

THE NEXT WAVE

EMPLOYER SANCTIONS BILLS IN THE STATES

State legislative sessions have gotten off to a quick and busy start with immigration at or near the top of the agenda in capitals across the country.

The types of measures being considered are as varied as the states: legislation modeled on Arizona's tough new enforcement law SB 1070, provisions to eliminate birthright citizenship, voter identification requirements, bans on government benefits for unauthorized immigrants, English-only mandates, bills abolishing "sanctuary city" protections and – a new gambit not seen before – provisions denying workers' compensation benefits to unauthorized immigrants. Of most concern to business owners, bills requiring that all employers, public and private, enroll in the federal employment verification program, E-Verify, are being talked about in at least five states and may well appear in several others.

Arizona SB 1070 copycat bills are getting the most attention. Measures have been circulated or introduced in up to 20 states, including Georgia, Florida, South Carolina, Mississippi, Colorado, Nebraska, Rhode Island, Nevada and Oklahoma. Most of them follow SB 1070 closely, if not to the letter, allowing police to question the status of suspects they stop for other reasons. In some states, the SB 1070 copycats are coupled with provisions aimed at employers, either mandating E-Verify or imposing new penalties on businesses that hire unauthorized immigrants.

Fourteen states already mandate E-Verify for some or all employers. Arizona and Mississippi require it of all business owners. Utah mandates it for employers with more than 15 employees. South Carolina strongly encourages but does not insist on its use, allowing employers to verify employees by means of a South Carolina driver's license instead. Seven additional states – Colorado, Florida, Georgia, Missouri, Nebraska, Oklahoma and Virginia – require public contractors and state agencies to enroll. Idaho and North Carolina require it of state agencies only. In Pennsylvania and Tennessee, participation protects employers from prosecution. Maine and Illinois, which once prohibited participation by some or all employers, have abandoned those bans.

With the federal government already requiring federal contractors to verify existing employees and Congress poised to consider its own universal mandate, political observers in many states are expecting the state mandates to be popular with lawmakers. Newly elected legislators and governors are eager to make good on their promises to crack down on illegal immigrants and the businesses that hire them. Few lawmakers seem inclined to wait for the outcome of the U.S. Supreme Court case considering the constitutionality of Arizona's 2007 E-Verify law. And in several states where the debate now centers on SB 1070 copycat measures, business insiders expect those provisions to fail or be dropped from bills, adding to the political pressure to pass laws mandating E-Verify.

In **Georgia**, a joint Senate-House special committee on immigration reform has been touring the state and holding hearings. The first of its two companion bills, dropped in the House in late January, combines an SB 1070-like law enforcement mandate with a measure that requires all private businesses with more than five employees to sign up for E-Verify. In a new twist not seen before in other states, employers applying for state business licenses

and tax certificates would have to attest they were enrolled in the federal program and using it. A bill introduced in the Senate in early February parallels the House measure but contains some significant differences: among other things, employers of temporary and seasonal workers are not required to enroll in E-Verify. Newly elected Republican Gov. Nathan Deal frequently pressed for tougher immigration enforcement when he served in Congress and is expected to sign any E-Verify mandate that reaches his desk.

In **Florida**, newly elected GOP Gov. Rick Scott beat legislators to the punch, issuing an executive order on employment verification his first week in office. The order directs all state agencies under the governor's control to use the federal system and also to insist that state contractors use it. Questions have been raised about the governor's edict: the definition of "contractor" is vague, and it's unclear if the order is retroactive. But several members of the legislature are gearing up to try to close those loopholes.

A bill introduced by Republican Sen. Alan Hays would extend the mandate to all Florida employers and suspend the business license of any company that fails to register with E-Verify. A companion bill is expected soon in the House. It remains to be seen how much traction the measures will get: with agriculture and hospitality together accounting for nearly 15 percent of Florida's economy, many lawmakers, Democrat and Republican, may be reluctant to pass enforcement provisions that place additional burdens on those industries, already struggling in a difficult economic climate.

Lawmakers in **Mississippi** also came fast out of the gate, with the Senate passing immigration legislation in the first three weeks of the session and sending it on to a receptive House. In a state that already requires E-Verify for all employers, the bill would impose new penalties, suspending the business license of any company that knowingly hires unauthorized immigrants. The measure also includes a provision modeled on Arizona SB 1070. GOP Gov. Haley Barbour, who is considering a 2012 presidential bid, has not yet indicated whether he will sign it.

South Carolina already mandates that all employers verify employees' work eligibility, whether with E-Verify or by checking a South Carolina driver's license. Large firms have been required to comply since the beginning of 2009; smaller businesses were phased into the program in January 2010. And the law includes a waiver for first-time offenders: employers discovered to have hired unauthorized workers are given three days to rectify the situation. New legislation pending in the Senate Judiciary Committee would eliminate that waiver. It is expected to reach the Senate floor in early February.

Yet another bill, pending in the South Carolina House, extends the use of E-Verify beyond the worksite – a new development not foreseen in federal law. The proposed measure would require the state unemployment agency to use E-Verify to screen laid-off workers' applications before paying claims.

Lawmakers in **Colorado** are also poised to add new provisions to state immigration statutes already on the books. Existing law in Colorado requires state contractors to use E-Verify and prohibits state agencies from contracting with companies that knowingly hire unauthorized workers. Under current law, penalties are triggered if an employer acts with "reckless disregard" in submitting false documents to state agencies auditing their hiring practices. The new bill, which also includes provisions modeled on Arizona SB 1070, would eliminate the "reckless disregard" standard and impose new, harsher penalties for employing unauthorized workers. The fine for a second offense would be \$25,000, and after a third offense, it would rise by \$500 per worker per day. Political insiders expect newly elected

Democratic Gov. John Hickenlooper to veto any package that includes a 1070 copycat provision but say they will not be surprised if mandatory E-Verify follows in its wake and is enacted into law.

In **Indiana**, Republican Sen. Mike Delph has once again emerged as the leading champion of tougher immigration enforcement. His new bill, introduced in early February, is modeled on Arizona's 2007 employer sanctions law: it would suspend and then, after a third offense, revoke the business licenses of employers found to have knowingly hired illegal immigrants. State agencies and local governments would be required to use E-Verify, as would businesses seeking to qualify for state contracts, loans and grants.

In **Kentucky**, Democratic Rep. Mike Cherry has floated a bill that would require state contractors to use E-Verify and punish violators by revoking their contracting privileges for up to five years. A second bill circulating in the House would revoke the business license of any employer found to have hired an unauthorized worker. The state Senate has traditionally been reluctant to impose burdens on employers, but election-year politics – Democratic Gov. Steven Beshear may be facing a challenge from GOP Senate President David Williams – could force some action on immigration.

Lawmakers in **Tennessee** are gearing up to consider a proposal mandating E-Verify for all public employers, including state institutions of higher education. Another measure, not yet introduced, would extend the mandate to the private sector. Insiders believe the state's budget crunch may give lawmakers some pause – both mandates would be expensive to implement. Others predict that small employers may be exempted even if the broader requirement gains momentum.

The unicameral legislature in **Nebraska** is poised to consider three measures. One, purely symbolic, recognizes the contributions made by immigrant workers and urges Congress to find a federal solution on immigration. A second, modeled on Arizona SB 1070, will get its first hearing in early March. The third extends Nebraska's existing E-Verify requirement – it covers only private firms doing business with the government – to all employers in the state. The draft of the E-Verify mandate now circulating among lawmakers includes no penalties for failing to comply, but the business community is watching it closely.

In **Texas**, some three dozen immigration-related bills have been introduced in the legislature. A number of them focus on the issue of sanctuary cities. Republican Rep. Leo Berman's proposal would block unauthorized immigrants from suing Texas citizens. A measure introduced by GOP Sen. Jane Nelson would require all Texas employers to participate in E-Verify. GOP Gov. Rick Perry has expressed strong opposition to sanctuary-city protections but has said nothing yet on the subject of E-Verify.

Lawmakers in **Utah** are also poised to consider an array of immigration-related bills – some 20 measures have been introduced. One is modeled on Arizona SB 1070. Another mandates E-Verify for businesses with more than five employees and suspends and then revokes the business licenses of employers found to have hired unauthorized immigrants. Still another measure would give waivers to unauthorized immigrants in the state, allowing them to work but not altering their immigration status. A fourth, pending in the Senate, would regularize unauthorized workers and require them or their employers to post a surety bond to ensure that they eventually return to their home countries. Senate leaders are pressing to consolidate several of these measures into a single bill – they say that will ensure there is

time to address immigration in the legislature's short 45-day session. Just which of the ideas being circulated would be included in a consolidated measure is still unclear.

The House of Representatives in **Kansas** is considering a bill that would require all employers in the state to use E-Verify – beginning January 1, 2011. Employers that knowingly hire unauthorized workers would be denied public contracts for two years, and the Kansas Department of Labor would be empowered to shut down a worksite after multiple violations. Kansas Secretary of State Kris Kobach, who has helped Arizona and other states develop immigration enforcement laws, supports the legislation. Former U.S. Senator now GOP Gov. Sam Brownback has not yet taken a position.

The news from the states isn't all bad for business – in some places, lawmakers are backing off E-Verify requirements. **Minnesota's** Gov. Mark Dayton appears ready to allow that state's mandate to lapse, freeing state agencies and contractors from the requirement. And one of **Rhode Island** Gov. Lincoln Chaffee's first acts in office was to rescind a 2008 executive order that required state agencies and vendors doing business with the state to enroll in the program. (A few weeks later, two Rhode Island lawmakers filed a bill that would require state agencies and anyone doing business with the state to use E-Verify, and it may be gaining traction.)

Meanwhile, business owners and lawmakers alike are awaiting the outcome of the challenge to Arizona's 2007 employer sanctions law currently under consideration in the U.S. Supreme Court. The model for many workplace enforcement bills now pending in other states, the Legal Arizona Workers Act requires all employers in the state to enroll in E-Verify and suspends, then revokes the business licenses of businesses that knowingly or intentionally hire unauthorized immigrants.

When the Supreme Court heard oral arguments for and against the act in early December, the justices appeared to divide into two camps. They are expected to issue a decision by July 1. Advocates on both sides hope the ruling will be dispositive, deciding beyond any doubt whether the states have a constitutional right to require that employers use E-Verify. But some observers fear the decision will not resolve the matter – that the justices will be divided or the ruling will be so narrow that it leaves the question up in the air.

Meanwhile, states across the country are moving ahead, adding to the ever more bewildering patchwork of federal, state and local immigration enforcement measures facing business owners trying to sustain and grow their businesses.