



Virginia Workplace Law

Get Ready For E-Verify

By: Mike DeCamps. Wednesday, July 6th, 2011

Increasingly, states have become lightning rods for controversial employment issues. Last winter, [Wisconsin became a battleground over public employee unions](#). Then Arizona attracted national attention when it adopted [strict laws aimed at addressing the illegal immigration issue](#). These internal battles may seem relevant only to the state in which they occur. Not so now after the [May 26, 2011 United States Supreme Court decision in Chamber of Commerce v. Whiting](#). That case, addressing the Arizona immigration laws, has a significant impact on laws recently enacted by the Virginia legislature, and Virginia employers should take note.

In *Whiting*, the Supreme Court determined that the Federal Immigration Reform and Control Act ("IRCA") does not preempt (i.e. nullify) provisions of Arizona's law imposing civil penalties on employers who hire unauthorized aliens and mandating certain employers to conduct employee background checks through E-Verify. The Court did rule that the IRCA does prohibit states from imposing "civil or criminal sanctions" on employers who hire unauthorized aliens. This is significant because current Virginia law makes it a class 1 misdemeanor under Section 40.1-11.1 for a business to hire unauthorized workers. Under the Supreme Court's ruling, that provision is now not enforceable. (However, note that the Virginia statute also makes it a requirement for employer application forms to ask prospective employees if they are legally eligible for employment in the United States.)

The US Supreme Court did make it clear though that states may impose penalties through "licensing and similar laws." Thus, it upheld as legal the Arizona provision that allows Arizona courts to suspend or revoke licenses necessary to do business in that state when employers intentionally or knowingly employ unauthorized aliens.

Of equal importance is the Court's decision to uphold portions of Arizona law that mandated the use of E-Verify by employers. E-Verify is an online system that can confirm employment authorization for new hires through queries in databases maintained by the Department of Homeland Security and the Social Security Administration. Federal law makes E-Verify optional in most cases but a number of

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states, including Virginia, have now made it mandatory for certain employers and the trend seems to be to add to that list of employers.

Beginning December 1, 2012 under Virginia Code §40.1-11.2, all agencies of the Commonwealth of Virginia, must enroll in the E-Verify program and use the program for each newly hired employee who is to perform work within the Commonwealth. Additionally, beginning on December 1, 2013, any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of \$50,000 with any agency of the Commonwealth to perform work or provide services pursuant to such contract shall register and participate in the E-Verify program and those who fail to do so can be debarred from contracting with any agency of the Commonwealth for a period up to one year. Similarly, virtually all private employers with federal contracts must use E-Verify (there are some exceptions).

It should be noted that at least ten other states have passed similar legislation, including neighboring state, Tennessee. The Department of Homeland Security indicates that a large number of businesses are enrolling each week in the E-Verify program as more and more states mandate its use. It appears likely that the Virginia legislature will continue its effort to increase the number of private employers who may be required to participate in the E-Verify program. [Employment lawyers at Sands Anderson](#) are ready and willing to assist employers as they meet this requirement and begin use of the E-Verify program.

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