Governor Bentley Signs Alabama Immigration Bill into Law:
The Nation’s “Toughest” Immigration Bill Will Greatly Impact Alabama Employers

House Bill 56 was passed by the Alabama Legislature on June 2, 2011. The bill was passed by large margins in both the House and Senate and was signed into law by Governor Robert Bentley on June 9, 2011. This law precludes any state or local government or official from refusing to enforce federal immigration laws by providing for the enforcement of immigration laws on the state and local level. As a whole, the law creates specific crimes relating to the entry, presence, and involvement in economic activity of unauthorized aliens in Alabama. Specifically, the law requires the verification of the legal status of persons by law enforcement officers under certain circumstances; prohibits the knowing/intentional hiring of unauthorized aliens; requires participation in the federal E-verify program; requires public schools to determine the citizenship and immigration status of students enrolling; prohibits illegal immigrants from enrolling in any public college; and prohibits landlords from entering into rental agreements with any unauthorized alien.

The law provides for the enforcement of immigration laws on the state and local level. Specifically, it prohibits the knowing/intentional hiring of unauthorized aliens and requires participation in the federal E-Verify program. Beginning April 1, 2012, if an employer is found to be in violation of the Act, its business licenses and permits will be suspended for up to 10 days at the business location where the unauthorized alien performed work. It also will be subjected to a three-year probationary period throughout the state. Upon an employer’s second violation of the Act, a court will permanently revoke all licenses held by the employer at the specific business location where the unauthorized alien performed work. For a subsequent violation, the court will forever suspend the business licenses and permits of the employer throughout the entire state.

This new law also requires that, beginning April 1, 2012, every employer, after hiring an employee, verify the employment eligibility of the employee through the E-verify program. The Alabama Department of Homeland Security will establish and maintain an E-Verify employer agent service for any business entity or employer with 25 or fewer employees. On or after January 1, 2012, an employer shall provide proof that it is enrolled and participating in E-Verify before it can receive any contract, grant, or incentive by the state. Any employer that is enrolled in the E-Verify Program and verifies employment eligibility in good faith is immune from liability under Alabama law for any action by an employee for wrongful discharge or retaliation based on notification from E-Verify that the employee is an unauthorized alien.

Furthermore, the law prohibits any business from deducting, as a business expense for any state income or business tax purpose in Alabama, any wage, compensation, or remuneration for the performance of services paid to an unauthorized alien. Any employer who violates this section is liable for a penalty equal to 10 times the business expense deduction claimed. The new law also states that it is a discriminatory practice for an employer to fail to hire a job applicant whom is a US citizen or authorized alien or discharge an employee who is a US citizen or authorized alien while retaining or hiring an employee who the employer knows, or reasonably should have known, is an unauthorized alien. A violation of this section may be the basis of a civil action in state court. Both of these sections will become effective September 1, 2011.

As a whole, this law models The Legal Arizona Workers Act of 2007 which was enacted in Arizona to limit the employment of unauthorized aliens. Although many opponents of Alabama’s new immigration law question its constitutionality, the Supreme Court of the United States recently held that the Arizona law was not preempted by federal immigration laws. The Court’s finding in Chamber of Commerce v. Whiting suggests that Alabama’s law, at least as it relates to employers, is constitutional.

To ensure compliance with this new law, Alabama employers should take extra precaution when hiring new employees. Specifically, employers should:

1. Sign up for E-Verify.
2. Make sure persons responsible for I-9s are well trained.
3. Adopt an immigration policy.
4. Consider conducting an I-9 audit.

—Breanna Harris
The Americans with Disabilities Act Amendments Act (ADAAA) was passed in 2008 in response to several Supreme Court decisions perceived by many to construe the ADA definition of disability too narrowly. The Act was passed with the intent of providing more individuals with protection under the ADA. The EEOC’s final regulations implementing the ADAAA were published in the March 25, 2011 Federal Register and became effective May 24, 2011. The Act and these new regulations will make it easier for individuals to claim protection under the law because the definition of disability is broadened and easier to meet. The focus of the law is no longer on who is covered by the ADA, but instead, on whether the employer meets its obligations under the ADA—specifically, not to discriminate against the disabled and to provide disabled persons reasonable accommodations so they can perform the essential duties of the job.

Although the basic three-prong definition of disability—a physical or mental impairment that substantially limits a major life activity of an individual, a record of such impairment, or being regarded as having such an impairment—is retained in the new regulations, the ADAAA emphasizes that the term “disability” must be given broad and liberal interpretation. The regulations also confirm that an individualized assessment of whether an impairment substantially limits a life function remains necessary. The EEOC’s new regulations provide nine rules of construction for use in determining whether an individual has a disability and is therefore entitled to the protections offered by the ADA. For example, these new rules of construction:

- Lower the threshold for finding a “substantial limitation” (it is no longer necessary for an impairment to prevent or severely or significantly restrict performance of a major life activity to be considered a disability);
- Expand the list of major life activities to include major bodily functions;
- Require the determination of substantial limitation to be made without regard to the ameliorative effects of mitigating measures (such as medication or hearing aids), except that eyeglasses or contact lenses may be considered;
- Include impairments that are episodic or in remission, provided the impairment would be substantially limiting when present; and
- Include specific types of impairments that should easily be concluded to be disabilities and examples of major life activities that the impairments substantially limit.

The regulations also make it easier for individuals to establish coverage under the “regarded as” part of the definition of disability. The analysis must be directed at how a person is treated because of a physical or mental impairment, rather than on what an employer may have believed about the nature of the person’s impairment; however, it is clearly stated that an individual who is “regarded as” is not entitled to a reasonable accommodation.

After the passage of the ADAAA in 2008, employers have faced an ever increasing number of ADA claims. The implementation of these new regulations will likely intensify this growth. To avoid being the target of such claims, employers should take measures to ensure their policies are in compliance with the new law and regulations and should be prepared to discuss and provide more reasonable accommodations to disabled employees.

—Breanna Harris
Prospective Employee’s Bankruptcy Can Preclude Employment

Many employers find an individual’s personal financial irresponsibility to reflect poorly on their ability to assist in the management of the company’s affairs. A recent Eleventh Circuit ruling will now allow an employer to refuse to hire an individual who has filed for bankruptcy.

Section 525 of the Bankruptcy Code provides individuals who are or have been in bankruptcy with some protection against discriminatory actions by employers. However, the Eleventh Circuit’s holding in Myers v. Too Jay’s Mgmt. Corp. acknowledges that the scope of the Code’s anti-discrimination provision differs with respect to government and private employers. A difference in statutory language between Section 525(a), which applies to government employers, and 525(b), which applies to private sector employers, was the foundation for the Court’s ruling that prospective employees in the private sector are not entitled to the same anti-discrimination protection afforded to prospective government employees. In other words, the private sector is prohibited only from discriminating against those persons who are already employees – prospective employees may legally be denied employment because of a bankruptcy.

While this ruling favors employers, it is not without its caveats. First, it applies only to hiring decisions, not to any other employment decisions. Private employers are still prohibited from discriminating against existing employees based on bankruptcy filings. Additionally, employers using credit-check screenings during the hiring process may face scrutiny from the EEOC, which for several years has warned that the practice could violate Title VII’s anti-discrimination provisions unless the employer can show a business necessity. Employers should be cautious before implementing a blanket policy of doing credit checks without considering job relatedness and any disparate impact the policy might have.

--Allison Garton

Be Careful When Contacting Employees on FMLA Leave

There is potential for trouble when an employer contacts an employee while the employee is on leave under the Family Medical and Leave Act (“FMLA”). Recently, one Arkansas federal court denied an employer’s Motion for Summary Judgment and allowed an employee to proceed with an interference claim under the FMLA where the employee alleged that she was pressured by her supervisor into cutting her FMLA leave short and returning to work. See Terwilliger v. Howard Memorial Hospital, No. 09-cv-4055 (W.D. Ark., Jan. 27, 2011).

Under the FMLA, eligible employees are provided up to 12 work weeks of unpaid leave during any 12 month period. Employers are prohibited from discriminating against employees who exercise their rights under the FMLA. The FMLA permits employees to bring two types of claims under the FMLA: (1) an interference claim, in which the employee alleges that an employer denied or interfered with his substantive rights under the FMLA; and (2) a retaliation claim, in which the employee alleges that the employer discriminated against him for exercising his FMLA rights. Terwilliger brought both types of claims against her employer. The court granted summary judgment in favor of the employer on the retaliation claim but allowed the interference claim to proceed.

Terwilliger was a housekeeper for Howard Memorial Hospital. She was approved for FMLA leave due to her need for back surgery. Although she was approved for 12 weeks of leave, Terwilliger claimed that she was denied her full benefits under the FMLA because her supervisor pressured her to return to work after only 11 weeks of leave.

In considering whether Terwilliger’s interference claim could proceed, the court noted that an employer is prohibited from interfering with, restraining, or denying an employee’s exercise of or attempted exercise of any right contained in the FMLA and that an employer’s action which deters an employee from participating in protected activities constitutes an interference with the employee's exercise of his or her rights.

Terwilliger testified that during her recovery, she felt pressured to return to work by her supervisor’s weekly phone calls inquiring when she was going to return to work. Specifically, during one phone call, she asked her supervisor if her job was in jeopardy, and the supervisor replied that plaintiff should return to work as soon as she could. Terwilliger asserted that she was discouraged from using the full FMLA leave to which she was entitled.

The court ultimately concluded that an interference claim can be based on a “chill theory” – i.e. interference occurs when an employer’s action deters an employee’s exercise of FMLA rights. The court held that Terwilliger had a right not to be discouraged from taking FMLA leave, and based on the evidence presented thus far, a reasonable jury could conclude that the employer interfered with plaintiff’s exercise of her FMLA rights by discouraging or “chilling” her exercise of those rights.

Please note that 29 C.F.R. § 825.311 permits an employer to require an employee on FMLA leave to report periodically on the employee’s status and intent to return to work. However, employers should be careful when communicating with employees on FMLA leave to make sure that nothing in the communications discourages the employee from exercising rights under the FMLA.

—Alfred Perkins
The Alabama Rules of Professional Conduct require the following statement: *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.*

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