

Employment Law Update September 2011

On September 28, 2011, the United States District Court for the Northern District of Alabama issued a preliminary injunction prohibiting enforcement of some provisions – but not all provisions – of Alabama's immigration/employment-eligibility verification law ([Act 2011-535](#), also referred to as HB 56 or the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act"). The two most significant provisions that affect employers are not subject to the injunction and will go into effect as set forth in the statute, but the enforcement of other sections that also could affect employers has been prohibited pending a final ruling by the federal court.

Sections not affected:

The section requiring E-Verify (Section 15) is not affected. It goes into effect on April 1, 2012.

The section imposing additional requirements on those contracting with state or local government-funded entities (Section 9) is not affected. It goes into effect on January 1, 2012.

Sections enjoined:

The section disallowing state income tax deductions for payments made to unauthorized aliens (Section 16) has been enjoined indefinitely by the federal court. That section was scheduled to become effective on September 1, 2011, but the state is prohibited from enforcing it pending a final determination by the federal court.

The section creating a new civil cause of action for discrimination for any employee who is not hired or who is fired if the employer hires or continues to employ a worker who the employer knows or should know is an unauthorized alien (Section 17) has been enjoined indefinitely by the federal court. It may not be enforced pending a final ruling by the federal court.

The section making it a crime to conceal, harbor, shield, or transport an unauthorized alien (Section 13) has been enjoined in definitely by the federal court. That section was to become effective on September 1, 2011, but the state is prohibited from enforcing it pending a final determination by the federal court.

Section 11(a), which is directed to the unauthorized aliens (not employers) and prohibits an unauthorized alien from applying for work, soliciting work in a public place, or performing work in the state, has also been indefinitely enjoined by the federal court pending a final ruling.

The federal court also prohibited the enforcement of Sections 11(f) and 11(g), which prohibit the hiring or picking up of anyone for work from a vehicle stopped in a roadway and prohibits anyone from entering a vehicle stopped on a street and to be transported to work if the vehicle blocks or impedes traffic.

A few other sections were enjoined, but they relate to postsecondary education and what evidence courts may consider in determining an alien's status, and those sections do not directly relate to employment issues.

For your convenience, the pages following this page contain the update posted in June after the enactment of Act 2011-535, with enjoined sections noted in **red print**.

If you have any questions about compliance with this new law, with ensuring the eligibility of employees to work, or with any other employment issues, please contact us.

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Employment Law Update June 2011

Governor Bentley signed the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act" ([Act 2011-535](#)) on June 9, 2011. This 70-page law addresses documentation and employment of immigrants and requires businesses and employers to use the federal E-Verify system to verify employment eligibility no later than April 1, 2012, prohibits deductions for tax purposes of any compensation paid to illegal or unauthorized aliens (effective September 1, 2011), and creates a civil claim for refusing to hire someone authorized to work while continuing to employ an illegal or unauthorized alien (effective September 1, 2011), among other things. It has been characterized as an "Arizona-style" law, referring to the Legal Arizona Workers Act upheld on May 26 by the U.S. Supreme Court in [Chamber of Commerce of United States of America v. Whiting](#).

Though the law addresses several topics, of particular interest to employers are Sections 15, 16, and 17. Section 15 prohibits any business entity, employer, or public employer from knowingly hiring or continuing to employ an unauthorized alien to work in the State of Alabama. It requires businesses and employers to enroll in and use the federal E-Verify system to verify employment eligibility of employees no later than April 1, 2012. Unless an employer is a federal contractor, only new employees hired after enrollment in E-Verify should be confirmed using E-Verify. Because the tax and civil liability sections become effective in September 2011, before the E-Verify requirement in April 2012, the safest practice (but not legally required practice) would be to go ahead and begin using the E-Verify system before September 2011 to confirm the eligibility of new hires.

E-Verify is a system that allows an employer to take an employee's information from an [I-9 form](#) and verify the employee's eligibility to work. It has been required for federal contractors for the last year or two and has also been available for voluntary use by any employer. You can get information on the E-Verify system at <http://1.usa.gov/8k8MZ> and can enroll in E-Verify at <http://bit.ly/xO2bM>. Recently, the E-Verify website seems to be extremely slow in loading (more than 10 minutes), probably due to increased traffic as more employers are required to use or encouraged to use the system. Hopefully that will be remedied soon.

Under the new Alabama law, if an employer fails to use E-Verify, upon a first violation the employer will be required to terminate the employment of all unauthorized aliens, will be put on three-years probation during which the employer must make quarterly reports to the district attorney of all hires, and will have its business license suspended for up to 10 days until the employer provides a sworn statement that all unauthorized aliens have been terminated and that the employer is in compliance with the law. A second

offense will result in the "permanent" revoking of all business licenses and permits held by the employer.

Additionally, Section 16 of the Act says that any wages or other compensation paid to an unauthorized alien for work or services performed are not deductible as a business expense for state income tax purposes. The consequences of violating this provision is a penalty equal to 10 times the business expense deduction claimed in violation of the provision. This prohibition on deducting compensation payments appears to include payments to an unauthorized alien who was considered an independent contractor, because the law says that it applies whether or not an IRS form 1099 was issued in conjunction with the remuneration. **[Enforcement of Section 16 has been enjoined by the federal court.]** So, a good practice is to obtain a [W-9 form](#) (Request for Taxpayer Identification Number and Certification) from all individual independent contractors, as this form requires the contractor to certify that he, she, or it is a "U.S. person" (which for an individual contractor means a U.S. Citizen or legal resident alien). Additionally, if there is a written contract with the contractor, it is a good idea to include a provision in which the contractor verifies by affidavit his or his company's eligibility to work in the United States and agreeing to hire only employees who are eligible to work in the United States. The federal Immigration Reform and Control Act ("IRCA") already prohibits an entity from hiring an independent contractor that employs illegal aliens. The new Alabama law does not appear to impose any additional liability on a business because an independent contractor with whom it contracts employs unauthorized aliens as long as the independent contract is itself not an unauthorized alien, but it is still a violation of federal law.

Section 17 of the new Alabama law says that it is a discriminatory practice for a business entity or employer to fail to hire a job applicant who is a citizen or alien authorized to work in the United States while retaining, continuing to employ, or hiring an employee who the business or employer knows or should have known is an unauthorized alien. It also makes it a discriminatory practice to discharge an employee who is a citizen or alien authorized to work in the United States while retaining, continuing to employ, or hiring an employee who the business or employer knows or should have known is an unauthorized alien. It creates a civil cause of action for any employee who is not hired or who is fired if the employer hires or continues to employ a worker who the employer knows or should know is an unauthorized alien. The law does limit damages to "compensatory relief," which seems to prevent any punitive damages. The law also has a very unusual loser-pays attorney-fee provision in this section that says the losing party must pay the attorneys' fees of the prevailing party but that the losing party's liability for fees is limited to the amount paid by the losing party for his or her own attorneys' fees. It requires both parties to report to the court the amount of attorneys' fees spent before a verdict is rendered. **[Enforcement of Section 17 has been enjoined by the federal court.]**

Additionally, though not applicable to employers generally, Section 9 of the Act applies to businesses that contract with the State of Alabama or any political subdivision of the state and imposes requirements on those entering such contracts and those subcontracting under any such contracts. Section 9 becomes effective January 1, 2012, and it requires a business with a state/government contract or subcontractor under a state/government contract to give a notarized verification that it will not knowingly employ or continue to employ an unauthorized alien and provide documentation that it is enrolled in the E-Verify program. So, for businesses with state/government contracts and subcontractors under state/government contracts, the E-Verify requirement becomes effective a few months sooner than for other businesses. This section does provide that a contractor is not liable for its subcontractors if it receives a sworn affidavit from the subcontractor that it has complied with the requirements to verify the employment eligibility of its employees. The penalties for this are similar to the penalties for noncompliance of businesses not contracting with the government with the addition that for a second offense the state/government contract of a primary contractor will be terminated. For practical purposes, the contract of a subcontractor would also necessarily terminate upon a second offense by a subcontractor because the subcontractor's business license and permits would be terminated.

Though not part of the new Alabama law, with the Alabama law's emphasis on employers taking action to ensure they are hiring only employees who are authorized to work in the United States, please keep in mind that an employer must be nondiscriminatory in its efforts to ensure the employment eligibility of its employees. As such, an employer cannot impose more requirements or do more investigation of employees or prospective employees based solely on the employee or prospective employee's race, color, or national origin.

The new law also makes it a criminal violation to conceal, harbor, shield, or transport an unauthorized alien (or to attempt to do any of these) if the person knows or recklessly disregards the fact that the alien is unauthorized. A violation is a Class A misdemeanor for each unlawfully present alien, and if the violation involves 10 or more aliens, it is a Class C felony. So, an employer who violates the provisions concerning employment of unauthorized aliens can turn it into a criminal offense if the employer conceals, harbors, shields, or transports the unauthorized aliens. Any vehicle or other conveyance used is also subject to civil forfeiture. There are also provisions that prohibit making or dealing in false documentation of employment eligibility. So if an employer tries to falsify the eligibility of its employees, that is another criminal violation (potentially a Class C felony). **[Enforcement of this section, Section 13, has been enjoined by the federal court.]**

For businesses or employers with 25 or fewer employees, the law provides that the [Alabama Department of Homeland Security](#) will establish an "E-Verify employer agent service" to enroll participating businesses in the E-Verify Program on behalf of the business and use E-Verify to verify employees' employment eligibility on behalf of the business or employer at no charge to the business or employer. That should be in place in by around January 2012.

The Alabama Department of Homeland Security will also request from the U.S. Department of Homeland Security a list of Alabama employers enrolled in the E-Verify program and will make that list available on the Alabama Department of Homeland Security's website. So, a business can check that site to see if another business or subcontractor is enrolled.

The law also prohibits courts from enforcing any contract with an unauthorized alien (subject to some limited exceptions) if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into and the performance of the contract required the alien to remain unlawfully in the United States for more than 24 hours after the time the contract was entered.

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