

NEW IMMIGRATION REGULATIONS IMPACT FLORIDA EMPLOYERS

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US Labor, Employment, and Workplace Safety Alert

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Since 1996, E-Verify, a free digital immigration verification service, has existed to help employers ensure that their hired workforce is authorized to work in the United States. While Florida made E-Verify enrollment and use mandatory for public employers and private employers that contracted with state or local governments (or received government incentive funds), the general use of E-Verify by Florida employers was otherwise voluntary. On 10 May 2023, that changed. Effective 1 July 2023, private employers with at least 25 employees in Florida will now be required to use E-Verify to confirm their employees' eligibility to work in the United States. If a covered employer fails to use the E-Verify system as required three times in any two-year period, the law provides that the employer is subject to a mandatory US\$1,000 fine for each day of noncompliance. The law even precludes a defense raised by the employer that the E-Verify system was unavailable. These strict requirements and potential penalties may significantly affect the hiring practices of many employers in Florida.

OVERVIEW AND BACKGROUND

The Immigration Reform and Control Act of 1986¹ requires all US employers (regardless of size) to have individuals who are hired complete the Employment Eligibility Verification Form (Form I-9) to help to verify the person's identity and confirm the person's authorization to work in the United States. The employer must complete its portion of Form I-9 on the date of hire, and employees must complete and provide documentation that confirms their identity and work authorization within three days of the first day of employment. Since 1996, employers have been able to use the E-Verify system, which is an Internet-based system provided by the US Department of Homeland Security to electronically confirm an individual's identity and employment eligibility in the United States. While there are laws that require certain employers in certain locations and under certain circumstances to use the E-Verify system, it is not an across-the-board mandatory tool. Nonetheless, many employers voluntarily use it because the government presumes that if the E-Verify system is used in good faith, the employer did not knowingly hire an unauthorized worker.

While some Florida employers have been required to use the E-Verify system, most employers in Florida have not. On 10 May 2023, Florida Governor Ron DeSantis signed into law Florida's immigration bill, Senate Bill 1718, ultimately imposing significant verification and recordkeeping requirements on private and public employers in Florida. Beginning 1 July 2023, private employers with at least 25 employees in Florida must use the E-Verify system to verify the employment eligibility of each new employee within three business days of the worker's first day of work.² This requirement applies to any worker hired on or after 1 July 2023. Covered employers also are obligated to retain records of the documentation and verification generated for any newly hired employees for at

least three years. Further, covered employers are prohibited from continuing to employ an individual upon learning that the employee is not authorized to work in the United States.

Under the new law, the use of the E-Verify system will convey a rebuttable presumption to employers that they are not knowingly employing an unauthorized worker. Covered employers are not excused from using the E-Verify system in the event that the system is down for maintenance or otherwise unavailable during the three-day compliance window. Instead, if the E-Verify system is unavailable, covered employers must use Form I-9 to verify a new hire's employment eligibility *and* document that the E-Verify system is unavailable by obtaining a screenshot for each day the system is down or saving any public announcement concerning the system's unavailability. Employers will also need to certify that they have used the E-Verify system when making contributions or reimbursements to Florida's unemployment system.

ENFORCEMENT

Covered employers must provide copies of documents supporting the verification of employment eligibility upon request from the Florida Department of Law Enforcement, the Attorney General, the Department of Economic Opportunity (DEO), the statewide prosecutor, or the state attorney for the circuit in which the newly hired employee works. Beginning on 1 July 2024, if the DEO determines that a covered employer failed to verify the employment eligibility of its new hires using the E-Verify system, the DEO must notify the employer of the noncompliance. The notified employer then will have 30 days to cure its noncompliance. If the DEO determines that an employer failed to use the E-Verify system three times in any 24-month period, the employer will be fined US\$1,000 per day until the noncompliance is cured.

WHAT ARE THE KEY TAKEAWAYS FOR FLORIDA EMPLOYERS?

- For every worker hired on or after 1 July 2023, Florida employers with at least 25 employees must use the E-Verify system to confirm the identity of new hires and their authorization to work in the US within three days of being hired.
- Florida employers with fewer than 25 employees are encouraged (albeit not required) to use the E-Verify system as they will benefit from the rebuttable presumption that they are not knowingly employing an unauthorized worker.
- Florida employers should use the time prior to 1 July 2023 to ensure that their hiring processes comply with the new requirements, including using the E-Verify system, maintaining appropriate records for three years, and creating records when the E-Verify system is not available.
- Florida employers should remember that the new law provides audit rights for the government as well as significant enforcement rights.

As Florida employers navigate these new verification and recordkeeping requirements, the K&L Gates Labor, Employment, and Workplace Safety practice group can assist with all aspects of preparing for and maintaining compliance under the new law.

FOOTNOTES

¹ 8 C.F.R. § 274a.2 (2023).

² Fla. SB 1718 (2023).

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