



Legislation of Immigration Enforcement: How Does It Affect You?

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The recent legislation in Arizona exemplifies an emerging trend affecting immigration laws in the United States. In the absence of concentrated efforts by the federal government to reform immigration, states are increasingly chartering their own waters in an area that traditionally has been reserved for the federal government. While a majority of the state laws focus on the issuance and use of state driver's licenses and identity cards for state related business, several state laws, including the controversial Arizona law, have attempted to impose certain obligations on employers.

Arizona's Path

As was widely reported in the national media, on April 23, 2010, the Governor of Arizona signed into law a new immigration law, S.B. 1070, better known as the Support of Law Enforcement and Safe Neighborhoods Act (Act). The Act, which was scheduled to go into effect by the end of July 2010, contained several controversial provisions including:

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- A provision that required authorities to verify the immigration status of incarcerated individuals before they are released from jail.
- A mandate that immigrants must either carry immigration registration papers or obtain immigration papers.
- A provision that permitted a police officer, while enforcing other laws, to question a person's immigration status if the officer believed the person was in the country illegally.
- A prohibition on illegal immigrants soliciting work in public places.
- A provision that allowed authorities to conduct a warrantless arrest when someone committed a crime that can lead to his deportation.

On July 28, 2010, a U.S. District Judge granted a partial mandatory injunction blocking those controversial provisions. Nevertheless, other provisions, applicable to employers, became law. The provisions amended the Legal Arizona Workers Act (LAWA) which actually took effect January 1, 2008, with the intent of preventing businesses from knowingly or intentionally hiring illegal immigrants. LAWA mandated that employers verify the immigration status of every employee hired after January 1, 2008, by E-Verify, a free online program provided by the federal government that compares an employee's I-9 Form and employment eligibility verification to data on file with the U.S. Department of Homeland Security. Under LAWA, a failure to follow that procedure results in a business losing its license from a period of 10 days to indefinitely. The new Arizona law amended LAWA to require each employer to maintain E-Verify verification on each employee hired after January 1, 2008, for a period of three years. In addition, the new law also provided employers with an entrapment defense in cases where employers are expected to assist the state or federal government in enforcing the immigration laws. In order to claim this affirmative defense, the employer has to prove that (1) the knowing or intentional hiring of an illegal immigrant started with law enforcement and not the employer, (2) law enforcement encouraged or induced the violation, and (3) the employer was not predisposed to commit the violation before being urged to do so.

Following Arizona's Path

Arizona is not alone in its effort; 22 other states have proposed, or are considering introducing, immigration legislation that could have implications for employers and which are similar to Arizona. Furthermore several states have joined Arizona in opposing federal actions for blocking the new Arizona law.

In our immediate geographic area, recent legislation in Ohio and Michigan are forging the same path as Arizona. In Ohio, State Representative Courtney Combs is very vocal about his interest in passing legislation that mirrors that of Arizona's. Rep. Combs' bill, H.B. 184, would require state agencies and political subdivisions to use a federal system to verify the citizenship and work eligibility of all new employees. The bill also would prohibit any state agency or subdivision from entering into a contract with any vendor that does not use an employment verification system. Additionally, the bill would require jails to determine the citizenship status of an individual before he or she is released. Rep. Combs introduced the bill on June 23, 2009. It currently remains in committee.



Similarly, in Michigan, H.B. 6256, also known as the Immigration Law Enforcement Act, was introduced in the House on June 10, 2010. Several provisions of this act mirror the controversial provisions of the Arizona law. For example, H.B. 6256 allows law enforcement to determine the immigration status of an individual if the officer has made a lawful stop and the officer has reasonable suspicion that the stopped individual is an illegal immigrant. Additionally, the bill mandates that law enforcement officers must determine an individual's immigration status prior to release from jail. Finally, the proposed Michigan law requires there to be no restriction on the sending of information concerning immigration status to determine eligibility for public benefits or claims of residency. As it currently is drafted, H.B. 6256 does not seem to add new burdens on employers, but if other State legislation is any indication, such provisions are likely to be introduced.

Negotiating the Treacherous Waters

The myriad of state and federal imposed employer obligations leave employers bewildered by inconsistent provisions and compliance requirements. It will take a while before the state/federal turf battle over immigration law is sorted out. In the meantime, one area where most state and federal laws seem to agree is on the use of E-Verify, a means of complying with the requirement to verify the immigration status of all workers.

The E-Verify registration process is simple but does require that the employer sign a Memorandum of Understanding with the United States Customs and Immigration Service. Once registered for E-Verify, employers need to follow the following process:

1. The employer gathers specific information about each newly hired employee (full name, date of birth, social security number, citizenship status, type of documentation provided for the I-9 form and proof of identity with expiration date).
2. The employer then uses the information gathered to answer a series of questions.
3. The system then sends the employer one of three responses:
 - a. "Employment authorized," in which case the employer should close the case and print the final verification; or
 - b. "DHS verification in process," which means that E-Verify could not determine the status immediately, that a manual search is necessary, and that the results will be available within one to three days; or
 - c. "Tentative non-confirmation," which means that the employee's information could not be verified with the Social Security Administration. The employer must notify the employee of the tentative non-confirmation classification as well as notify the Social Security Administration

In addition to E-Verify, employers should remain vigilant about the various laws that are continuously being proposed or considered in jurisdictions where they operate facilities and hire employees. Employers should seek the advice of counsel once such proposals are enacted into law to ensure compliance.



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