

STATE EMPLOYMENT-RELATED IMMIGRATION LAWS: WHEN THE I-9 FORM ISN'T ENOUGH

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When comprehensive immigration reform at the federal level stalled, many state governments decided to take matters into their own hands. Since 2006, many states have enacted laws which provide for employer sanctions related to hiring unauthorized workers – independent of any monetary or criminal sanctions available for federal immigration violations.

The focus of many of the state immigration laws is the U.S. Department of Homeland Security's (DHS) E-Verify system. The E-Verify system allows employers, after enrolling and signing a memorandum of understanding, to share information with the DHS and Social Security Administration and to check the newly-hired employee's employment authorization against the databases for those agencies.

As an employer, not only are you required to ensure that you are in compliance with federal immigration laws, but must also determine which state immigration laws apply and when and how state-level compliance is triggered. The first thing to determine is whether your company is doing business in any of the states which have enacted employment-related immigration laws. Once you have identified the applicable states, you next have to establish whether the state law applies to your business within that state, and if so, when you are required to start complying with the law.

STATES WHERE ALL EMPLOYERS MUST COMPLY WITH THE STATE IMMIGRATION LAWS

If you currently do business in the states of Arizona, Mississippi, and South Carolina, you may already be required, after completing the Form I-9 Employment Eligibility Verification, to verify the work authorization of your newly-hired employees using E-Verify. Currently, all businesses in Arizona are required to use E-Verify. Mississippi also requires all employers to use E-Verify but provides for phased-in implementation tied to the number of employees. South Carolina has a graduated implementation procedure based on number of employees as well but allows the employer to choose to verify using E-Verify or a driver's license/ID card.

Arizona

All businesses required to use E-Verify as of January 1, 2008.

Mississippi

- 1) All state agencies, public contractors and subcontractors, and all private employers with 250 or more employees required to use E-Verify as of July 1, 2008;
- 2) private employers with 100-249 employees must use E-Verify as of July 1, 2009;
- 3) private employers with 30-99 employees must use E-Verify as of July 1, 2010; and
- 4) all other private employers must begin using E-Verify by July 1, 2011.

South Carolina

Starting January 1, 2009, all employers with state service contracts must verify that a newly hired employee has valid work authorization by completing a Form I-9 and either: 1) verifying the employee's work authorization through E-Verify; or 2) determining that the employee has a valid South Carolina driver's license or ID card, or one from another state that uses the same standards for issuance as South Carolina. Private employers with 100 or more employees must start this verification process by October 1, 2009 and those with fewer than 100 employees must start no later than July 1, 2010.

STATES REQUIRING COMPLIANCE BY SPECIFIC TYPES OF EMPLOYERS

Many states have enacted immigration laws with a narrower focus – requiring only public employers and private employers who contract with the public employers (as opposed to all employers doing business in the state), to take additional steps to verify the legal work status of their employees.

Arkansas

State contractors must certify that they do not knowingly employ or contract with (including subcontractors) undocumented workers.

Colorado

Companies that contract with state agencies and political subdivisions of the state for services must use E-Verify for all newly-hired employees.

Connecticut

State contractors may be found criminally liable for hiring undocumented workers.

Delaware

Any state contractor with a contract for professional services, public works, or nonprofessional services, which is paid with public funds, must certify that they are in compliance with the requirements of the Immigration Reform and Control Act of 1986.

Florida

Legislation is currently pending to implement E-Verify as of July 1, 2009, for employers with state contracts for the physical performance of services in the state.

Georgia

All public employers and state contractors (including subcontractors) with 500 or more employees must use E-Verify to check the status of all newly-hired employees starting July 1, 2007. As of July 1, 2008, all companies with 100 or more employees and who have state contracts or subcontracts must use E-Verify for newly-hired employees. All other employers with state contracts or subcontracts must start using E-Verify for newly-hired employees as of July 1, 2009. As of January 1, 2008, a Georgia employer may not claim a state income tax deduction for wages of \$600 or more paid to an individual who does not have authorization to work.

Hawaii

All individuals seeking employment with the state or a county, must be a citizen, national or permanent resident or be eligible for unrestricted employment in the United States.

Idaho

State employees must have proper work authorization and the state must ensure that businesses with state contracts for services employ only legal workers.

Iowa

Any business that receives economic assistance from the state must verify that its employees are citizens of the United States or authorized to work in the U.S.

Kansas

Unemployment benefits and employment protection status are limited to U.S. citizens and those with legal immigration status.

Louisiana

Any state agency or department may conduct an investigation of a contractor's hiring policies if it suspects the contractor of employing unauthorized workers.

Massachusetts

Contractors doing business with a state agency in the Executive Branch must certify that they will not use unauthorized workers.

Minnesota

State agencies and all companies awarded state contracts must use E-Verify for newly-hired employees as of January 20, 2008.

Missouri

All state agencies, local governments, and private employers who receive state loans, tax credits or have a contract worth more than \$5,000 must use E-Verify for newly-hired employees.

Montana

Aliens temporarily in the U.S. to perform agricultural labor or services or studying temporarily in the U.S. are excluded from the definition of employment for purposes of unemployment insurance laws and laws relating to independent contractors.

Nebraska

Starting October 1, 2009, all public employers and any contractor and subcontractor awarded a contract by a public employer for the physical performance of services within the state, will be required to use E-Verify for all new hires. Tax incentives under various development and advantage acts are available for qualified private employers that use E-Verify.

Nevada

Aliens who are non-residents of the U.S. at the time of a work-related accident are not covered by the provisions of the state's workers' compensation law. The Nevada Tax Commission may impose fines on an employer found to be engaged in unlawful hiring or employment of unauthorized aliens.

New Mexico

Certain aliens admitted to the U.S. to perform agricultural labor are excluded from obtaining unemployment compensation.

Oklahoma

Private employers with state contracts for the "physical performance of services within the state" must use E-Verify for newly-hired employees. This law went into effect on November 1, 2007 but is currently not being enforced due to a temporary injunction.

Oregon

An insurer or self-insured employer may not make payments to a person pursuant to the state's workers' compensation law if that person is present in the U.S. without legal authorization.

Pennsylvania

Employers may not employ illegal aliens on projects financed by state grants or loans. Employers in the Keystone Opportunity Zone economic development program are required to repay the full value of any KOZ tax benefit if sentenced under federal law for knowingly employing illegal aliens or using a contractor that the taxpayer knew or had reason to know was employing illegal aliens.

Rhode Island

All persons and businesses (including contractors) doing business with the State must use E-Verify as of March 27, 2008.

Tennessee

Contractors must attest that they do not employ illegal workers and are prohibited from contracting with a state agency within one year of discovery that the contractor is employing illegal workers. It is a criminal offense to recklessly or knowingly employ an illegal alien, or knowingly encourage or induce an illegal alien to enter the state to work. Employers may not accept taxpayer identification numbers as proof of immigration status or as a form of identification.

Texas

In order to apply for and receive a public subsidy, the business must certify that it does not and will not knowingly employ an undocumented worker.

Utah

Effective July 1, 2009, all public entities and all private employers with contracts (including subcontractors) with the state must use E-Verify for all newly-hired employees.

Washington

Labor performed by non-resident aliens is excluded from the definition of employment under the state's unemployment insurance law.

West Virginia

All employers must verify the work authorization of all employees. Employing unauthorized workers may result in a misdemeanor, punishable by fines up to \$10,000 and incarceration for repeat offenses. Employers who have been convicted of hiring unauthorized workers may not claim a state income tax deduction for wages of \$600 or more paid to an unauthorized worker.

Going Against The Tide

Illinois went in a completely different direction from the majority of the states that have taken a position on immigration and enacted a law prohibiting businesses from using E-Verify until the system was proven to be more accurate. The U.S. Department of Justice sued the State of Illinois and on March 11, 2009, a federal district court judge ruled that the Illinois law was unconstitutional. As a result, employers in the state of Illinois are now free to use E-Verify if they choose without fear of violating the state law.

If a state is not specifically listed in this article, it means that it does not currently have an immigration law in place, has an immigration law in effect that does not have employment-related provisions, or there is proposed legislation but it has not yet been enacted. Developments in immigration law occur at a rapid pace and we recommend that you contact our Global Immigration Practice Group to discuss questions regarding specific state immigration requirements and to ensure that you have the most up-to-date information. We update our State Immigration Survey when there are any changes to state immigration laws, so please re-visit the firm's website for the most current information in this area.