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LEGAL ALERT



Legal Alert: South Carolina Enacts Law Prohibiting Employment of Unauthorized Aliens

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South Carolina has become the most recent state to join the battle against the employment of illegal immigrants. On June 4, 2008, the Governor signed the South Carolina Illegal Immigration Reform Act (H 4400). Among other things, this law prohibits employers from knowingly and intentionally employing unauthorized aliens. The law provides that employers who comply in good faith with its employment verification requirements will not be deemed to have knowingly and intentionally employed unauthorized aliens.

The law also “imputes” on all private employers a South Carolina employment license. Effective July 1, 2009 a private employer may not employ a person unless its South Carolina employment license is in effect and is not suspended or revoked. The South Carolina employment license remains in effect as long as the employer complies with the requirements of the new law.

Employment Verification Requirements for Private Employers:

The new law requires all private employers who are required by federal law to maintain employment eligibility information on employees to either:

- Register and participate in the federal E-Verify work authorization program, or its successor, and verify the work authorization of every new employee within five business days after employing a new employee; or
- Only hire individuals who have a valid South Carolina driver’s license or identification card issued by the South Carolina Department of Motor Vehicles; are eligible to obtain a South Carolina driver’s license or identification card; or have 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 Department of Motor Vehicles will publish a list of all such states on its website.

This requirement is effective on July 1, 2009, for employers with 100 or more employees. For employers with fewer than 100 employees, the effective date is July 1, 2010.

The state will send a written notice of these requirements and a list of states with driver’s license requirements at least as strict as those in South Carolina, to all South Carolina employers no later than January 1, 2009, and will publish the information contained in the notice on its website. However, the failure to receive this notice is not a defense to an allegation that the

employer failed to comply with the Act.

Remedies

An employer who violates the provisions of the new law regarding employment verification is subject to a penalty of at least \$100 but not more than \$1,000 for each violation. Any employer found to have knowingly and intentionally employed unauthorized aliens is subject to a suspension (or revocation, for repeated violations) of the imputed employment license.

Requirements for Public Employers:

- **Verification of New Hires.** Effective January 1 2009, all public employers (defined as every department, agency, or instrumentality of the State or a political subdivision of the State) must register and participate in the federal work authorization program to verify employment of all new employees.

- **Requirements of Contractors.** The law also prohibits public employers from entering into any contract for the physical performance of services unless the contractor agrees to:

1. Register and participate in the federal work authorization program and require sub-contractors to do the same or
2. Employ only workers who: possess a valid South Carolina driver's license or identification card issued by the South Carolina Department of Motor Vehicles; are eligible to obtain a South Carolina driver's license; or 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.

The effective date for this requirement depends on the size of the contractor:

- January 1, 2009, for contractors, subcontractors, or sub-subcontractors with 500 or more employees;
- July 1, 2009, for contractors, subcontractors, or sub-subcontractors with at least 100 but fewer than 500 employees;
- January 1, 2010, for all other contractors, subcontractors, or sub-subcontractors.

Creation of Wrongful Discharge Cause of Action:

The law creates a private right of action for wrongful termination against an employer who discharges an employee authorized to work in the United States for the purpose of replacing that employee with a person the employer knows or should reasonably know is an unauthorized alien. The person claiming to have been wrongfully discharged under this provision must show:

- the replacement occurred within sixty days of the date of the employee's termination,
- the replacement worker was an unauthorized alien at the time of the

replacement;

- the employer knew or reasonably should have known of the replacement worker's status; and
- the replacement worker filled duties and responsibilities the employee vacated.

An individual who prevails on a claim under this provision may be awarded reinstatement, actual damages and lost wages. Additionally, prevailing parties are entitled to attorney fees.

Employers who submit the necessary identifying information for all employees through the Systematic Alien Verification of Entitlement (SAVE) program, the E-Verify Program or a successor program used for verification of work authorization and operated by the United States Department of Homeland Security are not subject to liability under this provision. Additionally, this provision does not apply to a private employer who terminates an employee in accordance with the requirements of the new law.

Any lawsuit claiming violation of this provision must be brought within one year of the alleged violation. This provision is effective 90 days after the effective date of the Act.

Tax Deductions/Withholding Requirements

The law also provides that, effective January 1, 2009, an employer cannot take a business expense deduction from its state income tax return for wages paid to an unauthorized alien in excess of \$600 per year. However, this provision does not apply if the employer complied with the requirements of the new law and the information provided by the individual to the employer was facially correct.

The law also requires employers to withhold 7% of the compensation paid to an individual on a 1099 form if the individual (1) failed to provide a taxpayer identification number or social security number; (2) failed to provide a correct taxpayer identification number or social security number; or (3) provided an Internal Revenue Service issued taxpayer identification number issued for nonresident aliens.

Employers' Bottom Line:

South Carolina's law is similar to those passed recently by a number of other states. A federal court recently issued a decision temporarily prohibiting the state of Oklahoma from enforcing a similar law because it may be preempted by federal law. This decision may encourage the filing of a lawsuit challenging the South Carolina law.

Nevertheless, employers in South Carolina need to be aware of the requirements of the new law and take any steps necessary to ensure they will be able to comply with the law when it takes effect.

If you have any questions regarding this law or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.

