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Missouri Legislature Passes Bill Affecting Immigration Compliance Practices

Under federal law, all employers are required to timely verify a new employee's identity and work authorization. Employers cannot knowingly hire or continue to employ an unauthorized worker, or use a contractor knowing unauthorized labor is provided. An employer satisfies these requirements by maintaining solid "I-9" verification processes and records; promptly inquiring and taking action when work status questions arise; and taking reasonable steps to ensure contractors comply with the law. President Reagan and a Democratic Congress enacted these national standards in 1986 and they continue to define an employer's legal obligations in 2008. However, on January 1, 2009, Missouri employers will be subjected to the state's legislative foray into employer sanctions laws.

On May 16, the Missouri legislature passed House Bill 1549 enacting twenty-four new sections of law relating to "illegal aliens." Most provisions passed with overwhelming support in both houses of the legislature. The bill was delivered to Governor Blunt on May 29th and he is expected to sign the bill in the near future. The bill impacts all employers operating in the state, and places additional burdens and potential penalties on government contractors and recipients of government funds.

Summary of Requirements & Penalties

All Missouri Employers

House Bill 1549 prohibits knowingly employing, hiring, or continuing to employ an unauthorized worker in Missouri. The bill includes more than one definition of an "employer" and broadly defines the term "business entity" to include most all private sector employers.

Missouri's new law is similar in many respects to Arizona's controversial state law. Investigations are to originate from a complaint-driven process that can be initiated by a state official, other business entity, or a state resident. The complaint must be in writing, detailed, and not improperly based on national origin, ethnicity or race. The Attorney General must determine the validity of the complaint and request "identity information" of a worker in question within fifteen days. If a business entity fails to provide information, its business licenses, permits or licensure exemptions will be suspended. This identity information will then be provided to the federal government for verification. If the inquiry indicates the person is not work authorized, the Attorney General must then determine whether there is a "reasonable belief" that the business knowingly violated the state law. The Attorney General may then prosecute the business entity in Cole County.

If a business entity is found to have knowingly violated the state's law for the first time, the business entity shall have its business permits, licenses and licensure exemptions suspended for fourteen days. In addition, the business entity must take "corrective action," which includes making efforts to end the employment relationship, submitting a sworn-affidavit to the state, and registering for E-Verify/Basic Pilot. A second violation will result in suspension of permits, licenses and exemptions for one year. A third violation will result in a loss of permits, licenses and exemptions forever. Additionally, a business entity will not be permitted to count any compensation paid to unauthorized workers as a business expense deduction for state tax purposes.

Three other miscellaneous sections also affect employers. First, any employer with over five employees must file its federal 1099 forms with the state or face a monetary penalty of \$200 per form. Second, transporting a person for purposes of employment knowing that person is not "lawfully present" is a felony subject to one year in jail or a \$1,000 fine, or both. Third, commercial drivers' license tests will only be given in English without the aid of translators.

House Bill 1549 provides for two state specific defenses, both subject to scrutiny in the context of an enforcement action. A business entity participating in E-Verify/Basic Pilot will have a "rebuttable presumption" that it did not violate state law, but must still take corrective action. Also, anyone using a contractor will not be liable for its contractor's violation of the state law if the contractor provides certain assurances within a contract and in a separate affidavit. Additionally, the bill incorporates a provision that requires Missouri's scheme to incorporate any procedural mechanisms or legal defenses included in a federal work authorization program.

Government Contractors & Government Financial Aid Recipients

House Bill 1549 includes additional requirements for a business entity seeking a contract of over \$5,000 with the state or any political subdivision (any agency or unit of the state able to levy taxes). A business entity with a qualifying contract will be required to enroll and participate in E-Verify/Basic Pilot and affirm no unauthorized workers perform services.

Any employer with at least five employees providing labor on public works projects may not misclassify someone as a contractor to avoid legal obligations for employees. "Public works" encompasses all fixed works constructed for public use or benefit, or paid for wholly or in part out of public funds, to include certain utility projects. A subject employer may be inspected by the Attorney General independent of any complaint under the employer sanctions scheme. If a court determines an employer has knowingly misclassified an employee, the employer may be subjected to a state penalty of \$50 per day, per misclassified employee, up to \$50,000 total.

Finally, effective August 28, 2009, anyone that contracts with a public body for construction of public works must provide on-site employees with a 10-hour OSHA training program within sixty days of starting work. The term "public body" encompasses essentially any state-related entity, political subdivision, or any institution supported in whole or in part by public funds. Under this provision, the Department of Labor and Industrial Relations may investigate alleged violations and assess fines of \$2,500, plus \$100 per employee, per day of violation. Assessments may be withheld from any payments due to the employer.

Similar to government contractors, recipients of financial aid from the state or any political subdivision are subject to additional requirements. Business entities receiving aid from the state either through a grant in excess of \$5,000, or any state-administered or subsidized tax credit, tax abatement, or loan are required to enroll and participate in E-Verify/Basic Pilot and affirm no unauthorized workers will perform labor.

In addition to the penalties provided for under the basic state employer sanctions scheme, government contractors and aid recipients are subject to additional penalties. If found to have violated the state's law for the first time, the business entity shall be deemed in breach of contract, which may be terminated; may be suspended or debarred from state business for up to three years; and may forfeit up to 25% of any amounts due from the government. A second or subsequent violation includes similar penalties on a business entity, but adds the potential for a permanent debarment from state business.

Public Employers

"Public employers," which includes every department, agency, or instrumentality of the state or any political subdivision, must enroll and participate in E-Verify/Basic Pilot. Public employers are exempt from the state's investigation and enforcement scheme, but will need to incorporate the bill's requirements into their contracting practices.

Open Questions

As Missouri employers become aware of House Bill 1549, they will have many questions. Until regulations are issued by the Attorney General, it may be difficult to assess a specific employer's obligations under the new law. Regulations are also required to fill many of the gaps in the investigation, prosecution, and penalty phases of a state employer sanctions case.

The extension of the government's controversial E-Verify/Basic Pilot program beyond November 2008 also remains an open question. Congress must act to extend the system or the statutory authority for it expires. Certain proposals to extend or modify E-Verify/Basic Pilot in Congress include definitive language that expressly pre-empts state immigration laws. No one knows what action Congress will take in the coming months.

Court decisions challenging similar state immigration laws are split and provide no clear answers as to whether or not House Bill 1549 is pre-empted by existing federal laws. Employer interest groups have had initial victories in Pennsylvania and Oklahoma, but initial losses in Arizona and Missouri.

Conclusion

A large number of Missouri employers will be impacted by House Bill 1549. The lack of clarity in the bill's requirements will be a source of frustration for employers. In the coming months, prudent employers should review existing immigration compliance programs and records, to include sub-contractor compliance. If required to enroll in E-Verify/Basic Pilot under any government mandate, an employer's I-9 processes should first be airtight. Additionally, an employer should review issues associated with its overall employment practices, such as independent contractor relationships. Efforts made to comply with federal requirements will serve an employer well as the State of Missouri embarks on its foray into employer sanctions laws in 2009.

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