2011
South Carolina
Construction Law Update

NC/SC JOINT CONSTRUCTION LAW SECTIONS
BI-ANNUAL MEETING

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South Carolina Construction Law Update – Federal and State Court Decisions
July 2010 – August 2011

Arbitration

- **Notice of Arbitration Must Appear on First Page of Master Deed**

Developer of a condominium project sold twenty of twenty-four units under the terms of a recorded master deed, which included an arbitration provision. After the sale of the first twenty units, Developer created a supplemental master deed which also included an arbitration provision and added a new unit that did not previously exist. The supplemental master deed allotted the new unit a 4% ownership interest in the common areas, and reduced each of the original units' shares in the common elements accordingly. Purchasers of the first twenty units sought declaratory judgment against Developer, alleging that a sale of the newly created unit violated the terms of the original master deed and that the new unit should remain a part of the original common elements. Developer's motion to compel arbitration was denied because the arbitration clause did not comply with S.C. Code Ann. § 15–48–10(a), which required the clause to be on the first page of the master deed. Developer appealed, arguing that the trial court misconstrued the statutory meaning of "the first page of the contract" because the master deed contained a cover page, and the second page containing the arbitration provision was actually the first page of the document.

The South Carolina Court of Appeals declined to adopt Developer's interpretation, and maintained a strict reading of the statute. The cover page displayed a stamp by the Register of Deeds, prominently displayed the title of the master deed, and provided contact information for the attorney who prepared the deed; therefore, the cover page was the first page of the master deed. Applying this plain language of the statute, Developer's motion to compel arbitration was denied. Richland Horizontal Prop. Regime Homeowners Ass'n, Inc. v. Sky Green Holdings, Inc., 392 S.C. 194, 708 S.E.2d 225 (Ct. App. 2011).

- **Federal Arbitration Act Enforces Class Restrictions on Arbitrations**

Customer entered into an agreement for the sale and servicing of a cell phone with Company. The agreement provided that all disputes Customer brought against Company must be resolved through arbitration but prohibited arbitration as a class or group. Customer brought an action in California District Court against Company alleging false advertising and fraud, based on Company's charge of sales tax based on the cell phone's full retail value, although phone had

been provided for free under the agreement. Customer's action was consolidated into a class action against Company. The District Court denied Company's Motion to Compel Arbitration against individual customers on the grounds that the arbitration provision was unconscionable under California law and against public policy because the agreement prohibited class action arbitrations. The Ninth Circuit Court of Appeals affirmed.

The U.S. Supreme Court reversed, and held that the Federal Arbitration Act ("FAA") pre-empted California law because the state law stood as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress." AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740, 1742 (2011), citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399 (1941). The Court noted that class arbitrations were typically slower, more costly, and more risky for defendants. By refusing to allow parties to contract for bilateral (as opposed to class-based) arbitration, the California law was inconsistent with the federal policy of liberally promoting arbitration. Under the FAA, Company could enforce a contract provision that requires customers to arbitrate their disputes individually. AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740 (2011).

In light of this decision, the United States Supreme Court vacated and remanded the South Carolina Supreme Court decision of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010), which held that an arbitration clause in an automobile purchase contact that did not allow class action arbitrations was unenforceable. Sonic Automotive v. Watts, 131 S.Ct. 2872 (2011).

Contracts

- **Enforceability of Administrative Burden Provision Upon Default**

Electrical subcontract on a school renovation project included a damages provision permitting an administrative fee to be assessed should Subcontractor default, stating: "[General Contractor] shall be entitled to charge all reasonable costs incurred in [a default] (including attorney fees) plus an *allowance for administrative burden equal to fifteen percent (15%)* to the account of Subcontractor."

Subcontractor defaulted on the subcontract by failing to complete its work and by failing to pay its suppliers. Pursuant to the subcontract, Subcontractor automatically assigned all its rights under the subcontract to its Surety upon the default. General Contractor hired a

Replacement Subcontractor, who timely completed the subcontract and was paid in full. Upon completion of the project, Surety demanded payment from General Contractor for all amounts owed under the subcontract, and General Contractor withheld certain funds citing the administrative fee provision in the subcontract. General Contractor contended that the withheld funds were compensation for General Contractor's administrative burden in overseeing the completion of the electrical subcontract. Surety filed an action for breach of contract against General Contractor, contending the administrative fee constituted an unenforceable penalty, rather than an enforceable liquidated damages provision. The trial court granted Surety's motion for summary judgment, and General Contractor appealed.

The Court of Appeals reversed, and found that the administrative burden provision was a reasonable and fair liquidated damages provision and was clear in its terms and application. The Court determined that General Contractor undertook a significant administrative burden in overseeing the completion of the subcontract. Moreover, it found that the provision was reasonably intended by the parties to serve as the predetermined measure of compensation for damages that would be difficult to ascertain during the contracting phase of the project. The provision was fair to the parties in that it operated on a "sliding scale," which accounted for the amount of work remaining at the time of the default. As a matter of contract interpretation and public policy, the Court of Appeals ruled the provision was a valid, enforceable measure of liquidated damages. ERIE Ins. Co. v. Winter Constr. Co., 2011 WL 2446854 (S.C. Ct. App. June 15, 2011).

- **Inadequate License Classification Does Not Bar Recovery Under Contract**

Homeowners contracted with Contractor to build a home for over $800,000; however, Contractor's license classification was limited to projects not exceeding $100,000.00. After disputes arose between Homeowner and Contractor, Contractor filed a mechanics lien and foreclosure action alleging non-payment for performed work, which was referred to arbitration. The arbitrator found that, while S.C. Code Ann. § 40-11-370 precludes unlicensed contractors from enforcing construction contracts, it does not preclude recovery of a licensed contractor with an inadequate license classification. The arbitrator's award to the Contractor of actual damages, interest, and attorney's fees was confirmed by the Circuit Court and Homeowners appealed on the grounds that the arbitrator showed a manifest disregard for S.C. Code Ann. § 40-11-370.

The South Carolina Court of Appeals acknowledged the well-settled law that contractors operating without a valid license, with a license that differs in name from the name given in the contract, and contractors licensed in other states cannot bring an action to enforce a contract. However, the Court found no indication that the arbitrator's award disregarded the law because S.C. Code Ann. § 40-11-370 does not address classification requirements. In addition, no cases directly address this issue. Therefore, the circuit court's confirmation of the arbitration award was affirmed. C-Sculptures, LLC v. Brown, 2011 WL 2535543 (S.C. Ct. App., Apr. 27, 2011).

- **Formation of Contract, Waiver of Breach Claim by Participating in Bidding Process Without Objection**

Owner retained Contractor to develop a cost estimate for the construction of an upcoming Project. Contractor provided a cost estimate and a proposal to perform the work, and Contractor was paid for its estimation work. Owner and Contractor then conducted preliminary negotiations for construction of the Project, but no final written contract was ever executed by either party. As part of the negotiation process, Owner issued a Letter of Intent ("LOI") to Contractor to be used by Contractor for the sole purpose of securing steel prices from a fabricator. The LOI provided that Contractor was authorized by Owner to continue supporting work on the Project "as defined by preliminary specifications," and that "[t]he on-going determination of contract language and costs are still being negotiated and will be finalized [at a later date] . . . ." Negotiations continued after the issuance of the LOI. A few months thereafter, but before several essential elements of the contract had been agreed upon, Owner informed Contractor that it would be required to bid for the job against other contractors. Contractor participated in the bidding process without objection, but was not the successful bidder.

After Owner brought a declaratory judgment action against Contractor, Contractor answered and counterclaimed. In its counterclaims, Contractor alleged for the first time that Owner had breached a contract for construction of the Project, and sought lost profits for the entire job. The Circuit Court granted partial summary judgment to Owner on all of Contractor's counterclaims arising out of an alleged breach of contract on a number of grounds.

As an initial matter, the trial court found that there was no meeting of the minds as to a number of the essential elements of a construction contract. Contractor contended that the "preliminary specifications" referenced in the LOI referred to an unsigned contract for the

construction of the facility. Owner contended that the word "preliminary" did not mean "final," and the word "specifications" was not analogous to "contract terms." In addition, the record indicated that negotiations regarding cost, scope of work, scheduling, and time and manner of payment continued after the issuance of the LOI and were never agreed upon by the parties. Thus, because these were essential elements of a construction contract, no contract was ever formed between the parties.

As a second and alternative basis for partial summary judgment, the trial court found that Contractor abandoned or waived any claim for breach of contract, to the extent such a claim existed, by participating in the bid process without objection. By its participating in the bidding, Contractor lulled Owner into a false assurance that strict compliance with any existing contractual duty would not be required. In other words, an abandonment of any binding contractual terms could be inferred by Contractor's participation in the bidding process. Prysmian Power Cables and Systems USA, LLC v. THS Constructors, Inc., C/A No. 2008-CP-01-0145 (S.C. Ct. Com. Pls., Feb. 5, 2010).

- **Violation of Licensing Statute Must be Plead as Affirmative Defense**

Homeowner contracted with Landscaper to provide landscaping work on Homeowner's property. Landscaper did not have a contractor's license. After payment disputes arose, Landscaper filed a mechanics lien and foreclosure action based on non-payment for completed landscaping work. Homeowner filed a motion to dismiss for lack of subject matter jurisdiction and asserted that Landscaper could not assert a mechanics lien under Skiba v. Gessner, 374 S.C. 208, 648 S.E.d2d 605 (2007) (holding that, where plaintiff merely prepared land for landscaping and did no work relating to a building or structure, plaintiff could not assert a valid mechanic's lien). The Circuit Court distinguished this case from Skiba, and held that Landscaper actually performed labor and supplied materials that became integrated into the property. Therefore, Landscaper could recover under the mechanic's lien statute or in quantum meruit. Homeowner did not raise the issue of Landscaper's license in its motion to dismiss or in its subsequent answer.

On appeal, the South Carolina Supreme Court held that, because Homeowner failed to raise the licensing statute both as an affirmative defense and as a grounds for dismissal, the licensing issue was not preserved for appeal. The Court also affirmed the circuit court's holding

that Landscaper could proceed in quantum meruit. The Court declined to rule on the question of whether the mechanic's lien was valid since disposition of the prior issue of quantum meruit was dispositive. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E.2d 221 (2010).

- **Contractors Must Give Notice to Receive Prejudgment Interest under Prompt Payment Act**

University Owner retained Contractor to build a new science complex on its campus. The contract provided that interest would be paid in accordance with the South Carolina Prompt Payment Act, S.C. Code Ann. § 29-6-50 (2007). The statute provided that any payment delayed by more than 21 days would accrue interest at 1 % per month, but also provided that no interest would accrue unless the party being charged interest was notified of the provisions of the Act at the time the request for payment was made.

After completion of the Project, owner withheld partial payment and claimed Contractor failed to fully perform its contractual obligations. An administrative panel review of the dispute determined that Contractor failed to comply with the notice provisions of the Prompt Payment Act, but that it would be inequitable to hold that Contractor could not collect prejudgment interest. It awarded prejudgment interest to Contractor at the rate of 8.75 % per annum under South Carolina's general interest statute, S.C. Code Ann. § 34-31-20(A).

Upon review of the panel's decision, the circuit court agreed that the Contractor had failed to meet the notice requirements of the Prompt Payment Act, but also held that the general interest statute did not apply, either in equity or otherwise. The South Carolina Supreme Court affirmed, and found that the general interest statute only applies when an interest rate has not been agreed upon in a contract. Here, the parties' contract provided an interest rate by incorporating the Prompt Payment Act by reference. The Court also found that the administrative panel erroneously applied equitable principals in applying the general interest statute. The Court found that Contractor had a legal remedy for collecting interest – it needed only to meet the requirements of Prompt Payment Act to be entitled to interest. A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship and seek an equitable remedy. EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 707 S.E.2d 399 (2011).

Discovery

- **Sanctions for Conduct in Deposition Scheduling**

Plaintiff's Counsel was sanctioned by the Circuit Court after an agreement could not be reached regarding the sequence of depositions of the litigants. In November 2010, Defendant's counsel noticed Plaintiff's deposition for January 21st at 10:00 a.m. Plaintiff's counsel then requested the availability of Defendant for a deposition. Defendant's counsel responded with fourteen potential deposition dates between January 24th and February 25, 2011. One month later, Plaintiff's counsel responded by noticing Defendant's deposition to begin on January 21st at 9:00 a.m., one hour before the scheduled deposition of Plaintiff.

Defendant's counsel unsuccessfully requested that Plaintiff's counsel withdraw the notice, then filed a Motion to Quash. Plaintiff's counsel responded by filing a Motion for Protective Order and Motion for Sanctions. In a further effort to resolve the dispute, counsel for the parties emailed the Chief Judge for Administrative Purposes and requested direction on the depositions. The judge responded by instructing as follows: "first noticed deposition will proceed. Reschedule the second."

Plaintiff's counsel interpreted this e-mail as a direction from the judge to proceed with deposition of the Defendant, since it was noticed to occur earlier in the day. A series of e-mails among counsel followed, which called this interpretation into question and indicated that defense counsel intended to take Plaintiff's deposition as noticed. Plaintiff's counsel sent a final e-mail accusing defense counsel of showing a lack of civility.

The Circuit Court determined that Plaintiff's counsel had engaged in improper discovery practices. Although the Judge stated the order of depositions rarely makes any difference, the tactics employed by the Plaintiff's Counsel were reprehensible and worthy of sanctions. The Court was also troubled with the "caustic" nature of e-mails sent by Plaintiff's counsel. Fredrickson v. Reichert, C/A No. 2009-CP-23-8523 (S.C. Ct. Com. Pl., May 26, 2011).

- **Amendments to Fed. R. Civ. P. 26**

Fed. R. Civ. P. 26 was amended December 1, 2010 to provide work product protection for many communications between attorneys and retained expert witnesses. Specifically, the amended rule changes the criteria for supporting information and documentation that must be provided along with an expert's report. The old rule required retained experts to include the

"data and other information" considered by the witness in making his report, while the new rule requires disclosure of "the facts or data" considered by the witness. Fed. R. Civ. P. 26(a)(2)(B)(ii). This arguably allows expert witnesses to exclude theories about the case and analysis provided by the attorney to the witness.

In addition, Rule 26(b)(4) protects draft export reports and communications between the attorney and expert from discovery. The only exceptions to the protection for communications are (1) communications regarding the witness's compensation; (2) communications that identify facts or data the witness considered; and (3) communications identifying assumptions that lawyer provided that the witness agreed to rely on.

- **Amendments to S.C. R. Civ. P. 26**

S.C. R. Civ. P. 26 was amended in 2011 to provide rules for the discovery of electronically stored information. With the amendment, South Carolina's rules regarding electronic discovery are now substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. Rule 26 now provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost." S.C. R. Civ. P. 26(6)(A). If a motion to compel discovery is filed, the party from whom discovery is sought must show the undue burden or cost. In addition, the Court may limit the frequency or extent of discovery of electronically stored information if: (1) the discovery sought is unreasonably cumulative or duplicative; (2) the party seeking discovery has had ample opportunity to obtain the information sought; or (3) the burden or expense of the discovery outweighs its likely benefit. S.C. R. Civ. P. 26(6)(B).

Evidence

- **Prejudicial vs. Probative Effect of Evidence of Property Damage Insurance**

Homeowners executed a construction contract with Contractor to build a house, where Contractor assumed "full responsibility for acts, negligence or omissions of all his subcontractors and their employees . . . ." The contract also provided that both parties would waive "all claims against each other for fire damage" covered by the property damage insurance that Homeowners were to maintain on the construction site. After several days of work performed by

Subcontractor, a fire destroyed the entire house. Homeowners filed a lawsuit alleging that the fire was a result of Subcontractor's negligence. Contractor and Subcontractor disputed the negligence claim, and asserted that any subrogation claim against them was waived by way of the allocation of risk to Homeowners and their insurance carrier by contract. At trial, Homeowners unsuccessfully moved *in limine* to exclude references to insurance by arguing that the availability of insurance was irrelevant for purposes of determining liability on their causes of action grounded in contract and negligence.

The South Carolina Court of Appeals found that the waiver of subrogation clause and requirement that Homeowners maintain property damage insurance on the premises during construction were relevant to the issue of liability. The court did not receive any explanation from Homeowners as to why evidence of insurance was more prejudicial than probative, given that the contractors' defenses were based on insurance provisions included in the contract. Wright v. Hiester Constr. Co., 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010).

- **Failure to State a Field That Requires an Expert Witness**

Contractor and Owner contracted for the repair of decks at an apartment complex. The contract stated costs for the repairs, but added that "[p]ricing will vary depending on amount of rot found." When Contractor completed work and submitted its invoice, Owner felt the charges were excessive and refused to pay. Owner also contested the quality of Contractor's work. Contractor filed a mechanic's lien and foreclosure action. At trial, Owner sought to admit an owner's representative as an expert witness. When asked the witness's area of expertise, defendant's attorney stated that the witness was offered "as the owner's representative." The trial court refused to admit the witness as an expert on the grounds that expert testimony was not needed for the area of expertise identified by defense counsel.

The South Carolina Court of Appeals held that the trial court did not abuse its discretion in refusing to admit the owner's representative as an expert witness due to defense counsel's failure to identify an area of testimony requiring expertise. Because he was not qualified as an expert, the witness was not permitted to provide expert testimony as to the costs that should have been allowed for the repairs, nor was he permitted to testify as to the quality of work performed. However, as a lay witness, owner's representative was permitted to testify as to his expectation of the amount he would be charged, and was further allowed to testify that a repair contractor

was needed to complete Contractor's work. Hall's Custom Homes v. Vista Realty Partners, No. 2011-UP-004 (S.C. Ct. App., Jan. 20, 2011).

Limitation of Actions

- **Statute of Repose Applies to Indemnity Actions**

In 1997, Patient sought medical care at Hospital after experiencing chest pain. Doctor misdiagnosed Patient as having acid reflux and released Patient. Several days later, Patient went to a different hospital, where he was diagnosed as having had a heart attack. Two years later, Patient sued Doctor and Hospital based upon an apparent agency theory. Hospital sought indemnity from Doctor and Doctor's medical malpractice insurance carrier ("Insurer"). Insurer declined to defend or indemnify Hospital. Thereafter, in 2004, Hospital settled with Patient. Hospital brought this action in 2007 seeking equitable indemnification from Doctor and Insurer, who raised the three year statute of repose as an affirmative defense. The trial court granted summary judgment to defendants, holding that Hospital's claims were time-barred by the statute of repose.

Hospital appealed, and argued that the statute of repose did not apply because its cause of action did arise until it settled with Patient in 2004. The South Carolina Court of Appeals found that the statute of repose began to run at the time of Patient's treatment in 1997, and barred to any action that sought to recover damages from said treatment, including those that may have accrued later by way of settlement. Hospital's indemnity claim was predicated upon Doctor's liability to Patient in tort, which arose no later than 1997, if at all. Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. South Carolina Med. Malpractice Liability Joint Underwriting Ass'n, 2011 WL 1466456 (S.C. Ct. App. April 13, 2011).

- **Statute of Repose and Limitations in Staged Development**

Homeowners' Association ("HOA") brought suit against Developer after finding numerous construction defects involving the common areas of the development. The development had been built in several stages, with the oldest buildings (#1 - #8) having been constructed between 1978 and 1983, and the more recent buildings constructed in 1996 or later.

HOA brought its action in 2005. At that time, the statue of repose was thirteen years. S.C. Code Ann. § 15-3-640 (Supp. 2003). At trial, Developer sought a directed verdict on the

grounds that HOA's action was barred by the statute of repose because the HOA asserted, *inter alia*, that defects had damaged the foundation of building #5, which was completed between 1978 and 1983. The Circuit Court denied Developer's motion and the South Carolina Court of Appeals affirmed. While HOA's claims would have been barred by the statute of repose if they had related to the infrastructure of buildings #1 - #8, the alleged defects related primarily to general irrigation and design problems throughout the development. HOA contended that these defects ultimately led to the foundation problems in building #5. All other common elements claimed to be defective, including those related to the general irrigation of the Project, were constructed after 1996. Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011).

Torts/Negligence

- **Improper Release of Construction Loan Funds Does Not Create Duty of Care in Tort**

Developer obtained construction loan from Lender, which was secured in part by personal guarantees from a number of Guarantors. Near the end of the project, Developer's general contractor abandoned the job and declared bankruptcy. Lender sought recovery of the disbursed loan funds from Developer and Guarantors, who in turn counterclaimed, alleging Lender had exacerbated the debt owed by: (1) making disbursements directly to Contractor in violation of the loan agreement; (2) making disbursements that were not proportionate to the amount of completed work; (3) making a final disbursement of funds after Lender's own inspector had recommended against such action; and (4) making disbursements when Lender knew Contractor was in jeopardy of bankruptcy.

Lender moved for summary judgment on all counterclaims (breach of contract, breach of contract accompanied by fraudulent act, negligence, breach of fiduciary duty, and violation of the S.C. Unfair and Deceptive Trade Practices Act). The United States District Court for the District of South Carolina denied Lender's motions as to breach of contract and breach of contract accompanied by fraudulent act, finding that questions of fact were present which related to Lender's supposed disbursement of funds directly to Contractor, contrary to Lender's inspector's instructions to cease distributions. Lender's remaining motions were granted. In granting summary judgment on the remaining counterclaims, the Court distinguished these facts

from Roundtree Villas Association, Inc. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984), which held that a construction lender owes a duty of care when lender assumes direct control over construction of a project. In Roundtree, the lender undertook construction repairs of a project and attempted to market the project after its completion. Here, lender exercised no control over the property beyond the possible alteration of the disbursement process. The Court found that, even if disbursements were improperly made, an extension of Roundtree would be improper. Lender and Contractor ultimately settled the dispute for approximately half of the loan's total value. Regions Bank v. College Ave. Dev., LLC, 2010 WL 985298 (D.S.C. January 22, 2010).

- **Determination of Number of Tortfeasors to Calculate Pro Rata Share of Contribution Liability**

Developer brought a construction defect action against General Contractor for a hotel project. General Contractor subsequently brought third-party claims against several subcontractors, including Glass Subcontractor. General Contractor and several subcontractors settled with Developer, but Glass Subcontractor did not. After settling with Developer, General Contractor filed a contribution claim against Glass Subcontractor alleging Glass Subcontractor was a joint tortfeasor. The Circuit Court granted summary judgment to General Contractor, and properly used a *pro rata* calculation in determining the amount of judgment. The Circuit Court also awarded prejudgment interest.

Glass Subcontractor appealed, asserting that the Circuit Court erred by failing to include both the project's architect (for design defects) and the Developer itself (for deficient maintenance) from the number of joint tortfeasors in making its *pro rata* calculation. The South Carolina Court of Appeals disagreed, and noted that General Contractor's settlement agreement with Developer discounted Developer's alleged damages against General Contractor due to design defects. The Court further held that Developer could not be considered a joint tortfeasor for its own injuries. Glass Subcontractor prevailed in its appeal of the award of prejudgment interest, because General Contractor had failed to properly plead for the same. McGonigal's Flamingo, Inc. v. RJG Constr. Co., No. 2011-UP-260 (S.C. Ct. App. 2011).

Miscellaneous

- **Fraudulent Construction Seals**

A project engineer was convicted of mail and wire fraud after forging a set of S.C. Department of Health and Environmental Control seals on construction site plans to pass them off as possessing mandatory storm water permits. Construction commenced at Oconee Regional Airport to extend a runway, and resulted in significant run-off of sediment and mud onto private property and into Lake Hartwell. The project engineer was sentenced to 12 months and 1 day in prison and ordered to pay $118,000 to Oconee County. U.S. v. Wynn, C/A No. 8:10-CR-01026-GRA (D.S.C. Oct. 19, 2010).

- **Vexatious Removal to Federal Court Grounds for Sanctions**

Three hours before trial was to begin, Defendant filed a motion to remove a case to Federal District Court by asserting a federal question jurisdiction. The action had previously been removed on the same grounds and remanded back to state court. Because the court considered the filing to be frivolous since it was filed at such a late time, the court ordered sanctions against the Defendant to pay for the Plaintiff's reasonable attorney's fees and trial costs, reimbursement to the court for its staff salaries and benefits, reimbursement to the clerk of court for summoning jurors, and payment to each juror with a letter of apology. However, the South Carolina Supreme Court refused to allow all of the trial judge's sanctions except those to reimburse the plaintiff, stating that the trial judge had abused his discretion in not following the conventional sanctions allowed under Rule 11, SCRCP. Wieters v. Bon Secours-St. Francis Xavier Hospital, Inc. (Ex parte Bon Secours-St. Francis Xavier Hospital, Inc.), Op. No. 27016 (S.C., August 1, 2011).

Pending Cases

- **Individual Owner's Right to Sue Developer for Damages to Common Areas**

Plaintiffs, a group of individual condominium unit owners, brought an action against development's homeowner's association ("HOA") and Developer, asserting various causes of action arising out of damages to the development's common areas. Developer brought an action for summary judgment based on Plaintiffs' lack of standing, and asserted that claims against Developer must be brought by HOA. The trial court denied Developer's motion on the grounds

that a complete record was needed, but noted that Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (2002) appeared to support Developer's position. Concerned Dunes West was not directly on point because defendants therein did not raise the issue of the incorporated plaintiffs' standing, but the decision seemed to confine the developer's duty to provide common areas that are in good repair such as to be owed solely to the homeowner's association. Pulliam v. M.U.I. Carolina Corporation, C/A No. 2008-CP-46-2148 (S.C. Ct. Com. Pl. April 1, 2011).

- **Constitutionality of Act 26**

Insurer has filed a declaratory judgment action in the original jurisdiction of the South Carolina Supreme Court challenging the constitutionality and retroactivity of Act 26, which essentially requires courts to disregard the Court's ruling in Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 2011 WL 93716 (S.C. Jan. 7, 2011), withdrawn by Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 2011 WL 3667598 (S.C. Aug. 22, 2011). Harleysville Mut. Ins. Co. v. State of South Carolina, (S.C., filed May 23, 2011).

Legislation

- **CGL Coverage**

Gov. Nikki Haley signed into law S. 431, legislation to address the S.C. Supreme Court ruling on Crossmann Communities vs. Harleysville Mutual.

- **Underground Damage Legislation**

On June 7, Gov. Haley signed the Underground Damage Prevention legislation into law, less than three months after it was filed in the Senate. (S. 705)

The legislation calls for:

Mandatory one-call center membership: South Carolina will now require all utilities to be members of the 811 "Call Before You Dig" service, on a three-phase in process, meaning one call is all professional excavators, homeowners and others need to make to notify utilities of proposed excavation.

Positive response: Utilities are required to respond and coordinate responses with those who give notice before digging. This closes the communication circle between the time a notice of intent to dig is submitted and affected utilities respond.

Tolerance zones: The actual tolerance zone for locating and safe digging in the vicinity of underground utilities is now 24 inches. This was reduced from 30 inches. South Carolina was one of only three states in the nation who had such a wide tolerance.

Modernization: Many new technologies and standards have been adopted since the law was originally enacted in 1978. Many smaller changes were made to integrate new standards, technologies and practices into state law.

811/One-Call Center governance: The membership for board seats for the state's One Call Center was increased, with specified seats being selected for various stakeholder groups. The construction industry will now have a stronger voice in the SC 811 call before you dig process.

Enforcement: All stakeholders will be held accountable for their fulfilling their responsibilities in the one call safety and damage prevention process. Violations will now be divided between the Attorney General's office and the state's General Fund.

Federal Intervention: The federal government has given states until 2013 to bring their underground utility safety and damage prevention laws up-to-date before they may intervene. This law brings South Carolina more in-line with federal government standards.

- **Tort Reform Legislation**

H. 3375, the legislation clarifies the 2008 law that changed the statute of repose from 13 to 8 years. A building code violation cannot revert the statute of repose to 13 years from 8 years adopted three years ago.

The legislation includes a cap on punitive damages modeled after Florida's cap, establishes an appeal bond cap, requires the attorney general to approve civil actions by circuit solicitors and requires disclosure of insurance policy limits for personal auto policies in accident cases.

The legislation takes effect January 1, 2012 and applies to all actions that accrue on or after that date.

- **Unemployment Tax Relief**

Gov. Haley signed into law enabling legislation to give employers some relief on the new and much higher unemployment taxes levied on employers since Jan. 30. The legislation, H. 3762, directs that the appropriations go toward state unemployment tax relief for businesses in tiers 2 through 20, which results in reductions up to 25% for 2011, makes state unemployment tax reductions retroactive to January 2011, states that seasonal employees may be ineligible for unemployment benefits which would result in a 3% reduction in state unemployment tax costs to businesses, companies that have a positive state unemployment tax balance will be in no class higher than class 12 for 2011 only, and reduction of benefits will be applied for the newly unemployed to 20 weeks from 26 weeks, resulting in an 8% reduction in overall state unemployment tax costs to businesses.

- **Immigration Legislation**

S. 20, grants more power to police officers to check whether people are illegal immigrants. The legislation also made specific changes to how businesses must comply.

The only option states currently have to verify someone's status is through e-verify; businesses will no longer be allowed to use a driver's license for verification. This change came about because of a recent federal lawsuit filed mandating all states use e-verify.

The legislature also approved the length of time an employer violating the provisions of law would be posted on the agency website, changing it from one year to six months, adopted an amendment that specifies a license revocation is not a tax revocation, provided for felony violations, the transportation of prisoners, and the promulgation of regulations.

South Carolina General Assembly

119th Session, 2011-2012

A26, R49, S431

STATUS INFORMATION

General Bill
Sponsors: Senators McConnell, Rankin, Setzler, Campbell, Shoopman, Reese, Bright, Alexander, S. Martin, Fair, Cromer, Bryant, Elliott, O'Dell, Campsen, Ford, Rose, Lourie, Cleary, Verdin, McGill, Williams, Nicholson, Knotts, Land and Scott
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Companion/Similar bill(s): 3449

Introduced in the Senate on January 26, 2011
Introduced in the House on March 31, 2011
Last Amended on May 5, 2011
Passed by the General Assembly on May 12, 2011
Governor's Action: May 17, 2011, Signed

Summary: Insurance policies

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/26/2011	Senate	Introduced and read first time (Senate Journal-page 6)
1/26/2011	Senate	Referred to Committee on **Banking and Insurance** (Senate Journal-page 6)
2/15/2011	Senate	Committee report: Favorable with amendment **Banking and Insurance** (Senate Journal-page 14)
2/16/2011		Scrivener's error corrected
3/3/2011	Senate	Special order, set for March 3, 2011 (Senate Journal-page 32)
3/3/2011	Senate	Roll call Ayes-33 Nays-12 (Senate Journal-page 32)
3/17/2011	Senate	Debate interrupted (Senate Journal-page 15)
3/22/2011	Senate	Debate interrupted (Senate Journal-page 17)
3/29/2011	Senate	Debate interrupted (Senate Journal-page 18)
3/30/2011	Senate	Committee Amendment Adopted (Senate Journal-page 48)
3/30/2011	Senate	Amended (Senate Journal-page 48)
3/30/2011	Senate	Read second time (Senate Journal-page 48)
3/30/2011	Senate	Roll call Ayes-41 Nays-2 (Senate Journal-page 48)
3/31/2011	Senate	Read third time and sent to House (Senate Journal-page 29)
3/31/2011	Senate	Roll call Ayes-39 Nays-2 (Senate Journal-page 29)
3/31/2011	House	Introduced and read first time (House Journal-page 75)
3/31/2011	House	Referred to Committee on **Labor, Commerce and Industry** (House Journal-page 75)
5/4/2011	House	Committee report: Favorable with amendment **Labor, Commerce and Industry** (House Journal-page 2)
5/5/2011	House	Amended (House Journal-page 15)
5/5/2011	House	Read second time (House Journal-page 15)
5/5/2011	House	Roll call Yeas-104 Nays-0 (House Journal-page 15)

5/5/2011House Unanimous consent for third reading on next legislative day (House Journal-page 18)
5/6/2011House Read third time and returned to Senate with amendments (House Journal-page 107)
5/12/2011Senate Concurred in House amendment and enrolled (Senate Journal-page 12)
5/12/2011Senate Roll call Ayes-36 Nays-0 (Senate Journal-page 12)
5/17/2011 Ratified R 49
5/17/2011 Signed By Governor
5/24/2011 Effective date See Act for Effective Date
5/24/2011 Act No. 26

VERSIONS OF THIS BILL

1/26/2011
2/15/2011
2/16/2011
3/30/2011
5/4/2011
5/5/2011

(A26, R49, S431)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 38-61-70 SO AS TO DEFINE A "COMMERCIAL GENERAL LIABILITY INSURANCE POLICY", "CONSTRUCTION PROFESSIONAL", AND "CONSTRUCTION RELATED WORK", TO PROVIDE THAT A COMMERCIAL GENERAL LIABILITY INSURANCE POLICY MUST DEFINE OR BE DEEMED TO DEFINE THE WORD "OCCURRENCE" IN A SPECIFIC MANNER, AND TO PROVIDE FOR THE SCOPE AND LIMITS OF APPLICABILITY OF THIS SECTION.

Be it enacted by the General Assembly of the State of South Carolina:

Commercial general liability insurance policies, definitions, requirements, application limited to coverage for construction professionals for liability arising from construction related work

SECTION 1. Chapter 61, Title 38 of the 1976 Code is amended by adding:

"Section 38-61-70. (A) For purposes of this section:

(1) 'Commercial general liability insurance policy' means a contract of insurance that covers occurrences of damages or injury during the policy period and insures a construction professional for liability arising from construction related work.

(2) 'Construction professional' means a person, sole proprietorship, partnership, corporation, limited liability company, or other recognized legal entity that engages in the development, construction, installation, or repair of an improvement to real property.

(3) 'Construction related work' means activities by a construction professional involving the development, construction, installation, or repair of an improvement to real property.

(B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of 'occurrence' that includes:

(1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and

(2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.

(C) This section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer, including a surplus lines insurer, may include in a commercial general liability insurance policy.

(D) This section applies only to a commercial general liability insurance policy that insures a construction professional for liability arising from construction related work.

(E) This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future."

Severability clause

SECTION 2. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 3. This act takes effect upon approval by the Governor and applies to any pending or future dispute over coverage that would otherwise be affected by this section as to commercial general liability insurance policies issued in the past, currently in existence, or issued in the future.

Ratified the 17th day of May, 2011.

Approved the 17th day of May, 2011.

South Carolina General Assembly
119th Session, 2011-2012

A48, R66, S705

STATUS INFORMATION

General Bill
Sponsors: Senators Rankin, Campbell, Rose, Verdin, Hutto, Ford and Grooms
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Introduced in the Senate on March 17, 2011
Introduced in the House on April 26, 2011
Last Amended on May 24, 2011
Passed by the General Assembly on May 26, 2011
Governor's Action: June 7, 2011, Signed

Summary: Underground Facility Damage Prevention Act

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
3/17/2011	Senate	Introduced and read first time (Senate Journal-page 3)
3/17/2011	Senate	Referred to Committee on **Judiciary** (Senate Journal-page 3)
3/21/2011	Senate	Referred to Subcommittee: Rankin (ch), Hutto, Campbell
4/13/2011	Senate	Committee report: Favorable with amendment **Judiciary** (Senate Journal-page 11)
4/14/2011	Senate	Committee Amendment Adopted (Senate Journal-page 31)
4/14/2011	Senate	Read second time (Senate Journal-page 31)
4/14/2011	Senate	Roll call Ayes-39 Nays-1 (Senate Journal-page 31)
4/18/2011		Scrivener's error corrected
4/19/2011	Senate	Read third time and sent to House (Senate Journal-page 12)
4/26/2011	House	Introduced and read first time (House Journal-page 23)
4/26/2011	House	Referred to Committee on **Labor, Commerce and Industry** (House Journal-page 23)
5/5/2011	House	Recalled from Committee on **Labor, Commerce and Industry** (House Journal-page 21)
5/6/2011		Scrivener's error corrected
5/12/2011	House	Debate adjourned until Tuesday, May 17, 2011 (House Journal-page 16)
5/17/2011	House	Debate adjourned until Thursday, May 19, 2011 (House Journal-page 16)
5/19/2011	House	Debate adjourned until Tuesday, May 24, 2011 (House Journal-page 12)
5/24/2011	House	Amended (House Journal-page 11)
5/24/2011	House	Read second time (House Journal-page 11)
5/24/2011	House	Roll call Yeas-108 Nays-0 (House Journal-page 11)
5/25/2011	House	Read third time and returned to Senate with amendments (House Journal-page 14)
5/26/2011	Senate	Concurred in House amendment and enrolled (Senate Journal-page 29)
6/1/2011		Ratified R 66
6/7/2011		Signed By Governor
6/20/2011		Effective date 06/07/12
6/20/2011		Act No. 48

VERSIONS OF THIS BILL

3/17/2011
4/13/2011
4/14/2011
4/18/2011
5/5/2011
5/6/2011
5/24/2011

(A48, R66, S705)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 36 TO TITLE 58 SO AS ENACT THE "UNDERGROUND FACILITY DAMAGE PREVENTION ACT", TO PROVIDE DEFINTIONS, TO PROVIDE LIMITS ON COSTS RELATED TO THIS CHAPTER, TO REQUIRE THE CREATION OF A NOTIFICATION CENTER ASSOCIATION PROVIDING FOR RECEIVING NOTICE OF EXCAVATION OR DEMOLITION IN A DEFINED AREA, TO CREATE AND SPECIFY THE MEMBERSHIP OF A BOARD TO GOVERN THE NOTIFICATION CENTER, TO PROVIDE MISCELLANEOUS REQUIREMENTS AND DUTIES RELATED TO THE NOTIFICATION CENTER, TO REQUIRE CERTAIN NOTICE RELATED TO EXCAVATIONS, DEMOLITIONS, AND DAMAGE RESULTING DURING AN EXCAVATION OR DEMOLITION, TO PROVIDE EXCEPTIONS TO THE NOTICE REQUIREMENTS AND OTHER PROVISIONS OF THIS CHAPTER, AND TO PROVIDE PENALTIES FOR A VIOLATION OF THIS CHAPTER; AND TO REPEAL SECTIONS 58-35-10, 58-35-20, 58-35-30, 58-35-40, 58-35-50, 58-35-60, 58-35-70, 58-35-80, 58-35-90, 58-35-100, 58-35-110, AND 58-35-120 ALL RELATING TO THE UNDERGROUND FACILITY DAMAGE PREVENTION ACT.

Be it enacted by the General Assembly of the State of South Carolina:

Underground Facility Damage Prevention Act

SECTION 1. Title 58 of the 1976 Code is amended by adding:

"CHAPTER 36

South Carolina Underground Facility Damage Prevention Act

Section 58-36-10. This chapter may be cited as the Underground Facility Damage Prevention Act.

Section 58-36-20. For purposes of this chapter, the following words and terms are defined as follows:

(1) 'APWA' means the American Public Works Association or successor organization or entity.

(2) 'Association' means a group of operators, or their representatives, formed for the purpose of operating a notification center.

(3) 'Business continuation plan' means a plan that includes actions to be taken in an effort to provide uninterrupted service during catastrophic events.

(4) ‘Damage’ means the substantial weakening of structural or lateral support of a facility, penetration or destruction of protective coating, housing, or other protective device of a facility and the partial or complete severance of a facility.

(5) ‘Demolish’ or ‘demolition’ means any operation by which a structure or mass of material is wrecked, razed, rendered, moved, or removed by means of any tools, equipment, or discharge of explosives.

(6) ‘Designer’ means any architect, engineer, or other person who prepares or issues a drawing or blueprint for a construction or other project that requires excavation or demolition work.

(7) ‘Design request’ means a communication to the notification center in which a request for identifying existing facilities for advance planning purposes is made. A design request may not be used for excavation purposes.

(8) ‘Emergency’ means a sudden or unforeseen event involving a clear and imminent danger to life, health, or property; the interruption of essential utility services; or the blockage of transportation facilities, including highway, rail, water, and air, which require immediate action.

(9) ‘Excavate’ or ‘excavation’ means an operation for the purpose of the movement or removal of earth, rock, or other materials in or on the ground by use of mechanized equipment or by discharge of explosives and including augering, backfilling, digging, ditching, drilling, well drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching, and tunneling.

(10) ‘Excavator’ means any person engaged in excavation or demolition.

(11) ‘Extraordinary circumstances’ means circumstances which make it impractical or impossible for the operator to comply with the provisions of this chapter. Extraordinary circumstances may include hurricanes, tornadoes, floods, ice, snow, and acts of God.

(12) ‘Facility’ means any underground line, underground system, or underground infrastructure used for producing, storing, conveying, transmitting, or distributing communication, electricity, gas, petroleum, petroleum products, hazardous liquids, water, steam, or sewerage. Provided there is no encroachment on any operator’s right-of-way, easement, or permitted use and for purposes of this act, the following are not considered as an underground ‘facility’: petroleum storage systems subject to regulation pursuant to Chapter 2, Title 44; septic tanks as regulated by Chapter 55, Title 44; swimming pools and irrigation systems. For purposes of this act, and provided there is no encroachment on any operator’s right-of-way, easement, or permitted use, liquefied petroleum gas ‘systems’ as defined in Section 40-82-20(8) do not constitute an underground ‘facility’ unless such a system is subject to Title 49 C.F.R. Part 192.

(13) ‘Locator’ means a person that identifies and marks facilities for operators.

(14) ‘Mechanized equipment’ means equipment operated by means of mechanical power, including, but not limited to, trenchers, bulldozers, power shovels, augers, backhoes, scrapers, drills, cable and pipe plows, and other equipment used for plowing-in or pulling-in cable or pipe.

(15) ‘Nonmechanized equipment’ means hand tools.

(16) ‘Notification center’ means an entity that administers a system through which a person can notify operators of proposed excavations or demolitions.

(17) ‘Operator’ means any person, public utility, communications and cable service provider, municipality, electrical utility, electric and telephone cooperatives, and the South Carolina Public Service Authority as defined in Titles 5, 6, 33, and 58, Code of Laws of South Carolina, 1976, who owns or operates a facility for commercial purposes in the State of South Carolina.

(18) ‘Person’ means any individual, owner, corporation, partnership, association, or any other entity organized under the laws of any state; any subdivision or instrumentality of a state; and any authorized representative thereof.

(19) ‘Positive response’ means an automated information system that allows excavators, locators, operators, and other interested parties to determine the status of a locate request until excavation or demolition is complete.

(20) ‘Subaqueous’ means a facility that is under a body of water, including rivers, streams, lakes, waterways, swamps, and bogs. (21) ‘Tolerance zone’ means:

(a) if the diameter of the facility is known, the distance of one-half of the known diameter plus twenty-four inches on either side of the designated center line;

(b) if the diameter of the facility is not marked, twenty-four inches on either side of the outside edge of the mark indicating a facility; or

(c) for subaqueous facilities, a clearance of fifteen feet on either side of the indicated facility.

(22) 'Working day' means every day, except Saturday, Sunday, and legal holidays as defined by South Carolina law.

Section 58-36-30. (A) The provisions in this chapter supersede and preempt any ordinance enacted by a local political subdivision that purports to:

(1) require operators to obtain permits from local governments in order to identify facilities;

(2) require pre-marking or marking of facilities;

(3) specify the types of paint or other marking devices that are used to identify facilities; or

(4) require removal of marks.

(B) A permit issued pursuant to law authorizing an excavation or demolition shall not be deemed to relieve a person from the responsibility for complying with the provisions of this chapter.

Section 58-36-40. (A) Any costs or expenses associated with compliance by an excavator with the requirements in this chapter applicable to excavators shall not be charged to any operator. Any costs or expenses associated with compliance by an operator with the requirements in this chapter applicable to operators shall not be charged to any excavator. Neither the association nor the notification center may impose any charge on any person giving notice to the notification center.

(B) This section shall not excuse an operator or excavator from liability for any damage or injury for which it would be responsible under applicable law.

Section 58-36-50**.** (A) Operators must maintain an association that will operate a notification center providing for the receipt of notice of excavation or demolition in a defined geographical area. The notification center must be governed by a board of directors composed of operators and damage prevention stakeholders that are members of the association. The by-laws of the association must provide for a board of directors with the following membership:

(1) one representative from each of the six facility members that receive the highest annual notification transmission volumes from the notification center;

(2) one representative of a public water or sewer company;

(3) one representative of an electric cooperative;

(4) one representative of an investor-owned natural gas utility;

(5) one representative of a company that transports hazardous liquids as defined in 49 U.S.C. 60101(a)(4);

(6) one representative of a telephone cooperative;

(7) one representative of a rural water district;

(8) one representative of the South Carolina Association of Municipal Power Systems;

(9) one representative of the South Carolina Association of Counties;

(10) one representative of a company licensed in South Carolina for facility contract locating;

(11) one representative of the South Carolina Department of Transportation;

(12) one representative of a company licensed in South Carolina for construction of roads and highways;

(13) one representative of a company licensed in South Carolina for construction of facilities;

(14) one representative of a company licensed in South Carolina for landscaping or irrigation;

(15) one representative of a company licensed in South Carolina as a general contractor or as a subcontractor in the construction industry;

(16) three representatives employed by different facility operators in South Carolina; and

(17) one representative of a special purpose district providing natural gas.

In choosing members of the association to fill these board positions, the association will solicit nominations from the membership of the association and industry organizations representing entities designated by this subsection. The South Carolina 811 Board of Directors existing on the effective date of this act must elect the board as required by the provisions of this subsection within nine months following the effective date of this act.

(B) All operators are required to join the association and utilize the services of the notification center.

(1) Operators that are members of the existing association on the effective date of this act must remain members.

(2) Operators with more than fifty thousand customers or one thousand miles of facilities who are not members must join the association within one year from the effective date of this act.

(3) Operators with more than twenty-five thousand customers or five hundred miles of facilities, who are not members, must join the association within two years from the effective date of this act.

(4) All operators that do not meet the thresholds described in items (1), (2), or (3) must join the association within three years from the effective date of this act.

(C) There shall be only one notification center for the State of South Carolina.

(D) The association shall provide for a reasonable way of apportioning the cost of operating the notification center among its members.

(E) The notification center shall receive notices from persons with intention of performing excavation or demolition and transmit to the operators the following information:

(1) the name, address, and telephone number of the person providing the notice, and, if different, the excavator completing the proposed excavation or demolition;

(2) the start date of the proposed excavation or demolition;

(3) the anticipated duration of the proposed excavation or demolition;

(4) the type of proposed excavation or demolition to be conducted;

(5) the location of the proposed excavation or demolition; and

(6) whether or not explosives are to be used in the proposed excavation or demolition.

(F) The notification center must maintain a record of the notices received pursuant to subsection (E), and information regarding operators failing to provide a response pursuant to subsection (E), and excavators failing to provide notice pursuant to Section 58-36-60(C). This record must be maintained for at least three years.

(G) The notification center shall receive and transmit notices.

(H) The notification center must have a business continuation plan.

(I) The notification center shall provide a positive response system that must be fully operational within three years from the effective date of this act.

(J) The notification center shall file with the South Carolina Public Service Commission the telephone number and address of the notification center and a list of the names and addresses of each operator that received service from the notification center. This filing must be made no later than April fifteenth of each year.

(K) The notification center shall provide to the Chairman of the House of Representatives Labor, Commerce and Industry Committee and the Chairman of the Senate Judiciary Committee a report regarding the activities and operations of the notification center for the preceding calendar year. This report must include, but is not limited to, the following information:

(1) average speed of answer;

(2) abandoned call rate;

(3) transmit times;

(4) total number of locate requests;

(5) total number of transmissions to operators of locate requests; and

(6) business continuation plan.

This report must be made no later than April fifteenth of each year.

(L) The notification center must establish and operate a damage prevention training program.

Section 58-36-60. (A) Before commencing any excavation or demolition, the person responsible for the excavation or demolition shall provide, or cause to be provided, notice to the notification center of his intent to excavate or demolish. Notice for any excavation or demolition that does not involve a subaqueous facility must be given within three to twelve full working days before the proposed commencement date of the excavation or demolition. Notice for any excavation or demolition in the vicinity of a subaqueous facility must be made within ten to twenty full working days before the proposed commencement date of the excavation or demolition.

(B) Notice given pursuant to subsection (A) shall expire within fifteen working days after the date of notice. No excavation or demolition may continue after this fifteen-day period unless the person responsible for the excavation or demolition provides a subsequent notice pursuant to subsection (A).

(C) The notice to the notification center must contain:

(1) the name, address, and telephone number of the person providing the notice;

(2) the anticipated start date of the proposed excavation or demolition;

(3) the anticipated duration of the proposed excavation or demolition;

(4) the type of proposed excavation or demolition to be conducted;

(5) the location of the proposed excavation or demolition, not to exceed one-quarter mile in geographical length, or five adjoining addresses; and

(6) whether or not explosives are to be used in the proposed excavation or demolition.

(D) When demolition of a building is proposed, operators shall be given reasonable time to remove or protect their facilities before demolition is commenced.

(E) An excavator must comply with the following:

(1) When the excavation site cannot be clearly and adequately identified within the area described in the notice, the excavator must designate the route, specific area to be excavated, or both, by premarking before the operator performs a locate. Premarking must be made with white paint, flags, or stakes.

(2) Check the notification center's positive response system prior to excavating or demolishing to ensure that all operators have responded and that all facilities that may be affected by the proposed excavation or demolition have been marked.

(3) Plan the excavation or demolition to avoid damage to or minimize interference with facilities in and near the construction area.

(4) Excavation or demolition may begin prior to the specified waiting period if the excavator has confirmed that all operators responded with an appropriate positive response.

(5) If an operator declares extraordinary circumstances, the excavator must not excavate or demolish until after the time and date that the operator provided in its response.

(6) An operator's failure to respond to the positive response system does not prohibit the excavator from proceeding, provided there are no visible indications of a facility, such as a pole, marker, pedestal, or valve at the proposed excavation or demolition site. However, if the excavator is aware of or observes indications of an unmarked facility, the excavator must not begin excavation or demolition until an additional call is made to the notification center detailing the facility, and an arrangement is made for the facility to be marked by the operator within three hours from the time the additional call is received by the notification center.

(7) Beginning on the date provided in the excavator's notice to the notification center, the excavator shall preserve the staking, marking, or other designation until no longer required. When a mark is no longer visible, but the work continues in the vicinity of the facility, the excavator must request a re-mark from the notification center to ensure the protection of the facility.

(8) The excavator shall notify the notification center's positive response system when the excavation or demolition is complete.

(9) An excavator may not perform any excavation or demolition within the tolerance zone unless the following conditions are met:

(a) no use of mechanized equipment, except non-invasive equipment specifically designed or intended to protect the integrity of the facility, within the marked tolerance zone of an existing facility until:

(i) the excavator has visually identified the precise location of the facility, or has visually confirmed that no facility is present up to the depth of excavation; and

(ii) reasonable precautions are taken to avoid any substantial weakening of the facility's structural or lateral support, or both, or penetration or destruction of the facilities or their protective coatings.

Mechanical means may be used, as necessary, for initial penetration and removal of pavement or other materials requiring use of mechanical means of excavation and then only to the depth of the pavement or other materials. For parallel type excavations within the tolerance zone, the existing facility shall be visually identified at intervals not to exceed fifty feet along the line of excavation to avoid damages. The excavator shall exercise due care at all times to protect the facilities when exposing these facilities;

(b) maintain clearance between a facility and the cutting edge or point of any mechanized equipment, taking into account the known limit of control of such cutting edge or point, as may be reasonably necessary to avoid damage to such facility; and

(c) provide support for facilities in and near the excavation or demolition area, including backfill operations, as may be reasonably required by the operator for the protection of such facilities.

Section 58-36-70. (A) An operator or designated representative must provide to an excavator the following information:

(1) The horizontal location and description of all of its facilities in the area of the proposed excavation or demolition. The location shall be marked by stakes, paint, flags, or any combination thereof as appropriate depending on the site conditions of the proposed excavation or demolition using the APWA Uniform Color Code. If the diameter or width of the facility is greater than three inches, the dimension of the facility will be indicated at least every twenty-five feet in the area of the proposed excavation or demolition. Operators who operate multiple facilities in the same trench shall locate each facility individually.

(2) Any other information that would assist the excavator to identify, and thereby avoid damage to, the marked facilities.

(B) The information in subsection (A) must be provided to the excavator within:

(1) three full working days, not including the day the notice was made, for a facility after notice of the proposed excavation or demolition to the notification center;

(2) ten full working days, not including the day the notice was made, for a subaqueous facility after notice of the proposed excavation or demolition to the notification center; or

(3) as otherwise provided by written agreement by the excavator and the operator or designated representative of the operator.

These time lines do not apply in the event the operator declares an extraordinary circumstance.

(C) An operator may reject an excavation or demolition locate request due to homeland security considerations based upon federal statutes or federal regulations until the operator can confirm the legitimacy of the request. The operator must notify the person making the request of the denial and request additional information, through the positive response system, within the time frame established in subsection (B).

(D) An operator must provide a positive response to the notification center prior to the expiration of the required notice period. This response shall indicate the status of the required activities of the operator or designated representative in regard to the proposed excavation or demolition.

(E) If the operator determines that provisions for marking subaqueous facilities are required, the operator or their designated representative will provide a positive response to the notification center not more than three full working days after notice of the proposed excavation or demolition from the notification center.

(F) If extraordinary circumstances prevent the operator from marking the location in the required time period, the operator must notify the excavator either by contacting the notification center or by directly contacting the excavator. The operator must state the date and time when the location will be marked.

(G) All facilities installed by or on behalf of an operator as of the effective date of this act, must be electronically locatable using a generally accepted locating method by operators.

(H) A facility locator must notify the operator if the locator becomes aware of an error or omission in facility placement documentation. The operator must update its records to correct the error or omission.

(I) An operator must prepare, or cause to be prepared, installation records of all facilities installed on or after the effective date of this act in a public street, alley, or right-of-way dedicated to public use, excluding service drops and services lines. The operator must maintain these records in its possession while the facility is in service.

(J) An operator that fails to become a member of the association as required by Section 58-36-50(B) may not recover for damages to a facility caused by an excavator that has complied with this chapter and has exercised reasonable care in the performance of the excavation or demolition.

Section 58-36-80. (A) An excavator performing an emergency excavation or demolition is exempt from the notice requirements in Section 58-36-60. However, the excavator must give, as soon as practicable, oral notice of the emergency to the notification center and the facility operator. The excavator must provide a description of the circumstances to the notification center and request emergency assistance from each affected operator in locating and providing immediate protection to the facilities.

(B) The declaration of an emergency excavation or demolition does not relieve any party of liability for causing damage to an operator's facilities, even if those facilities are unmarked.

Section 58-36-90. (A) The excavator performing an excavation or demolition that results in any damage to a facility must, immediately upon discovery of such damage, notify the notification center and the facility operator, if known, of the location and nature of the damage. The excavator must allow the operator reasonable time to accomplish necessary repairs before completing the excavation or demolition in the immediate area of such facility. The excavator shall delay any backfilling in the immediate area of the damaged facility until authorized by the operator. The repair of any damage shall be performed by the operator or by qualified personnel authorized by the operator.

(B) An excavator responsible for any excavation or demolition that results in damage to a facility where damage results in the escape of any flammable, toxic, or corrosive gas or liquid, or electricity, or endangers life, health, or property, immediately shall notify emergency services, including 911, the notification center and the operator, if known. The excavator must take reasonable measures to protect themselves, those in immediate danger, the general public, property, and the environment until the operator or emergency responders have arrived and completed their assessment.

Section 58-36-100. (A) A designer may submit a design request to the notification center. The design request shall describe the tract or parcel of land for which the design request has been submitted with sufficient particularity, as defined by policies developed and promulgated by the notification center, so that the operator can ascertain the precise tract or parcel of land involved.

(B) Within fifteen working days after a design request has been submitted to the notification center for a proposed project, the operator shall respond by one of the following methods:

(1) designate the location of all facilities within the area of the proposed excavation pursuant to Section 58-36-70(A);

(2) provide to the person submitting the design request the best available description of all facilities in the area of proposed excavation, which may include drawings of facilities already built in the area, or other facility records that are maintained by the operator; or

(3) allow the person submitting the design request or any other authorized person to inspect the drawings or other records for all facilities within the proposed area of excavation at an acceptable location.

(C) An operator may reject a design request based on homeland security pending additional information confirming the legitimacy of the request. The operator must notify the person making the

request of the denial and request additional information, through the positive response system, within the time frame set forth in Section 58-36-70(B).

Section 58-36-110. A person is exempt from the requirements of Section 58-36-60(A) when an excavation is performed under the following conditions:

(1) by the owner of a single-family residential property on his own land when the excavation:

(a) does not encroach on any operator's known right-of-way, easement, or permitted use;

(b) is performed with nonmechanized equipment; and

(c) is less than ten inches in depth;

(2) tilling or plowing of soil when less than twelve inches in depth for agricultural purposes;

(3) for excavation with nonmechanized equipment by an operator or an agent of an operator for the following purposes:

(a) locating for a valid notification request, or for the minor repair, connecting or routine maintenance of an existing facility; or

(b) underground probing to determine the extent of gas or water migration.

(4) when the Department of Transportation, a local government, special purpose district, or public service district is carrying out maintenance activities within its designated right-of-way, which may include resurfacing, milling, emergency replacement of signs critical for maintaining safety, or the reshaping of shoulder and ditches to the original road profile.

Section 58-36-120. Any person who violates any provision of this chapter shall be subject to a civil penalty not to exceed one thousand dollars for each violation. Actions to recover the penalty provided for in this section shall be brought by the Attorney General at the request of the injured party in the proper forum in and for the county in which the cause, or some part thereof, arose or in which the defendant has its principal place of business or resides. All penalties recovered in any such actions shall be equally divided between the state's general fund and the Office of the Attorney General.

This chapter does not affect any civil remedies for personal injury or property damage except as otherwise specifically provided for in this chapter. The penalty provisions of this chapter are cumulative to, and not in conflict with, provisions of law with respect to civil remedies for personal injury or property damage."

Repeal

SECTION 2. Chapter 35, Title 58 of the 1976 Code is repealed.

Severability clause

SECTION 3. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act. The General Assembly hereby declares that it would have passed this act irrespective of the fact that any of one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid or otherwise ineffective.

Time effective

SECTION 4. The provisions of this chapter become effective one year after approval by the Governor.

Ratified the 1st day of June, 2011.

Approved the 7th day of June, 2011.

South Carolina General Assembly
119th Session, 2011-2012

A52, R86, H3375

STATUS INFORMATION

General Bill
Sponsors: Reps. Harrell, Lucas, Cooper, Hardwick, Harrison, Owens, Sandifer, White, Bingham, Atwater, Parker, Crawford, Loftis, Bowen, G.R. Smith, Bedingfield, Toole, Sottile, V.S. Moss, Forrester, Bikas, Huggins, Brady, Allison, Pinson, Frye, Whitmire, Skelton, Nanney, Henderson, Limehouse, Corbin, Barfield, Battle, Clemmons, Cole, Crosby, Daning, Gambrell, Hamilton, Hiott, Hixon, Horne, Lowe, D.C. Moss, Murphy, Norman, Patrick, Simrill, G.M. Smith, J.R. Smith, Spires, Taylor, Willis, Young, Herbkersman, Ballentine, Thayer, Bannister, McCoy, Tallon, Stringer, Long, Hayes, Ott, J.M. Neal, Vick, G.A. Brown, Branham, Anthony, Bowers, Sellers, Quinn, Hearn, Edge, Anderson, Erickson, Knight, Chumley, Butler Garrick and Bales
Document Path: l:\council\bills\ms\7075ahb11.docx
Companion/Similar bill(s): 22, 23

Introduced in the House on January 19, 2011
Introduced in the Senate on February 15, 2011
Last Amended on May 31, 2011
Passed by the General Assembly on June 2, 2011
Governor's Action: June 14, 2011, Signed

Summary: S.C. Fairness in Civil Justice Act

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/19/2011	House	Introduced and read first time (House Journal-page 12)
1/19/2011	House	Referred to Committee on **Judiciary** (House Journal-page 12)
1/20/2011	House	Member(s) request name added as sponsor: Herbkersman
1/25/2011	House	Member(s) request name added as sponsor: Ballentine, Thayer, Bannister
1/26/2011	House	Member(s) request name added as sponsor: McCoy, Tallon, Stringer, Long, Hayes
1/27/2011	House	Member(s) request name added as sponsor: Ott, J.M.Neal, Vick, G.A.Brown, Branham, Anthony, Bowers
2/1/2011	House	Member(s) request name added as sponsor: Sellers
2/2/2011	House	Member(s) request name added as sponsor: Quinn, Hearn
2/2/2011	House	Committee report: Favorable **Judiciary** (House Journal-page 5)
2/3/2011	House	Member(s) request name added as sponsor: Edge, Anderson
2/4/2011		Scrivener's error corrected
2/8/2011	House	Member(s) request name added as sponsor: Erickson, Knight, Chumley, Butler Garrick
2/8/2011	House	Debate adjourned until Wednesday, February 9, 2011 (House Journal-page 77)
2/9/2011	House	Member(s) request name added as sponsor: Bales
2/9/2011	House	Read second time (House Journal-page 24)
2/9/2011	House	Roll call Yeas-100 Nays-7 (House Journal-page 24)
2/10/2011	House	Read third time and sent to Senate (House Journal-page 16)

2/10/2011House Roll call Yeas-100 Nays-11 (House Journal-page 16)
2/15/2011Senate Introduced and read first time (Senate Journal-page 10)
2/15/2011Senate Referred to Committee on **Judiciary** (Senate Journal-page 10)
2/23/2011Senate Committee report: Favorable with amendment **Judiciary** (Senate Journal-page 30)
2/24/2011 Scrivener's error corrected
3/2/2011 Scrivener's error corrected
3/15/2011Senate Special order, set for March 15, 2011 (Senate Journal-page 19)
3/31/2011Senate Debate interrupted (Senate Journal-page 31)
4/5/2011Senate Debate interrupted (Senate Journal-page 31)
4/6/2011Senate Debate interrupted (Senate Journal-page 21)
4/7/2011Senate Debate interrupted (Senate Journal-page 40)
5/11/2011Senate Debate interrupted (Senate Journal-page 52)
5/31/2011Senate Committee Amendment Amended and Adopted (Senate Journal-page 41)
5/31/2011Senate Read second time (Senate Journal-page 41)
5/31/2011Senate Roll call Ayes-39 Nays-0 (Senate Journal-page 41)
5/31/2011Senate Debate interrupted (Senate Journal-page 41)
6/1/2011 Scrivener's error corrected
6/1/2011Senate Read third time and returned to House with amendments (Senate Journal-page 178)
6/2/2011House Concurred in Senate amendment and enrolled (House Journal-page 54)
6/2/2011House Roll call Yeas-99 Nays-16 (House Journal-page 54)
6/8/2011 Ratified R 86
6/14/2011 Signed By Governor
6/20/2011 Effective date See Act for Effective Date
6/20/2011 Act No. 52

VERSIONS OF THIS BILL

1/19/2011
2/2/2011
2/4/2011
2/23/2011
2/24/2011
3/2/2011
5/31/2011
6/1/2011

(A52, R86, H3375)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE "SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT OF 2011" BY ADDING ARTICLE 5 TO CHAPTER 32, TITLE 15 SO AS TO PROVIDE LIMITS ON THE AWARD OF PUNITIVE DAMAGES AND TO PROVIDE FOR CERTAIN PROCEDURES AND REQUIREMENTS RELATING TO THE AWARD OF THESE DAMAGES; BY ADDING SECTION 1-7-750 SO AS TO AUTHORIZE CIRCUIT SOLICITORS TO EMPLOY OUTSIDE COUNSEL UNDER CERTAIN CIRCUMSTANCES; BY ADDING SECTION 38-77-250 SO AS TO REQUIRE EVERY INSURER PROVIDING AUTOMOBILE INSURANCE COVERAGE IN THE STATE TO PROVIDE CERTAIN INSURANCE COVERAGE INFORMATION WHEN A WRITTEN REQUEST IS MADE BY A CLAIMANT'S ATTORNEY AND TO AUTHORIZE SANCTIONS BY THE COURT FOR NONCOMPLIANCE; TO AMEND SECTION 15-3-670,

RELATING TO LIMITATIONS ON ACTIONS BASED ON UNSAFE OR DEFECTIVE IMPROVEMENTS TO REAL PROPERTY, SO AS TO PROVIDE THAT THE VIOLATION OF A BUILDING CODE DOES NOT CONSTITUTE PER SE FRAUD, GROSS NEGLIGENCE, OR RECKLESSNESS BUT MAY BE ADMISSIBLE AS EVIDENCE; AND TO AMEND SECTION 18-9-130, AS AMENDED, RELATING TO THE EFFECT OF A NOTICE OF APPEAL ON THE EXECUTION OF JUDGMENT, SO AS TO PROVIDE LIMITS FOR APPEAL BONDS.

Be it enacted by the General Assembly of the State of South Carolina:

Citation

SECTION 1. This act may be cited as the "South Carolina Fairness in Civil Justice Act of 2011".

Punitive damages, limitations

SECTION 2. Chapter 32, Title 15 of the 1976 Code is amended by adding:

"Article 5

Punitive Damages

Section 15-32-510. (A) A claim for punitive damages must be specifically prayed for in the complaint.

(B) The plaintiff shall not specifically plead an amount of punitive damages, only that punitive damages are sought in the action.

Section 15-32-520. (A) All actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury.

(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant only to the issues of punitive damages is not admissible at this stage.

(C) Punitive damages may be considered if compensatory or nominal damages have been awarded in the first stage of the trial.

(D) Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct.

(E) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages. In determining the amount of punitive damages, the jury may consider all relevant evidence, including, but not limited to:

(1) the defendant's degree of culpability;

(2) the severity of the harm caused by the defendant;

(3) the extent to which the plaintiff's own conduct contributed to the harm;

(4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;

(5) the existence of similar past conduct;

(6) the profitability of the conduct to the defendant;

(7) the defendant's ability to pay;

(8) the likelihood the award will deter the defendant or others from like conduct;

(9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;

(10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and

(11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

(F) If punitive damages are awarded, the trial court shall review the jury's decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.

(G) In an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section 15-32-530. (A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.

(B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), the trial court should first determine whether:

(1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages;

If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A).

(C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages:

(1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or

(2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiff's damages; or

(3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.

(D) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December thirty-one of the previous year, and the maximum amount recoverable for punitive damages pursuant to subsection (A) must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised maximum amount recoverable for punitive damages to the State Register for publication, pursuant to Section 1-23-40(2), and the revised maximum amount recoverable for punitive damages becomes effective upon publication in the State Register. For purposes of this subsection, 'Consumer Price Index' means the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics.

Section 15-32-540. The provisions of this article do not affect any right, privilege, or provision of the South Carolina Tort Claims Act pursuant to Chapter 78, Title 15 or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33."

Circuit solicitors authorized to employ outside counsel

SECTION 3. Article 5, Chapter 7, Title 1 of the 1976 Code is amended by adding:

"Section 1-7-750. A circuit solicitor may employ outside counsel, in his discretion, without approval of the Attorney General, for civil forfeiture proceedings arising from criminal activity or from estreatment of bail bonds. In any other matter, the circuit solicitor must obtain written approval of the Attorney General prior to retaining counsel to or filing a civil cause of action."

Automobile insurance coverage, release of coverage information upon written request of claimant's attorney

SECTION 4. Article 3, Chapter 77, Title 38 of the 1976 Code is amended by adding:

"Section 38-77-250. (A) Every insurer providing automobile insurance coverage in this State and which is or may be liable to pay all or a part of any claim shall provide, within thirty days of receiving a written request from the claimant's attorney, a statement, under oath, of a corporate officer or the insurer's claims manager stating with regard to each known policy of nonfleet private passenger insurance issued by it, the name of the insurer, the name of each insured, and the limits of coverage. The insurer may provide a copy of the declaration page of each such policy in lieu of providing such information. The request shall set forth under oath the specific nature of the claim asserted and shall be mailed to the insurer by certified mail or statutory overnight delivery. The request also must state that the attorney is authorized to make such a request and must be accompanied by a copy of the incident report from which the claim is derived.

(B) If the request provided in subsection (A) contains information insufficient to allow compliance, the insurer upon whom the request was made may so state in writing, stating specifically what additional information is needed and such compliance shall constitute compliance with this section.

(C) The information provided to a claimant or his attorney as required by subsection (A) of this section shall not create a waiver of any defenses to coverage available to the insurer and shall not be admissible in evidence.

(D) The information provided to a claimant or his attorney as required by subsection (A) shall be amended upon the discovery of facts inconsistent with or in addition to the information provided.

(E) The provisions of this section do not require disclosure of limits for fleet policy limits, umbrella coverages, or excess coverages.

(F) The information received pursuant to this section is confidential and must not be disclosed to any outside party. Upon final disposition of the case, the claimant's attorney must destroy all information received pursuant to this section. The court must impose sanctions for a violation of this subsection."

Limitations on actions based on unsafe or defective improvements to real property, evidence of fraud, negligence, gross negligence, or recklessness

SECTION 5. Section 15-3-670 of the 1976 Code is amended to read:

"Section 15-3-670. (A) The limitation provided by Sections 15-3-640 through 15-3-660 may not be asserted as a defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property,

in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

(B) For the purposes of subsection (A), the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness, but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness.

(C) The limitation provided by Section 15-3-640 may not be asserted as a defense to an action for personal injury, including a personal injury resulting in death, or property damage which is:

(1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and

(2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma."

Limitations on appeal bonds

SECTION 6. Section 18-9-130(A)(1) of the 1976 Code, as last amended by Act 216 of 2004, is further amended to read:

"(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or:

(a) twenty-five million dollars, whichever is less, for a business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; or

(b) one million dollars, whichever is less, for all other entities or individuals."

Time effective

SECTION 7. This act takes effect January 1, 2012, and applies to all actions that accrue on or after the effective date except the provisions of SECTION 3 do not apply to any matter pending on the effective date of this act.

Ratified the 8th day of June, 2011.

Approved the 14th day of June, 2011.

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South Carolina General Assembly
119th Session, 2011-2012

A63, R93, H3762

STATUS INFORMATION

General Bill
Sponsors: Reps. Cooper, White, Bowen, Gambrell, Thayer, Sandifer, D.C. Moss, McLeod, Viers and Clemmons
Document Path: l:\council\bills\nbd\11399dg11.docx
Companion/Similar bill(s): 478, 3286, 4198

Introduced in the House on March 1, 2011
Introduced in the Senate on May 3, 2011
Last Amended on May 26, 2011
Passed by the General Assembly on June 1, 2011
Governor's Action: June 14, 2011, Signed

Summary: Unemployment insurance trust fund

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
3/1/2011	House	Introduced and read first time (House Journal-page 3)
3/1/2011	House	Referred to Committee on **Ways and Means** (House Journal-page 3)
3/2/2011	House	Member(s) request name added as sponsor: Sandifer
3/29/2011	House	Member(s) request name added as sponsor: D.C.Moss
4/6/2011	House	Member(s) request name added as sponsor: McLeod
4/6/2011	House	Committee report: Favorable **Ways and Means** (House Journal-page 65)
4/13/2011	House	Member(s) request name added as sponsor: Viers
4/13/2011	House	Debate adjourned until Tuesday, April 26, 2011 (House Journal-page 83)
4/26/2011	House	Debate adjourned until Wednesday, April 27, 2011 (House Journal-page 54)
4/27/2011	House	Member(s) request name added as sponsor: Clemmons
4/27/2011	House	Debate adjourned (House Journal-page 14)
4/27/2011	House	Debate adjourned (House Journal-page 56)
4/27/2011	House	Amended (House Journal-page 82)
4/27/2011	House	Read second time (House Journal-page 82)
4/27/2011	House	Roll call Yeas-108 Nays-0 (House Journal-page 82)
4/28/2011	House	Read third time and sent to Senate (House Journal-page 13)
4/28/2011		Scrivener's error corrected
5/3/2011	Senate	Introduced and read first time (Senate Journal-page 25)
5/3/2011	Senate	Referred to Committee on **Labor, Commerce and Industry** (Senate Journal-page 25)
5/4/2011	Senate	Recalled from Committee on **Labor, Commerce and Industry** (Senate Journal-page 42)
5/4/2011	Senate	Amended (Senate Journal-page 42)
5/4/2011	Senate	Debate interrupted
5/11/2011	Senate	Amended (Senate Journal-page 49)

5/11/2011Senate Read second time (Senate Journal-page 49)
5/11/2011Senate Roll call Ayes-38 Nays-0 (Senate Journal-page 49)
5/12/2011 Scrivener's error corrected
5/26/2011Senate Amended (Senate Journal-page 83)
5/26/2011Senate Read third time and returned to House with amendments (Senate Journal-page 83)
5/26/2011Senate Roll call Ayes-32 Nays-0 (Senate Journal-page 83)
6/1/2011House Concurred in Senate amendment and enrolled (House Journal-page 66)
6/1/2011House Roll call Yeas-93 Nays-11 (House Journal-page 66)
6/8/2011 Ratified R 93
6/14/2011 Signed By Governor
6/22/2011 Effective date 06/14/11
6/27/2011 Act No. 63

VERSIONS OF THIS BILL

3/1/2011
4/6/2011
4/27/2011
4/28/2011
5/4/2011
5/11/2011
5/12/2011
5/26/2011

(A63, R93, H3762)

AN ACT TO AMEND SECTION 41-31-5, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO DEFINITIONS CONCERNING THE RATE OF CONTRIBUTIONS TO THE UNEMPLOYMENT TRUST FUND, SO AS TO MODIFY THE METHOD OF COMPUTATION; TO AMEND SECTION 41-31-20, AS AMENDED, RELATING TO EMPLOYERS' ACCOUNTS, SO AS TO PROVIDE THAT THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE SHALL MAINTAIN A SEPARATE ACCOUNT FOR EACH EMPLOYER AND SHALL ACCURATELY RECORD THE DATA USED TO DETERMINE AN EMPLOYER'S EXPERIENCE FOR THE PURPOSE OF RATE ASSIGNMENT; TO AMEND SECTION 41-31-40, AS AMENDED, RELATING TO BASE RATE COMPUTATION PERIODS, SO AS TO LOWER THE NEW EMPLOYER TAX CLASS FROM THIRTEEN TO TWELVE; TO AMEND SECTION 41-31-50, AS AMENDED, RELATING TO BASE RATE DETERMINATIONS, SO AS TO CLARIFY EXCLUSIONS TO TAXABLE WAGES AND TO PROVIDE THAT FOR CALENDAR YEAR 2011 AND SUBSEQUENT CALENDAR YEARS, VOLUNTARY PAYMENTS ARE NOT PERMITTED FOR THE PURPOSE OF OBTAINING A LOWER RATE OF REQUIRED CONTRIBUTIONS; TO AMEND SECTION 41-31-60, AS AMENDED, RELATING TO BASE RATES WHERE A DELINQUENT REPORT IS RECEIVED, SO AS TO CHANGE REFERENCES TO TAX RATES; TO AMEND SECTION 41-31-70, AS AMENDED, RELATING TO A PROHIBITION ON THE TERMINATION OF THE ACCOUNT OF AN EMPLOYER, SO AS TO DELETE A BENEFIT RATIO CALCULATION; TO AMEND SECTION 41-31-125, AS AMENDED, RELATING TO THE ASSIGNMENT OF AN EMPLOYMENT BENEFIT RECORD UPON ACQUISITION OR REORGANIZATION OF AN EXISTING EMPLOYMENT UNIT, SO AS TO PROVIDE IF THE EXPERIENCE RATING ACCOUNT OF A PREDECESSOR IS EQUAL TO OR EXCEEDS TAX CLASS THIRTEEN, THIS EXPERIENCE RATING ACCOUNT MUST BE TRANSFERRED TO THE SUCCESSOR

EMPLOYER; TO AMEND SECTION 41-31-140, AS AMENDED, RELATING TO LIMITS ON THE TRANSFER OF AN EXPERIENCE RATING ACCOUNT IN CERTAIN CIRCUMSTANCES, SO AS TO CLARIFY TIME LIMITS OF APPLICABILITY AND TO PROVIDE FOR FUTURE LIMITS ON TRANSFERS FOR AN EXPERIENCE RATING ACCOUNT; TO AMEND SECTION 41-31-670, AS AMENDED, RELATING TO SPECIAL PROVISIONS FOR ORGANIZATIONS THAT MADE CONTRIBUTIONS PRIOR TO 1969, SO AS TO UPDATE REFERENCES TO APPLICABLE TAX FORMULAS AND TO PROVIDE FOR THE MANAGEMENT OF AN ACCOUNT IF THE ORGANIZATION TERMINATES THE ELECTION AVAILABLE UNDER THIS SECTION; TO AMEND SECTION 41-35-125, AS AMENDED, RELATING TO BENEFITS FOR INDIVIDUALS UNEMPLOYED AS A RESULT OF DOMESTIC ABUSE, SO AS TO REDEFINE THE TERM "DISABILITY"; TO AMEND SECTION 41-35-130, AS AMENDED, RELATING TO PAYMENTS NOT CHARGEABLE TO A FORMER EMPLOYER, SO AS TO MAKE THE SECTION APPLICABLE TO BENEFITS PAID AS A RESULT OF A NATURAL DISASTER DECLARED BY THE PRESIDENT OF THE UNITED STATES; TO AMEND SECTION 41-39-30, AS AMENDED, RELATING TO LIMITS ON FEES, SO AS TO ELIMINATE THE REQUIREMENT THAT A PERSON APPEARING AT A HEARING PURSUANT TO THIS SECTION MUST BE REPRESENTED BY AN ATTORNEY; TO AMEND SECTION 41-41-40, AS AMENDED, RELATING TO THE RECOVERY OF BENEFITS PAID TO A PERSON NOT ENTITLED TO BENEFITS, SO AS TO PROVIDE AN ADDITIONAL MEANS FOR ATTEMPTING A COLLECTION PURSUANT TO THIS SECTION; TO AMEND SECTION 41-27-260, AS AMENDED, RELATING TO EXEMPTED EMPLOYMENT, SO AS TO PROVIDE THE CIRCUMSTANCES BY WHICH SERVICES PERFORMED BY A DIRECT SELLER ARE EXEMPT FROM CERTAIN PROVISIONS OF CHAPTERS 27 THROUGH 41, TITLE 41; TO AMEND SECTION 41-31-50, AS AMENDED, RELATING TO DETERMINATION OF BASE RATES, SO AS TO PLACE A LIMIT ON THE EMPLOYER BASE TAX RATE FOR TAX YEAR 2011; BY ADDING SECTION 41-31-52 SO AS TO PROVIDE FOR THE CIRCUMSTANCES BY WHICH A SEASONAL WORKER IS ELIGIBLE TO RECEIVE BENEFITS; TO AMEND SECTION 41-35-50, RELATING TO ANNUAL MAXIMUM POTENTIAL BENEFITS, SO AS TO REDUCE A POTENTIAL MAXIMUM FROM TWENTY-SIX TIMES THE WEEKLY BENEFIT AMOUNT TO TWENTY TIMES THE WEEKLY BENEFIT AMOUNT; TO AMEND SECTION 41-29-300, AS AMENDED, RELATING TO THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE APPELLATE PANEL, SO AS TO DESIGNATE SEAT NUMBERS ON THE PANEL; TO AMEND SECTION 41-31-330, RELATING TO PENALTIES FOR ADDITIONAL CONTRIBUTIONS DUE, SO AS TO SET AN INTEREST RATE FOR 2011; AND TO DIRECT THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE TO RECALCULATE PREMIUM RATES AND TO APPLY CERTAIN APPROPRIATIONS TO THE UNEMPLOYMENT INSURANCE TRUST FUND.

Be it enacted by the General Assembly of the State of South Carolina:

Definitions

SECTION 1. Section 41-31-5(1) of the 1976 Code, as added by Act 234 of 2010, is amended to read:

"(1) 'Benefit ratio' means:

(a) for the period of January 1, 2011, through December 31, 2013, the number calculated by dividing the sum of all benefits charged to an employer during the forty calendar quarters immediately preceding the calculation date by the sum of the employer's taxable payroll for the same period. If fewer than forty but more than one calendar quarter of data are available, the data from those available calendar

quarters shall be used in the calculation. The benefit ratio must be calculated annually using data for quarters filed through June thirtieth of the current year to the sixth decimal place;

(b) from January 1, 2014, the number calculated by dividing the sum of all benefits charged to an employer during the twelve calendar quarters immediately preceding the calculation date by the sum of the employer's taxable payroll for the same period. If fewer than twelve but more than one calendar quarters of data are available, the data from those available calendar quarters shall be used in the calculation. The benefit ratio must be calculated annually using data for quarters filed through June thirtieth of the current year to the sixth decimal place."

Experience for rate assignment

SECTION 2. Section 41-31-20(A) of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"(A) The department shall maintain a separate account for each employer and shall accurately record the data used to determine an employer's experience for the purpose of rate assignments. Nothing in Chapters 27 through 41 of this title shall be construed to grant any employer or individual in his service prior claims or rights to the amounts paid by him into the fund either on his behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged, in the amounts provided in Chapters 27 through 41 of this title, against the accounts of his most recent employer. No employer shall be deemed as the most recent employer for the purpose of this section unless the eligible person to whom benefits are paid earned wages in the employ of the employer equal to at least eight times the weekly benefit amount of the eligible claimant."

Rate Class

SECTION 3. Section 41-31-40 of the 1976 Code, as last amended by Act 234 of 2010, is futher amended to read:

"Section 41-31-40. Each employer's base rate for the twelve months commencing January first of any calendar year is determined in accordance with Section 41-31-50 on the basis of his record up through June thirtieth of the preceding calendar year, but no employer's base rate is less than the rate applicable for rate class twelve until there have been twelve consecutive months of coverage after first becoming liable for contributions under Chapters 27 through 41 of this title. Each employer who completes twelve consecutive calendar months of coverage after first becoming liable for contributions during the current calendar year shall have a base rate computed on the basis of his record up through the next occurring June thirtieth, with that base rate being effective for the next calendar year beginning in January."

Tax rate; voluntary payment

SECTION 4. Section 41-31-50 of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"Section 41-31-50. Each employer eligible for a rate computation shall have his tax rate determined in the following manner:

(1)(a)(i) Annually the department must calculate a contribution rate for each employer qualified for an experience rating. The contribution rate must correspond to the rate calculated for the employer's benefit ratio class.

(ii) To determine an employer's benefit ratio rank, the department must list all employers by increasing benefit ratios, from the lowest benefit ratio to the highest benefit ratio. The list must be divided into classes ranked one through twenty. Each class must contain approximately five percent of the total

taxable wages, excluding employers with less than twelve months of accomplished liability, employers with outstanding tax liens, delinquent tax class employers, and employers who reimburse the department in lieu of contributions, paid in covered employment during the four completed calendar quarters immediately preceding the computation date. Each employer must be placed in the class that corresponds with the employer's benefit ratio.

(iii) If an employer's taxable wages qualify the employer for two separate classes, the employer shall be afforded the class assigned the lower contribution rate. Employers with identical benefit ratios shall be assigned to the same class.

(b) The income needed to pay benefits for the calendar year plus any applicable income needed to reach the solvency target must be divided by the estimated taxable wages for the calendar year. The result rounded to the next higher one-hundredth of one percent is the average required rate needed to pay benefits and achieve solvency targets.

(c) The rate for class twenty will be set such that the entire schedule raises the income required to pay benefits for the year, as well as the income necessary to move the trust fund toward the solvency target, subject to the structure provided in this chapter. However, the rate for class twenty must be at least five and four-tenths percent.

(2)(a) If the calculated rate necessary for benefit rate class twenty exceeds five and four-tenths percent, then the rate for each preceding benefit rate class shall be equal to ninety percent of the rate calculated for the succeeding class, except that rate class twelve shall be set at one-fourth the rate calculated for class twenty, provided that the rate for class one shall be zero.

(b)(i) If the computed rate necessary for class twenty is less than five and four-tenths percent, then the rate for class twenty shall be set at five and four-tenths percent.

(ii) The rate for rate class twelve shall be calculated by multiplying the average tax rate computed in item (1)(b) by twenty, subtracting five and four-tenths percent, and dividing by nineteen.

(iii) The contribution rate for rate classes eleven through one shall be equal to ninety percent of the rate for the succeeding class, provided that the rate for class one shall be zero.

(iv) The contribution rate for class thirteen shall be equal to one hundred twenty percent of the rate calculated for rate class twelve.

(v) The contribution rate for rate class nineteen shall be set at an amount that allows for average contributions, beginning with class eighteen and ending with class fourteen, that are equal to ninety percent of the preceding class.

(3) For calendar year 2011 and any subsequent calendar year, voluntary payments are not permitted for the purpose of obtaining a lower rate of required contributions."

Rates for delinquent reports

SECTION 5. Section 41-31-60 of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"Section 41-31-60. (A) If on the computation date upon which an employer's tax rate is to be computed as provided in Section 41-31-40 there is a delinquent report, the tax class twenty rate must be assigned to the employer for the period to which the computation applies.

(B) No employer is permitted to pay his unemployment compensation tax at a reduced tax rate class for any quarter when a tax execution issued in accordance with Section 41-31-390 with respect to delinquent unemployment compensation tax for a previous quarter is unpaid and outstanding against the employer. If on the computation date upon which an employer's tax rate is computed as provided in Section 41-31-40 there is an outstanding tax execution, the tax class twenty rate must be assigned to the employer until the next computation date or until such time as all outstanding tax executions have been paid."

Benefit ratio for continued account

SECTION 6. Section 41-31-70 of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"Section 41-31-70. If the department finds that an employer ceased to render employment solely due to the closing of the business because of the entrance of one or more of the owners, officers, partners, or the majority stockholders into the Armed Forces of the United States, or any of its allies, or of the United Nations after January 1, 1951, such employer's account shall not be terminated; and, if the business is resumed and employment rendered within two years after the discharge or release from active duty in the armed forces of the person or persons, the employer's experience shall be deemed to have been continuous throughout that period. The benefit ratio of the employer shall be the amount calculated pursuant to Section 41-31-5, including benefits paid to any individual during the period the employer was in the armed forces. This provision shall not be construed to authorize cash refunds and any adjustments required hereunder only shall be by credit certificate."

Experience rating of predecessor

SECTION 7. Section 41-31-125(C) of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"(C) If the experience rating account of the predecessor is equal to or exceeds tax class thirteen, the experience rating account of the predecessor employer in any event must be transferred to the successor employer in accordance with the provisions of Section 41-31-140."

Transfer of experience rating account

SECTION 8. Section 41-31-140 of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"Section 41-31-140. (A) For the purposes of this section and for tax years 2010 and prior, 'debit balance' means the excess of total benefits charged over total contributions made.

(B) For acquisitions that occur in tax years 2010 and prior, no transfer of experience rating accounts, in whole or in part, is permitted under the provisions of Sections 41-31-100 through 41-31-130 unless all unemployment compensation taxes based on wages paid by the transferring employer prior to the date of the transfer are paid by the transferring employer when due or assumed by the acquiring employer within sixty days from the date he is notified by the department that the transfer cannot be allowed because of unpaid unemployment compensation taxes. If the experience rating account of the predecessor employer contains a debit balance, the experience rating account of the predecessor employer in any event must be transferred to the successor employer in accordance with the provisions of Sections 41-31-100 and 41-31-120.

(C) Effective for acquisitions occurring in tax years 2011 and later, no transfer of benefit charges or taxable wages, in whole or in part, is permitted pursuant to the provisions of Sections 41-31-100 through 41-31-130 unless all unemployment compensation taxes based on wages paid by the transferring employer prior to the date of transfer are paid by the transferring employer when due or assumed by the acquiring employer within sixty days from the date he is notified by the department that the transfer cannot be allowed because of unpaid unemployment compensation taxes or outstanding contribution reports. If the predecessor employer has an acquisition year tax class of thirteen or higher, the experience of the predecessor employer in any event must be transferred to the successor employer in accordance with the provisions of Sections 41-31-100 and 41-31-120."

Tax rate for terminating payment in lieu of contribution

SECTION 9. Section 41-31-670(B) of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"(B) Any nonprofit organization which has elected to become liable for payments in lieu of contributions under the provisions of Sections 41-31-620 and 41-31-630 and thereafter terminates the election shall become an employer liable for the payments of contributions upon the effective date of the termination but no such employer's tax rate thereafter may be less than tax rate class twelve until there have been twenty-four consecutive calendar months of coverage. Upon termination of the election to reimburse the department in lieu of contributions, if the employer was previously an employer liable for contributions, the previously established contributory account will be reopened."

Definition of "disability"

SECTION 10. Section 41-35-125 of the 1976 Code, as last amended by Act 234 of 2010, is further amended to read:

"Section 41-35-125. (A)(1) Notwithstanding the provisions of Section 41-35-120, an individual is eligible for waiting week credit and for unemployment compensation if the department finds that the individual has left work voluntarily or has been discharged because of circumstances directly resulting from domestic abuse and:

(a) reasonably fears future domestic abuse at or en route to the workplace;

(b) needs to relocate to avoid future domestic abuse; or

(c) reasonably believes that leaving work is necessary for his safety or the safety of his family.

(2) When determining if an individual has experienced domestic abuse for the purpose of receiving unemployment compensation, the department must require him to provide documentation of domestic abuse such as police or court records or other documentation of abuse from a shelter worker, attorney, member of the clergy, or medical or other professional from whom the individual has sought assistance.

(3) Documentation or evidence of domestic abuse acquired by the department pursuant to this section must be kept confidential unless consent for disclosure is given, in writing, by the individual.

(B)(1) Notwithstanding the provisions of Section 41-35-120, an individual is eligible for waiting week credit and for unemployment compensation if the department finds that the individual was separated from employment due to compelling family circumstances.

(2) For the purposes of this subsection:

(a) 'Immediate family member' means a claimant's spouse, parents, or dependent children.

(b) 'Illness' means a verified illness that necessitates the care of the ill person for a period of time that exceeds the amount of time the employer will provide paid or unpaid leave.

(c) 'Disability' means a verified disability which necessitates the care of the disabled person for a period of time longer than the employer is willing to grant paid or unpaid leave. Disability encompasses all types of disability, including mental and physical disabilities, permanent and temporary disabilities, and partial and total disabilities.

(d) 'Compelling family circumstances' means:

(i) that a claimant was separated from employment with the employer because of the illness or disability of the claimant and, based upon available information, the department finds that it was medically necessary for the claimant to stop working or change occupations;

(ii) the claimant was separated from work due to the illness or disability of an immediate family member; and

(iii) the claimant's spouse was transferred or employed in another city or state, the family is required to move to the location of that job, the location is outside the commuting distance of the claimants previous employment, and the claimant separates from employment in order to move to the new location with his spouse."

Benefits paid due to natural disaster or emergency

SECTION 11. Section 41-35-130 of the 1976 Code, as last amended by Act 146 of 2010, is further amended to read:

"Section 41-35-130. (A) A benefit paid to a claimant for unemployment immediately after the expiration of disqualification for:

(1) voluntarily leaving his most recent work without good cause;

(2) discharge from his most recent work for misconduct; or

(3) refusal of suitable work without good cause must not be charged to the account of an employer.

(B) A benefit paid to a claimant must not be charged against the account of an employer by reason of the provisions of this subsection if the department determines under Section 41-35-120 that the individual:

(1) voluntarily left his most recent employment with that employer without good cause;

(2) was discharged from his most recent employment with that employer for misconduct connected with his work; or

(3) subsequent to his most recent employment refused without good cause to accept an offer of suitable work made by that employer if the employer furnishes the department with those notices regarding the separation of the individual from work or the refusal of the individual to accept an offer of work as is required by the law and regulations of the department.

(C) If a benefit is paid pursuant to a decision that is finally reversed in subsequent proceedings with respect to it, an employer's account must not be charged with a benefit paid.

(D) A benefit paid to a claimant for a week in which he is in training with the approval of the department must not be charged to an employer.

(E) Benefits paid as a result of a natural disaster declared by the President of the United States.

(F) Benefits paid as a result of declaration of emergency declared by the Governor must not be charged to an employer.

(G) The provisions of subsections (A) through (E), all inclusive, with respect to the noncharging of benefits paid must be applicable only to an employer subject to the payment of contributions.

(H) A benefit paid to a claimant during an extended benefit period, as defined in Article 3, Chapter 35, must not be charged to an employer; except that a nonprofit organization electing to become liable for payments in lieu of contributions in accordance with Section 41-31-620 must reimburse fifty percent of extended benefits attributable to services performed in its employ and that after January 1, 1979, the State or a political subdivision or instrumentality of it as defined in Section 41-27-230(2)(b) electing to become liable for payment in lieu of contributions in accordance with Section 41-31-620 must reimburse all extended benefits attributable to services performed in its employ.

(I) A nonprofit organization that elects to make a payment in lieu of a contribution to the unemployment compensation fund as provided in Section 41-31-620(2) or Section 41-31-810 is not liable to make those payments with respect to the benefits paid to an individual whose base period wages include wages for previously uncovered services as defined in Section 41-35-65 to the extent that the unemployment compensation fund is reimbursed for those benefits pursuant to Section 121 of P.L. 94-566.

(J) A benefit paid to an individual whose base period wages include wages for previously uncovered services as defined in Section 41-35-65 must not be charged against the account of an employer to the extent that the unemployment compensation fund is reimbursed for those benefits pursuant to Section 121 of P.L. 94-566.

(K) A benefit paid to an individual pursuant to Section 41-35-125 must not be charged to the account of a contributing employer.

(L) A benefit paid to an individual pursuant to Section 41-35-126 must not be charged to the account of a contributing employer."

Representation by an attorney

SECTION 12. Section 41-39-30 of the 1976 Code, as last amended by Act 146 of 2010, is further amended to read:

"Section 41-39-30. An individual claiming benefits may not be charged a fee in a proceeding under Chapters 27 through 41 of this title by the department or its representatives or by a court or an officer, except an attorney, of it. An individual claiming a benefit in a proceeding before the department or a court may be represented by an attorney or other duly authorized agent, but an attorney or agent must not charge or receive for this service more than an amount approved by the department. A person who violates a provision of this section, for each offense, must be fined not less than fifty dollars nor more than five hundred dollars, imprisoned for not more than six months, or both."

Collecting overpayment of benefits

SECTION 13. Section 41-41-40(A) of the 1976 Code, as last amended by Act 146 of 2010, is further amended to read:

"Section 41-41-40. (A)(1) A person who has received a sum as benefits under Chapters 27 through 41 while conditions for the receipt of benefits imposed by these chapters were not fulfilled or while he was disqualified from receiving benefits is liable to repay the department for the unemployment compensation fund a sum equal to the amount received by him.

(2) If full repayment of benefits, to which an individual was determined not entitled, has not been made, the sum must be deducted from future benefits payable to him under Chapters 27 through 41, and the sum must be collectible in the manner provided in Sections 41-31-380 through 41-31-400 for the collection of past due contributions.

(3) The department may attempt collection of overpayments through the South Carolina Department of Revenue in accordance with Section 12-56-10, et seq. If the overpayment is collectible in accordance with Section 12-56-60, the department shall add to the amount of the overpayment a collection fee of not more than twenty-five dollars for each collection attempt to defray administrative costs.

(4) The department may attempt collection of overpayment through the federal Unemployment Compensation Treasury Offset Program (UCTOP). If the overpayment is collectible, the department shall add to the amount of the overpayment a collection fee not to exceed the administrative costs set by this program.

(5) Notwithstanding any other provision of this section, no action to enforce recovery or recoupment of any overpayment may begin after five years from the date of the final determination for nonfraudulent overpayments nor after eight years from the date of the final determination for fraudulent overpayments."

Exempted employment

SECTION 14. Section 41-27-260 of the 1976 Code, as last amended by Act 3 of 2011, is further amended by adding an appropriately numbered new item to read:

"(18) Services performed by a direct seller, provided that:

(a) the individual:

(i) is engaged in the trade or business of selling or soliciting the sale of consumer products, including, but not limited to, services or other intangibles, to any buyer on a buy-sell basis, a

deposit-commission basis, or any similar basis for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment; or

(ii) is engaged in the trade or business of selling or soliciting the sale of consumer products, including, but not limited to, services or other intangibles, in the home or otherwise than in a permanent retail establishment;

(b) substantially all the remuneration, whether or not paid in cash, for the performance of the services described in subitem (a) is directly related to sales or other output, including, but not limited to, the performance of services, rather than to the number of hours worked; and

(c) the services performed by the individual are performed pursuant to a written contract between the individual and the person for whom the services are performed and the contract provides that the individual will not be treated as an employee for federal and state tax purposes."

Maximum base tax rate for 2011

SECTION 15. Section 41-31-50 of the 1976 Code, as last amended by Act 234 of 2010, is further amended by adding an appropriately numbered subsection to read:

"(4) For tax year 2011, no employer shall have a base tax rate higher than the base tax rate for rate class twelve if during the applicable rate computation period, as defined in Section 41-31-5, the employer has been credited with more in tax contributions than have been charged to that employer's account for benefits."

Benefits for seasonal workers

SECTION 16. Article 1, Chapter 31, Title 41 of the 1976 Code is amended by adding:

"Section 41-31-52. Effective with claims filed on or after January 1, 2012:

(1) A seasonal pursuit is one which, because of seasonal conditions making it impracticable or impossible to do otherwise, customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of thirty-six weeks in a calendar year. No pursuit shall be considered seasonal until the department makes a determination that the pursuit is seasonal. However, any successor to a seasonal pursuit shall be deemed seasonal unless the successor requests cancellation of the seasonal pursuit status within one hundred twenty days after the acquisition. This provision shall not be applicable to pending cases nor retroactive in effect.

(2) Upon application by a pursuit for seasonal pursuit status, the department shall determine or redetermine whether the pursuit is seasonal and, if seasonal, the pursuit's active period. The department may, on its own motion, redetermine a seasonal pursuit's active period. An application for a seasonal determination must be made on forms prescribed by the department and must be made at least thirty days prior to the beginning date of the period of production operations for which a determination is requested.

(3) Whenever the department has determined or redetermined a pursuit to be seasonal, the pursuit shall be notified immediately, and the notice must contain the beginning and ending dates of the pursuit's active period or periods. Pursuits determined or redetermined to be a seasonal pursuit shall display notices of its seasonal determination conspicuously on its premises in a sufficient number of places to be available for inspection by its workers. The notices shall be furnished by the department.

(4) A seasonal determination must become effective unless an interested party files an application for review within ten days of the beginning date of the first period of production operations to which it applies. An application for review shall be an application for a determination of status.

(5) All wages paid to a seasonal worker during his base period must be used in determining his weekly benefit amount; provided, however, that all weekly benefit amounts so determined shall be rounded to the nearest lower full dollar amount, if not a full dollar amount.

(6)(a) A seasonal worker is eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs, within the active period of the seasonal pursuit in which he earned base period wages.

(b) A seasonal worker is eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during any active period of the seasonal pursuit in which he has earned base period wages; provided he has exhausted benefits based on seasonal wages. The worker is also eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during the inactive period or periods of the seasonal pursuit in which he earned base period wages irrespective as to whether he has exhausted benefits based on seasonal wages.

(c) The maximum amount of benefits which a seasonal worker is eligible to receive, based on seasonal wages, shall be an amount, adjusted to the nearest multiple of one dollar, determined by multiplying the maximum benefits payable in his benefit year, as provided in Section 41-35-50, by the percentage obtained by dividing the seasonal wages in his base period by all of his base period wages.

(d) The maximum amount of benefits which a seasonal worker is eligible to receive based on nonseasonal wages shall be an amount, adjusted to the nearest multiple of one dollar, determined by multiplying the maximum benefits payable in his benefit year, as provided in Section 41-35-50, by the percentage obtained by dividing the nonseasonal wages in his base period by all of his base period wages.

(e) In no case is a seasonal worker eligible to receive a total amount of benefits in a benefit year in excess of the maximum benefits payable for such benefit year, as provided in Section 41-35-50.

(7)(a) All benefits paid to a seasonal worker based on seasonal wages shall be charged, as prescribed in Section 41-31-20, against the account of his base period employer who paid him such seasonal wages, and for the purpose of this paragraph such seasonal wages shall be deemed to constitute all of his base period wages.

(b) All benefits paid to a seasonal worker based on nonseasonal wages shall be charged, as prescribed in Section 41-31-20, against the account of his base period employer who paid him such nonseasonal wages, and for the purpose of this paragraph such nonseasonal wages shall be deemed to constitute all of his base period wages.

(8) The benefits payable to any otherwise eligible individual shall be calculated in accordance with this section for any benefit year which is established on or after the beginning date of a seasonal determination applying to a pursuit by which such individual was employed during the base period applicable to such benefit year, as if such determination had been effective in such base period.

(9) Nothing in this section shall be construed to limit the right of any individual whose claim for benefits is determined in accordance herewith to appeal from such determination as provided in Section 41-35-660.

(10) As used in this section:

(a) 'Pursuit' means an employer or branch of an employer.

(b) 'Branch of an employer' means a part of an employer's activities which is carried on or is capable of being carried on as a separate enterprise.

(c) 'Production operations' means all the activities of a pursuit which are primarily related to the production of its characteristic goods or services.

(d) 'Active period or periods' of a seasonal pursuit means the longest regularly recurring period or periods within which production operations of the pursuit are customarily carried on.

(e) 'Seasonal wages' means the wages earned in a seasonal pursuit within its active period or periods. The department may prescribe by regulation the manner in which seasonal wages shall be reported.

(f) 'Seasonal worker' means a worker at least twenty-five percent of whose base period wages are seasonal wages.

(g) 'Interested party' means any individual affected by a seasonal determination.

(h) 'Inactive period or periods' of a seasonal pursuit means that part of a calendar year which is not included in the active period or periods of such pursuit.

(i) 'Nonseasonal wages' means the wages earned in a seasonal pursuit within the inactive period or periods of such pursuit, or wages earned at any time in a nonseasonal pursuit.

(j) 'Wages' means remuneration for employment."

Annual maximum potential benefits

SECTION 17. Section 41-35-50 of the 1976 Code is amended to read:

"Section 41-35-50. The maximum potential benefits of any insured worker in a benefit year are the lesser of:

(1) twenty times his weekly benefit amount;

(2) one-third of his wages for insured work paid during his base period.

If the resulting amount is not a multiple of one dollar, the amount must be reduced to the next lower multiple of one dollar, except that no insured worker may receive benefits in a benefit year unless, subsequent to the beginning of the next preceding benefit year during which he received benefits, he performed 'insured work' as defined in Section 41-27-300 and earned wages in the employ of a single employer in an amount equal to not less than eight times the weekly benefit amount established for the individual in the preceding benefit year."

Appellate panel seat designations

SECTION 18. Section 41-29-300(B)(2) of the 1976 Code, as added by Act 146 of 2010, is amended to read:

"(2) The members of the appellate panel must be elected by the General Assembly, in joint session, for terms of four years and until their successors have been elected and qualified, commencing on the first day of July in each presidential election year. Initial elections for members of the appellate panel must be held before May 22, 2010. The seats on the appellate panel are designated as Seat 1, Seat 2, and Seat 3."

Interest rate for 2011 on additional contributions due

SECTION 19. Section 41-31-330(A) of the 1976 Code, as amended by Act 234 of 2010, is further amended to read:

"(A)(1) If the department finds that an additional contribution is due, that the report was made in good faith, that the understatement of the contribution is not deliberate, then no penalty shall be added because of the understatement. However, except for the time period contained in item (2), the amount of the deficiency shall bear interest at the rate of one percent for each month or fraction of a month that it remains unpaid.

(2) For calendar year 2011, retroactive to January 1, 2011, for months January through June thirtieth of that year, the amount of deficiency that arises under the circumstances provided in item (1) shall bear interest at the rate of 0.25 percent for each month or fraction of a month that it remains unpaid. However, if the department finds that the understatement is due to the circumstances provided in subsection (B) or (C) then the employer is not entitled to the 0.25 percent interest rate."

Department of Employment and Workforce to recalculate premium rates, trust fund

SECTION 20. (A) As soon as practicable after the effective date of this act, the Department of Employment and Workforce is directed to recalculate premium rates. The recalculated premium rates shall be retroactive to January 1, 2011. Employers must be notified of changes in the premiums due and employer accounts must be credited and adjusted as appropriate.

(B) The Department of Employment and Workforce must apply all funds directly appropriated to the department pursuant to Act 73, R 106, H. 3700, in such a manner to reduce the amount of income that must be raised pursuant to Section 41-31-45(A)(3) and (B).

Time effective

SECTION 21. This act takes effect upon approval by the Governor.

Ratified the 8th day of June, 2011.

Approved the 14th day of June, 2011.

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South Carolina General Assembly
119th Session, 2011-2012

A69, R103, S20

STATUS INFORMATION

General Bill
Sponsors: Senators Grooms, McConnell, Thomas, Alexander, Leatherman, Knotts, Bryant, Hayes, Rose, Verdin, S. Martin, Peeler, L. Martin, Fair, Ryberg, Cromer, Campsen, Davis, Shoopman, Rankin and Bright
Document Path: l:\s-res\lkg\001alie.kmm.lkg.docx
Companion/Similar bill(s): 4174

Introduced in the Senate on January 11, 2011
Introduced in the House on March 14, 2011
Last Amended on June 14, 2011
Passed by the General Assembly on June 21, 2011
Governor's Action: June 27, 2011, Signed

Summary: Immigration Reform

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
12/1/2010	Senate	Prefiled
12/1/2010	Senate	Referred to Committee on **Judiciary**
1/11/2011	Senate	Introduced and read first time (Senate Journal-page 15)
1/11/2011	Senate	Referred to Committee on **Judiciary** (Senate Journal-page 15)
1/12/2011	Senate	Referred to Subcommittee: L.Martin (ch), Campsen, Ford
2/9/2011	Senate	Committee report: Favorable with amendment **Judiciary** (Senate Journal-page 11)
2/10/2011		Scrivener's error corrected
2/15/2011	Senate	Motion For Special Order Failed (Senate Journal-page 20)
2/15/2011	Senate	Roll call Ayes-29 Nays-15 (Senate Journal-page 20)
2/22/2011	Senate	Motion For Special Order Failed (Senate Journal-page 21)
2/22/2011	Senate	Roll call Ayes-26 Nays-16 (Senate Journal-page 21)
3/1/2011	Senate	Special order, set for March 1, 2011 (Senate Journal-page 11)
3/1/2011	Senate	Roll call Ayes-27 Nays-8 (Senate Journal-page 11)
3/2/2011	Senate	Debate interrupted (Senate Journal-page 19)
3/3/2011	Senate	Debate interrupted (Senate Journal-page 33)
3/8/2011	Senate	Debate interrupted (Senate Journal-page 41)
3/9/2011	Senate	Committee Amendment Amended and Adopted (Senate Journal-page 42)
3/9/2011	Senate	Amended (Senate Journal-page 42)
3/9/2011	Senate	Read second time (Senate Journal-page 42)
3/9/2011	Senate	Roll call Ayes-28 Nays-8 (Senate Journal-page 42)
3/10/2011		Scrivener's error corrected
3/10/2011	Senate	Read third time and sent to House (Senate Journal-page 8)
3/10/2011	Senate	Roll call Ayes-34 Nays-9 (Senate Journal-page 8)
3/10/2011		Scrivener's error corrected

3/14/2011House Introduced and read first time (House Journal-page 3)
3/14/2011House Referred to Committee on **Judiciary** (House Journal-page 3)
5/18/2011House Committee report: Favorable with amendment **Judiciary** (House Journal-page 68)
5/19/2011 Scrivener's error corrected
5/24/2011House Requests for debate-Rep(s). Bedingfield, White, Corbin, Loftis, DC Moss, Norman, Hixon, JR Smith, Taylor, GM Smith, Hamilton, Nanney, Henderson, GR Smith, Mack, McCoy, Clyburn, Hosey, RL Brown, Allison, Tallon, Patrick, Chumley, Crawford, Viers, Whipper, Hardwick, and Hearn (House Journal-page 74)
5/24/2011House Amended (House Journal-page 84)
5/24/2011House Read second time (House Journal-page 84)
5/24/2011House Roll call Yeas-69 Nays-43 (House Journal-page 84)
5/25/2011House Read third time and returned to Senate with amendments (House Journal-page 32)
5/25/2011House Roll call Yeas-65 Nays-39 (House Journal-page 32)
6/1/2011Senate House amendment amended (Senate Journal-page 166)
6/1/2011Senate Roll call Ayes-37 Nays-0 (Senate Journal-page 166)
6/14/2011Senate House amendment amended (Senate Journal-page 47)
6/14/2011Senate Returned to House with amendments (Senate Journal-page 47)
6/15/2011 Scrivener's error corrected
6/21/2011House Concurred in Senate amendment and enrolled (House Journal-page 21)
6/21/2011House Roll call Yeas-69 Nays-43 (House Journal-page 21)
6/22/2011 Ratified R 103 (Senate Journal-page 47)
6/27/2011 Signed By Governor
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(A69, R103, S20)

AN ACT TO AMEND SECTION 6-1-170, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PREEMPTION OF LOCAL ORDINANCES REGARDING IMMIGRATION, SO AS TO ALLOW A CIVIL ACTION TO BE BROUGHT UNDER CERTAIN CIRCUMSTANCES WHEN A POLITICAL SUBDIVISION LIMITS OR PROHIBITS A LOCAL OFFICIAL FROM SEEKING TO ENFORCE A FEDERAL OR STATE LAW WITH REGARD TO IMMIGRATION OR THE UNLAWFUL IMMIGRATION STATUS OF A PERSON; TO AMEND SECTION 8-14-10, RELATING TO DEFINITIONS FOR THE PURPOSES OF UNAUTHORIZED ALIENS AND PUBLIC EMPLOYMENT, SO AS TO EXPAND THE DEFINITION OF "PRIVATE

EMPLOYER"; TO AMEND SECTION 8-14-20, RELATING TO PUBLIC EMPLOYER PARTICIPATION IN THE FEDERAL WORK AUTHORIZATION PROGRAM AND SERVICE CONTRACTORS, SO AS TO DELETE PROVISIONS REGARDING CERTAIN TYPES OF IDENTIFICATIONS PREVIOUSLY ALLOWED FOR VERIFICATION OTHER THAN E-VERIFY AND TO MAKE TECHNICAL CHANGES; TO AMEND SECTION 16-9-460, RELATING TO AIDING ILLEGAL ENTRY OR HARBORING AN UNLAWFUL ALIEN, SO AS TO INCLUDE IN THE PURVIEW OF THE STATUTE THE PERSON WHO ENTERED THE COUNTRY, REMAINED, OR SHELTERED THEMSELVES FROM DETECTION ILLEGALLY; BY ADDING SECTION 16-17-750 SO AS TO CREATE THE OFFENSE OF FAILURE TO CARRY A CERTIFICATE OF ALIEN REGISTRATION ISSUED TO THE PERSON AND TO PROVIDE A PENALTY; BY ADDING SECTION 17-13-170 SO AS TO REQUIRE LAW ENFORCEMENT UNDER CERTAIN CIRCUMSTANCES AND WITH REASONABLE SUSPICION TO DETERMINE WHETHER A PERSON IS LAWFULLY PRESENT IN THE UNITED STATES, TO DELINEATE INFORMATION THAT MAY BE PROVIDED TO PRESUME THE PERSON IS LEGALLY PRESENT IN THE UNITED STATES, TO PROVIDE FOR THE OFFENSE OF PROVIDING FALSE INFORMATION AND TO PROVIDE PENALTIES, TO PROVIDE PROCEDURES FOR VERIFICATION OF STATUS AND EXCEPTIONS, AND TO PROVIDE FOR THE COLLECTION OF DATA ON MOTOR VEHICLES STOPPED WITHOUT A CITATION ISSUED; TO AMEND SECTION 23-3-1100, RELATING TO THE VERIFICATION OF THE STATUS OF PRISONERS, NOTIFICATION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, AND HOUSING AND MAINTENANCE EXPENSES, SO AS TO PROVIDE FOR TRANSPORTATION OF A PRISONER WHO IS AN ALIEN UNLAWFULLY PRESENT IN THE UNITED STATES TO A FEDERAL FACILITY OR OTHER FORM OF FEDERAL CUSTODY AND FOR NOTIFICATION TO THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TO AMEND SECTION 41-8-10, RELATING TO DEFINITIONS FOR PURPOSES OF ILLEGAL ALIENS AND PRIVATE EMPLOYMENT, SO AS TO REDEFINE THE TERMS "LICENSE" AND "PRIVATE EMPLOYER" AND DEFINE THE TERM "UNAUTHORIZED ALIEN"; TO AMEND SECTION 41-8-20, RELATING TO THE REQUIREMENTS OF COMPLETION AND MAINTENANCE OF FEDERAL EMPLOYMENT ELIGIBILITY VERIFICATION FORMS OR E-VERIFY, SO AS TO REQUIRE AUTHORIZATION OF EVERY NEW EMPLOYEE WITHIN THREE, RATHER THAN FIVE, DAYS AND REQUIRE CONTRACTORS TO MAINTAIN CONTACT PHONE NUMBERS OF ALL SUBCONTRACTORS AND SUB-SUBCONTRACTORS PERFORMING SERVICES FOR THE CONTRACTOR AND PROVIDE THIS INFORMATION UPON REQUEST; TO AMEND SECTION 41-8-30, RELATING TO EMPLOYMENT OF UNAUTHORIZED ALIENS, SO AS TO PROVIDE THAT A PRIVATE EMPLOYER VIOLATES THE PRIVATE EMPLOYER LICENSE IF HE KNOWINGLY AND INTENTIONALLY EMPLOYS AN UNAUTHORIZED ALIEN; TO AMEND SECTION 41-8-40, RELATING TO A PRIVATE EMPLOYER'S PRESUMPTION OF COMPLIANCE WITH THE LAW, SO AS TO MAKE TECHNICAL CHANGES; TO AMEND SECTION 41-8-50, RELATING TO PENALTIES FOR FAILING TO COMPLY WITH E-VERIFY REQUIREMENTS, SO AS TO ALLOW ACTION AGAINST A PRIVATE EMPLOYER TO BE BROUGHT AFTER A RANDOM AUDIT OR AN INSPECTION REGARDING AN EMPLOYEE WHO HAS BEEN EMPLOYED THREE, RATHER THAN FIVE, DAYS AND TO PROVIDE FURTHER PROCEDURES FOR A PRIVATE EMPLOYER'S COMPLIANCE, TO PROVIDE FOR SUSPENSION AND REVOCATION OF THE PRIVATE EMPLOYER'S LICENSE UNDER CERTAIN CIRCUMSTANCES, AND TO MAKE CONFORMING CHANGES; TO AMEND SECTIONS 41-8-60, RELATING TO ACTIONS TO COLLECT CIVIL PENALTIES AGAINST A PRIVATE EMPLOYER, AND 41-8-120, RELATING TO THE PROMULGATION OF REGULATIONS AND STATEWIDE RANDOM AUDITS, BOTH SO AS TO DELETE REFERENCES TO CIVIL PENALTIES AND MAKE

CONFORMING CHANGES REGARDING DISCIPLINARY ACTION AGAINST A PRIVATE EMPLOYER; BY ADDING SECTION 16-13-480 SO AS TO CREATE THE OFFENSE OF PROVIDING A FALSE PICTURE IDENTIFICATION FOR USE BY AN ALIEN UNLAWFULLY PRESENT IN THE UNITED STATES AND TO PROVIDE A PENALTY; TO REPEAL SECTION 23-3-80 RELATING TO THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION'S AUTHORIZATION TO NEGOTIATE A MEMORANDUM OF UNDERSTANDING WITH THE UNITED STATES DEPARTMENT OF JUSTICE OR THE DEPARTMENT OF HOMELAND SECURITY REGARDING UNLAWFUL ALIENS; AND BY ADDING SECTION 23-6-60 SO AS TO CREATE THE ILLEGAL IMMIGRATION ENFORCEMENT UNIT WITHIN THE DEPARTMENT OF PUBLIC SAFETY, TO PROVIDE FOR ITS ADMINISTRATION AND DUTIES, AND TO REQUIRE A MEMORANDUM OF AGREEMENT WITH UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT.

Be it enacted by the General Assembly of the State of South Carolina:

Civil actions to enforce laws relating to immigration

SECTION 1. Section 6-1-170 of the 1976 Code, as added by Act 280 of 2008, is amended by adding subsection (E) to read:

"(E)(1)Notwithstanding any other provision of law, a resident of a political subdivision in this State may bring a civil action in the circuit court in which the resident and political subdivision are located to enjoin:

(a) an enactment by the political subdivision of any ordinance or policy that intentionally limits or prohibits a law enforcement officer, local official, or local government employee from seeking to enforce a state law with regard to immigration;

(b) an enactment by the political subdivision of any ordinance or policy that intentionally limits or prohibits a law enforcement officer, local official, or local government employee from communicating to appropriate federal or state officials regarding the immigration status of a person within this State; or

(c) an enactment by the political subdivision of any ordinance, policy, regulation, or other legislation pertaining to the employment, licensing, permitting, or otherwise doing business with a person based upon that person's authorization to work in the United States, which intentionally exceeds or conflicts with federal law or that intentionally conflicts with state law.

(2) A person who is not a resident of the political subdivision may not bring an action against the political subdivision pursuant to this subsection. The action must be brought against the political subdivision and not against an employee of the political subdivision acting in the employee's individual capacity.

(3) If the court finds that the political subdivision has intentionally violated this section, the court shall enjoin the enactment, action, policy, or practice, and may enter a judgment against the political subdivision of not less than one thousand dollars nor more than five thousand dollars for each day that the enactment, action, policy, or practice remains or remained in effect. The proceeds from any such judgment must be used to reimburse the resident's reasonable attorney's fees. Any remaining proceeds must be used to cover the administrative costs of implementing, investigating, and enforcing the provisions of Chapter 8, Title 41."

Definitions, unauthorized aliens and public employment

SECTION 2. Section 8-14-10(9) of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"(9) 'Private employer' means any:

(a) person or entity that transacts business in this State, is required to have a license issued by an agency, department, board, commission, or political subdivision of this State that issues licenses for the purposes of operating a business in this State, and employs one or more employees in this State, as defined in Section 12-8-10;

(b) person or entity carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person; or

(c) person or entity for whom an individual performs a service or sells a good, of whatever nature, as an employee, as defined in Section 12-8-10."

Federal Work Authorization Program, verification of workers' status, deletion of certain forms of identification rather than E-Verify

SECTION 3. Section 8-14-20 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 8-14-20. (A) Every public employer shall register and participate in the federal work authorization program to verify the employment authorization of all new employees.

(B) A public employer may not enter into a services contract with a contractor for the physical performance of services within this State unless the contractor agrees to register and participate in the federal work authorization program to verify the employment authorization of all new employees and require agreement from its subcontractors, and through the subcontractors, the sub-subcontractors, to register and participate in the federal work authorization program to verify the employment authorization of all new employees.

(C) Private employers shall comply with the provisions of Chapter 8, Title 41."

Unlawful entry into the United States, unlawful immigration status, penalties

SECTION 4. Section 16-9-460 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 16-9-460. (A) It is a felony for a person who has come to, entered, or remained in the United States in violation of law to allow themselves to be transported, moved, or attempted to be transported within the State or to solicit or conspire to be transported or moved within the State with intent to further the person's unlawful entry into the United States or avoiding apprehension or detection of the person's unlawful immigration status by state or federal authorities.

(B) It is a felony for a person knowingly or in reckless disregard of the fact that another person has come to, entered, or remained in the United States in violation of law to transport, move, or attempt to transport that person within the State or to solicit or conspire to transport or move that person within the State with intent to further that person's unlawful entry into the United States or avoiding apprehension or detection of that person's unlawful immigration status by state or federal authorities.

(C) It is a felony for a person who has come to, entered, or remained in the United States in violation of law to conceal, harbor, or shelter themselves from detection or to solicit or conspire to conceal, harbor, or shelter themselves from detection in any place, including a building or means of transportation, with intent to further that person's unlawful entry into the United States or avoiding apprehension or detection of the person's unlawful immigration status by state or federal authorities.

(D) It is a felony for a person knowingly or in reckless disregard of the fact that another person has come to, entered, or remained in the United States in violation of law to conceal, harbor, or shelter from detection or to solicit or conspire to conceal, harbor, or shelter from detection that person in any place, including a building or means of transportation, with intent to further that person's unlawful entry into the United States or avoiding apprehension or detection of that person's unlawful immigration status by state or federal authorities.

(E) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be punished by a fine not to exceed five thousand dollars or by imprisonment for a term not to exceed five years, or both.

(F) A person who is convicted of, pleads guilty to, or enters into a plea of nolo contendere to a violation of this section must not be permitted to seek or obtain any professional license offered by the State or any agency or political subdivision of the State.

(G) This section does not apply to programs, services, or assistance including soup kitchens, crisis counseling, and intervention; churches or other religious institutions that are recognized as 501(c)(3) organizations by the Internal Revenue Service; or short-term shelters specified by the United States Attorney General, in the United States Attorney General's sole discretion after consultation with appropriate federal agencies and departments, which:

(i) deliver in-kind services at the community level, including through public or private nonprofit agencies;

(ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and

(iii) are necessary for the protection of life or safety.

Shelter provided for strictly humanitarian purposes or provided under the Violence Against Women Act is not a violation of this section, so long as the shelter is not provided in furtherance of or in an attempt to conceal a person's illegal presence in the United States.

(H) Providing health care treatment or services to a natural person who is in the United States unlawfully is not a violation of this section."

Failure to carry a certificate of alien registration, penalty

SECTION 5. Article 7, Chapter 17, Title 16 of the 1976 Code is amended by adding:

"Section 16-17-750. (A) It is unlawful for a person eighteen years of age or older to fail to carry in the person's personal possession any certificate of alien registration or alien registration receipt card issued to the person pursuant to 8 U.S.C. Section 1304 while the person is in this State.

(B) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or imprisoned for not more than thirty days, or both."

Law enforcement authorization to determine immigration status, reasonable suspicion, procedures, data collection on motor vehicle stops

SECTION 6. Article 1, Chapter 13, Title 17 of the 1976 Code is amended by adding:

"Section 17-13-170. (A) If a law enforcement officer of this State or a political subdivision of this State lawfully stops, detains, investigates, or arrests a person for a criminal offense, and during the commission of the stop, detention, investigation, or arrest the officer has reasonable suspicion to believe that the person is unlawfully present in the United States, the officer shall make a reasonable effort, when practicable, to determine whether the person is lawfully present in the United States, unless the determination would hinder or obstruct an investigation.

(B)(1) If the person provides the officer with a valid form of any of the following picture identifications, the person is presumed to be lawfully present in the United States:

(a) a driver's license or picture identification issued by the South Carolina Department of Motor Vehicles;

(b) a driver's license or picture identification issued by another state;

(c) a picture identification issued by the United States, including a passport or military identification; or

(d) a tribal picture identification.

(2) It is unlawful for a person to display, cause or permit to be displayed, or have in the person's possession a false, fictitious, fraudulent, or counterfeit picture identification for the purpose of offering proof of the person's lawful presence in the United States. A person who violates the provisions of this item:

(a) for a first offense, is guilty of a misdemeanor, and, upon conviction, must be fined not more than one hundred dollars or imprisoned not more than thirty days; and

(b) for a second offense or subsequent offenses, is guilty of a felony, and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than five years.

(3) If the person cannot provide the law enforcement officer with any of the forms of picture identification listed in this subsection, the person may still be presumed to be lawfully present in the United States, if the officer is able to otherwise verify that the person has been issued any of those forms of picture identification.

(4) If the person is operating a motor vehicle on a public highway of this State without a driver's license in violation of Section 56-1-20, the person may be arrested pursuant to Section 56-1-440.

(5) If the person meets the presumption established pursuant to this subsection, the officer may not further stop, detain, investigate, or arrest the person based solely on the person's lawful presence in the United States.

(6) This section does not apply to a law enforcement officer who is acting as a school resource officer for any elementary or secondary school.

(C)(1) If the person does not meet the presumption established pursuant to subsection (B), the officer shall make a reasonable effort, when practicable, to verify the person's lawful presence in the United States by at least one of the following methods:

(a) contacting the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety;

(b) submitting an Immigration Alien Query through the International Justice and Public Safety Network;

(c) contacting the United States Immigration and Customs Enforcement's Law Enforcement Support Center; or

(d) contacting the United States Immigration and Customs Enforcement's local field office.

(2) The officer shall stop, detain, or investigate the person only for a reasonable amount of time as allowed by law. If, after making a reasonable effort, the officer is unable to verify the person's lawful presence in the United States by one of the methods described in item (1), the officer may not further stop, detain, investigate, or arrest the person based solely on the person's lawful presence in the United States.

(3) If the officer verifies that the person is lawfully present in the United States, the officer may not further stop, detain, investigate, or arrest the person based solely on the person's lawful presence in the United States.

(4) If the officer determines that the person is unlawfully present in the United States, the officer shall determine in cooperation with the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety or the United States Immigration and Customs Enforcement, as applicable, whether the officer shall retain custody of the person for the underlying criminal offense for which the person was stopped, detained, investigated, or arrested, or whether the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety or the United States Immigration and Customs Enforcement, as applicable, shall assume custody of the person. The officer is not required by this section to retain custody of the person based solely on the person's lawful presence in the United States. The officer may securely transport the person to a federal facility in this State or to any other point of transfer into federal custody that is outside of the officer's jurisdiction. The officer shall obtain judicial authorization before securely transporting a person to a point of transfer that is outside of this State.

(D) Nothing in this section must be construed to require a law enforcement officer to stop, detain, investigate, arrest, or confine a person based solely on the person's lawful presence in the United States.

A law enforcement officer may not attempt to make an independent judgment of a person's lawful presence in the United States. A law enforcement officer may not consider race, color, or national origin in implementing this section, except to the extent permitted by the United States or South Carolina Constitution. This section must be implemented in a manner that is consistent with federal laws regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of United States citizens.

(E) Except as provided by federal law, officers and agencies of this State and political subdivisions of this State may not be prohibited or restricted from sending, receiving, or maintaining information related to the immigration status of any person or exchanging that information with other federal, state, or local government entities for the following purposes:

(1) determining eligibility for any public benefit, service, or license provided by the federal government, this State, or a political subdivision of this State;

(2) verifying any claim of residence or domicile, if determination of residence or domicile is required under the laws of this State or a judicial order issued pursuant to a civil or criminal proceeding in this State;

(3) determining whether an alien is in compliance with the federal registration laws prescribed by Chapter 7, Title II of the federal Immigration and Nationality Act; or

(4) pursuant to 8 U.S.C. Section 1373 and 8 U.S.C. Section 1644.

(F) Nothing in this section must be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release. However, pursuant to the provisions of Section 17-15-30, a court setting bond shall consider whether the person charged is an alien unlawfully present in the United States.

(G) No official, agency, or political subdivision of this State may limit or restrict the enforcement of this section or federal immigration laws.

(H) This section does not implement, authorize, or establish, and shall not be construed to implement, authorize, or establish the federal Real ID Act of 2005.

(I) Any time a motor vehicle is stopped by a state or local law enforcement officer without a citation being issued or an arrest being made, and the officer contacts the Illegal Immigration Enforcement Unit within the Department of Public Safety pursuant to this section, the officer who initiated the stop must complete a data collection form designed by the Department of Public Safety, which must include information regarding the age, gender, and race or ethnicity of the driver of the vehicle. This information may be gathered and transmitted electronically under the supervision of the Department of Public Safety, which shall develop and maintain a database storing the information collected. The Department of Public Safety must promulgate regulations with regard to the collection and submission of the information gathered. In addition, the Department of Public Safety shall prepare a report to be posted on the Department of Public Safety's website regarding motor vehicle stops using the collected information. The General Assembly shall have the authority to withhold any state funds or federal pass-through funds from any state or local law enforcement agency that fails to comply with the requirements of this subsection."

Verification of immigration status of prisoners, transport to federal facility or custody

SECTION 7. Section 23-3-1100 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 23-3-1100. (A) If a person is charged with a criminal offense and is confined for any period in a jail of the State, county, or municipality, or a jail operated by a regional jail authority, a reasonable effort shall be made to determine whether the confined person is an alien unlawfully present in the United States.

(B) If the prisoner is an alien, the keeper of the jail or other officer must make a reasonable effort to verify whether the prisoner has been lawfully admitted to the United States or if the prisoner is unlawfully present in the United States. Verification must be made within seventy-two hours through a query to the

Law Enforcement Support Center (LESC) of the United States Department of Homeland Security or other office or agency designated for that purpose by the United States Department of Homeland Security. If the prisoner is determined to be an alien unlawfully present in the United States, the keeper of the jail or other officer shall notify the United States Department of Homeland Security.

(C) Upon notification to the United States Department of Homeland Security pursuant to subsection (B), the keeper of the jail must account for daily expenses incurred for the housing, maintenance, transportation, and care of the prisoner who is an alien unlawfully present in the United States and must forward an invoice to the Department of Homeland Security for these expenses.

(D) The keeper of the jail or other officer may securely transport the prisoner who is an alien unlawfully present in the United States to a federal facility in this State or to any other point of transfer into federal custody that is outside of the keeper of the jail or other officer's jurisdiction. The keeper of the jail or other officer shall obtain judicial authorization before securely transporting a prisoner who is unlawfully present in the United States to a point of transfer that is outside of this State.

(E) If a prisoner who is an alien unlawfully present in the United States completes the prisoner's sentence of incarceration, the keeper of the jail or other officer shall notify the United States Department of Homeland Security and shall securely transport the prisoner to a federal facility in this State or to any other point of transfer into federal custody that is outside of the keeper of the jail or other officer's jurisdiction. The keeper of the jail or other officer shall obtain judicial authorization before securely transporting a prisoner who is unlawfully present in the United States to a point of transfer that is outside of this State.

(F) Nothing in this section shall be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release. However, pursuant to the provisions of Section 17-15-30, a court setting bond shall consider whether the person charged is an alien unlawfully present in the United States.

(G) The State Law Enforcement Division shall promulgate regulations to comply with the provisions of this section in accordance with the provisions of Chapter 23, Title 1.

(H) In enforcing the terms of this section, no state officer shall attempt to make an independent judgment of an alien's immigration status. State officials must verify an alien's status with the federal government in accordance with 8 U.S.C. Section 1373(c)."

Definitions, illegal aliens and private employer

SECTION 8. Section 41-8-10 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 41-8-10. As used in this chapter:

(A) 'Agency' means any agency, department, board, commission, or political subdivision of this State that issues licenses for the purposes of operating a business in this State.

(B) 'Director' means the Director of the Department of Labor, Licensing and Regulation or the director's designee.

(C) 'License' means an agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency or political subdivision of this State for the purpose of operating a business in this State, excluding professional licenses, but including employment licenses, articles of organization, articles of incorporation, a certificate of partnership, a partnership registration, a certificate to transact business, or similar forms of authorization issued by the South Carolina Secretary of State, and any transaction privilege tax license.

(D) 'Political subdivision' includes counties, cities, towns, villages, townships, districts, authorities, and other public corporations and entities whether organized and existing under charter or general law.

(E) 'Private employer' means any:

(1) person or entity that transacts business in this State, is required to have a license issued by an agency, department, board, commission, or political subdivision of this State that issues licenses for the

purposes of operating a business in this State, and employs one or more employees in this State, as defined in Section 12-8-10;

(2) person or entity carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person; or

(3) person or entity for whom an individual performs a service or sells a good, of whatever nature, as an employee, as defined in Section 12-8-10.

(F) 'Unauthorized alien' means an unauthorized alien as defined by 8 U.S.C. Section 1324a(h)(3)."

Federal Work Authorization Program, requirements for verification of new employees, contact information to be maintained

SECTION 9. Section 41-8-20 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 41-8-20. (A) All private employers in South Carolina shall be imputed a South Carolina employment license, which permits a private employer to employ a person in this State. A private employer may not employ a person unless the private employer's South Carolina employment license and any other applicable licenses as defined in Section 41-8-10 are in effect and are not suspended or revoked. A private employer's employment license shall remain in effect provided the private employer complies with the provisions of this chapter.

(B) All private employers who are required by federal law to complete and maintain federal employment eligibility verification forms or documents must register and participate in the E-Verify federal work authorization program, or its successor, to verify the work authorization of every new employee within three business days after employing a new employee. A private employer who does not comply with the requirements of this subsection violates the private employer's licenses.

(C) The South Carolina Department of Employment and Workforce shall provide private employers with technical advice and electronic access to the E-Verify federal work authorization program's website for the sole purpose of registering and participating in the program.

(D) Private employers shall employ provisionally a new employee until the new employee's work authorization has been verified pursuant to this section. A private employer shall submit a new employee's name and information for verification even if the new employee's employment is terminated less than three business days after becoming employed. If a new employee's work authorization is not verified by the federal work authorization program, a private employer must not employ, continue to employ, or reemploy the new employee.

(E) To assist private employers in understanding the requirements of this chapter, the director shall send written notice of the requirements of this section to all South Carolina employers, and shall publish the information contained in the notice on its website. Nothing in this section shall create a legal requirement that any private employer receive actual notice of the requirements of this chapter through written notice from the director, nor create any legal defense for failure to receive notice.

(F) If a private employer is a contractor, the private employer shall maintain the contact phone numbers of all subcontractors and sub-subcontractors performing services for the private employer. The private employer shall provide the contact phone numbers or a contact phone number, as applicable, to the director pursuant to an audit or investigation within seventy-two hours of the director's request."

Employment of unauthorized aliens, private employer license violation

SECTION 10. Section 41-8-30 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 41-8-30. A private employer who knowingly or intentionally employs an unauthorized alien violates the private employer's licenses."

Verification of immigration status of new employees, technical changes

SECTION 11. Section 41-8-40 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 41-8-40. For purposes of this chapter, a private employer who in good faith verifies the immigration status of a new employee pursuant to Section 41-8-20 must be presumed to have complied with the provisions of Section 41-8-20 and Section 41-8-30."

Violations regarding unauthorized aliens and E-Verify program, deletion of civil penalties, random audits and inspections, private employer compliance, suspension and revocation of licenses

SECTION 12. Section 41-8-50 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 41-8-50. (A) Upon receipt of a written and signed complaint against a private employer, or upon an investigation initiated by the director for good cause, if the director finds reasonable grounds exist that a private employer violated the provisions of Section 41-8-20 or Section 41-8-30, the director shall institute an investigation of the alleged violation. The director shall verify the work authorization status of the alleged unauthorized alien with the federal government pursuant to 8 U.S.C. Section 1373(c). A state, county, or local official must not attempt to independently determine if an alien is authorized to work in the United States.

(B) If, after completing the investigation, and after reviewing any information or evidence submitted by the private employer demonstrating compliance with the provisions of this chapter, the director determines that substantial evidence exists to support a finding that the private employer has committed a violation of Section 41-8-20 or Section 41-8-30, the director shall:

(1) notify the United States Immigration and Customs Enforcement of suspected unauthorized aliens employed by the private employer;

(2) notify state and local law enforcement agencies responsible for enforcing state immigration laws of the employment of suspected unauthorized aliens by the employer; and

(3) take appropriate action in accordance with subsection (D) of this section.

(C) The director must not bring an action against a private employer for any employee who has been employed for three business days or less at the time of the director's inspection or random audit. A second occurrence involving a violation of this section must be based only on an employee who is employed by the private employer after a first action has been brought for a violation of Section 41-8-20 or Section 41-8-30.

(D) Upon a finding of an occurrence involving a violation after an investigation pursuant to subsection (A), or after a random audit pursuant to Section 41-8-120(B), where the director considered all information or evidence gathered by the director and any information or evidence submitted by the private employer demonstrating compliance with the provisions of this chapter:

(1)(a) prior to July 1, 2012, for a first occurrence involving a violation of Section 41-8-20, the private employer shall, upon notification by the director of a violation of Section 41-8-20, swear or affirm in writing that the private employer has complied with the provisions of 8 U.S.C. Section 1324a from the effective date of this section to the time the private employer received notification from the director, and shall comply with the provisions of Section 41-8-20 within three business days. Failure to swear or affirm compliance in writing or failure to comply with Section 41-8-20 within three business days requires that the private employer be placed on probation for a period of one year, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Section 41-8-20. The director shall provide appropriate assistance to the private employer to aid the private employer in complying with Section 41-8-20 within the three business day period. The director may extend the three business day period, as necessary, if the director determines that more time is required for compliance. Any subsequent occurrence involving a violation of Section 41-8-20 by the private employer must result in the suspension of the private employer's licenses for at least ten days, but not more than thirty days, by the director, except, if a private employer has not committed a violation of

Section 41-8-20 within the previous three years, a subsequent occurrence must be treated as a first occurrence. If a private employer has ever committed a violation of Section 41-8-30, the private employer's licenses must be suspended for at least ten days but not more than thirty days for any violation or subsequent occurrence involving a violation of Section 41-8-20. The director shall verify the work authorization status of the employees with the federal government pursuant to 8 U.S.C. Section 1373(c) and notify the private employer of the results. The private employer shall immediately terminate an employee whose work authorization was not verified upon being notified by the director. The director shall notify federal, state, and local law enforcement officials of any suspected unauthorized aliens employed by the private employer;

(b) on or after July 1, 2012, for a first occurrence involving a violation of Section 41-8-20, the private employer shall, upon notification by the director of a violation of Section 41-8-20, immediately comply with the provisions of Section 41-8-20, and the private employer must be placed on probation for a period of one year, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Section 41-8-20. Any subsequent occurrence involving a violation of Section 41-8-20 by the private employer must result in the suspension of the private employer's licenses for at least ten days but not more than thirty days by the director, except, if a private employer has not committed a violation of Section 41-8-20 within the previous three years, a subsequent occurrence must be treated as a first occurrence. If a private employer has ever committed a violation of Section 41-8-30, the private employer's licenses must be suspended for at least ten days but not more than thirty days for any violation or subsequent occurrence involving a violation of Section 41-8-20. The director shall verify the work authorization status of the employees with the federal government pursuant to 8 U.S.C. Section 1373(c) and notify the private employer of the results. The private employer shall immediately terminate an employee whose work authorization was not verified upon being notified by the director. The director shall notify federal, state, and local law enforcement officials of any suspected unauthorized aliens employed by the private employer;

(2) for a first occurrence involving a violation of Section 41-8-30, the private employer's licenses must be suspended, and must remain suspended for at least ten days but not more than thirty days. During the period of suspension, the private employer may not engage in business, open to the public, employ an employee, or otherwise operate. After the period of suspension, the private employer's licenses must be reinstated, permitting the private employer to engage in business and to employ an employee, if the private employer:

(a) demonstrates that the private employer has terminated the unauthorized alien; and

(b) pays a reinstatement fee equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars;

(3) for a second occurrence involving a violation of Section 41-8-30, the private employer's licenses must be suspended, and must remain suspended for at least thirty days but not more than sixty days. During the period of suspension, the private employer may not engage in business, open to the public, employ an employee, or otherwise operate. After the period of suspension, the private employer's licenses must be reinstated, permitting the private employer to engage in business, open to the public, employ an employee, and otherwise operate, if the private employer:

(a) demonstrates that the private employer has terminated the unauthorized alien; and

(b) pays a reinstatement fee equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars;

(4) for a third or subsequent occurrence involving a violation of Section 41-8-30, the private employer's licenses must be revoked, and the private employer may not engage in business, open to the public, employ an employee, or otherwise operate. For a third occurrence only, after ninety days, a private employer may petition the director for a provisional license. A provisional license permits a private employer to engage in business, open to the public, employ an employee, and otherwise operate. The director may grant the private employer permission to apply for a provisional license if the private employer:

(a) agrees to be on probation for a period of three years, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Sections 41-8-20 and 41-8-30;

(b) demonstrates that the private employer has terminated the unauthorized alien; and

(c) pays a reinstatement fee equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars.

For all other occurrences where a private employer's licenses are revoked, the private employer may not seek reinstatement of the private employer's licenses for a period of five years. After five years, the director may grant reinstatement of a private employer's licenses if the private employer:

(a) agrees to be on probation for a period of three years, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Sections 41-8-20 and 41-8-30;

(b) demonstrates that the private employer has terminated the unauthorized alien; and

(c) pays a reinstatement fee equal to the cost of investigating and adjudicating the matter, provided that the reinstatement fee must not exceed one thousand dollars.

(5) If a private employer engages in business or employs a new employee during the period that the private employer's licenses are suspended, the private employer's licenses must be revoked, and must not be reinstated for a period of five years, and only upon a determination by the director that the private employer has complied with the provisions of item (4) of this subsection.

(E) For purposes of this chapter, it shall be a separate violation each time the private employer fails to verify the immigration status of a new employee as required by Section 41-8-20.

(F) In taking any disciplinary action for a violation of Section 41-8-20 or Section 41-8-30, the director shall base the director's determination on any evidence or information collected during the investigation or submitted for consideration by the employer, and shall consider the following factors, if relevant:

(1) the number of employees for whom the private employer has failed to verify their immigration status;

(2) the prior violations of this chapter by the private employer;

(3) the size of the private employer's workforce;

(4) any actions taken by the private employer to comply with federal immigration laws or with the provisions of this chapter;

(5) any actions taken by the private employer subsequent to the inspection or random audit to comply with the provisions of this chapter;

(6) the duration of the violation;

(7) the degree of the violation; and

(8) the good faith of the private employer.

(G) Reinstatement fees assessed in accordance with this section must be used to cover the administrative costs of implementing, investigating, and enforcing the provisions of this chapter.

(H) The director shall maintain a list of all private employers who have had their licenses disciplined pursuant to this chapter and shall publish the list on the agency's website. The director shall remove a private employer from the list who has committed only a first occurrence pursuant to Section 41-8-20 six months after the private employer's name has been published, if the private employer has not subsequently had their licenses disciplined pursuant to this chapter within the one year probation period.

(I) If a private employer continues to engage in business after the private employer's licenses have been revoked pursuant to this chapter, the director must seek an injunction from the Administrative Law Court to enjoin the private employer from continuing to operate the private employer's business for which the private employer's licenses were revoked or from employing new employees.

(J) The director shall notify the applicable licensing agency or political subdivision if the director determines that a private employer's license must be suspended or revoked pursuant to this section. The applicable agency or political subdivision immediately shall suspend or revoke the private employer's license.

(K) A license suspension or revocation pursuant to this section:

(1) does not constitute a dissolution, liquidation, or a winding down process; or a transfer, or other taxable event for tax purposes, including, but not limited to, taxes imposed or authorized by Title 12; and

(2) does not affect protections against personal liability provided in Title 33."

Civil penalties against private employers deleted, conforming changes

SECTION 13. Section 41-8-60 of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"Section 41-8-60. A private employer may seek review of the director's disciplinary action pursuant to Section 41-8-50 with the Administrative Law Court, and the action must be brought in accordance with the provisions of Chapter 23, Title 1."

Civil penalties against private employers deleted, conforming changes

SECTION 14. Section 41-8-120(A) of the 1976 Code, as added by Act 280 of 2008, is amended to read:

"(A) The director shall promulgate regulations in accordance with the provisions of Chapter 23, Title 1 to establish a procedure for administrative review of any disciplinary action against a private employer pursuant to this chapter."

Providing false identifications for use by unlawful aliens, penalty

SECTION 15. Article 1, Chapter 13, Title 16 of the 1976 Code is amended by adding:

"Section 16-13-480. Unless otherwise provided by law, it is unlawful for a person to make, issue, or sell, or offer to make, issue, or sell, a false, fictitious, fraudulent, or counterfeit picture identification that is for use by an alien who is unlawfully present in the United States. A person who violates this section is guilty of a felony, and, upon conviction, must be fined twenty-five thousand dollars or imprisoned for not more than five years, or both."

Repeal

SECTION 16. Section 23-3-80 of the 1976 Code is repealed.

Illegal Immigration Enforcement Unit within Department of Public Safety, creation, duties

SECTION 17. Article 1, Chapter 6, Title 23 of the 1976 Code is amended by adding:

"Section 23-6-60. (A) There is created an Illegal Immigration Enforcement Unit within the Department of Public Safety. The purpose of the Illegal Immigration Enforcement Unit is to enforce immigration laws as authorized pursuant to federal laws and the laws of this State.

(B) The Illegal Immigration Enforcement Unit is under the administrative direction of the department's director. The department's director shall maintain and provide administrative support for the Illegal Immigration Enforcement Unit. The department's director may appoint appropriate personnel within the department to administer and oversee the operations of the Illegal Immigration Enforcement Unit.

(C)(1) The Illegal Immigration Enforcement Unit shall have such officers, agents, and employees as the department's director may deem necessary and proper for the enforcement of immigration laws as authorized pursuant to federal laws and the laws of this State.

(2)(a) The enforcement of immigration laws as authorized pursuant to federal laws and the laws of this State must be the only responsibility of the officers of the Illegal Immigration Enforcement Unit.

(b) The officers shall be commissioned by the Governor upon the recommendation of the department's director.

(c) The officers shall have the same power to serve criminal prossesses against offenders as sheriffs of the various counties and also the same power as those sheriffs to arrest without warrants and to detain persons found violating or attempting to violate immigration laws. The officers also shall have the same power and authority held by deputy sheriffs for the enforcement of the criminal laws of the State.

(d) The department must provide the officers with distinctive uniforms and suitable arms and equipment for use in the performance of their duties. The officers shall at all times, when in the performance of their duties, wear complete uniforms with badges conspicuously displayed on the outside of their uniforms, except officers performing undercover duties. The department director shall prescribe a unique and distinctive official uniform with appropriate insignia to be worn by all officers when on duty and at other times as the department's director shall order, and a distinctive color or colors and appropriate emblems for all motor vehicles used by the Illegal Immigration Enforcement Unit except those designated by the director. No other law enforcement agency, private security agency, or any person shall wear a similar uniform and insignia that could be confused with the uniform and insignia of the Illegal Immigration Enforcement Unit. An emblem may not be used on a nondepartment motor vehicle, nor may the vehicle be painted in a color or in any manner that would cause the vehicle to be similar to an Illegal Immigration Enforcement Unit vehicle or readily confused with it. The department's director shall file with the Legislative Council for publication in the State Register a description and illustration of the official Illegal Immigration Enforcement Unit uniform with insignia and the emblems of the official Illegal Immigration Enforcement Unit and motor vehicles including a description of the color of the uniforms and vehicles.

(D) Notwithstanding any other provision of law, the Illegal Immigration Enforcement Unit must be funded annually by a specific appropriation to the Illegal Immigration Enforcement Unit in the state general appropriations act, separate and distinct from the department's other appropriations.

(E) The department's director shall negotiate the terms of a memorandum of agreement with the United States Immigration and Customs Enforcement pursuant to Section 287(g) of the federal Immigration and Nationality Act as soon as possible after the effective date of this act.

(F) Nothing in this section may be construed to prevent other law enforcement agencies of the State and political subdivisions of the State, including local law enforcement agencies, from enforcing immigration laws as authorized pursuant to federal laws and the laws of this State.

(G) The department shall develop an illegal immigration enforcement training program which the department shall offer to all local law enforcement agencies to assist any local law enforcement agency wishing to utilize the training program in the proper implementation, management, and enforcement of applicable immigration laws."

Savings clause

SECTION 18. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Severability clause

SECTION 19. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 20. SECTION 17 of this act takes effect upon funding of the Illegal Immigration Enforcement Unit by the General Assembly pursuant to Section 23-6-60(D) and upon granting of Section 287(g) of the federal Immigration and Nationality Act authority to the Department of Public Safety pursuant to Section 23-6-60(E). The remaining provisions of this act take effect on January 1, 2012.

Ratified the 22nd day of June, 2011.

Approved the 27th day of June, 2011.