

March 19, 2008

Governor Barbour Signs Mississippi Employment Protection Act

On Monday, March 17th, Governor Haley Barbour signed into law the Mississippi Employment Protection Act. The Act will impose significant new requirements on virtually every employer doing business in the state. The thrust of the new law is simple: employers must hire only United States citizens and lawfully present foreign nationals. The Act is noteworthy because of how it enforces this basic rule.

The Act requires every employer in Mississippi to register and utilize the United States Department of Homeland Security's E-Verify system. The system allows employers to submit the social security numbers of new hires to verify their employment eligibility. Under federal law, use of the system is strictly voluntary. The Mississippi Employment Protection Act effectively makes its use mandatory for all employers doing business in Mississippi. The requirement will be phased in gradually. Employers with 250 or more employees must register and begin utilizing E-Verify by July 1, 2008. Employers with 100-250 employees must comply by July 1, 2009; those with 30-100 employees by July 1, 2010; and all other employers by July 1, 2011.

The sanctions for failure to use E-Verify are substantial. The Act provides that employers hiring unauthorized workers may be declared ineligible for public contracts for up to three years, and may lose any license or permit to do business for up to one year. Intentional violations of the Act constitute a felony, punishable by up to \$10,000 in fines or five years in prison, or both. Depending on how it is interpreted, the Act may even create a private cause of action for discrimination, by which an employee can sue his employer if he believes he was discharged while the employer retained an unauthorized worker in a job category involving similar skill, responsibility, and working conditions. This provision raises numerous questions about the availability, nature and scope of private lawsuits, which will have to await clarification by the courts. The Act also contains several exemptions from liability, including one for homeowners hiring workers for noncommercial purposes.

The Act empowers the Mississippi Department of Employment Security, the Secretary of State, the Department of Human Services, and the Attorney General to seek penalties and bring charges for violations of the law. Use of E-Verify, however, will serve as a safe harbor against liability or suit under the Act. Although E-Verify is easy to use, employers are required to enter into a memorandum of understanding with the U.S. Department of Homeland Security, by which the employer agrees - among other things - to safeguard the information on employees it receives via E-Verify, and to make employment records available to DHS and the Social Security Administration.

The Act may be challenged in court. A challenge to a similar Arizona law was recently dismissed by a federal judge, who found that state sanctions against employers who hired illegal workers were not preempted by federal immigration laws and did not violate the requirements of due process. However, other questions, such as whether mandating use of E-Verify might require employers to waive Fourth Amendment rights, have not yet been addressed by the courts. In addition, Governor Barbour has acknowledged his concerns about unintended negative consequences of the Act and urged the Legislature to make "technical" changes to address these. It remains to be seen what, if any, revisions might be made.

Despite the uncertain status of the Act, employers doing business in Mississippi-particularly employers with 250 or more workers-should be begin preparing to implement E-Verify. If you have questions or concerns, please contact Brett Harvey at harveyb@phelps.com or Brandon Davis at davisb@phelps.com.

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