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North Carolina to Require Employers to Use E-Verify

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North Carolina has joined the growing list of states that will require private employers to verify the eligibility of their new hires to work in the United States through E-Verify, a federally administered online system for confirming the identity and employment eligibility of individuals. The new statute, signed by Governor Perdue on June 23, 2011, will phase in its E-Verify requirement over the next two years, eventually applying to all North Carolina employers with twenty-five or more employees.

The New Legislation

The new law will require all North Carolina employers with twenty-five or more employees to enroll in and use E-Verify to check the eligibility of employees to work in the United States. The law applies only to new hires and does not require employers to verify the immigration status of their existing workforce through E-Verify. The law also specifically exempts seasonal temporary employees employed for ninety or fewer days during a consecutive twelve-month period.

The E-Verify requirement will be phased in gradually, depending on the size of the employer. The E-Verify requirement will become effective on October 1, 2012, for employers with 500 or more employees. Employers with 100 to 499 employees will become subject to the requirement on January 1, 2013, and employers with twenty-five to ninety-nine employees will be covered by the law on July 1, 2013.

Once the law takes effect, employers who fail to verify a new hire's employment eligibility through E-Verify will face civil penalties from the North Carolina Department of Labor, regardless of whether that employee is indeed authorized to work in the United States. The size of potential penalties will vary based on the number of employee verifications the employer failed to make as well as whether the failure constitutes a repeat violation. For any violation, an employer will also be required to submit an affidavit stating that, after consultation with the affected employee, it has requested a verification of the employee's work authorization through E-Verify.

Potential Legal Questions

Opponents of the North Carolina statute could potentially argue that it is preempted by federal law. Federal immigration law prohibits states from "imposing civil or criminal sanctions" upon those that employ unauthorized aliens, except through "licensing or similar laws." Although the United States Supreme Court recently upheld Arizona's E-Verify law in *Chamber of Commerce v. Whiting*, the Court emphasized that the Arizona law is enforced through suspension of business licenses, rather than through civil or criminal penalties.

The North Carolina law presents a substantially different question from that resolved by the Supreme Court in *Whiting*. On the one hand, North Carolina's new statute arguably runs afoul of federal law because it is enforced through civil penalties. On the other hand, the North Carolina law does not directly penalize the employment of unauthorized aliens; rather, it penalizes employers for failing to use the E-Verify system, even if those employers employ no unauthorized aliens. As North Carolina's law departs

from the model of the Arizona E-Verify law that survived a Supreme Court challenge, the new law could face its own legal challenges.

Practical Implications

Employers in North Carolina that have twenty-five or more employees should prepare to enroll in and use the E-Verify system, if they are not already participating in that system. E-Verify compares information provided by a new hire on Form I-9 with information in the federal government's databases to verify the individual's identity and eligibility to work in the United States. Although E-Verify is a free service, participating employers will incur costs in using it as a result of the time it takes the employer's personnel to be trained in the use of E-Verify, to enter data into the E-Verify system, and to respond to E-Verify determinations that information supplied on a new hire's Form I-9 does not match government records.

For more information about these issues, please contact the author(s) of this Legal Alert or your existing firm contact.

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