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Is E-Verify Requirement Coming to Pennsylvania Employers?

BY VALENTINE BROWN
Special to the Legal

On May 26, the U.S. Supreme Court upheld the Legal Arizona Workers Act against a federal pre-emption challenge. Signed into law by then-Gov. Janet Napolitano in 2007, the law mandates that all Arizona employers use E-Verify or lose their license to do business in the state. E-Verify is a federal electronic system that checks information provided by an employee on the I-9 form against information contained in Social Security, Homeland Security and Department of State databases.

The case, *Chamber of Commerce of the United States v. Whiting*, involved the question of whether the Arizona law was pre-empted by the 1986 Immigration Reform and Control Act (IRCA), which made it a federal civil and criminal offense to employ undocumented workers and mandated that employers complete the Employment Eligibility Verification Form, now commonly known as the I-9.

Writing for a 5-3 majority, Chief Justice John G. Roberts Jr. said, "Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the states, and therefore is not expressly pre-empted." Justice Elena Kagan recused herself, having written the Obama administration's brief opposing the Arizona law while she was Solicitor General.

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This decision endorsed an interpretation of the 9th U.S. Circuit Court of Appeals that IRCA expressly permits states to impose sanctions on businesses that hire undocumented workers through business licensing. The Legal Arizona Workers Act is a precursor to Arizona's controversial SB 1070, which is itself currently under challenge in the 9th Circuit.

The Supreme Court's decision lends support to numerous state E-Verify requirements that have been passed in the wake of the Arizona law. It will also certainly increase the momentum for state legislatures across the country considering E-Verify requirements. This movement is also being carefully watched in Washington, D.C., where legislation mandating E-Verify on a national level has broad support, including from the Obama administration. While the debate goes on, the Department of Homeland Security (DHS) is continually expanding the system's capabilities. In March, DHS launched a self-check tool so that individuals may verify and correct their own electronic records. And earlier this month, DHS published a Federal Register notice proposing to expand the database check to include state driver's license and identification documents.

On June 9, Alabama became the latest state to mandate E-Verify for all employers, joining Arizona, Georgia, Mississippi, Rhode Island, South Carolina and Utah. Penalties for noncompliance vary, but include loss of business license, debarment from state contracts, civil penalties and even criminal sanctions including jail time

for the employment of undocumented workers. Colorado, Minnesota, Nebraska, Missouri and Idaho mandate that state employers and contractors use E-Verify. Statutes passed in Oklahoma, Arkansas and Indiana are under challenge in the federal courts. The changing landscape and variation in state law requirements leaves employers in a tenuous position.

Pennsylvania employers are no exception. Currently, there are several pieces of E-Verify legislation working their way through the legislature in Harrisburg. On May 24, the Pennsylvania Senate passed SB 637 (by a vote of 47-7). This bill would require "public works" contractors and subcontractors to verify the work authorization of existing employees through the Social Security Number Verification System (SSNVS) and to begin using E-Verify for all new hires 60 days after the bill's enactment. Sanctions for violation of the act would include debarment from state contracting for a minimum of 90 days. The House version, HB 379, is awaiting action by the state government committee.

Similarly, HB 360, the Construction Industry Employment Verification Act, would require all employers involved in construction trades to verify the work authorization of existing employees through the SSNVS and to begin using E-Verify for all new hires. Employers would also be required to file annual reports verifying compliance. Failure to comply would potentially result in forfeiture of business licenses and revocation of articles of incorporation.

HB 858, the Fair Employment Act, would require each entity filing an initial or renewal business registration to provide an affidavit confirming that it has no undocumented workers on staff and that it has enrolled in and is actively using E-Verify. A first-time failure to comply with this requirement would result in suspension of the entity's business license until the affidavit is submitted. The sanction for a second or subsequent failure to comply would be a minimum 20-day suspension of the business registration and reporting of the failure to the Department of Homeland Security.

In addition to legal sanctions, these bills would provide for random audits and complaint-based investigations by state agencies. They also contain employment protections for whistleblowers and anti-immigration-related discrimination provisions to protect legal workers, all of which will lead to additional administrative and litigation concerns for employers.

Pennsylvania will have one of the most comprehensive E-Verify legislative programs in the country if these bills are signed into law in combination with two other proposals: HB 379 and HB 355. HB 379 would make it unlawful for any Pennsylvania organization or individual (including attorneys) to "knowingly employ or permit the employment" of an undocumented worker; and HB 355 would mandate E-Verify for all state agencies and funding recipients. While many states have passed prospective E-Verify requirements, none have so far mandated the SSNVS requirement for existing workers, and none have singled out the construction industry.

Currently, the only federally mandated E-Verify requirement applies to federal contractors. Since Sept. 8, 2009, all federal contracts over $100,000 and subcontracts over $3,000 have an E-Verify component, requiring verification of all existing hires who will be assigned to work on the contract and verification of all new hires starting with the contract date. This provision is monitored by the Office of Federal Contract Compliance. Contractors who fail to comply may be debarred from federal contracting. There are several exceptions to the broad requirement such as for contracts that will be less than 60 days in duration, universities conducting research with federal monies, and for workers who already have certain types of security clearances.

E-Verify gets mixed reviews: Advocates of the system tout its 97 percent effective rate; the 250,000 businesses that are enrolled; the 1,300 new businesses that enroll every week; and the certainty that it provides employers regarding the work eligibility of employees. Detractors cite the 3 percent error rate that disproportionately occurs in the electronic records of foreign national workers; the difficult costs of administration, especially for smaller employers; the confusing patchwork of state law requirements; and the complicated set of standards an employer must agree to before it can participate in the program.

Prior to being enrolled in the program, employers must sign a memorandum of understanding (MOU) with DHS and participate in an online training program. The MOU sets out standards and time frames an employer must follow when using the system. It also authorizes DHS access to company personnel and documentation relating to participation.

Once enrolled, employers are required to input I-9 information for every new hire into the E-Verify system. Existing employees are not permitted to be E-Verified unless they are working on a federal contract. The new-hire information provided by the employer is compared first against the Social Security Administration

database and then, if necessary, against the DHS and Department of State databases. About 97 percent of the records entered by employers will receive a confirmation of employment eligibility within three seconds. Once the confirmation is received, the employer is required to maintain a record of the E-Verify confirmation number with the employee's I-9 form. Under the MOU, an E-verify confirmation of employment eligibility provides the employer with a presumption that it acted in good faith and that the employee was work authorized.

If any of the information provided by the employee does not match the electronic records of any one of the agencies, the employer will receive a "Tentative Nonconfirmation." Upon receiving this result, the employer is required to provide the employee with information regarding the nonconfirmation, and instruct the employee to contact the appropriate agency to straighten out the problem. Each of the agencies has designated specific customer service phone numbers and personnel for this purpose so employees are not left to fend for themselves in the general customer service queues, which are often slow and overly bureaucratic. Employers are forbidden from taking any adverse employment action against an employee who receives a tentative nonconfirmation until the situation is resolved.

Resolution of an E-Verify database hit normally takes 10 to 15 business days, although employers with foreign nationals on staff report that some hits are never resolved. When the nonconfirmation is resolved against the employee, the employer may terminate the employee based upon the negative information. This is regardless of what documentation was presented for I-9 purposes and whether that information was sufficient to meet those requirements. Under the MOU, employers must notify DHS if they continue to employ any employee after receiving a final nonconfirmation from the system. Failure to provide this notification to DHS is subject to a civil money penalty between $550 and $1,100. In this circumstance, the employer will also be subject to a rebuttable presumption that it has knowingly employed an unauthorized worker in violation of INA Section 274A(a)(1)(A).

Other than a possible fine for failing to notify DHS of the continued employment of an employee with a final nonconfirmation, no penalties exist for voluntary users of the E-Verify system. However, they will receive cease and desist letters for failures to comply with program requirements. The most common misuse of the system by employers is E-Verifying job applicants before the actual date of hire. This practice is strictly forbidden by the E-Verify MOU and was put in place in an attempt to eliminate discrimination that workers might face by employers who attempt to verify employment eligibility of a particular applicant prior to making a decision regarding hiring.

Another common mistake by employers is the termination of an employee immediately upon receipt of a tentative nonconfirmation. Under the MOU, employers must provide all employees with the appropriate notification and time to resolve tentative nonconfirmation. The majority of tentative nonconfirmations are due to agency record error and have little to do with the employee's actual work authorization status.

The question as to whether a particular employer should voluntarily participate in the program will probably be moot in Pennsylvania, and possibly nationwide, by the end of 2011. But in the meantime, many employers are voluntarily participating in the program to increase certainty in the legal work authorization of their employees. Others, however, have been reluctant to provide the government with any more information than is minimally required, and have decided not to participate.

In counseling clients on their decision to participate, lawyers should take into consideration the aforementioned factors as well as the following: the type and nature of the workforce; the employer's comfort level with the authenticity of the documents presented by its employees for I-9 completion; the costs of administering the program; and the size and scope of the employer's operations.

In addition, employers and their immigration counsel should take into account the likelihood of getting a federal contract or starting up operations in a state that has an E-Verify requirement; the employer's ability and wherewithal to follow required procedures in the event of a tentative nonconfirmation and whether an employer is willing to have all of its hiring decisions catalogued by DHS.

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