

PUBLICATION

New Alabama Immigration Law Will Impact Employers in the Construction Industry

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Alabama's new immigration law, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (H.B. 56) (the law), has received substantial nationwide publicity since its passage in July 2011. Notwithstanding this publicity, much remains unknown regarding the validity and practical long-term effects of the law. This is particularly true in light of numerous ongoing legal challenges that have prevented many of its sections from taking effect and changes to the law that have been proposed, and in some cases passed, by the Alabama State Legislature during the 2012 session. Businesses and individuals in Alabama must take extra precautions to ensure compliance with the law, even while its final shape remains unknown.

Provisions That Have Taken Effect

While the fate of numerous sections of the law remains unclear, most of its provisions relating to employers have taken effect and require the immediate attention of employers. Perhaps most importantly for employers in Alabama, courts have refused to block the provisions requiring businesses to confirm the legal status of all newly hired workers using the federal E-Verify system and imposing stiff penalties for hiring unauthorized aliens. These provisions took effect on April 1, 2012. Also, in order to receive government contracts, grants or incentives from the state or a recognized political subdivision, a business entity must enroll in the E-Verify program; not knowingly employ, hire or continue to employ an unauthorized alien; and attest to both of those requirements by sworn affidavit. All tiers of subcontractors on these projects must also meet the same requirements.

Violations of these provisions are extremely costly under the law and can result in hefty fines and loss of the right to do business in Alabama. Employers across Alabama must vigorously ensure compliance with the provisions to avoid those consequences. Penalties include suspension of business licenses and permits for first offenses, and revocation of licenses and permits for second offenses, as well as hefty monetary penalties.

Additionally, employers must be careful not to run afoul of existing federal law while attempting to comply with the law's requirements. Employers must keep in mind that federal law prohibits the use of E-Verify to pre-screen applicants or for existing employees unless an exception applies. Accordingly, E-Verify should only be used for new hires, after an offer of employment has been accepted, but before the employee starts working. If employers have not used E-Verify for new employees hired after the effective date of the law's E-Verify requirement (January 1 for state contractors, April 1 for other employees), these employers may be in a legal bind, as they are in violation of the law's requirement to use E-Verify, but would likely be in violation of federal law if they attempted to go back and E-Verify these new employees at this point, since they would now be considered existing employees.

Provisions Struck Down by the Courts

The federal courts have temporarily halted enforcement of numerous sections of the law. On September 28, 2011, the Chief Judge of the United States District Court for the Northern District of Alabama, Sharon Blackburn, issued three orders addressing the law. Two provisions that would have proved very costly for employers were enjoined by the federal court: Section 16, which prohibits taking a state tax deduction for wages paid to an unauthorized alien; and Section 17, which creates a state "discrimination" cause of action

based on the retention or hiring of an unauthorized alien over a United States citizen or an alien authorized to work in the United States.

Numerous other sections have been temporarily halted by the federal courts, although none of them will have as large an impact on employers in Alabama as Sections 16 or 17. Judge Blackburn also halted enforcement of Section 11(a), which makes it unlawful for an illegal alien to apply for, solicit or perform work as an employee or independent contractor; and Section 13, which makes it unlawful to harbor, conceal or transport an illegal alien. Judge Blackburn also halted the state of Alabama from enforcing Sections 11 (f) and (g) of the law, which make it illegal for an occupant of a motor vehicle stopped on the street to attempt to hire someone to work at a different location if it impedes traffic and for an individual to enter into a motor vehicle for such purpose if it impedes traffic.

On appeal from Judge Blackburn's orders, the United States Court of Appeals for the Eleventh Circuit halted enforcement of two additional sections of the law: Section 10, which made it a violation of state law for illegal aliens to be present in the state of Alabama; and Section 28, which required public schools to check the immigration status of their students.

In March 2012, the Eleventh Circuit halted enforcement of two more provisions of the law that are relevant for businesses in Alabama. First, the Eleventh Circuit struck down the provision that barred illegal immigrants from engaging in government transactions. This provision had created confusion and delays in routine transactions such as obtaining car tags as state and county workers determined what the law required them to do. The Eleventh Circuit also halted a provision of the law making contracts with unlawful aliens illegal and unenforceable in the courts of Alabama.

Judge J. Scott Vowell of the Circuit Court of Jefferson County, Alabama, had previously entered an order indicating that the bar on enforcement of contracts by unlawful aliens was unenforceable because it violates Alabama's constitution. The Eleventh Circuit's injunction, and the language in Judge Vowell's opinion also raise an interesting question regarding the validity of Alabama's prohibition on the enforcement of contractual rights by contractors that are not licensed as such in Alabama. Courts in Alabama have long held that general contractors and subcontractors working on projects in Alabama without first obtaining a contractors' or homebuilders' license cannot recover for breach of contract or related theories stemming from this work, regardless of how harsh or inequitable this result may appear to be in certain circumstances.

It would stand to reason that, if the section of the law prohibiting the enforcement of contracts by unlawful aliens is unconstitutional, then the law prohibiting out of state contractors from enforcing contractual rights would be unconstitutional for similar reasons. It does not appear that any Alabama court has yet ruled on this issue, but out of state contractors may rely on Judge Vowell's opinion in an attempt to enforce their contractual rights relating to Alabama building projects. It should be noted that the two situations may be distinguishable in a number of ways, including that the prohibition on the enforcement of contracts by out of state contractors implicates the state of Alabama's inherent licensing powers and its great interest in public safety while the prohibition relating to unlawful aliens likely does not. Nevertheless, Judge Vowell's order could have profound implications both for the validity of this section of the law and on the rights of out of state contractors in Alabama.

Conclusion

Alabama's new immigration law has numerous provisions that require the attention of any company doing business in Alabama. While the state and federal courts have prevented certain portions of the law from taking effect as scheduled, many other portions have taken effect or will take effect in the coming months. Additionally, while the state legislature has indicated that it plans to revise the law in some manner, it is unclear

what, if any, changes will be made to the provisions that affect Alabama employers. Accordingly, Alabama businesses need to act proactively to minimize their costs and avoid compliance issues.