

REFERENCE TITLE: employer sanctions; e-verify; safe harbor

State of Arizona
Senate
Fiftieth Legislature
Second Regular Session
2012

SB 1517

Introduced by
Senator Lewis; Representative Ash; Senators Barto, Crandall, Driggs,
McComish, Nelson, Reagan, Yarbrough

AN ACT

AMENDING SECTIONS 23-212 AND 23-212.01, ARIZONA REVISED STATUTES; RELATING TO
THE EMPLOYMENT OF UNAUTHORIZED ALIENS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 23-212, Arizona Revised Statutes, is amended to
3 read:

4 23-212. Knowingly employing unauthorized aliens; prohibition;
5 false and frivolous complaints; violation;
6 classification; license suspension and revocation;
7 affirmative defense

8 A. An employer shall not knowingly employ an unauthorized alien. If,
9 in the case when an employer uses a contract, subcontract or other
10 independent contractor agreement to obtain the labor of an alien in this
11 state, the employer knowingly contracts with an unauthorized alien or with a
12 person who employs or contracts with an unauthorized alien to perform the
13 labor, the employer violates this subsection.

14 B. The attorney general shall prescribe a complaint form for a person
15 to allege a violation of subsection A of this section. The complainant shall
16 not be required to list the complainant's social security number on the
17 complaint form or to have the complaint form notarized. On receipt of a
18 complaint on a prescribed complaint form that an employer allegedly knowingly
19 employs an unauthorized alien, the attorney general or county attorney shall
20 investigate whether the employer has violated subsection A of this section.
21 If a complaint is received but is not submitted on a prescribed complaint
22 form, the attorney general or county attorney may investigate whether the
23 employer has violated subsection A of this section. This subsection shall
24 not be construed to prohibit the filing of anonymous complaints that are not
25 submitted on a prescribed complaint form. The attorney general or county
26 attorney shall not investigate complaints that are based solely on race,
27 color or national origin. A complaint that is submitted to a county attorney
28 shall be submitted to the county attorney in the county in which the alleged
29 unauthorized alien is or was employed by the employer. The county sheriff or
30 any other local law enforcement agency may assist in investigating a
31 complaint. When investigating a complaint, the attorney general or county
32 attorney shall verify the work authorization of the alleged unauthorized
33 alien with the federal government pursuant to 8 United States Code section
34 1373(c). A state, county or local official shall not attempt to
35 independently make a final determination on whether an alien is authorized to
36 work in the United States. An alien's immigration status or work
37 authorization status shall be verified with the federal government pursuant
38 to 8 United States Code section 1373(c). A person who knowingly files a
39 false and frivolous complaint under this subsection is guilty of a class 3
40 misdemeanor.

41 C. If, after an investigation, the attorney general or county attorney
42 determines that the complaint is not false and frivolous:

43 1. The attorney general or county attorney shall notify the United
44 States immigration and customs enforcement of the unauthorized alien.

1 2. The attorney general or county attorney shall notify the local law
2 enforcement agency of the unauthorized alien.

3 3. The attorney general shall notify the appropriate county attorney
4 to bring an action pursuant to subsection D of this section if the complaint
5 was originally filed with the attorney general.

6 D. An action for a violation of subsection A of this section shall be
7 brought against the employer by the county attorney in the county where the
8 unauthorized alien employee is or was employed by the employer. The county
9 attorney shall not bring an action against any employer for any violation of
10 subsection A of this section that occurs before January 1, 2008. A second
11 violation of this section shall be based only on an unauthorized alien who is
12 or was employed by the employer after an action has been brought for a
13 violation of subsection A of this section or section 23-212.01, subsection A.

14 E. For any action in superior court under this section, the court
15 shall expedite the action, including assigning the hearing at the earliest
16 practicable date.

17 F. On a finding of a violation of subsection A of this section:

18 1. For a first violation, as described in paragraph 3 of this
19 subsection, the court:

20 (a) Shall order the employer to terminate the employment of all
21 unauthorized aliens.

22 (b) Shall order the employer to be subject to a three year
23 probationary period for the business location where the unauthorized alien
24 performed work. During the probationary period the employer shall file
25 quarterly reports in the form provided in section 23-722.01 with the county
26 attorney of each new employee who is hired by the employer at the business
27 location where the unauthorized alien performed work.

28 (c) Shall order the employer to file a signed sworn affidavit with the
29 county attorney within three business days after the order is issued. The
30 affidavit shall state that the employer has terminated the employment of all
31 unauthorized aliens in this state and that the employer will not
32 intentionally or knowingly employ an unauthorized alien in this state. The
33 court shall order the appropriate agencies to suspend all licenses subject to
34 this subdivision that are held by the employer if the employer fails to file
35 a signed sworn affidavit with the county attorney within three business days
36 after the order is issued. All licenses that are suspended under this
37 subdivision shall remain suspended until the employer files a signed sworn
38 affidavit with the county attorney. Notwithstanding any other law, on filing
39 of the affidavit the suspended licenses shall be reinstated immediately by
40 the appropriate agencies. For the purposes of this subdivision, the licenses
41 that are subject to suspension under this subdivision are all licenses that
42 are held by the employer specific to the business location where the
43 unauthorized alien performed work. If the employer does not hold a license
44 specific to the business location where the unauthorized alien performed
45 work, but a license is necessary to operate the employer's business in

1 general, the licenses that are subject to suspension under this subdivision
2 are all licenses that are held by the employer at the employer's primary
3 place of business. On receipt of the court's order and notwithstanding any
4 other law, the appropriate agencies shall suspend the licenses according to
5 the court's order. The court shall send a copy of the court's order to the
6 attorney general and the attorney general shall maintain the copy pursuant to
7 subsection G of this section.

8 (d) May order the appropriate agencies to suspend all licenses
9 described in subdivision (c) of this paragraph that are held by the employer
10 for not to exceed ten business days. The court shall base its decision to
11 suspend under this subdivision on any evidence or information submitted to it
12 during the action for a violation of this subsection and shall consider the
13 following factors, if relevant:

- 14 (i) The number of unauthorized aliens employed by the employer.
- 15 (ii) Any prior misconduct by the employer.
- 16 (iii) The degree of harm resulting from the violation.
- 17 (iv) Whether the employer made good faith efforts to comply with any
18 applicable requirements.
- 19 (v) The duration of the violation.
- 20 (vi) The role of the directors, officers or principals of the employer
21 in the violation.
- 22 (vii) Any other factors the court deems appropriate.

23 2. For a second violation, as described in paragraph 3 of this
24 subsection, the court shall order the appropriate agencies to permanently
25 revoke all licenses that are held by the employer specific to the business
26 location where the unauthorized alien performed work. If the employer does
27 not hold a license specific to the business location where the unauthorized
28 alien performed work, but a license is necessary to operate the employer's
29 business in general, the court shall order the appropriate agencies to
30 permanently revoke all licenses that are held by the employer at the
31 employer's primary place of business. On receipt of the order and
32 notwithstanding any other law, the appropriate agencies shall immediately
33 revoke the licenses.

34 3. The violation shall be considered:

35 (a) A first violation by an employer at a business location if the
36 violation did not occur during a probationary period ordered by the court
37 under this subsection or section 23-212.01, subsection F for that employer's
38 business location.

39 (b) A second violation by an employer at a business location if the
40 violation occurred during a probationary period ordered by the court under
41 this subsection or section 23-212.01, subsection F for that employer's
42 business location.

43 G. The attorney general shall maintain copies of court orders that are
44 received pursuant to subsection F of this section and shall maintain a
45 database of the employers and business locations that have a first violation

1 of subsection A of this section and make the court orders available on the
2 attorney general's website.

3 H. On determining whether an employee is an unauthorized alien, the
4 court shall consider only the federal government's determination pursuant to
5 8 United States Code section 1373(c). The federal government's determination
6 creates a rebuttable presumption of the employee's lawful status. The court
7 may take judicial notice of the federal government's determination and may
8 request the federal government to provide automated or testimonial
9 verification pursuant to 8 United States Code section 1373(c).

10 I. For the purposes of this section, proof of verifying the employment
11 authorization of an employee through the e-verify program creates a
12 ~~rebuttable presumption~~ SAFE HARBOR that an employer did not knowingly employ
13 an unauthorized alien UNLESS THE EMPLOYER HAS PAID THE EMPLOYEE IN CASH OR
14 HAS RECEIVED NOTICE FROM THIS STATE, A LOCAL LAW ENFORCEMENT AGENCY OR THE
15 UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT THAT THE EMPLOYEE IS USING
16 A NAME, SOCIAL SECURITY NUMBER OR OTHER DOCUMENT THAT IS FALSE, FRAUDULENT OR
17 DOES NOT BELONG TO THE EMPLOYEE TO ESTABLISH EMPLOYMENT ELIGIBILITY.

18 J. For the purposes of this section, an employer that establishes that
19 it has complied in good faith with the requirements of 8 United States Code
20 section 1324a(b) establishes an affirmative defense that the employer did not
21 knowingly employ an unauthorized alien. An employer is considered to have
22 complied with the requirements of 8 United States Code section 1324a(b),
23 notwithstanding an isolated, sporadic or accidental technical or procedural
24 failure to meet the requirements, if there is a good faith attempt to comply
25 with the requirements.

26 K. It is an affirmative defense to a violation of subsection A of this
27 section that the employer was entrapped. To claim entrapment, the employer
28 must admit by the employer's testimony or other evidence the substantial
29 elements of the violation. An employer who asserts an entrapment defense has
30 the burden of proving the following by a preponderance of the evidence:

31 1. The idea of committing the violation started with law enforcement
32 officers or their agents rather than with the employer.

33 2. The law enforcement officers or their agents urged and induced the
34 employer to commit the violation.

35 3. The employer was not predisposed to commit the violation before the
36 law enforcement officers or their agents urged and induced the employer to
37 commit the violation.

38 L. An employer does not establish entrapment if the employer was
39 predisposed to violate subsection A of this section and the law enforcement
40 officers or their agents merely provided the employer with an opportunity to
41 commit the violation. It is not entrapment for law enforcement officers or
42 their agents merely to use a ruse or to conceal their identity. The conduct
43 of law enforcement officers and their agents may be considered in determining
44 if an employer has proven entrapment.

1 Sec. 2. Section 23-212.01, Arizona Revised Statutes, is amended to
2 read:

3 23-212.01. Intentionally employing unauthorized aliens;
4 prohibition; false and frivolous complaints;
5 violation; classification; license suspension and
6 revocation; affirmative defense

7 A. An employer shall not intentionally employ an unauthorized alien.
8 If, in the case when an employer uses a contract, subcontract or other
9 independent contractor agreement to obtain the labor of an alien in this
10 state, the employer intentionally contracts with an unauthorized alien or
11 with a person who employs or contracts with an unauthorized alien to perform
12 the labor, the employer violates this subsection.

13 B. The attorney general shall prescribe a complaint form for a person
14 to allege a violation of subsection A of this section. The complainant shall
15 not be required to list the complainant's social security number on the
16 complaint form or to have the complaint form notarized. On receipt of a
17 complaint on a prescribed complaint form that an employer allegedly
18 intentionally employs an unauthorized alien, the attorney general or county
19 attorney shall investigate whether the employer has violated subsection A of
20 this section. If a complaint is received but is not submitted on a
21 prescribed complaint form, the attorney general or county attorney may
22 investigate whether the employer has violated subsection A of this section.
23 This subsection shall not be construed to prohibit the filing of anonymous
24 complaints that are not submitted on a prescribed complaint form. The
25 attorney general or county attorney shall not investigate complaints that are
26 based solely on race, color or national origin. A complaint that is
27 submitted to a county attorney shall be submitted to the county attorney in
28 the county in which the alleged unauthorized alien is or was employed by the
29 employer. The county sheriff or any other local law enforcement agency may
30 assist in investigating a complaint. When investigating a complaint, the
31 attorney general or county attorney shall verify the work authorization of
32 the alleged unauthorized alien with the federal government pursuant to
33 8 United States Code section 1373(c). A state, county or local official
34 shall not attempt to independently make a final determination on whether an
35 alien is authorized to work in the United States. An alien's immigration
36 status or work authorization status shall be verified with the federal
37 government pursuant to 8 United States Code section 1373(c). A person who
38 knowingly files a false and frivolous complaint under this subsection is
39 guilty of a class 3 misdemeanor.

40 C. If, after an investigation, the attorney general or county attorney
41 determines that the complaint is not false and frivolous:

- 42 1. The attorney general or county attorney shall notify the United
43 States immigration and customs enforcement of the unauthorized alien.
44 2. The attorney general or county attorney shall notify the local law
45 enforcement agency of the unauthorized alien.

1 3. The attorney general shall notify the appropriate county attorney
2 to bring an action pursuant to subsection D of this section if the complaint
3 was originally filed with the attorney general.

4 D. An action for a violation of subsection A of this section shall be
5 brought against the employer by the county attorney in the county where the
6 unauthorized alien employee is or was employed by the employer. The county
7 attorney shall not bring an action against any employer for any violation of
8 subsection A of this section that occurs before January 1, 2008. A second
9 violation of this section shall be based only on an unauthorized alien who is
10 or was employed by the employer after an action has been brought for a
11 violation of subsection A of this section or section 23-212, subsection A.

12 E. For any action in superior court under this section, the court
13 shall expedite the action, including assigning the hearing at the earliest
14 practicable date.

15 F. On a finding of a violation of subsection A of this section:

16 1. For a first violation, as described in paragraph 3 of this
17 subsection, the court shall:

18 (a) Order the employer to terminate the employment of all unauthorized
19 aliens.

20 (b) Order the employer to be subject to a five year probationary
21 period for the business location where the unauthorized alien performed work.
22 During the probationary period the employer shall file quarterly reports in
23 the form provided in section 23-722.01 with the county attorney of each new
24 employee who is hired by the employer at the business location where the
25 unauthorized alien performed work.

26 (c) Order the appropriate agencies to suspend all licenses described
27 in subdivision (d) of this paragraph that are held by the employer for a
28 minimum of ten days. The court shall base its decision on the length of the
29 suspension under this subdivision on any evidence or information submitted to
30 it during the action for a violation of this subsection and shall consider
31 the following factors, if relevant:

32 (i) The number of unauthorized aliens employed by the employer.

33 (ii) Any prior misconduct by the employer.

34 (iii) The degree of harm resulting from the violation.

35 (iv) Whether the employer made good faith efforts to comply with any
36 applicable requirements.

37 (v) The duration of the violation.

38 (vi) The role of the directors, officers or principals of the employer
39 in the violation.

40 (vii) Any other factors the court deems appropriate.

41 (d) Order the employer to file a signed sworn affidavit with the
42 county attorney. The affidavit shall state that the employer has terminated
43 the employment of all unauthorized aliens in this state and that the employer
44 will not intentionally or knowingly employ an unauthorized alien in this
45 state. The court shall order the appropriate agencies to suspend all

1 licenses subject to this subdivision that are held by the employer if the
2 employer fails to file a signed sworn affidavit with the county attorney
3 within three business days after the order is issued. All licenses that are
4 suspended under this subdivision for failing to file a signed sworn affidavit
5 shall remain suspended until the employer files a signed sworn affidavit with
6 the county attorney. For the purposes of this subdivision, the licenses that
7 are subject to suspension under this subdivision are all licenses that are
8 held by the employer specific to the business location where the unauthorized
9 alien performed work. If the employer does not hold a license specific to
10 the business location where the unauthorized alien performed work, but a
11 license is necessary to operate the employer's business in general, the
12 licenses that are subject to suspension under this subdivision are all
13 licenses that are held by the employer at the employer's primary place of
14 business. On receipt of the court's order and notwithstanding any other law,
15 the appropriate agencies shall suspend the licenses according to the court's
16 order. The court shall send a copy of the court's order to the attorney
17 general and the attorney general shall maintain the copy pursuant to
18 subsection G of this section.

19 2. For a second violation, as described in paragraph 3 of this
20 subsection, the court shall order the appropriate agencies to permanently
21 revoke all licenses that are held by the employer specific to the business
22 location where the unauthorized alien performed work. If the employer does
23 not hold a license specific to the business location where the unauthorized
24 alien performed work, but a license is necessary to operate the employer's
25 business in general, the court shall order the appropriate agencies to
26 permanently revoke all licenses that are held by the employer at the
27 employer's primary place of business. On receipt of the order and
28 notwithstanding any other law, the appropriate agencies shall immediately
29 revoke the licenses.

30 3. The violation shall be considered:

31 (a) A first violation by an employer at a business location if the
32 violation did not occur during a probationary period ordered by the court
33 under this subsection or section 23-212, subsection F for that employer's
34 business location.

35 (b) A second violation by an employer at a business location if the
36 violation occurred during a probationary period ordered by the court under
37 this subsection or section 23-212, subsection F for that employer's business
38 location.

39 G. The attorney general shall maintain copies of court orders that are
40 received pursuant to subsection F of this section and shall maintain a
41 database of the employers and business locations that have a first violation
42 of subsection A of this section and make the court orders available on the
43 attorney general's website.

44 H. On determining whether an employee is an unauthorized alien, the
45 court shall consider only the federal government's determination pursuant to

1 8 United States Code section 1373(c). The federal government's determination
2 creates a rebuttable presumption of the employee's lawful status. The court
3 may take judicial notice of the federal government's determination and may
4 request the federal government to provide automated or testimonial
5 verification pursuant to 8 United States Code section 1373(c).

6 I. For the purposes of this section, proof of verifying the employment
7 authorization of an employee through the e-verify program creates a
8 ~~rebuttable presumption~~ SAFE HARBOR that an employer did not intentionally
9 employ an unauthorized alien UNLESS THE EMPLOYER HAS PAID THE EMPLOYEE IN
10 CASH OR HAS RECEIVED NOTICE FROM THIS STATE, A LOCAL LAW ENFORCEMENT AGENCY
11 OR THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT THAT THE EMPLOYEE IS
12 USING A NAME, SOCIAL SECURITY NUMBER OR OTHER DOCUMENT THAT IS FALSE,
13 FRAUDULENT OR DOES NOT BELONG TO THE EMPLOYEE TO ESTABLISH EMPLOYMENT
14 ELIGIBILITY.

15 J. For the purposes of this section, an employer that establishes that
16 it has complied in good faith with the requirements of 8 United States Code
17 section 1324a(b) establishes an affirmative defense that the employer did not
18 intentionally employ an unauthorized alien. An employer is considered to
19 have complied with the requirements of 8 United States Code section 1324a(b),
20 notwithstanding an isolated, sporadic or accidental technical or procedural
21 failure to meet the requirements, if there is a good faith attempt to comply
22 with the requirements.

23 K. It is an affirmative defense to a violation of subsection A of this
24 section that the employer was entrapped. To claim entrapment, the employer
25 must admit by the employer's testimony or other evidence the substantial
26 elements of the violation. An employer who asserts an entrapment defense has
27 the burden of proving the following by a preponderance of the evidence:

28 1. The idea of committing the violation started with law enforcement
29 officers or their agents rather than with the employer.

30 2. The law enforcement officers or their agents urged and induced the
31 employer to commit the violation.

32 3. The employer was not predisposed to commit the violation before the
33 law enforcement officers or their agents urged and induced the employer to
34 commit the violation.

35 L. An employer does not establish entrapment if the employer was
36 predisposed to violate subsection A of this section and the law enforcement
37 officers or their agents merely provided the employer with an opportunity to
38 commit the violation. It is not entrapment for law enforcement officers or
39 their agents merely to use a ruse or to conceal their identity. The conduct
40 of law enforcement officers and their agents may be considered in determining
41 if an employer has proven entrapment.

42 Sec. 3. Legislative intent

43 A. It is the intent of the legislature that this act:

44 1. Clarify and conform the legal Arizona workers act ("LAWA") to the
45 interpretation of the LAWA by the United States Supreme Court, which recently

1 upheld the constitutionality of LAWA and explained that an employer's use of
2 e-verify is a "safe harbor".

3 2. Help create jobs in Arizona by:

4 (a) Giving clear guidance and direction to employers on immigration
5 compliance.

6 (b) Reducing risk and uncertainty in the hiring process.

7 3. Promote greater immigration employment compliance by giving a more
8 meaningful incentive for employers to use the federal e-verify system.

9 4. Level the playing field by denying the benefits of the safe harbor
10 defense for employers who pay employees in cash or who have knowledge from
11 government agencies that an employee is using false documentation to
12 establish employment eligibility.

13 B. In the United States Supreme Court's recent decision upholding the
14 constitutionality of LAWA, *Chamber of Commerce of the United States v.*
15 *Whiting*, 131 S. Ct. 1968 (2011), the Supreme Court stated that under LAWA,
16 "employers enjoy safe harbors from liability when they use the I-9 system and
17 e-verify - as Arizona law requires them to do." (131 S. Ct. at 1984). This
18 legislation makes LAWA consistent with the Supreme Court's opinion by
19 clarifying that using the e-verify system is a true safe harbor, as the
20 United States Supreme Court stated it should be.

21 C. The legislation is intended to create jobs in Arizona by reducing
22 the risk and uncertainty to employers when hiring employees. The safe harbor
23 will enable employers who obey the law and use the most reliable tool that
24 the government makes available to them - the e-verify system - to reduce the
25 risk that they will face court proceedings that could suspend or revoke
26 business licenses in situations in which the e-verify system reported that
27 the employee was eligible to be employed.

28 D. The legislation is intended to achieve greater immigration
29 employment compliance in Arizona by giving employers a more meaningful
30 incentive to use the e-verify system. LAWA currently requires employers to
31 use e-verify, but does not contain a penalty if they do not do so. By giving
32 employers who use e-verify a safe harbor, the legislation encourages more
33 widespread e-verify use, thereby achieving greater immigration employment
34 compliance in Arizona.

35 E. This legislation is not intended to open the door to possible
36 abuse. Employers who try to compete unfairly by paying workers in cash or
37 who disregard a notice from the government that they have an employee who is
38 using false documents will not qualify for the safe harbor and will face the
39 strong penalties of suspension or revocation of their business license.