

I. Litigation (as of November 2011)

The Beason-Hammon Alabama Taxpayer and Citizen Protection Act (the “Act”) became law on June 9, 2011. From the beginning, the Act has been in the news, both locally and nationally. More recently, the Act became the focal point for a series of lawsuits seeking to have the federal courts enjoin the enforcement of several of its provisions. Plaintiffs in these lawsuits include the United States and various private parties.

Litigation began when the Department of Justice, acting on behalf of the United States, filed suit in federal district court on August 1, 2011. The Department asked the court to declare invalid and to preliminarily and permanently enjoin the enforcement of numerous provisions of the Act on the basis that those provisions are preempted by federal law and therefore violate the Supremacy Clause of the United States Constitution. The Hispanic Coalition of Alabama (HICA) also filed a lawsuit in federal district court, principally arguing that the Act is unconstitutional in its entirety and asking that the court enjoin its enforcement. Finally, leaders of the Episcopal, Methodist, and Roman Catholic churches of Alabama filed suit in federal district court similarly arguing that the Act is unconstitutional in its entirety. The church leaders argued that the Act, at least some parts of it, violated the First Amendment rights of members of Alabama's faith community to freely exercise their requisite duty to practice the Gospel. They also sought an injunction against enforcement of part of the Act.

On August 29, 2011, the district court judge, Sharon Lovelace Blackburn, temporarily enjoined enforcement of the Act until September 29, 2011 in order to allow more time to consider the various challenges. Subsequently, on September 28, 2011, the court granted in part the U.S. motion to enjoin various sections of the Act by preliminarily enjoining enforcement of four of the nine sections that were the subject of the motion. It should be noted that the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. When that trial is held, the injunction may or may not be made permanent. The HICA motion for preliminary injunction was granted in part and denied in part. The churches's amended motion for preliminary injunction, which only concerned two sections of the Act, was denied as to one section. The motion was declared moot as to the other section, since the latter had already been enjoined by the court's decision in response to the motion brought by the U.S.

HICA and the U.S. next filed petitions for an interlocutory appeal (an appeal that occurs prior to the trial court's final decision in the entire case) on September 29 and September 30, 2011, respectively. The petitions requested that the Eleventh Circuit Court of Appeals permit an appeal of the lower court's decision not to enjoin certain sections of the Act prior to its final ruling in the case. At the same time, the parties requested by motion that the district court enjoin, pending resolution of the interlocutory appeal, the enforcement of the sections not previously enjoined by the court. The district court denied this motion.

On October 7, 2011, both the U.S. and HICA filed motions with the Eleventh Circuit Court of Appeals asking it to grant injunctions with respect to six sections of the Act, pending the interlocutory appeal of the district court's decision. The Court of Appeals enjoined two of the sections, pending appeal, leaving the other four in full force and effect. As is the case with preliminary injunctions, decisions regarding injunctions pending appeal are not final decisions. The next step in the chain of litigation will be the Eleventh Circuit's hearing on the merits of the interlocutory appeal of the September 28, 2011 orders of the federal district court.

II. The Act in General

The Act was prompted by the Alabama legislature's finding that illegal immigration is causing economic hardship and lawlessness in the state and that illegal immigration is encouraged when public agencies within the state provide public benefits without verifying immigration status. To address this situation, the Act imposes restrictions and requirements, including the provisions described below that are indicative of its far-ranging scope:

- *Section 11*

This section makes it unlawful for an unauthorized alien (one whose federal immigration status does not authorize him/her to work) to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state. Violation of this section is a Class C misdemeanor subject to a fine of not more than \$500.

- *Section 13*

Section 13 prohibits concealing the presence of an alien, transporting an alien in furtherance of an unlawful presence, or harboring an alien by entering into a rental agreement to provide accommodations knowingly, or in reckless disregard of the fact, that the alien's presence in this country violates federal law. Depending upon the number of aliens involved, violations of this section may be a Class A misdemeanor or a Class C felony. First responders or protective services providers acting in their official capacity are exempt from the provisions dealing with the harboring or transporting of illegal aliens.

- *Section 16*

This section states that payments for services paid to an unauthorized alien shall not be allowed as a deductible business expense for any state income or business tax purposes in Alabama.

- *Section 17*

A new employment "discriminatory practice" is created by this section. An employer is guilty of such a discriminatory practice if it fails to hire a job applicant who is a United States citizen or who is an alien authorized by federal law to work in the United States, while at the same time retaining or hiring an employee who is known (or who reasonably should have been

known) to be an unauthorized alien. The same rule applies in the situation where a citizen or authorized alien is discharged while a known unauthorized alien is hired or retained in the work force. Employers engaging in such a discriminatory practice may be sued for compensatory relief in the state courts.

- *Section 27*

Under this section, Alabama courts are not to enforce a contract between a party and an illegal alien, under certain circumstances. The first of these circumstances involves the party's knowledge (direct or constructive) that the alien was in an unlawful status at the time the contract was entered into. The other circumstance is that the contract requires the alien to remain in the United States for more than 24 hours after the time the contract was made or, at least, that the alien could not reasonably be expected to perform without remaining here for such period. There are a couple of types of contracts that are outside the scope of this provision: a contract for one night's lodging, a contract for food for the alien, and a medical services contract. It is also inapplicable to a contract to transport the alien back to his/her country of origin. Finally, it is not applicable to any contract authorized by federal law.

- *Section 28*

Alabama public elementary and secondary schools will be required, under *Section 28*, to determine whether an enrolling student qualifies for an "English as a Second Language" (ESL) class or another remedial program. This determination is to be based on a finding that the student was born outside the jurisdiction of the United States or is the child of an illegal alien. Reports of the numbers of citizens, lawful aliens, and illegal aliens in the school and the number of students in each category participating in ESL classes are to be collected by the school districts for each school and submitted annually to the State Board of Education. A report of this data, aggregated by school, along with an impact analysis regarding the effect on educational quality of the presence of unlawful aliens in the schools, is to be made annually to the legislature.

- *Section 29*

Applications for voter registration are to furnish, under this section, voter eligibility requirements and other information to prevent duplicative voter registrations. An applicant is not to be registered until he or she has provided satisfactory evidence of United States citizenship. Documents that demonstrate citizenship are listed. The section expressly states that proof of voter registration from another state is not satisfactory evidence of United States citizenship.

III. Sections of the Act of Special Interest to the University

A. Enjoined Provisions Clearly Affecting the University

Only one of the enjoined provisions clearly affects the University - the prohibition on public universities' enrolling unlawful aliens (*Section 8*). The University already takes steps to ensure that aliens not lawfully in the U.S. do not enroll in or attend the University.

B. Provisions Not Enjoined That Affect the University

Use of E-Verify in Employment: All employers were required to enroll in and use E-Verify by **April 1, 2011** (*Section 15*). The University was already enrolled in E-Verify and was already using E-Verify with regard to all new hires and where required by federal contracts.

Use of E-Verify by Contractors: The University will implement by **January 1, 2012** a process requiring parties awarded University contracts through the competitive bid process (contracts over \$7,500 and public works over \$50,000) to declare and maintain sworn affidavits that they are enrolled in and are using E-Verify (*Section 9*). Subcontractors on such contracts must meet similar requirements.

Provisions Impacting Campus Police: The University's campus police will continue to follow the law's requirement that a law enforcement officer making a lawful stop or arrest seek to determine the individual's citizenship and immigration status, when "reasonable suspicion" exists that the individual is an unlawful alien (*Section 12*). Campus police will also comply with a provision requiring officers to seek a determination of citizenship or immigration status for certain persons arrested for failure to have a driver's license in their immediate possession (*Section 18*).

C. Provisions Not Enjoined Which May or May Not Affect the University

Prohibition on Furnishing State and Local Benefits to Unlawful Aliens: This section (*Section 7*) appears to be directed toward means-tested public assistance programs such as those administered by the Alabama Medicaid Agency. An Alabama Attorney General opinion is being sought declaring this section inapplicable to the University. This opinion is being sought in conjunction with Auburn and The University of South Alabama.

Prohibition on Unlawful Aliens Entering into Business Transactions with the State: In considering whether to issue a preliminary injunction regarding this section (*Section 30*), Judge Blackburn construed this prohibition narrowly as only prohibiting the issuance of licenses by the State. So long as this interpretation is ultimately upheld, this provision will not affect the University since it does not issue licenses. Additionally, the Attorney General's opinion mentioned last above will seek a declaration that this section does not apply to the University.

Governor Bentley and others have described the Act as the nation's toughest such law. The Governor has recently revealed that, while he will seek changes to the Act to simplify it, he has no plans to make the Act less strict. This appears to set the stage for protracted litigation.