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Client Alert: Impact of Senate Bill 1718 on Private Employers

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W. Jan Pietruszka
Maria del Carmen Ramos
Haley D. Kole

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

On May 10, 2023, Florida Governor Ron DeSantis signed into law Senate Bill 1718 (SB 1718), which amends various Florida statutes to address provisions related to individuals in Florida who may be unauthorized aliens. In this Client Alert, we discuss some of those amendments and their effect on private employers.

Specifically, as of July 1, 2023, all private employers with 25 or more employees will be required to use the E-Verify system to verify the employment eligibility of new employees within three business days after the new employee begins working for pay. This mandate applies only to new employees hired on or after July 1, 2023. It does not apply to past hires or existing employees, nor does it require employers to re-verify past hires or existing employees. It is important to keep in mind that SB 1718's E-Verify requirements are in addition to an employer's continued duty under federal law to complete an Employment Eligibility Verification form (Form I-9) for all new hires.

An "employee" is defined by SB 1718 as "an individual filling a permanent position who performs labor or services under the control or direction of an employer that has the power or right to control and direct the employee in the material details of how the work is to be performed in exchange for salary, wages, or other remuneration." An employee is not: (i) an individual hired for casual labor, as defined in Fla. Stat. § 443.036, which is to be performed entirely within a private residence, or (ii) an independent contractor, as defined in federal laws or regulations, hired to perform a specified portion of labor or services.

E-Verify is a free Internet-based system operated by the U.S. Department of Homeland Security (DHS) that allows employers to electronically verify the employment eligibility of new employees by comparing the information entered by an employer from an employee's Form I-9 to the records available to DHS and the Social Security Administration. If E-Verify is unavailable for three business days after the new employee begins working for pay, the employer must use Form I-9 to verify employment eligibility and must document the unavailability of E-Verify by retaining a screenshot from each day, which shows the employer's lack of access to the system, a public announcement that E-Verify is not available, or any other communication or notice recorded by the employer regarding its unavailability.

Employers must retain "a copy of the documentation provided and any official verification generated, if applicable, for at least three years." At this time, it is unclear what specific documentation employers are required to retain or from when this three-year period begins to run. The phrase "documentation provided"

may be in reference to the identification documents presented by the employee for completion of Form I-9. Until there is further clarification, employers should consider retaining not only the Form I-9 and E-Verify verification, but also copies of the identification documentation for all new hires. Private employers subject to the E-Verify requirement are also required to certify on their annual Florida tax returns that they are in compliance with this provision when contributing to or reimbursing the state's unemployment compensation or reemployment assistance system.

Beginning July 1, 2024, if the Florida Department of Economic Opportunity (DEO) determines that an employer failed to use E-Verify, the DEO must notify the employer of its determination of noncompliance and provide the employer with 30 days to cure. If the DEO determines that an employer failed to use E-Verify three or more times in any 24-month period, the DEO must impose a fine on the employer of \$1,000 per day (from the date the DEO determined the employer failed to use E-Verify) in addition to suspending all licenses, until the employer provides proof of compliance.

Also worth noting, effective July 1, 2024, SB 1718 creates penalties that the DEO can impose on a person who knowingly employs, hires, recruits, or refers any person for public or private employment who is an unauthorized alien. These penalties include requiring repayment of any economic development incentive; placing an employer on probation for a one-year period with required quarterly reporting to demonstrate compliance; or if a violation takes place within 24 months after a previous violation, revoking or suspending of applicable state licenses. However, if the employer can establish that it complied with SB 1718's E-Verify requirements as to a new hire (or completed a Form I-9 for an existing employee), the employer may be able to avoid liability under the statute.

Additionally, SB 1718 states that employee leasing companies that specifically place the primary obligation for E-Verify compliance upon client companies—in "a written agreement or understanding"—will not be required to verify employment eligibility of any new employee of the client companies. In the absence of a written agreement or understanding, the employee leasing company is responsible for compliance.

We recommend every employer who is subject to SB 1718's E-Verify requirements enroll in E-Verify as soon as possible in order to become familiar with the platform before July 1, 2023. Enrollment information for E-Verify can be found [here](#). E-Verify.gov also provides free Webinars for E-Verify and Form I-9, which can be found [here](#).

Shumaker will continue to monitor developments with respect to SB 1718 and we are available to answer any questions you may have.