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IMMIGRATION

At least six states have passed broad immigration bills that will have dramatic impacts on employment practices, and the U.S. Supreme Court has validated Arizona's 2007 employer sanctions law, immigration attorney Michael Wildes says in this BNA Insights article. He discusses the state law provisions, arguments by supporters and opponents, and the financial implications for states and employers. Wildes also offers advice for employers on advance preparation to respond effectively to a potential U.S. Immigration and Customs Enforcement audit.

Immigration's Changing Landscape: What the New Immigration Laws Mean For Current Businesses and How to 'Chill' an Audit

BY MICHAEL WILDES

Following years of frustrating silence from the federal government in response to nationwide pleas for comprehensive immigration reform, many state legislators felt compelled to draft local immigration laws to finally address this issue directly. Notably, lawmakers in at least six states—including Alabama, Arizona, Georgia, Indiana, South Carolina, and Utah—have passed broad immigration bills that will have dramatic impacts on the states' employment practices. These provisions have received mixed reviews from critics and advocates of immigration reform.

The catalyst for such sweeping state action can be attributed to America's recent economic crisis, which resulted in record unemployment rates all over the country. Accordingly, a primary reason for the new immigration laws was to provide more job opportunities for citizens of those states over undocumented aliens as part of statewide efforts to promote fiscal recovery.

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Arizona has been at the center of state immigration reform since 2007, enacting arguably the most controversial anti-illegal immigrant measures in recent U.S. history. Its laws have addressed the main networks of immigrant activity, imposing sanctions on education opportunities, housing laws, and occupational concerns of immigrants. In particular, the laws affecting employment have been hotly contested among state inhabitants, thousands of whom are in Arizona's undocumented immigrant population.

Supreme Court Addressed Arizona Law. On May 26, 2011, the U.S. Supreme Court delivered a landmark decision validating Arizona's 2007 employer sanctions law, having a direct impact on local employment practices. In *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 32 IER Cases 225 (2011)(102 DLR AA-1, 5/26/11), the court held by a 5-3 vote that Arizona authorities are permitted to penalize businesses for hiring workers who entered the state's borders illegally.

The "Legal Arizona Workers Act" passed in 2007 subjects all persons and businesses who either unknowingly or intentionally hire an unauthorized alien to civil and criminal sanctions. Nicknamed the "business death penalty," state authorities may now audit companies suspected of employing illegal immigrants, resulting in heavy fines, loss of business licenses, and even imprisonment for repeat offenders.

Supporters of the Arizona law have praised the court for its progressive finding and criticized the federal government for its lack of response to requests for immigration reform. On the other hand, civil rights activists are outraged at what they see as the slippery slope such policies will create among targeted minorities. In his dissenting opinion, Justice Stephen Breyer asserted that the Arizona law upsets a "balance in federal law between dissuading employers from hiring illegal work-

ers and ensuring that people are not discriminated against" based on their race, ethnicity, and national origin.

Specifically, the Hispanic populations along the south and southwestern regions of the United States who have legal status feel that they would be unfairly discriminated against by employers that will be reluctant to hire minority employees in fear of potential government inspection. In addition, the cost, the time lag, and the red tape involved in setting up a system that would compound such employers' concerns would be very difficult for local businesses to incur, especially during this time of economic recovery.

Other States Followed. Shortly after, other states began to follow the *Whiting* decision, which upheld the right of states to enact licensing laws and to mandate use of E-Verify. In a series of "copy cat" bills that followed, state leaders were motivated to re-evaluate their immigration-related laws amidst an upswing in national sentiment favoring sweeping anti-illegal immigration enforcement.

For example, on June 9, Alabama enacted many new restrictions in its local laws that were eerily reminiscent of Arizona's newest provisions (111 DLR A-1, 6/9/11). Specifically, the law requires businesses to use the federal government's E-Verify database to confirm the immigration status of new employees and subjects employers to similar legal consequences.

Operated by the Department of Homeland Security, E-Verify is an internet-based program that allows employers to determine the eligibility of newly hired employees to work in the United States. The system cross-references an employee's Form I-9 Employment Eligibility Verification to data from U.S. government records. If the information does not match up, E-Verify sends an alert to the employer. The employee then may contact DHS or the Social Security Administration to resolve the discrepancy.

Since its inception, over 246,000 employers have been enrolled in E-Verify, representing over 850,000 job sites, with the volume of queries per fiscal year increasing dramatically from 3.27 million in 2007 to more than 5.3 million in 2011.

The staggering numbers produced by E-Verify in such a short amount of time made other neighboring legislators eager to use the new system to address their state's immigration problems. The ink had barely dried on Alabama's new bill when other southern states including South Carolina finalized their own sets of immigration regulations, now attracted by the anticipated success of such radical steps to handle its undocumented inhabitants.

By a 69-43 vote, the South Carolina House of Representatives conceded to the state senate's amendments requiring employers to use E-Verify to check their employees' work authorization (124 DLR A-10, 6/28/11). The measure creates a grace period of one year for employers, during which penalties will be probationary. After that, employers can face temporary suspension of their business license and reinstatement penalties, leading to license revocation and criminal punishment if the issues are not timely addressed.

Will the State Laws Help Unemployed U.S. Workers? Supporters of the new bills have applauded the reform, claiming that such restrictions on immigrant employment are critically needed to prevent illegal immigrants from securing U.S. jobs. Currently, there are about 24 million Americans who are unemployed or who have given up looking for work, according to the Bureau of Labor Statistics. Of these men and women, 19 million are Americans without a college degree, who are often the most hurt by unskilled illegal immigrant workers in industries that take advantage of their cheap labor.

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However, despite the short-term advantages of these new laws, immigrant rights groups steadily oppose the new restrictions, remaining skeptical of the long-term effects such widespread reform will have on our nation's economy, job markets, and immigrant communities, as well as America's international reputation for attracting foreigners seeking to contribute to our nation's workforce.

As more states continue to empower their local officials with the authority to investigate local job markets in search of illegal immigrants, the anticipated results create a palpable tension between the over 11 million undocumented immigrants within U.S. borders and state officials who are compelled to prioritize their duties to their own citizens first.

As it stands, undocumented immigrants living in America contribute over $1 billion to our nation's economy. A vast majority of them reside in the southern border regions of this country. The cheaper labor helps keep domestic costs down, lessening our reliance on foreign products. Moreover, there is no guarantee that the jobs opened up by these removal processes will be taken up by American workers without more costly measures in place.

For example, last year, Arturo Rodriguez, President of the United Farm Workers, established the "Take Our Jobs" campaign in response to American citizens who were protesting immigrant farm labor (121 DLR A-3, 6/25/10). Of the nearly 90,000 inquiries that were made, only 11 Americans ended up taking the jobs (185 DLR A-9, 9/24/10).

Thus, the exchange of "immigrants for citizens" theory remains unsubstantiated. Simply excising these immigrant workers from our borders without any defi-

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nite plans to replace their contributions leaves a gaping hole in our national economic structure.

Financial Implications for States, Employers. For businesses, the financial consequences in implementing the aforementioned policies will have a direct impact on the state's citizens. Since these new programs are not federally funded, the burden shifts to the local taxpayer to subsidize the added costs of implementing states' new immigration laws. Furthermore, employers will also incur substantial financial difficulties if found to be in violation of the new immigration laws, as these businesses thrive on undocumented immigrant labor.

In particular, the agricultural and hospitality industries, notorious for their employment of illegal immigrants, are now directly targeted for government audits to ensure that all employees are working lawfully. The penalty impact of such violations will cost companies millions of dollars, suspensions, and even shutdowns, thus acting in a directly counterproductive way to the legislative intent to promote more job opportunities for citizens.

As a practical matter, businesses cannot reasonably be expected to hire scores of lawful residents to replace their former employees with significantly higher wages while simultaneously having their resources drained by immigration penalties.

It also needs to be said that our nation, which has a reputation as a country that welcomes immigrants to our borders, may now be viewed as turning its back on the same people responsible for making the United States one of the most prosperous nations in the world. The perception that the American government is permitting its states to lock out immigrant labor serves as a deterrent to foreigners who may take their talents and resources to other countries. Even though the new laws do not impose restrictions on foreign nationals lawfully entering the country, the anti-immigrant stigma created as a byproduct of this reform process could potentially have a chilling effect on the desperately needed foreign resources to rebuild our nation's economy.

Keeping Up With Immigration Laws. As various political groups continue to debate this new trend of immigration reform, employers must nevertheless abide by the enacted laws as they develop. Furthermore, as E-Verify's use inches closer to mandatory nationwide application, employers need to prepare for a storm of government audits and how to handle them as efficiently as possible.

Currently, the federal government has taken steps to perpetuate E-Verify's expansion across America. In June DHS's Immigration and Customs Enforcement expedited this process by announcing that 1,000 employers across the country would be subject to Form I-9 audits (119 DLR A-7, 6/21/11). These measures have businesses nationwide fearing to be one of the thousands of recipients of Notices of Inspection (NOIs) to ensure their compliance with proper I-9 documentation and other current immigration standards.

Now, more than ever, no business can afford to have its business license suspended or revoked, nor needlessly waste time and money in ensuring that its employment practices are consistent with the new regulations. In particular, those companies that are already stigmatized for catering specifically to undocumented, low-skilled workers will be the first on the chopping block. In the past audits were random, but in recent years audits have been assigned due to tips and leads that suspect certain businesses to be in violation of hiring restrictions.

How to 'Chill' an ICE Audit:

1. Get organized: All legal strategies aside, the proper organization of employee files is essential in responding to an audit. The short amount of time between an NOI notice and an audit is barely enough to account for all documented employees. In most cases, ICE allows approximately three business days between service and audit for the company to produce all of its properly filled-out I-9 forms.

Oftentimes, the most tedious and frustrating part of this process is going through thousands of improperly filled-out forms that cumulatively lead to a presumption of widespread, improper company practice, resulting in both technical and substantive fines that could have been easily remedied if proper procedures had been in place.

It is best to keep your I-9 forms in one place—separate from other personnel files and employer records so sensitive information will not be unnecessarily revealed during an audit.

2. Keep track of all employees—review and understand the retention requirements: Essentially, for current employees, the I-9 must be retained throughout the life span of the employment. For terminated employees, the I-9 must be retained as follows: three years from hire or one year from discharge, whichever is later. We recommend the creation of an Excel spreadsheet to keep track of the hire date, the termination date, and the retention date. Once the retention date has passed, the I-9 may be purged.

3. Prevent against fraud: Oftentimes, employers are unaware their employees have entered the United States illegally, as they are given fraudulent documentation by the prospective worker. Because the exchange of documentation is usually more of a formality than a scrutinized proceeding, many workers enter the business with forged work visas, Social Security cards, driver's licenses, etc.

Despite workers' actions, the liability falls on the employer to have recognized and eliminated such applicants from their company when given fraudulent paperwork. However, as the methods for producing fake documents become more pervasive and sophisticated, employers rarely have the training necessary to determine the validity of such forms of identification.

As a result, employers must be able to cross-reference employee documentation with a database of valid forms of identification to ensure compliance in the event of an audit. The problem is, however, that this may cause discrimination towards foreigners who apply for jobs with targeted employment agencies (i.e. restaurant, hotel, agricultural). To avoid such practices, employers are advised to consult unbiased/objective third party legal experts to verify the documentation. Once again, the added expense of this process is only a fraction of the legal implications that a company will incur if illegal documents are found by ICE instead.

4. Stay updated with compliance standards: As immigrant-employment standards continue to be debated throughout our nation, we can expect to see various changes in these laws before the state and federal governments can come to a consensus on an agreeable

course of action. Given the backlash most of these new laws have created, it is reasonable to assume that it will be some time until a lasting set of immigration laws will be established for American companies to refer to.

Until then, immigration officials foresee subtle yet significant changes in our immigration laws—the knowledge of which could have substantial impact on employment practices with regard to audit procedures, penalties, and the legal channels available to address license suspensions and revocations. As always, handling such issues as they arise is a time-sensitive process that does not excuse legal ignorance in the event of delays.

5. Perform internal audits regularly: An internal audit is the best way to detect and correct errors and ensure that I-9s have been completed properly for your workforce. It can also demonstrate a "good faith effort" to remain compliant, which could spare you serious penalties in the event of a government audit.

And finally . . .

6. Establish a "tickler" system: Alert yourself to fast approaching deadlines for I-9 completion as well as approaching work authorization expiration dates. Continuously adjusting to the newest attempts at immigration reform is no doubt a burdensome effort for businesses to maintain. Nevertheless, such hurdles are necessary to keep one's business afloat, and company resources must be allocated accordingly. Any immigration lawyer worth his or her salt will strongly advocate the importance of staying on top of various immigration document completion deadlines and the crucial need for employers to keep their fingers on the pulse of this rapidly changing dynamic.

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