



Supreme Court Upholds Arizona Employer Sanctions Law; State and Federal Legislation to Expand E-Verify Mandates

On May 26, 2011 the US Supreme Court, in [*Chamber of Commerce of United States of America v. Whiting*](#), upheld the Legal Arizona Workers Act (A.R.S. §§23-211 to 23-214) (LAWA). LAWA authorizes the investigation and prosecution of employers who knowingly or intentionally employ unauthorized aliens. Under LAWA, only the federal government can determine whether an employee is an "unauthorized alien." Any employer found in violation is subject to temporary or permanent revocation of all business licenses and authorizations to do business in Arizona. In addition, LAWA requires that employers register with the federal government's web-based E-Verify program for I-9 employment authorization verification.

In February 2008 the US District Court for the District of Arizona upheld LAWA, and the Ninth Circuit Court of Appeals affirmed that decision. The Supreme Court's decision in *Whiting* affirms the lower courts' rejection of the argument that the federal immigration law preempts the subject matter of LAWA, finding that federal law specifically authorizes state licensing sanctions of the type involved in the Arizona statute. The District Court's decision concluded that the Arizona law regulated only licensing and employment in Arizona and did not impermissibly regulate the field of immigration. The District Court also found that LAWA was consistent with the purposes and objectives of Congress and that it carefully tracked federal employer sanction laws, particularly the Immigration Reform and

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Contacts:

[Rebekah J. Poston](#)
+1.305.577.7022

[Brian E. Schield](#)
+1.213.689.5109

[D. Lewis Clark, Jr.](#)
+1.602.528.4065

[Donald A. Wall](#)
+1.602.528.4005

[Gregory A. Wald](#)

Control Act of 1986. The Supreme Court affirmed the District Court's finding that there were no impediments to LAWA's mandatory E-Verify requirements for Arizona employers. However, this decision does not impact another Arizona immigration law, SB 1070, which would require local and state law enforcement officials to check the immigration status of those they suspect are illegal immigrants. Implementation of portions of SB 1070 was blocked by a federal judge in July 2010; the Ninth Circuit affirmed that decision on April 11, 2011 and the State of Arizona has announced that it will seek a separate Supreme Court review of that law.

As a result of LAWA, Arizona employers are required to register with and use E-Verify and should take the following steps to comply with the law:

- Register for E-Verify and become familiar with the system and its requirements including the memorandum of understanding (requiring retention of I-9 identification documents not previously required to be kept), completion of the program tutorial and designation of a company representative.
- Review I-9 files and current I-9 practices to ensure compliance with requirements, modify hiring procedures as necessary to comply with LAWA and train appropriate personnel responsible for compliance.
- Establish company policies for dealing with governmental inquiries, responding to complaint investigations and handling information regarding employee immigration status, and train hiring, administrative and management personnel regarding these policies.

This issue is not limited to Arizona. In a related matter, on June 6, 2011 the Supreme Court, in a summary order, vacated and remanded the US Court of Appeals for the Third Circuit's decision in *City of Hazleton, Pennsylvania v. Pedro Lozano, et al.*, 2011 U.S. LEXIS 4259; 79 U.S.L.W. 3684 (US June 6, 2011), in light of its decision in the Arizona case. As of now, E-Verify is also mandated for all employers in Utah, Mississippi and South Carolina. Alabama and Georgia have enacted legislation requiring E-Verify registration, which will take effect in the coming months. Several other states also require public employers and contractors to register with E-Verify.

The impact of the Supreme Court decision was not limited to the state level. Shortly after the Court's

+1.415.393.9828
+1.305.577.7016

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decision was published, House Judiciary Committee Chairman Lamar Smith announced that he would introduce a mandatory E-Verify bill. This bill, titled the "Legal Workers Act" (H.R. 2164), was introduced on June 14, 2011 and would modify the voluntary E-Verify program by mandating a new Employment Eligibility Verification System (EEVS) nationwide. The largest employers would be required to use EEVS within six months from enactment while most employers would have to comply within two years. Agricultural employers would be given a three year reprieve from compliance after enactment. This bill would also make significant changes to the I-9 compliance and employer sanctions laws including a tenfold increase in some fines, criminalizing misuse of a social security number or other documentation, expanding the Social Security Administration's enforcement duties, and providing safe harbor protections for employers from liability for unauthorized employment if actions were taken in good faith reliance on EEVS.

For further information regarding this decision or other immigration matters, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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2011

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