CHAPTER 8

Illegal Aliens and Private Employment

Editor’s Note

2008 Act No. 280, Section 20 provides as follows:

“If any subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of Section 19 [adding Sections 41‑8‑10 e seq.] is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of the section, the General Assembly hereby declaring that it would have passed this act, and each and every subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.”

**SECTION 41‑8‑10.** Definitions.

 As used in this chapter:

 (A) “Agency” means any agency, department, board, commission, or political subdivision of this State that issues licenses for the purposes of operating a business in this State.

 (B) “Director” means the Director of the Department of Labor, Licensing and Regulation or the director’s designee.

 (C) “License” means an agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency or political subdivision of this State for the purpose of operating a business in this State, excluding professional licenses, but including employment licenses, articles of organization, articles of incorporation, a certificate of partnership, a partnership registration, a certificate to transact business, or similar forms of authorization issued by the South Carolina Secretary of State, and any transaction privilege tax license.

 (D) “Political subdivision” includes counties, cities, towns, villages, townships, districts, authorities, and other public corporations and entities whether organized and existing under charter or general law.

 (E) “Private employer” means any:

 (1) person or entity that transacts business in this State, is required to have a license issued by an agency, department, board, commission, or political subdivision of this State that issues licenses for the purposes of operating a business in this State, and employs one or more employees in this State, as defined in Section 12‑8‑10;

 (2) person or entity carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person; or

 (3) person or entity for whom an individual performs a service or sells a good, of whatever nature, as an employee, as defined in Section 12‑8‑10.

 (F) “Unauthorized alien” means an unauthorized alien as defined by 8 U.S.C. Section 1324a(h)(3).

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 8, eff January 1, 2012.

Effect of Amendment

The 2011 amendment rewrote the definitions for “Agency”, “Director”, “License”, and “Private employer”; and added the definition for “Unauthorized alien”.

CROSS REFERENCES

South Carolina employment licenses, federal work authorization program, requirements for verification of new employees, assistance to employers, contractors and subcontractors, see Section 41‑8‑20.

LAW REVIEW AND JOURNAL COMMENTARIES

Preemption and United States v. South Carolina: Undermining our nation’s border and the Constitution’s border between State and Federal sovereignty. Honorable George E. “Chip” Campsen, III, 65 S.C. L. Rev. 901 (Summer 2014).

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

**SECTION 41‑8‑20.** South Carolina employment licenses; federal work authorization program; requirements for verification of new employees; assistance to employers; contractors and subcontractors.

 (A) All private employers in South Carolina shall be imputed a South Carolina employment license, which permits a private employer to employ a person in this State. A private employer may not employ a person unless the private employer’s South Carolina employment license and any other applicable licenses as defined in Section 41‑8‑10 are in effect and are not suspended or revoked. A private employer’s employment license shall remain in effect provided the private employer complies with the provisions of this chapter.

 (B) All private employers who are required by federal law to complete and maintain federal employment eligibility verification forms or documents must register and participate in the E‑Verify federal work authorization program, or its successor, to verify the work authorization of every new employee within three business days after employing a new employee. A private employer who does not comply with the requirements of this subsection violates the private employer’s licenses.

 (C) The South Carolina Department of Employment and Workforce shall provide private employers with technical advice and electronic access to the E‑Verify federal work authorization program’s website for the sole purpose of registering and participating in the program.

 (D) Private employers shall employ provisionally a new employee until the new employee’s work authorization has been verified pursuant to this section. A private employer shall submit a new employee’s name and information for verification even if the new employee’s employment is terminated less than three business days after becoming employed. If a new employee’s work authorization is not verified by the federal work authorization program, a private employer must not employ, continue to employ, or reemploy the new employee.

 (E) To assist private employers in understanding the requirements of this chapter, the director shall send written notice of the requirements of this section to all South Carolina employers, and shall publish the information contained in the notice on its website. Nothing in this section shall create a legal requirement that any private employer receive actual notice of the requirements of this chapter through written notice from the director, nor create any legal defense for failure to receive notice.

 (F) If a private employer is a contractor, the private employer shall maintain the contact phone numbers of all subcontractors and sub‑subcontractors performing services for the private employer. The private employer shall provide the contact phone numbers or a contact phone number, as applicable, to the director pursuant to an audit or investigation within seventy‑two hours of the director’s request.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 9, eff January 1, 2012.

Code Commissioner’s Note

Pursuant to the directive to the Code Commissioner in 2010 Act No. 146, Section 122, “Department of Employment and Workforce” was substituted for all references to “Employment Security Commission”, and “Executive Director of the Department of Employment and Workforce” or “executive director” was substituted for all references to the “Chairman of the Employment Security Commission” or “chairman” that refer to the Chairman of the Employment Security Commission, as appropriate.

Effect of Amendment

The 2011 amendment rewrote the section.

CROSS REFERENCES

Violations, investigations, suspension and revocation of license, see Section 41‑8‑50.

RESEARCH REFERENCES

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 42:10, Employment Verification Required of Employer.

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

Immigration Reform and Control Act, unauthorized alien employment law, preemption, Illegal Immigration Reform and Immigrant Responsibility Act, see Chamber of Commerce of U.S. v. Whiting, 2011, 131 S.Ct. 1968, 563 U.S. 582, 179 L.Ed.2d 1031.

**SECTION 41‑8‑30.** Employment of unauthorized alien.

 A private employer who knowingly or intentionally employs an unauthorized alien violates the private employer’s licenses.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 10, eff January 1, 2012.

Effect of Amendment

The 2011 amendment substituted “who knowingly or intentionally employs an unauthorized alien violates the private employer’s licenses” for “shall not knowingly or intentionally employ an unauthorized alien”.

CROSS REFERENCES

Violations, investigations, suspension and revocation of license, see Section 41‑8‑50.

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

**SECTION 41‑8‑40.** Presumption of compliance.

 For purposes of this chapter, a private employer who in good faith verifies the immigration status of a new employee pursuant to Section 41‑8‑20 must be presumed to have complied with the provisions of Section 41‑8‑20 and Section 41‑8‑30.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 11, eff January 1, 2012.

Effect of Amendment

The 2011 amendment substituted “Section 41‑8‑20 must” for “subsection (B)(1) of Section 41‑8‑20 shall”.

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

**SECTION 41‑8‑50.** Violations; investigations; suspension and revocation of license.

 (A) Upon receipt of a written and signed complaint against a private employer, or upon an investigation initiated by the director for good cause, if the director finds reasonable grounds exist that a private employer violated the provisions of Section 41‑8‑20 or Section 41‑8‑30, the director shall institute an investigation of the alleged violation. The director shall verify the work authorization status of the alleged unauthorized alien with the federal government pursuant to 8 U.S.C. Section 1373(c). A state, county, or local official must not attempt to independently determine if an alien is authorized to work in the United States.

 (B) If, after completing the investigation, and after reviewing any information or evidence submitted by the private employer demonstrating compliance with the provisions of this chapter, the director determines that substantial evidence exists to support a finding that the private employer has committed a violation of Section 41‑8‑20 or Section 41‑8‑30, the director shall:

 (1) notify the United States Immigration and Customs Enforcement of suspected unauthorized aliens employed by the private employer;

 (2) notify state and local law enforcement agencies responsible for enforcing state immigration laws of the employment of suspected unauthorized aliens by the employer; and

 (3) take appropriate action in accordance with subsection (D) of this section.

 (C) The director must not bring an action against a private employer for any employee who has been employed for three business days or less at the time of the director’s inspection or random audit. A second occurrence involving a violation of this section must be based only on an employee who is employed by the private employer after a first action has been brought for a violation of Section 41‑8‑20 or Section 41‑8‑30.

 (D) Upon a finding of an occurrence involving a violation after an investigation pursuant to subsection (A), or after a random audit pursuant to Section 41‑8‑120(B), where the director considered all information or evidence gathered by the director and any information or evidence submitted by the private employer demonstrating compliance with the provisions of this chapter:

 (1)(a) prior to July 1, 2012, for a first occurrence involving a violation of Section 41‑8‑20, the private employer shall, upon notification by the director of a violation of Section 41‑8‑20, swear or affirm in writing that the private employer has complied with the provisions of 8 U.S.C. Section 1324a from the effective date of this section to the time the private employer received notification from the director, and shall comply with the provisions of Section 41‑8‑20 within three business days. Failure to swear or affirm compliance in writing or failure to comply with Section 41‑8‑20 within three business days requires that the private employer be placed on probation for a period of one year, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Section 41‑8‑20. The director shall provide appropriate assistance to the private employer to aid the private employer in complying with Section 41‑8‑20 within the three business day period. The director may extend the three business day period, as necessary, if the director determines that more time is required for compliance. Any subsequent occurrence involving a violation of Section 41‑8‑20 by the private employer must result in the suspension of the private employer’s licenses for at least ten days, but not more than thirty days, by the director, except, if a private employer has not committed a violation of Section 41‑8‑20 within the previous three years, a subsequent occurrence must be treated as a first occurrence. If a private employer has ever committed a violation of Section 41‑8‑30, the private employer’s licenses must be suspended for at least ten days but not more than thirty days for any violation or subsequent occurrence involving a violation of Section 41‑8‑20. The director shall verify the work authorization status of the employees with the federal government pursuant to 8 U.S.C. Section 1373(c) and notify the private employer of the results. The private employer shall immediately terminate an employee whose work authorization was not verified upon being notified by the director. The director shall notify federal, state, and local law enforcement officials of any suspected unauthorized aliens employed by the private employer;

 (b) on or after July 1, 2012, for a first occurrence involving a violation of Section 41‑8‑20, the private employer shall, upon notification by the director of a violation of Section 41‑8‑20, immediately comply with the provisions of Section 41‑8‑20, and the private employer must be placed on probation for a period of one year, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Section 41‑8‑20. Any subsequent occurrence involving a violation of Section 41‑8‑20 by the private employer must result in the suspension of the private employer’s licenses for at least ten days but not more than thirty days by the director, except, if a private employer has not committed a violation of Section 41‑8‑20 within the previous three years, a subsequent occurrence must be treated as a first occurrence. If a private employer has ever committed a violation of Section 41‑8‑30, the private employer’s licenses must be suspended for at least ten days but not more than thirty days for any violation or subsequent occurrence involving a violation of Section 41‑8‑20. The director shall verify the work authorization status of the employees with the federal government pursuant to 8 U.S.C. Section 1373(c) and notify the private employer of the results. The private employer shall immediately terminate an employee whose work authorization was not verified upon being notified by the director. The director shall notify federal, state, and local law enforcement officials of any suspected unauthorized aliens employed by the private employer;

 (2) for a first occurrence involving a violation of Section 41‑8‑30, the private employer’s licenses must be suspended, and must remain suspended for at least ten days but not more than thirty days. During the period of suspension, the private employer may not engage in business, open to the public, employ an employee, or otherwise operate. After the period of suspension, the private employer’s licenses must be reinstated, permitting the private employer to engage in business and to employ an employee, if the private employer:

 (a) demonstrates that the private employer has terminated the unauthorized alien; and

 (b) pays a reinstatement fee equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars;

 (3) for a second occurrence involving a violation of Section 41‑8‑30, the private employer’s licenses must be suspended, and must remain suspended for at least thirty days but not more than sixty days. During the period of suspension, the private employer may not engage in business, open to the public, employ an employee, or otherwise operate. After the period of suspension, the private employer’s licenses must be reinstated, permitting the private employer to engage in business, open to the public, employ an employee, and otherwise operate, if the private employer:

 (a) demonstrates that the private employer has terminated the unauthorized alien; and

 (b) pays a reinstatement fee equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars;

 (4) for a third or subsequent occurrence involving a violation of Section 41‑8‑30, the private employer’s licenses must be revoked, and the private employer may not engage in business, open to the public, employ an employee, or otherwise operate. For a third occurrence only, after ninety days, a private employer may petition the director for a provisional license. A provisional license permits a private employer to engage in business, open to the public, employ an employee, and otherwise operate. The director may grant the private employer permission to apply for a provisional license if the private employer:

 (a) agrees to be on probation for a period of three years, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Sections 41‑8‑20 and 41‑8‑30;

 (b) demonstrates that the private employer has terminated the unauthorized alien; and

 (c) pays a reinstatement fee equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars.

 For all other occurrences where a private employer’s licenses are revoked, the private employer may not seek reinstatement of the private employer’s licenses for a period of five years. After five years, the director may grant reinstatement of a private employer’s licenses if the private employer:

 (a) agrees to be on probation for a period of three years, during which time the private employer shall submit quarterly reports to the director demonstrating compliance with the provisions of Sections 41‑8‑20 and 41‑8‑30;

 (b) demonstrates that the private employer has terminated the unauthorized alien; and

 (c) pays a reinstatement fee equal to the cost of investigating and adjudicating the matter, provided that the reinstatement fee must not exceed one thousand dollars.

 (5) If a private employer engages in business or employs a new employee during the period that the private employer’s licenses are suspended, the private employer’s licenses must be revoked, and must not be reinstated for a period of five years, and only upon a determination by the director that the private employer has complied with the provisions of item (4) of this subsection.

 (E) For purposes of this chapter, it shall be a separate violation each time the private employer fails to verify the immigration status of a new employee as required by Section 41‑8‑20.

 (F) In taking any disciplinary action for a violation of Section 41‑8‑20 or Section 41‑8‑30, the director shall base the director’s determination on any evidence or information collected during the investigation or submitted for consideration by the employer, and shall consider the following factors, if relevant:

 (1) the number of employees for whom the private employer has failed to verify their immigration status;

 (2) the prior violations of this chapter by the private employer;

 (3) the size of the private employer’s workforce;

 (4) any actions taken by the private employer to comply with federal immigration laws or with the provisions of this chapter;

 (5) any actions taken by the private employer subsequent to the inspection or random audit to comply with the provisions of this chapter;

 (6) the duration of the violation;

 (7) the degree of the violation; and

 (8) the good faith of the private employer.

 (G) Reinstatement fees assessed in accordance with this section must be used to cover the administrative costs of implementing, investigating, and enforcing the provisions of this chapter.

 (H) The director shall maintain a list of all private employers who have had their licenses disciplined pursuant to this chapter and shall publish the list on the agency’s website. The director shall remove a private employer from the list who has committed only a first occurrence pursuant to Section 41‑8‑20 six months after the private employer’s name has been published, if the private employer has not subsequently had their licenses disciplined pursuant to this chapter within the one year probation period.

 (I) If a private employer continues to engage in business after the private employer’s licenses have been revoked pursuant to this chapter, the director must seek an injunction from the Administrative Law Court to enjoin the private employer from continuing to operate the private employer’s business for which the private employer’s licenses were revoked or from employing new employees.

 (J) The director shall notify the applicable licensing agency or political subdivision if the director determines that a private employer’s license must be suspended or revoked pursuant to this section. The applicable agency or political subdivision immediately shall suspend or revoke the private employer’s license.

 (K) A license suspension or revocation pursuant to this section:

 (1) does not constitute a dissolution, liquidation, or a winding down process; or a transfer, or other taxable event for tax purposes, including, but not limited to, taxes imposed or authorized by Title 12; and

 (2) does not affect protections against personal liability provided in Title 33.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 12, eff January 1, 2012.

Effect of Amendment

The 2011 amendment rewrote the section.

CROSS REFERENCES

Administrative review of any revocation, civil penalty, or other disciplinary action against the employment license of a private employer, see S.C. Code of Regulations R. 71‑10001.

Federal Aspects

Communication between Government agencies and the Immigration and Naturalization Service, see 8 U.S.C.A. Section 1373.

Unlawful employment of aliens, see 8 U.S.C.A. Section 1324a.

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

**SECTION 41‑8‑60.** Review of disciplinary action.

 A private employer may seek review of the director’s disciplinary action pursuant to Section 41‑8‑50 with the Administrative Law Court, and the action must be brought in accordance with the provisions of Chapter 23, Title 1.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 13, eff January 1, 2012.

Effect of Amendment

The 2011 amendment rewrote the section.

CROSS REFERENCES

Administrative review of any revocation, civil penalty, or other disciplinary action against the employment license of a private employer, see S.C. Code of Regulations R. 71‑10001.

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

**SECTION 41‑8‑70.** Filing false or fraudulent documents; penalty.

 In addition to other penalties provided for by law, a person who knowingly makes or files any false, fictitious, or fraudulent document, statement, or report pursuant to this chapter is guilty of a felony and, upon conviction, must be fined within the discretion of the court or imprisoned for not more than five years, or both.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.

**SECTION 41‑8‑80.** Local ordinances limiting enforcement of chapter.

 A local government must not enact an ordinance or policy that limits or prohibits a law enforcement officer, local official, or local government employee from seeking to enforce the provisions of this chapter.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.

**SECTION 41‑8‑90.** Equal enforcement of chapter.

 The provisions of this chapter are enforceable without regard to race, religion, gender, ethnicity, or national origin.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.

**SECTION 41‑8‑100.** Compliance with federal immigration requirements.

 Nothing in this chapter shall be construed to abrogate a private employer’s obligation to comply with federal immigration law, including the proper completing and maintaining of federal employment eligibility verification forms or documents.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.

**SECTION 41‑8‑110.** Exemption from civil action for wrongful termination.

 A private employer who terminates an employee to comply with the provisions of this chapter shall not be subject to a civil action for wrongful termination of the employee under Section 41‑1‑30 or as otherwise provided for by law.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.

**SECTION 41‑8‑120.** Promulgation of regulations; statewide random auditing program.

 (A) The director shall promulgate regulations in accordance with the provisions of Chapter 23, Title 1 to establish a procedure for administrative review of any disciplinary action against a private employer pursuant to this chapter.

 (B) The director shall develop a statewide random auditing program to inspect private employers for compliance with the provisions of this chapter, and shall promulgate regulations in accordance with the provisions of Chapter 23 of Title 1 of the South Carolina Code of Laws governing the implementation of the audit program.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008; 2011 Act No. 69, Section 14, eff January 1, 2012.

Effect of Amendment

The 2011 amendment, in subsection (A), substituted “disciplinary action against a private employer” for “revocation, civil penalty, or other disciplinary action assessed against a private employer or his South Carolina employment license”.

CROSS REFERENCES

Audit program, illegal aliens and private employment, see S.C. Code of Regulations R. 71‑10002.

Violations, investigations, suspension and revocation of license, see Section 41‑8‑50.

United States Supreme Court Annotations

Deportation or removal, federal law preempts most of Arizona immigration law, see Arizona v. U.S., 2012, 132 S.Ct. 2492, 567 U.S. 387, 183 L.Ed.2d 351, on remand 689 F.3d 1132. Aliens, Immigration, and Citizenship 103; States 18.43

**SECTION 41‑8‑130.** Right of entry and inspection by inspectors.

 The director, his inspectors, agents, or designees, upon proper presentation of credentials to the owner, manager, or agent of the employer, may enter at reasonable times and have the right to question either publicly or privately any employer, owner, manager, or agent and the employees of the private employer and inspect, investigate, reproduce, or photograph original business records relevant to determining compliance with the provisions of this chapter.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.

CROSS REFERENCES

Records retention, illegal aliens and private employment, see S.C. Code of Regulations R. 71‑10003.

**SECTION 41‑8‑140.** Retention and use of funds collected.

 All amounts collected pursuant to this chapter shall be retained by the director and must be used to fund the costs of implementing and enforcing the provisions of this chapter.

HISTORY: 2008 Act No. 280, Section 19, eff June 4, 2008.