

November 2011

## Despite Legal Challenge, Effective Date Approaches for Key Provisions of Alabama Immigration Legislation

By Jorge Lopez and Patrick Simpson

Alabama gained notoriety in June when Governor Robert Bentley signed into law HB 56, the *Beason-Hammon Alabama Taxpayer and Citizen Protection Act*. HB 56 quickly gained a reputation as the most aggressive in a long line of state immigration legislation and attracted interest (and ire) from the federal government, immigrant rights groups, and others. A recent federal court decision has halted implementation of certain provisions of the Act, but the central requirement that employers use E-Verify remains intact and on schedule.

Of most importance to employers, HB 56 requires all employers to enroll in, and verify employment eligibility of new employees through, E-Verify. This requirement goes into effect April 1, 2012. It also prohibits all Alabama employers, public and private, from knowingly employing unauthorized aliens.

In addition, the law prohibits state government entities from awarding contracts or providing grants or other incentives to employers that fail to enroll in and verify employment eligibility through E-Verify. This provision goes into effect January 1, 2012.

Violations of the law can result in significant penalties for employers. Businesses cited multiple times for hiring undocumented workers could lose their business licenses, not to mention face debarment from contracting with the state and its agencies. The new law also creates a state law cause of action for U.S. citizens and authorized aliens against employers that refuse to hire or that discharge them while knowingly or negligently employing unauthorized aliens.

These, however, are not the most controversial aspects of the legislation. Of apparent concern to the U.S. Departments of Justice (DOJ) and Homeland Security (DHS) are those provisions of HB 56 that authorize detention of individuals on reasonable suspicion they are illegal immigrants, prohibit undocumented immigrants from applying for a job, and punish, by fines or jail time, anyone convicted of transporting or harboring undocumented immigrants. The DOJ commenced suit in the Northern District of Alabama in an effort to halt implementation of HB 56. *United States of America v. State of Alabama and Governor Robert J. Bentley*, No. 2:11-CV-02746 (filed Aug. 1, 2011).

On September 28, 2011, the district court, through Judge Sharon Blackburn, issued a ruling on a motion for preliminary injunction in the lawsuit filed by the DOJ. The court preliminarily enjoined enforcement of several provisions of HB 56 which are of concern to employers. The first is Section

11(a), which makes it unlawful for an unauthorized alien to apply for or solicit work. The court also enjoined enforcement of Section 13, which pertains to prohibitions on concealing, harboring or transporting unlawfully-present aliens.

In addition, the court enjoined enforcement of Section 16 of HB 56, which prohibits employers from deducting as business expenses, for state income or business tax purposes, wages or compensation paid to an unauthorized alien and imposes a penalty of 10 times the claimed deduction. And finally, the court enjoined enforcement of Section 17, which creates a new cause of action making it a discriminatory practice for employers to knowingly fail to hire a job applicant or discharge an employee who is either a U.S. citizen or authorized alien while retaining or hiring an individual the employer knows, or reasonably should know, is an unauthorized alien. Employers violating this provision could be subject to a civil suit, and the prevailing party may recover compensatory damages and reasonable attorneys' fees.

The ruling does not address the E-Verify provisions of HB 56, and those provisions will go into effect January 1, 2012, as scheduled. Employers should continue to make preparations to ensure that they comply with the E-Verify provisions on a timely basis. Failure to comply may result in an employer being debarred from state contracts, and having its state government grants or incentives canceled, and its business license suspended or revoked for up to 60 days. For a second offense, an employer may have its business license revoked permanently. As a result, serious consequences for non-compliance are still intact following the court's September 28 ruling. The preliminary injunction will remain in effect until final judgment is entered on the lawsuit, which likely will not occur for several months. In the meantime, Alabama employers should continue to monitor this case and consider seeking the advice of experienced employment or immigration law counsel to determine the best strategies and practice following this ruling.

Jorge Lopez, a Shareholder in Littler Mendelson's Miami office, is Co-Chair of the firm's Immigration & Global Migration Practice; Patrick Simpson is Of Counsel in the firm's Rochester office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Lopez at [jlopez@littler.com](mailto:jlopez@littler.com), or Mr. Simpson at [psimpson@littler.com](mailto:psimpson@littler.com).