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Following months of litigation, a federal district court judge has ruled that the Legal Arizona Workers Act is constitutional. The decision – which the Ninth Circuit Court of Appeals will likely review – affirms the new Arizona law prohibiting employers from knowingly or intentionally employing unauthorized workers at the risk of losing their business licenses.

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Arizona Edition

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Eyes on the Workforce: Legal Arizona Workers Act Withstands Constitutional Scrutiny

By Steven G. Biddle and Michael J. Lehet

Signed into law on July 2, 2007, and effective January 1, 2008, the Legal Arizona Workers Act (“the Act”) penalizes employers that knowingly or intentionally employ unauthorized workers in the state of Arizona. Immediately after its enactment, several business groups filed a lawsuit contending the Act violated the Arizona and U.S. Constitutions. U.S. District Court Judge Neil Wake has issued a ruling rejecting the challenges and holding that the Act is constitutional.

The Legal Arizona Workers Act and Its Challengers

The Legal Arizona Workers Act imposes two obligations on Arizona employers. First, the Act prohibits employers from “knowingly” or “intentionally” employing unauthorized workers on or after January 1, 2008. Employers who do so risk business license suspension for a first offense and business license revocation for a second offense. Second, employers must use “E-Verify” – a web-based program operated by the U.S. Department of Homeland Security – to confirm the work authorization of individuals hired on or after January 1, 2008.

The Act also provides two defenses to employers. An employer has an affirmative defense to business license suspension or revocation if it can prove it complied in good faith with the federal Form I-9 requirements. Moreover, an employer is entitled to a rebuttable presumption that it did not knowingly or intentionally employ an unauthorized worker if

it proves it confirmed that employee’s work authorization using E-Verify. (As a rebuttable presumption, the defense is not complete; the government may offer evidence to show the employer did in fact knowingly or intentionally employ an unauthorized worker.)

After Governor Janet Napolitano signed the Act into law, 12 nonprofit associations filed a lawsuit in the U.S. District Court in Arizona alleging the Act violated the Arizona and U.S. Constitutions. They named the Governor and Attorney General as defendants. Two other groups filed a similar lawsuit three months later, naming the Director of the Department of Revenue as an additional defendant. The plaintiffs in both lawsuits claimed federal immigration law preempts the Act, and challenged the adequacy of the investigation and hearing procedures preceding business license suspension and revocation, claiming those procedures do not provide sufficient procedural safeguards or “due process.”

Judge Wake dismissed both lawsuits last December, in part because the plaintiffs failed to name a single county attorney as a defendant. Under the Act, only county attorneys are authorized to bring enforcement actions against noncompliant employers. The plaintiffs immediately refiled their respective lawsuits, with the first lawsuit naming the Attorney General, 15 County Attorneys, and the State Registrar of Contractors as defendants, and the second lawsuit naming the Attorney General and Director of the Department of Revenue, as well

as the Maricopa County Attorney, as defendants. The court consolidated the two lawsuits and held a trial on January 16, 2008.

Decision Upholding the Act

On February 7, 2008, Judge Wake ruled against the plaintiffs and upheld the Act. Key points of the ruling include:

- The prohibition against knowingly or intentionally employing unauthorized workers parallels similar prohibitions in existing federal immigration law – therefore, the Act “does not make employers conform to a stricter standard of conduct than federal law.”
- Federal immigration law specifically authorizes, rather than preempts, states to act, including by such means as the Act’s business license penalties.
- The Act provides employers with sufficient procedural safeguards in connection with business license suspension and revocation – that is, hearings take place before a court with full evidence-taking and fact-finding authority, courts may only find an employee is unauthorized after receiving a federal determination to that effect, and the employer may present evidence to prove it did not knowingly or intentionally employ an unauthorized worker.
- By requiring use of E-Verify, the Act furthers federal policy encouraging use of the program – and does so as part of a licensing sanctions law expressly authorized by federal immigration law.

Judge Wake also noted “debate” on whether the Act’s business license sanctions apply to those employees hired before January 1, 2008. Without resolving the issue, he explained that no County Attorney has expressed an intent to enforce the business license penalty provisions with respect to those workers hired before January 1, 2008.

Finally, Judge Wake clarified another previously unanswered issue. He believes

the Act expressly requires companies to use E-Verify only with their newly-hired employees working in Arizona, so companies with employees in Arizona and other states do not need to use E-Verify for their non-Arizona new hires.

Action Items for Arizona Employers

Although the plaintiffs may ask the Ninth Circuit Court of Appeals to review Judge Wake’s decision, at this point, the Act is in effect and Arizona employers must comply with its provisions. This includes registering for E-Verify and using it to verify the work authorization of any individual hired to work in Arizona after December 31, 2007. We also recommend that employers: (1) audit current I-9’s for accuracy and completion; and (2) as needed, train personnel on proper completion, storage, and retention of I-9 forms.

We will continue to update employers as this litigation develops and inform them of any changes to their legal obligations under the new Arizona law.

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