

ALABAMA'S IMMIGRATION ACT

On June 9, 2011, Gov. Robert Bentley signed The Beason-Hammon Alabama Taxpayer and Citizen Protection Act (Act 2011-535) into law, calling the legislation the toughest illegal immigration law in the nation. At more than 70 pages, the Act is lengthy and complex. While various provisions of the bill will be phased in, most of the requirements were set to take effect **September 1, 2011**. However, on September 28, 2011, U.S. District Judge Sharon Blackburn issued an order enjoining six provisions but allowing the remaining parts of the law to become effective September 29, 2011. While some parts of the law might ultimately be blocked by the courts, most of the provisions relating directly to employers appear likely to survive these challenges. A summary of the major provisions in the Act that will have the most direct impact on Alabama employers is set forth below following a status update on litigation filed to challenge the constitutionality of the Act.

Litigation

Three separate lawsuits filed in federal court were consolidated into one case by U.S. District Judge Sharon Blackburn in Birmingham. The suits were filed by the U.S. Department of Justice, the Southern Poverty Law Center, the ACLU, and several Alabama churches. Following a hearing on the suits on August 24, 2011, Judge Blackburn *temporarily* blocked enforcement of the *entire* Act pending further consideration by her. On June 28, 2011, Judge Blackburn issued an order indefinitely enjoining six of the Act's provisions but lifting the stay with regard to all of the other provisions of the Act. The six *limited* areas that remain stayed are:

- Section 8: Education
- Section 10: Crime for Failure to Carry Alien Registration Document;
- Section 11: Unauthorized Aliens Prohibited From Applying for Work;
- Section 13: Transportation of Aliens;
- Section 16: Tax Treatment for Wages Paid to Unauthorized Aliens; and
- Section 17: Employment Discrimination.

The federal case has been appealed; however, except for the above six parts of the Act, the Act is in force and effect.

Prohibition on Employing Unauthorized Aliens

The Act prohibits any employer doing business in the State of Alabama from hiring or continuing to employ unauthorized aliens in Alabama. An employer that has "complied in good faith" with the I-9

requirements found in 8 U.S.C. § 1324a(b) will have an affirmative defense that it did not knowingly hire or employ an unauthorized alien.

E-Verify Mandate

The Act also requires that all Alabama employers register and use E-Verify no later than **April 1, 2012**. For employers doing business (contract, grant or incentive) with the State, a municipality, or a State-funded entity, the E-Verify mandate takes effect **January 1, 2012**. The January 1, 2012 date probably applies to banks that accept SAFE deposits or have other contracts with the State, a municipality, or a State-funded entity. Small businesses with 25 or fewer employees will be able to register to use E-Verify through the Alabama Department of Homeland Security (ADHS). It remains unclear, however, what the process will be for utilizing the ADHS E-Verify program or if it will require that small employers provide ADHS with copies of their I-9 forms in order to query employees through the system. For purposes of employment, E-Verify serves as a limited safe harbor under the Act. There is no similar safe harbor under Federal law.

Penalties for Violations of the Employment Provisions of the Act

Penalties for hiring unauthorized aliens are severe. The penalties can range from temporary suspension of business licenses and permits for the first violation to *permanent revocation* of the business licenses statewide for multiple violations. Furthermore, employers that are found to have violated the law will have to comply with additional reporting requirements for up to three years after discovery of a violation. The enforcement provisions in the employment provisions of the Act are complex and involve various state agencies including the Attorney General, local district attorneys, the Alabama Department of Homeland Security, and ultimately, the state courts.

Independent Contractors

The Act generally does not impose liability on employers for violations committed by their independent contractors. However, under Federal law, an employer may face liability for violations of independent contractors if it has actual or constructive knowledge that the independent contractor's employees are unauthorized. The Act also exempts "casual domestic labor performed in a household" from its provisions.

Disallowance of Tax Deductions (Stayed by Federal Court)

This provision, now stayed by Federal court order, provided that employers may not take deductions for wages, salaries or compensation of any kind paid to an unauthorized alien. If an employer knowingly claims a tax deduction that is disallowed under this provision of the Act, the Act imposes a penalty of up to 10 times the claimed deduction.

Discrimination and Wrongful Termination Claims (Stayed by Federal Court)

This provision, now stayed by Federal court order, made it “a discriminatory practice” for an employer to refuse to hire or to discharge a U.S. citizen or authorized alien while retaining an alien the employer knows or should know is an unauthorized alien. The U.S. citizen or authorized worker aggrieved by the “discriminatory practice” could have collected compensatory damages, costs, and attorney’s fees in a state-court civil action.

Employers who terminate unauthorized employees in compliance with the Act are immune from wrongful termination and retaliation claims arising under Alabama law. This immunity does not apply, however, to any claim arising under Federal law, including claims of discrimination based on national origin.

Public Contractors

The Act imposes on all state contractors the same prohibition against hiring or continuing to employ unauthorized aliens in Alabama that it applies against private employers. In addition, state contractors are required to attest to their compliance by sworn affidavit signed before a notary. State contractors also have to provide proof of E-Verify enrollment before a contract, grant or incentive may be awarded.

These same requirements are applicable to subcontractors on projects paid for by recipients of contracts, grants or incentives from the state, any political subdivision thereof, or any state-funded-entity. Further, the Act requires any recipient of state funds, including contract grantees and incentive recipients, to require an affidavit of compliance with the Act and proof of E-Verify enrollment from all business entities or employers with whom it enters into contracts. The Act allows state authorities and law enforcement to verify compliance with the requirements imposed on state contractors at any time.

The penalties for a contractor or subcontractor failing to comply with the Act are significant, including loss of state contracts and possible suspension of business license.

Contracts With Unlawfully Present Aliens

The Act declares most contracts entered into by unlawfully present aliens to be void and unenforceable in Alabama courts if the other party to the contract had knowledge that the alien was unlawfully present in the United States and the contract requires “the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining.”

State Employee’s Duty to Report

The Act makes it the obligation of every person working for the State or a political subdivision of the State to report any violation of the Act. Any person who willfully fails to report violations may be found guilty of obstructing governmental operations as defined in Section 13A-10-2 of the Alabama Code.

State Officials Obligated to Comply with and Enforce the Act

Any official or agency of the State or a political subdivision of the State may be liable in a civil suit substantial for civil penalties if the official adopts a policy or practice that limits or restricts the enforcement of the Act.

Registration of Motor Vehicles, Driver’s Licenses, Business Licenses; Business Transactions with the State.

Section 30 of the Act prohibits any alien who is unlawfully present in the United States from entering into any business transaction with the State or political subdivision of the State. This prohibition applies to

registration of motor vehicles, renewing motor vehicles license plates, applying for or renewing driver's licenses or applying for or renewing a business license. Complying with these requirements is expected to create significant additional work for licensing authorities and significantly slow down the licensing process. The Act does not define "business transactions". It should be anticipated that the interpretation of "business transactions" will be the subject of future questions and resolution.

Conclusion

The Act imposes several new obligations on employers doing business in Alabama and imposes severe penalties for noncompliance. The primary employment provisions of the Act, including the E-Verify requirement, become effective on **January 1, 2012 or April 1, 2012**. The other relevant provisions are effective now.

While some parts of the law have drawn legal challenges, most of the provisions relating directly to employers likely are to survive these challenges. Many other questions arising under the Act are likely to be litigated in the courts for years to come. Despite these uncertainties, some things are clear: Alabama employers should promptly take steps to implement an immigration compliance program. Such a program, which should include the employment eligibility verification (I-9 Form) process and E-Verify, among other measures, can help ensure that the employer remains in compliance with the Act. It is recommended that all employers engage an outside experienced person to conduct an audit of the employer's Form I-9s and immigration practices.