

## Does Tennessee Law Now Require Employers to Use E-Verify?

Last year, Governor Haslam signed into law the Tennessee Lawful Employment Act (the "Act"), which is intended to curb the hiring of illegal aliens. Because there was significant debate over prior versions of this bill (some of which contained more stringent requirements for employers), there is now some confusion about what the Act actually requires and when it becomes effective. Previous drafts of the bill had mandated the use of the federal "E-Verify" program for documenting a worker's immigration status, but the Act was eventually amended to encourage, but not require, the use of E-Verify. The requirements of the Act went into effect on January 1, 2012 for government employers and private employers with 500 or more employees. The Act becomes effective on July 1, 2012 for employers with 200 - 499 employees; and on July 1, 2013 for employers with 6 - 199 employees.

Employers subject to the law must either (a) verify that all newly hired employees are eligible to work in the U.S. through the federal E-Verify program, or (b) require newly hired employees to provide one or more of the following documents proving identity and work eligibility:

- (1) A valid Tennessee driver license or photo identification license issued by the Department of Safety;
- (2) A valid driver license or photo identification license issued by another state where the issuance requirements are at least as strict as those in this state, as determined by the department.
- (3) An official birth certificate issued by a United States state, jurisdiction or territory;
- (4) A United States government-issued certified birth certificate;
- (5) A valid, unexpired United States passport;
- (6) A United States certificate of birth abroad (forms DS-1350 or FS-545);
- (7) A report of birth abroad of a citizen of the United States (form FS-240);
- (8) A certificate of citizenship (forms N560 or N561);
- (9) A certificate of naturalization (forms N550, N570 or N578);
- (10) A United States citizen identification card (forms I-197 or I-179); or
- (11) Valid alien registration documentation or other proof of current immigration registration recognized by the United States Department of Homeland Security that contains the individual's complete legal name and current alien admission number or alien file number.

Human resources managers will note that the list of acceptable verification documents is substantially identical to those required for federal form I-9. Therefore, an employer can meet its obligations under both federal and state law by accurately completing form I-9, with a couple of exceptions noted below.

First, one primary difference between the Act and current federal law, is that the Act expressly applies to "non-employees," defined to include "any individual, other than an employee, paid directly by the employer in exchange for the individual's labor or service" (emphasis added). It is



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unclear what the “paid directly” requirement means in the context of the statute since every independent contractor is “paid directly” by the person or entity with which he or she contracts. We believe the intent of this language is to make employers responsible for establishing work eligibility for individuals they directly hire as 1099 contractors, but to relieve employers from such responsibility when they engage a business as a 1099 contractor. Until this ambiguity is resolved, our suggestion to employers who are otherwise covered by the Act is to establish work eligibility for individuals who are their 1099 independent contractors. They must do so by obtaining one of the listed documents prior to the independent contractor beginning work for the employer (independent contractors are not eligible for enrollment in E-Verify).

Second, unlike federal law, the Act requires employers to keep and maintain copies of the required work eligibility documents for three years after the date of hire, or one year after the date of termination, whichever is longer.

### **Safe Harbors**

In order to encourage the use of E-Verify, the Act provides a legal safe harbor to employers if a worker whose immigration status was confirmed through E-Verify is later found to be in the country illegally. This safe harbor is not available to employers who opt out of E-Verify and instead comply with the Act by obtaining one of the listed documents.

### **Coverage**

Because these issues are not addressed in the statutory provisions, some questions remain regarding the reach and coverage of the Act. First, the Act makes no distinction between in-state and out-of-state employees in its requirements to confirm immigration status. It would appear unlikely that the Act would apply to employees located outside the state of Tennessee. However, exempting out-of-state workers from the Act runs the risk of encouraging employers to move work operations outside of Tennessee to states that have less stringent requirements. Along the same lines, in calculating an employer’s total number of employees for purposes of the Act’s effective date, it is unclear whether all of an employer’s employees are counted, or only those located within Tennessee. Because the language makes no such distinction, our conservative opinion is to include all employees when making such calculations, including out-of-state employees.

### **Penalties**

Penalties for non-compliance can be assessed by the Commissions of Department of Labor and Workforce Development. For violations of the Act’s verification provisions, the Act authorizes a \$500 penalty for a 1st offense; a \$1,000 penalty for a 2nd offense; and a \$2,500 penalty for a 3rd and all subsequent offenses. On top of these penalties, the Act authorizes, for a 1st time violator, an additional penalty of \$500 per worker not properly verified; \$1,000 per worker not properly verified for a 2nd time violator; and \$2,500 per worker not properly verified for any additional violations.

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If you have any questions about this issue of Employment Law Alert, please contact any of the attorneys in our Labor and Employment practice listed below.

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