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Critical Changes in Arizona Employment Verification Requirements to Take Effect January 1, 2008

As of January 1, 2008, all business owners with worksites in Arizona are subject to loss of their state and local licenses if they knowingly or intentionally hire undocumented workers. The state law also mandates the verification of employment eligibility of all new hires using the Department of Homeland Security's "E-Verify" program, commencing January 1, 2008. This new law represents a significant change in employment verification protocol and adds harsh penalties for employers who employ unauthorized workers, and we urge any clients with worksites in the state of Arizona to contact our office immediately to discuss these requirements in greater detail.

The language in the Legal Arizona Workers Act (AZHB 2779) establishes the process by which employment authorization shall be investigated and documented in the state of Arizona after January 1, 2008. Upon receipt of a complaint that an employer has intentionally or knowingly employed an unauthorized alien, the Arizona State Attorney General (or County Attorney) shall verify the work authorization of any allegedly unauthorized alien. These provisions maintain that if after an investigation, the Attorney General or County Attorney determines that the complaint filed is not frivolous, they are mandated to bring a legal action against the employer for violations in the county where the unauthorized alien is employed, and are further mandated to notify U.S. Immigration and Customs Enforcement and local law enforcement about the unauthorized alien.

The Arizona law provides that an employer's use of the Basic Pilot Program (now known as "E-Verify") creates a rebuttable presumption that an employer did not intentionally or knowingly employ an unauthorized alien. Even for those who do not use the E-Verify system, the Arizona law states that if a company has complied "in good faith" with the requirements of 8 U.S.C. 1324b (the federal statute that outlines the requirements of the I-9 process), the company

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will have an affirmative defense that it did not intentionally or knowingly employ an unauthorized alien. This affirmative defense is not as comforting as the rebuttable presumption that E-Verify offers. Actual or constructive knowledge that an employee is in fact illegal will not be tolerated and will not receive the benefit of either the rebuttable presumption or the affirmative defense. **Accordingly, we strongly recommend using the E-Verify System as of January 1, 2008 for new hires and maintaining strict compliance with I-9 requirements for the company's entire workforce.**

For an employer's first violation that is a "knowing violation," that is, it is shown that the employer knowingly hired an alien unauthorized to work, the court is mandated to order the termination of the employment of all unauthorized workers and subject the employer to a three-year probationary period. During the period, the employer must file quarterly reports with the County Attorney regarding each new employee who is hired in the location where the initial unauthorized employee(s) performed work. The employer must also file a sworn affidavit with the County Attorney within three business days of the court's order, attesting to the fact that the employer has terminated the employment of all unauthorized aliens and that the employer will not intentionally or knowingly employ an unauthorized alien. Failure to submit such an affidavit will trigger a mandatory court-ordered suspension of all licenses required to operate the employer's business (such as articles of incorporation, certificate of partnership, transaction privilege tax license, etc.) These licenses will remain suspended until the submission of the required affidavit. The court is also granted discretion to suspend additional licenses for up to 10 days depending on factors such as the number of unauthorized aliens, degree of harm resulting from the violation, prior misconduct, etc.

For an employer's first violation that is an "intentional violation," the court is given similar mandates as described above, except that the employer may be subject to a five-year probationary period and suspension of all licenses necessary to operate the employer's business for a minimum of 10 business days. Second violations will result in the permanent revocation of all licenses held by the employer that are necessary to operate the employer's business.

It is important to note that the definitions of "intentional" or "knowing" violations under the Arizona law will be interpreted in a manner consistent with federal law and regulations and thus further strengthen the need for strong, centralized control and implementation of the I-9 process. Additionally, "constructive knowledge" can be found as a result of improperly completed I-9 forms. While technical I-9 failures may not give rise to liability, substantive failures will likely prohibit employers from being able to avail themselves of the "good-faith" defense provided by proper I-9 compliance.

The E-Verify system is an evolving program that may require significant resources and time to implement, but this may be minimized by training designated personnel who are already familiar with the I-9 employment eligibility process. Since E-Verify cannot be used for existing employees, employers must adhere to strict I-9 compliance procedures for both existing and new members of the workforce and consult with immigration counsel as necessary for I-9 compliance best practices and oversight to ensure availability of the good-faith protections provided by robust I-9 compliance.

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If you would like more information on any immigration matter, please contact your immigration attorney at Mintz Levin or go to www.mintz.com.

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