

## IMMIGRATION- Businesses Struggle To Manage Legislative Confusion

After OK of new Colorado immigration law, business owners, managers hope for more clarification to help hire employees

By SARAH COLWELL THE GAZETTE

Conflicts and contradictions between new state and federal immigration laws are causing confusion for local business owners and managers.

A state law that went into effect Jan. 1 says Colorado employers must affirm the legal status of each employee, must not alter or falsify the employee's identification documents and must not have knowingly hired an unauthorized alien.

The new law was aimed at curbing illegal immigration in the state by denying illegals access to jobs. Supporters say it will help to ensure that businesses do not exploit illegal immigrants for cheap labor.

But business owners say the new law, also known as HB1017, conflicts with other state and federal labor laws and puts an undue burden on business owners who do not have training to identify false documents. They're also concerned about problems with government databases used to check identification documents and worry that if they take on the job of immigration enforcement, they could be accused of discrimination.

Officials at the Colorado Department of Labor and Employment admit they have had difficulty figuring out how to implement the new laws, department spokesman Bill Thoennes said.

"The position I think it plays on small-business people is that we are having to police the immigration issue," said Byron McCurdy, chief executive officer of Colorado Springs-based Aspen Resource Partners, a human resources agency for small businesses. "I think the public perceives that employers are the ones advantaging from an illegal work force . . . but most employers, from my experience, are trying to do the right thing."

"Even if they try to do everything correctly," McCurdy continued, "I think the small-business people are still at risk because if you find out later . . . that the employee is not legal to work in the U.S., they are

kind of caught between a rock and a hard place as to whether or not they should pay that person."

### 'NOT ON THE SAME PAGE'

Shane Bunker, owner of Scenic View Professional Landscaping Services in Colorado Springs, said he recently hired an employee only to find out six days after the employee started working that he was not legal to work in the U.S.

Bunker said he released the worker but did not pay him. "We told him, if you bring us correct paperwork, we'll pay you," he said.

Several times the employee brought in documentation with the same name but with different documentation numbers, Bunker said.

Bunker said he was told by the Colorado Department of Labor and Employment to pay the worker, while his human resources company, citing guidance from the U.S. Department of Homeland Security, told him not to pay the worker. Bunker said he has requested a hearing with the Colorado Department of Labor to clarify the situation but has not heard back.

"These entities are not on the same page," Bunker said. "We're just trying to comply with the laws. I would just like to know what the laws are."

If Bunker pays the employee, he would violate the new state law because he would be knowingly hiring and paying an illegal immigrant, said McCurdy, who runs Bunker's Human Resource Department with his company Aspen Resource Partners. Bunker could then be subject to a \$5,000 or \$25,000 fine and be unable to deduct wages for state income taxes.

Thoennes said that if Bunker doesn't pay the worker, he violates the federal Fair Standards Labor Act and other Colorado labor laws, which require an employer to pay an employee for work done no matter the employee's legal status. Bunker could be subject to a lawsuit from the employee and fines from the U.S. Department of Labor,

Thoennes said, adding the federal government could even shut down his business.

"Under our law, we don't differentiate the legal or illegal status of a worker," said Alex Salaiz, director of the Denver office of the U.S. Department of Labor, Wage and Hour Division, which enforces the Fair Standards Labor Act. "If someone worked for you, you have to pay the employee, plain and simple."



Byron McCurdy with Aspen Resource Partners has called plice twice when workers who didn't provide legal documents threatened staffers. He keeps a baseball bat in his office. "I've been doing this type of business for 26 years now, and I've never seen anything like this," he said. "We feel like we're in the eye of the hurricane."

U.S. Immigration and Customs Enforcement, an agency of Homeland Security, has a different policy than that of the Labor Department.

"When you know they're illegal, all I can tell you is it's against federal immigration law to knowingly hire or continue to employ an illegal immigrant," said Carl Rusnok, public affairs officer at the ICE office in Dallas.

At the Pikes Peak Hospital PAC Committee meeting this month at The Broadmoor hotel, an employer asked Joe Herrera, a compliance officer for the Colorado Department of Labor and Employment, what she should do if she discovers an employee is not legal to work in the U.S. after the employee started working for the company.

"I apologize about this, but I don't have any answers and I don't think anyone does at this point because it's so new," Herrera told her.

Thoennes agreed that employers should pay an employee regardless of legal status, if the employee performed work for the

company. The state Department of Labor "would never use an employer's compliance with the wage act to prosecute them under HB 1017," Thoennes said.

### 'NO PLACE TO GET TRAINING'

On its Web site, the Colorado Department of Labor recommends employers check an employee's identification information through online government databases. But the department recently changed

its position because employers interpreted the recommendation to be a requirement, which is not what the department wants, Thoennes said.

"It is so new to us and new to employers," Thoennes said. "I'll even admit the Department of Labor has been unsure of ourselves, what are we legally responsible for. But we believe, at this point, we have a clear standard for what it means for us."

Some experts interpret the new state law as requiring business owners only to make and keep photocopies of the employee's identification documentation. But government groups have come up with different ways to define the legislation, said Stan Weekes, spokesman with the Colorado Alliance for Immigration Reform, a nonprofit anti-immigration group.

"I'm not sure, but I think it's going to take court cases to solidify the answers," he said.

McCurdy said some employers may just take photocopies of a new employee's identification documents but do not check them in hopes of pleading ignorance if they are audited by immigration authorities.

But he added that most business owners want to do the right thing and abide by the law but are not sure how to do it.

McCurdy said one of his clients unknowingly hired illegal immigrants and was involved in an ICE raid late last year at Buckley Air

Force Base near Denver.

"When I went to that audit, it was pretty intimidating," McCurdy said. "When you walk into a small, 8-by-8 room . . . and the guy giving you the audit has a gun on his hip, it's pretty intimidating.

"I want to be a law-abiding business," said Tim Austin, co-owner of Handyman Matters Colorado Springs. "I want to take care of my business, and I want to take care of my customers. But when you have a horrible situation like this, I can't figure out how to do it legally."

Rusnok, the ICE spokesman, said "employers are not expected to be fraudulent document experts," but business owners are concerned they should have some knowledge on how to identify false documents because under the new law they are required to "examine" the legal work status of new hires.

But there is no formal training program for employers, Rusnok said. Employers can request training from a local ICE investigation office, but classes are dependent on the office's availability.

"We're an employment business, and I got my training at an audit from an ICE agent," said McCurdy, whose company represents about 75 small businesses. "There is just no place to get training. We've been trying to get ICE to come out here and do some training . . . and they've been trying, but they are overwhelmed. They are just swamped."

Some employers and experts say intense background checks on employees could open the door to discrimination lawsuits.

"How far do you go in finding out a person's identity and not insult someone who is a citizen of the U.S. or have a discrimination lawsuit on your hands?" asked H.A. Andy Divine, professor emeritus at the University of Denver, who spoke at the Pikes Peak Hospitality PAC committee meeting in February.

Legal experts recommend employers should not allow an employee to start working for a company until the worker has provided legal documentation required for the Form I-9, an employment eligibility verification form.

If an employer suspects a worker is illegal, he or she should call immigration agents and not take action against the employee because

it could open the employer up to a possible lawsuit, Thoennes said. Thoennes also said an employer should terminate an employee as soon as it is discovered that person is not legal to work in the U.S. so as not to be in violation of HB 1017.

Employers can hire a background screening company that, for less than \$5 an employee, can conduct a Social Security trace report, said Barry Nadell, president of InfoLink Screening Services Inc., a California-based background screening company. The report will give the names that are listed under a certain Social Security number and can help detect an employee who is using a stolen identity for employment, he said. An employer, however, cannot conduct a background check on an employee until that person has been hired, Thoennes said.

#### **NEW DATABASE ON WAY**

Government databases used to verify a person's identification documentation are not foolproof.

McCurdy said that many of the illegal immigrants rounded up in an ICE raid at the Swift & Co. meat-packing plant in Greeley in December had stolen identities, but those identities will pass through the Social Security Number Verification System.

That system "doesn't verify that the individual that is handing in that name or Social Security number is in fact that individual," said Mark Lassiter, spokesman for the U.S. Social Security Administration in Maryland. "It is not confirming the identity of the individual, just that that name matches that Social Security number in our system."

And Thomas Hurley Jr., an immigration attorney in Colorado Springs, said that if an employee's Social Security number fails the agency's number verification system, it does not necessarily mean he or she is an illegal immigrant.

"Social Security will say in the letter, 'Do not terminate an employee based on this letter,'" Hurley said. "There can be errors and you don't want to be involved in a wrongful termination lawsuit."

Another database is the U.S. Department of Homeland Security's Basic Pilot Program, which is administered by the U.S. Citizenship and Immigration Services. This free service matches a person's name to

a Social Security number and also determines if that person is legal to work in the U.S.

Colorado employers who receive state contracts are required to use the Basic Pilot Program to verify the legal status of new hires. But Nadell said about 10 to 15 percent of queries to the Basic Pilot Program come back with a "tentative nonconfirmation," which indicates a program error.

Employers may not use the Basic Pilot Program for preemployment screening of job applicants, according to the Colorado Department of Labor Web site.

A new documentation verification database is on the way. In July, former Gov. Bill Owens signed a law that will require the state to establish a database called the Work Eligibility Verification Portal by January 2008. Employers are supposed to be able to use the database to verify the validity of a taxpayer identification number, which most commonly is a person's Social Security number.

#### **BUSINESSES MAKING DO**

Until the government can clarify the confusion immigration legislation, business owners are doing what they can to stay out of trouble.

Bunker, with Scenic View Landscaping, has become involved in the Guestworker Programs. The programs, which are run by the U.S. Department of Labor, give foreigners a temporary work permit to be employed in the U.S. Bunker has been trying to get into the program for several years, and this year he was allowed to get 20 workers from Mexico for seven months. Bunker said the program is useful because he has a hard time filling the seasonal positions otherwise.

McCurdy said he now requires his clients to submit the documents of every new hire to be checked by staff at Aspen Resource Partners before the person starts working. McCurdy and his clients also have decided not to pay workers until they can provide legal documentation. The decision has repercussions.

McCurdy said he has closed his office and called police on two occasions because workers who failed to provide legal documentation threatened his staffers, demanding they be paid. McCurdy

keeps a baseball bat near his desk in case a worker threatens his staff again.

"I've been doing this type of business for 26 years now, and I've never seen anything like this," he said. "We feel like we're in the eye of the hurricane."

#### **NEW COLORADO IMMIGRATION LAWS**

##### **House Bill 06S-1001:**

Took effect in October, requires employers prove they don't have illegal immigrant workers to qualify for state economic development grants, loans or incentives.

##### **House Bill 06S-1009:**

Took effect in January, prohibits municipalities, counties and the state from issuing commercial or professional licenses to people who cannot prove they are legally in the U.S.

##### **House Bill 06S-1015:**

Requires the state to establish a database called the Work Eligibility Verification Portal by January.

##### **House Bill 06S-1017:**

Took effect in January, says Colorado employers must affirm the legal work status of each employee, must not alter or falsify the employee's identification documents and must not have knowingly hired an unauthorized alien. An employer that violates the law is subject to a fine of no more than \$5,000 on first offense and no more than \$25,000 on second or subsequent offenses.

##### **House Bill 06-1343:**

Took effect in August, requires employers who receive state contracts to use a federal online database called the Basic Pilot Program to verify the legal status of new hires.

##### **House Bill 06S-1020/Referendum H:**

Was approved by voters in November, eliminates the ability of businesses to claim wages for unauthorized aliens as an expense for state income tax purposes starting in January. SOURCE: Colorado Legislative Web site [www.leg.state.co.us](http://www.leg.state.co.us)

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