



Alabama's New Immigration Law: The Employment Provisions

Presented By

Wendy Padilla-Madden

Balch & Bingham



- Covers all public and private employers
- Prohibits employers from knowingly hiring, employing, or continuing to employ unauthorized aliens
- Provides penalties and an enforcement scheme
- Requires all employers in Alabama to use E-Verify
- Effective April 1, 2012



- Section 15(a): Makes it unlawful for an employer to “knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama”
- Section 15(b): Requires all employers to enroll in E-Verify and the use E-Verify to verify work authorization

Section 15(a)'s Prohibition



- Prohibition is nothing new – has been law under the federal Immigration Reform and Control Act (IRCA) since Nov. 6, 1986
- The Alabama Law states: “Knowingly employ, hire for employment, or continue to employ an unauthorized alien means the actions described in 8 U.S.C. § 1324a” (IRCA)
 - **Strict Penalties for Violations**
 - **Complex Enforcement Scheme**

Penalties for 1st Violation of 15(a)



- On a finding of a first violation of Section 15(a), the Court shall:
 1. Order the employer to terminate the employment of every unauthorized alien.
 2. Subject the employer to a three-year probationary period throughout the State.
 - During this probationary period, the employer shall file quarterly reports with the local district attorney of each new employee who is hired in the State.

Penalties 1st Violation of 15(a) cont.



- 3.** Order the employer to file a signed, sworn affidavit with the local district attorney within three days of the order stating that the employer has terminated the employment of every unauthorized alien and the employer will not knowingly or intentionally employ an unauthorized alien in the State.
- 4.** Direct the applicable state, county or municipal governing bodies to suspend the business licenses and permits of the employer for a period not to exceed 10 business days specific to the business location where the unauthorized alien performed work.

Penalties 2nd Violation of 15(a)



- For a section violation of Section 15(a), the Court shall:
 1. Direct the applicable state, county, or municipal governing bodies to permanently revoke all business licenses and permits held by the employer specific to the business location where the unauthorized alien performed work
 2. Revocation is required by the state agency upon receipt of the Court Order

Penalties for Subsequent Violation of 15(a)



- For a subsequent violation of Section 15(a), the Court shall:
 1. **Direct the applicable governing bodies to forever suspend the business licenses and permits of the employer throughout the State.**

Elements of a 15(a) Violation



1. The employee was an unauthorized alien
 - This determination must be made by the federal government pursuant to a § 1373(c) inquiry
2. The employer **knowingly** employed, hired, or continued to employ the unauthorized alien

Definition of Knowingly



- Section 15(a): “Knowingly employ, hire for employment, or continue to employ an unauthorized alien means the actions described in 8 U.S.C. § 1324a.”
- Section 15(o): “The terms of this section shall be interpreted consistently with 8 U.S.C. §1324a and with any applicable federal rules and regulations.”

Federal Definition of “Knowingly”



- 8 U.S.C. § 1324a
- 8 C.F.R. § 274a – Control and Employment of Aliens
 - **a.1 Definitions**
 - (l)(1) The term **knowing** includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include but is not limited to, situations where an employer:
 - (i) fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
 - (ii) Has information available to it that would indicate that the alien is not authorized to work

Unclear Definition of Knowingly



- However, statute contains a definition of term in Section 3(9):
 - A person acts knowingly or with knowledge with respect to either of the following:
 - a. The person's conduct or to attendant circumstances when the person is aware of the nature of the person's conduct or that those circumstances exist.
 - b. A result of the person's conduct when the person is reasonably aware that the person's conduct is likely to cause that result."



- I-9 Compliance Defense:
 - An employer can establish an “affirmative defense” to a claim that the employer knowingly hired or employed an unauthorized alien if it can establish that it has complied in good faith with the requirements of 8 U.S.C. § 1324a(b).
- E-Verify “safe harbor” defense:
 - “ A business entity or employer that uses E-Verify to verify the work authorization of an employee shall not be deemed to have violate this [Section 15] with respect to the employment of that employee.”



- **I-9 Compliance Defense: 8 U.S.C. § 1324a(a)(3)**
 - Defense.- A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) [I-9 requirements] with respect to the hiring, ... for employment of an alien ... **has established an affirmative defense** that the person or entity has not violated paragraph (1)(A)
- **Good faith compliance defense: 8 U.S.C. § 1324a(b)(6).-**
 - (A) In general. – Except as provided in subparagraphs (B) and (C), a person or entity **is considered to have complied with a requirement of this section notwithstanding a technical or procedural failure ... if there was a good faith attempt to comply with the requirement.**
 - (B) Exception if failure to correct after notice.- Subparagraph (A) shall not apply if. -
 - (i) notice of the failure has been provided
 - (ii) 10 day correction period is allowed
 - (iii) employer fails to correct technical violation within such 10 days

Who will enforce this provision?



- Authority to bring an action in Court to enforce Section 15(a) is vested in:
 - **Local District Attorneys**
 - **Alabama Attorney General**
- Section 15(k)(1): “Any resident of this state may petition the Attorney General to bring an enforcement action against a specific business entity or employer by means of a written, signed petition.”
 - **Rejected Job Applicants**
 - **Disgruntled Employees, EX- Spouses**
 - **Union Officials**
 - **Competitors**
 - **Anti-Immigration Advocates**
- Sections 5 and 6 also imposes a duty on State Employees to report any violation of the act or face individual charges for obstruction of governmental operations.

Petition for Enforcement Action Under 15(a)



- Must include an allegation that describes:
 - The alleged violators;
 - The action constituting the violation; and
 - The date and location of the violation
- Petitions alleging violations based on national origin, ethnicity, or race are invalid and shall not be acted upon
- Within 60 days of the receipt of a resident petition, the Attorney General shall:
 - File a civil complaint or
 - Inform the petitioner in writing that the Attorney General has determined that filing a complaint is not warranted.
- Not clear how much discretion the Attorney General has in determining that a complaint is not warranted or what will be requested as part of an investigation.

Section 15(b)



- “Effective April 1, 2012, every business entity or employer in this state shall enroll in E-Verify and thereafter, according to the federal statutes and regulations governing E-Verify, shall verify the employment eligibility of the employee through E-Verify.”
- Under federal law, E-Verify is voluntary (except for federal contracts governed by FAR)
- E-Verify must be used “according to the federal statutes and regulations governing E-Verify”

Section 15(b) cont.

- Act does not appear to contain any specific penalty provisions for an employer's failure, initially, to enroll and use E-Verify
 - Employer may lose "Safe Harbor" protection.
 - If the employer's business license is suspended for a first violation, the employer must submit evidence of enrollment in E-Verify prior to reinstatement.
 - The fact that the employer was not enrolled in and using E-Verify as required by state law will likely be deemed evidence that the employer had knowledge that employees were unauthorized.

Section 15(l) Independent Contractors



- “This section does not apply to the relationship between a party and the employees of an independent contractor performing work for the party.”
 - Issue is what constitutes an independent contractor?
 - Who controls the work and instrumentality?
 - Joint employment issue
- Employers are not required to E-Verify the employees of their subcontractors and independent contractors
- Does this also mean an employer cannot be held liable for unauthorized aliens employed by its subcontractors?
 - Arguably, yes. However, an employer violates 8 U.S.C. § 1324a(4) if it uses a contract to obtain the labor of an alien knowing that the alien is unauthorized.



- Declares that wages, compensation, and other remuneration paid to an unauthorized alien shall not be allowed as a deductible business expense for any state income or business tax purposes.
- Employers who knowingly fail to comply shall be liable for a penalty equal to 10 times the business expense deduction claimed



- The Act makes it a “discriminatory practice” for an employer to fail to hire a job applicant or to discharge an employee who is a U. S. citizen or alien authorized to work “while retaining or hiring an employee who the ...employer knows, or reasonably should have known, is an unauthorized alien.”
- Creates a private cause of action entitling a rejected job applicant or discharged employee to sue the employer for a “discriminatory practice” if the employer retains or hires “an employee who the ... employer knows, or reasonably should have known, is an unauthorized alien”

Section 17 cont.



- Authorizes civil actions in court for violations
- Provides for the recovery of “compensatory relief,” but not civil or criminal sanctions
- Losing party must pay the court costs and reasonable attorneys fees for the prevailing party (up to the amount paid by the losing party for his or her own attorneys fees)



- Section 26: Allows small businesses with less than 25 employees to use ADHS as an E-Verify Agent
- Section 27: Renders contracts with unlawfully present aliens unenforceable
- Section 13: Prohibition against....
 - (1) Conceal, harbor, or shield...
 - (2) Encourage or induce...
 - (3) Transport...



IMMIGRATION COMPLIANCE and E-Verify Overview

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- Immigration and Nationality Act (INA)
- IRCA – 1986 Immigration Reform and Control Act
 - Goals to legalize pool of undocumented workers prior to 1982
 - Required employers to screen workers to ensure an authorized workforce through Form I-9 Employment Eligibility Verification
- IMMACT90 – Immigration Act of 1990
 - Established OSC to enforce anti-discrimination laws found in INA and introduced document abuse cases
- 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)
 - Good Faith Defense against technical violations - Thanks Sony Bono!
 - Problem: not enough appropriations to enforce
- Enforcement AGENCIES: DHS, HIS (ICE), DOJ-OSC, SSA, DOL

OMB No. 1615-0047; Expires 08/31/12

Form I-9, Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification (To be completed and signed by employee at the time employment begins.)

Print Name - Last		First	Middle Initial	Maiden Name	
Address (Street Name and Number)			Apt. #	Date of Birth (month/day/year)	
City		State	Zip Code	Social Security #	
<p>I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.</p>			<p>I attest, under penalty of perjury, that I am (check one of the following):</p> <input type="checkbox"/> A citizen of the United States <input type="checkbox"/> A noncitizen national of the United States (see instructions) <input type="checkbox"/> A lawful permanent resident (Alien #) <input type="checkbox"/> An alien authorized to work (Alien # or Admission #) _____ <small>until (expiration date, if applicable - month/day/year)</small>		
Employee's Signature			Date (month/day/year)		

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature	Print Name
Address (Street Name and Number, City, State, Zip Code)	
Date (month/day/year)	

Section 2. Employer Review and Verification (To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

List A	OR	List B	AND	List C
Document title: _____	OR	_____	AND	_____
Issuing authority: _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name and Address (Street Name and Number, City, State, Zip Code)		Date (month/day/year)

Section 3. Updating and Reverification (To be completed and signed by employer.)

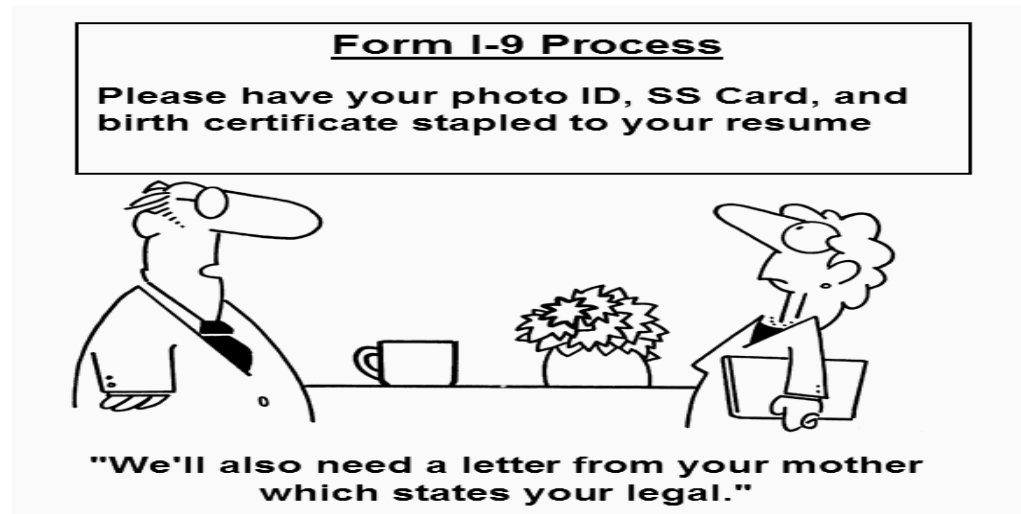
A. New Name (if applicable)	B. Date of Rehire (month/day/year) (if applicable)	
C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.		
Document Title	Document #	Expiration Date (if any)

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Date (month/day/year)
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- All employees hired after Nov. 6, 1986 are required to complete
- After employee accepts offer of employment:
 - Employee must complete Section 1 no later than first day of work for pay
 - Employer must complete Section 2 no later than 3rd business day employee starts work for pay
 - If Employee's work authorization expires, complete Section 3 or new I-9 Form on or before the authorization expires
- I-9 Form must be retained for three years after the date of hire or one year after the date of termination whichever is longer



I-9 Form Resources

www.uscis.gov/I-9Central

M-274 Manual for Employers

M-396 Guide to Selected U.S. Travel
and Identity Documents

Enforcement Landscape



- Federal enforcement policy shift was announced April 2009 and began July 2009 with 652 NOIs
 - Really started in Alabama March 1, 2010 when 180 NOIs were served in AL, AK, TN. At least 30 Alabama companies were targeted.
 - Shift came along with different budgetary appropriations.
- New ICE Employment Compliance Inspection Center designed to audit I-9s of large and multi-state employers.
- In June 2011, ICE commenced the latest wave of 1,000 new audits that included employers of all sizes, states, and industries.
 - At least 10 Alabama companies were targeted.
- Tips and leads from disgruntled employees, complaints related to identity theft, and referrals from other agencies may cause audits.
 - New Alabama law will impact and increase federal enforcement – especially the 287g MOU (Sec. 4)

Why Is I-9 Compliance Important?



- 8 U.S.C. § 1324a
- 8 C.F.R. § 274a – Control and Employment of Aliens
 - **a.1 Definitions**
 - (l)(1) The term **knowing** includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include but is not limited to, situations where an employer:
 - (i) fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
 - (ii) Has information available to it that would indicate that the alien is not authorized to work

Why Is I-9 Compliance Critical?



- Good faith compliance with the I-9 regulations is your first line of defense to both Federal and now State immigration enforcement actions.
 - **8 U.S.C. § 1324a**
 - **Regulations: 8 C.F.R. § 274a**
 - **Alabama Law Sec. 15**
- HSI and OCAHO have clearly established that they will give credit to employers who audit their I-9 Forms prior to receipt of NOI.
- Implemented I-9 compliance SOPs will ensure E-Verify does not trigger Federal investigations of your company.
- Enrollment and proper use of E-Verify will likely give you a safe harbor under the new Alabama Immigration Law against a charge of “knowingly employ, hire for employment or continue to employ an unauthorized worker.”



- **8 U.S.C. § 1324a(a)(3).**

- Defense.- A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) [I-9 requirements] with respect to the hiring, ... for employment of an alien ... **has established an affirmative defense** that the person or entity has not violated paragraph (1)(A)

- **8 U.S.C. § 1324a(b)(6) Good faith compliance.-**

- (A) In general. – Except as provided in subparagraphs (B) and (C), a person or entity **is considered to have complied with a requirement of this section notwithstanding a technical or procedural failure ... if there was a good faith attempt to comply with the requirement.**
- (B) Exception if failure to correct after notice.- Subparagraph (A) shall not apply if. -
 - (i) notice of the failure has been provided
 - (ii) 10 day correction period is allowed
 - (iii) employer fails to correct technical violation within such 10 days



- **Section 15(b)....A business entity or employer that uses E-Verify to Verify the work authorization of an employee shall not be deemed to have violated this section with respect to the employment of that employee.**
- **Section 15(g)...A person or entity that establishes that it has complied in good faith with the requirements of 8 U.S.C. 1324a(b) [*I-9 Form*] establishes an affirmative defense that the business entity or employer did not knowingly hire or employ an unauthorized alien.**

Thank You!



Wendy Padilla-Madden

Balch & Bingham LLP

wmadden@balch.com

www.balch.com/immigration

205-226-3447