

# **H.B. 56, Alabama's Immigration Statute, is largely upheld - time to get ready?**

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In orders entered on September 28, Judge Blackburn declared that the State of Alabama will be prevented from enforcing only certain provisions of H.B. 56, with the remaining provisions going into effect on September 29, 2011. A full synopsis of the enjoined provisions follows below. The Hispanic Interest Coalition of Alabama, the first group to challenge H.B. 56, has already filed an emergency motion to get the Court to prevent enforcement of specific provisions while they appeal to the 11th Circuit. A stay is possible, but in our opinion, not likely.

The bottom line for employers is this: the provisions you are most concerned with (the state contractor provisions, E-verify requirements, and business license penalties) have not been directly challenged by any lawsuit, are not the subject of the stay or appeal, and even if they were, similar provisions in Arizona's immigration bill have been upheld by the United States Supreme Court already. While anything is possible, it may be time to make a call about when you want to start making preparations to comply with this law if you haven't already done so.

There is some certainty in this equation - here is the list of some of the provisions that are currently enjoined and not likely to withstand a final judgment on constitutionality:

- Section 11(a), which prohibits an unauthorized worker from soliciting and accepting employment or performing work as an independent contractor. The Court made it very clear that Alabama cannot penalize individuals when the federal government puts the burden on employers to make sure that their workforces are free of unauthorized workers. In other words, it is solely the employer's responsibility to weed out any unauthorized workers.
- Sections 11(f) and (g), which criminalize the act of stopping a vehicle in the road for the purpose of picking people up to hire them and transport them to a job. The Court found that this provision could impair free speech, in that an individual would be prevented from communicating a desire for and ability to do a job. The Court says that because Alabama does not have a really good reason for endangering free speech, it cannot enforce this provision.
- Section 13, which makes it a criminal offense to: conceal, harbor, or shield an illegal alien from detection by law enforcement; induce an illegal alien to enter the United States unlawfully; transport an illegal alien; and enter into rental agreements with illegal aliens. The Court found that this provision appears to sanction activities that are permitted under federal law, which makes it likely that it would ultimately be held unconstitutional.

- Section 16, which penalizes businesses for claiming state tax deductions for wages or other compensation paid to unauthorized workers. Under federal law, employers are governed by the Immigration Reform and Control Act (IRCA) and its progeny. When dealing with employer/employee issues, IRCA specifically prohibits states from imposing more or different criminal and civil penalties than what IRCA itself provides for immigration violations. The Court found that this section imposes a penalty outside of IRCA, so it cannot be enforced.
- Section 17, which creates a private cause of action for discrimination against employers who knowingly hire or retain an unauthorized worker while simultaneously failing or refusing to hire or retain an authorized worker. This is the provision that allows an individual to collect back pay and other damages based on a mere showing that an employer has an unauthorized worker on the payroll. Like Section 16, this provision imposes a new and different penalty than what IRCA allows, so it cannot be enforced.

The majority of the other provisions of H.B. 56 took effect on September 29, when the Court's temporary injunction was set to expire. While there are probably going to be some delays in enforcing these provisions, due to the lag in Alabama's rulemaking time and even the possibility of a stay, it is likely that AGC members are going to be required to be in compliance by the January 1, 2012 (if you do business with the State) and April 1, 2012, deadlines. Here is a brief refresher on what will be expected by those dates:

### **Section 9 - State/Local Government Contractors**

For businesses who receive contracts to do work for Alabama state and/or local government, receive state and/or local government incentives, or receive state and/or local grants, here is what must be done to comply with H.B. 56:

- On or after January 1, 2012, the government will not award a contract, grant, or incentive to a business without a sworn affidavit from the business that it will not knowingly hire or employ an unauthorized worker.
- The government also will not award the contract, grant, or incentive without proof that the business is enrolled in E-verify. The State has not expressed what kind of proof it will require, but E-verify does provide account confirmation print-offs and requires you to sign a memorandum agreement before use.
- The prime contractor or grant/incentive recipient must obtain from its subcontractors and suppliers a sworn affidavit that they will not knowingly hire or employ an unauthorized worker. Subcontractors and suppliers must also provide proof to the prime contractor of their enrollment in E-verify.

Failure to comply with these requirements can result in revocation of a contractor's business license and the termination of the contract. In terms of the prime contractor/subcontractor relationship, the prime is not liable for a sub's failure to comply if the prime got the affidavits and E-verify proof and did not know that the sub was not complying.

### **All Employers**

Keep in mind that state enforcement of the overall commandment: THOU SHALT NOT KNOWINGLY HIRE OR EMPLOY AN UNAUTHORIZED WORKER, is effective immediately. At some point, the State Attorney General and county prosecutors will be required to act on evidence of violations by bringing suit in court to seek revocation of business licenses. Additionally, the E-verify requirement will go into effect on April 1, 2012. The Alabama Department of Homeland Security is required to keep track of how many and which Alabama businesses are enrolled in E-verify, and this activity will likely result in more enforcement action.

If you do not plan to enroll in E-verify until close to the deadline, compliance with existing federal I-9 verification procedures is the best defense against the prosecution of violations in the interim, if those prosecutions start to happen. This is a good time to mention that the federal government is still actively enforcing compliance with I-9 procedures, so keeping up with compliance is only going to be good for businesses in the long run.

With Sections 16 and 17 (see above) out of the picture for now, some of the costly consequences of H.B. 56 are not an immediate concern. However, it's hard to imagine anything more costly than a 10-day shutdown of a jobsite due to a license suspension or the revocation of a good state contract. Compliance with this law (and with federal law) can be expensive and time consuming, and with the costs of doing regular business likely to rise, AGC members are going to have to make some hard decisions about when and how to start getting ready. In the meantime, resources like this will monitor the legal situation and keep you informed so you can make the best decisions.

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