

## South Carolina's Illegal Immigration Reform Act

On May 29, 2008, the South Carolina Legislature passed the South Carolina Illegal Immigration Reform Act, and was signed into law by Governor Mark Sanford the following week.

What obligation does the new law impose on government employers?

Beginning January 1, 2009, all public employers are required to register and participate in E-Verify.

What obligations does the new law impose on employers engaged in contracts with state agencies?

Contractors and their sub-contractors seeking to do business with state agencies must register for E-Verify or only employ workers with a valid South Carolina Driver's license or an out-of-state driver's license if the license requirements are as strict as South Carolina's. The provision does not apply to contracts worth less than \$15,000 for political subdivisions and \$25,000 for other public employers (and employers may not divide work in order to avoid the applicability of the section. It also does not apply to contracts for the acquisition of an end product and contracts predominantly for professional or consultant services. Contractors must provide a written statement verifying compliance, though the public employer need not audit or independently verify compliance by the contractor.

Are there requirements applicable to all private employers?

All employers with more than 100 employees (and their contractors and subcontractors) must, by July 1, 2009, either use E-Verify and verify employment authorization within five days or employ only workers possessing a valid South Carolina Drivers License or a license from a state with requirements at least as strict as South Carolina. The state shall publish a list of states with equivalent drivers licenses no later than January 1, 2009. This provision of the new law will apply to employers with less than 100 employees beginning July 1, 2010.

Employers who elect to use E-Verify must provisionally employ a new employee until the employee's work authorization has been verified. A private employer who elects to verify a new employee's work authorization must submit a new employee's name and information for verification even if the new employee's employment is terminated less than five days after becoming employed. If a new employee's work authorization is not verified by the federal work authorization program, a private employer must not employ, continue to employ, or re-employ the employee.

There is now a general requirement stating that a private employer shall not knowingly or intentionally employ a person who is not lawfully present in the US.

How are complaints against private of the employers investigated and violations punished?

After the Director of the State Budget and Control Board receives a written complaint against a private employer or the state begins its own investigation based on good cause or under random auditing, the director must conduct an investigation. If the Director believes "substantial evidence exists" to support a finding of a violation of the South Carolina law, the Director shall notify ICE, notify local and state law enforcement agencies enforcing state immigration laws and assess a penalty as follows:

- A fine for between \$100 and \$1000 for each violation (though a first offense will not be assessed with a penalty if the employer complies within 72 hours of being notified of a violation. Fines may vary based on the number of employees for whom the employer failed to verify status, the violation history of the employer, the size of the employer, the steps the employer has taken to remediate the problem and the duration of the violation.
- Employees must be terminated if the Director notifies the employer that the work authorization of an employee was not verified during the Director's investigation.
- The employment license shall be suspended from 10 to 30 days for a first offense and the employer may not employ any workers during the suspension period. After the period of suspension, the private employer's license may be reinstated if the employer demonstrates that the unauthorized employee has been terminated, a reinstatement fee equal to the cost of investigating and enforcing has been paid (not to exceed \$1000).
- For a second offense, the suspension of the employment license shall be 30 to 60 days with reinstatement being permitted based on the same terms as above.
- For a third or later offense, the employment license is revoked and the employer may seek a provisional license only after 90 days. The employer would have to provide quarterly reports to the director demonstrating compliance and that unauthorized employees have been terminated. Also, a reinstatement fee must be paid.
- If an employer engages in business or employs a new employee during the suspension period, the employer is subject to a revocation of the employment license and reinstatement shall not be permitted for at least five years.

The Director shall maintain a list of violators and publish it on the agency's web site.

What is the new "employment license" created by the new law?

All private employers in South Carolina on or after July 1, 2009 will be deemed to have an employment license which permits the employer to employ a person in the state. After July 1, 2009, employer may not employ a person in South Carolina unless the employment license is in effect and is not suspended or revoked. The employment license will remain in effect only as long as the employer is in compliance with the new law.

When does the new law take effect?

Under the provisions of the law relating to contractors with public employers, subcontractors with five hundred or more employees must comply by January 1, 2009. For those with 100 to 500 employees, the new law takes effect July 2009. For everyone else, the law takes effect on and after January 1, 2010.

Is there a safe harbor for employers in the new law?

Yes. Employers complying with the E-Verify or driver's license requirement may not be sanctioned under the contractor section of the new law. Private employers subject to the general section applicable to all private employers with 100 or more employees are also provided a safe harbor if they are in compliance with I-9 rules.

Are there penalties for those filing false complaints?

Those making false reports shall be guilty of a felony and imprisoned for up to five years.

What is the new requirement for reporting violations?

The State's Commissioner for Minority Affairs is required to set up a 24 hour hotline to receive allegations of federal work authorization program violations and the department shall, in turn, relay the information to the appropriate law enforcement agency.

What does the new law change with respect to deducting wages paid to unauthorized employees?

The new law bars after January 1, 2009, the deduction of wages paid to persons not authorized to be working in the US except where after a reasonable investigation, the employer did not know or should not have known the worker was unauthorized. The provision only applies to individuals hired after January 1, 2009 and does not apply to any individuals with a valid South Carolina driver's license or license issued by a state with license requirements as strict as South Carolina's.

What is the new transporting bar contained in the new law?

It is now a state law felony to transport, shelter, harbor or conceal unauthorized individuals knowingly or in reckless disregard of the fact that the person is illegally present in the US. Fines range from \$3000 to \$5000 and guilty parties may be subject to imprisonment for up to five years. Also, persons convicted under the law are barred from receiving a professional license in South Carolina.

What does the new law change with regard to identity theft?

Individuals who engage in identity theft for the purpose of working in the US must pay restitution to the state for any benefits received as a result of benefiting under any state programs and individuals suffering any harm as a result of such identity theft may now bring a private cause of action and claim triple damages and attorney fees.

Does the law give any rights to discharged US workers?

Yes. Employees who are replaced by unauthorized workers when the employer knows the replacement worker is unauthorized shall have a civil right of action for wrongful termination. The replacement must have occurred within 60 days of the termination, the replacement worker must not have been authorized at the time of the replacement, the employer must have known the replacement worker's status and the replacement worker must perform the same duties and have the same responsibilities as the terminated employee. Employees successful in such a suit can seek reinstatement in the position, actual damages and attorney fees. The claim must be made within a year of the date of the alleged violation.

[Provided courtesy of Suskind's Immigration Bulletin. [Subscribe here.](#)]