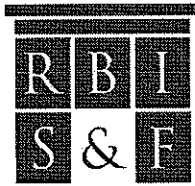


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The Mississippi Employment Protection Act: an Overview

By Jeremy P. McNinch
Updated January 26, 2009

Mississippi Senate Bill 2988, the Mississippi Employment Protection Act ("Act"), was signed into law by Governor Haley Barbour on March 17, 2008. The Act is codified as Mississippi Code Annotated Sections 71-11-1 and 71-11-3.

The Act mandates that all employers in Mississippi shall only hire employees who are legal citizens of the United States of America or are legal aliens. The following is a summary of the Act, its potential problems, and its current status. In short, although the stated legislative purpose of the Act is highly laudable, the legislation contains many inconsistencies, and its penalties could threaten some Mississippi businesses.

- **Applicability:**

- Any "employer" in the state of Mississippi, subject to the phased "rollout" set forth in the Act – an "employer" is "any person or business that is required by federal or state law to issue a United States Internal Revenue Service Form W-2 or Form 1099 to report income paid to employed or contracted personnel in Mississippi"
- Any person who accepts or performs employment for compensation knowing or in reckless disregard that the person is an unauthorized alien with respect to employment

- **Penalties for Noncompliance:**

- *Civil:* An employer that violates the provisions of the Act is subject to cancellation of any state or public contract, resulting in ineligibility for any state or public contract for up to three years. The violator may *also* be subject to the loss of any license, permit, certificate, or other document granted by any agency, department, or entity of the State of Mississippi for the right to do business for up to one year.
- *Criminal:* It is a felony for any individual to accept or perform employment knowingly or in reckless disregard that the person is an unauthorized alien. Such employees, upon conviction, are subject to imprisonment for not less than one year and no more than five years. Employee violators are also subject to fines in the amount of at least \$1,000 and not more than \$10,000. However, in at least one bid solicitation, the state of Mississippi has misstated the potential criminal penalties as applicable to *employers*. (Please see Exhibit "A", appended hereto.)

- **Deadlines for Compliance and Effective Date:**

- **July 1, 2008:** Deadline for State of Mississippi agencies and political subdivisions, public contractors and public subcontractors and private employers with two hundred fifty or more employees
- **July 1, 2009:** Deadline for compliance by employers with at least **100** but less than **250** employees
- **July 1, 2010:** Deadline for compliance by employers with at least **30** and not more than **100** employees
- **July 1, 2011:** Deadline for "all employers" to meet the Act's requirements
- The Act is effective on **July 1, 2008** for state agencies, departments, and political subdivisions, all employers who have contracts with the State of Mississippi, or its departments, agencies, political subdivisions, all third-party employers, and any person or company using a third-party employer. For all other employers who do business in Mississippi, the effective date of the Act is **January 1, 2009**.

- **Potential Problems and Issues:**

- *E-Verify Program:* The Act requires employers to use E-Verify, a federal online database, to determine the federal employment authorization status of all newly hired employees. However, some employers question the accuracy of the system. In addition, the Act does not allow the use of any other database to determine work authorization status, and there has

been speculation that the E-Verify program will not be funded in the future; therefore, if the E-Verify program is discontinued, it would be impossible for employers to comply with the Act.

- *Ambiguous Penalty Provisions:* As currently drafted, the Act provides that any employer violating the Act shall be subject to, among other things, “the loss of any license, permit, certificate or other document” granted by the state “for the right to do business in Mississippi for up to one year.” This section could be narrowly interpreted to mean only a city business license is subject to revocation, or, more broadly, that it means any license, including a contractor’s certificate of responsibility, could be revoked for noncompliance.
- *Constitutionality:* The Act arguably violates the United States Constitution in that it seeks to regulate an area of law that is committed to the federal government. Further, the Act’s specific reference to contractors and subcontractors could raise constitutional equal protection questions. It could be argued that the statute’s lack of notice and hearing provisions creates due process concerns.
- *Employee/independent contractor distinction:* Notwithstanding the legislation’s attempt to limit its definitions “for purposes of this section only,” the Act blurs the line between employees and independent contractors, referring to a worker that receives federal Form 1099 as an “employee”.
- *Conflicting Effective Dates and Compliance Deadlines:* Some of the Act’s deadlines and effective dates are in conflict, which raises questions regarding when some employers must meet the Act’s verification requirements.
- *Liability for Another’s Non-Compliance:* The Act is unclear as to whether a contractor can be liable for a subcontractor’s noncompliance.
- *Uniformity of Enforcement among State Agencies:* No specific agency is charged with the overall responsibility of coordinating the enforcement efforts of the five agencies given the power to enforce the Act. On July 2, 2008, Cille Litchfield of the Mississippi Department of Finance and Administration circulated a memorandum to state agencies setting out “E-Verify Boilerplate Contract Language.” (Please see Exhibit “B” appended hereto.)
- *Probable Cause:* It appears that there is no specific level of “cause” – reasonable, probable, or otherwise – required to support an investigation to determine compliance. Will businesses be required to provide reports to demonstrate that they comply with the Act?

- *Federal law:* How does the Act mesh with federal requirements under the I-9 program? Can an investigation by the federal government under the I-9 program trigger a state investigation under the Act?
- *Cause of Action Against Employers:* The Act creates a potential cause of action by a discharged employee against his or her former employer where the employer retains an unauthorized alien hired after July 1, 2008 and the employer knew or reasonably should have known that the retained employee is an unauthorized alien.
- **Current Status of the Act:**
 - On May 28, 2008, in special session, the Mississippi Senate adopted amendments to the Act. The revisions would have corrected many of the problems with the law. However, the proposed Senate substitute died in House committee. Therefore, the Act remains in the same form as signed by the Governor on March 17, 2008.

Attn: *Jeremy*

Joe [Redacted] *ble*

Consultant Service Unit - Rev. 6/26/08

PRIME CONSULTANT / CONTRACTOR EEV CERTIFICATION AND AGREEMENT

Project No: _____

Termini: _____

Prime Consultant: _____

By executing this Certification and Agreement, the undersigned verifies its compliance with Senate Bill 2988 from the 2008 Mississippi Legislative Session, "Mississippi Employment Protection Act," as published in Laws, 2008 and codified in the Mississippi Code of 1972, as amended, and any rules or regulations promulgated by Mississippi Transportation Commission [MTC], Department of Employment Security, State Tax Commission, Secretary of State, Department of Human Services in accordance with the Mississippi Administrative Procedures Law (Section 25-43-1 et seq., Mississippi Code of 1972, as amended), stating affirmatively that the individual, firm, or corporation which is contracting with MTC has registered with and is participating in a federal work authorization program* operated by the United States Department of Homeland Security to electronically verify information of newly hired employees pursuant to the Immigration Reform and Control Act of 1986, Pub.L. 99-603, 100 Stat 3359, as amended. The undersigned agrees to inform the MTC if the undersigned is no longer registered or participating in the program.

The undersigned agrees that, should it employ or contract with any subconsultant(s) and/or subcontractor(s) in connection with the performance of this Contract, the undersigned will secure from such subconsultant(s) and/or subcontractor(s) verification of compliance with the Mississippi Employment Protection Act. The undersigned further agrees to maintain records of such compliance and provide a copy of each such verification to MTC, if requested, for the benefit of the MTC or this Contract.

EEV* Company Identification Number [Required]

The undersigned certifies that the above information is complete, true and correct to the best of my knowledge and belief. The undersigned acknowledges that any violation may be subject to the cancellation of the contract, ineligibility for any state or public contract for up to three (3) years, the loss of any license, permit, certificate or other document granted by any agency, department or government entity for the right to do business in Mississippi for up to one (1) year, or both, any and all additional costs incurred because of the contract cancellation or the loss of any license or permit, and may be subject to additional felony prosecution for knowingly or recklessly accepting employment for compensation from an unauthorized alien as defined by 8 U.S.C §1324a(h)(9) said action punishable by imprisonment for not less than one (1) year nor more than five (5) years, a fine of not less than One thousand Dollars (\$1,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or both, in addition to such prosecution and penalties as provided by Federal law.

BY: _____
Authorized Officer or Agent

Date

Printed Name of Authorized Officer or Agent

Title of Authorized Officer or Agent of Contractor / Consultant

SWORN TO AND SUBSCRIBED before me on this the _____ day of _____, 200_____.

NOTARY PUBLIC

My Commission Expires: _____

* As of the effective date of the Mississippi Employment Protection Act, the applicable federal work authorization program is E-Verify™ operated by the U. S. Citizenship and Immigration Services of the U.S. Department of Homeland Security, in conjunction with the Social Security Administration.



Department of Finance and Administration

Mississippi Management and Reporting System

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P. O. Box 267, Jackson, MS 39205-0267

Phone: (601) 359-6570 - Fax: (601) 359-6551

TO: State Agency Executive Directors
State Agency Procurement Directors
State Agency Accounting Directors
State Agency Human Resource Directors

FROM: Cille Litchfield, MMRS Administrator Cille Litchfield, CPM

DATE: July 2, 2008

SUBJECT: E-Verify Boilerplate Contract Language in Compliance with Mississippi Employment Protection Act (MEPA)

Digitally signed by Cille Litchfield, CPM
DN: cn=Cille Litchfield, CPM, o=State of Mississippi, ou=Department of Finance and Administration/MMRS, email=litchc@dfa.state.ms.us, c=US
Date: 2008.07.01 17:18:43 -05'00'

The MMRS Steering Committee, composed of the Executive Directors of the Department of Finance and Administration (DFA), the Department of Information Technology Services (ITS), and the State Personnel Board (SPB) approved a directive on May 20, 2008, to engage the assigned Special Assistant Attorneys General at DFA, SPB, and ITS to collectively generate boilerplate language for bids, contracts, and competitive procurements to comply with the Mississippi Employment Protection Act (MEPA) passed in SB2988 during the 2008 Legislative Session.

All contracts entered into on July 2, 2008, and later, and for which DFA, ITS, or SPB have either execution or approval authority, will require the following language in the contract boilerplate. This boilerplate language is also being made available for use by any agency desiring to include it in agency contracts not subject to DFA, ITS, or SPB approval.

Contractor/Seller represents and warrants that it will ensure its compliance with the Mississippi Employment Protection Act (Senate Bill 2988 from the 2008 Regular Legislative Session) and will register and participate in the status verification system for all newly hired employees. The term "employee" as used herein means any person that is hired to perform work within the State of Mississippi. As used herein, "status verification system" means the Illegal Immigration Reform and Immigration Responsibility Act of 1996 that is operated by the United States Department of Homeland Security, also known as the E-Verify Program, or any other successor electronic verification system replacing the E-Verify Program. Contractor/Seller agrees to maintain records of such compliance and, upon request of the State, to provide a copy of each such verification to the State. Contractor/Seller further represents and warrants that any person assigned to perform services hereunder meets the employment eligibility requirements of all immigration laws of the State of Mississippi. Contractor/Seller understands and agrees that any breach of these warranties may subject Contractor/Seller to the following: (a) termination of this Agreement and ineligibility for any state or public contract in Mississippi for up to three (3) years, with notice of such



cancellation/termination being made public, or (b) the loss of any license, permit, certification or other document granted to Contractor/Seller by an agency, department or governmental entity for the right to do business in Mississippi for up to one (1) year, or (c) both. In the event of such termination/cancellation, Contractor/Seller would also be liable for any additional costs incurred by the State due to contract cancellation or loss of license or permit."

If you have any questions about the contents of this memo, please contact Cille Litchfield at (601) 359-1433 or by email at litchc@dfa.state.ms.us.