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New Employer Sanctions Law In Arizona and Big Changes For Foreign Workers Seeking Visas

By Nancy-Jo Merritt and Matthew J. Martinez

Governor Napolitano Signs HB 2779 Into Law, Putting Employers' Hiring Procedures Under the Microscope

On Monday, July 2, 2007, Governor Janet Napolitano signed House Bill 2779, the Legal Arizona Workers Act, into law. The new law takes the most aggressive action in the country against employers who "knowingly" or "intentionally" hire undocumented workers. Under the new law, employers are required to verify that new employees are present in the country legally; knowing or intentional failure to do so will cause the employer's business licenses to be suspended. A second offense can result in the "business death penalty" – permanent revocation of the employer's licenses to do business in Arizona.

Major Provisions of HB 2779:

- Effective January 1, 2008, Arizona employers must use the federal government's E-Verify program to verify the employment authorization of all newly hired employees.
- Employers cannot "knowingly" or "intentionally" employ unauthorized workers. "Intentionally" means that the objective is to cause a certain result or to engage in certain conduct. "Knowingly" includes not only actual knowledge, but also constructive knowledge (knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead an employer, through reasonable care, to know about a certain condition).
- A complaint by *anyone* that an employer has hired unauthorized workers in violation of the law triggers a duty of the Attorney General or County Attorney to investigate. (Penalties are imposed for knowingly filing a false or frivolous complaint against an employer.) If a complaint is not frivolous, the Attorney General or County Attorney must notify Immigration and Customs Enforcement (ICE) and local law enforcement, and file charges against the employer.
- If an employer is found to have "knowingly" employed an unauthorized worker:
 - The employer must terminate the worker and must sign a sworn affidavit that it has terminated the employee and will not, in the future, knowingly or intentionally hire undocumented workers, or risk suspension of its business license(s).
 - The employer's business licenses may be suspended for up to 10 days.

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- The employer is subject to a three-year probationary period, during which it must file quarterly reports with the County Attorney listing each new employee who is hired by the employer at the specific location where the unauthorized worker performed work. If the employer knowingly or intentionally employs an unauthorized worker during the probationary period, the employer's business license(s) is permanently revoked.
- If an employer is found to have "intentionally" employed an unauthorized worker:
 - The employer must terminate the worker and sign a sworn affidavit that it has terminated the employee and will not, in the future, knowingly or intentionally hire undocumented workers, or risk suspension of its business license(s).
 - The employer's business license(s) must be suspended for at least ten days.
 - The employer is subject to a five-year probationary period, during which it must file quarterly reports with the County Attorney listing each new employee hired by the employer at the specific location where the unauthorized worker performed work. If the employer knowingly or intentionally employs an unauthorized worker during the probationary period, the employer's business license(s) is *permanently* revoked.
- Licenses subject to suspension or revocation upon a finding of a knowing or intentional violation include "any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business" in Arizona, including articles of incorporation, certificates of partnership, and transaction privilege tax licenses.
- An employer is entitled to a rebuttable presumption that it did not knowingly or intentionally employ an unauthorized worker, if:
 - The employer demonstrates that it used the federal E-Verify program to verify the employment eligibility of a worker later determined to be unauthorized, or
 - The employer can show that it, in good faith, followed the federal I-9 employment verification process.

Governor Napolitano has indicated that the bill contains certain flaws which must be addressed, including:

- The bill should protect critical infrastructure. Hospitals, nursing homes and power plants could be shut down for days because of a single wrongful employment decision.
- The revocation provision is overbroad, and could cause a business with multiple locations to face shutdown of its entire operation based on an infraction that occurred at only one location.
- The bill is underfunded. Even though the Attorney General's office must establish an entirely new database and must investigate complaints statewide, only \$100,000 is appropriated for that purpose, and only \$70,000 is appropriated to notify employers of the change in the law.
- There is no express provision protecting Arizona citizens or legal residents from discrimination under the terms of this bill.
- The bill contains several typos, mis-citing a federal law.

Governor Napolitano is willing to call for a special session later in the year in order to "fix" the bill before its effective date of January 1, 2008. However, she emphasized that the special session will be aimed at clarifications, omissions and corrections, not at undercutting the underlying strength of the bill.

Need to Know

Implications of the Bill

Employers should immediately review company compliance policies relating to the I-9 and anti-discrimination requirements, and should become familiar with the E-Verify program Memorandum of Understanding (MOU). Information about the MOU and registration for the E-Verify Program is available online at

<https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>. Companies would do well to decide how to best manage government inquiries from both federal and state enforcement agencies, including designating a specific point of contact. It is also important that the appropriate personnel be adequately trained in the statutes and regulations governing hiring procedures, especially with respect to I-9 compliance. We strongly urge that training and an outside audit be conducted annually to ensure strong compliance with I-9 completion and management, in order to ensure the availability of state statute's rebuttable presumption against a charge of a knowing or intentional violation.

Companies should also be prepared to handle interruptions in business activity, in light of any possible loss of business licenses, including to a key vendor or business relationship. Finally, it remains to be seen how HB 2779 will affect the existing workforce, but given the failure of comprehensive immigration reform at the federal level, employers should prepare for a potential shift in the availability of qualified workers.

Related Legislation

At the same time the Governor signed HB 2779, she also signed Senate Bill 1265 and House Bill 2467. SB 1265 deals with bail for undocumented immigrants. Under the law, courts must deny bail to those charged with a felony and who are believed to be in the country illegally. This bill conforms Arizona law more closely to federal law, and aligns with the intent of Proposition 100 passed by voters last year. HB 2467 requires individuals to show documentation of legal status to receive state services, per the provisions of Proposition 200, which was approved by voters in 2004.

Department of State Withdraws the July 2007 Visa Bulletin

On July 2, 2007 the Department of State unexpectedly announced that it has revised its July 2007 Visa Bulletin and there will be no further authorizations of visa numbers for employment-based immigrant visa ["green card"] preferences. Thus employment preference numbers will not be available until October 1, 2007, under the FY-2008 annual numerical limitation. USCIS then announced that it will be rejecting all employment-based adjustment of status applications where the priority date is not current under the revised Department of State Visa Bulletin beginning July 2, 2007. This means that your employees with expectations of filing in July for "adjustment of status" to permanent resident will be disappointed. Their "green card" process must continue to wait in the lengthy quota lines. The American Immigration Law Foundation's Legal Action Center has indicated that it is prepared to litigate this matter, and we have notified individual applicants of AILF's plans.

If you have any questions regarding this wholly unexpected and unprecedented action by the Department of State and USCIS, please contact Nancy-Jo Merritt or Matthew Martinez.

Nancy-Jo Merritt focuses her practice in immigration law and has nearly three decades of experience representing domestic and international companies with issues concerning foreign national employees and business immigration matters. She provides strategic counseling to clients and assists employers in developing compliance programs. She earned her B.A., (1964) M.A., (1974) J.D., (1978) from Arizona State University.

Matthew J. Martinez focuses his practice in the area of immigration and nationality law, with an emphasis on corporate transfers, professionals, entrepreneurs, investors, entertainers and athletes. Mr. Martinez has extensive experience representing employers and athletes in the equine industry, and in obtaining visas for temporary and seasonal workers. He earned his B.S., (1995) and his J.D., (1999) from Brigham Young University.



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