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Changes to Arizona's Law Against the Employment of Unauthorized Aliens

By Steven D. Leach and Barry H. Uhrman

On May 1, 2008, Governor Janet Napolitano approved a series of changes to the Legal Arizona Workers Act ("the Act"), the state's law that prohibits the knowing or intentional employment of unauthorized aliens, to address shortcomings with the controversial employer-sanctions law that took effect January 1, 2008. These recent amendments clarify some questions raised when the Act was first adopted, while also providing "safe harbors" to Arizona employers where good faith attempts to comply with the Act can insulate employers from liability.

The following is a brief outline of the primary amendments. Jones, Skelton & Hochuli's Employment Law Practice Group will be scheduling a seminar in the near future to provide employers further education on these changes and to discuss compliance strategies for the law in its current form.

The Amended Act Does Not Apply to Existing Employees

The amended Act clears up uncertainty over whether the Act was intended to apply to existing employees hired before the Act's January 1, 2008 effective date. The amended Act makes it clear that the Act only applies to employees hired after December 31, 2007. Employers cannot be held liable for the knowing or intentional employment of employees hired prior to that date.

Distinguishing Between Independent Contractors and Employees

Independent contractors are not considered "employees" for purposes of the Act. However, the Act defines the independent contractor relationship to ensure that only legitimate independent contractors fit within this exception. In other words, if the relationship is not found to be a legitimate independent contractor relationship, the workers in question may be considered employees for the purposes of the Act.

In addition, if an employer contracts to obtain labor and knows that the laborer is unauthorized, or if an employer contracts with an independent contractor to obtain labor and the employer knows the independent contractor hires unauthorized workers, the employer violates the Act.

License Suspension and Revocation

The license suspension and revocation provisions are now less severe than those set forth in the original Act. The amended Act now provides that the licenses susceptible to suspension and revocation are only those held by the location where the unauthorized employee worked. If the employer does not have a business license for that specific location, however, the suspension will apply to the employer's primary place of business in Arizona.

The same change applies for the probation periods imposed on employers who knowingly or intentionally employ an unauthorized worker - three years probation for knowing violations and five years probation for intentional violations. The amended Act clarifies that the probationary period applies to the specific business location where the unauthorized worker was employed. Accordingly, if an employer has two business locations (A and B), a violation at location A will not impose a probation on location B. If the employer is later found, during the probationary period for location A, to

have violated the Act through an employee at location B, the violation will be considered a first violation for location B, and have no effect on the probation at location A.

Issues of Race, Color, and National Origin Discrimination

Under the original provisions of the Act, an employer was not required to take action under the Act if the employer, in good faith, believed that such action would violate federal or state laws prohibiting employment based on national origin discrimination. This put employers in a difficult position. If an employer had a reasonable basis to believe an employee is an unauthorized alien, the employer was required by the Act to terminate the employee or face possible prosecution. However, if the employer terminated the employee, and it was later determined that the employee was authorized to work, the employer could have faced liability for national origin discrimination.

In response to concerns regarding discrimination, the amended Act provides that neither the Attorney General nor the County Attorneys may investigate complaints based solely on race, color, or national origin. Employers should therefore use immigration policies to reinforce that it is illegal to discriminate on the basis of race, national origin, and other statutorily-protected categories.

Criminal Liability

Human Resources departments beware; the amended Act provides for criminal liability (a Class 4 felony) for knowingly accepting false identification documents from an applicant and using those documents to verify a person's legal work status.

Government Contractors

Governmental entities must ensure that contractors or subcontractors comply with the requirements of the Act. Government contractors must comply with the federal Employment Eligibility Verification Program ("E-Verify") (https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES) and all federal immigration laws.

Voluntary Enhanced Employer Compliance Program

The amended Act also creates a Voluntary Enhanced Employer Compliance Program. This voluntary program provides employers a "safe harbor" from liability under the Act. To participate in this program, an employer must submit a sworn affidavit to the Attorney General that the employer agrees to perform all of the following actions in good faith:

- After hiring an employee, the employer must verify employment eligibility through E-Verify.
- Verify an employee's Social Security Number through the Social Security Number Verification Service for any employee who is not verified through E-Verify. This seemingly applies to all employees, including those employed as of January 1, 2008. Compliance with this component of the program will require employers to verify Social Security Numbers on all of its employees.
- Within thirty days after enrolling in the Voluntary Enhanced Employer Compliance Program, an employer must submit the full name, the social security number, the date of birth and the gender of each employee to the Social Security Number Verification Service.
- On receipt of a failed verification result, the employer shall notify the employee and instruct the employee to resolve the discrepancy with the Social Security Administration ("SSA") within ninety days. If the failed result is not resolved within the ninety-day period, but the employer and employee are continuing to actively and consistently work toward resolving the failed result with the SSA, the ninety-day period does not apply as long as the employer and employee have documented proof of these ongoing efforts to resolve the failed result in good faith and have provided the documented proof to the Attorney General.
- Verify the accuracy of the social security numbers and resolve any failed verification results in a consistent manner for all employees.

- In response to a written request by the Attorney General or County Attorney regarding a complaint, provide the documents demonstrating that the employee was verified through E-Verify or that the accuracy of the employee's wage report was verified through the Social Security Number Verification Service.

An employer who participates in the Voluntary Enhanced Employer Compliance Program does not violate the Act if the employer verified employment eligibility for its employees through E-Verify or through the Social Security Number Verification Service and provided the Attorney General or County Attorney with documentation as requested.

For employers who do not enroll in the Voluntary Enhanced Employer Compliance Program, they still have an affirmative defense that they did not violate the Act if, "notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements" of those laws, the employers can demonstrate they made a good faith attempt to comply with the requirements of federal immigration laws.

There was much uncertainty regarding the Act's application after the Act became law at the beginning of this year. These amendments provide some clarity to the law, but employers are still faced with the daunting task of complying with the Act to prevent putting their ability to stay in business at risk. Arizona employers must understand their legal obligations and requirements with respect to the employment of alien workers. We will be scheduling a future seminar to provide an additional forum for assisting Arizona employers to manage their employment practices and policies associated with this changing legislation.

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning the Legal Arizona Workers Act. Please feel free to contact Steven D. Leach [(602) 263-7350, sleach@jshfirm.com] or Barry H. Uhrman [(602) 263-7328, buhrman@jshfirm.com] with any questions you may have regarding this important development in Arizona employment law. ◆

About The Authors

Steven D. Leach

Mr. Leach joined the firm as a partner in 2005 and is the chair of the firm's Employment Law Practice Group. His practice is focused on defending employers on all manner of employment related disputes. In particular, for much of his near 20 years of practice, Mr. Leach has assisted employers with efforts to reduce or manage employment liability, and has defended employers on employment claims such as wrongful termination, sexual harassment, gender, race and disability discrimination, and civil rights violations in both Arizona and Federal Courts. Mr. Leach is committed to working with clients to manage employment risk to avoid exposure, or to be in the best position possible to succeed when litigation is inevitable. He recognizes that effective employer representation requires a team approach between client and counsel, and he strives to provide his clients with services that are both highly effective and efficient.

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Barry H. Uhrman

Mr. Uhrman joined the firm in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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