

# STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.

January 11, 2011

## **LABOR AND EMPLOYMENT ALERT**

### **GOVERNOR SCOTT SIGNS EXECUTIVE ORDER MANDATING USE OF E-VERIFY FOR FLORIDA AGENCIES**



On his first day in office, January 4, 2011, Governor Scott signed Executive Order No. 11-02. The Executive Order requires all agencies under the direction of the Governor to verify the employment eligibility of all current and prospective agency employees through the U.S. Department of Homeland Security's E-Verify System. The Executive Order also applies to private companies that have contracts with covered state agencies.

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**GOVERNOR SCOTT SIGNS EXECUTIVE ORDER  
MANDATING USE OF E-VERIFY FOR FLORIDA AGENCIES**

On his first day in office, January 4, 2011, Governor Scott signed Executive Order No. 11-02. The Executive Order requires all agencies under the direction of the Governor to verify the employment eligibility of all current and prospective agency employees through the U.S. Department of Homeland Security's E-Verify System. The Executive Order also directs all agencies under the direction of the Governor to include, as a condition of all state contracts, an express requirement that contractors use the E-Verify system to verify the employment eligibility of (1) all persons employed during the contract term by the contractor to perform employment duties within Florida and (2) all persons (including subcontractors) assigned by the contractor to perform work pursuant to the contract with the state agency.

Before addressing some of the questions raised by the Executive Order, we provide a brief overview of E-Verify. E-Verify is an Internet



based system jointly operated by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) that allows participating employers to verify electronically the employment eligibility of new hires. To participate in E-Verify, the employer must sign a multi-page Memorandum of Understanding (MOU) with the DHS and SSA.

The employer must still complete the Form I-9 but uses E-Verify to check the information the new hire has provided against records contained within the DHS and SSA databases. The employer submits information about the

new hire, such as name, Social Security number, date of birth, citizenship status, A number or I-94 card number, the type of documentation presented to establish work authorization, the proof of identity presented, and the expiration date of presented documents.

The E-Verify system then notifies the employer if the new employee is authorized to work in the United States. The system may provide a tentative non-confirmation regarding the employee's work authorization. Employees receiving the tentative non-confirmations may contest the finding. The employee has eight business days to contact the appropriate federal agency and initiate a challenge to the tentative non-confirmation, such as visiting the local SSA field office or calling the U.S. Citizenship and Immigration Services (USCIS). The employer cannot take adverse action against the worker with the tentative non-confirmation, absent cause.

If the employee fails to act on the tentative non-confirmation within the eight days or the SSA or USCIS is unable to confirm work authorization, the employer receives a final non-confirmation notice. The employer must then either terminate the employee or risk possible sanctions for knowingly employing an unauthorized worker.

**What is an agency under the direction of the Governor?**

The Executive Order only applies to agencies under the direction of the Governor. The following agencies and departments are identified as part of the executive branch in Florida: Agency for Enterprise Information Technology, Agriculture, Attorney General, Auditor General, Business & Professional

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Regulation, Children & Families, Citrus, Community Affairs, Corrections, Education, Elder Affairs, Emergency Management, Environmental Protection, Financial Services, Fish & Wildlife Conservation, Health, Health Care Administration, Highway Safety & Motor Vehicles, Juvenile Justice, Law Enforcement, Lottery, Management Services, Military Affairs, Office of Financial Regulation, Office of Insurance Regulation, Parole Commission, Persons with Disabilities, Public Service Commission, Revenue, State, Transportation, Veterans' Affairs, and Workforce Innovation.

## **May an E-Verify User Verify the Employment Eligibility of a Current Employee?**

On its face, the Executive Order seems to contradict the prohibition against employers using E-Verify to verify the employment eligibility of any employee who is an employee at the time the company signs the MOU with the DHS. Companies participating in E-Verify may only verify new hires and not existing employees. The **only** exception to this prohibition applies to federal government contractors mandated to use E-Verify as a term of their federal government contract. Federal contractors must use E-Verify to verify the employment eligibility of (1) all persons the contractor hires during the contract term of the federal contract to work in the U.S. and (2) all persons assigned by the federal contractor to work on the contract in the United States, whether a current employee or a new hire. Federal contractors may opt to use E-Verify to

verify the employment eligibility of all employees. As currently written, Governor Scott's Executive Order would require state agencies and their contractors to verify current employees, in violation of the DHS rules for all E-Verify users except covered federal contractors. We have contacted the Governor's



office for a clarification of this issue. Until this discrepancy is resolved, unless you are a covered federal contractor,

we counsel against using E-Verify to verify the employment eligibility of existing employees. Violation of the federal prohibition could expose the employer to Department of Justice enforcement for an immigration-related unfair employment practice.

## **Do State Contractors Have to Enroll in E-Verify Immediately?**

Whether a state contractor must immediately enroll in E-Verify is unclear. The Executive Order states that the use of E-Verify will be a condition of all state contracts. Arguably, a state contractor will not be compelled to use E-Verify until such time as it executes a new contract with the state agency containing a contractual term mandating the use of E-Verify.

We will continue to monitor implementation of the Executive Order and issue alerts as the issues raised become clearer.

# STATE OF FLORIDA

## OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 11-02 (Verification of Employment Status)

WHEREAS, Federal law requires employers to employ only individuals eligible to work in the United States; and

WHEREAS, the U.S. Department of Homeland Security's E-Verify system allows employers to quickly verify employee eligibility in an efficient and cost-effective manner;

NOW, THEREFORE, I, RICK SCOTT, as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (1)(a) of the Florida Constitution, and all other applicable laws, do hereby promulgate the following Executive Order, to take immediate effect:

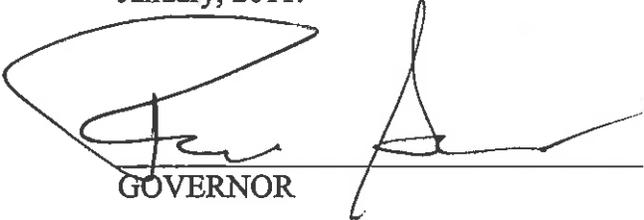
**Section 1.** I hereby direct all agencies under the direction of the Governor to verify the employment eligibility of all current and prospective agency employees through the U.S. Department of Homeland Security's E-Verify system.

**Section 2.** I hereby direct all agencies under the direction of the Governor to include, as a condition of all state contracts, an express requirement that contractors utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of: (a) all persons employed during the contract term by the contractor to perform employment duties within Florida; and (b) all persons (including subcontractors) assigned by the contractor to perform work pursuant to the contract with the state agency.

**Section 3.** Agencies not under the direction of the Governor are encouraged to verify the employment eligibility of their current and prospective employees utilizing the E-Verify system, and to require contractors to utilize the E-Verify system to verify the employment eligibility of their employees and subcontractors.



IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, the Capitol, this 4th day of January, 2011.

  
GOVERNOR

ATTEST:

  
SECRETARY OF STATE

# STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.



## Practice Areas

Immigration  
Labor and Employment

## Industries

Healthcare  
Hospitality and Leisure  
Pharmaceutical and Life Sciences  
Retail

## Education

J.D., *with honors*, University of Florida, 1991  
B.A., *magna cum laude*, Duke University, 1988

## Admissions

Florida, 1991  
U.S. District Court, Southern District of Florida, 1991  
U.S. Court of Appeals for the Ninth and Eleventh Circuits, 1991  
U.S. District Court, Middle District of Florida, 1994  
U.S. District Court, Northern District of Florida, 2005

Glenn M. Rissman is a Shareholder in the Labor and Employment Department. Mr. Rissman's practice focuses on employment law, immigration, and accessibility. Mr. Rissman regularly represents clients in a wide variety of matters arising under Title VII, Section 1981, ADA, ADEA, FMLA, WARN Act, FLSA, ERISA, and the Florida Civil Rights Act. He also advises employers regarding hiring, termination, and discipline of employees; compliance with federal, state, and local discrimination laws and wage and hour issues; sexual harassment matters; I-9 compliance and unauthorized employment; and mass layoffs and plant closings.

Mr. Rissman also practices in the area of employment-based immigration and naturalization. He represents employers and investors seeking temporary visas and permanent residence for employees and has successfully obtained non-immigrant visas (H-1B, L-1, TN, O, P, E) for employers in industries such as retail, hospitality, pharmaceutical, and manufacturing. Mr. Rissman also counsels clients regarding I-9 compliance, audits and inspections.

Mr. Rissman also defends and advises institutions with respect to public accessibility for persons with disabilities. Mr. Rissman has defended dozens of public accessibility lawsuits brought under Title III of the Americans with Disabilities Act.

## Representative Experience

- Obtained defense verdict for prominent retailer on national origin discrimination claim
- Obtained defense verdict for national bank on public accessibility claims arising under federal and state law.
- Obtained L blanket petition for Miami-based multinational to ease the transfer of overseas managers and executives
- Obtained alien of extraordinary ability status for musicians, business people, IT personnel and a chef
- Regularly conduct in-house training on I-9 compliance, sexual harassment and other topical issues impacting the workplace

## Recognition

- *Florida Trend's* Florida Legal Elite, selected for inclusion, 2005-2006 and 2008

## Publications

Co-author, "The Legal Reference Guide for Private Clubs: Employment Law," National Club Association

## ABOUT OUR IMMIGRATION PRACTICE

Stearns Weaver Miller's immigration practice represents employers and investors in a wide range of industries who seek guidance and assistance employing foreign nationals and structuring their business entities to facilitate the transfer of foreign personnel. Whether a multi-national corporation seeking to transfer an overseas executive to the United States or an investor wishing to establish a business in the United States, Stearns Weaver Miller's immigration practice has the experience necessary to navigate clients through the obstacles of the immigration process.

We represent large multinational companies in connection with the temporary employment of professionals and intra-company transfers, the entry of business visitors, and the permanent employment of foreign workers. We have extensive experience obtaining H-1B, L-1, and TN status for our clients' foreign workers and then navigating our clients through the permanent residence process, including labor certification.

We have assisted musicians, scientists, and business people in obtaining O visas as aliens of extraordinary ability and achieving permanent residence on such grounds. We have assisted entrepreneurs in obtaining E visas so that they can establish businesses in the United States and we have helped professional athletes obtain P visas. Our practice also includes providing advice to employers regarding the I-9 employment verification process and immigration-related unfair employment practices.

### Range of Services

- Non-immigrant Visas – H-1B, L-1, TN, E, O, and P
- Blanket L Petitions
- Permanent Residence – Aliens of Extraordinary Ability, Multinational Executives and Managers, and Labor Certification (PERM)
- Naturalization
- I-9 Counseling
- Family-Based Permanent Residence