorization issues; (2) training or re-training of staff who completes I-9 forms to make sure they do so properly, recognize work authorization documents, ask the right questions when questions arise—without discriminating, and know when and how to escalate difficulties; (3) reviewing/modifying/creating policies for storing and retaining I-9 documents; and (4) discussions about options for enrolling in the EEVP/Basic Pilot program. Employers should consider seeking the advice of experienced employment and/or immigration law counsel to determine the best strategies and practices before the new law takes effect.

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