



**SUPREME COURT UPHOLDS ARIZONA STATE E-VERIFY MANDATE
 AND OTHER IMMIGRATION DEVELOPMENTS**



Anita Patel

"The Court further rejected arguments that the E-Verify mandate was preempted because it makes mandatory that which the federal law seeks to make voluntary."

On May 26, 2011 the U.S. Supreme Court upheld an Arizona state law that allows the state to revoke the business licenses of employers that knowingly hire illegal immigrants and requires employers in Arizona to use E-Verify. *Chamber of Commerce v. Whiting*. In the 5-3 decision, the Court said that the licensing portion of the Arizona law is not preempted by federal law because it falls under the federal law's savings clause, which permits state "licensing and similar laws." The Court further rejected arguments that the E-Verify mandate was preempted because it makes mandatory that which the federal law seeks to make voluntary.

Opponents of state immigration laws, including the Chamber of Commerce, noted that the ruling does not give states or local governments a blank check to pass any and every immigration law. That is, state and local laws must closely track federal law and not extend beyond "licensing" laws. This ruling leaves in debate other portions of Arizona's immigration law and those in similar states that go beyond these narrow confines. For example, the decision does not address a more recent Arizona law that gives police greater authority to check the immigration status of people they stop.

Meanwhile, in a May 10 speech President Obama outlined his administration's approach to an immigration legislative overhaul, and focused on four main points: responsibility by the federal government to secure the borders; accountability for businesses that break the law by exploiting undocumented workers; strengthening economic competitiveness by improving the legal immigration system; and providing a path to legalization for undocumented workers already in the U.S. by requiring illegal immigrants to register, undergo a background check, pay taxes and a penalty, and learn English. Until new immigration legislation is passed, Obama administration officials are continuing to focus on the hiring of illegal immigrants by increasing tough criminal charges on employers while moving away from criminal arrests of the workers themselves. Further, Administration officials say that their audits of employers have set the groundwork for a system that would dissuade companies from hiring illegal immigrants, a tactic sometimes called a "silent raid." Some have likened the current ICE enforcement strategy to be like an IRS enforcement model. ICE officials speaking anonymously indicated that they were no longer authorized to carry out worksite raids unless they cooperate with federal prosecutors to prepare criminal cases against the employers.

In March and again in June 2011, ICE notified some 1,000 employers across the country that it would audit their hiring records to determine compliance with employment eligibility verification laws. The March audit reached employers of all sizes and in every state, without targeting any particular industry. Also, the June audits were directed to 17 industry sectors, including agriculture, food, and transportation. In these recent audits, ICE has been seeking information about hiring personnel and their knowledge of the I-9 laws. ICE had previously conducted at least two other major I-9 audit initiatives, one in July 2009 targeting some 654 businesses and another in November 2009 targeting 1,000 employers associated with critical infrastructure. The notices are not random, and the actual costs of non-compliance involve fines ranging from \$110.00 to \$16,000.00 per violation, potential federal contract debarment, and a large sum of monies spent on internal reviews and legal fees.

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WHAT EMPLOYERS SHOULD DO IN RESPONSE TO THE ADA AND IMPLEMENTING REGULATIONS



Michael W. Jones

“It will be helpful to have a standardized policy, procedure, and documentation.”

In light of the new Americans with Disabilities Act regulations, when facing an issue involving an employee with a medical condition other than the cold or the flu, employers should assume the employee has a covered condition and then determine how to handle it. If the employee says he or she needs a reasonable accommodation, and if it would not be burdensome to provide a reasonable accommodation, it makes sense to provide it. Only if the accommodation is truly burdensome or problematic should the employer consider whether the employee is a qualified individual with a disability under either the first or second prongs of the definition of “disability” and then consider whether there is a legal defense which would support denying the request for an accommodation.

This writer suggests all companies have a published ADA policy much like a published harassment policy. The policy should set forth the procedure employees must follow to request a reasonable accommodation for a disability. It should state clearly that in the event an employee needs a reasonable accommodation, the employer will engage in an interactive process with the employee in an effort to reach a individualized assessment that provides the employee with a reasonable accommodation process.

In most situations requests for a reasonable accommodation should be directed to one person, such as the employer’s human resource director. It is also important to have a person with knowledge of the ADA be responsible for overseeing the interactive process. To avoid the risk that one decision-maker might not recognize the significance of an employee’s medical condition and the need for an accommodation, there should be some means to appeal the initial decision.

It will be helpful to have a standardized policy, procedure, and documentation. When requesting a reasonable accommodation for a disability, have the employee complete a standard form identifying what his or her condition is, how it is affecting his or her ability to perform the essential functions of the job, and what, if any, reasonable accommodations the employee thinks would enable him or her to perform the essential functions of the job. The employee should also be permitted to take this form to his or her doctor to have the doctor help identify the problem and possible accommodations. The employee should also be provided a list of the essential functions of the job to help him or her and the doctor identify obstacles the employee may face in the job and possible accommodations.

When seeking information from the employee, it is important employers not request too much information. Employers should always remember they may not request medical information other than that which relates to the disability at issue, the ways in which the disability may affect the employee’s ability to perform the essential job functions, and possible reasonable accommodations.

Perhaps the area with the highest potential for future litigation is the “no-fault” attendance policy. The EEOC has taken the position in certain cases that a “no-fault” attendance policy must be subject to a reasonable accommodation requirement. The EEOC is also interested in whether an employer provides employees whose leave is expiring notice of the upcoming expiration and information about their options. In light of the EEOC’s position, some commentators suggest limits on leaves should be eliminated. Others say such caps are helpful in many cases, so long as the employer provides additional leave as a reasonable accommodation in those rare cases where warranted. It is also possible that exempting an employee from a “no-fault” attendance policy as a reasonable accommodation would be an undue hardship and/or that an employee who cannot return to work at the end of the available leave is not qualified for the job. This determination should, however, be made on an individualized assessment.

The ADA also affects workers’ compensation matters. Employers cannot assume an employee injured on the job is limited to relief under the state’s worker’s compensation laws. An employee may be entitled to relief under the worker’s

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STUDY FINDS THIRTY PERCENT OF EMPLOYERS TO DROP HEALTHCARE



Anne T. McKnight

"In surveying over 1,000 employers, McKinsey found that 30% said they would definitely or probably stop offering employer coverage."

According to a report by McKinsey and Co., at least 30% of employers are likely to stop offering workers health insurance after the healthcare legislation provisions take full effect in 2014. Some of the evidence leading to this result is the fact that many employers are seeking waivers from a provision in the law that requires them to not cap annual benefit payouts below \$750,000.00 per person, per year. This waiver provision ends starting in 2014, leaving those employers with a decision of whether to change their coverage or drop coverage.

The Obama administration had previously suggested that the number of employers who would elect to completely drop healthcare coverage in 2014 would be minimal. However, the McKinsey study predicts otherwise. In surveying over 1,000 employers, McKinsey found that 30% said they would definitely

or probably stop offering employer coverage. That figure increased to more than 50% among employers with a full understanding of healthcare law.

Other than possible employee relations concerns and publicity concerns, the only disincentive for employers to drop coverage is a requirement that employers with more than 50 employees that do not offer health benefits must pay a penalty of \$2,000.00 per worker, although it doesn't apply to the first 30 workers. Many believe this penalty is not high enough to discourage companies from dropping health coverage. In fact, McKinsey found that at least 30% of employers would gain economically from dropping coverage even if they completely compensated employees through other benefits or higher pay. The study suggests any adverse employee reaction would be minimal, with more than 85% of employees remaining in their jobs even if their employer dropped coverage. In addition to dropping coverage entirely, some employers are considering a switch to a defined-contribution model of insurance and offering coverage only to certain employees.

On June 17, 2011 the Obama administration announced that employers and insurers have until September 22, 2011 to apply for waivers of the requirement to increase annual limits on health benefits. Most employers and insurers who take advantage of the waiver are expected to drop coverage in 2014 when the waivers expire.

The Firm Welcomes Ed Trent!

EDWARD H. TRENT is a Member of Wimberly Lawson Wright Daves & Jones, PLLC in the Knoxville, Tennessee



office of the firm, which he joined in 2011. His practice includes labor and employment law matters in both state and federal court and before state and federal agencies. Ed's broad range of experience includes

jury trials in employment discrimination cases, including the defense of appeals before federal and state appellate courts, day-to-day preventative counseling and advice, training for supervisor and human resources personnel on managing the workplace and complying with federal, state and local employment laws and regulations. Ed received his Bachelor of Science degree in Accounting from the University of Florida and his law degree from Duke University School of Law. He has been admitted to practice in the United States Court of Appeals, Eleventh Circuit, and the United States Supreme Court. Ed is Board Certified in Labor and Employment Law by The Florida Bar.



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November 3 - 4, 2011

Knoxville, Tennessee

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THE 2011 WIMBERLY LAWSON LABOR EMPLOYMENT UPDATE

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for the latest legal updates,
seminars, alerts and firm
biographical information!

GOVERNMENT AGENCIES AGREE TO AVOID OVERLAP IN ENFORCEMENT



James Friauf

On March 31, 2011, the U.S. Department of Labor and the Department of Homeland Security entered into a Memorandum of Understanding (MOU) pertaining to worksite enforcement of labor and immigration laws designed to “reduce the duplication of our efforts.” Within DOL, the MOU pertains to the enforcement efforts of the Wage and Hour Division, the Office of Federal Contract Compliance Programs, and the Occupational Safety and Health Administration. Within DHS, the MOU involves enforcement efforts of ICE. The general idea is that one of the federal agencies would not conduct an investigation at a worksite in which the other agencies were in the process of an investigation, absent special circumstances. In a particularly interesting portion of the MOU, each agency “agrees to be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for elicit or improper purposes.” That is, ICE will continue to assess

“The general idea is that one of the federal agencies would not conduct an investigation at a worksite in which the other agencies were in the process of an investigation, absent special circumstances.”

“whether tips and leads . . . are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.”

“ARIZONA E-VERIFY MANDATE” continued from page 1

providing information pertaining to I-9 issues. In March another initiative was released known as “E-Verify Self-Check,” a web-based service employees can use to confirm their work authorization status or correct any errors they find in their records before they are hired. This program is available in five states and Washington, D.C., and employers cannot require anyone to use Self-Check or request to see an employee’s results. The five states are Arizona, Idaho, Colorado, Mississippi, and Virginia. In the coming months the government will expand E-Verify Self-Check to additional states, and hopes to make Self-Check available nationwide within 12 months. The I-9 Central website and the E-Verify Self-Check service may be accessed at USCIS.gov (links are located on the right of the page). On April 14, the U.S. Citizenship and Immigration Services (USCIS) announced as a final rule an interim rule to improve the integrity of the Form I-9 process. The main changes made by the interim rule and adopted by the final rule include: prohibiting employers from accepting expired documents; revising the list of acceptable documents by removing outdated documents and making technical amendments; and adding documentation applicable to certain citizens of the Federated States of Micronesia and the Republic of the Marshall Islands. Employers may continue to use the current version of the Form I-9 (Rev. 8/7/09) or the previous version (Rev. 2/2/09).

In other immigration developments, in June USCIS issued an updated Handbook for Employers: Instructions for Completing Form I-9, and in May the government launched a website described as “I-9 Central,”

“ADAAA REGULATIONS” continued from page 2

to do so. In fact, this writer recalls a case he handled in which an employee settled a worker’s compensation claim for permanent and total disability and the same day, requested reinstatement to the job.

compensation laws, and may even be given a disability rating, but if the employee is also able to perform the essential functions of the job with or without reasonable accommodation, the employee would be entitled

Employers should also remember they cannot insist an employee returning from leave with a medical condition be 100% healthy and completely able to perform their job before they can return to work. Rather, employees can return if they can perform the essential functions of their job and they are entitled to reasonable accommodation to enable them to do so. Employers also have an obligation to consider whether a person who is unable to perform the essential functions of their existing job can be transferred to another available position. In some cases, employers must also consider whether another job is available at another location.

Given these new regulations, this is good time for all employers to review handbook and policy provisions that could in any way relate to disability issues. If employers’ policies define “disability,” the definition needs to be reviewed to ensure it is consistent with the new rules. Additionally, policies not directly related to disabilities, such as limits on leaves of absence, need to be reviewed.



Wimberly Lawson

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We invite you to attend our 32nd Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 3 & 4, 2011



KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of

"Stress! Are You in Control?"

SPECIAL GUESTS EEOC OFFICIALS

Opportunities to participate in panel discussions entitled *"EEOC Officials Talk Directly With You"* with guest speakers Sarah L. Smith, Director, Sylvia Hall, Enforcement Supervisory Federal Investigator, and Sally Ramsey, Senior Trial Attorney, with the Nashville, Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

- “ A wealth of beneficial information ”
- “ Very informative, helpful and enjoyable ”
- “ All pertinent areas of HR covered ”
- “ Well presented, understandable, relevant ”

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Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the thirty-five or more topics are:

- Healthcare Reform Headaches for 2012
- FLSA Hot Buttons and Enhanced Federal Enforcement
- Social Media in the Workplace – Unforeseen Dangers for Employers
- Nuts and Bolts of Unemployment Claims
- Employment Contracts and Agreements – How They Can Protect Employers
- Wage and Hour Compliance Tips/Class-Action Alerts
- Employer Policies/Handbooks – For Better or Worse
- Records Retention Guidelines/Litigation Holds
- Employee Conduct and Appearance – On and Off the Job
- Workplace Crisis/Violence in the Workplace – How to Prevent and Protect
- Workers Compensation Update/Strategies – One of Your Biggest Employment Costs
- EEOC Compliance/Charge Responses – EEOC Officials Talk Directly With You
- USERRA (Uniformed Services Employment and Reemployment Rights Act)
- Labor Update/Impacts of Continuing Recession/Union Initiatives
- Employer Access to Employee Medical Information: GINA, ADA and FMLA
- Affirmative Action Requirements – Who and What

Join us in Knoxville on November 3rd and 4th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member



South Carolina
Greenville

Tennessee
Knoxville Morristown Cookeville Nashville

Georgia
Atlanta Athens

AGENDA

Thursday, November 3, 2011 (9:15 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session

The Year in Review
Overview of Department of Labor Initiatives
Healthcare Reform Headaches
Labor Unions Impact on Upcoming Elections
Class Actions and Implications for Employers

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Social Media Implications in Employment/Labor
FLSA Hot Buttons and Enhanced Federal Enforcement
Overview of EEOC Initiatives
ADAAA - Forget What You Always Knew
Practical Strategies to Defend Workers' Compensation Claims
Handbooks and Policies - Do We Really Need All This?
Labor/NLRB Update in Depth

12:00 p.m. - 1:15 p.m. - Lunch (*As Guests of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker, Dr. Farris Jordan, *"Staying Motivated Through Comic Vision"*

2:45 p.m. - 3:45 p.m. - Breakout Sessions

EEOC Compliance - EEOC Officials Talk Directly With You
How to Avoid Class Action Litigation/Consequences
ICE Enforcement and Current Trends in I-9 Audits
Employee Contracts: Who Needs 'Em?
Affirmative Action Update
FMLA - Beyond the Basics
HR Jeopardy - Interplay Between ADA, FMLA and WC

4:00 p.m. - 5:15 p.m. - General Session

Legislative Developments in Workers' Compensation
Constitutional Impact on Employment Issues
Whistleblowing Gone Wild
Internal Investigations
Challenges for Corporate General Counsel

5:15 p.m. - 7:00 p.m. Reception (*please join us for scrumptious hors d'oeuvres*)

Friday, November 4, 2011 (8:30 a.m. - 1:00 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session

USERRA
Independent Contractors - More Dangerous Than Ever
Sexual Harassment - Still Don't Get It!
Employment Litigation Trends

9:45 a.m. - 10:45 a.m. - Breakout Sessions

FMLA - Beyond the Basics
There's Something About "GINA"
OSHA 2011: Bigger and Meaner, and Heading Your Way
Practical Strategies to Defend Workers' Compensation Claims
EEOC Compliance - EEOC Officials Talk Directly With You
Strategies for Hiring Criteria - Using Unemployment History, Credit Checks,
Criminal Arrests, Convictions and the Like
Unemployment Claims - Tactics and Strategies

11:15 a.m. - 1:00 p.m. - General Session

Records Retention and Litigation Holds
Workers' Compensation Case Law Update
Jury Waivers/Mandatory Arbitration
Documentation Do's and Don'ts
Employment Issues That Will Affect 2012 Political Elections

1:00 p.m. Conclusion



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This program has been approved for 9.50 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

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Thirty-Second Annual Labor & Employment Law Update Conference

**Knoxville Marriott - Knoxville, Tennessee
November 3-4, 2011**

COST:

Early Bird (registration AND payment received by Sept. 30)
\$309 per person
\$299 for each additional person from same company
\$259 for eight or more from same company

Registration and payment received AFTER October 15
\$349 per person
\$339 for each additional person from same company
\$299 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 3, 2011

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 12. Cancellations made after October 25, 2011 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

HOTEL ACCOMMODATIONS

Knoxville Marriott • 500 Hill Avenue

SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$105.00/standard.

800-836-8031

RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code LAWLAWA to reserve at the conference rate)

FIVE WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Wright
Daves & Jones, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: www.wimberlylawson.com
5. Phone: 865-546-1000



KEYNOTE SPEAKER

Dr. Farris Jordan

*Licensed Psychologist
and author of*

"Stress! Are You in Control?"

No one is immune from stress, but Dr. Farris C. Jordan can teach anyone how to make it productive instead of damaging. And he is a master at having fun and laughing while he does it.

Dr. Jordan is a licensed psychologist who knows what it means to take control of stress. After receiving four degrees from the University of Tennessee, he has been extensively involved in stress research.

Dr. Jordan is the author of four books and numerous articles on the prevention of mental and physical illness. He has received national recognition for his "hands on" research on the effects of stress by becoming personally involved in highly stressful events such as Brahma Bull riding, NASCAR race driving, sky diving, Giant Canadian Bear wrestling, alligator wrestling, 13 consecutive Boston Marathons, completion of the 2,150 mile Appalachian Trail from Georgia to Maine in 139 days, and the 2,552 mile Mississippi River in a small canoe in 57 days. These experiences have enabled him to teach others how to control stress and stay motivated without fear or hesitancy.

Dr. Jordan's presentation will help you learn:

- what your stress-coping behavior reveals about you
- if you have a stress-prone or stress-tolerant personality
- why you experience worry and depression
- how well you are satisfying your 6 basic psychological needs
- your happiness IQ
- your social awareness score
- if you are in the right job

Name _____

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BPR and State for CLE: _____ No. Attending Reception: _____

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.