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Labor and Employment Update: Arizona Employer Sanctions Law Update

By Nancy-Jo Merritt and Matthew J. Martinez

On December 7, 2007, U.S. District Court Judge Neil Wake issued a ruling dismissing the lawsuit against the new Legal Arizona Workers Act brought by 12 non-profit organizations. The court's ruling essentially turned on the two aspects of the Act: (1) whether the plaintiffs have standing to challenge the Act based on a "threat of prosecution" (i.e., the threat of losing a business license), and (2) whether the plaintiffs have standing to challenge the Act based on the economic cost of complying with E-Verify. Judge Wake determined that the plaintiffs sued the wrong parties; had they named the county attorneys instead of only Governor Napolitano and Attorney General Terry Goddard, the suit could have challenged the E-Verify mandate, but not the threat of license proceedings. The reason: the Governor and Attorney General have only investigatory or informational authority, while the County Attorneys are authorized to enforce the Act.

The court held that the plaintiffs could not challenge the Act based on a "threat of prosecution" (i.e., loss of business license) because (1) none of the plaintiffs knowingly employs or plans to employ any unauthorized workers, and (2) the Attorney General and the Governor have not threatened to prosecute anyone. Nevertheless, the court held that despite the absence of a specific threat of enforcement proceedings, the plaintiffs could have challenged the Act based on the economic cost of complying with E-Verify, had they sued the proper defendants. Part of the court's rationale is that the law "coerces" the plaintiffs to use E-Verify. The court reasoned that despite the fact that there is no express civil or criminal penalty for not enrolling with E-Verify, the Act may be read to charge employers with the knowledge of the E-Verify data that they wrongfully refuse to obtain, and that "the plausible consequence for refusing to use E-Verify may be that employers also cannot prove their good faith compliance with the I-9 process because the E-Verify system would have exposed the employee's lack of authorization."

The court did not rule on the merits of the lawsuit, most notably failing to address the constitutionality of the Act, but dismissed the lawsuit without prejudice, leaving the door open for the plaintiffs to re-file their lawsuit and name the proper defendants. On December 10, a new lawsuit was filed with the U.S. District Court in Phoenix naming Arizona's 15 County Attorneys, the Arizona Registrar of Contractors, and the Arizona Attorney General, essentially setting forth the same allegations and legal claims asserted in the previous lawsuit. The plaintiffs also filed a temporary restraining order (TRO) to stop implementation of the law before the court can decide on the merits of the case. The new lawsuit is again assigned to U.S. District Court Judge Neal Wake. We will be monitoring these developments closely and will provide updates as events unfold.

While we wait to see how this lawsuit plays out, employers should continue to proceed with compliance plans for the new law to take effect on January 1, 2008. We cannot predict the outcome or the timing of a decision. Until then, whatever their decision regarding signing up for E-Verify, employers should be sure to have I-9s for every employee filled out correctly, and terminate any employees known to be undocumented.

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The Department of Homeland Security has published a new E-Verify policy

Companies with over 1000 employees may now sign one MOU to cover those hiring sites that the company chooses for application of E-Verify. The corporate office address should be used on the MOU. In addition, when registered under this manner, the multiple site button should be used during the registration process to enter, per state, the number of sites which will initially participate in E-Verify. The number of sites noted in E-Verify can be amended over time, depending on the activities and decisions of the company. Any changes should be made to the company's E-Verify profile.

Regardless of the initial title of the hiring site, whether it be the branch office, satellite office, local office, franchise operation, retail operation, construction project, or any other individual/practical business name given a site, the decision to use E-Verify must be made in a nondiscriminatory manner.

Amendments to the MOU to address this new policy are under consideration.

Increase in Visa Fees

The Toronto Consulate advises that effective January 1, 2008, the application fee for a U.S. nonimmigrant visa will increase from \$100 to \$131. This increase allows the Department of State [DOS] to recover the costs of security and other enhancements to the non-immigrant visa application process.

Applicants who paid the prior \$100 application fee before January 1 will be processed only if they are scheduled and appear for a visa interview before January 31. Applicants who paid the prior \$100 application fee and appear for visa interviews after January 31, 2008 must pay the difference – \$31 – before they will be interviewed.

The DOS is required by law to recover the cost of processing non-immigrant visas through the collection of the Machine-Readable Visa application fee. It claims that because of new security-related costs, new information technology systems, and inflation, the \$100 Machine-Readable Visa fee is lower than the actual cost of processing the visa. Another cost increase arises out of the necessity to collect 10 fingerprints from each applicant, and an additional cost charged by the FBI to review those fingerprints. The application fee has increased twice since 9/11, the last time in 2002.

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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