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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:

R-07-0007

PETITION TO ADD RULE 65.2 OF THE
ARIZONA RULES OF CIVIL PROCEDURE.

MARICOPA COUNTY ATTORNEY'S
COMMENTS TO PETITION TO ADD RULE
65.2 OF THE ARIZONA RULES OF CIVIL
PROCEDURE

The Maricopa County Attorney's Office hereby comments on the Petition to Add Rule 65.2 of the Arizona Rules of Civil Procedure.

Respectfully submitted this ____ day of November, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

By: _____
PHILIP J. MACDONNELL
CHIEF DEPUTY

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Rule 65.2(a) and (b)**

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4 Proposed Rule 65.2(a) and (b) prescribe the information that must be provided by a county
5 attorney’s office in filing a complaint alleging a violation of Arizona Revised Statutes § 23-212. The
6 proposed rule requires a county attorney’s office to file a verified complaint, Rule 65.2(a), and provide
7 significant detail in the opening pleading of an action alleging a violation of this law, Rule 65.2(b).

8 Concerning the requirement of a verified complaint, Rule 65.2(a) creates a procedural hurdle
9 that the statute creating the cause of action does not require. A.R.S. § 23-212, which establishes the
10 “employer sanctions” law, has no provision that supports the requirement in proposed Rule 65.2(a) of a
11 verified complaint. In contrast, the Legislature in subsection F(2)(d) requires an employer to file a
12 “signed sworn affidavit with the county attorney” in certain situations. The Legislature in this statute
13 when it wanted to impose additional filing requirements showed that it knew how to do so. The
14 Supreme Court should not create procedural thresholds that the Legislature did not prescribe.

15
16 Arizona has long been a notice pleading state. *Folk v. City of Phoenix*, 27 Ariz.App. 146, 151,
17 551 P.2d 595, 600 (Ariz. App. 1976). Because of this, the requirements for an initial complaint are
18 “minimal.” *See Rowland v. Kellog Brown and Root, Inc.*, 210 Ariz. 530, 534, 115 P.3d 124, 128 (Ariz.
19 App. 2005).

20
21 In a notice pleading regime, “technical pleading requirements are rejected in favor of an
22 approach designed to reach the merits of an action.” *U.S. ex rel. Bledsoe v. Community Health Systems,*
23 *Inc* 501 F.3d 493¹ (6th Cir. 2007). As the United States Supreme Court stated in *Conley v. Gibson*:
24 “[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by
25 counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to
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¹ Probably due to how recent this decision is, there are no page numbers displayed for this case on Westlaw.

1 facilitate a proper decision on the merits.” 355 U.S. 41, 48, 78 S.Ct. 99, 103 (1957)(overruled on other
2 grounds by *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (2007)).

3 In addition, an action against an employer under A.R.S. § 23-212 does not fall into the
4 longstanding exceptions to the notice pleading standards, that is, that allegations of fraud and mistake
5 must be plead with particularity. Ariz.R.Civ.P. Rule 9(b).
6

7 In adopting this draft rule, the Supreme Court would be carving out a special exemption to the
8 notice pleading policy that has governed civil actions in Arizona for decades. *See Folk v. City of*
9 *Phoenix*, 27 Ariz.App. at 151, 551 P.2d at 600. The risk in doing that is that pleadings would again
10 become a game of special skill that would impair the ability of the courts and the parties to procure
11 decisions on the merits. In cases alleging a violation of A.R.S. § 23-212, instead of the main issue
12 being whether an employer knowingly hired an illegal alien, the main issue will too often be whether
13 the state met the technical, esoteric pleading requirements of Rule 65.2.
14

15 This is precisely why notice pleading was adopted—to facilitate decisions on the merits, not
16 legal showmanship at the pleading stage. Proposed Rule 65.2 embodies special rules and protections in
17 favor of employers that other Arizonans do not enjoy. A departure from notice pleading is not merited
18 in this instance and should be rejected by the Court. Instead subsections (a) and (b) of Rule 65.2 should
19 be consolidated into a simple requirement as follows:
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21 (A) AN ACTION BROUGHT BY THE COUNTY ATTORNEY PURSUANT TO A.R.S. § 23-
22 212 SHALL BE COMMENCED BY FILING A COMPLAINT WITH THE CLERK OF THE
23 SUPERIOR COURT. THE COMPLAINT SHALL COMPLY WITH THE REQUIREMENTS
24 OF RULE 8(A) OF THESE RULES.

25 **Rule 65.2(c) through (i)**

26 The Maricopa County Attorney’s Office supports these subsections of the proposed Rule 65.2.
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1 **Rule 65.2(j)—Enforcement of Court Orders**

2 This provision is simply too complicated, and unnecessarily burdens the state. Under A.R.S. §
3 23-212, if an employer is found to have violated the statute for the first time, the court is required to
4 order the employer to file, within three days, a sworn affidavit with the state that the employer has
5 terminated all unauthorized workers and will not knowingly hire unauthorized workers in the future. If
6 an employer fails to this, the employer’s licenses are suspended until it does.
7

8 The rule requires the county attorney to file an application for an order to show cause why the
9 employer’s license should not be suspended. Instead of placing this burden on the state, when it orders
10 the employer to file the affidavit with the county attorney, the court should simply order the employer
11 to file a notice of filing of the affidavit with the court contemporaneously with the filing of the affidavit
12 with the county attorney.
13

14 Under the procedure that we propose, the court can simply take action if it does not receive this
15 notification within the prescribed time. And this is more consistent with the statute, which prescribes
16 license suspension if there is no affidavit filed within three days, and does not contemplate the delays
17 and burden to the state inherent in an order to show cause process. Instead of the proposed first two
18 paragraphs of Rule 65.2(j) we would propose the following two new paragraphs:
19

20 **(j) Enforcement of Court Orders.**

21 (1) AN EMPLOYER SUBJECT TO THE ENTRY OF AN ORDER UNDER
22 A.R.S. § 23-212(F)(1) OR A.R.S. § 23-212(F)(2) FOR A FIRST
23 VIOLATION SHALL FILE WITH THE COURT A COPY OF THE
24 TIMELY SWORN AFFIDAVIT REQUIRED BY A.R.S. § 23-212(F)(1)(c)
25 OR A.R.S. § 23-212(F)(2)(d) TO BE FILED WITH THE COUNTY
26 ATTORNEY.

27 (2) IF AN EMPLOYER FAILS TO FILE WITH THE COURT THE
28 AFFIDAVIT PRESCIBED IN PARAGRAPH (1) IN A TIMELY MANNER
THE COURT SHALL IMMEDIATELY ORDER THE APPROPRIATE
LICESNING AGENCIES TO SUSPEND INDEFINITELY ALL
APPLICABLE LICENSES HELD BY THE EMPLOYER.

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The Maricopa County Attorney's Office supports the remaining two paragraphs of Rule 64.5(j)

Rule 65.2(k) through (m)

The Maricopa County Attorney's Office supports these subsections of the proposed Rule 65.2.

Respectfully submitted this ____ of November, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

By: _____
PHILIP J. MACDONNELL
CHIEF DEPUTY

Copies of the forgoing mailed
this ___ day of November, 2007 to:

Clerk of the Court
Arizona Supreme Court

David K. Byers, Director
Administrative Office of the Courts
1501 West Washington
Phoenix, AZ 85007