

## Labor & Employment Client Service Group

To: Our Clients and Friends

June 30, 2011

# Georgia's Immigration Crackdown Phases in E-Verify Requirements for Private Employers

## Georgia's New Immigration Law

Last month, Georgia became the latest state to enact immigration legislation when Governor Nathan Deal executed the Illegal Immigration Reform and Enforcement Act of 2011 (IIREA). Portions of the law are scheduled to take effect on July 1, 2011, with the remaining portions becoming effective during the next two (2) years.

Among its changes to Georgia's current immigration enforcement scheme, IIREA mandates that private employers in Georgia (as small as 11 employees) register and use the Department of Homeland Security's web-based employment verification system, E-Verify, to confirm new hires' employment eligibility. IIREA also expands provisions in the Georgia Security and Immigration Compliance Act of 2006 that require state and local government contractors and subcontractors to comply with E-Verify. To read the text of IIREA, click [here](#).

The Federal court for the Northern District of Georgia recently held two of the criminal provisions of IIREA unconstitutional, but the employer-related provisions of the statute were unaffected. While further constitutional challenges to the new Georgia law are expected, the U.S. Supreme Court recently upheld the constitutionality of a similar state statute in Arizona. The decision (*Chamber of Commerce of the United States v. Whiting*) suggests that state immigration statutes, such as Arizona's and Georgia's new IIREA, represent the new status quo in private employer workforce eligibility compliance. To read the Supreme Court's recent decision in *Whiting*, click [here](#).

## Impact on Employers

E-Verify is an internet tool that verifies an individual's eligibility for U.S. employment. Employers input data from the Form I-9, and the E-Verify system compares the information to government databases to confirm the employee's identity and work authorization. If the employee is authorized for employment, the employer attaches the E-Verify confirmation to the Form I-9 or otherwise records the confirmation number. If the system finds a discrepancy, the employee must resolve the issue or system

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error. The employer may terminate an employee *only* after E-Verify issues a final confirmation that the employee is not eligible for employment.

Private Employers. IIREA will eventually affect every Georgia private employers with 11 or more full-time employees (defined as at least 35 hours per week). For employers with a workforce of at least 500 employees, employees hired on or after January 1, 2012 must be verified through E-Verify. For employers with 100 to 499 employees, the implementation deadline is July 1, 2012. As of July 1, 2013, employers with 11 to 99 employees must use E-Verify for new hires. Georgia employers will also be required to provide an affidavit confirming E-Verify usage (or an affidavit describing the employer's exemption from the provision) in order to receive a business license, occupational tax certificate, or other requisite business operation approval from counties or municipalities.

Employers with 10 or fewer employees or with a completely part-time workforce are exempt. This exemption is determined by the status and/or number of employees as of January 1 of the year in which the employer submits the affidavit (in its application for a license, for example).

Enforcement of the IIREA is left to the Georgia Attorney General. The Attorney General may also investigate and bring criminal or civil action against an employer for failure to comply with the provisions. Beyond that, the Attorney General can choose the actions he deems appropriate. For an inadvertent violation, the Attorney General must provide an offending employer 30 days to bring its systems into compliance.

State and Local Government Contractors. IIREA also expands existing rules for businesses who contract with the State and local government agencies. IIREA establishes E-Verify requirements throughout the supply chain for public works projects, with contractors now required to provide an E-Verify affidavit to submit work bids to a public agency for work inside *or* outside of the state. Every subsequent sub-contracting level must also provide a compliance affidavit, each of which must travel up the chain from sub-subcontractor to subcontractor to contractor within five (5) days of receipt, and then be provided to the public agency.

The IIREA permits random and investigative audits of public employers and contractors. A violation of will result in public disclosure of the violation via an official state website and likely require subsequent disclosure by the violating party in future bid proposals. Upon a second infraction, contractors, subcontractors, and sub-subcontractors face a 12-month bar from submitting bids or entering into contracts with public agencies. It appears contractors are liable only for their own employees, not the violations of their subcontractors. A conviction for false statements in an affidavit also results in the 12-month bar.

## **Managing Risks & Compliance Costs**

To ensure smooth transition once the requirement takes effect, employers should review new hire procedures and carefully consider enrolling in E-Verify prior to the applicable deadline. Those employers who contract, either directly or indirectly with the State of Georgia or any of its political subdivisions should also review contract compliance and bid preparation procedures. When used properly, efficient internal I-9 and E-Verify processes and protocols can reduce administrative costs, as

well as improve compliance. You may also consider evaluating your Human Resources training to reflect new I-9 and E-Verify compliance requirements, as well as internal policies and procedures for document retention, for internal and external I-9 and E-Verify auditing, and for employee investigation and termination in response to returned E-Verify submissions.

E-Verify has the potential to add yet another complicated layer to an already complex I-9 process and has several disadvantages, such as potentially triggering an audit of the employer's I-9 files by U.S. Immigration and Custom Enforcement (ICE). However, if implemented appropriately, E-Verify may also offer valuable protection for employers such as, under federal law, creating the rebuttable presumption that the employer has not knowingly employed unauthorized U.S. workers.

Before enrolling in E-Verify, changing your policy regarding its usage, or developing related hiring procedures, therefore, we encourage you to contact your Bryan Cave attorney to discuss E-Verify's benefits and common pitfalls (e.g. E-Verify may not be used to verify the employment authorization of existing employees), as well as best practices for internal processes. After an enrollment plan is put in place, registration for E-Verify is fairly straight forward. More information on E-Verify is available [here](#).

For questions or further information, please speak to your Bryan Cave contact, a member of our [Labor and Employment Client Service Group](#) or one of the contributors to this Client Alert:

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