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The U.S. District Court for the District of Arizona has dismissed two lawsuits challenging the Legal Arizona Workers Act. Effective January 1, 2008, the law imposes new obligations on Arizona companies and penalizes those that knowingly or intentionally employ undocumented workers.

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Arizona Edition

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Countdown to January 1: Court Dismisses Lawsuits Challenging the Legal Arizona Workers Act

By Bonnie K. Gibson and Michael J. Lehet

In our November 2007 ASAP Newsletter (Federal Court Holds Hearing on Challenges to the Legal Arizona Workers Act), we notified you of two consolidated lawsuits challenging the constitutionality of the recently enacted Legal Arizona Workers Act. On December 7, 2007, U.S. District Court Judge Neil Wake issued a ruling dismissing both lawsuits. The ruling is “without prejudice,” meaning the plaintiffs are free to correct deficiencies in their pleadings and come back to court and refile the complaint. Several plaintiffs quickly responded to the ruling and filed a second lawsuit on December 9.

Employer Obligations on January 1, 2008

The Legal Arizona Workers Act is scheduled to go into effect on January 1, 2008. Beginning on that date, Arizona employers must confirm the employment authorization of all new hires using “E-Verify,” an Internet-based program operated by the U.S. Department of Homeland Security. In addition, the Act penalizes any Arizona employer that “knowingly” or “intentionally” employs undocumented workers on or after January 1. Specifically, the Arizona Attorney General or County Attorney must investigate any complaint that an employer is knowingly or intentionally employing an undocumented worker. If the complaint is deemed “not frivolous,” the County Attorney must bring a lawsuit against the employer in superior court. If the court determines the employer knowingly employed an undocumented

worker, it may order suspension of the employer’s business license for up to 10 business days. If the court concludes the employer did so intentionally, it must order suspension of the employer’s business license for at least 10 business days. If a court later determines the same employer knowingly or intentionally employed an undocumented worker during a designated probationary period—three years after the first offense for a knowing violation, and five years after the first offense for an intentional violation—it must order the permanent revocation of the employer’s business license.

Challenges to the New Law

Shortly after Governor Janet Napolitano signed the Act into law, 12 nonprofit associations filed suit in the U.S. District Court for the District of Arizona, claiming the Act violated both the Arizona and U.S. Constitutions. The plaintiffs named the Governor and Attorney General as defendants. Three months later, two additional groups filed a separate lawsuit in the same court, also challenging the constitutionality of the Act. They named the Governor and Attorney General, as well as Gale Garriott, Director of the Arizona Department of Revenue, as defendants. Notably, neither lawsuit named a single County Attorney as a defendant. The court subsequently consolidated the lawsuits and held a hearing on the parties’ legal arguments. The hearing constituted a “trial on the merits.” U.S. District Court Judge Neil Wake presided over the hearing.

During the hearing, the parties raised multiple challenges and defenses to the Act. The plaintiffs argued the Act was preempted by—and otherwise in conflict with—federal immigration laws. They also questioned the investigation and hearing procedures outlined in the Act, contending those procedures were inadequate under the Arizona and U.S. Constitutions. In addition, the plaintiffs claimed the Act improperly compelled employers to relinquish rights guaranteed to them by the Fourth Amendment to the U.S. Constitution. The defendants responded that the court lacked jurisdiction over the lawsuits because the cases were not “ripe” for review and the plaintiffs lacked “standing.” In particular, the plaintiffs showed no actual or imminent injury resulting from the Act, and the named defendants lacked direct authority to enforce the new law.

The Court’s Ruling

On December 7, the court issued a ruling dismissing both lawsuits. In reaching the decision, Judge Wake explained plaintiffs must have standing to assert legal claims in federal court. In other words, they must establish actual or imminent injury—as either a “genuine threat” of prosecution or economic injury resulting from the challenged law. Moreover, plaintiffs must demonstrate the named defendants possess authority to enforce the law. If plaintiffs fail to prove these elements, they lack standing and the federal court may not adjudicate their claims.

The court analyzed the two features of the Act—the business license penalty and the E-Verify requirement—separately. In the case of the business license penalty provisions, the court concluded the plaintiffs failed to prove a genuine threat of prosecution and therefore did not demonstrate the necessary injury. In so finding, the court relied on record evidence that members of the plaintiff groups do not knowingly or intentionally employ undocumented workers. In addition, the plaintiffs presented no evidence of any threat of prosecution directed specifically toward them or their mem-

bers. Because threat of prosecution by a County Attorney was neither actual nor imminent, the plaintiffs lacked standing to challenge the business license penalty provisions of the Act.

Turning to the E-Verify requirement, the court, however, agreed that the plaintiffs had demonstrated actual or imminent economic injury. In particular, the court found that the Act compels the plaintiffs to devote time and resources to using, and preparing to use, E-Verify (for example, installing necessary software, completing the E-Verify tutorial, and confirming the employment authorization of new hires). The court noted that if the plaintiffs did not use E-Verify, they might lose their sole affirmative defense under the Act—good faith compliance with the Form I-9 employment verification process. Expanding on this point, Judge Wake explained: “It is enough at the threshold of this case that Plaintiffs reasonably fear that if they do not use E-Verify and a new employee turns out to be unauthorized, they may have no good faith defense to the Act’s harsh [business license] sanctions.”

Although the plaintiffs established economic injury, thereby satisfying the first element of the standing test for purposes of challenging the E-Verify requirement, the court held they named the wrong defendants. The Act authorizes only County Attorneys to bring enforcement actions against employers for noncompliance. Nevertheless, the plaintiffs neglected to name a single County Attorney as a defendant. Instead, they sued the Attorney General, Governor and Director of the Department of Revenue. None of these individuals possess direct enforcement authority under the Act, and a ruling against them would not preclude a County Attorney from executing the law, or otherwise diminish the Act’s coercive effect. The court also emphasized the Attorney General has neither threatened to refer a complaint to a County Attorney, nor threatened to unilaterally bring enforcement proceedings, despite the lack of power to do so. Because the plaintiffs named the incorrect defendants, they

lacked standing to challenge the E-Verify requirement.

Thus, because the plaintiffs suffered no actual or imminent injury from the business license provisions of the Act and named the incorrect defendants, the court dismissed both lawsuits. The court did not address the merits of the case—in particular, the plaintiffs’ contention that the Arizona statute is preempted by federal law. The dismissal, however, is without prejudice, meaning the plaintiffs may refile the lawsuit against a County Attorney to challenge the business license penalties and E-Verify requirement once they can prove actual or imminent injury resulting from those provisions.

If they choose, the plaintiffs could appeal Judge Wake’s decision to the Ninth Circuit Court of Appeals, but the procedural nature of the ruling significantly decreases the chance of a successful appeal. On December 9, however, several plaintiffs filed a second lawsuit in the same court, naming the Attorney General, 15 County Attorneys, and Fidelis Garcia, the State Registrar of Contractors, as defendants. The new lawsuit raises virtually the same allegations and legal claims. In addition, the complaint alleges that Maricopa County officials have already targeted specific plaintiffs. The new lawsuit is assigned to U.S. District Court Judge Mary Murguia.

Recommendations for Arizona Employers

The Act is scheduled to go into effect on January 1. Although the plaintiffs have filed a new lawsuit challenging the Act, that action alone will not defeat the new law. The plaintiffs must first secure a court order either temporarily or permanently preventing the Act—at least its E-Verify component—from going into effect. The order will turn on the plaintiffs’ substantive challenges to the Act’s constitutionality, challenges Judge Wake chose not to address and Judge Murguia may not resolve before the year ends.

Given Judge Wake’s ruling, as well as the uncertainty surrounding any additional

challenges to the E-Verify requirement, employers should continue to take the following steps:

1. Register for E-Verify. Employers should register in enough time for them to begin conducting verifications on new employees on January 1. In light of the time necessary to complete the registration process, train personnel on the program, and make any necessary operational adjustments, employers are generally advised to register immediately. Although the majority of Arizona employers have yet to register, enrollment in the program is steadily increasing as the new year approaches, and there have not been any reported glitches in the registration process.
2. Audit current I-9's to insure the forms are accurate and complete.
3. As needed, train personnel on proper completion of the Form I-9. (Note: Beginning on December 26, 2007, employers must use a modified Form I-9, available at www.uscis.gov/files/form/i-9.pdf.)
4. Review, revise and develop policies for storing and retaining I-9 documents.

We will continue to update employers as this litigation progresses and inform them of any changes to their legal obligations under the Act. In the meantime, employers should consider seeking the advice of experienced employment and/or immigration law counsel with any questions, and to determine the best strategies and practices as January 1 quickly approaches.

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