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Employment Law Update

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Governor Napolitano has signed H.B. 2279, the immigration enforcement measure known as the “Legal Arizona Workers Act.”

The main focus of the Act is to **significantly** enhance the **penalties** for employers who “intentionally” or “knowingly” hire unauthorized aliens, all the way up to the permanent suspension of the employer’s business licenses.

However, despite all of the media uproar about the Act, **employers in Arizona should not be overly concerned by those enhanced penalties.** That is because **the Act does not impose any significant new obligations on employers.** Employers who **already** are complying with their existing obligations under **federal** immigration laws (the basic I-9 requirements) **will not be subject to the increased sanctions** under H.B. 2279.

Basic Prohibitions and Requirements

The Act prohibits Arizona employers from “intentionally” or “knowingly” employing unauthorized aliens.

The Act defines “intentionally” employing an unauthorized alien as engaging in conduct that violates the existing **federal** laws regulating the employment of aliens. Those laws include the general prohibition against intentionally employing individuals who are not legally authorized to work in the United States, and the prohibition against hiring any person without completing the standard I-9 verification process.

The Act basically defines “knowingly” employing an unauthorized alien as employing such an individual with the **awareness** or **belief** that the individual is not authorized to work in the United States.

The Act also states that after December 31, 2007, every Arizona employer must use the federal Basic Pilot Program to verify the employment eligibility of all new hires. (Notably, the Act does not establish any enforcement procedure or penalty for failing to use the Basic Pilot Program.) More detailed information concerning the Basic Pilot Program, including registration information, is available at the U.S. Citizenship & Immigration Services web site, www.ice.gov/partners/employers/worksite/baspiro.htm.

Enforcement Provisions and Effective Date

The Arizona attorney general and the state's various county attorneys will have joint statutory authority to investigate complaints that an employer has violated the Act. The state's county attorneys will have the authority to commence formal legal actions against employers (in the county where the unauthorized alien at issue is employed).

The Act's practical **effective date is January 1, 2008**. The statute prohibits the filing of any legal actions against any employer for any violation that occurs before that date, and requires that employers start using the Basic Pilot Program after that date.

Potential Penalties

The potential penalties for violating the Act's prohibitions against hiring unauthorized aliens are undeniably severe.

Under the Act, an employer's **first** violation results in a mandatory three- to five-year **probationary period** (three years for a "knowing" violation, and five years if the violation was "intentional"). The employer must file a sworn affidavit with the county attorney confirming that it has terminated all unauthorized aliens, and stating that the employer will not employ any other unauthorized aliens. The employer also must file follow-up affidavits each quarter during the probationary period, identifying each new employee whom it hires at the location where the unauthorized alien worked. The first violation also can result in a 10-business-day suspension of all business licenses held by the employer. (The Act gives the court the discretion not to order such a suspension, based on a variety of factors.)

A **second** violation of the Act during any probationary period will result in the **mandatory permanent suspension of all of the employer's business licenses**.

Safe Harbor for Employers

As noted, however, despite the harsh new penalties, the Act nevertheless contains two very important protections for employers.

First, if the employer can show that it verified the unauthorized individual's right to work by using the federal Basic Pilot Program, the employer has established a "rebuttable presumption" that it did not violate the Act.

Second, if the employer shows that it has "complied in good faith" with the **existing** requirements of **federal** immigration laws concerning verification of the legal right to work in the United States, the employer has established an "affirmative defense" that it did not violate the Act. In other words, if the employer can show that it complied in good faith with the existing federal requirements, the employer **wins** the state-law claim, without any further analysis.

In view of the fact that compliance with existing federal regulations gives employers a defense to a claim under the Act, it is helpful to keep in mind just what the federal regulations actually require. As they have done for the past 20 years, employers simply must

continue to require that all new hires produce the documentation required by the federal I-9 form. Employers must continue to review the documentation, and must complete the I-9 form within three days of hire. However, as the federal immigration enforcement agency itself has stated, **“Employers are not required to be document experts.”** If the documentation **“reasonably appears to be genuine,”** the employer will **not** be held legally responsible simply because it might turn out later that the documentation was not in fact genuine.

Finally, the protection afforded by simple compliance with existing federal I-9 regulations becomes even more clear when one considers other language in both the new state law and in the federal immigration laws themselves. H.B. 2279 states explicitly that it “shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law.” Under certain circumstances, meanwhile, existing federal immigration law **prohibits** employers from requiring different or additional legal documentation from applicants who have produced any of the documents that satisfy form I-9. To require such different or additional documentation actually can be constitute an “unfair employment practice” that violates the federal law. The new state law makes it clear that **it** will not require that employers take such actions.

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Again, employers no doubt have heard (and will continue to hear) a huge media uproar about enhanced penalties in the Act. But employers who simply continue to follow the **existing** federal I-9 requirements in good faith will **not** be subject to those penalties. **For those employers, the Act should have little practical impact.**

For more information about any of these topics, feel free to contact any of the members of Gallagher & Kennedy’s Employment & Labor Law Group:

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