

GEORGIA SECURITY AND IMMIGRATION COMPLIANCE ACT (GSICA)

After passing the Georgia House and Senate by wide margins, the Georgia Security and Immigration Compliance Act (“GSICA” or “the Act”) was signed into law by Governor Perdue in April 2006. The Act will eventually require citizenship verification of all employees hired by the state, state contractors, and subcontractors. Once fully in effect, GSICA will prevent any business from claiming certain wages paid undocumented employees as allowable business expenses for state income tax purposes. This does not apply to federal income tax returns. GSICA will also mandate heightened state income tax withholding for those employees with incorrect or missing tax identification numbers and subject employers to liability for failure to properly withhold.

Outside the business realm, the law impacts the ability of non-citizens to secure public services as citizenship verification will be a prerequisite to the receipt of certain services. The Act additionally requires that authorities make a reasonable effort to verify the immigration status of any foreign national charged with and jailed for a felony or DUI. Those found not to be in the country legally will be reported by Georgia authorities to the Department of Homeland Security.

Also contained in the bill are provisions amending the criminal code to make it a felony to traffic or contribute to the trafficking of people for labor or sexual servitude.

The *Atlanta Journal-Constitution* has labeled GSICA a “responsible” effort by the state to use its limited powers to address the illegal immigration problem. The *AJC* claimed business interests were placated by the Act’s delayed effective dates and immigrants’ rights advocates by the human trafficking provisions and inapplicability to minors of certain sections related to the receipt of public services.

The office of Senator Chip Rogers, a primary sponsor of GSICA, described the Act as intended to have an impact in four primary areas: private employment, public employment and contracting, public safety, and public benefits. Beyond its primary focus areas, GSICA imposes stringent regulations on the ability of non-attorneys to provide immigration-related advice.

Following is fuller treatment of the specific provisions of GSICA and their potential impact.

I. Private Employers

a. Tax Benefit Prohibitions

The GSICA section perhaps most likely to impact employers prohibits annual wages or remuneration of \$600.00 or more paid an “unauthorized employee” from being claimed as an allowable business expense for state income tax purposes. An employee is deemed authorized when the requirements of 8 U.S.C. § 1324a are satisfied, which can be accomplished through completion of an I-9 Employment Eligibility Verification Form. The I-9 was created in 1986 and its completion has been federally mandated since that time.

Notably, the section is inapplicable to any compensation paid an individual who holds and presents a valid license or identification card issued by the Georgia Department of Driver Services. The driver's license "loophole" presents an issue insofar as a single fraudulent form of identification may provide a basis for an employer to unknowingly find an employee authorized for GSICA purposes. The issue of employer liability for accepting a fraudulent document is not addressed. In an interview with the *AJC*, Senator Rogers conceded that the issue of fraudulent documents was left unaddressed by the Act but pledged to work on the issue during the 2007 legislative session.

Key aspects of GSICA's tax benefit prohibition:

- Applicable only to individuals hired after January 1, 2008.
- Applicable only to compensation for labor services physically performed in Georgia.
- Applicable to deduction claims made after January 1, 2008.
- Inapplicable to payments made to individuals neither directly employed nor paid by taxpaying employer.
- Issuance of IRS Form 1099 to an employee does not relieve employer of duty to otherwise comply with verification procedures.

b. Tax Withholding Requirement

GSICA has the potential to further impact employers financially by rendering them liable for state income taxes not withheld from certain employees. Again, this is not applicable to federal tax withholding. The Act requires that taxes be withheld from the amount reported on IRS Form 1099 at a rate of six percent where an individual has:

- Failed to provide a taxpayer identification number a/k/a ITIN;
- Failed to provide a correct taxpayer identification number; or
- Provided an IRS taxpayer identification number issued to a nonresident alien.

The failure of an employer to withhold taxes from an individual in any of the above categories renders the employer liable for any amount not withheld unless the employer is exempt from federal withholding relative to the individual pursuant to a properly filed IRS Form 8233. Liability is avoided under GSICA only when Form 8233 is properly filed with the IRS and a copy is provided to the Georgia Commissioner of Labor. Of course, employers must continue withholding on W-2 employees.

The language of the Act does not specify an effective date for tax withholding provisions, but information provided by Governor Perdue's office sets the date at July 1, 2007.

II. Public Employers and Contractors

In addition to requiring immigration status verification of all newly hired public-sector employees, GSICA forbids the state or any political subdivision from contracting or subcontracting with an employer not registered with and actively verifying the status of new employees through a federal work authorization program. The Act does not specify the federal program, allowing adaptation of GSICA to any authorization program that may emerge from Congress in the near term. The Georgia Secretary of Labor is given authority to promulgate rules and regulations to effectuate the enforcement of the specifics of the section.

GSICA verification requirements do not apply to contractors or subcontractors hired for the work performed outside the State of Georgia.

Those performing work related to public transportation may be subject to different verification requirements, as the Georgia Secretary of Transportation is given independent authority to promulgate rules and regulations to control the application of GSICA to employers providing services pursuant to “any contract of agreement relating to public transportation.”

Deadlines for employer registration and participation in a federal work authorization program:

- July 1, 2007: All state contractors, subcontractors, agencies, departments, instrumentalities, and political subdivisions with 500 or more employees.
- July 1, 2008: All above employers with 100 or more employees.
- July 1, 2009: All above employers with fewer than 100 employees.

It should be noted that employer registration and participation is only required by these companies contracting with the State of Georgia or any of its political subdivisions.

III. Public Safety

a. Human Trafficking

The centerpiece public safety provision of GSICA classifies the offense of trafficking or contributing to the trafficking of a person for labor or sexual servitude as a felony punishable by up to 20 years imprisonment. If the trafficking involves a victim under the age of 18, the minimum sentence is 10 years.

GSICA allows the prosecution of corporations for trafficking offenses only where the conduct constituting trafficking is performed by an agent of the corporation acting within the scope of their agency pursuant to authorization given by the corporation. Where the agent’s conduct is unauthorized, the corporation may still be liable where the conduct is part of a “pattern of illegal activity that an agent of the company knew or should have known was occurring.”

b. Legal Status Verification for Individuals Charged with Felony or DUI

GSICA requires that authorities make a reasonable effort to identify the immigration status of any person jailed following a felony or DUI charge. Where status cannot be verified from documents on the prisoner’s person, authorities are to submit a query to the Law Enforcement Support Center (LESC) of the Department of Homeland Security (DHS) within 48 hours. If a prisoner is found to be in the country illegally, Georgia authorities are to notify DHS.

The Act makes clear that the inability of authorities to timely ascertain a prisoner’s immigration status cannot serve as basis for denial of bond or release where the prisoner is otherwise eligible.

c. State Enforcement of Federal Immigration and Customs Laws

GSICA will allow appropriately trained state peace officers to “enforce federal immigration and customs laws while performing within the scope of [their] authorized duties.”

Training of Georgia officers will be pursuant to a Memorandum of Understanding negotiated between the State of Georgia, DHS, and U.S. Department of Justice and will be contingent on the provision of federal funding.

The three public safety provisions above take effect July 1, 2007.

IV. Public Benefits

The Act presents a potential hurdle to the accessibility of public benefits provided or administered by the state, as GSICA requires that state agencies and political subdivisions verify the immigration status of any applicant for benefits over the age of 18. Benefits applicants must execute an affidavit swearing to their citizenship, legal permanent residency, or the legality of their presence under the federal Immigration and Nationality Act. The eligibility of an affiant for benefits is ultimately to be made through the Systematic Alien Verification of Entitlement (SAVE) program operated by DHS. Once eligibility is verified through SAVE, the affidavit may be presumed to be proof of lawful presence in satisfaction of GSICA requirements.

The Act allows agencies and political subdivisions to vary GSICA requirements where so doing will improve efficiency or reduce delay in verification. Such agencies and subdivisions must account for any variance in verification procedures in required annual reports detailing their compliance with GSICA requirements.

Verification is not required for benefits sought by minors or in cases where the potential beneficiary seeks emergency medical assistance, in-kind disaster relief, immunizations, testing or treatment for symptoms of communicable diseases, prenatal care, or various other assistance deemed by the U.S. Attorney General to be necessary for the protection of life and safety. Excluded from the Act's definition of emergency medical assistance are organ transplant procedures, meaning that as of July 1, 2007, immigration status verification will be a prerequisite to the receipt of an organ transplant in the State of Georgia.

On the topic of education, discretion is given to the Regents of the University of Georgia and State Board of Technical and Adult Education to promulgate policies concerning the provision of public postsecondary education in accordance with federal law. Federal law continues to guarantee a kindergarten through twelfth grade education to children regardless of immigration status.

All provisions related to the provision of public benefits take effect July 1, 2007.

V. Immigration Assistance Regulation

In the name of "establishing and enforcing standards of ethics in the profession of immigration assistance by private individuals not licensed as attorneys," GSICA restricts the activities of and imposes licensure requirements on non-attorneys in the business of providing information and assistance in immigration matters.

To provide any of the limited services allowed under the Act (limited generally to transcription, translation, form completion, and document retrieval), an individual or business must first obtain a license from the Secretary of State.

GSICA functions to delineate between attorneys and non-attorneys by forbidding non-attorneys from accepting payment for the provision of legal advice, analysis, or judgment. Non-attorneys must go so far as to post signs, in multiple languages, making clear that they are not licensed to practice law or dispense legal advice. Violations of GSICA provisions are subject to a \$1000.00 fine per offense.

Exempted from the Act's restrictions are licensed attorneys, those directly supervised by an attorney, non-profits recognized by the Board of Immigration Appeals, and employers providing advice to current or prospective non-citizen employees. Employers' advice must be given free of charge.

Immigration assistance regulations also take effect July 1, 2007.

If you have any further inquiries regarding GSICA, please contact:

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