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Arizona

Ninth Circuit Court of Appeals Upholds Legal Arizona Workers Act

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In a February 2008 ASAP article, *Eyes on the Workforce: Legal Arizona Workers Act Withstands Constitutional Scrutiny*, we discussed the federal district court ruling upholding the Legal Arizona Workers Act ("the Act"). On September 17, the Ninth Circuit Court of Appeals issued a decision affirming the district court judgment. The Act, initially passed by the Arizona legislature in July 2007 and amended in May 2008, penalizes employers that knowingly or intentionally hire undocumented workers in Arizona by suspending or revoking their business licenses. The Act also requires that all Arizona employers use E-Verify, the online employment eligibility verification program, to confirm the work authorization of newly hired employees. Although the unsuccessful challengers may appeal the Ninth Circuit ruling to the U.S. Supreme Court, the Act will remain in full force and effect unless and until struck down.

The Act: Then and Now

In its current form, the Act prohibits employers from hiring undocumented workers in Arizona. This prohibition only applies to hires on or after January 1, 2008. Thus, employers are not liable under the Act for hiring undocumented workers before this date, even if they continued to employ them in 2008. These employers, however, are nevertheless subject to liability under federal immigration law, which has long prohibited employers from knowingly hiring or continuing to employ undocumented workers. Under the Act, employers found liable of knowingly or intentionally hiring undocumented workers risk business license suspension for the first offense and face mandatory business license revocation for the second offense. Only Arizona business licenses are subject to suspension or revocation.

The Act also mandates that employers use the E-Verify system to confirm the work authorization of any individual hired on or after January 1, 2008, to perform services in Arizona. Although employers are required to use E-Verify, there is no automatic penalty for not doing so. Instead, employers that fail to use E-Verify forego a defense otherwise provided by the Act. Under this defense, an employer is entitled to a rebuttable presumption that it did not knowingly or intentionally hire an undocumented worker if it proves it confirmed that individual's work authorization using E-Verify. As amended, the Act also encourages the use of E-Verify in two other ways. First, after September 30, 2008, state government entities are prohibited from awarding contracts for services in Arizona to contractors or subcontractors not in compliance with the Act's E-Verify requirement. Second, in order to receive a grant, loan, or performance-based incentive from the state government after September 30, 2008, an employer must register for and use E-Verify.

In addition to the E-Verify rebuttable presumption, the Act includes an affirmative defense to business license suspension or revocation if an employer can prove it complied in good faith with the federal Form I-9 requirements. An employer does not lose this defense for isolated, sporadic, or accidental failure to fully comply with the Form I-9 requirements (e.g., minor typographical errors or omissions on the I-9), provided it otherwise makes a good faith effort to comply. For employers looking to maximize their defenses, the Act also includes the Voluntary Employer Enhanced Compliance Program. To enroll in this program, an employer must file an affidavit with the Arizona Attorney General, agreeing to confirm the work authorization of every new Arizona hire using E-Verify on a going forward basis and use the online Social Security Number Verification Service to verify the Social Security number of every employee not otherwise confirmed using E-Verify. Employers enrolled in the program that comply with these requirements are not liable under the Act for knowingly or intentionally hiring an undocumented worker.

The Ninth Circuit Ruling

At the district court level, the plaintiffs – various businesses and civil rights organizations – claimed the Act violated both the Arizona and U.S. Constitutions. Specifically, they alleged federal immigration law preempts the Act and asserted that the investigation and hearing procedures preceding license suspension or revocation do not provide adequate due process for employers. Like the district court, the Ninth Circuit Court of Appeals rejected these arguments.

On the issue of preemption, the court of appeals acknowledged that federal law precludes states from imposing civil or criminal sanctions upon those who recruit or employ undocumented workers. The court, however, also noted an exception to this preclusion that permits states to penalize these employers "through licensing and similar laws." Because the Act's penalty provisions address business license suspension and revocation, the court concluded the Act falls within the licensing exception and is therefore not preempted by federal law. The court of appeals also dismissed the argument that mandating E-Verify use by state law is irreconcilable with federal law, under which E-Verify is voluntary, but not required. The court explained that although E-Verify participation at the federal level is voluntary, there is no indication that Congress intended to prevent states from making participation mandatory. To the contrary, Congress has plainly envisioned and endorsed an increase in E-Verify usage.

On the issue of due process, the court of appeals agreed that an employer has a property interest in its business license and should receive a meaningful opportunity to be heard before the license is suspended or revoked. However, according to the court, the Act does in fact afford this meaningful opportunity. In particular, an employer's business license is suspended or revoked only after a superior court hearing, during which the employer is entitled to present evidence, including evidence that the employee at issue is authorized to work in the United States (and presumably also evidence that the employer did not hire the worker knowing he or she was unauthorized).

Although it upheld the Act, the court of appeals cautioned that its decision addressed the constitutionality of the statute itself, not its application or enforcement. Noting that the Act "has yet to be enforced against any employer," the court warned that "[i]f and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied to any particular instance or manner will not be controlled by our decision." Thus, the court's ruling leaves the door open to further legal challenges to the Act.

Recommendations for Employers

With the Ninth Circuit ruling in place, the Act remains fully enforceable against Arizona employers. Even if the appellants take their challenge to the U.S. Supreme Court, the Act will remain enforceable until it is actually struck down. Consequently, employers should take steps now to ensure they comply with the Act and maximize their defenses:

1. **Conduct an I-9 Audit.** All current employees should have a complete and correct I-9 on file. Former employees should also have a complete and correct I-9 on file for one year following the date of termination or three years from the date of hire, whichever is later.
2. **Minimize Future I-9 Problems.** To avoid incomplete or inaccurate I-9's in the future, employers should train human resources personnel on the proper procedures for completing the I-9, including the process for re-verifying expired work authorization documents.
3. **Register for E-Verify.** If an employer has not yet registered for E-Verify to confirm the work authorization of its new Arizona hires, it should do so at this time. Employers contracting or subcontracting with the state to perform services within Arizona after September 30, 2008, or those receiving state grants, loans, or performance-based incentives after September 30, 2008, must register immediately.
4. **Additional Measures.** Employers should consult with legal counsel to determine whether the Voluntary Employer Enhanced Compliance Program is appropriate or necessary for them. Employers that have not yet registered for E-Verify or registered after January 1, 2008, may benefit most from this Program.

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