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Arizona made national news with the enactment of Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act." In addition to the legislation's more controversial and highly publicized provisions, the law amends the Legal Arizona Workers Act of 2007 by providing employers with an additional affirmative defense and requiring they retain E-Verify documentation on their workforce. The new legislation also creates an added hurdle to employers attempting to recruit and transport day laborers.

UPDATE: What Arizona's Controversial Immigration Law Means for Employers

By Neil M. Alexander and Michael J. Lehet

UPDATE: On July 28, 2010, the U.S. District Court for the District of Arizona issued a highly anticipated order in *United States v. State of Arizona, et al.*, a recent federal lawsuit challenging the constitutionality of the Arizona "Support of Law Enforcement and Safe Neighborhoods Act" ("SB 1070"). The order temporarily enjoins enforcement of certain provisions of SB 1070 pending the court's final ruling in the matter. The now-enjoined provisions include some of the more controversial elements of SB 1070, including the requirement that law enforcement officers make a reasonable attempt to determine the immigration status of persons stopped, detained, or arrested, if there is reasonable suspicion to believe those individuals are unlawfully present in the United States.

In reaching its ruling, the court agreed certain challenged elements of SB 1070 were likely preempted by federal law and therefore unconstitutional. Nevertheless, the court concluded other challenged provisions were likely not preempted and noted the federal government's failure to specifically challenge other elements of the new law, including those pertaining to employers. Therefore, the court rejected the federal government's request to enjoin SB 1070 in its entirety and limited its ruling to those provisions it agreed were likely preempted.

Given the court's ruling, the language in SB 1070 amending the Legal Arizona Workers Act (LAWA) remains in full force and effect. Specifically, LAWA will continue to provide an entrapment affirmative defense to employers charged with knowingly or intentionally hiring undocumented workers and require employers to keep a "record" of each E-Verify verification for either the duration of the worker's employment or three years from the date of verification, whichever is later. In addition, the ruling does not impact the element of SB 1070 making it a Class 1 Misdemeanor for any occupant of a motor vehicle stopped on a street, roadway, or highway to hire and pick up – or attempt to hire and pick up – passengers for work at a different location, if the motor vehicle blocks or impedes the normal movement of traffic.

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Late last week, with many in the nation watching, Arizona Governor Jan Brewer signed the “Support Our Law Enforcement and Safe Neighborhoods Act” (“SB 1070”) into law. The legislation represents Arizona’s latest effort to combat illegal immigration and is now the centerpiece of a national political firestorm, including criticism from President Obama and numerous public interest groups. In addition, SB 1070 already is the subject of two federal lawsuits challenging its constitutionality. Lost among this debate however, are those provisions of the law directed toward Arizona employers.

Amendments to the Legal Arizona Workers Act

The Legal Arizona Workers Act of 2007 (LAWA) penalizes employers that knowingly or intentionally hire undocumented workers in Arizona by suspending or revoking their business licenses. LAWA also requires that all Arizona employers use E-Verify, the online employment eligibility verification program, to confirm the work authorization of newly hired employees.

SB 1070 amends LAWA in two ways.

First, SB 1070 provides an “entrapment” affirmative defense to employers charged with knowingly or intentionally hiring undocumented workers. To avail itself of this defense, an employer must first admit it did, in fact, knowingly or intentionally hire an undocumented worker. It must then prove the idea for committing the violation originated with law enforcement officers or their agents who urged and induced the employer to commit the violation. The employer must also establish it was not predisposed to commit the violation. The law specifically states entrapment does not occur simply because law enforcement officers or their agents “use a ruse or conceal their identity” or “merely provided the employer with an opportunity to commit the violation.” The inclusion of this defense suggests state and local law enforcement agencies will begin undercover investigations of employers and pursue more creative means of determining whether employers are knowingly or intentionally hiring undocumented workers.

Second, SB 1070 amends LAWA provisions requiring use of E-Verify. Under the amended language, employers must also keep a “record” of each verification for either the duration of the worker’s employment, or three years from the date of verification, whichever is later. According to the Memorandum of Understanding employers sign when registering for E-Verify, registered employers must either record the case verification number generated by E-Verify on the Form I-9, or print the screenshot containing the case verification number and attach it to the I-9. It is unclear whether recording the number on the I-9 satisfies this new requirement. Therefore, employers should err on the side of printing a copy of all E-Verify results, including tentative non-confirmations, and store them with the I-9. Under federal law, employers must retain I-9s for three years from the date of hire or one year from the date of termination, whichever is later.

Other Provisions Addressing Employment in Arizona

SB 1070 also makes it a Class 1 Misdemeanor for any occupant of a motor vehicle stopped on a street, roadway, or highway to hire and pick up – or attempt to hire and pick up – passengers for work at a different location, if the motor vehicle blocks or impedes the normal movement of traffic. The prohibition applies whether or not the passengers are legally authorized to work in the United States. As a result, although the provision is likely intended to discourage persons from hiring and transporting unauthorized day laborers, it may apply in other circumstances as well.

Recommendations for Employers

Absent any additional action, SB 1070 will become effective on July 28, 2010.

Given the amendments to LAWA, including state and local government’s seemingly renewed interest in pursuing those who

knowingly or intentionally hire undocumented workers, employers should train human resources personnel on all applicable immigration compliance procedures, including proper completion of the Form I-9 and use of E-Verify. Employers also should continue to use E-Verify, retain records of all verifications and store them with the accompanying I-9 forms. Finally, if they have not done so already, employers should conduct an I-9 audit to ensure all current employees have a complete and correct I-9 on file and all former employees have a complete and correct I-9 on file for one year following the date of termination or three years from the date of hire, whichever is later.

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