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ATTORNEYS AND COUNSELORS

OVERVIEW OF CURRENT STATUS OF ALABAMA'S IMMIGRATION LAW

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Alabama's new comprehensive immigration law, the [Beason-Hammon Alabama Taxpayer and Citizen Protection Act](#), was enacted on June 9, 2011, and has been described as the nation's toughest immigration law. Given its strict requirements, it is no surprise that the Act has been subject to legal challenge. As a result, the future of some provisions remains uncertain. Certain provisions of the law have been allowed to take effect in accordance with the terms of the Act. Even those provisions that have been enjoined, and, therefore, cannot be enforced currently, have not been ruled permanently unenforceable.

The Act as passed by the Legislature provided that most of the requirements of the Act would take effect on September 1, 2011, with certain exceptions. When portions of the Act were challenged in three separate lawsuits, the Chief Judge for the U.S. District Court for the Northern District of Alabama, Sharon Blackburn, temporarily enjoined all of the Act's provisions, preventing them from becoming effective until at least September 29, 2011. The day before the temporary injunction expired on September 29th, Chief Judge Blackburn entered [three orders](#) continuing the injunction as to certain portions of the Act until a final decision on the merits of the case. The provisions of the Act that were not further enjoined by Chief Judge Blackburn on September 28, 2011, became effective in accordance with the dates provided in the Act.¹

Chief Judge Blackburn's rulings quickly were appealed to the Eleventh Circuit Court of Appeals, which ordered expedited consideration of the underlying appeal. The parties also asked the Eleventh Circuit to suspend enforcement of the Act pending the appeal. On October 14, 2011, the Eleventh Circuit issued an [order](#) enjoining two additional provisions of the Act – provisions that Chief Judge Blackburn had ruled enforceable - pending a decision on the appeal of the case.

It is important to know both the obligations currently imposed by the Act and the provisions that are not enforceable at this time. The purpose of this article is to summarize for businesses,

¹ Unless otherwise specified in this article, the enforceable provisions of the Act became effective on September 29, 2011, when the Chief Judge Blackburn's temporary stay of enforcement expired.

employers and educators the requirements of the Act that are in effect or scheduled to become effective and to identify those provisions that currently are not enforceable.

I. THE ENFORCEABLE PROVISIONS OF THE ACT

Pertinent provisions of the Act that are enforceable include the following:²

- Section 9 prohibits businesses/employers, as a condition for the award of any contract or grant by a state or local government or state-funded entity, from knowingly employing or hiring an unauthorized alien. Subcontractors paid by any such contract or grant are likewise prohibited from knowingly employing or hiring unauthorized aliens. As a condition for the award of such contracts or grants, businesses/employers must enroll in the federal E-Verify program, explained more fully below. Upon a first violation, the contract may be terminated and the business license suspended for 60 days. With a second violation, the contract shall be terminated, and the contractor's business license may be revoked permanently. Section 9 becomes effective on January 1, 2012.
- Section 12 requires law enforcement, in the event of a lawful stop, detention or arrest, to determine the citizenship and immigration status of the person if there is reasonable suspicion that the person is an unlawful alien.
- Section 15(a) forbids businesses/employers from knowingly employing or hiring an unauthorized alien to perform work in Alabama.³ Knowingly includes both actual and constructive knowledge (knew or should have known). The employer's review of an employee's status is subject to a reasonableness standard. An employer acts unreasonably if it becomes aware of information that creates a suspicion that an employee is an unauthorized alien. Examples where an employer knows or should know of unauthorized immigration status include:
 - An employee's admission;
 - An employee's failure to assist in the completion of the Form I-9 within three days of employment;⁴

² Those provisions of the Act relating to many of the obligations of state government agencies are beyond the scope of this article.

³ The prohibition against knowingly hiring or employing an unauthorized alien has existed under federal law since the 1986 enactment of the Immigration Reform and Control Act ("IRCA"), codified at 8 U.S.C. §§ 1324a–1324b. IRCA requires compliance by employers, independent of the Alabama Act.

⁴ The I-9 verification process is a federal mandate under IRCA requiring an employer to examine certain documents that establish both identification and employment authorization for new employees. The employer must then fill out an I-9 form attesting that he/she reviewed the documents, that they reasonably appear to be genuine and that, to the best of the employer's knowledge, the employee is authorized to work in the U.S.

- Discrepancies between the information and documentation provided by the employee; and
- A clear discrepancy between photograph presented in I-9 process and photograph received from E-Verify check.

Penalties for violations of Section 15(a) include:

- For a first violation, termination of the unauthorized alien; a three-year probationary period with quarterly reports required of every new employee; the submission of an affidavit of compliance; and the suspension of the business license and required permits for the violating location of a business for up to ten days.
 - For a second violation, permanent revocation of the business license and permits for the violating location.
 - For a third violation, all business licenses and permits for all locations of the violating business throughout the state are permanently revoked.
 - A civil monetary penalty in an amount between \$1000 and \$5000 per day.
- Section 15(b) requires employers to use the federal E-Verify database. The requirement applies to all employers, both public and private, regardless of size. There is an alternative e-verification system allowed for Alabama employers with fewer than 26 employees. For private employers, the E-Verify requirement becomes effective on April 1, 2012, but all businesses that receive government contracts or grants must provide proof of enrollment and participation in the E-Verify system beginning on January 1, 2012.
 - Section 18 amends the Alabama Code to include a provision that, if a person is arrested for driving without a license and law enforcement is unable to determine by any other means that the person has a valid driver's license, law enforcement shall transport the arrested person to the nearest magistrate. A reasonable effort must be made to determine the citizenship of the arrested person, and, if found to be unlawfully present in the U.S., the arrested person shall be considered a flight risk and must be detained until prosecution or transfer to federal immigration authorities.
 - Section 19 states that, if a person is charged with a crime for which bail is required or is confined for any period in state, county or municipal jail, law enforcement must make a reasonable effort to determine if the person is an unlawful alien.
 - Section 20 requires the state agency responsible for the incarceration of an unlawful alien who is convicted of a violation of state or local law to notify federal immigration authorities and to assist in the coordination and transfer of the prisoner to appropriate federal immigration authorities.
 - Under Section 27, contracts with unauthorized immigrants are not enforceable where the contracting party had knowledge that the person was unlawfully present in the U.S. at the time of the contract. The statute includes certain exceptions such as agreements

for one night's lodging, food to be consumed by the illegal immigrant, medical services and travel to the immigrant's home country.

- Section 30 makes it a felony for an unlawful alien to engage (or attempt to engage) in business transactions with the state. A "business transaction" under the Act includes applying for or renewing a car tag, driver's license, nondriver identification card or business license. (It does not include applying for a marriage license, however.)

II. THE ENJOINED PROVISIONS OF THE ACT

As explained above, certain provisions of the Act have been enjoined and currently cannot be enforced, but it is important to note that no court has ruled any provisions of the Act permanently unenforceable. The issue of whether provisions of the Act are permanently struck will not be resolved until a final decision by the courts on the merits of the legal challenges. For now, Chief Judge Blackburn of the Northern District of Alabama has enjoined five sections of the Act (more including subsections) pending a final decision in the case. Additionally, the Eleventh Circuit has enjoined two more provisions of the Act pending a decision on the appeal.

Chief Judge Blackburn has enjoined the following provisions of the Act, meaning that they cannot be enforced at this time:

- Section 8 prohibits an unlawful alien from enrolling in or attending any public post-secondary education institution in the state and bars eligibility for scholarships, grants or financial aid.
- Section 11(a) makes it a misdemeanor for an unauthorized alien to apply for, solicit or perform work as an employee or independent contractor.
- Section 11(e) provides that a court of this state, when determining whether an alien is lawfully present, only can consider the federal government's verification.
- Section 11(f) prohibits drivers from stopping along a road to hire temporary workers. Section 11(g) applies to the person picked up by the driver in such circumstances.
- Section 13 criminalizes knowingly sheltering or harboring illegal immigrants, which includes, but is not limited to, renting housing to or transporting them. Although the Act does not define the term "harbor," it is defined by Black's Law Dictionary to mean "the furnishing of shelter, lodging or food."
- Section 16 forbids employers from claiming as business expense tax deductions any wages paid to unlawful aliens. The provision, as enacted, includes a penalty for claiming such a deduction of ten times the deduction claimed.
- Section 17 establishes a civil cause of action against an employer who discharges or fails to hire a citizen or person authorized to work in the U.S. while hiring or retaining an illegal alien. The provision in the Act provides that courts may award compensatory damages, as well as attorneys' fees, but not punitive damages.

The Eleventh Circuit has also enjoined the following provisions, prohibiting enforcement at least until a ruling on the appeal:

- Section 10 creates a criminal misdemeanor under Alabama law for unauthorized aliens who fail to carry proper alien registration documentation.
- Section 28 requires public elementary and secondary schools to report the immigration status of students.

III. BUSINESSES AND EMPLOYERS SHOULD ACT NOW

The legal challenges and judicial decisions do not affect many of the Act's requirements that most directly impact employers in the state. Importantly, the requirement that employers use the federal E-Verify program to determine whether job applicants are eligible for hire will go into effect on January 1, 2012, for employers doing business with the state and on April 1, 2012, for all other Alabama employers. An overview of the E-Verify program is included below.

The prohibition against employers knowingly employing illegal aliens also remains the law in Alabama (and is an obligation under federal law pre-dating the Alabama Act), and employers are required to comply. Further, the Act's penalties for violations of this prohibitions - the suspension and revocation of business licenses, for example - have passed muster in the courts.

Employers should take proactive steps now to ensure their compliance with the law. Employers should perform self-audits to be certain their I-9 forms are in good order, review their policies for the completion of I-9 forms by employees and review their employment authorization process generally. The failure to correctly complete an I-9 for an employee within three days of employment is sufficient evidence to support a determination that the employer was aware of an employee's illegal immigration status.

Employers should register for, learn about and start using E-Verify. There is no reason to wait. Given that many provisions of the Act will be clarified further by rules and regulations that have not yet been drafted, it is a good idea to plan for uncertainty by educating yourself on the Act's requirements and by anticipating likely changes in workforce or employment applicant pool. Businesses should also take time to examine and revise subcontract arrangements to be sure those are in compliance with the Act as well.

As a further best practice, when entering into any contract, always ask to see a valid driver's license (or other specific document identified in the Act).

IV. THE FEDERAL E-VERIFY PROGRAM

E-Verify allows an employer to authenticate applicable documents to determine employment eligibility for new hires (not existing employees). When using E-Verify, an employer enters information from an employee's documents into an internet-based computer program, and that information is then transmitted to the Social Security Administration and/or DHS for

authentication. These federal agencies then confirm or tentatively “nonconfirm” whether the employee’s documents are authentic and whether the employee is authorized to work in the U.S. If a tentative nonconfirmation is issued, the employer must notify the employee, who may contest the results. If an employee does not contest the tentative result within the statutorily prescribed period, the tentative nonconfirmation becomes a final nonconfirmation. If the employee does contest it, the appropriate agencies undertake additional review and ultimately issue a final decision. An employer may not take any adverse action against an employee until it receives a final nonconfirmation. Once a final nonconfirmation is received, however, an employer is expected to terminate the employee or face sanctions.

Employers who use the E-Verify system to confirm an employee’s authorization to work are entitled to a rebuttable presumption under federal law that they did not knowingly hire an unlawful alien. Under the Alabama Act, an employer that uses E-Verify to verify the work authorization of an employee shall not be deemed to have violated Section 15 with respect to the employment of that person.

The federal government provides several resources for the E-Verify system and I-9 forms, including the following:

- E-Verify: www.uscis.gov/E-verify
- U.S. Citizenship and Immigration Services Handbook for Employers (last updated in January 2011) - www.uscis.gov/files/form/m-274.pdf
- E-Verify Training on the USCIS website: www.uscis.gov

For more information, visit [Federal Immigration Law Requirements](#).

The information contained herein, as well as in materials linked to this information, provides highlights of a particular law or legal issue. It is not intended to be, and should not be construed as, legal advice for any particular fact situation. If you have questions about any of this information or would like to discuss a particular fact situation, please contact a member of Christian & Small’s Alabama Immigration Act Task Force.

** No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. For more information, please contact the firm’s Alabama Immigration Act Task Force.*

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