

Labor & Employment Client Service Group

To: Our Clients and Friends

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U.S. Supreme Court Upholds Arizona's Employment Verification Law

On May 26, 2011, the U.S. Supreme Court upheld the Arizona law that sanctions employers for hiring unauthorized aliens and endorsed Arizona's requirement that employers use the federal E-Verify screening program. A 5-3 majority of the Court found that language in the Immigration Reform and Control Act of 1986 (IRCA) did not preempt the Arizona law, known as "The Legal Arizona Workers Act." While Congress made the IRCA program voluntary at the national level, Congress did not intend to prevent states from mandating participation.

FREQUENTLY ASKED QUESTIONS

What is the Legal Arizona Workers Act?

The Legal Arizona Workers Act prohibits businesses from "knowingly" or "intentionally" hiring an "unauthorized alien." The law requires employers in Arizona to use the "E-Verify" system to verify the employment authorization of all new employees hired after December 31, 2007.

What is E-Verify?

E-Verify is a free, internet-based program run by the U.S. government that compares information from an employee's I-9 to data from U.S. government records. The Department of Homeland Security operates the program in partnership with the Social Security Administration.

Who is "an unauthorized alien?"

Under the Act an "unauthorized alien" is "an alien who does not have the legal right or authorization under federal law to work in the United States."

What does it mean to "intentionally" or "knowingly" hire an unauthorized alien worker?

The determination of whether an employer hired an unauthorized alien "intentionally" or "knowingly" is a legal determination made by the Superior Court judge deciding the case.

Under the Act, a person will be deemed to have acted “intentionally” if that person’s “objective is to cause that result or to engage in that conduct.” Ariz. Rev. Stat. § 13-105. “Knowingly” is defined Under the Act by federal immigration law, which permits violations based on an employer’s constructive knowledge of a person’s lack of legal status, other than the person’s appearance or accent.

Are all Arizona employers required to use the E-Verify program?

Yes. Arizona law requires all employers to use E-Verify for new employees hired after December 31, 2007.

Does the Legal Arizona Workers Act apply to workers who were hired before January 1, 2008?

No.

Does the Legal Arizona Workers Act apply to workers paid in cash?

Yes.

Does the Legal Arizona Workers Act apply to an employer who hires an independent contractor?

Under the Act, an independent contractors is not an “employee.” Ariz. Rev. Stat. § 23-211(3)(b). However, when an employer uses a contract, subcontract or other independent contractor agreement to obtain labor of an alien in Arizona, the employer will be in violation of the law if they knowingly or intentionally contract with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor.

What happens if E-Verify indicates a mismatch?

If the information in E-Verify matches, that employee is eligible to work in the United States. If there is a mismatch however, employers must notify the employee and provide a document that outlines their options for appeal and with the contact information for doing so. Employers cannot immediately fire the employee. Workers have eight federal business days to challenge the mismatch.

How do I register for E-Verify?

You can register for E-Verify on the U.S. Citizenship and Immigration Services website at www.uscis.gov. Click on the E-Verify logo and follow the links to E-Verify registration. Before using the program, an employer, or someone authorized by the employer, must sign a memorandum of understanding that outlines the terms of service.

Can E-Verify be used as part of the hiring process?

No. Employers can only use E-Verify for new hires within three business days of their start date. Employers cannot use E-Verify to consider whether to hire someone or to screen existing employees.

Who enforces the law?

Arizona’s County Attorneys are primarily responsible for enforcing the law against employers. If someone files a complaint against an employer, and the complaint appears to have merit, the County Attorney will contact local police and U.S. Immigration and Customs Enforcement about the suspected employers. The County Attorney will also go to Superior Court to formally resolve the licensing matter.

Arizona's Superior Court judges will then consider whether the employer knowingly or intentionally hired the employee in violation of the Act. County Attorneys and Arizona Superior Court judges do not determine a worker's legal status. The federal government determines an employee's actual legal working status in all cases.

What are the penalties?

The penalties imposed depend on a number of factors. As an initial matter, the court will consider whether the employer "knowingly" or "intentionally" committed the violation and whether it was a first or second time offense.

Under the Act, the court can suspend or permanently revoke an employer's state and local business licenses. The Superior Court judges will determine the length of the suspension based on a variety of factors, including: how long the business had employed someone illegally; whether the business had any prior misconduct; and the degree of harm caused by the violation.

Under the Act, the court can also place the employer on probation. For "knowingly" type violations, probation lasts three years. For "intentionally" type violations, probation lasts five years. To comply with probation, an employer is required to file quarterly reports with the County Attorney.

For both "knowingly" and "intentionally" types of violations, employers must terminate all unauthorized alien employees and file an affidavit within three business days swearing not to hire unauthorized alien workers again.

Does the Legal Arizona Workers Act make it a state crime to employ an unauthorized alien?

No. Federal law defines several crimes that may be committed in connection with employment of an unauthorized alien, but the Legal Arizona Workers Act does not impose criminal penalties.

E-Verify and the Rebuttable Presumption

Verifying the employment authorization of an employee through the E-Verify program creates a rebuttable presumption that an employer did not knowingly or intentionally employ an unauthorized alien. To overcome this presumption, the County Attorney must produce additional evidence that the employer was actually aware of the employee's true unauthorized status to prove that an employer violated the Legal Arizona Workers Act.

What about franchises and business that share a business license?

Under the law, each business location seems to be treated separately from its corporate cousins. This means that if a franchise with a violation at one location faces penalties, others with separate licenses are not affected unless they also are found to have knowingly hired unauthorized alien workers. However, many business owners with multiple locations share business licenses. Businesses that operate under a single license as one corporate entity could therefore suffer the consequences at all sites.

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For further information, contact Bryan Cave LLP's [Labor and Employment Client Service Group](#).