

IMMIGRATION PRACTICE

WHAT YOU NEED TO KNOW ABOUT MISSOURI H.B. 1549 AND ITS NEW RULES ON THE EMPLOYMENT OF UNAUTHORIZED ALIENS

On Monday July 7, 2008, Missouri Governor Matt Blunt signed into law House Bill 1549 which addresses the issue of illegal immigration. The new bill cracks down on employers who knowingly hire unauthorized aliens and enacts provisions to punish employers who hire illegal immigrants. In addition, the bill requires verification of legal employment status of every public employee, and allows for cancellation of state contracts for contractors who hire illegal immigrants.

PROHIBITION OF EMPLOYMENT OF UNAUTHORIZED ALIENS

The Missouri bill provides that, “no business entity or employer shall knowingly employ, recruit, hire for employment, or continue to employ an unauthorized alien to perform work within the state of Missouri.” The Missouri bill, however, imposes **additional** requirements and/or restrictions on public employers, certain business entities, and contractors.

For instance, all public employers in Missouri must enroll and actively participate in a federal work authorization program (“FWAP”). A public employer is defined as any department, agency, or instrumentality of the state or political subdivision of the state. A political subdivision is any agency or unit of the state that is authorized to levy taxes or cause taxes to be levied. A FWAP includes any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security (“DHS”) – such as E-Verify.

In most circumstances a private employer has the discretion to enroll in a FWAP. Indeed, under the Missouri bill, a private employer may enroll and participate in a FWAP. If a private employer elects to participate in such a program it shall verify the employment eligibility of every employee

whose employment commences after the employer enrolls in a FWAP. The good news is that any business entity that participates in a FWAP shall have an affirmative defense to a claim the business entity knowingly hired or continued to employ an unauthorized alien. In that case, a FWAP can serve as a safe harbor of sorts.

In some instances, however, a private employer may have to enroll and participate in a FWAP. For example, as a condition for the award of any contract or grant in excess of \$5,000 by the state or by any political subdivision of the state to a business entity, or for any business entity receiving a state-administered or subsidized tax credit, tax abatement, or loan from the state (collectively referred to as the “**Project**”), the business entity shall, by sworn affidavit and provision of documentation, affirm its enrollment and participation in a FWAP for the employees working “in connection with” the Project. In addition to enrolling in a FWAP, every business entity must also sign an affidavit affirming that it does not knowingly employ any person who is an unauthorized alien in connection with the Project.

General contractors and subcontractors may also need to participate in a FWAP. The bill provides that a general contractor or subcontractor of any tier shall not be liable for employing an unauthorized alien if its direct subcontractor employs an unauthorized alien if the contract binding the contractor and subcontractor affirmatively states that the direct subcontractor is not knowingly in violation of the Missouri law and shall not henceforth be in such violation, and the contractor or subcontractor receives a sworn affidavit under the penalty of perjury attesting to the fact that the direct subcontractor’s employees are lawfully present in the United States. The required contract language and sworn affidavit from all lower tier contractors appears to apply in all construction settings, not just on a Project.

ENFORCEMENT BY ATTORNEY GENERAL

The Missouri Attorney General is charged with the responsibility of enforcing the provisions prohibiting the employment of unauthorized aliens. The Attorney General shall initiate an enforcement action upon receipt of a written, signed complaint under the penalty of perjury from a state official, business entity, or state resident. The Attorney General has 15 business days to request identity information from the business entity regarding any persons alleged to be unauthorized aliens. The business entity must respond to the Attorney General in 15 business days otherwise the Attorney General shall direct the applicable municipal or county governing body to suspend the business entity's applicable license(s), permit(s), or exemption(s).

Upon receipt of the information, the Attorney General shall verify the employee's identity data and immigration status with the federal government, and provide the business entity with written notice of the results of the verification request. The employer is not required to take any further action if the verification confirms the employee is *authorized* to work in the United States.

If the federal government notifies the Attorney General that the employee is *not authorized* to work in the United States *and* the employer *participates in a FWAP*, there shall be a rebuttable presumption that the employer has met the requirements for an affirmative defense. The employer, however, will still need to take corrective action.

If the federal government determines the employee is *not authorized* to work in the United States, *and* if the Attorney General reasonably believes the business entity *knowingly violated the provision* prohibiting the employment of unauthorized aliens, the Attorney General shall bring a civil action against the employer. If the court finds that the business entity *did not knowingly violate the provision* prohibiting the employment of unauthorized aliens, the employer shall have 15 business days to take corrective action. If the entity fails to take such corrective action within 15 business days, the court shall direct the applicable municipal or county governing body to suspend the business entity's permit(s) and any applicable licenses or exemptions until the business entity takes such action.

If the court finds that the business entity *did knowingly violate the provision* prohibiting the employment of unauthorized aliens, the court shall direct the applicable municipal or county governing body to suspend the business entity's permit(s) and any applicable licenses or exemptions for 14 days. The court will reinstate such

permits, licenses, and exemptions if the business entity takes corrective action during that 14 day period.

CORRECTION OF A VIOLATION

A business entity seeking to correct a violation must undertake certain actions. The business entity can terminate the unauthorized alien's employment; **or** the business entity, after acquiring additional information from the employee, can request a secondary or additional verification by the federal government of the employee's authorization, under the procedures of a FWAP.

In addition, a legal representative of the business entity shall submit to the Attorney General: 1) a sworn affidavit stating that the violation has ended, including a description of the specific measures and actions taken by the business entity to end the violation, and the name, address, and other adequate identifying information for any unauthorized aliens related to the complaint; and 2) documentation which confirms that the business entity has enrolled in and is participating in a FWAP.

PENALTIES

If the Attorney General orders the suspension of a business entity's license or licenses, that suspension shall terminate one business day after a legal representative of the business entity submits to the Attorney General the above-mentioned affidavit and other required documentation (such as confirmation of the business entity's enrollment and participation in a FWAP). An entity that violates the provision prohibiting the employment of unauthorized aliens for a second time shall lose its business permit and any applicable license or exemptions for one year. For subsequent violations, the business entity shall permanently lose its business permit and any applicable license or exemptions.

In addition to the suspension of a business entity's permit or licenses, upon the first violation by any business entity awarded a Project, the business entity shall be deemed in breach of contract and the state may terminate the contract and suspend or debar the business entity from doing business with the state for a period of three years. Upon such termination of the contract, the state may also withhold up to 25% of the total amount due to the business entity. Upon a second violation, the business entity shall be deemed in breach of contract and the state may terminate the contract and permanently suspend or debar the business entity from doing business with the state. Upon a second violation, the state may also withhold up to 25% of the total amount due to the business entity.

Also, any compensation—whether in money, in-kind, or in services—knowingly provided to any unauthorized alien may not be allowed as a business expense deduction from any income or business taxes of the state of Missouri. Likewise, any business entity that terminates an employee in accordance with the provisions of this bill shall not be liable for any claims made against the business entity under Section 213 of the Revised Missouri Statutes (Human Rights). Although the statute contains immunity from state level employment lawsuits, the legislation does not prevent an employer from being sued in federal court for a potential Title VII violation.

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDANT CONTRACTORS

Employers with five or more employees will be required to file federal 1099-miscellaneous forms with the Missouri Department of Revenue within the same deadline as the filing of Missouri form 99 forms (currently on or before February 28 of each year for the previous calendar year). Previously, federal 1099 miscellaneous forms were not required to be filed with the Missouri Director of Revenue. An employer who intentionally, on five or more occasions, fails to submit these forms, shall be fined up to \$200 for each time the employer fails to file these forms on or after the fifth occurrence.

Employers are prohibited from knowingly misclassifying a worker as an independent contractor by failing to claim the worker as an employee when the employer knows that the worker is an employee. The Attorney General is given authority to investigate claims of violations of this part of the new law. Anyone violating this provision will be subject to a fine of \$50 per day per misclassified worker up to \$50,000.

KNOWINGLY TRANSPORTING AN ILLEGAL ALIEN FOR PURPOSES OF EMPLOYMENT

Knowingly transporting an illegal alien in Missouri for the purpose of employment is a felony punishable by a fine of not less than \$1,000 and imprisonment for not less than one year or both.

OSHA TRAINING REQUIREMENTS

In addition to the immigration provisions, this Missouri bill also imposes new OSHA training requirements that apply to both immigrant and nonimmigrant employees. Any person, contractor or subcontractor signing a contract to work on the construction of public works for any public body must provide their on-site employees with a 10-hour construction safety and health course. The course must be approved by OSHA or must be as stringent as an OSHA-approved course. Employers may not know or understand whether the course

their employees attend meets that “as stringent” standard. Public works are defined as all fixed work constructed for public use or paid out of public funds; public works include any work done directly by any public utility company—but not public utilities under the jurisdiction of the public service commission—or other public authority. All employees are required to complete the course within sixty days of beginning work on the public works project.

Any employee required to, but found to have not completed the course, will have 20 days to produce documentation of the completion of the course or be removed from the project. The penalty for contractors who do not follow the provision is \$2,500 plus \$100 per day for every employee who has not completed the course. The public body awarding the contract can withhold these penalties from the contractor’s payment, and the contractor may withhold or recover payments from the subcontractor sufficient to cover any penalty for which the subcontractor is responsible. If the contractor or subcontractor fails to pay the penalty within 45 days, the department will bring an enforcement action to recover the penalty and the cost of enforcement.

CONCERNS REGARDING H.B. 1549

A number of concerns have been raised about the above-mentioned immigration-related provisions. Most notably, the legislation may be susceptible to a constitutional challenge. The enforcement of immigration is regulated by the Department of Homeland Security and it could be argued that this is a federal concern that should be handled by the federal government. Another concern is that employers will need to go to great efforts to identify every contract they have with the state, county or local government and verify the status of all workers working “in connection with” the Project. Some have asked whether this bill covers things such as Medicaid payments by the State.

EFFECTIVE DATES OF NEW LAW

The provisions of the law regarding misclassifying an employee as an independent contractors, requiring the filing of federal 1099 miscellaneous forms with the Missouri Director of Revenue, and the provisions on knowingly transporting an illegal alien for purposes of employment take effect August 28, 2008. The provisions prohibiting the hiring of illegal aliens take effect January 1, 2009, and the provisions relating to OSHA training take effect on August 28, 2009.

CONCLUSION

As a result of H.B. 1549’s enactment, Missouri employers will be responsible for observing increased compliance requirements beyond those already imposed by Federal law, and may be subject to strict penalties for failing to follow the new Missouri immigration law provisions. Furthermore, employers will be faced with the prospect of responding to enforcement

actions by both the Missouri Attorney General and the Federal government. In light of the substantial Missouri and Federal penalties associated with hiring illegal aliens, we recommend that all employers, whether they operate in Missouri or in some other state, have an Immigration Compliance Plan. Such a Compliance Plan would include consideration of whether you are required to use e-verify and whether you should opt to use E-Verify even if it is not required. Other important elements

of that Compliance Plan include an internal I-9 self audit supervised by counsel experienced in these matters, plus regular training for those with hiring authority and those working with I-9s. In addition, all employers should review their contracts with subcontractors to protect themselves in the event the subcontractor hires an illegal alien. Employers operating in Missouri will need to determine which provisions of H.B. 1549 apply to them, and what steps they must take now to comply.

For more information regarding this article, please contact:

Martha Neville Hereford
Partner – Immigration Practice Group Leader
Phone: 314-621-5070
E-mail: mhereford@armstrongteasdale.com

Julie E. O’Keefe
Partner – Corporate Services
Phone: 314-621-5070
E-mail: jokeefe@armstrongteasdale.com

John Vering
Partner – Employment and Labor Law
Phone: 314-621-5070
E-mail: jvering@armstrongteasdale.com

Brad Pace
Of Counsel – Public Finance and Real Estate
Phone: 816-221-3420
E-mail: bp pace@armstrongteasdale.com

CALIFORNIA | ILLINOIS | KANSAS | MISSOURI | NEVADA | SHANGHAI | WASHINGTON, DC

This alert is offered as a service to clients and friends of Armstrong Teasdale LLP and is intended as an informal summary of certain recent legislation, cases, rulings and other developments. This alert does not constitute legal advice or a legal opinion and is not adequate substitute for the advice of counsel.