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CLIENT E-NEWSLETTER

SPECIAL BULLETIN UPDATE

Ruling on U.S. Justice Department's Challenge to the Alabama Taxpayer and Citizen Protection Act

On September 28, 2011, U.S. District Court for the Northern District of Alabama Chief Judge Sharon Blackburn ruled on the U.S. Justice Department's challenge to the Alabama Taxpayer and Citizen Protection Act (generally known as the Alabama immigration law). Most significantly, as to employees, Judge Blackburn enjoined enforcement of the provision that made it unlawful for any unauthorized alien to "knowingly apply for work, solicit work....or perform work as an employee or an independent contractor." As to other provisions impacting employers, Judge Blackburn upheld all but two provisions of the Act. Judge Blackburn enjoined enforcement of the provision that prohibited employers from failing to hire a job applicant authorized to work in the United States while hiring an unauthorized alien. She also enjoined enforcement of the provision that prohibited employers from deducting wages paid to an unauthorized alien as a business expense from state income or business tax. The remainder of the provisions applicable to employers are still in effect.

First, the Act still prohibits any business entity or employer from knowingly employing, hiring for employment, or continuing to employ an unauthorized alien to perform work within the State of Alabama. However, employers are not liable for the employees of an independent contractor performing work for the employer. An employer in violation of this provision will be required to terminate any undocumented alien and file a signed, sworn affidavit stating that the employment of the undocumented alien was terminated. Additionally, the employer's business license will be suspended for a period of up to ten days at the location where the undocumented alien worked. The employer will also be subject to a three-year probationary period in which the employer will be required to file quarterly reports regarding each new employee that is hired by the employer. Employers who violate this provision a second time will have their business license permanently revoked at the location where the undocumented alien worked. Employers who violate the section a third time will have their business license permanently revoked statewide.

The Act also still requires employers to enroll in E-Verify by April 1, 2012. Employers with 25 or fewer employees will be able to utilize the Alabama Department of Homeland Security's employer agent service in order to use E-Verify. Once enrolled, an employer must verify the employment eligibility of new employees through E-Verify. While the penalties for knowingly employing an undocumented alien are harsh, the good news for employers is that if they use E-verify to verify the work authorization of an employee, they will not be liable if that particular employee turns out to be an undocumented alien. However, under current federal restrictions, E-Verify can only be used for prospective employees so liability for current employees would still exist.

The Act also continues to put conditions on the receipt of contracts, grants, or incentives from the state. These conditions also apply to subcontractors on a project paid for by contract, grant, or incentive by the state. The conditions prohibit both recipients and subcontractors from employing, hiring, or continuing to employ an unauthorized alien, and also require recipients and subcontractors to enroll in E-Verify. A contractor is not liable for the violations of its subcontractors if the contractor receives an affidavit from the subcontractor attesting to the fact that it verified each of its employees.

Employers in violation of this provision are subject to termination of the contract and up to a sixty-day suspension of their business licenses. Subsequent violations can result in permanent revocation of a business license. Subcontractors in violation of this provision may be barred from doing business in the state or have their business licenses revoked for up to sixty days. Subsequent violations may result in a permanent suspension of a subcontractor's business license. While penalties for violations of this section are harsh, as in previous provisions, enrollment in E-Verify during the full performance of the contract or subcontract limits the liability of employers and subcontractors.

Employers are cautioned that they are still subject to anti-discrimination provisions of the Immigration and Nationality Act ("INA"), as amended, and Title VII of the Civil Rights Act of 1964, as amended, both of which make it unlawful for an employer to discriminate or retaliate against an employee or job applicant based upon their national origin.

If you have any questions about this or would like to discuss it further, please contact the Kullman attorney with whom you regularly correspond.



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