

# AN UNWORKABLE PATCHWORK

Once burned, twice shy, employers seared in recent years by state legislatures mandating immigration enforcement awaited the opening of this year's sessions with an all too familiar sense of dread. Would lawmakers extend the reprieve of 2009, a year when relatively few states endeavored to pass immigration law? Or would legislatures resume the trend pioneered in the three years before, using every legal means available and then some to crack down on employers who hire immigrants?

More than halfway through most 2010 legislative sessions, the news is mixed. Immigration is again an issue in many state capitals – far more than in 2009. And one state – Utah – has gone all out, becoming the fourth state in the nation to mandate E-Verify for private employers. But despite much drama in several other states, few other legislatures have enacted laws that break new ground or severely burden employers who hire immigrants.

Under the Constitution, immigration policy and enforcement are generally thought to be vested in the federal government, and until recent years, few states had ventured into this area of the law. That changed abruptly in 2006 when anti-immigration activists seized on Congress's failure to pass new law and moved the battle to the states, stirring voter anger and sparking debate in legislatures across the country.

The trend continued, growing ever more virulent, through the 2007 state legislative sessions. Lawmakers in virtually every state proposed immigration enforcement measures, and several legislatures passed draconian law, much of it aimed at employers who hire foreign workers. By 2008, businesses had begun to band together to fight bills they deemed unconstitutional and harmful to their state economies – and many were successful in their efforts. Then, in 2009, lawmakers busy coping with the economic downturn appeared to lose interest in immigration – at least temporarily.

The state laws passed in these years covered everything from drivers' licenses to what landlords could ask of prospective tenants. But by far the most popular provision, copied in state after state, was to require use of the federal government's electronic employment verification system, E-Verify.

As of January 1, 2010, after four years of activity, there were E-Verify laws on the books in 16 states. Arizona and Mississippi required all employers – public contractors and private businesses – to use the web-based federal program. Eight other states – Colorado, Georgia, Minnesota, Missouri, Nebraska, Oklahoma, Rhode Island and Utah – required public contractors and state agencies to enroll. Idaho and North Carolina required it of state agencies only. In Pennsylvania and Tennessee, participation protected some employers from prosecution. And South Carolina, encouraged, but did not mandate, use by all types of employers. (Illinois' law sought not to increase enrollment, but rather make sure that participating employers were using the system correctly.)

Nationally, according to the Department of Homeland Security, some 184,000 of the nation's 8 million public and private employers are enrolled in the federal verification system, and since September 2009, it has been required of all federal contractors.

How to explain this year's mix of activity and indifference in state capitals? On one hand, many lawmakers are still preoccupied with responding to the downturn, leaving little time or attention for immigration. And the fact that the Obama administration has been talking about tackling comprehensive reform seems to be deterring at least some states from moving ahead with enforcement efforts. On the other hand, the approaching midterm elections are tempting some lawmakers to grandstand on immigration, appealing to the Tea Party movement and rising anti-business sentiment by cracking down on employers.

The most dramatic debate so far this year occurred in Utah, where lawmakers proposed to mandate E-Verify for all private employers and impose criminal penalties on businesses that ignored the requirement. The proposal sent shock waves across the state and beyond: until now, no law at the federal or state level has imposed criminal penalties for sidestepping E-Verify – and only one state has criminalized hiring unlawful immigrants. Under the federal immigration code, both are civil offenses.

After much discussion in Utah, the penalties were stripped out of the bill. But the E-Verify mandate passed and is awaiting the governor's signature.

Still another cause for concern: in February, the U.S. Tenth Circuit Court of Appeals upheld Oklahoma's authority to enforce a 2007 law requiring public contractors to use E-Verify – and this could spur other states to consider mandating enrollment.

The Tenth Circuit decision hardly settles the matter nationally. Courts in other parts of the country have come to very different conclusions in recent years about whether federal law preempts the states from enacting immigration enforcement. Dueling decisions – on state laws in Oklahoma and Arizona and local ordinances in Valley Park, Missouri and Hazleton, Pennsylvania – cannot be resolved except by the U.S. Supreme Court. And the resulting uncertainty seems to be slowing legislative activity in some states.

Meanwhile, the economic downturn has made it somewhat more difficult for states to implement the verification mandates passed in recent years. Prosecutors in Arizona, for example, have been able to bring only one enforcement action under the state's E-Verify law. A sandwich shop in Phoenix will have to close for two days this year, Easter and Thanksgiving – a penalty for knowingly hiring an undocumented worker. And another complaint – against a furniture business in Scottsdale – is making its way through the Arizona courts.

But this doesn't mean workplace immigration is easing. On the contrary, federal authorities are tightening the screws. Immigration and Customs Enforcement priorities have shifted under the Obama administration, with workplace raids designed mainly to arrest unlawful workers giving way to sharply increased audits of companies' I-9 employment records – a seemingly less disruptive approach but one that is wrecking havoc in business sectors that rely heavily on immigrant workers.

Still another new trend of concern to employers: not only states but also counties and municipalities (especially in states that haven't passed immigration enforcement laws) are stepping in to mandate E-Verify and tighten regulation of what happens in the workplace.

## IN THE STATES

A measure passed in March by the **Utah** legislature will require all but the smallest private employers in the state to enroll in E-Verify.

Utah already has a law on the books directing public employers and businesses contracting with the state to use E-Verify or a similar program, so the new law will make the mandate universal for all Utah employers with more than 15 employees.

And unlike in other states, where verification requirements have often been introduced in a phased manner, in Utah, the requirement will kick in for all covered private employers on July 1.

The silver lining: things could have been worse. Under the original bill, introduced by Republican Sen. Chris Butters, an employer who failed to enroll in E-Verify could have been charged with a Class B misdemeanor. If found guilty, he or she would have been stripped of state-issued business licenses, prohibited from getting state contracts and would have faced a criminal penalty of six months in jail and a \$1,000 fine.

Just before the final vote, Butters himself stripped out the penalties, civil and criminal. In their place, the bill specifies that businesses can avoid liability in civil lawsuits by complying with the E-Verify mandate. Employers can also voluntarily report their use of E-Verify to state authorities, and the list of participating companies will be made available to the public online.

"This bill will give a lot more jobs to our [domestic] work force," Butters told the *Desert Sun* in Salt Lake City. "If a person is here from wherever on Earth . . . if they can't get a job because of E-Verify, they're going to leave the state."

The measure has been sent to Gov. Gary Herbert for his signature.

In **Idaho**, the legislative session started with three immigration bills on the agenda. Two have been defeated, and a third is still making its way through the legislature.

A bill authored by Republican Reps. Raul Labrador and Phil Hart would have suspended for a year the business license of any firm found to have knowingly hired unauthorized workers. That bill was struck down in committee.

A second measure, authored by Republican Sen. Mike Jorgenson, would have mandated E-Verify for all employers in the state. Businesses found to have hired unlawful workers would have had their business licenses suspended and – on the third offense – revoked.

Both Hart and Jorgenson are from a part of northern Idaho where the Tea Party movement is strong and where Tea Party leaders have made an issue of illegal immigration. And Jorgenson was abetted in his efforts by Kansas-based immigration law professor, Kris Kobach, a veteran of several legislative and judicial battles over worksite enforcement who has worked with the anti-immigration Federation for American Immigration Reform. Kobach flew to Boise in March to lead a rally and testify on behalf of the Jorgenson bill – but to no avail. The measure was defeated in committee by a vote of 7 to 2.

According to Brent Olmstead, lobbyist for the Idaho Business Coalition for Immigration Reform, the debate focused as much on practical problems associated with E-Verify as on the constitutional question of whether states are authorized to enforce immigration law.

A broad array of employer representatives testified against the Jorgenson bill, including lobbyists for the state's powerful dairy industry. And lawmakers were particularly concerned about the mandate's likely consequences, intended and unintended, for small businesses – including small dairy farms.

Yet a third Idaho bill would zero in on individuals – forgers, employers and unlawful workers – trading in false documentation. That measure, authored by Republican Sen. John McGee, would make it a felony to create or manufacture and sell false identity documents, and a misdemeanor to “knowingly accept” false documentation for the purpose of employment. Employers enrolled in E-Verify would be exempt from prosecution.

The Idaho Business Coalition for Immigration Reform helped drafted the false-documents bill as an alternative to Jorgenson’s measure. The compromise language has passed out of a Senate committee and is headed for the floor. If it passes there, it will go to the House. The Idaho legislature is expected to remain in session through the end of March.

(Full disclosure: the Idaho Business Coalition for Immigration Reform is one of 25 state-based business coalitions affiliated with ImmigrationWorks USA.)

In **Kentucky**, lawmakers in the House voted 93 to 3 in February to pass House Bill 3211, which would require state and local contractors to use E-Verify or face a five-year ban on getting state contracts.

The bill is now before a committee in the Senate. So far, no hearings have been held. The legislature is scheduled to adjourn in mid-April, and committee staff expect the panel to deal with the measure before then.

In **Arizona**, Republican Sen. Russell Pearce has been attempting to amend the state’s immigration enforcement law, already the toughest in the country, to give local law enforcement officials the right to investigate the immigration status of any individual they stop for whatever reason, whether or not the person is believed to have committed a crime.

Among other provisions, the bill would allow local police to conduct sting operations in the workplace.

Author of virtually all the immigration enforcement passed in Arizona in recent years, Pearce is trying to close a loophole created by the discrepancy between state and federal law – the fact that Arizona prohibits the hiring of illegal workers, but state authorities have no power, even under subpoena or warrant, to ask business owners for their I-9 employment records.

The business community succeeded in modifying Pearce’s bill in the Senate, not stripping out the language permitting sting operations, but adding a number of protections from the state entrapment code, including the right to make an affirmative defense.

The Pearce measure cleared the Senate, then was dropped at the eleventh hour from the agenda of the House ways and means committee. Republicans in the House are squabbling over details but expect the measure to be reintroduced. The Arizona legislature is expected to remain in session through late April and perhaps into May.

In **Minnesota**, House Republican Rep. Tom Emmer succeeded in attaching an E-Verify amendment to a \$1 billion stimulus bill designed to fund construction projects. His amendment would have required all companies with government construction contracts to enroll in the federal program.

“Are we creating jobs for Minnesotan citizens or are we creating jobs for illegal aliens?” Emmer asked during the House debate.

But his provision was not included in the Senate version of the bill, and it was jettisoned in the conference committee with virtually no discussion.

In **Georgia**, Republican Rep. Bobby Reese has introduced a bill that would expand the state's 2006 E-Verify requirement. As is, the law requires all public employers and their contractors to enroll in the system. Reese's amendment would require all businesses in the state to participate.

As of late March, Reese still had no Senate sponsor. And he was working to get a hearing in the House governmental affairs committee, racing against the clock to get the bill passed in the House before the legislature adjourns, probably in mid- to late April.

"Everybody is talking about jobs and how we can create more," Reese said. "If only people here legally had jobs we wouldn't have a job issue." He believes that if E-Verify were used statewide, it would "stop future jobs from going to illegal labor."

A coalition of municipal and business leaders is opposing the measure.

There are two E-Verify bills under consideration in **Maryland**, one in each chamber. In the House version, only contracts worth more than \$10,000 would be subject to the E-Verify requirement. A first-time violator would lose his or her state contract immediately and be barred from receiving state money for one year.

Under the Senate version of the bill, all firms working for the state would be subject to the E-Verify requirement. First-time violators would be put on probation for three years, and after a second offense, their business licenses would be revoked. Similar legislation failed in committee last year.

In **Virginia**, the legislature has passed a new law requiring state agencies to enroll in E-Verify and use the system to verify all new state hires. The bill will take effect in December 2012. The House version of the bill would have required local municipalities to enroll in the program as well, but that provision was stripped from the enacted law.

## IN THE COURTS

While states continue to consider new measures requiring employers to use E-Verify, conflicting federal court decisions muddy the legality of laws already passed.

The two most important court decisions come from the Ninth and Tenth Circuit U.S. Courts of Appeals. The first, issued in September 2008, concerns Arizona's 2007 law; the second, issued this February, concerns Oklahoma's 2007 measure.

In the case of the Arizona law, the Ninth Circuit came down clearly on the side of state legislators seeking to enforce immigration law. The court ruled that Arizona could mandate E-Verify for all employers and revoke the business licenses of companies found to have violated federal requirements for I-9 employment forms. According to the Ninth Circuit, the federal government does not have the right to preempt this kind of statute.

The Tenth Circuit ruling was more complex, agreeing with the Ninth on some things, but at the same time less permissive in what it found states had the right to do.

Specifically, in line with the Ninth Circuit, the Tenth Circuit found that Oklahoma could require companies doing business with the state to use E-Verify.

But the Tenth Circuit decision struck down two other provisions of Oklahoma's law. One would have required contractors to turn over their workers' I-9 employment records to the state agencies that issued their contracts – or, if they failed to do so, face state tax consequences. The second overturned provision would have allowed a fired worker to sue his or her former employer if they believed an illegal worker was been hired in their place.

In other words, according to the Tenth Circuit – in contrast to the Ninth Circuit – the federal government has preeminent power to make immigration law, and it can trump state action in all but a few narrow areas.

The state of Oklahoma has asked the Tenth Circuit to reconsider its decision.

But in the meantime, the ambiguity created by these two conflicting appellate rulings makes the issue ripe for consideration by the U.S. Supreme Court. The high court is currently deciding whether to revisit the Ninth Circuit's decision and has asked for input from the U.S. Solicitor General.

If the Supreme Court joins the debate, it may decide once and for all what if anything states can do to regulate immigration and what must be left to the federal government. But in the meantime, states will remain without guidance. And while some may be deterred from acting by the lack of clarity, others will continue to take uncertainty as a license to take matters into their own hands.

## IN COUNTIES

In many states without state E-Verify states, counties and municipalities are coming forward to fill the void.

An advisory resolution passed unanimously last month by the **Baltimore County, Maryland** county council requires contractors to attest that they are abiding by federal immigration law before they do business with the county. The resolution also encourages contractors to use E-Verify.

Baltimore County Executive Jim Smith supports the resolution and is modifying the county's contracting bid documents to include a box employers must check confirming that they have complied with all federal immigration laws. The new bid documents will also encourage aspiring contractors to enroll in E-Verify.

If a contractor is found to have violated federal immigration law, he or she could be barred from doing further business with the county.

**Florida's Hillsborough County** is moving to use E-Verify to screen its own employees. Officials are also considering requiring companies that do business with the county to enroll in the system or face a diminished chance of getting government contracts.

**Florida's Hernando County** may soon follow suit. It has brought in officials from nearby Hillsborough to demonstrate their new policy. Hernando has also invited the Department of Homeland Security to train county officials on how to use E-Verify.

In **Alamance County, Vermont**, which includes the city of Burlington, county commissioners voted unanimously in February to require companies that do business with the county to use E-Verify. A new amendment to the county contracting rules says that contractors and subcontractors who do not comply can be barred from doing business with the county in the future.

County Manager Craig Honeycutt told reporters that he had no intention of creating a “bureaucratic nightmare” and that the county did not plan to monitor every contract. Instead, officials plan to react to problems brought to their attention by local officials and the public.

## **NOT OUT OF THE WOODS YET**

Some state legislatures are running out of time, but others will remain in session through spring and early summer. Meanwhile, Congress looks less and less likely to take up immigration reform this year – creating an inviting vacuum for state officials. Approaching midterms may also tempt governors to jump into the fray with executive orders on immigration enforcement. And although uncertainty about federal jurisdiction may deter some states, until the Supreme Court acts, state and local governments are likely to keep legislating in this area.

With an increasing number of employers nationwide signing up voluntarily for E-Verify, laws requiring its use appear less burdensome than they once did.

But no business owner, no matter how law-abiding, welcomes the spreading patchwork of overlapping and often conflicting federal, state and local immigration enforcement. It’s a patchwork crying out for action by Congress and the high court, reaffirming the federal government’s authority to make immigration law.

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