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Amendments to the South Carolina Illegal Immigration and Reform Act

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Author:

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As the end of 2011 draws closer, employers are reminded of several key changes to the South Carolina Illegal Immigration and Reform Act (SCIIRA), which **are scheduled to take effect on January 1, 2012**. These changes include a state-wide mandate that all employers use E-Verify to confirm the employment eligibility of all newly-hired employees, as well as a significant revision to the penalty scheme for non-compliance with SCIIRA.

Background

Governor Nikki Haley signed amendments to the Act on June 27, 2011. The amended law requires all employers to enroll in the U.S. Department of Homeland Security's E-Verify system beginning January 1, 2012. Employers must use E-Verify to check the legal status of all new employees within three business days of hire. Employers may no longer confirm a new employee's legal status with a driver's license or state identification card. Failure to enroll in and verify new hires through E-Verify could result in probation for the employer or suspension/revocation of the employer's business licenses.

E-Verify

E-Verify is a free Internet-based system. E-Verify compares the information an employee provides on Form I-9 against government records. The database provides results in about five seconds. If the information matches, the employee is eligible to work in the United States. If there is a mismatch, E-Verify will alert the employer, but the employee will be allowed to work while he or she resolves the problem. To enroll in E-Verify, go to www.dhs.gov/e-verify.

Employment License

Under the Act, all private employers in South Carolina are imputed a South Carolina employment license. An employer cannot employ any person unless its South Carolina employment license and any other applicable licenses are in effect. Professional licenses are excluded, but the term "license" includes employment licenses, articles of organization, articles of incorporation, a certificate of partnership, a partnership

registration, a certificate to transact business, or similar forms of authorization issued by the South Carolina Secretary of State, and any transaction privilege tax license.

Subcontractors

If a private employer is a contractor, it must maintain the telephone number of all subcontractors and sub-subcontractors performing services for the private employer. It also must provide such contact information to the South Carolina Department of Labor Licensing and Regulation (LLR) pursuant to an audit or investigation.

Failure to Comply

For a first failure to verify a new hire through E-Verify within three business days *before July 1, 2012*, an employer must affirm in writing to the LLR that the employer has complied with federal laws covering employment of unauthorized aliens from January 1, 2012 until notification by LLR of a violation, and should comply with the E-Verify requirements within three business days of notification. A subsequent violation within three years will result in the suspension of the private employer's licenses (employment, business) for at least 10 days, but not more than 30 days.

For a first failure to verify a new hire through E-Verify within three business days *after July 1, 2012*, LLR will place the employer on probation for a period of one year, during which time the employer must submit quarterly reports to the agency demonstrating compliance with the law. A subsequent violation within three years will result in the suspension of the private employer's licenses (employment, business) for at least 10 days, but not more than 30 days.

In addition, an employer that *knowingly* or *intentionally* employs an unauthorized alien will have its licenses suspended by LLR for at least 10 days, but not more than 30 days. During the suspension, the employer may not engage in business, employ an employee, or otherwise operate in any fashion. The employer's licenses will be reinstated when the employer terminates the unauthorized alien and pays reinstatement fees equal to the costs of investigation and enforcement up to \$1,000. If an employer knowingly or intentionally employs an unauthorized alien a second time, the employer's licenses will be suspended for at least 30 days, but not more than 60 days. For a third or subsequent violation, the private employer's licenses will be revoked. Private employers may seek reinstatement if certain conditions are met.

Legal Challenges

While the E-Verify mandate has not been challenged, the U.S. Department of Justice (DOJ) recently filed a lawsuit against South Carolina and Governor Haley to prevent enforcement of certain provisions of the new law. Generally, the DOJ views the law as an unconstitutional attempt at preempting federal immigration laws. Specifically, the DOJ objects to the law because it creates new, stiffer criminal penalties for immigration violations and because it requires police officers to determine the immigration status of detained suspects if they have a suspicion that the suspect may be in the United States illegally.

In addition to the DOJ lawsuit, another lawsuit aimed at preventing enforcement of the law has been filed by the American Civil Liberties Union along with a coalition of other civil rights groups. These two legal challenges are similar to the lawsuits filed in Arizona and Alabama to prevent enforcement of new immigration laws in those states.

Conclusion

Notwithstanding these legal challenges, the E-Verify mandate is likely here to stay. The recent U.S. Supreme Court decision, *Chamber of Commerce v. Whiting*, specifically upheld similar provisions under the Arizona law requiring the use of E-Verify. Moreover, because the SCIIRA E-Verify mandate is severable from the rest of the law, the E-Verify mandate will likely remain untouched even if other portions of the law are enjoined or held to be unconstitutional. Accordingly, employers that are not currently enrolled in E-Verify should prepare for the implementation of E-Verify at their businesses so they will be in compliance on or before the January 1, 2012 effective date of SCIIRA as amended.

Additional Information

Should you have any questions about SCIIRA or its impact on your workplace, contact the Ogletree Deakins attorney with whom you normally work or the Client Services Department at 866-287-2576 or via email at clientservices@ogletreedeakins.com.

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