

Ross & Levy, LLC

LAW OFFICES

Albany Atlanta Savannah

www.rossandlevylaw.com

C. Todd Ross
Nathan C. Levy*
John David Blair
Ernest R. Burriss, IV
Casey D. Bowen

*also licensed in Alabama

Correspondence:
Post Office Box 71668
Albany, GA 31708-1668

Toll Free: 866-995-8663
Fax: 877-284-4034

Albany Office:
415 Pine Avenue - Ste. 250
Albany, GA 31701
229-277-2555

Atlanta Office:
10 GlenLake Parkway - Ste. 130
Atlanta, GA 30328

Savannah Office:
5500 Abercorn Street - Ste. 32
Savannah, GA 31405

Summer 2011

Dear Friends:

We hope that you enjoy this edition of the Ross & Levy newsletter. This newsletter covers information and current events pertaining to developments in the law and changes in legal precedent with a focus on the impact for employers, insurers, and human resource professionals. *†

IN THIS EDITION:

UPCOMING SEMINARS.....1

EMPLOYMENT LAW.....1
Immigration Reform for Employers1

Addressing Employee Safety Concerns in Light
of OSHA Whistleblower Protections: *Solis v.
Blue Bird*.....5

WORKERS' COMPENSATION (GA).....6
Workers' Compensation Benefits Declared
Taxable for Social Security Recipients: *Sherar v.
IRS*.....6

UPCOMING SEMINARS

11/04/11: Augusta, Workers' Compensation &
EEOC Claims Seminar

EMPLOYMENT LAW SECTION

The following articles are focused on legal precedents and developments of particular interest to employers and human resource professionals:

IMMIGRATION REFORM 2011:

The Impact for Private Employers

John David Blair

Sweeping immigration reforms went into effect on July 1, 2011 according to Georgia's "**Illegal Immigration Reform Act of 2011**," (formerly known as HB 87 and abbreviated below as the "Act") or, rather, sweeping immigration reforms were **supposed** to go into effect on July 1, 2011.

Federal Injunction Imposed

For the purposes of the average person, however, immigration reform has been delayed. Of the 23 sections of the Act, which amends

numerous existing statutes and also creates several new statutes, 2 of the most controversial sections have been recently enjoined (stayed) entirely by the United State District Court for the Northern District of Georgia.

On June 27, 2011, District Judge Thomas W. Thrash issued an interlocutory injunction following a legal challenge to the Act brought by multiple plaintiffs, including the ACLU, in the now pending case of Georgia Latino Alliance for Human Rights, et al. v. Nathan Deal, Governor, et al.¹ This decision primarily enjoins the criminal provisions of the Act that mirrored criminal provisions of an Arizona law with similar aims that were ultimately struck down on grounds that the criminal enforcement of immigration is the exclusive jurisdiction/providence of the federal government.

The provisions of the Act enjoined by the district court include Sections 7 and 8, which have the primary effect of criminalizing, at the state level, the transportation of illegal aliens, the harboring/concealment of illegal aliens, and the inducement of illegal aliens to enter the State of Georgia. These matters will remain enjoined (nullified) temporarily until this case comes to a full hearing/trial, at which point Judge Thrash will determine whether to permanently enjoin these sections or to allow them to take effect.

E-Verify Now Mandatory

Of the provisions remaining in effect, the most notable is the requirement that *certain private employers must register for and use the Federal E-Verify system to verify the work eligibility of new hires*. In fact, in a recent statement to the Atlanta Journal Constitution, Georgia State Representative Matt Ramsey (R) said, *“E-Verify is kind of the tent pole of the whole legislation to me ... We know the No. 1 incentive that exists for illegal aliens to come to Georgia is access to private sector jobs.”*

For those unfamiliar with E-Verify, it is a software program and networking system developed by the Federal Government that uses the Internet to connect employers to the US Department of Homeland Security and also the Social Security Administration for purposes of establishing whether a “new hire” is legally authorized to work. Note that, *though the language of the Act (a Georgia law) requires every private employer with more than 10 employees to “register for and utilize [the E-Verify program],” the Federal Government prohibits the use of E-Verify program as a screening mechanism.*

Given the somewhat vague phrasing of the Act’s requirements concerning the use of E-Verify, and in light of Representative Ramsey’s comments, one might mistakenly believe that E-Verify is properly used to screen job applicants. This is not the case, however, and all private employers who register for E-Verify must agree to the Federal Government’s “Memorandum of Understanding” (often abbreviated the “MOU”) governing the use of E-Verify. The MOU prohibits the practice of using E-Verify to screen Job Applicants for work authorization in much the same fashion that the Americans with Disabilities Act (a/k/a the “ADA”) prohibits the use of medical questionnaires to screen new job applicants for disabilities.

As aforementioned, *use of the Federal E-Verify system is now mandatory* for Georgia employers with more than 10 employees. However, there are restrictions concerning how the system may be used. Specifically, the MOU and Federal law governing use of E-Verify permit employers to use E-Verify to confirm employment only *after* both an offer of employment has been made and an I-9 Form has been completed. This is an important distinction, as E-Verifying a job applicant before he or she is offered employment might be viewed by the EEOC as illegal work place discrimination in much the same fashion that using medical questionnaires to screen job

applicants is viewed by the EEOC as illegal discrimination under the ADA.

As the EEOC is the law enforcement agency primarily tasked with implementing and enforcing the United States' efforts to eradicate workplace discrimination, the EEOC's insights into the potential risks associated with E-Verify are of obvious import to employers. Employers using E-Verify must adopt and observe legal, non-discriminatory hiring policies to avoid liability for illegal work place discrimination.

It may seem disingenuous or even contradictory for employers to be required to use E-Verify to check into its new employees' status and then ordered not to discriminate against those employees on the bases of "national origin" or "citizenship status." It is common knowledge that Federal (and now arguably certain state) laws prohibit employers from knowingly hiring illegal immigrants lacking authorization to work in the United States, yet an employer's actions in improperly questioning an employee or potential employees national origin may result in an EEOC claim.

Avoiding Illegal Discrimination in the use of the E-Verify System

Workplace discrimination is unlawful when it is motivated by, or undertaken because of, an employee/applicant's race, religion, sex, national origin, citizenship status, or genetic information. It can also be illegal in many cases where motivated by and employee/applicant's age, disability, medical condition, or pregnancy. Perhaps the most confusing of these factors is citizenship status. ***Remember, one does not have to be a citizen of the United States in order to be authorized to work in the United States.*** Employers would be wise to avoid making assumptions based on appearance or other inconclusive factors without definitive evidence, which is why E-Verify was created.

E-Verify inputs the information reported by an employee on his/her I-9 Form and cross-checks it against Federal databases and then issues a response to the employer's representative. Invariably, E-Verify's first response is never that an employee is not authorized to work. If E-Verify finds that the employee's information does not produce a work "authorized" response, then it generates forms for the employer to discreetly discuss with the employee that give the employee and opportunity to contest the "tentative non-confirmation" or similar finding. The employee is given a deadline to contest, and if he or she fails, then E-Verify will report that the employee is not authorized to work.

Though it is *literally* "discrimination" to refrain from employing persons who are not legally authorized to work in the United States, it is not *unlawful* discrimination to refrain from hiring persons lacking such authorization. ***It is, in fact, unlawful to knowingly employ someone lacking authorization to work in the US.*** On the other hand, ***it is unlawful to discriminate against an employee authorized to work in the US because the employer suspects that the employee lacked authorization.*** Because employers do not always know whether an employee is so authorized, E-Verify gives employer the means to make this determination.

The key is to know when to use E-Verify and for what purpose. Job applicants cannot be screened using E-Verify, and it is unlawful to terminate existing employees because E-Verify generates certain a response that indicates an employee "tentatively" appear to lack authorization. ***Ultimately it is not "unlawful discrimination" to terminate an employee whom E-Verify confirms is unauthorized to work so long as that confirmation is final and not "tentative."*** Also, where an employee declines to contest a tentative non-confirmation generated by E-Verify, that employee may be terminated without fear of an unlawful discrimination claim.

Employers in Georgia are legally obligated to collect Forms I-9 from all new hires and to input that data into E-Verify ***within three Federal work dates*** of the first date of employment. To treat the employee differently from other employees because the I-9 and E-Verify processes are pending would place the employer at risk of an EEOC discrimination claim.

US Supreme Court: Mandatory E-Verify OK

E-Verify is not likely to simply “go away.” Though the Act is still under judicial review in Georgia, a similar law mandating use of E-Verify from the State of Arizona has been upheld as lawful by the United States Supreme Court in the case of Chamber of Commerce of the United States v. Whiting.ⁱⁱ

Effective Dates under the Act

The Act is an expansive piece of legislation that will, eventually, have a major impact for Georgians, particularly those employed in, working in, or operating businesses in the private sector. Precisely when this major impact will begin to really show, however, remains to be seen. In part, this may be related to confusion over when the Act’s requirements are effective.

Section 12 of the Act indicates that the mandatory E-Verify are effective, depending on the size of the employer’s work force, on: (1) January 1, 2012 for those with 500 or more employees; (2) July 1, 2012 for those with 100-499 employees; and (3) July 1, 2013 for those with 11-99 employees. ***Employers with 0-10 employees are exempt from the E-Verification requirements*** (though they may voluntarily register and use E-Verify, which might be wise for small companies with rapidly growing work forces).

However, Section 22 of the Act states that all portions of the Act except Section 17 and certain dates pertaining to “offenses and violations” for

which specific dates are prescribed are ***effective July 1, 2011***. It is possible that a court would find that the deadlines between Sections 12 and 22 can be read in concert, or that they conflict. Certainly, it seems that the former is more logical (and likely) than the latter.

However, in the event of an irreconcilable conflict, courts will sometimes resolve the conflicting provisions by giving greater weight/consideration to the provision found nearer to the end of a document, whether that document be a will, contract, or in this case an act of law. The rationale is that a provision nearer to the end of the document was more recently written (a flimsy rationale in the age of word processing software). Though this is a common law doctrine of construction that can best be described as one of “last resort,” it would clearly support Section 22’s deadline over those set forth in Section 12.

For that reason, though the staggered deadlines in Section 12 would seem more likely to prevail, giving private employers a year or more to register for and implement E-Verify, the “safer” interpretation is that Section 22’s deadline prevails. Because E-Verify can be implemented voluntarily regardless of when the Act becomes effective, the risks would seem to be lower for employers with 11 or more employees to presume that the Act went into effect on July 1, 2011. Either way, ***regardless of when the Act goes into effect, employers with 10 or fewer employees remain exempt from the E-Verify requirements of the Act. For employers with 11 or more employees would be wise to consult with an attorney well-versed in both employment and immigration law before choosing to delay registering for and implementing the E-Verify system.*** The I-9 and E-Verify procedures can be a confusing process even for the most knowledgeable human resources professionals. Consulting an attorney may be advisable even where an employer is satisfied concerning its timeframe for compliance.

A Final Note Concerning the Act's Future

It is often the case that existing laws affecting private employers (or any large group/interest) have had years of review by courts issuing all manner of opinions that over time resolve many, if not all, ambiguities and conflicts therein. The Act is a new law, however, and there are few 100% certainties where new laws are concerned. Particularly where a new law is controversial or seeks to make substantial changes to the status quo, there is always uncertainty and the risk of unpredictability. This Act does both.

Not even the most skilled attorney can predict the future, so “best guesses” and “safe bets” will continue to surround discussion of the Act until it is further interpreted by the Courts. At this time, it appears that certain portions of this Act will be struck down by the Federal District Court for the Northern District of Georgia, which decision will likely be appealed, possibly for years. However, the portions of this Act discussed at length above are likely to remain in effect in the State of Georgia during that time. Employers would be wise to make plans sooner rather than later, avoiding the sometimes tempting “wait and see” approach.

ADDRESSING EMPLOYEE SAFETY CONCERNS IN LIGHT OF OSHA WHISTLEBLOWER PROTECTIONS:

Solis v. Blue Bird

Casey D. Bowen

Although for most employers safety is stressed above all else in the workplace, a recent wrongful termination settlement raised important issues regarding the importance of addressing employee safety concerns.

Case Background

In the recent (2011) case of Solis v. Blue Bird,ⁱⁱⁱ the employee refused to use a buck lift truck to install Christmas wreaths until he received training in the operation of the equipment. After a disagreement regarding whether the employee was previously trained in the matter, the employer terminated the employee for failure to perform his job duties.

Thereafter, an OSHA whistleblower investigation found that the employee was wrongfully terminated for refusing to work under unsafe conditions. The employer refused to reinstate the employee, which led to the Labor Department filing suit in the U.S. District Court. After much litigation, the Labor Department prevailed at the District Court and U.S. Court of Appeals. As part of the judgment, the Courts ruled the employer must reinstate the employee. Shortly after filing an appeal to the U.S. Supreme Court, the parties reached a settlement whereby the employer agreed to pay the employee \$170,800.00 in back wages plus \$5,625.00 in interest as well as the Labor Department's cost associated with the appeal in this case.

What Employers Can Learn from this Case

OSHA can and will enforce the whistleblower provision of Section 11(c) of the Occupational Safety and Health Act (“OSHA”) as well as many other related statutes that protect employees who raise safety concerns. All safety concerns expressed by employees should be documented and addressed by appropriate personnel. Additionally, employer provided training should be well documented as to prevent similar disagreements. The avoidance of penalties such as those involved here is yet another reason a safe workplace is invaluable.

WORKERS' COMPENSATION SECTION (GEORGIA)

The following articles are focused on legal precedents and developments of particular interest to employers, human resource professionals, and workers' compensation insurers and adjusters:

UNITED STATES TAX COURT HOLDS WORKERS COMPENSATION BENEFITS TAXABLE FOR SOCIAL SECURITY RECIPIENTS:

Sherar v. Commissioner of Internal Revenue

John David Blair

“**T**he issue for decision is whether certain workers' compensation benefits ... are taxable as though they were Social Security benefits by virtue of section 86(d)(3)” [Internal Revenue Code].^{iv}

-Special Trial Judge Robert n. Armen, Jr.

Linda Sherar suffered two compensable work-related injuries in the State of California during 1998 requiring not less than 12 surgeries. For these injuries, she began receiving workers compensation benefits in 1999 and, eventually, Social Security benefits in 2007.

On her 2007 income tax return, Ms. Sherar did not report her worker's compensation benefits. However, the amount of Social Security benefits received by Ms. Sherar was reduced by the amount of workers' compensation benefits she received, resulting in an “offset” that the Revenue Commissioner contended was taxable.

IRC § 86 subjects Social Security benefits to income taxation. On the other hand, IRC § 104(a) dictates that workers' compensation

benefits are not taxable. However, Social Security benefits are often reduced when a person receives workers' compensation benefits. The amount of such a reduction bears the characteristics of both a Social Security and workers' compensation benefit.

Where a recipient of Social Security benefits receives workers' compensation benefits and a reduction or “offset” is taken by the Social Security Administration, there develops a policy concern as to whether similarly situated recipients of Social Security benefits are receiving equal tax treatment.

But for the workers' compensation benefits received by Ms. Sherar, for instance, she would have been taxed on the full amount of her Social Security benefits as income. Ms. Sherar argued that, because of § 104 exemption for workers' compensation benefits, she could only be taxed for the reduced portion of her Social Security benefits. The Revenue Commissioner, however, demanded taxation on the full amount of Social Security benefits awarded, before any reduction or “offset” was made for Ms. Sherar's worker's compensation benefits.

The Court was in a difficult position. To find for Ms. Sherar would result in disparate income tax treatment between recipients of Social Security benefits who do and do not receive workers' compensation benefits. Such a ruling would mean that, even where their Social Security benefits are equal, recipients of Social Security benefits not receiving workers' compensation benefits will likely owe more income tax than those recipients who do not.

On the other hand, the Court noted that the alternative was unfair to Ms. Sherar, who applied for Social Security benefits only on advice of counsel. “**We ... acknowledge that if Mrs. Sherrar had not applied for Social Security benefits, then her workers' compensation benefits would not have been subject to Federal income tax.**”^v

Nevertheless, the Court had to balance the inequity to Ms. Sherar, individually, against the potential inequity to many similarly situated Social Security recipients. A recipient not receiving workers' compensation benefits whose circumstances and disabilities were otherwise identical/comparable to Ms. Sherar's would not realize the same reduction in taxable income that Ms. Sherar asserted. This raises a simple question: should those taxpayers who suffer work-related disabilities enjoy preferential income tax treatment versus those taxpayers with similar disabilities that were not work-related (e.g., a person injured by a drunk driver)?

This was not the question, however, that the Court struggled with most. The question that truly plagued the Court was this: *should recipients of workers' compensation benefits sustain a higher taxable income simply because they voluntarily applied for Social Security benefits?* The court answered "yes." In Ms. Sherar's case, this was a particularly difficult result. Her attorney advised her to apply, and Ms. Sherar was presumably not a tax professional or legal expert.

Ultimately, despite the obvious prejudice to Ms. Sherar, the Court reached this decision by following the letter of the law. "[W]e are duty-bound to apply the law as written by Congress to the facts as they occurred and not as they might have occurred."^{vi} That law requires Social Security benefits to be taxed. *IRC § 86(d)(3) expressly dictates that all Social Security income, before any reduction for worker's compensation benefits, must be counted as taxable income.* The Court noted Congress' express intention for this section was to "equalize" income tax treatment for taxpayers receiving Social Security benefits.^{vii} The language of the statute is plain and unambiguous.

After expressing sympathy to Ms. Sherar, the Court ruled that she was deficient in her income tax payment as a result of failing to include her

workers' compensation benefits. Under IRC § 86(d)(3), those benefits are counted as taxable Social Security income. However, *the Court noted that this case shall not serve as precedent for other cases*, meaning that while it might be discussed in a future proceeding, this case is not intended to govern the conduct of future disputes before the US Tax Court or any other court or administrative agency.

Despite this disclaimer, the Court's decision is clearly supported by the plain and unambiguous language of the law. For purposes of workers' compensation professionals, it is clear that employee-claimants who receive workers' compensation benefits may incur a higher income tax liability if they apply for and obtain Social Security benefits.

Impact for Adjustors & HR Professionals

This case primarily affects the employee/claimant rather than the employer/insurer. However, representatives for both employers and insurers who negotiate directly with any employee/claimant for settlement of his/her claim should *refrain from making any statements or representations to the employee/claimant that workers' compensation benefits are not taxable.* This is particularly important where the employee/claimant is not represented by an attorney and, thus, is not in a position to question such statements/representations.

Advising an employee/claimant that he or she will not be required to pay taxes on workers' compensation benefits may give the employee/claimant grounds to dispute the settlement or to assert a claim of fraudulent misrepresentation against the employer/carrier representative who advised him that such benefits are not taxable if, in fact, the employee/claimant is subsequently taxed on those benefits due to his/her status as a recipient of Social Security benefits.

It is unclear whether a lump sum settlement would be treated in the same fashion as weekly benefits. Also, if the employee/claimant does not receive any taxable Social Security benefits, then this case would not apply.

Even when an employee/claimant asks direct questions about the tax treatment of workers' compensation benefits, it would be best to advise that employee/claimant to direct such

questions to a qualified attorney or tax professional. Because the application of the Sherar case to any particular case requires complex analyses, employer/insurer representatives are advised to seek legal counsel before making any representations about the tax treatment of workers' compensation benefits directly to an employee/claimant.

** If you would like to subscribe to the mailing list (or if you would like to unsubscribe), please contact Christie Eades of Ross & Levy at 866-995-8663(toll free) or by email to info@rossandlevylaw.com.*

The law firm of Ross & Levy, LLC represents and defends employers and insurers in the areas of workers' compensation (including longshore matters), premises liability claims, personal injury claims, business/contract disputes, general litigation, and other areas. The firm has offices throughout Georgia. Questions and comments about the firm and its services, for all regions, may be addressed to:

Ross & Levy Law
P.O. Box 71668
Albany, Georgia 31708-1668
Toll Free Telephone: (866) 995-8663
Toll Free Facsimile: (877) 284-4034
Website: <http://www.rossandlevylaw.com>
Email: info@rossandlevylaw.com

† **DISCLAIMER:** The information provided in this update is for informational purposes only and does not constitute legal advice. For advice and recommendations specific to your case, please consult a licensed, qualified attorney.

ⁱ 2011 WL 2520752 (F.Supp.2d) (N.D. Ga. 2011) (CAF No. 1:11-CV-1804-TWT).

ⁱⁱ 131 S. Ct. 1968 (2011).

ⁱⁱⁱ Solis, 404 F.App'x. 412 (11th Cir 2011).

^{iv} Sherar v. Commissioner of Internal Revenue, 2011 TC Summary Opinion 44 (U.S. Tax Court 2011) (Case No. 19548-09S) (not precedent per IRC § 7463(b)).

^v Sherar (cit. omitted).

^{vi} *Id.*

^{vii} See H. Rept. 98-25, at 26 (1983).