



## Legal Alert: Tennessee Enacts New Employment Authorization Law

6/24/2011

**Executive Summary:** The Tennessee Lawful Employment Act ("TLEA") was signed into law on June 7, 2011, and gives employers the option of either enrolling in the federal E-Verify program or obtaining specific employment authorization documentation from employees.

### **Background**

TLEA is an attempt to localize E-Verify laws in an effort to close the void left by the federal government's failure to curb illegal immigration. Tennessee joins 15 other states that have enacted localized E-Verify laws to combat illegal immigration within their borders. As described below, TLEA replaces the present law provisions prohibiting any person from knowingly employing an illegal alien; requires each employer to enroll and maintain active participation in the federal E-Verify program before October 1, 2011 or obtain and retain copies of certain employment authorization documents; and establishes certain requirements for contractors regarding illegal aliens.

### **Requirements**

TLEA is a non-mandatory state E-Verify law. Under TLEA, an employer may, but is not required to, enroll in the federal E-Verify program. Alternatively, an employer may accept, copy and maintain a state-issued driver's license or identification, birth certificate, unexpired U.S. passport, permanent resident card, work authorization, certificate of naturalization or citizenship or other proof of an employee's immigration status and authorization to work in the United States, i.e. the same documents permitted for I-9's under federal law. If an employer signs up to utilize E-Verify, it must use it for all newly hired employees.

Employers who choose to use E-Verify are required to:

- Before October 1, 2011, enroll and maintain active participation in the federal E-Verify program. The "E-Verify program" is the federal electronic work authorization verification service provided by the U.S. Department of Homeland Security;
- On or after October 1, 2011, verify the work authorization status of each employee hired on or after October 1, 2011, by using the E-Verify program; and
- On or after October 1, 2011, maintain records of all results generated by the E-Verify program pursuant to the work authorization status check

required by this bill.

TLEA will impose these employer compliance obligations in phases as follows:

- All state and local government agencies must enroll and participate in E-Verify or request and maintain an identity/employment authorization document from a newly hired employee no later than January 1, 2012<sup>[1]</sup>;
- All private employers with 500 or more employees must enroll and participate in E-Verify or request and maintain an identity/employment authorization document from a newly hired employee no later than January 1, 2012;
- All private employers with 200 to 499 employees must enroll and participate in E-Verify or request and maintain an identity/employment authorization document from a newly hired employee no later than July 1, 2012;
- All private employers with 6 to 199 employees must register and utilize E-Verify or request and maintain an identity/employment authorization document from a newly hired employee no later than July 1, 2013; and
- Employers with five or fewer employees are exempt from the law.

### ***Record Retention Requirements***

TLEA requires employers to maintain a record of E-Verify documents for three years from the date of hire or one year from the date of the employee's termination, whichever is later. Employers who choose to verify employment through identity/authorization documents instead of E-Verify must maintain such documentation for three years after receipt of the documentation or for one year after the employee (or non-employee)<sup>[2]</sup> stops providing labor for the employer, whichever is later.

TLEA covers "non-employees" such as independent contractors as well as employees. If the employer contracts with an individual who is an independent contractor, the employer must obtain the same type of documentation as required for employees and such documentation must be kept for the same time frame as outlined above for employees. If the employer contracts with a business entity as the independent contractor, rather than an individual, the documentation is not required. For example, if an employer contracts with ABC Lawn Care to maintain the landscaping, that company could, and likely would, send different employees to provide the work. In this situation, there is no need to obtain the documentation of the individual workers. However, if an employer contracts (regardless of whether there is a written contract or not) with Mike Smith to provide those same lawn care services, the employer would be required to obtain the documentation for Mike Smith. As the more conservative view, it would seem most prudent to obtain such documentation from any company/independent contractor where the only individuals who would provide the work are limited to the owner and/or a family member.

### ***Violation of the Act***

An employer violates TLEA by failing to receive E-Verify confirmation or to

request and maintain a copy of one of the specified identification documents if E-Verify is not utilized. If an employer is suspected to have violated the provisions of TLEA, a complaint may be filed by any lawful Tennessee resident or any federal agency employee. The Commissioner of the Tennessee Department of Labor and Workforce Development will conduct an investigation into the complaint. If satisfactory evidence exists, the Commissioner will issue an initial order containing: 1) the Commissioner's findings and determination; 2) the penalties if a final order is issued; 3) the process involved in requesting a contested hearing; and/or 4) the process by which the Commissioner will waive penalties for first-time offenders.

Upon issuance of a final order, the private employer would be subject to the following penalties:

- For a first violation, the Commissioner must assess a civil penalty of \$1,000 and issue an order to all applicable governmental entities that all licenses held by the private employer would be suspended for 30 days from the date of the final order (the Commissioner may waive a violation if it is determined the employer did not *knowingly* violate the employment verification provisions of TLEA and complies with all remedial actions);
- For a second violation, the Commissioner must assess a civil penalty of \$1,000 and issue an order to all applicable governmental entities that all licenses held by the private employer would be suspended for one year from the date of the final order; and
- For a third violation, the Commissioner must assess a civil penalty of \$1,000 and issue an order to all applicable governmental entities that all licenses held by the private employer would be permanently revoked as of the date of the final order.

A second or third violation must accrue from an investigation separate from any prior investigation. If the violation is a failure to verify the work authorization status of each employee hired on or after October 1, 2011, then a separate civil penalty would be assessed for each employee hired on or after October 1, 2011 who is not verified.

The above penalties are not mutually exclusive and may be imposed in conjunction with any applicable penalties levied pursuant to this bill. The Commissioner would issue a warning in lieu of the penalties for a first violation if the private employer remedies the violation within 30 days of the date of the preliminary order and the Commissioner determines that the violation was unintentional.

Beginning November 1, 2011, and on a monthly basis thereafter, the Commissioner must post a publicly accessible list on the department's website of the employers that have violated TLEA. The list must state, at a minimum, the name of the employer, the place of business where the violation occurred, a brief description of the violation, whether the violation is a first or subsequent violation, any penalties assessed to the employer, and any steps that the employer has taken to remedy the violation.

### ***Safe Harbor***

Employers who utilize E-Verify have a "safe harbor" and cannot be found to have violated the law by employing an employee without work authorization

if: 1) the employer utilized E-Verify and received a confirmation; or 2) the employee appealed the tentative non-confirmation and the appeal has not been resolved. TLEA's "safe harbor" provision is not applicable to employers who elect to copy and maintain an employee's driver's license or identification and the employee is later discovered to be without employment authorization.

For employees hired before October 1, 2011, an employer would not be in violation of TLEA if: 1) the employer requested from the employee, received, and documented in the employee's record, at least 14 calendar days after commencement of employment, lawful resident verification information consistent with employer requirements under the federal Immigration Reform and Control Act of 1986; and 2) the lawful resident verification information provided by the employee later was determined to be false or the employer verified the work authorization status of the employee by using the E-Verify program.

### ***Uncertainty Within the Act***

The requirement that employers enroll and participate in E-Verify or request and maintain an identity/employment authorization document does not appear to make a distinction between in-state and out-of-state employers, and it is unclear whether the Act requires an employer with operations in multiple states to utilize E-Verify to confirm the employment eligibility of all of the employer's workers or only the employees in Tennessee. It could be argued, however, that if TLEA were only applicable to newly hired Tennessee workers, it would create an unfair incentive for employers to relocate outside of Tennessee to states that do not require participation in E-Verify. Additionally, the language of TLEA does not clarify whether employees who are employed by a Tennessee employer but working outside of Tennessee are counted in the total number of employees used to calculate the law's effective date on private employers.

We will keep you updated as clarification of these and other issues regarding the Act become available. If you have any questions regarding the new law, please contact the author of this Alert, Asia Diggs, [adiggs@fordharrison.com](mailto:adiggs@fordharrison.com), an attorney in our Memphis office, or the Ford & Harrison attorney with whom you usually work.

[1] Employers who use E-Verify must enroll and maintain active participation in that program by October 1, 2011, as discussed above. That is, employers cannot wait until the compliance dates to enroll in E-Verify – they must have either enrolled in E-Verify or have begun obtaining and maintaining employment authorization documents by the dates set forth in the schedule.

[2] If an employer contracts with an individual/non-employee, it must request and maintain a copy of one of the specified documents, such as state-issued driver's license or identification.