

# A REVIEW OF ALABAMA'S NEW IMMIGRATION LAW: HOW IT IMPACTS YOU AND YOUR BUSINESS

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## INTRODUCTION

Governor Bentley on June 9, 2011 signed into law the Beason-Hammon Alabama Taxpayer and Citizen Protection Act sometimes referred to as HB 56 ("Act"). The U.S. government, numerous groups and individuals filed suit in federal court challenging certain provisions of the Act. The U.S. District Court and the U.S. 11<sup>th</sup> Circuit Court of Appeals preliminarily enjoined certain sections of the Act. In Part 1 below we have summarized the sections of the Act which we believe will have the most impact on individuals and businesses. In Part 2 below we have summarized those sections of the Act which were not challenged and will remain in effect no matter what occurs in the pending suits challenging the Act. In Part 3 below we have summarized those sections of the Act enjoined by the U.S. District Court or the U.S. 11<sup>th</sup> Circuit Court of Appeals.

### PART 1

#### **Section 9 - Public Contracts; Employment Requirements [Effective January 1, 2012]**

**NOTE:** This section of the Act was not challenged and will remain in effect no matter what occurs in the pending suits challenging the Act.

Section 9 requires that as a condition for the award of any contract, grant or incentive by the state, any political subdivision thereof (city, county or school system, which would also include certain municipal utilities) or a state-funded entity to a business entity (this could include non-profits) or employer that employs one or more employees, the business or employer shall not knowingly employ, hire, or continue to employ, an unauthorized alien, and the employer must attest to such by affidavit and by January 1, 2012 enroll in the E-Verify program.

This section also applies to a subcontractor who works on a project paid for by any such contract, grant or incentive. A contractor on any such project shall not be liable for

a violation of this section of the Act by its subcontractor if the contractor has received a sworn affidavit from the subcontractor stating that the subcontractor has complied with the E-Verify requirements of Section 9. However, the contractor would be liable if the contractor knows that its direct subcontractor is violating this section of the Act.

**NOTE:** Section 9 provides that if a business follows the provisions regarding enrolling and using E-Verify then a business shall not be considered in violation of Section 9.

### **Penalties for Violating Section 9**

A business that violates Section 9 of the Act for the first time shall be deemed in breach of the contract, and the state, political subdivision or state-funded entity may terminate the contract after notice and an opportunity to be heard. In addition, the government entity may then apply to the Attorney General to bring an action to temporarily suspend the business licenses and permits of the business for a period not to exceed sixty (60) days.

Upon the second or subsequent violation of Section 9 by a business, the business shall be deemed in breach of contract, and the state, political subdivision or state-funded entity shall, after notice and hearing, terminate the contract. The state entity may then apply to the Attorney General to bring an action to permanently revoke the business license and permits of the business.

### **Section 12 - Law Enforcement**

Section 12 requires a law enforcement officer to make a reasonable attempt, when practicable, to determine the citizenship and immigration status of a person stopped, detained or arrested when reasonable suspicion exists that the person is an alien who is unlawfully present in the United States.

## **Section 15 - Employment of Aliens; E-Verify [Effective April 1, 2012]**

**NOTE:** This section of the Act was not challenged and will remain in effect no matter what occurs in the pending suits challenging the Act.

This section of the Act will have the most impact on employers in Alabama. Effective April 1, 2012 this section of the Act provides that no business entity, employer, or public employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama. An "employer" encompasses any person or entity that employs another person in the State of Alabama, with the exception of an occupant of a household contracting with another person to perform casual domestic labor within the household. Section 15 does not apply to "the relationship between a party and the employees of an independent contractor performing work for the party and does not apply to casual domestic labor performed within a household." (See definitions of Employee, Employer and Employment in Section 3 of the Act.)

**NOTE:** Section 15 provides that if a business follows the provisions regarding enrolling and using E-Verify for each employee then a business "shall not be deemed to have violated Section 15 with respect to the employment of that employee". Section 15 further provides that an employer who terminates an employee in order to comply with the requirements of Section 15 shall not be liable for claims by said employee, "provided that such termination is made without regard to race, ethnicity or national origin of the employee and that such termination is consistent with the anti-discrimination laws of this state and the United States."

### **Penalties for Violating Section 15**

For the first violation a Court shall (1) order the termination of every unauthorized alien by the business entity or employer, (2) place that the business entity or employer on probation for three years, (3) order that the business entity or employer file a signed, sworn affidavit with the District Attorney stating that every unauthorized alien has been

terminated and no new unauthorized aliens will be knowingly or intentionally employed in the State of Alabama; and, (4) direct the appropriate governing body to suspend the business license and permits of the business entity or employer for up to 10 business days in the location where the unauthorized alien worked. Before the business license or permits may be reinstated, the business entity or employer must submit a signed, sworn affidavit stating that it is in compliance, as well as a copy of its enrollment in the E-Verify program.

For the second violation of this section of the Act the penalty is an immediate revocation of all business licenses and permits for the location where the unauthorized alien works. A subsequent violation will result in the permanent suspension of the business license and permits for the business throughout the State of Alabama.

### **Enforcement of Section 15**

This section of the Act can be enforced by District Attorneys and the Alabama Attorney General by filing a civil action against a business. Also, any citizen of Alabama may request the Attorney General to enforce this section of the Act against a business. The person making the request to the Attorney General must submit to the Attorney General a signed, written request that sets out the specific violator, the actions constituting the violation and the date and location of the violation.

### **Information about E-Verify:**

#### **E-Verify Enrollment Tips**

Download and read the 22 page [E-Verify Quick Reference Guide for E-Verify Enrollment](#), May 2011 version (Booklet —1042). To find it, either google the title or go to [www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify) and do a search for the booklet. This booklet is most helpful and should be used.

Determine who in your organization will sign the Memorandum of Understanding, and be sure that person has read it and agrees to its terms and is willing to sign it before

you start the enrollment process. Entering that person's name and contact information constitutes "electronic signing".

See pages 10 and 11 of the booklet for a checklist of information you will need to have available when you enroll your company or organization. Once you have gathered the information, the actual on-line enrollment process only takes about 10 to 15 minutes. It is important to know that once you start the process, you must complete it in one sitting. It is not possible to leave the site and return later to complete it

On that checklist under "you will need to know" is "Administrator name (E-Verify corporate account) (optional)". This is not the same thing as "program administrator" which every E-Verify account must have at least one of. This Administrator is used only in certain rare instances (see page 22 of booklet: Appendix A: Corporate Administrator Access). Page 6 of the booklet gives information about the three types of users – Program Administrator, General User, and the Corporate Administrator.

You will not find on the on-line enrollment form a place to enter "program administrator." You will have places to enter "users" and for each user you will need to enter name, email address, telephone number, and, optionally, fax number. After the enrollment process is completed, each person designated as a "user" will receive an email from the Department of Homeland Security with the User ID and a temporary password and this email will refer to each one as "program administrator." It is possible later to change that designation to simply "user", but it cannot be done until at least one of the "program administrators" has completed the online User Tutorial and passed the Knowledge Test, and has thereby gained access to the E-Verify account. At that time, once you login to E-Verify from your homepage, under "My Company", select "View Existing Users", then hit the "Display User Summary List" button. This will pull up a list of all users on the account and their roles. If you select their User ID, you can change the role attached to that User ID. (You will not find this information in the booklet. It came in answer to an emailed question to E-Verify Customer Support.)

The online Tutorial and Knowledge Test, which each user must complete, takes one to two hours or perhaps a bit longer to complete.

See page 20 of booklet for contact information. Customer Support, either by telephone or email, is quite helpful.

### **E-Verify for Businesses with 25 or fewer employees**

Section 26 of the Act requires the Alabama Department of Homeland Security to establish and maintain by December 1, 2011 an E-Verify employer agent service for any business or employer with 25 or fewer employees to use the E-Verify system. This service is not yet operational but will be by December 1, 2011. Visit the Department's website for further information. (Not on website yet, but to be added before December 1<sup>st</sup>): [www.dhs.alabama.gov](http://www.dhs.alabama.gov)

### **MEMORANDUM OF UNDERSTANDING ("MOU") - EMPLOYER RESPONSIBILITIES**

- Display posters.
- Provide Social Security Administration ("SSA") and Department of Homeland Security ("DHS") names, titles, addresses and telephone numbers of employee representative.
- Become familiar and comply with the latest employer manual (currently 88 pages).
- Representatives must take tutorial prior to initiating queries.
- Must take refresher tutorial as well.
- Comply with I-9 procedures, except that:
  - List B documents must contain photo.
  - Must make and retain with I-9 a high quality photocopy if employee uses form I-551 (permanent resident card) or form I-766 (employment authorization document).
- Employers still subject to all I-9 and anti-discrimination rules, etc., except that identity documents must have photos.

- There are certain rebuttable presumptions and protections which arise from the use of E-Verify:
  - That the employer has not violated the Immigration and Nationality Act ("INA") regarding or concerning hiring if it in good faith confirms identity and eligibility through E-Verify.
  - Employer has violated the law if it continues to employ individual after receiving a final non-confirmation ("NC").
  - Employer must notify DHS if it continues to employ individual after receiving a final NC - fines for failure to notify - between \$550.00 and \$1,100.00 for each violation.
  - No person or entity participating in E-Verify is criminally or civilly liable for any action taken in good faith based on information provided by the E-Verify system.
  
- Will initiate E-Verify procedures for **new** employees within three (3) business days after employee has been hired and begins work for pay.
  
- May not begin procedures before hiring and I-9 complete. May delay initiation when employee is obtaining a Social Security number.
  
- E-Verify cannot be used to pre-screen applicants, or to support any unlawful employment practice or any other use not authorized by the MOU.
  
- Will not verify selectively or verify employees who are hired before the effective date of the MOU (may differ for employers subject to the federal acquisition regulations). If the MOU is violated, employer may be terminated from the program.
  
- Follow appropriate procedures concerning receipt of a tentative non-confirmation (TNC), including:
  - notifying employee privately;
  - providing a written notice of findings;
  - printing and giving of referral letters; and
  - NO ADVERSE ACTION WHILE SSA/DHS IS PROCESSING VERIFICATION REQUEST **UNLESS** EMPLOYER OBTAINS KNOWLEDGE THAT EMPLOYEE IS NOT AUTHORIZED TO WORK.
  
- "Adverse Action" includes such things as termination, reduction in pay, suspension of pay; placement in an undesirable work location. Employee cannot be terminated unless he chooses not to contest a TNC or a Report of Photo Mismatch, until the employer has received a final non-

confirmation.

- Comply with Title VII and §274B of the INA.
- Record case verification numbers on the employees I-9 or print the verification number and attach to the form I-9.
- Do not use SSA or DHS information for any purpose other than to verify employment eligibility of employee. Safeguard this information in your records.
- Information from SSA and DHS is subject to the Privacy Act and anyone who uses it for unauthorized purposes is subject to criminal penalties.
- Cooperate with DHS and SSA in audits, etc. and in the production of employment records at their requests.

### **Information about I-9:**

Under Federal law, every business that employs even one person must verify their employee's eligibility using the Form I-9 published by the U.S. Department of Homeland Security - [www.uscis.gov/files/form/i-9.pdf](http://www.uscis.gov/files/form/i-9.pdf). The paperwork must be completed in the first 3 days an employee is on the job. Supervisors and human resource personnel should be trained on the proper use of the I-9 form and record keeping responsibilities. A good resource in this regard is the *Handbook for Employers: Instructions for Completing Form I-9*, the June 1, 2011, revision [www.uscis.gov/files/form/m-274.pdf](http://www.uscis.gov/files/form/m-274.pdf).

### **Suggested Actions:**

1. You should consider getting an I-9 audit done by an independent company to insure that your business is in compliance with federal law regarding I-9's.
2. You may want to add an E-Verify provision in your company employee handbook.
3. You should also consider including in your form of employment application language concerning the use by your company of E-Verify and that continued employment is contingent on an applicant being authorized through the E-Verify system.

## **Section 18 - No Driver's License**

Section 18 states if a person is arrested for failing to have a driver's license in their possession and a police officer is unable to determine by other means that the person has a valid driver's license, then the officer shall transport the person to a magistrate. This section of the Act further states that the person arrested must have his or her citizenship determined. The Act is unclear about who is supposed to make this determination. Further, this section of the Act states if the person is found to be unlawfully present in the United States the driver shall be detained until prosecution or until handed over to federal immigration authorities.

## **Section 27 - Enforcement of Contracts**

Under Section 27 the courts of Alabama shall not enforce an otherwise valid contract between a party and an alien unlawfully present in the U.S. if (1) the person had direct or constructive knowledge the alien was unlawfully present in the U.S. at the time the contract was entered into and (2) the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining. This section does not apply to contracts for lodging for one night, contracts for the purchase of food, contracts for medical services, or contracts for transportation for an alien to return to his or her country of origin.

The Circuit Court of Jefferson County on October 24, 2011 held that this section of the Act shall not apply to contracts existing at the time this section of the Act became effective. Perez v. GTX Auto Import and Auto Repair, LLC, et al., Case No. CV 2010-904012.

## **Section 30 - Business Transactions with State and Political Subdivisions**

Section 30 states that any person entering into a business transaction with the state or any political subdivision thereof (city, county or school system, which could also include certain municipal utilities) shall be required to demonstrate his or her U.S. citizenship. The law says “business transaction” includes “any transaction”. How broad this is going to be interpreted is unknown at this time, but we do know presently it applies to applying for or renewing a business license, building permit, driver’s license, vehicle registration, car tags, etc. This section only applies to individuals, not corporations and LLC’s, but it does apply to partnerships.

Also, under this section of the Act it is illegal for another person to enter into or attempt to enter into a business transaction with the State on behalf an unlawful alien. A violation of this section of the Act is a felony.

**NOTE:** This section of the Act applies to automobile dealers involved in the title and registration process for automobiles.

## PART 2

### **THE FOLLOWING SECTIONS WERE NOT CHALLENGED OR ENJOINED**

These sections of the Act were not challenged and will remain in effect no matter what occurs in the pending suits challenging the Act. Sections 9 and 15 of the Act which were discussed in Part 1 were also not challenged or enjoined.

**Section 14** - which deals in the crime of false identification documents.

**Section 19** - which requires a reasonable effort be made to determine if a person charged with a crime that is a bailable offense is an unlawful alien and if so determined, the person must be detained as a flight risk until prosecution or until turned over to federal immigration authorities.

**Section 20** - requires an incarcerating agency of an unlawful alien to notify Immigration and Customs Enforcement and assist in the transfer of said person to the appropriate federal immigration authorities.

**Section 21** - stays provision of this Act to a victim of a crime who is an unlawful alien, a child of a victim of a criminal act, is a critical witness in any prosecution or is the child of a critical witness until proceedings are concluded.

**Section 22** - deals with the Alabama Department of Homeland Security hiring certified law enforcement officers.

**Section 23** - authorizes Alabama Department of Homeland Security to coordinate with state and local law enforcement as to the practices and methods required to enforce this Act in cooperation with federal immigration authorities consistent with federal

immigration laws.

**Section 24** - which requires Alabama Department of Homeland Security to file quarterly reports with the legislature.

**Section 25** - which makes it a crime to solicit or attempt to violate any criminal provisions of this Act.

**Section 26** - which requires the Alabama Department of Homeland Security to establish by December 1, 2011 and maintain an E-Verify employer agent service for any business or employer with 25 or fewer employees to use the E-Verify system.

**Section 29** - which concerns voter registration.

### **PART 3**

#### **Sections of the Act Enjoined by the U.S. District Court or the U.S. 11<sup>th</sup> Circuit Court of Appeals**

These sections of the Act are presently not in force:

**Section 8** - which prohibits an alien who is not lawfully present in the United States from attending or enrolling in an Alabama post secondary education institution in this state and requires any alien attending such an institution to possess either lawful permanent residence or an appropriate non-immigrant visa under 8 U.S.C. § 1101m et seq.

**Section 10** - which creates a criminal misdemeanor violation under Alabama law for willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a) and is unlawfully present in the United States.

**Sections 10(e), 11(e), and 13(h)** (last sentence ) - which states "A court of this state shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States."

**Section 11(a)** – which states "It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state."

**Sections 11(f) and (g)** - It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway to attempt to hire or hire and pickup passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of

traffic; and it is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

**Section 13** – which prohibits concealing, harboring, transporting, etc., of unlawfully present aliens.

**Section 16** – which concerns the taking of a state tax deduction for wages paid to an unauthorized alien employee.

**Section 17** – which creates a state “discrimination” cause of action based on the retention or hiring of an unauthorized alien.

**Section 28** - which requires every public elementary and secondary school in Alabama to determine if an enrolling student was born outside the jurisdiction of the United States or is the child of an unlawfully present alien and qualifies for assignment to an English as second language class or other remedial program.

*This document was prepared as a general informational tool regarding the Act. It is not intended as a substitute for the provision of any specific legal advice or to provide legal advice as to any particular set of facts. It is important to seek specific legal advice as it relates to individual circumstances and facts as these arise.*

The Alabama State Bar requires the following disclosure: “No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”