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ATTORNEYS AT LAW

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Arizona Governor Janet Napolitano recently signed into law the Arizona Fair and Legal Employment Act (FLEA), which is slated to take effect January 1, 2008. Under the new law, Arizona employers will be required to verify that their employees are documented workers. An employer who fails to do so faces possible suspension or loss of its business licenses. If you are an employer, you need to know about the new employer sanctions law.

The FLEA has two key features. First, it imposes a business license penalty against any employer who knowingly or intentionally hires unauthorized employees. Second, it requires all employers in Arizona to enroll in the federal government's Employment Eligibility Verification Program (EEVP) in order to confirm the work eligibility of all new hires.

Business License Enforcement

The FLEA penalizes employers that knowingly or intentionally employ undocumented workers on or after January 1, 2008. An employer violating the FLEA may have its business license suspended for the first infraction or revoked for a subsequent violation. The FLEA does not provide for monetary penalties against employers.

Under the FLEA, the state attorney general or county attorney must investigate any complaint alleging that an employer is knowingly or intentionally employing an undocumented worker. If the complaint is not frivolous, the investigating agency will notify both the U.S. Immigration and Customs Enforcement and the applicable local law enforcement agency of the findings concerning an allegedly undocumented worker. In addition, the county attorney will bring a lawsuit against the employer to suspend or revoke its business license.

If the court finds that the employer knowingly or intentionally employed the undocumented worker:

New Arizona Employer Sanctions Law to Take Effect



- The employer must terminate the employment of all undocumented workers.
- The employer must file a signed affidavit with the county attorney, stating the employer has terminated the employment of all undocumented workers and it will not knowingly or intentionally employ any undocumented workers in the future. If the employer does not file the affidavit within three business days, the court will order the suspension of the employer's business license until the affidavit is filed.
- The employer is placed on a three-year (knowingly) or five-year (intentionally) probationary period, during which it must file quarterly reports on each new employee hired. (If the court determines that an

employer knowingly or intentionally employed undocumented workers during the probationary period, it must order the permanent revocation of the employer's business license.)

- The court may order the suspension of the employer's business license for at least ten business days.

The FLEA provides three defenses for employers:

1. If an employer can prove it verified the employment authorization of an alleged undocumented worker using the EEVP, there is a rebuttable presumption that the employer did not knowingly or intentionally employ an undocumented worker.

Restrictive Covenants in Employment

If you are an employer and want to impose limitations on your employees' post-employment activities, you may do so with the use of restrictive covenants. Because your employees may be at a bargaining disadvantage, however, restrictive covenants generally will be strictly construed against you.

There are two types of restrictive covenants: 1) covenants not to compete, and 2) non-solicitation covenants. As an employer, it is important to understand each type of restrictive covenant.

Covenant Not to Compete

A covenant not to compete restricts your employee's ability to work after his current employment is terminated. Typically, it will prohibit your employee from working in the same trade or industry for a specified period of time after his termination, within a specified geographic area. To be enforceable, both the term and the geographic scope of the covenant must be reasonable.

What is "reasonable" will depend on duration, geographic area and the activity prohibited. Each case hinges on its own particular facts. A restriction is unreasonable and will not be enforced, however, if 1) the restraint is greater than necessary to protect

your legitimate interest, or 2) that interest is outweighed by the hardship to your employee and the likely injury to the public.



If a restrictive covenant is unfair or imposes an extreme hardship, it likely is not enforceable.

Non-Solicitation Covenant

The second type of restrictive covenant is the non-solicitation, or "anti-piracy" covenant, as it is sometimes called. Unlike the covenant not to compete, it does not restrict your employee's subsequent employment. Instead, the non-solicitation covenant restricts your employee's ability to solicit your customers

after the termination of his employment. This type of covenant is designed to prevent former employees from using information learned during their employment to divert or "steal" customers from you. A non-solicitation covenant ordinarily is not deemed unreasonable or oppressive, and will be enforced unless it is broader than necessary to protect your legitimate business interest.

Here again, the burden is on you, the employer, to prove the extent of your protectable interest. Your interest in your customer base will be balanced with your employee's right to the customers. Where an employee takes an active role and brings customers with him to the job, courts are more reluctant to enforce non-solicitation covenants.

As a general rule, if a restrictive covenant is unfair or if it imposes an extreme hardship on your departed employee, it likely is not enforceable. If you use restrictive covenants, therefore, make them as fair as possible to both you and your employees. By so doing, you will increase the odds of having your restrictive covenants upheld in court.

This article was excerpted from Arizona Laws 101: A Handbook for Non-Lawyers, by Donald A. Loose (Fenestra Books 2006), and edited for this publication. Reproduced with the author's permission.

Payment of Wages

If you are an employer, you undoubtedly pay wages to your employees. It is important to understand the law governing payment of wages in Arizona to avoid wage disputes with your employees and penalties for noncompliance with the wage laws.

Wages are defined as "nondiscretionary income due an employee in return for labor or services, for which the employee had a reasonable expectation of being paid." It is immaterial whether the amount is determined by a time, task, piece, commission or other method of calculation. Wages include sick pay, vacation pay, severance pay, commissions, bonuses and other amounts promised if you have a policy or practice of making those payments.

The Arizona minimum wage is \$6.75 per hour. Certain employers are exempt from the minimum wage requirement, but the exemptions are very limited.

You must designate two or more days in each month, not more than 16 days apart, as fixed paydays for the payment of wages to your employees. You are permitted to personally deliver the wages to an employee no later than five days after the end of the most recent pay period, or deposit the wages in the mail no later than five days after the end of the most recent pay period for delivery to an address specified by the employee.

You may withhold wages from an employee only if you are required or empowered to do so by law, or you have the employee's prior written authorization, or there is a reasonable good faith dispute as to the amount of wages due.

In the case of discharge, the employee must be paid wages due him within three working days or the end of the next, regular pay period, whichever is sooner. When an employee quits, he must be paid in the usual manner all wages due

him no later than the regular payday.

The wage statutes contain significant penalties for noncompliance. Any employer who fails to pay wages due is guilty of a petty offense, and may be required to pay three times the amount of the unpaid wages, plus costs and attorney's fees.

An employee with a wage claim that does not exceed \$2,500 may file a claim with the Labor Department of the Industrial Commission of Arizona. The Labor Department will investigate the wage claim to determine if wages are due or if a dispute exists between you and your employee. You will be notified of the wage claim and may file a response to it. Additional information and forms are available at the Labor Department's Web site, www.ica.state.az.us.

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2. If an employer proves it has complied, in good faith, with the federal immigration laws, the employer establishes a complete defense.

3. An employer is not required to take action under the FLEA if it believes, in good faith, that such action would violate other federal or state laws. Although Arizona employers must comply with the FLEA, they must also ensure that their actions do not violate applicable laws which prohibit discrimination based on an employee's race, color, national origin, sex and religion.

Employment Verification Requirement

The FLEA also requires all Arizona employers, no later than January 1, 2008, to participate in the federal EEVP that provides for the electronic verification of the identity and work authorization of newly hired employees. The EEVP is a voluntary program run by the Department of Homeland Security that uses sophisticated computer analysis to compare information gathered from new hires with various government databases, including Social Security and Immigration records. Arizona requires EEVP enrollment for all employers.

EEVP is different from the Social Security number verification system. Use of the Social Security system will not satisfy the FLEA after January 1, 2008. EEVP requires the employer to register with the Department of Homeland Security, sign a Memorandum of Understanding, and complete a web-based tutorial.

The FLEA does not include an enforcement mechanism for an employer's failure to enroll in EEVP, and failure to enroll does not directly threaten an employer's business license. However, employers that do not enroll will likely face additional scrutiny if they are investigated for violating the FLEA.

Steps To Take Now

With tough Arizona penalties just around the corner, now is the time to jumpstart compliance efforts. Simple steps include:

- Auditing current I-9's to determine work authorization issues;
- Training or re-training staff who complete I-9 forms to make sure they do so properly, based on the FLEA;
- Reviewing, modifying, creating policies for storing and retaining I-9 documents – it may be helpful to keep the documents in a separate file to facilitate location of such

documentation in the event of an investigation.

Under the FLEA, employers are prohibited from using the EEVP to verify eligibility of current employees. However, if you already received a No-Match Letter from Social Security for any current employees, you should follow the steps outlined in "Safe-Harbor Procedures for Employers Who

With tough Arizona penalties around the corner, now is the time to jumpstart compliance efforts.

Receive a No-Match Letter," published by the Department of Homeland Security. A copy of the document is available from our office, upon request.

A No-Match Letter on its own does not indicate that you should terminate the employee whose Social Security number is listed on the letter, and you should not assume that the No-Match Letter is the result of any wrongdoing on the part of the employee. You should keep proof of verifying a newly hired employee's employment authorization through the EEVP to create a rebuttable presumption that you did not knowingly or intentionally employ an unauthorized worker. To create a rebuttable presumption and receive "safe harbor" you should follow the Safe-Harbor Procedures to resolve the mismatch or you risk violating federal law.

What To Do About Undocumented Workers

Prior to January 1, 2008. You are prohibited from using the new EEVP to verify the employment eligibility of *current*

employees before January 1, 2008. However, you must still comply with the federal Immigration Reform and Control Act, which requires you to verify the identity and work authorization of all workers hired after November 6, 1986. The Act provides civil penalties from \$100 to \$1,000 per violation for knowingly hiring unauthorized workers. You must still complete and retain for three years the I-9 forms for each employee you hire, and attest under penalty of perjury that you have verified, by examining the required documents, that the worker is not an unauthorized alien.

After January 1, 2008. Once the FLEA becomes effective, you must abide by the law as outlined in this article for both current and new employees. If you have taken all reasonable steps to verify an employee's employment authorization and such actions do not resolve the no-match discrepancy, and the employee's identity and work authorization cannot be verified, you must:

- Terminate the undocumented employee, or
- Face the risk that the employee was unauthorized, and that by continuing to employ such undocumented worker, you have violated federal law.

If you follow all procedures outlined in the Safe-Harbor Procedures letter and cannot determine that an employee is authorized to work in the U.S., and you subsequently terminate the employee, you will not be liable for federal discrimination charges. If a lawsuit is brought against you by the county attorney, your business license will not be suspended until the court finds that you have violated the FLEA. At that time, you will be placed on probation and you will have an opportunity to remedy the violation without a permanent revocation of your license. If the court finds that you have again violated the FLEA during your probationary period, you may lose your business license permanently.

The new law is being challenged in court. The probable outcome of the litigation is uncertain, but it may effect implementation of the FLEA on January 1, 2008. There has also been talk of convening a special legislative session to modify some of the new law's provisions before it takes effect, which may or may not happen. Please feel free to contact us for legal updates or for additional information.



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Arizona Laws 101

A handbook for non-lawyers

Arizona Laws 101 is one of the handiest reference books you'll ever own. Written so that a person with no legal training will readily understand the principles set forth, this handbook covers the 101 laws most relevant to Arizona residents, including:

- landlord/ tenant rights • divorce
- jury duty • consumer fraud • living wills
- traffic laws • wrongful firing • lawsuits
- child custody/support • sexual harassment • business law • medical malpractice and MORE!

Donald A. Loose has been practicing law for over twenty-five years. In that time, he has counseled thousands of individuals and businesses on almost every area of Arizona Law.

"Here is a real fundamental, basic crash course in Arizona law. Everything is taken care of in this book. It has information on every possible legal aspect. You can find out more than you ever dreamed."

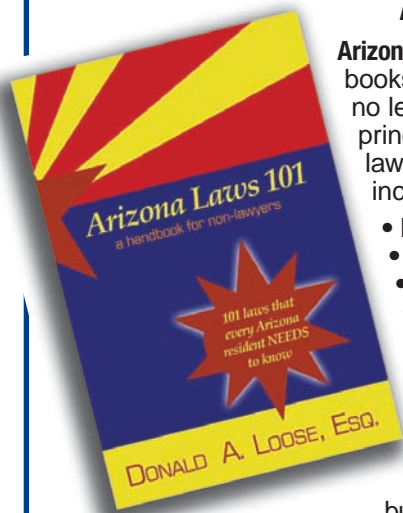
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"Interpreting the legal jargon and navigating the various laws can be a daunting task for even a trained professional. That's why **Arizona Laws 101: A Handbook for Non-Lawyers** is so helpful. Written specifically for the layperson, 101 Arizona laws are interpreted and spelled out in a way that easily lays out the principles... **Arizona Laws 101** can make sure you know what you're getting into if you're faced with a challenging legal situation."

- BizAZ Magazine



Available in bookstores throughout Arizona, or online at Amazon.com!

www.ArizonaLaws101.com