SOUTH CAROLINA AND NORTH CAROLINA ENACT NEW EMPLOYMENT VERIFICATION REQUIREMENTS

On May 26, 2011, the U.S. Supreme Court decided *Chamber of Commerce of the United States v. Whiting*, No. 09-115, which held that states could mandate employment verification and could suspend or revoke business licenses for an employer's violation of immigration laws. Shortly thereafter, several states including South Carolina and North Carolina passed state immigration laws mandating employment verification and imposing penalties for failure to comply. This article summarizes the main provisions of each state law.

South Carolina

Amendments to the South Carolina Illegal Immigration and Reform Act ("IIRA") were signed into law by Governor Nikki Haley on June 27, 2011. The amended law provides that:

1. All private employers must enroll and participate in E-Verify by January 1, 2012.

2. Employers can no longer accept a state-issued driver's license or identification card at the time of hire as proof of employment verification.

3. Employers can operate in the state and employ workers only if their imputed employment license and all other applicable licenses (*i.e.,* business license) are in effect.

4. Employers must verify a new hire's work authorization status within three business days from the date of hire, even if the employee is terminated within the first three days of employment.

5. Employers violating the state immigration law will be listed on the South Carolina Department of Labor, Licensing and Regulation ("SCLLR") website but may be removed with the passage of time.

SCLLR enforces the employment verification requirements of the law. Before July 1, 2012, if an employer commits a first offense violation of the E-Verify requirement, the employer will be required to sign an affidavit indicating the employer has complied with the law within three business days. If the employer does not sign the affidavit, the employer will be placed on probation for a year, during which time the employer will be required to submit quarterly reports demonstrating compliance. After July 1, 2012, if an employer commits a first offense violation, the employer will be placed on probation for a year and will be required to submit quarterly reports.

Subsequent violations are treated the same regardless of whether they occur before or after July 1, 2012, and will result in the suspension of the entity's employment license for at least 10 but no more than 30 days. A violation may be treated as a first offense if there has been no violation in the prior three years. An employer will not be found to be in violation of the law if the employee has been employed for less than three business

days. Employers who in good faith verify an employee's immigration status are presumed to have complied with the law.

If an employer knowingly and/or intentionally employs an unauthorized worker, its employment license must be suspended for at least 10 days but no more than 30 days. The employer will not be able to engage in business and/or employ workers during any suspension period. For a second occurrence, the license suspension period is 30 to 60 days. Reinstatement may occur after the suspension period if the employer terminates the unauthorized worker(s) and pays a reinstatement fee. For third and subsequent occurrences, the employment license will be revoked. If the employment license is revoked, the employer may not seek reinstatement for a five-year period. After the third occurrence, the employer may be able to apply for a provisional license with certain conditions allowing the business to operate and employ workers.

These penalty provisions replace the monetary penalties set out in the IIRA. SCLLR may initiate an investigation based upon a written and signed complaint, or based upon good cause if reasonable grounds exist that the employer violated the law. SCLLR will continue with random audits and complaint investigations of employers as well.

North Carolina

A state immigration law affecting private employers is new in North Carolina. It was signed into law on June 23, 2011 and provides the following:

1. All employers in North Carolina employing 25 or more employees must use E-Verify.
2. Employers that employ 500 or more employees must begin to use E-Verify in the hiring process starting prior to October 1, 2012.
3. Employers that employ 100 to 499 employees must begin to use E-Verify prior to January 1, 2013.
4. Employers with 25 to 99 employees have until July 1, 2013 to comply.
5. Seasonal, temporary employees employed for 90 days or less during any consecutive 12-month period are exempt from compliance.

Complaints may be filed by any person with the North Carolina Department of Labor ("NCDOL") and may be filed anonymously. The NCDOL will investigate complaints with the assistance of the State Bureau of Investigation. The NCDOL also has the authority during the course of an investigation to issue subpoenas for the production of employment records for virtually all aspects of the employer-employee relationship.

If an employer is found by the NCDOL to have violated the state immigration law, the employer must file an affidavit stating it has requested verification for work authorization for its employees. Failure to timely provide an affidavit will result in a civil penalty of $10,000 to be assessed against the employer. For repeat violations, the employer will face an additional $1,000 penalty for a second violation; for third and subsequent violations, the employer will face a civil penalty of $2,000 for each employee that the employer failed to E-Verify.

If the NCDOL finds there is a reasonable likelihood that an employee is an unauthorized worker, the NCDOL will notify Immigration and Customs Enforcement ("ICE") and local law enforcement agencies.

Conclusion

In the wake of the *Whiting* decision, employers need to consider carefully both federal and applicable state laws in the employment verification process. Inevitably, more states will likely pass their own laws with specific employment verification requirements. Businesses with operations in different states will need to wear "multiple hats" in order to abide by state law requirements and federal standards.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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