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## Labor and Employment Update: The Legal Arizona Workers Act, Updated

By Nancy-Jo Merritt and Matthew J. Martinez

On May 1, 2008, Governor Napolitano signed SB1374 into law, effective on the date signed. SB1374 clarified and added some new sections to the Legal Arizona Workers Act ("LAWA") signed by the Governor in 2007. The revised LAWA contains a number of interesting, and sometimes unexpected, additions to the LAWA, primarily a fine tuning of the enforcement provisions, including creation of a "Gold Star" status for employers in exchange for using the Social Security Administration's SSN confirmation system. The revised LAWA also clarifies the reach of the employment verification system and the definitions of "employer" and "independent contractor."

### Enforcement

- The definition of "identity theft" is expanded to include a new crime, "knowingly accepting the identity of another person." The proscribed behavior occurs during the hiring process, if the employer accepts personal identifying information with knowledge (which includes "constructive knowledge") that the individual is not the actual person represented by the information, and then uses the information to verify employment.
- The crime of "trafficking in the identity of another person" is expanded to include "knowingly selling or transferring personal identity information (whether of a real or fictional individual) to allow another person to obtain and continue employment."
- The 2007 version of the LAWA did not specify the procedure for filing a complaint under the Act and the 2008 revisions clarify the procedure for filing a LAWA complaint. The Attorney General must prescribe a complaint form, which need not be notarized or require the complainant to list his or her social security number. All complaints filed on the prescribed form must be investigated. The revised LAWA allows the Attorney General or county attorney to investigate complaints that are not submitted on the prescribed complaint form, even if anonymous, but does not require investigation of those complaints.

Further fine-tuning of the LAWA complaint process includes:

- A complaint filed with a county attorney must be referred to the county attorney in the county in which the alleged unauthorized employment occurred;
- The county sheriff or other local law enforcement agent may assist in investigating LAWA complaints;
- The AG or county attorney, after determining that a complaint is not false and frivolous (as opposed to only frivolous), must notify U.S. Immigration and Customs Enforcement;

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- The AG must notify the appropriate county attorney to bring an action if a complaint is filed with the AG; and
- The county attorneys may bring actions only in the county where the unauthorized employee is or was employed by the employer, as opposed to the county in which the unauthorized employee is currently employed.

Finally, the 2008 revisions clarify that a second violation for unauthorized employment may only be based on an employee who is or was employed by the employer after a first action has already been brought for a violation. This means that an employer may have more than one “first” LAWVA violation.

The revised LAWVA clarified a number of miscellaneous issues related to violations.

- The first violation probation period will be imposed on the business location where the unauthorized individual performed work;
- An employer’s “first violation” affidavit must state that the employer had “terminated the employment of all unauthorized aliens in Arizona and that the employer did not intentionally or knowingly employ an unauthorized alien in Arizona.”
- Following both a first intentional violation and first knowing violation, the Court must suspend the subject licenses for failure to file the affidavit within three business days after the order requiring the affidavit is issued.
- The quarterly reports required for the first violation must be in the same form as new hire reports to DES and must relate to employees hired by the employer at its business location, as opposed to the actual work location of the unauthorized individual;
- The licenses subject to suspension or revocation are those licenses specific to the business location where the unauthorized employee performed work, but if there is not a license specific to that business location, licenses subject to suspension are all licenses held by the employer at its primary place of business.
- Under the revised LAWVA, a violation is a “first violation” if it did not occur during a probationary period for that employer’s business location, and a “second violation” is that which occurs during a probationary period for that employer’s business location.
- Clarifies that the employer has an affirmative defense if it has complied in good faith with the federal requirements pertaining to the I-9 employment verification process.

## Clarifications

The bill also clarifies other key aspects of LAWVA, the most welcome of which is modification of the definition of “employee” to clearly omit independent contractors, and the provision of a specific definition of “independent contractor.” Many questions after the passage of LAWVA arose out of concerns that the use of independent contractors might lead to prosecution of the contracting entity. The LAWVA definition of “independent contractor” now refers to “independent businesses” who contract to do a piece of work according to the businesses’ own means and methods and subject to control only as to results. The statute lists specific factors to be considered on a “case-by-case basis” with respect to whether the contractor:

- a) supplies the tools or materials;
- b) makes services available to the general public;
- c) works or may work for a number of clients at the same time;
- d) has an opportunity for profit or loss as a result of labor or service provided;

# Need to Know

- e) invests in the facilities for work;
- f) directs the order or sequence in which the work is completed; and
- g) determines the hours when work is completed.

The revised LAWA also confirms that compliance with the U.S. Internal Revenue Code sections pertaining to the services of real estate agents and direct sellers ensures their treatment as independent contractors. Keep in mind that the Federal employment verification provisions providing that the “knowing and intentional” use of a contract to obtain unauthorized workers is also a LAWA violation. Thus, while employers are not required to verify the employment status of independent contractors, using contract labor with knowledge (which includes “constructive knowledge”) that the workers are not authorized is a LAWA violation. The continuing use of services after knowledge of the unauthorized status of an individual or group of contract workers will violate both the Federal statute and LAWA.

## “Gold Star” Status

The revised LAWA requires the AG to establish a Voluntary Employer Enhanced Compliance program (“VEEC”) available only to those employers who are participating in E-Verify and are not on probation for LAWA violations. Employers in the VEEC program must verify the accuracy of social security numbers of all current employees who were not verified through E-Verify through the Social Security Number Verification Services (SSNVS) program. Employers must use SSNVS within 30 days after enrolling in the VEEC and must agree to resolve any no-match discrepancies with the employee and SSA within 90 days (that period may be extended if the employer and employee can document ongoing efforts to resolve any failed verifications). The VEEC will also require the SSNVS verification and resolution processes to be applied in a consistent manner for all employees. The VEEC program would provide a “form of recognition” that employers may display to the general public with respect to their enrollment. While the aims of VEEC are commendable, we remind our clients that according to SSA, the SSNVS program “can only be used to verify current or former employees and only for wage reporting (W-2) purposes.” (emphasis added)

The statute has a number of peripheral provisions, including an expanded list of definitions with respect to the E-Verify program and rules for civil enforcement of violations of employment laws related to cash-paying employers. It also prohibits the issuance of any state licensure to any individuals who cannot demonstrate valid presence and work authorization status in the U.S.

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