

## **Tennessee Law Imposes Employment Verification Requirements**

In the closing days of the most recent legislative session, the Tennessee General Assembly passed legislation aimed at requiring employers to check the employment eligibility of new hires. The "Tennessee Lawful Employment Act" (Public Chapter No. 436) mandates that most Tennessee employers either use the federal E-Verify program or review certain identification documents of new employees and independent contractors. Governor Haslam signed this bill on June 7, 2011, and it will take effect on January 1, 2012.

### **What Does The New Law Require?**

**New verification mandate.** All employers are already required under federal law to verify the work status of new hires, via the I-9 process. This process requires employers to complete an employment eligibility form required by the U.S. Department of Homeland Security for new hires, excluding independent contractors. The new Tennessee law now imposes these same requirements under state law. An employer's obligation to use the I-9 process under federal law will not change, however, the new law will remove the safe harbor protection for employers under current Tennessee law where the lawful verification information is later determined to be false. In addition, it will require employers to either request and maintain a copy of one of certain identification documents, such as a driver's license, or, alternatively, to enroll in the E-Verify program. E-Verify is a federal electronic work authorization verification service created by the U.S. Department of Homeland Security and first introduced in 2003. Aside from government contractors, E-Verify is not mandated by federal law, and only about 4,000 Tennessee employers currently use the service.

Note that, unlike laws recently passed in several other states, the Tennessee law does not require employers to use E-Verify. Rather, it attempts to bring the existing employment verification process (essentially, the I-9 process) within the reach of the State, while also encouraging – but not requiring -- the use of E-Verify. On the other hand, in one respect it goes further than certain other state laws, by also requiring businesses to review the driver's license or other valid document for 1099 non-employees (independent contractors) to show lawful presence in the U.S.

**Safe-harbor.** This law provides a safe harbor for employers who use the E-Verify program to verify the status of an employee if the employee is later found to be in the country illegally.

**Phase-in process.** The provisions of the new law take effect on January 1, 2012 for employers with 500 or more employees. It will apply to private employers with 200 to 499 employees on July 1, 2012 and to employers with 6 to 199 employees on January 1, 2013. The law will not apply to employers with five or less employees.

**Assistance from newly created government office.** In an effort to assist small businesses that do not have access to the Internet, this new law creates, within the

Department of Labor and Workforce Development, an Office of Employment Verification Assistance. If an employer does not have Internet access, this Office, at no charge to the employer, will enroll the employer in the E-Verify program or conduct work authorization status checks of the employer's employees by using the program. However, in order to avail themselves of this service, an employer will have to attest, under penalty of perjury, that it lacks Internet access.

**Enforcement process.** In order to assure that employers are complying with the verification mandate, any lawful Tennessee resident, or employee of a federal agency, will be authorized to file a complaint against an employer alleging non-compliance. Where satisfactory evidence of a violation exists, the Commissioner of Labor and Workforce Development may initiate an inquiry and request documentation from the business to determine whether it has complied with the verification law. Upon expiration of a 30-day period, the Commissioner will determine whether a violation occurred. If the Commissioner determines that an employer has violated the law or has misclassified an individual in order to avoid the requirements of the law, the Commissioner will be required to issue an initial order, including potential penalties. Where an employer commits a first violation and then complies with remedial action required by the Commissioner, a warning may be issued in lieu of penalties.

**List of violators will be published.** Beginning February 1, 2012, the Department must publicly post an accessible list on the Department's website of any employer against whom a final order has been issued. The Department will also be required to report violators to the U.S. Department of Homeland Security.

**Penalties for non-compliance.** Employers who fail to follow to this law will be subject to harsh penalties. For a first violation, an employer will be subject to a penalty of \$500 and an additional \$500 for each non-verified employee or non-employee. A second violation will result in a \$1,000 penalty and an additional \$1,000 for each non-verified employee or non-employee. A third or subsequent violation will result in a penalty of \$2,500 and an additional \$2,500 for each non-verified employee or non-employee. These provisions for monetary penalties may prove problematic for Tennessee in light of the recent U.S. Supreme Court ruling on a similar Arizona immigration law ([see recent Miller & Martin alert.](#)) Miller & Martin will keep you posted on any developments in this area.

Additional details about the E-Verify program can be found under the Employment Verification Section of the website for the U.S. Department of Homeland Security, Office of Citizenship and Immigration Services found [here](#).

If you have questions about the potential impact of this Tennessee law on your business, please contact [Sarah Maxwell](#), [Junaid Odubeko](#), or [Kelly Weston](#) in Miller & Martin's [Labor & Employment Department](#).

*The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.*

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