



Update on Arizona's New Law Against the Employment of Unauthorized Aliens

By Steven D. Leach and Barry H. Uhrman

On Friday, February 7, 2008, Judge Neil V. Wake of the United States District Court dismissed a federal lawsuit filed by various business associations in an effort to derail Arizona's new immigration law, the "Legal Arizona Workers Act." The Act, which went into effect on January 1, 2008, prohibits the knowing or intentional employment of unauthorized aliens and requires Arizona employers to use the federal "E-Verify" program to confirm the work authorization of new hires.

In his decision, Judge Wake stated that the Act does not improperly infringe on the federal government's authority to regulate illegal immigration or violate an employer's due process rights. To the contrary, Judge Wake found that federal immigration law specifically authorizes states to regulate business licensing and that given this authority, the Act is consistent with federal law.

Judge Wake determined the Act had sufficient procedural safeguards regarding business license suspension and revocation. Judge Wake recognized that the Act provides for hearings in the Superior Court of Arizona in which the State has the burden of proving that an employer knowingly or intentionally employed an unauthorized alien and where the Superior Court has full evidence-taking, fact-finding, and discretionary authority on all issues of liability. Judge Wake also emphasized that under the Act, Arizona Courts may only find that an employee is unauthorized after receiving a federal determination to that effect. Furthermore, the Act allows an employer to present evidence to prove it did not knowingly or intentionally employ an unauthorized worker. Judge Wake ruled that these provisions in the Act provided employers sufficient due process.

Judge Wake held that requiring the use of E-Verify furthers federal policy encouraging use of the program as part of a licensing sanctions law expressly authorized by federal immigration law. He found that the financial burden on employers to participate in the E-Verify program is minimal and does not constitute an undue burden. Judge Wake also held that the Act's requirement that Arizona employers use E-Verify was not inconsistent with federal law despite the fact that federal law makes use of E-Verify voluntary.

Of note, Judge Wake clarified that the Act expressly requires companies to use E-Verify only with their newly-hired employees working in Arizona. Judge Wake did not decide whether the Act applies to all workers or only those hired before January 1, 2008. However, he noted that none of the County Attorneys stated intent to enforce the Act's penalty provisions regarding workers hired before that date.

The plaintiffs filed an appeal of Judge Wake's decision to the Ninth Circuit Court of Appeals. The Attorney General and the County Attorneys avowed to the Judge Wake that they would not begin enforcement of the Act until after March 1, 2008. Plaintiffs have asked the Ninth Circuit to enjoin enforcement of the Act during the appeal, and have further asked the Ninth Circuit to rule on the injunction motion prior to the beginning of enforcement action on March 1, 2008. They have also requested that Judge Wake enter an order enjoining enforcement of the Act while the Court's order is being appealed.

The important fact is that the Act remains valid today. Accordingly, Arizona employers must ensure they are in compliance with the Act's requirements to avoid being subject to the Act's severe penalties, which include the suspension

or revocation of necessary business licenses. In other words, failure to comply with the Act could result in an employer being put out of business temporarily or permanently.

Employers must register for the E-Verify program (<https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>) to verify the work authorization for anyone hired to work in Arizona after December 31, 2007. At the end of the registration process, employers must sign a Memorandum of Understanding that provides the terms of the agreement between the employer, the Department of Homeland Security, and the Social Security Administration. Employers must read the Memorandum of Understanding carefully because it imposes significant obligations. Note that the E-Verify program is to be used to verify newly hired employees only after I-9 forms have been completed, not to pre-screen applicants or “re-verify” the employment eligibility of current employees.

Employers should also audit current I-9 forms to make certain that appropriate policies and practices are in place and help ensure compliance with the Act. Employers should also designate a specific employee who is appropriately trained in I-9 and E-Verify compliance to ensure that all I-9 forms are properly completed, stored, and periodically reviewed and that the E-Verify procedure is appropriately conducted on all new hires.

Employers must continue, however, to balance efforts to comply with the Legal Arizona Workers Act with prohibitions against discriminating against current and prospective employees on the basis of national origin.

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

About The Authors



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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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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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