



Tough New Immigration Law Now in Effect in South Carolina

Insights

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June 4, 2008 - Today Gov. Mark Sanford will sign into law the South Carolina Illegal Immigration Reform Act. The legislation places South Carolina among the few states that require public and private employers to take affirmative steps to verify the legal status of new employees.

The Act creates a new implied South Carolina employment license that applies to all private employers in South Carolina. The imputed employment license remains in effect as long as the business abides by the hiring requirements set forth in the Act. If an employer's employment license is suspended or revoked, the employer may not employ a person to do work during that period. The legislation provides for substantial penalties for employers who violate its provisions.

For employers that have service contracts with a department, an agency or other instrumentality of the State of South Carolina, compliance with the new Act begins as early as January 1, 2009. For private employers who have 100 or more employees, compliance with the new requirements begins on October 1, 2009. For private employers who employ fewer than 100 employees, the time for compliance does not begin until July 1, 2010.

New Verification Requirements

The new verification procedures for private employers require the following:

1. Completion and maintenance of the federal employment eligibility verification form, otherwise known as the I-9 Form; and either
2. Registration and participation in the E-Verify federal work authorization program; *or*
3. Employment of workers who at the time of employment:
 - possess a valid South Carolina driver's license or identification card issued by the South Carolina Department of Motor Vehicles;
 - are eligible to obtain a South Carolina driver's license or identification card; or
 - possess a valid driver's license or identification card from another state whose eligibility criteria are approved by South Carolina.

Employers are provided a choice. You may comply with the Act by filling out and maintaining an I-9 Form on your employees, and verifying their work status through the federal E-Verify program. This

verification must take place within five business days after employing the new employee.

Alternatively, you can comply by filling out and maintaining an I-9 Form on the employee and verifying that an employee possesses either a South Carolina driver's license or identification card, or is qualified to obtain one, or has an out-of-state driver's license from a state having qualification requirements as strict as those in South Carolina.

The Act creates an inducement to use the E-Verify authorization program by establishing a presumption of compliance for those employers who "in good faith" verify the immigration status of the new employee pursuant to E-Verify. No such presumption is created for employers who elect only to use the I-9 Form and verification of the employee's driver's license or identification card.

For those employers who elect to verify employment status by requesting proof of a valid South Carolina driver's license or identification card, remember that the federal Immigration Act of 1990 makes it illegal for you to specify which documents an employee may present to prove identity or employability. And you may not insist upon presentation of more documents than are minimally necessary to complete the I-9 Form. These infractions are referred to as "document abuse."

The South Carolina Illegal Immigration Reform Act does not require employers to use a South Carolina driver's license or identification card to *fill* out the I-9 Form. Completion of the I-9 Form should follow the established federal procedures. Presumably, after the employee has presented appropriate documents to be used for the I-9 process, an employer may then request proof of a South Carolina driver's license or ID card (or other approved license or ID card). Otherwise, employers who demand presentation of a South Carolina driver's license or ID card in order to fill out the I-9 Form could run afoul of federal immigration law.

Penalties for Violations of the Act

The Act expressly states that a private employer shall not "knowingly or intentionally" employ an unauthorized alien, and establishes a system of penalties for employers who violate either the verification provisions or the prohibition on hiring an unauthorized alien. For violations of the procedures for hiring and verifying the authorization of an employee, a private employer can be assessed a civil penalty of not less than \$100.00 and not more than \$1000.00 for each violation. For a first violation, an employer can avoid assessment of a penalty by complying with the verification provisions within 72 hours of notification of a violation. For any subsequent violation, the employer will be assessed a civil penalty.

If an employer knowingly or intentionally hires an unauthorized alien, the penalties involve either suspension or revocation of the employer's imputed license, thereby preventing the employer from hiring new employees within the state of South Carolina. Additionally, in order to obtain reinstatement of the employer's license, the employer must terminate the unauthorized alien, and pay a reinstatement fee of not more than \$1000.00. Subsequent violations of this portion of the Act can result in revocation of the employer's license for a period of five years.

Other Provisions

The Act creates a new cause of action against an employer of wrongful termination for discharging an employee authorized to work in the United States, if the discharge is for the purpose of replacing that employee with a person who the employer knows or should reasonably know is an unauthorized alien. Aggrieved employees can recover their former positions, lost wages, and other actual damages, including attorneys' fees. The employee has a year to bring a lawsuit for violation of the Act. Again, the legislation creates a "safe harbor" for those employers who verify work authorization through the E-Verify program. Employers who use the E-Verify program have an absolute defense against any cause of action alleging wrongful termination arising under the Act.

Other provisions of the Act allow the State to develop a random auditing program to inspect private employers for compliance with the provisions of the Act. State agents will be authorized to enter an employer's premises and question any employer, owner, agent, or employee and to inspect, investigate, reproduce or photograph business records relevant to determining compliance with the provisions of the Act. This right of inspection is broader than that accorded to federal immigration agents.

Finally, to those employers who may not be deterred by civil penalties or short periods of suspended licenses, the Act provides that the State will maintain a list of all private employers who have been assessed a civil penalty or who have had their license revoked and that the list will be published on a State maintained website.

Conclusion

South Carolina legislators hail the new legislation as the "toughest bill in the United States." Regardless of the accuracy of that assertion, what is apparent is that employers doing business in South Carolina will have to tighten their hiring procedures and decide which employment verification process works best with their operations.

Using E-Verify carries its own concerns; but under South Carolina's new Immigration Reform Act, not using the federal verification program exposes a South Carolina employer to potentially greater liability than an employer who elects to use the federal program. How aggressive South Carolina officials will be in enforcing the Act remains to be seen.

For more information contact any attorney in the Columbia office of Fisher Phillips at 803.255.0000

This Legal Alert provides information about a particular new law. It is not intended to be, nor should it be considered as, legal advice for a specific fact situation.