

in this issue:

NOVEMBER 2007

Multiple Arizona-based groups have filed two federal lawsuits challenging the constitutionality of the recently enacted Legal Arizona Workers Act. The court's ruling, which is expected by the end of the year, will have a significant effect on immigration law compliance for Arizona employers.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

Arizona Edition

A Littler Mendelson Arizona-specific Newsletter

Federal Court Holds Hearing on Challenges to the Legal Arizona Workers Act

By Bonnie K. Gibson and Michael J. Lehet

In our July 2007 ASAP Newsletter, *Arizona Adopts Nation's Strictest Workplace Law to Assure Employees Are Authorized to Work*, we informed you of the recently enacted Legal Arizona Workers Act. Arizona associations and organizations have filed two lawsuits in federal court challenging the constitutionality of the Act. A court ruling in both matters is expected this December.

The Legal Arizona Workers Act

Signed into law on July 2, 2007, the Legal Arizona Workers Act imposes two primary obligations on Arizona employers (defined as individuals or organizations employing at least one individual in the state and holding at least one Arizona business license).

First, on or before January 1, 2008, employers must register for and use "E-Verify" (formerly known as the Basic Pilot/Employment Eligibility Verification Program). E-Verify is an Internet-based system operated by the U.S. Department of Homeland Security—in cooperation with the U.S. Social Security Administration—that allows participating employers to electronically verify the employment eligibility of newly hired employees. As part of the registration process, employers must sign a Memorandum of Understanding with the DHS and SSA. By signing the MOU, an employer "agrees to allow" the DHS and SSA into the workplace to review E-Verify related records, including I-9 forms and transaction reports generated

during the online verification process.

Second, the Act prohibits employers from "knowingly" or "intentionally" employing undocumented workers after January 1, 2008. The Act provides that the Arizona Attorney General or County Attorney must investigate any complaint that an employer is knowingly or intentionally employing an undocumented worker. If, after verifying the work authorization status of the alleged undocumented worker with the federal government, the Attorney General or County Attorney determines the complaint is "not frivolous," the County Attorney must bring a lawsuit against the employer in superior court. When determining the worker's authorization status, the court may only consider the federal government's prior determination; it may not conduct or entertain an independent investigation into the worker's authorization status.

Depending on its determination, the court may temporarily suspend the employer's Arizona business license, as follows:

- If the court concludes that the employer knowingly employed an undocumented worker, the court may order suspension of the employer's business license for up to 10 business days and the court must place the employer on a 3-year probationary period.
- If the court concludes that the employer intentionally employed an undocumented worker, the court must order suspension of the

employer's business license for at least 10 business days. The court also must place the employer on a 5-year probationary period.

Thereafter, if a court determines the employer knowingly or intentionally employed an undocumented worker during the designated probation period, it must order the permanent revocation of the employer's business license.

Legal Challenges to the Act

On July 13, the Arizona Contractors Association and Arizona Employers for Immigration Reform filed a lawsuit in the U.S. District Court for the District of Arizona challenging the constitutionality of the Act. The plaintiffs named Attorney General Terry Goddard and Governor Janet Napolitano as defendants. On September 4, Chicanos Por La Causa and Somos America filed a separate lawsuit with the court, also challenging the constitutionality of the Act. In addition to the Attorney General and Governor, Chicanos Por La Causa and Somos America named Gale Garriott, Director of the Arizona Department of Revenue, as a defendant.

Together, the lawsuits challenge the Act on six grounds:

- **Pre-emption:** The U.S. Constitution gives Congress the authority to regulate immigration. Pursuant to this authority, Congress passed the Immigration Reform and Control Act of 1986, which provides that federal law "pre-empts any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . undocumented aliens." The plaintiffs argue that states may only implement "licensing or similar laws" to redress violations of federal immigration law, not state-created immigration law. The plaintiffs also argue that the Act is pre-empted because it conflicts with principles of federal immigration law.
- **Separation of Powers:** Under the Arizona Constitution, power is appropriated among three separate

and distinct branches of government: legislative, executive, and judicial. The legislative branch is responsible for enacting laws and the executive branch is responsible for enforcing those laws. Generally, no branch may exercise powers assigned to another branch. The Act—passed by Arizona's legislative branch—provides when the Attorney General or County Attorney—members of the executive branch—must investigate and when the County Attorney must file a lawsuit against an employer. The plaintiffs argue the Act impermissibly intrudes on executive branch enforcement authority and prerogatives.

- **Interference with Interstate Commerce:** Under the U.S. Constitution, Congress may regulate commerce between or among states. States, however, are ordinarily proscribed from regulating interstate commerce. On its face, the Act does not limit its application to employees hired or employed within Arizona only. Thus, the plaintiffs contend that the Act will impact employment activity outside the state and regulate interstate commerce.
- **Fourth Amendment:** The Fourth Amendment to the U.S. Constitution protects individuals from unreasonable searches and seizures. To that end, federal law generally requires that government entities have court authorization (e.g., a warrant or subpoena) or consent of the individual whose property is searched before conducting a search. The plaintiffs argue that the Act improperly compels employers to relinquish their Fourth Amendment rights. Specifically, by signing the MOU—action indirectly required by the Act—an employer "agrees to allow" the federal government access to its workplace for purposes of reviewing documents and records.
- **Procedural Due Process:** Under both the Arizona and U.S. Constitutions, the government may not deprive any person, including corporations, of

liberty or property without due process of law, such as notice and an opportunity to be heard. The plaintiffs claim that a business license is "property" and that the investigation and hearing procedures outlined in the Act do not provide adequate process. The plaintiffs also claim that employees have a liberty and property interest in their employment and that the investigation and hearing procedures outlined in the Act do not provide sufficient process. As a result, both employers and employees are allegedly deprived of liberty and/or property without due process of law.

- **Substantive Due Process:** Under the principle of substantive due process, a statute is unconstitutional if it is not based on a legitimate governmental interest. The plaintiffs argue that Arizona has no legitimate reason for legislating in the areas of immigration law and interstate commerce. As a result, they claim the Act is not based on a legitimate governmental interest and, therefore, violates substantive due process principles.

In September, the court consolidated the two cases. U.S. District Court Judge Neil Wake is currently presiding over the cases.

Following consolidation, the plaintiffs sought a preliminary injunction to prevent the Act from going into effect. For their part, the defendants filed a motion with the court to have both cases dismissed. The defendants contend that the lawsuits are premature and that the plaintiffs lack standing to challenge the law. The defendants base this defense on two general arguments. First, the plaintiffs have not shown any actual or imminent injury stemming from the Act. Second, the named defendants have no direct authority to bring legal action against the plaintiffs for violating the Act.

Hearing on the Legal Challenges

On November 14, the court held a four-hour long hearing on the parties' legal arguments. The hearing represented a

“trial on the merits” and was based on written evidence only. Judge Wake indicated he would issue a ruling before January 1, 2008. This ruling will constitute the court’s final determination of the issues. The unsuccessful party or parties, however, may appeal the decision to the Ninth Circuit Court of Appeals.

Approximately half of the hearing focused on whether the lawsuits are premature and whether the plaintiffs have standing to challenge the Act. To that end, Judge Wake posed several questions regarding the plaintiffs’ actual and imminent injuries, particularly those harms allegedly incurred by them in connection with using—and preparing to use—the E-Verify program. Judge Wake also explored the Attorney General’s role in assisting County Attorneys in enforcing the Act.

The court spent the remainder of the hearing examining three of plaintiffs’ six legal claims: pre-emption, procedural due process, and the Fourth Amendment. Judge Wake questioned the plaintiffs’ counsel at length regarding pre-emption and, in particular, the precise meaning of the pre-emption language located in the Immigration Reform and Control Act. Noticeably fewer questions were posed by the court on the issue of procedural due process. Judge Wake did, however, inquire about whether the E-Verify program provides adequate “process” for employees. Finally, in regard to the Fourth Amendment argument, Judge Wake pressed the plaintiffs’ counsel on whether the MOU actually precludes employers from asserting Fourth Amendment rights in the future. Neither Judge Wake nor any of the parties discussed the plaintiffs’ separation of powers, interstate commerce, or substantive due process claims.

Although uncertainty invariably surrounds any court ruling, the issues examined at the hearing, and the questions posed in regard to those issues, indicate that Judge Wake is strongly considering the defendants’ arguments, and thus the possibility of upholding the Act.

Steps to Take Before the Court’s Ruling

A court ruling is expected before January 1, 2008, the effective date of the Act. If the court concludes either that (1) the Act is constitutional, or (2) the lawsuits are premature or the plaintiffs lack standing to challenge the law, Arizona employers must register for and use E-Verify beginning in the new year. In addition, an employer will face business license suspension or revocation if a court determines that it knowingly or intentionally employed an undocumented worker after January 1. If the court concludes the Act is unconstitutional, the law after January 1 will remain as it is today. Specifically, although an employer will not be required to use E-Verify, it must still comply with existing federal immigration law, including I-9 requirements.

If an employer waits to register for E-Verify until the court’s ruling and the court upholds the Act, the employer may find itself unprepared on January 1, given the time necessary to register for E-Verify, train personnel on E-Verify, and adjust human resources operations accordingly. Consequently, employers should generally register for E-Verify on or before December 1, 2007. If the court strikes down the Arizona law, employers may discontinue use of E-Verify at any time with thirty (30) days prior notice. Regardless of whether the Act is upheld or struck down, employers should continue to take steps to ensure they remain in compliance with federal immigration law. These steps include: (1) auditing current I-9’s to correct any errors; (2) training personnel on properly completing I-9’s; and (3) reviewing, revising, and developing policies for storing and retaining I-9 documents.

Because the unsuccessful party may appeal the matter, complete and final resolution may be several months away. Thus, employers should consider seeking the advice of experienced employment and/or immigration law counsel to determine the best strategies and practices following the court’s ruling.

Bonnie K. Gibson is a Shareholder in Littler Mendelson Global’s Phoenix office. Michael J. Lehet is an Associate in Littler’s Phoenix office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Gibson at bgibson@littlerglobal.com, or Mr. Lehet at mlehet@littler.com.
