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South Carolina's new Illegal Immigration Reform Act requires South Carolina employers to participate in federal work verification programs. Employers who do not participate or fail to verify their employees' work status face harsh penalties up to and including permanent revocation of the ability to employ workers in South Carolina.

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Southern Edition

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New South Carolina Law Requires Employers to Register and Participate in Federal Work Verification Programs

By Jim O. Stuckey, II and Alexander D. Paterra

South Carolina has become the most recent state to require employers to use a federal work verification program to verify employees' legal status. South Carolina Governor Mark Sanford recently signed into law "The South Carolina Illegal Immigration Reform Act," which requires both private and public employers to register and participate in a federal work verification program, such as E-Verify, the online employment eligibility verification program operated by the U.S. Department of Homeland Security. The new law also prohibits state employers from awarding contracts or subcontracts to employers who fail to use federal work verification programs. The new law also provides for strict penalties against employers who "knowingly or intentionally" employ any unauthorized workers. The penalties include monetary fines, suspension, and even permanent revocation of the ability to employ workers in South Carolina. (For more information on E-Verify requirements, see Littler's 2008 ASAP, *Proposed Regulation Addresses Mandatory Use of E-Verify for Federal Contractors*, and additional articles on state requirements on www.littler.com.)

Private Employers

The bill also amends Chapter 8 of Title 41 of the South Carolina Code of Law, specifically focusing on private employers. The Act makes a number of key changes to the business of hiring employees in South Carolina.

On July 1, 2009, all private employers in South Carolina will be "imputed" with a state employment license that permits private employers to employ a person in the state. These new licenses will remain in effect as long as the employer complies with the provisions of the Act by:

1. registering and participating in the federal work authorization program to verify the employment authorization of all new employees; or
2. employing only workers who possess or are eligible to possess a valid South Carolina driver's license or identification card or who possess a valid driver's license or identification card from another state where the license requirements are at least as strict as those in South Carolina. The South Carolina Department of Motor Vehicles will publish on its website a list of states where the license requirements are at least as strict as those in South Carolina.

Private employers must comply with the Act under the following schedule dates:

1. Private employers with at least 100 employees must be in compliance by July 1, 2009.
2. All other private employers must be in compliance by July 1, 2010.

Private employers who in good faith verify the immigration status of a new employee pursuant to the provisions of the Act will be presumed to have complied with the new law.

Employers who violate the new law may incur a civil penalty of not less than \$100 and not more than \$1,000 for each employee whose work status the employer fails to verify. If an employer is found to “knowingly or intentionally” employ unauthorized aliens, the employer’s “imputed” employment license can be suspended for 10 to 30 days for a first violation. The license can be revoked for 60 days for a second offense and up to five years for a third offense. The Act goes as far as allowing an employer’s license to be permanently revoked in the most egregious cases.

The Act also creates a civil right of action for wrongful termination against an employer who replaces an employee who is authorized to work with an employee who the employer “knows or should have known” is an unauthorized alien.

In addition, the new law requires businesses to withhold 7% income tax on Form 1099 compensation paid to an individual who cannot provide a valid taxpayer ID number or Social Security number.

Public Employers and State Contractors

Section III of the bill amends Title 8 of South Carolina Code of Law for Public Officers and Employees by adding Chapter 14 to the Title.

All public employers must register and participate in a federal work authorization program to verify employment by January 1, 2009. The new law also restricts with whom public employers can contract. Under the new law, public employers may not enter into service contracts with a contractor, subcontractor or sub-subcontractor for the physical performance of services within South Carolina unless the contractor agrees:

1. to register and participate in the federal work authorization program to verify the employment authorization of all new employees; and
2. require agreement from its subcontractors and sub-subcontractors to register and participate in the federal verification of the employment autho-

zation of all new employees; or

3. to employ only workers who possess or are eligible to possess a valid South Carolina driver’s license or identification card issued by the South Carolina Department of Motor Vehicles or who possess a valid driver’s license or identification card from another state where the license requirements are at least as strict as those in South Carolina as determined by the Executive Director of the South Carolina Department of Motor Vehicles. The Executive Director of the South Carolina Department of Motor Vehicles will publish on its website a list of states where the license requirements are at least as strict as those in South Carolina.

Government contractors, subcontractors and sub-subcontractors must comply with the Act under the following schedule:

Contractors of 500 or more employees must be signed up by January 1, 2009;

Contractors of 100 or more employees, but less than 500 employees, must be signed up by July 1, 2009; and

all other contractors must be signed up by January 1, 2010.

Public employers will be in compliance with this chapter if they obtain a written statement from the contractor certifying that the contractor will comply with the requirements of the chapter and agrees to provide to the public employer any documentation required to establish either:

the applicability of the chapter to the contractor, subcontractor and sub-subcontractor; or

compliance with the chapter by the contractor and any subcontractor or sub-subcontractor.

A public employer or contractor who complies with these requirements in good faith will not be subject to sanctions or subject to any civil or administrative action for employing an individual who is not authorized to work in the United States.

Action Items for South Carolina Employers

With these amendments in place, South Carolina employers should continue to assess their operations to ensure compliance with state and federal law and to minimize any risk of liability. To that end, employers should take the following steps, if they have not already done so:

1. Register for and begin using work verification programs, such as E-Verify, by January 1, 2009, for all new hires. We suggest registering prior to the law’s effective date so employers can be sure that they are in compliance with the Act and, if not, they will have time to adjust to the new procedures and correct any potential issues that may arise.
2. Employ only workers who at the time of hire possess or are eligible to possess a South Carolina driver’s license or possess a license from another state where the license requirements are at least as strict as those in South Carolina, as determined by the Executive Director of the Department of Motor Vehicles.
3. Perform an I-9 audit to ensure every current employee has a complete and accurate I-9 on file and every former employee has a complete and accurate I-9 on file for one year after the date of termination or three years after the date of hire, whichever is later.
4. As necessary, train human resources personnel on proper completion of the Form I-9. With the state’s current prohibition against knowingly or intentionally hiring unauthorized workers, it is vital that employers retain objective and trustworthy personnel to oversee the I-9 process with new hires.
5. Like South Carolina, several other states are enacting legislation prohibiting the employment of undocumented workers and/or mandating the use of E-Verify or similar electronic employment verification programs. To ensure compliance with all applicable laws, employers are encouraged to contact experienced employment or immigration counsel

with any questions regarding state and federal statutes that may affect their operations.

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