

Arizona Passes Support Our Law Enforcement and Safe Neighborhoods Act

April 30, 2010

On April 23, Arizona Governor Jan Brewer signed Arizona's Support Our Law Enforcement and Safe Neighborhoods Act into law. This law is designed to combat illegal immigration into the state of Arizona; its most controversial provisions are those that empower Arizona law enforcement officers to verify the legal status of any person reasonably suspected of being in the United States in violation of the immigration laws, making the unlawful presence of a foreign national a criminal offense.

The following is a series of questions and answers about this new law:

When will the law become effective?

The law will become effective 90 days after the Arizona legislature goes into recess. Since this is scheduled to happen on May 26, 2010, the effective date of the law will be August 24, 2010.

Does the law apply outside Arizona?

No. Only persons who are physically in Arizona (whether or not they reside in Arizona) are subject to the provisions of this law.

What does the law allow Arizona law enforcement officers to do?

The law states that an Arizona law enforcement officer who has a "reasonable suspicion" that a person is an alien who is unlawfully present in the United States must make a reasonable attempt to determine that person's immigration status, including asking for immigration-related documentation to establish the person's lawful status. A foreign national who is unable to provide acceptable documentation can be charged with criminal trespass, a misdemeanor under Arizona state law, or with a felony if certain other circumstances, such as possession of drugs or deadly weapons, also exist.

What will guide such officers in making a reasonable determination of this type?

The Governor of Arizona has issued an executive order that requires state authorities to implement the law appropriately and to develop standards that set out what does and does not constitute "reasonable suspicion" of a person's unlawful presence. While the law prohibits racial profiling, it appears inevitable that law enforcement officers will rely at least in part on physical appearance to make their determinations.

Does the law affect the I-9 Employment Verification Process?

Yes. Employers in Arizona are already required to use the E-Verify program when completing Forms I-9, and will now also be required to maintain a record of the employee's verification for the longer of the duration of the employee's employment or three years. Since federal law requires employers to maintain I-9 employment eligibility verification records for the longer of three years after the date of hire, or one year after the date employment ends, employers in Arizona will be subject to two separate retention requirements: the first under federal law for I-9 records, and the second under state law for E-Verify records.

Is the law certain to become effective?

No. A number of legal challenges to the law, including one from the federal government, are now being prepared. If any of these are successful, the law could be deemed unconstitutional and its implementation blocked.

Also, Arizona legislators have proposed three amendments to the new law, which are likely to be signed by the governor. They include some limitations on the context in which a law enforcement officer must make the attempt to determine immigration status; the removal of race, color, or national origin as a factor to be considered in making the determination (but giving no guidance as to what factors may be used); and a provision that states that immigration status may be determined by a police officer authorized by the federal government to make such determinations, or by a check of the E-Verify system. With respect to this last provision, it is not clear how status can be verified using these two methods.

How should employers react to the new law?

If your organization maintains a location in Arizona where you employ foreign nationals, or if you anticipate that a foreign national employee will travel to Arizona for business or personal reasons, it is crucial to ensure that the foreign national employee (and any foreign national spouse or children of the employee) carry with him or her documentation that establishes his or her authorization to be present in the United States.

What documents should our employees carry?

For employees in nonimmigrant status such as H-1B or L-1, documentation evidencing lawful presence will consist of a valid passport and I-94 card; for permanent resident employees, this documentation will consist of their original and valid permanent resident cards. If a nonimmigrant's status has expired, but he or she has a pending application to extend stay or change status, a receipt for this application should be carried.

Persons who have pending adjustment of status applications, but have I-94 cards that have expired because they were granted for only year as a result of an entry with Advance Parole, should carry with them their adjustment of status application receipt notices; it is not certain that Arizona state law enforcement officers will accept such documents as evidence of lawful status, however.

Haven't foreign nationals always been required to carry evidence of their lawful presence?

Under federal law, all U.S. permanent residents must carry their original permanent resident cards at all times and nonimmigrants must carry evidence of their lawful status in this country. In all states except Arizona, only officers of one of the federal immigration agencies may request such documentation; this means that producing such documentation will generally only be required when entering the United States or seeking an immigration benefit in this country. Under the Arizona law, foreign nationals may be required to produce evidence of their lawful status in any day-to-day situation that involves an encounter with a state official.

What else does the law do?

The law also makes it unlawful to seek work from a road or sidewalk if this slows or impedes traffic, and makes it a criminal offense for an automobile driver to pick up a person if the driver "knows or recklessly disregards the fact that the alien" is in the United States without authorization.

For more information, or if you have any questions regarding the issues discussed in this Immigration Alert, please contact any of the following attorneys:

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