

# Alabama's Immigration Law: Version 2.0 And How It Impacts Employers

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# Compliance With Federal Laws

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## **Immigration and Naturalization Act – 8 U.S.C. § 1324(a) (1952).**

Penalizes and Criminalizes any person who:

- Brings to or attempts to bring an alien to the United States;
  - Domestically transports an alien;
  - Conceals, harbors or shields from detection an alien;
  - Induces an alien to enter or reside in the United States;
  - Encourages the alien to enter the United States;
  - Conspires to do any of the above.
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- Importantly, the Act permits fines or imprisonment for "any person, who during any 12 month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens."

# Federal Immigration Law

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## Immigration Reform and Control Act – 8 U.S.C. § 1101 (1986)

- Established I-9s
- Every employee must complete within three days of hire
- The employer must verify types of identification
- I-9s must be kept on file and should be kept separately from personnel files
- Handbook for Employers – [www.uscis.gov](http://www.uscis.gov)
- Prohibits discrimination on the basis of national origin or citizenship status

# E-verify

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- Must be completed no later than the third business day after the employee started work for pay
- The information entered into E-Verify comes from the employee's I-9
- Three Responses:
  1. Employment Authorized
  2. SSA Tentative Nonconfirmation (TNC)
  3. DHS Verification in Process
- No Retaliation while employee is contesting TNC

## **E-verify Required Under HB-56**

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- All Alabama employers must enroll in the E-Verify program by April 1, 2012.
- Alabama DHS will provide an E-Verify employer agent service for Alabama employers with 25 or fewer employees.
- All E-Verify employers will be published on Alabama DHS's website.

# Employers' Penalties Under Alabama's Immigration Law

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- After April 1, 2012, it will be unlawful to hire or use the services of an unauthorized alien in the State of Alabama.
- An employer that uses E-Verify to verify an employee's work authorization will not be in violation of this part of the Act with respect to that employee, if it later is determined the employee was an unauthorized alien.

# I've Hired An Illegal Alien. What Happens?

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- District Attorneys and Attorney General have authority to bring a civil complaint to enforce the Act.
- Any resident may petition the Attorney General to bring an enforcement action against an employer.
- No wages or compensation paid to an unauthorized alien shall be allowed as a deductible business expense for any state income or business tax purpose.
  - Penalty = 10 times the business expense deduction claimed

## Penalties (Continued)

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- First offense for knowingly hiring unauthorized alien:
  - Terminate the employee
  - Three year probationary period requiring reports of new hires to be filed with the local district attorney
  - Affidavit must be submitted to the local district attorneys attesting to the termination of any unauthorized alien
  - Up to ten-day suspension of permits and licenses for the location where the unauthorized alien worked



## Penalties (Continued)

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- Second offense: permanently revoke the permits and license held by the employer for the location where the employee worked
- Third offense: forever suspend the business license and permits of the employer throughout the State of Alabama

# Revised Requirements For Those Who Do Business With The State

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- As a condition for **government contracts, grants or incentives by the state or a recognized political subdivision (e.g., counties)**, a business must not knowingly employ, hire or continue to employ an unauthorized alien.
- ***Revised:* Only for competitively bid contracts or those required to be submitted to the Contract Review Permanent Legislative Oversight Committee.**

## E-verify And Doing Business With The State

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- **Unchanged:** Any business entity must provide documentation of enrollment with the E-Verify program and use the program **to be awarded a contract, grant, or incentive with the State of Alabama or a recognized political subdivision.**
- *Revised:* No affidavits required.

# Subcontractors' Duties When Doing Business With The State

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- ***Revised:* Definition of Subcontractor**  
"A person, business entity, or employer who is awarded a portion of an existing contract by a contractor, regardless of its tier."
- **Unchanged:** All tiers of subcontractors **on any project paid for by contracts, grants, or incentives from the State or a recognized political subdivision** are prohibited from knowingly employing, hiring, or continuing to employ any unauthorized alien and must enroll in the E-Verify program.
- ***Revised:* No Affidavits required.**

## Subcontractor Caveat

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- The Hiring and E-Verify requirements do not apply to "collateral persons or business entities" hired by the subcontractor.

# Big News for Contractors

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- No cascading affidavits required for each subcontractor.
- Contractor liability rests upon a showing the contractor ***knew*** or ***should have known*** that the direct subcontractor was in violation.

## ***Revised Contractor Penalties: Strike One***

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- Breach and termination of contract
- Court shall order:
  1. termination of the employment of unauthorized alien;
  2. three-year probationary period-file quarterly reports to ALDIR on each new employee; and
  3. File a sworn affidavit with ALDIR post-termination.

## Strike Two

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- Second violation has the same penalties as Strike One.
- To qualify as a second violation, it must have been within ten years of the first violation.



# Strike Three

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- Breach and Termination of Contract
- You're OUT!
- Permanently revoke all business licenses or permits of the business entity or employer
- No circumventing

## ***New Contractor Penalties for Policies and Practices***

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- Suspend the business licenses or permits for no less than 60 days but not greater than 120 days for the location where the unauthorized alien worked.
- Affidavit must be submitted by business attesting to compliance.

## E-Verify Safe Harbor

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- If the business entity or employer is enrolled in E-Verify and has used the program to verify the work authorization of an employee SHALL NOT BE LIABLE for hiring of the employee.
- Documentation is key.

## New State Contract Language

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- "By signing this contract, the contracting parties affirm, for the duration of the agreement, that they will not violate federal immigration law or knowingly employ, hire for employment, or continue to employ an unauthorized alien within the state of Alabama. Furthermore, a contracting party found to be in violation of this provision shall be deemed in breach of the agreement and shall be responsible for all damages resulting therefrom."

## HB 56's Discrimination Cause Of Action – Remains

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- A new cause of action for discrimination is created for refusing to hire or discharging a United States citizen or any authorized alien while retaining a person who the employer knew or reasonably should have known was an unauthorized alien.
- Regardless of the reason for refusing to hire an applicant or discharging an employer.

## Citizenship A Protected Class?

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- Jury trial presumed
- The determination of whether an employee is an unauthorized alien is made by the federal government.

## Damages Under The New Discrimination Cause Of Action

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- Compensatory relief (back pay, benefits, and mental anguish). No punitive damages.
- Losing party pays for the attorneys' fees; but only for the amount paid by the losing party for his or her own attorneys' fees.
- *This section was enjoined by Judge Blackburn.*

# Alabama Department of Homeland Security

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- Mechanism to receive tips from the general public regarding violations of the law.



# Effective Dates

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- September 1, 2011
  - Alabama DHS will be the go-between for E-Verify for employers with less than 25 employees.
  - New cause of action.
  - Contracts with illegal aliens cannot be enforced by the courts.
  - Class C misdemeanor to pick up workers.
  - Class A misdemeanor to transport, conceal, harbor or shield illegal aliens.

# Effective Dates

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- January 1, 2012
  - Any business that gets a "contract, grant, or incentive" from state, locality or state funded entity must sign sworn affidavits and must enroll in E-Verify.
  - All subcontractors working on a project paid for by a "contract, grant or incentive" from the state must submit a signed affidavit it is not employing illegal aliens.
  - Contractors are not liable for subcontractors' violations if they get a sworn affidavit from the subcontractors.
- April 1, 2012
  - All employers must enroll in E-Verify and enrollment is an affirmative defense.
  - Any employer who knowingly hires unauthorized aliens, penalties will be assessed.
  - Resident can petition Attorney General for enforcement.

# Pending Litigation

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- Hispanic Interest Coalition of Alabama v. Robert Bentley
- Filed on July 8, 2011
- Northern District of Alabama – Judge Blackburn
- Federal law v. State law
- Seeking injunctive and declaratory relief – arguing HB 56 is unconstitutional in its entirety

## More Lawsuits

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Doe v. Bentley – Circuit Court of Montgomery County – Judge Hardwick

- Filed July 22, 2011 by Attorney General
- Petition for Declaratory Relief
- Violates Alabama Constitution by discouraging immigration

U.S. v. Alabama – Northern District – Judge Acker

- Filed on August 1, 2011
- Strike portions of the bill as unconstitutional
- Federal Preemption – Supremacy Clause

Reverend Henry Parsley, Jr. v. Bentley – Northern District – Judge Blackburn

- Filed on August 1, 2011
- Violates First Amendment of the U.S. Constitution (freedom of religion, free assembly, freedom of speech and expression); Equal Protection and Due Process Clause, Contracts Clause

## Other Items Of Interest

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- Employees do not include any inmate in the legal custody of the state, a county, or a municipality.
- A valid Uniformed Services Privileges and Identification Card now proves lawful presence in the United States.
- State-funded entities do NOT include an entity that merely provides a service or product to any governmental entity of the state and receives compensation for those services or products.
- Post-secondary education students not required to possess lawful permanent residence or nonimmigrant visa.
- Religious denomination exemption

# Concerned Citizen Petitions

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- A person can file a petition with the local district attorney or the Attorney General to challenge a state agency that adopts a practice in violation of federal or Alabama immigration law.
- If the district attorney or AG elects not to bring an action, he or she shall state in writing the justification. Action must be brought in 90 days; notice of action within 30 days.
- The petition must be signed under oath and include specifics.