PUBLICATION

State E-Verify Requirements Upheld by Supreme Court

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The United States Supreme Court has upheld Arizona's requirement for all employers in the state to use E-Verify on penalty of losing their business licenses. More states might follow Arizona.

Arizona was the first state to require all employers in the state to use E-Verify, the Department of Homeland Security's "voluntary" system by which participating employers electronically verify certain workers' claimed identity and work authorization against government databases. Other states with such broad requirements include Georgia, Mississippi, and Utah.

Employers and unions combined to challenge the aspect of the Arizona law that claimed to avoid federal preemption of immigration law through connection with state business licenses. In Chamber of Commerce v. Whiting, case number 09-115, the Supreme Court now has rejected that challenge, allowing Arizona to enforce the law.

Immigration enforcement related laws have been proposed in many states this year, but most have been defeated in their legislatures, with Utah and Georgia as noteworthy exceptions. The Supreme Court decision may spur enactment of similar laws in other states.

Many other states and local governments already require E-Verify use for employers performing contracts for the state or receiving grants. Those requirements had been upheld by reviewing courts. Many private employers require their vendors to use E-Verify. The federal government also requires certain federal government contractors to use E-Verify, even as to existing employees working on the contract regardless of when hired. Otherwise, participating employers may (and must) "query" E-Verify only for workers hired after the facility registered for E-Verify. Several bills have been introduced in Congress to make E-Verify or some variation of it mandatory nationally, but none have passed yet.

While E-Verify tends to make it harder for an unauthorized worker to find a job, it also has had the effect of driving unauthorized workers to get around it by embodying stolen identities of real people into fake documents. DHS is trying to enhance E-Verify by showing querying employers copies of photos from databases relating to key documents being verified, such as permanent resident cards, temporary work cards, passports, and "enhanced" drivers licenses in certain states. DHS has begun to pilot a program to validate electronically against Mississippi drivers licenses presented.

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's "E-Verify" program. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized

aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group.

We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.