BRADLEY ARANT BOULT CUMMINGS LLP

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Southeastern Legislative Updates

Alabama Employment-Related Legislation

Unemployment Benefits for Military Spouses Who Relocate: In 2012, Alabama amended its unemployment benefits provision to allow spouses of active duty members of the military who receive change of station orders, activation orders, or unit deployment orders to receive unemployment benefits if they voluntarily quit working in order to relocate. Section 25-4-78 of the Alabama Code describes the circumstances that disqualify an individual from total or partial unemployment benefits. One such disqualifying circumstance is voluntarily quitting work without good cause. However, the Alabama Legislature created an exception for individuals who voluntarily quit working in order to relocate as a result of a spouse's military assignment: "[A]n individual shall not be disqualified if he or she left his or her employment to permanently relocate as a result of his or her active duty military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders."

Immigration: In May 2012, Governor Bentley signed legislation amending HB 56, Alabama's controversial immigration legislation that passed in 2011. Two sections of HB56 apply directly to employers: Section 15, which was not amended, and Section 9, which was amended significantly. Each section is discussed below.

Section 15 of HB56 applies to both public and private employers and became effective on April 1, 2012. Section 15 has two basic components. *First*, it makes it unlawful for an employer to "knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama." Employers who violate this provision face stiff penalties, ranging from temporary suspension of business licenses and permits to permanent revocation of business licenses and permits throughout the State. *Second*, it requires all employers to enroll in the federal web-based E-Verify system and to use it to verify newly hired employees' work authorization. An employer can establish an affirmative defense to a claim that it knowingly hired or employed an unauthorized alien if it can establish that it complied in good faith with the federally imposed Form I-9 obligations. Additionally, HB56 provides an E-Verify "safe harbor" defense. An employer that uses E-Verify to verify the work authorization of an employee "shall not be deemed to have violated [Section 15] with respect to the employment of that employee." The 2012 amendments did not change Section 15.

By contrast, Section 9 was amended significantly. Section 9 applies only to state contractors and became effective on January 1, 2012. The original version of Section 9 required an employer, as a condition for the award of a contract, grant, or incentive from the state, a political subdivision of the state, or a state-funded entity, to (1) enroll in E-Verify and (2) attest through a sworn affidavit that it had not knowingly hired, employed, or continued to employ an unauthorized alien and that it had enrolled in E-Verify. The original version also contained severe penalty provisions that included the termination of the contract as well as the suspension or loss of business licenses and permits. The 2012 amendments to Section 9 accomplished, in pertinent part, the following:

- Clarified that contractors need only E-Verify employees within Alabama.
- Eliminated the affidavit requirements altogether.
- Provided that a contractor is not liable for contracting with a direct subcontractor who violates Section 9 unless the contractor knew or should have known that the direct subcontractor was in violation of Section 9.
- Clarified that businesses that only receive compensation for goods or services provided to the State are not "state-funded entities."
- Added a requirement that contracts or agreements to which the state, a political subdivision of the state, or a state-funded entity are a party must include a clause affirming that, for the duration of the contract, the contractor will not violate federal immigration law or knowingly employ, hire for employment, or continue to employ an unauthorized alien within Alabama. Such language is required only in contracts that are competitively bid or, if entered into by the state or a state agency, would be required to be submitted to the Contract Review Permanent Legislative Oversight Committee.
- Revised the penalty scheme into three tiers:
    - Violation #1: The contract *may* be terminated and the court must (1) order the employer to terminate the employment of all unauthorized aliens, (2) subject the employer to *three* years of probation and quarterly reporting requirements, and (3) require the employer to provide an affidavit stating that it has terminated the employment of all unauthorized aliens and will not knowingly or intentionally employ an unauthorized alien within Alabama. Additionally, if the court determines that the employer has a policy or practice that violates Section 9, the employer's business licenses or permits for the *location where the unauthorized work occurred* must be suspended for *up to 60* days.
    - Violation #2: If a second violation occurs within ten years of the first violation, the contract *must* be terminated and the court must (1) order the employer to terminate the employment of all unauthorized aliens, (2) subject the employer to *five* years of probation and quarterly reporting requirements, and (3) require the employer to provide an affidavit stating that it has terminated the employment of all unauthorized aliens and will not knowingly or intentionally employ an unauthorized alien within Alabama. Additionally, if the court determines that the employer has a policy or practice that violates Section 9, the employer's business licenses or permits for the *location where the unauthorized work occurred* must be suspended for *at least 60 days but no more than 120 days*. However, if a second violation occurs more than ten years after the first violation, the employer is subject to the same penalty as a first violation but it is still considered a second violation.
    - Violation #3: The contract *must* be terminated and all of the employer's business licenses or permits *throughout the State are permanently revoked.*

- Clarified that all procedural mechanisms or legal defenses included in the E-Verify program can still be used by anyone who allegedly violates this section, and that any entity that has enrolled in and properly uses E-Verify shall not be liable for violations of Section 9.

Mississippi Employment-Related Legislation

Workers' Compensation – In 2012, the Mississippi Legislature enacted significant changes to the Mississippi Workers' Compensation Law which favor employers. The new law is effective for injuries that occur after July 1, 2012 (S.B. 2576). The most noteworthy changes in the legislation are:

- The new law gives employers the right to administer drug and alcohol testing to injured employees. If the employee tests positive for a blood alcohol content of .08% or greater, for any amount of an illegal drug, or for any amount of a prescription medication taken contrary to doctor's orders, the law presumes that the use of drugs or alcohol was the proximate cause of the injury. If the claimant refuses the drug and alcohol test, same presumption arises. Once the presumption arises, the claimant bears the burden of proving that drug or alcohol use "was not a contributing cause of the accident."
- The legislature eliminated the traditional assumption that workers' compensation laws should be interpreted and applied to favor compensation for employees. Instead, Mississippi's new law expressly states that the statute and the evidence in a workers' compensation case "shall not be presumed to favor one party over another and shall not be liberally construed in order to fulfill any beneficent purposes."
- The new law requires claimants to file medical records proving a direct causal connection between the work performed and the alleged injury in support of a petition to controvert in cases in which no benefits have been paid. If a claimant is unable to file supporting medical records at the time of filing the petition due to an impending statute of limitations, the claimant is given 60 days after filing the petition to file the required records.
- Claimants may not receive benefits for the effects that a preexisting medical condition have on a workplace injury. Instead, permanent disability and death benefits are reduced by the proportion to which a preexisting condition "contributed to the production of the results following the injury."
- The legislature also increased the benefits for certain claims:
  - Facial or head disfigurements increased from $2,000 to $5,000;
  - Additional compensation for rehabilitation time increased from $10 to $25 per week, for a maximum of 52 weeks.
  - The surviving spouse's lump-sum payment in a death claim increased from $250 to $1,000;
  - Funeral expenses in a death claim increased from $2,000 to $5,000.

North Carolina Employment-Related Legislation

E-Verify: In 2011, North Carolina adopted its own mandatory E-Verify law requiring public and private employers with 25 or more employees to use the federal E-Verify system to confirm a workers' legal status. The law's effective dates are staggered. For the state's biggest employers (i.e., those with 500 or more employees in North Carolina), the law becomes effective on Oct. 1, 2012, with smaller employers to follow. Failure to comply could subject an employer to a $10,000 fine and a $1,000 civil penalty for a second violation or $2,000 civil penalty for subsequent violations for each required verification the employer failed to make. For more information, see N.C. Gen. Stat. §§ 64-25 – 64-38.

Disability Discrimination: In 2011, North Carolina amended its "Persons with Disabilities Protection Act" to conform with the federal Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). Changes include relaxing standards concerning whether an individual is disabled and adding a new anti-retaliation provision. For more information, see N.C. Sess. Laws 2011-94, S.B. No. 384, or N.C. Gen. Stat. §§ 168A-1 – 168A-12.

Unemployment Benefits: Effective Nov. 1, 2012, a new definition of employee misconduct will govern unemployment benefit decisions, potentially making it easier for employers to succeed in unemployment hearings. The revised North Carolina law redefines "misconduct connected with the work" and includes examples of "prima facie evidence of misconduct." Those examples include three written reprimands in the 12months preceding the employee's termination, violating an employer's absenteeism policy, violating the employer's written alcohol or drug policy, and any inappropriate comments or behavior which creates a hostile work environment. For more information, see N.C. Sess. Laws 2012-134, S.B. No. 828.

Workers' Compensation: In 2011, North Carolina revised its workers compensation laws in an effort to make them more favorable to employers. The changes include the following: redefining "suitable employment" to make definition clearer; adopting a complete defense for employers if an employee makes a willful misrepresentation about his/her physical condition at time of hire; shifting the burden of proof to employees regarding requesting changes in medical treatment; allowing written and oral employer communication with medical providers so long as notice and opportunity to participate in oral communications is provided to employees; and placing a cap on 500 weeks of compensation for temporary total disability unless the injuries meet the criteria for being permanent and total. See N.C. Sess. Laws 2011-287, H.B. No. 709.

Unclaimed Wages: Wages are now considered abandoned one-year after the date the compensation becomes payable, as opposed to two years. Before Nov. 1 of each year, employers must file a verified report with the state treasurer for unclaimed wages totaling more than $250 for the 12-month period ending on July 1. For more information, see N.C. Sess. Laws 2011-230 or N.C. Gen. Stat. § 116B-60.

Tennessee Employment-Related Legislation

Unemployment: The Unemployment Insurance Accountability Act of 2012, signed by Governor Haslam on May 21, 2012, requires—among other things—that unemployment recipients apply for at least three jobs every week or go to a local career center and then submit detailed information to verify these applications. The law provides a new definition of what constitutes "misconduct." It specifies that misconduct includes but is not limited to, the following conduct by a claimant:

- Conscious disregard of the rights or interests of the employer;
- Deliberate violations or disregard of reasonable standards of behavior that the employer expects of an employee;
- Carelessness or negligence of such a degree or recurrence to show an intentional or substantial disregard of the employer's interest or to manifest equal culpability, wrongful intent or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employee's employer;
- Deliberate disregard of a written attendance policy and the discharge is in compliance with such policy;
- A knowing violation of a regulation of this state by an employee of an employer licensed by this state, which violation would cause the employer to be sanctioned or have the employer's license revoked or suspended by this state; or
- A violation of an employer's rule, unless the claimant can demonstrate that:
  - The claimant did not know, and could not reasonably know, of the rule's requirements; or
  - The rule is unlawful or not reasonably related to the job environment and performance.

The legislation calls for disqualification of unemployment benefits for anyone who has been incarcerated for four or more days during any week of unemployment. Under the bill, an employer may also supply information to the state's agency, administering unemployment benefits prior to a request for information being mailed from a claimant. If an employee receives a severance package or wages in lieu of notice, they are not eligible for unemployment benefits until it is paid out. An employee is not eligible for benefits if he or she is laid off and offered the same job or a similar job at the same wages and he or she refuses that job. If a laid-off worker is offered a job back with an employer but the new position requires a drug test, whereas the previous job did not, they must take and pass the test or be considered ineligible for benefits. For more information, see SB 3658/HB 3431.

Employee Meal Breaks: In 2012, the Tennessee Legislature enacted legislation allowing an employee who is principally employed in the service of food or beverages to customers and who receives and reports tips to waive their right to a 30-minute unpaid meal break, at the discretion of the employer. The bill requires the employee to submit a waiver request to the employer in writing on a form established by the employer. The law specifies that in

order for the waiver to be effective, the employee must submit the request knowingly and voluntarily and both parties must consent to the waiver. It also requires employers who intend to enter into waiver agreements to establish a reasonable policy in writing and to post the policy in at least one conspicuous place in the workplace. It provides for rescinding of waivers and prohibits coercion by an employer. For more information, see SB 2625/HB 3253.

Employment of Physicians by Nursing Homes: Tennessee Legislature passed a bill allowing nursing homes and their affiliates to employ physicians if certain conditions are met. For more information, see SB 3263/HB 3514.

Washington, D.C. Employment-Related Legislation

Discrimination and Retaliation Protections for the Unemployed: Employers in the District of Columbia must comply with a number of local laws regarding employees. These range from the D.C. Human Rights Act, which largely mirrors Title VII and similar federal laws, but specifically covers sexual orientation and political affiliation; to the D.C. Paid Sick Leave Act (DC Code § 32-131.02), requiring paid sick leave for employees based on the employer's size; and the D.C. Family and Medical Leave Act (D.C. Code § 32-509), providing up to 16 weeks of unpaid leave in a 24-month period. D.C.'s latest enactment is the Unemployed Anti-Discrimination Act of 2012. The Act provides that employers may not exclude candidates because they are unemployed and may not retaliate against anyone who exercises their rights under the Act. Although the Act has an exemption that permits employers to examine the reasons underlying an individual's status as unemployed, it is a fine line between rejecting someone because they are unemployed and rejecting them because of the reasons underlying the unemployment. Although the Act does not create a private cause of action, it does establish civil penalties of $1,000 per violation per claimant, $5,000 for a second violation, and $10,000 for each subsequent violation, not to exceed $20,000 per violation.