

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 2040

INTRODUCER: Judiciary Committee and Judiciary Committee

SUBJECT: Unauthorized Immigrants

DATE: April 6, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	Fav/CS
2.			CJ	
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill prescribes multiple requirements and other provisions relating to unauthorized immigrants. The principal provisions include:

- Requiring employers, effective July 1, 2012, to verify the employment eligibility of new employees using the federal E-Verify Program;
- Providing an exemption from the requirement to register with the E-Verify Program if the employer requests and receives from each new employee a driver's license or identification card that complies with the federal REAL ID Act of 2005 and if the employer checks the document using authentication equipment and software;
- Specifying that the exemption procedures are designed to combat fraud and may not be used for a discriminatory purpose;
- Providing that an employer is not liable for wrongful termination of an employee stemming from compliance with the employment-verification procedures;
- Authorizing the suspension of an employer's license during the period of noncompliance with the bill's verification requirements;
- Authorizing the Department of Corrections to pursue an agreement with the U.S. Department of Homeland Security for the training of department employees as jail enforcement officers

to help enforce federal immigration law, pursuant to section 287(g) of the federal Immigration and Nationality Act (“287(g) agreement”);

- Directing the Department of Law Enforcement to perform all actions reasonably necessary to meet the obligations of its 287(g) agreement with the U.S. Department of Homeland Security, under which department employees are trained as task force officers;
- Encouraging sheriffs to pursue 287(g) agreements;
- Directing a prison, jail, or other detention facility that has custody of a person after his or her conviction of a dangerous crime to make reasonable efforts to determine the person’s nationality and whether he or she is present in the United States lawfully;
- Providing for the Department of Corrections to release certain criminal aliens convicted of nonviolent offenses to the custody of the federal government as part of the Rapid REPAT Program; and
- Requiring the Agency for Workforce Innovation to quantify the costs to the state related to unauthorized immigration and to seek financial remuneration from the federal government.

This bill creates the following sections of the Florida Statutes: 448.30, 448.31, and 945.80. The bill also creates an undesignated section of the Florida Statutes.

II. Present Situation:

Background on Unauthorized Immigration¹

Immigration into the United States is largely governed by the Immigration and Nationality Act (“INA”).² The INA utilizes several federal agencies, including the Department of Justice, Department of Homeland Security (DHS), and Department of State to administer and enforce federal immigration policies.³ An alien is a person present in the United States who is not a citizen of the United States.⁴ The INA provides for the conditions whereby an alien may be admitted to and remain in the United States⁵ and provides a registration system to monitor the entry and movement of aliens in the United States.⁶ An alien may be subject to removal for certain actions, including entering the United States without inspection, presenting fraudulent documents at a port of entry, health reasons, violating the conditions of admission, or engaging in certain other proscribed conduct.⁷

Various categories of legal immigration status exist that include students, workers, tourists, research professors, diplomats, and others.⁸ These categories are based on the type and duration of permission granted to be present in the United States, and expire based on those conditions. All lawfully present aliens must have appropriate documentation based on status.⁹

¹ Significant portions of the “Present Situation” section of this bill analysis are from the staff analysis of PCB JDC 11-01, prepared by the House Committee on Judiciary (Mar. 3, 2011; used with permission).

² 8 U.S.C. s. 1101, et seq.

³ See, e.g., *id.* ss. 1103-1104.

⁴ *Id.* s. 1101(a)(3).

⁵ *Id.* ss. 1181-1182, 1184.

⁶ *Id.* ss. 1201(b), 1301-1306.

⁷ *Id.* ss. 1225, 1227, 1228, 1229, 1229c, 1231.

⁸ *Id.* ss. 201- 210.

⁹ *Id.* s. 221.

It has been reported that an estimated 825,000 unauthorized immigrants were present in Florida in 2010, representing 4.5 percent of Florida's population of 18,492,000 – a decline from 1.05 million unauthorized immigrants in 2007.¹⁰ Nevertheless, Florida continued to rank third among states in the size of its unauthorized immigrant population.¹¹ Of Florida's 9,064,000 total work force, 600,000 are unauthorized immigrants, which represents 6.6 percent of the work force (above the national average of 5.2 percent).¹²

Enforcement of Immigration Laws

State and local law enforcement officers do not inherently have the authority to enforce federal immigration laws. The INA authorizes areas of cooperation in enforcement between federal, state, and local government authorities.¹³

The Secretary of DHS, acting through the Assistant Secretary of Immigration and Customs Enforcement ("ICE"), may enter into written agreements with a state or any political subdivision of a state so that qualified personnel can perform certain functions of an immigration officer.¹⁴ ICE trains and cross-designates state and local officers to enforce immigration laws as authorized through section 287(g) of the Immigration and Nationality Act. An officer who is trained and cross-designated through the 287(g) program can interview and initiate removal proceedings of aliens processed through the officer's detention facility. Local law enforcement agencies without a 287(g) officer must notify ICE of a foreign-born detainee, and an ICE officer must conduct an interview to determine the alienage of the suspect and initiate removal proceedings, if appropriate. Since January 2006, the 287(g) program has been credited with identifying more than 79,000 individuals, mostly in jails, who are suspected of being in the country illegally.¹⁵

Florida currently has four law enforcement agencies that participate in the 287(g) program: the Florida Department of Law Enforcement (FDLE), and the sheriff's offices of Bay, Collier, and Duval counties.

Within the Department of Homeland Security is the Law Enforcement Support Center ("LESC"), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESC twenty-four hours a day, seven days a week. Significant statistics from LESC for FY 2008:

¹⁰ Jeffrey S. Passel and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center (February 1, 2011).

¹¹ *Id.*

¹² *Id.*

¹³ *See id.* s. 1357(g)(1)-(9) (permitting the Department of Homeland Security to enter into agreements whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities); *id.* s. 1373 (establishing parameters for information-sharing between state and local officials and federal immigration officials); *id.* s. 1252c (authorizing state and local law enforcement officials to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported).

¹⁴ Section 287(g) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296.

¹⁵ Details taken from information provided on the website of ICE, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited March 8, 2011).

- The number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESC placed 16,423 detainees on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESC confirmed 8,440 NCIC hits during FY 2008.¹⁶

Employment & E-Verify

The federal Immigration Reform and Control Act of 1986 (IRCA)¹⁷ made it illegal for any U.S. employer to knowingly:

- Hire, recruit or refer for a fee an alien knowing he or she is unauthorized to work;
- Continue to employ an alien knowing he or she has become unauthorized; or
- Hire, recruit or refer for a fee, any person (citizen or alien) without following the record keeping requirements of the Act.¹⁸

The law established a procedure that employers must follow to verify that employees are authorized to work in the United States.¹⁹ The procedure requires employees to present documents that establish both the worker's identity and eligibility to work, and requires employers to complete an "I-9" form for each new employee hired.²⁰ The IRCA provides sanctions to be implemented against employers who knowingly employ aliens who are not authorized to work.²¹ Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation.²² The United States Citizenship and Immigration Services (USCIS – formerly the INS and now part of the Department of Homeland Security) enforces these provisions.²³

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),²⁴ which, among other things, created various employment eligibility verification programs, including the Basic Pilot program. Originally, the Basic Pilot program (now referred to as E-Verify) was available in five of the seven States that had the highest populations of unauthorized aliens and initially authorized for only four years. However, Congress has consistently extended the program's life. It expanded the program in 2003, making it available in all fifty States. In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify.²⁵

¹⁶ Details taken from information provided on the website of ICE, <http://www.ice.gov/news/library/factsheets/lesc.htm> (last visited March 8, 2011).

¹⁷ Public Law 99-603, 100 Stat. 3359.

¹⁸ 8 U.S.C. s. 1324a.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* s. 1324a(a)(1)-(2).

²² *Id.* s. 1324c.

²³ *Id.* s. 1324a.

²⁴ Public Law 104-208.

²⁵ History taken from information provided on the website of the Department of Homeland Security, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210Vgn>

E-Verify allows employers to ensure that they are hiring authorized workers by electronically comparing the identification and authorization information that employees provide with information contained in federal Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. To participate in E-Verify, the employer must sign a memorandum of understanding that governs the system's operation. After enrolling in E-Verify, employers must still complete the I-9 verification process.

If the information that the employer submits matches the records in the federal databases, E-Verify immediately notifies the employer that the individual is employment authorized. If the information the employee has provided does not match the information in the federal databases, E-Verify issues a tentative nonconfirmation. Before issuing a tentative nonconfirmation, however, E-Verify will ask the employer to confirm that the information submitted is accurate to avoid inaccurate results based on typographical errors.

If a tentative nonconfirmation is issued, the employee is notified and given an opportunity to contact SSA or DHS to resolve any potential problem. Until there is a final determination, the employer may not terminate the employee for being unauthorized. Upon receipt of a final nonconfirmation, an employer must terminate the employee per the E-Verify memorandum of understanding. Other information regarding E-Verify:

- Free to employers; must register and agree to an MOU.
- Used by more than 243,000 employers.
- On average, 1,000 new employers enroll each week with the program.
- In FY 2010, the E-verify Program ran more than 16 million queries.²⁶

E-Verify was the subject of an independent evaluation in 2009. This study concluded that E-Verify was 95.9 percent accurate in its initial determination regarding employment authorization.²⁷ E-Verify participants reported minimal costs to participate and were generally satisfied with the program.²⁸

However, the study also found that:

approximately 3.3 percent of all E-Verify findings are for unauthorized workers incorrectly found employment authorized and 2.9 percent of all findings are for unauthorized workers correctly not found employment authorized. Thus, almost half of all unauthorized workers are correctly found to be employment authorized (2.9/6.2) and just over half are found to be employment authorized

[VCMS100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD](http://www.dhs.gov/e-verify/VCMS/VCMS100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD) (last visited March 8, 2011).

²⁶ Program description taken from information provided on the website of the Department of Homeland Security, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a16988e60a405110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD> (last visited March 8, 2011).

²⁷ United States Citizenship and Immigration Services; 2009 Westat Report at 116, http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (last visited March 8, 2011).

²⁸ 2009 Westat Report at 169.

(3.3/6.2). Consequently, the *inaccuracy rate for unauthorized workers* is estimated to be approximately 54 percent with a plausible range of 37 percent to 64 percent. This finding is not surprising, given that since the inception of E-Verify it has been clear that many unauthorized workers obtain employment by committing identity fraud that cannot be detected by E-Verify.²⁹

Law Enforcement and Corrections

Unauthorized Aliens in Prisons

Information is not available to determine the total number of criminal aliens who are in jails and prisons in the United States. However, ICE estimates that 300,000 to 450,000 criminal aliens who are potentially removable are detained each year nationwide at federal, state, and local prisons and jails. These include illegal aliens in the United States who are convicted of any crime and lawful permanent residents who are convicted of a removable offense.

Unauthorized Aliens in Florida Prisons

Florida Model Jail Standard 4.01 provides in part “[w]hen a foreign citizen is received/admitted to a detention facility for any reason, the detention facility shall make notification using the guidelines as set forth by the U.S. Department of State.”³⁰ Generally, when a person is booked into a local jail, jail officials use the information given by the detainee to help determine the person’s citizenship status. If a detainee admits he or she is not a U.S. citizen, or if there is reason to believe a detainee is not a U.S. citizen, jail officials attempt to determine the detainee’s citizenship status by submitting the detainee’s identification information through LESC.

Immigration and Customs Enforcement (ICE) agents working in Florida prison reception centers investigate newly admitted inmates to identify those who may be aliens. If ICE notifies the Department of Corrections that they want to take an alien inmate into custody, the inmate is released into ICE custody when his or her sentence is completed. Immigration and Customs Enforcement (ICE) may refuse to take custody of an alien inmate in some cases, such as when the alien is from a country to which he or she cannot be deported. Most alien inmates who complete their sentences in Florida prisons are released to ICE for further immigration processing, including possible deportation. These inmates are deported promptly after release from prison if they have been ordered out of the country and have no further appeals of their final deportation order.

The chart below shows the number of alien inmates released from Florida custody to ICE from 2000 through 2007:

²⁹ *Id.* at xxx-xxx (Executive Summary) (emphasis in original).

³⁰ http://www.flsheriffs.org/our_program/florida-model-jail-standards/?index.cfm/referer/content.contentList/ID/408/ (last visited March 8, 2011).

YEAR OF RELEASE	EXPIRATION OF SENTENCE	COMMUNITY SUPERVISION	TOTAL
2000	433	169	602
2001	730	326	1,056
2002	793	323	1,116
2003	798	383	1,181
2004	752	348	1,100
2005	746	326	1,072
2006	754	354	1,108
2007	799	321	1,120
2008	885	337	1,222
TOTAL	6,690	2,887	9,577

Confirmed Aliens in Florida Prisons as of November 30, 2010³¹

PRIMARY OFFENSE	NUMBER OF CONFIRMED ALIENS	Percent
MURDER/MANSLAUGHTER	1,278	22.66
SEXUAL/LEWD BEHAVIOR	1,000	17.73
ROBBERY	433	7.68
VIOLENT, OTHER	765	13.56
BURGLARY	733	12.99
PROPERTY THEFT/FRAUD/DAMAGE	220	3.90
DRUGS	976	17.30
WEAPONS	86	1.52
OTHER	150	2.66
TOTAL	5,641	100.00

ICE Cooperative Programs

Immigration and Customs Enforcement (ICE), which is the investigative arm of the Department of Homeland Security,³² administers a number of programs that involve cooperation between federal immigration officers and state and local law enforcement. Florida currently participates in some of these programs aimed at identifying unauthorized immigrants in the state who have committed crimes.

The umbrella program that encompasses all other cooperative law enforcement programs is called ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS). ACCESS was developed to promote the various programs or tools that ICE offers to assist state, local, and tribal law enforcement agencies. Under this initiative, ICE works closely

³¹ Supplied by the Florida Department of Corrections.

³² U.S. Immigration and Customs Enforcement, *ICE Overview*, available at <http://www.ice.gov/about/overview/> (last visited Mar. 11, 2011).

with other law enforcement agencies to identify an agency's specific needs or the local community's unique concerns. In developing an ACCESS partnership agreement, ICE representatives will meet with the requesting agency to assess local needs and draft appropriate plans of action. Based upon these assessments, ICE and the requesting agency will determine which type of partnership is most beneficial and sustainable before entering into an official agreement.³³

The section 287(g) program, the Secure Communities Program,³⁴ the Criminal Alien Program,³⁵ and the Law Enforcement Support Center are all ACCESS initiatives currently operating in Florida.

Section 287(g)

For a discussion of s. 287(g) agreements, see the discussion of **Enforcement of Immigration Laws** above.

Secure Communities

The Secure Communities program assists in the identification and removal of criminal aliens held in local and state correctional facilities by using technology to share national, state, and local law enforcement data, such as fingerprint-based biometric information sharing, among agencies. Fingerprinting technology is used during the booking process to quickly and accurately determine the immigration status of individuals arrested. Fingerprints for all arrested individuals are submitted during the booking process and are checked against FBI criminal history records and DHS records.³⁶ As of June 22, 2010, ICE was using this information sharing capability in all Florida jurisdictions.³⁷ "ICE prioritizes the removal of criminal aliens by focusing efforts on the most dangerous and violent offenders. This includes criminal aliens determined to be removable and charged with or convicted of crimes such as homicide, rape, robbery, kidnapping, major drug offenses, or those involving threats to national security."³⁸

Criminal Alien Program

The Criminal Alien Program (CAP) identifies, processes and removes criminal aliens incarcerated in federal, state, and local prisons and jails throughout the U.S. and in Florida. It was created to prevent criminal aliens from being released into the general public. The program

³³ U.S. Immigration and Customs Enforcement, *ICE ACCESS*, available at <http://www.ice.gov/access/> (last visited Mar. 10, 2011).

³⁴ U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions*, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Mar. 10, 2011).

³⁵ Department of Homeland Security Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, (Jan. 2009), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_11-26_Jan11.pdf (last visited Mar. 10, 2011).

³⁶ U.S. Immigration and Customs Enforcement, *Secure Communities*, available at http://www.ice.gov/secure_communities/ (last visited Mar. 10, 2011).

³⁷ U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions*, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Mar. 10, 2011).

³⁸ U.S. Immigration and Customs Enforcement, *Secure Communities* brochure, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf> (last visited April 5, 2011).

secures a final removal order, prior to the termination of criminal aliens' sentences whenever possible. CAP deports criminals after their sentence is served and applies to aliens who have been convicted of any crime.³⁹ The Criminal Alien Program (CAP) agents work in state field offices and screen removable criminals through an electronic records check and interview process. Correctional facilities are requested to contact ICE prior to release of a criminal alien to allow ICE time to assume custody.⁴⁰

Law Enforcement Support Center

Also within the Department of Homeland Security is the Law Enforcement Support Center (LESC), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESL twenty-four hours a day, seven days a week. Significant statistics from LESL for FY 2008:

- The number of requests for information sent to LESL increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESL placed 16,423 detainers on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESL confirmed 8,440 NCIC hits during FY 2008.⁴¹

Rapid REPAT

The ICE Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) program, in which Florida does not currently participate, is designed to expedite the deportation process of criminal aliens by allowing selected criminal aliens incarcerated in U.S. prisons and jails to accept early release in exchange for voluntarily returning to their country of origin.⁴²

Rapid REPAT is a law enforcement tool that ensures that all criminal aliens serving a time in prison are identified and processed for removal prior to their release. The identification and processing of incarcerated criminal aliens prior to release reduces the burden on the taxpayer and ensures that criminal aliens are promptly removed from the U.S. upon completion of their criminal sentence. This program allows ICE to more effectively identify and quickly remove criminal aliens from the United States. ICE Rapid REPAT also allows ICE and participating states to reduce costs associated with detention space.⁴³

³⁹ U.S. Immigration and Customs Enforcement, *Criminal Alien Program*, available at <http://www.ice.gov/criminal-alien-program/> (last visited Mar. 10, 2011).

⁴⁰ Department of Homeland Security Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, 3 (Jan. 2009), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_11-26_Jan11.pdf (last visited Mar. 10, 2011).

⁴¹ Details taken from information provided on the website of ICE, <http://www.ice.gov/news/library/factsheets/lesc.htm> (last visited Mar. 8, 2011).

⁴² U.S. Immigration and Customs Enforcement, *Rapid REPAT*, available at <http://www.ice.gov/rapid-repat/> (last visited Mar. 11, 2011).

⁴³ *Id.*

Key Elements of Rapid REPAT include:

- In states where Rapid REPAT is implemented, certain aliens who are incarcerated in state prison and who have been convicted of non-violent offenses may receive conditional release if they have a final order of removal and agree not to return to the United States;
- Eligible aliens agree to waive appeal rights associated with their state conviction(s) and must have final removal orders; and
- If aliens re-enter the United States, state statutes must provide for revocation of parole and confinement for the remainder of the alien's original sentence. Additionally, aliens may be prosecuted under federal statutes that provide for up to 20 years in prison for illegally reentering the United States.⁴⁴

REAL ID Act of 2005

On May 11, 2005, President Bush signed into law the "REAL ID Act of 2005," which was attached to the "Emergency Supplemental Appropriation for Defense, the Global War on Terror, and Tsunami Relief, 2005" (H.R. 1268, P.L. 109-13).⁴⁵ Under the Act, state-issued driver's licenses and identification cards must meet federal standards in order to be accepted for federal purposes, including, for example, boarding commercial aircraft and gaining access to federal facilities.⁴⁶

With respect to immigration, the Act requires that:

[b]efore issuing a DL/ID, a state shall require and verify valid documentary evidence that the person: (i) is a U.S. citizen, (ii) is an alien lawfully admitted for permanent or temporary residence, (iii) has a conditional permanent resident status, (iv)) is a refugee or has been granted asylum, (v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status, (vi) has a pending application for asylum, (vii) has a pending or approved application for temporary protected status, (viii) has approved deferred status, or (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence or conditional permanent resident status[.]⁴⁷

On March 4, 2011, the Secretary of the U.S. Department of Homeland Security extended by 20 months – from May 10, 2011, to January 15, 2013 – the deadline for states to be in full compliance with the Act.⁴⁸

⁴⁴ *Id.*

⁴⁵ National Conference of State Legislatures, *Real ID Act of 2005: Summary*, <http://www.ncsl.org/default.aspx?tabid=13579> (last visited April 5, 2011).

⁴⁶ *Id.*; see also Fla. Dep't of Highway Safety and Motor Vehicles, *The REAL ID Act*, <http://www.flhsmv.gov/realid/> (last visited April 5, 2011).

⁴⁷ National Conference of State Legislatures, *supra* note 45.

⁴⁸ National Conference of State Legislature, *Countdown to REAL ID*, <http://www.ncsl.org/default.aspx?tabid=13577> (last visited April 5, 2011).

The Florida Department of Highway Safety and Motor Vehicles began issuing REAL ID licenses and ID cards on January 1, 2010. The new credentials have a single gold star in the upper right corner of the card. The department estimates that it has issued more than 3 million REAL ID licenses and ID cards thus far.⁴⁹ The conversion of existing, valid non-REAL ID documents will occur over time, as the documents are renewed (e.g., due to expiration) or replaced (e.g., due to loss). A current Florida license or ID card will continue to be valid as identification for federal purposes until December 1, 2014, for individuals born after December, 1964, and December 1, 2017, for everyone else.⁵⁰

III. Effect of Proposed Changes:

This bill prescribes multiple requirements and other provisions relating to unauthorized immigrants.

Mandatory Participation by Employers in E-Verify; Exemption (Sections 1-3)

The bill requires every employer who hires a new employee on or after July 1, 2012, to register with the federal E-Verify Program and to verify the employment eligibility of each newly hired employee. An “employer” includes any person or agency employing one or more employees in this state.⁵¹ The employer shall use the program for both U.S. citizens and noncitizens and shall not use the program selectively. Further, the employer must maintain a record of the verification for the longer of three years or one year after the employment ends.

However, the bill prescribes an alternative process, under which an employer is exempt from the requirement to register with the E-Verify Program if the employer does the following:

- Requests and receives from each new employee a valid driver’s license or identification card that complies with the federal REAL ID Act of 2005 and the implementing rules from the U.S. Department of Homeland Security.
- Swipes the machine-readable zone on the document using “the highest standard of authentication equipment and software.” The purpose of this procedure is to determine that the document is not fraudulent and to compare the physical description and other personal information of the person who presents the document against the data obtained through the swipe.
- Maintains a printed record of the results of the authentication.
- Complies with these requirements for every new employee (without employing the procedures selectively) unless and until the employer registers with the E-Verify Program.

The bill specifies that the alternative procedure to registering with E-Verify is designed to combat fraud and may not be used for any discriminatory purpose.

⁴⁹ See email from Steven Fielder, Office of Legislative Affairs, Fla. Dep’t of Highway Safety and Motor Vehicles (April 4, 2011) (on file with the Senate Committee on Judiciary).

⁵⁰ Fla. Dep’t of Highway Safety and Motor Vehicles, *supra* note 46.

⁵¹ In the case of an independent contractor, the term “employer” means the independent contractor and not the person that uses the contract labor. An employee leasing company is excluded from the definition of “employer” if the leasing company has entered into an agreement under which its client company assumes responsibility for compliance with the bill’s employment-verification requirements.

An employer who does not comply with the bill's requirements is subject to having the employer's licenses suspended during the period of noncompliance. The bill specifies that suspension of a license must comply with a provision of the Administrative Procedure Act (APA), s. 120.60(5), F.S., which requires notice to the licensee. If the agency issuing the license is not subject to the APA, then the suspension must include procedures substantially similar to those prescribed in s. 120.60(5), F.S.

Under the bill, if an employer terminates an employee upon a determination that the employee is not work-eligible, the employer is not liable for wrongful termination, provided the employer complies with the E-Verify regulations. An employer also is protected from liability if the employer terminates the employee after complying with the alternate procedure and reasonably concluding that the employee presented a fraudulent document or concluding that the employee's physical description or personal information does not match the data obtained through the authentication technology.

The bill directs the Department of Highway Safety and Motor Vehicles to maintain on the department's website of detailed list of states that comply with the REAL ID Act of 2005. Additionally, the department shall issue rules governing the standards and requirements for the authentication software and equipment.

These E-Verify requirements are proposed for codification in a new section of the Florida Statutes, s. 448.31, F.S. The bill also creates a corresponding definitions section, s. 448.30, F.S. In addition, the bill directs the Division of Statutory Revision to publish the two new sections as part III of ch. 448, F.S., titled "Unauthorized Immigrants." Chapter 448, F.S., relates to general labor regulations.

Law Enforcement and Criminal Justice Cooperation with Federal Government (Section 4)

The bill expresses the intent of the Legislature that law enforcement and criminal justice agencies in the state work cooperatively with the Federal Government to:

- Identify unauthorized immigrants and enforce immigration laws, and
- Maximize opportunities to transfer custody and detention of unauthorized immigrants who are accused or convicted of crimes from state and local governments to the federal government.

Delegated Enforcement Authority (287(g) Agreements)

The bill encourages state and local participation in delegated authority from the federal government to enforce immigration laws under s. 287(g) of the federal Immigration and Nationality Act. Specifically, the bill:

- Authorizes the Department of Corrections to pursue an agreement with the U.S. Department of Homeland Security to have departmental employees or contractors trained as jail enforcement officers. The department shall, by November 1, 2011, report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the status of

implementation of this authority. If the department has not entered into an agreement by that date, it shall include in the report information on barriers to implementation. The bill requires the department to report annually on enforcement activities taken under the statute. Because the bill provides that the department “may” enter into an agreement with the U.S. Department of Homeland Security, the annual activity report would appear to be relevant solely if the department indeed executes an agreement.

- Provides statutory authority for the Department of Law Enforcement’s existing 287(g) agreement with the federal government to have employees trained as task force officers. The department must report annually on activities under the agreement.
- Provides that county sheriffs may explore the feasibility of signing 287(g) agreements with the Department of Homeland Security to have employees trained as either jail enforcement officers or task force officers. The bill specifies that if a sheriff determines that an agreement is feasible, he or she may make an initial request to the department. The bill specifies that its provisions do not compel a sheriff to execute an agreement with the federal government.

Identification of Unauthorized Immigrants upon Conviction

The bill prescribes requirements designed to identify certain convicts who are detained in prisons, jails, or other detention facilities in this state and who are unauthorized immigrants. Specifically, the bill directs an agency that has custody of a person in a jail, prison, or other facility *after* his or her conviction of a dangerous crime⁵² to make reasonable efforts to determine the person’s nationality and whether he or she is present in the United States lawfully. The holding agency must submit the fingerprints of the individual to U.S. Immigration and Customs Enforcement (ICE) pursuant to an agreement between the “arresting agency”⁵³ and ICE. In addition, if the holding or custodial agency establishes, independent of the fingerprint submission, that the convict is not lawfully present in the United States, it shall notify the Department of Homeland Security.

The relationship is not immediately clear between the bill’s provisions and the existing participation by all 67 county sheriffs in the Secure Communities Program operated by ICE. As noted in the “Present Situation” section of this bill analysis, the Secure Communities program assists in the identification and removal of criminal aliens held in local and state correctional facilities by using technology to share national, state, and local law enforcement data, such as fingerprint-based biometric information sharing, among agencies. The program focuses on aliens who are arrested for a crime and booked into local law enforcement custody. Fingerprinting technology is used during the booking process to determine the immigration status of individuals arrested. Fingerprints for all arrested individuals are submitted during the booking process and are checked against FBI criminal history records and DHS records.⁵⁴ As of June 22, 2010, ICE was using this information-sharing capability in all Florida jurisdictions.⁵⁵

⁵² The bill cites s. 907.041(4)(a), F.S. That provision lists dangerous crimes for purposes of evaluating retrial detention and release.

⁵³ It is not clear if this reference to “arresting agency” should instead be to the “holding agency.”

⁵⁴ U.S. Immigration and Customs Enforcement, *Secure Communities*, available at http://www.ice.gov/secure_communities/ (last visited Mar. 10, 2011).

⁵⁵ U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions*, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Mar. 10, 2011).

The bill arguably appears to contemplate an additional check of fingerprints for a person detained *after* he or she is convicted of a dangerous crime. It appears possible that the immigration status of this same individual may have been investigated already through the fingerprinting process that occurred at the time of arrest and booking – as a result of the sheriffs' existing participation in the Secure Communities Program.

The bill specifies that its provisions may not be construed to deny a person bond or to prevent release from confinement if a person is otherwise eligible. However, the determination that a person in custody is not present in the United States lawfully creates a presumption that he or she is a flight risk in the consideration of bail determinations. Because the bill seems to focus on persons who are confined *after* being convicted, the reference to bail – which addresses the appearance of criminal defendants – is not immediately clear.

Removal and Deportation of Criminal Aliens (Section 5)

The bill provides for the Department of Corrections to participate in the Rapid REPAT Program administered by U.S. Immigration and Customs Enforcement (ICE), under which nonviolent criminal aliens may be released from the state prison system to the custody and control of ICE. The bill authorizes the secretary of the department to enter into an agreement with ICE for the rapid repatriation of removable custodial aliens under this program.

In addition to the prisoner being convicted of a nonviolent offense, the department must have received from ICE a final order of removal, and the secretary of the department must determine that removal is appropriate. The bill specifies that a prisoner would not be eligible for release and repatriation if he or she would not meet the criteria for control release in Florida.⁵⁶ The bill does not require that the person have served a particular portion of his or her sentence.

Under the terms of the proposed statute, if the prisoner returns to the United States unlawfully, his or her release is revoked, and the department shall seek the prisoner's return to Florida to complete the remainder of his or her sentence. The department shall notify each prisoner who is eligible for removal of this condition.

The department shall identify, during the inmate reception process and from the existing population, prisoners who are eligible for removal under this program.

Study on Costs of Unauthorized Immigration; Request for Federal Reimbursement (Section 6)

The bill directs the Agency for Workforce Innovation (AWI or agency) to conduct a study that quantifies the costs to the state attributable to unauthorized immigration. The agency shall prepare the report in consultation with the Legislature's Office of Economic and Demographic Research and submit it to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 1, 2011. Based on the quantified costs and within a

⁵⁶ Section 947.146, F.S., creates the Control Release Authority (CRA), which is composed of members of the Parole Commission. The CRA is required to implement a system for determining the number and type of inmates who must be released into the community under control release in order to maintain the state prison system between 99 and 100 percent of its total capacity. Section 947.146(3)(a)-(m), F.S., prescribes inmates who are not eligible for control release.

month after submitting the report, AWI shall request, before January 1, 2012, from the appropriate federal agency or official:

- Reimbursement to the state of the quantified costs; or
- A corresponding reduction or forgiveness of any moneys owed to the federal government by the state due to borrowing to fund unemployment compensation claims.

Due to the increasing unemployment rate in the state, the Unemployment Compensation Trust Fund has been paying out more funds than it has been collecting. The trust fund fell into deficit in August 2009, and since that time, the state has requested more than \$2 billion in federal advances in order to continue to fund unemployment compensation claims.⁵⁷

Effective Date (Section 7)

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Preemption

States are generally able to legislate in areas not controlled by federal law. “Congress has the power under the Supremacy Clause of Article VI of the [United States] Constitution to preempt state law.”⁵⁸ Provisions comparable to those included in this proposed committee bill have been passed in other states and have faced legal challenges under the federal preemption doctrine. For instance, a challenge to the employment verification provision in Arizona’s 2007 law is currently pending before the U.S. Supreme Court.⁵⁹

⁵⁷ As of February 17, 2011. See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct, *Title XII Advance Activities Schedule*, http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiesched.htm (last visited Feb. 21, 2011).

⁵⁸ *Northwest Central Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 509 (1989).

⁵⁹ See *Chamber of Commerce of the United States, et. al. v. Whiting* (Case No. 09-115; argued before the U.S. Supreme Court on December 8, 2010).

In determining whether a state law is preempted, “the purpose of Congress is the ultimate touchstone.”⁶⁰ In the Immigration Reform and Control Act of 1986, Congress provided, “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”⁶¹

The provision in the bill requiring employers to register with E-Verify authorizes sanctions in the form of license suspension. The U.S. Court of Appeals for the Ninth Circuit upheld against a preemption challenge a similar portion of an Arizona law requiring employers to use the federal Internet verification and authorizing licensure sanctions.⁶² The Ninth Circuit reasoned that Arizona’s revocation of business licenses fits squarely within the exception under the Immigration Reform and Control Act. In addition, the court rejected the plaintiff’s argument that the law was impliedly preempted because the federal statute created E-Verify as a voluntary pilot program and Arizona made it mandatory. The court explained that, although Congress did not mandate E-Verify, it plainly envisioned and endorsed its increased usage through expansion of the pilot program.⁶³ As noted, the U.S. Supreme Court granted certiorari to consider the question of preemption.

Access to Courts

Under the bill, if an employer terminates an employee upon a determination that the employee is not work-eligible, the employer is not liable for wrongful termination, provided the employer complies with the E-Verify regulations. An employer also is protected from liability if the employer terminates the employee after complying with the alternate (REAL ID Act) procedures and reasonably concluding that the employee presented a fraudulent document or concluding that the employee’s physical description or personal information does not match the data obtained through the authentication software.

These protections from liability may raise questions related to the right of access to the courts under Article I, section 21 of the Florida Constitution by circumscribing an individual’s right of action against an employer for wrongful termination. Article I, section 21 of the Florida Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” The Florida Constitution protects “only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.”⁶⁴

⁶⁰ *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).

⁶¹ See 8 U.S.C. s. 1324a(h)(2) (unlawful employment of aliens).

⁶² *Chicanos Por La Causa, Inc., v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert granted*, *Chamber of Commerce of U.S. v. Candelaria*, 130 S.Ct. 3498 (2010).

⁶³ *Chicanos Por La Causa*, 558 F.3d at 865-67.

⁶⁴ 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

[W]here a right of access ... has been provided ..., the Legislature is without power to abolish such a right without providing a reasonable alternative ... unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.⁶⁵

However, the bill does preclude a claimant from challenging the employer's compliance with the requirements prescribed in the bill; nor does it affect the employee's ability to assert a claim of wrongful termination on other grounds. To that extent, it may not be viewed as abolishing a right of access in a manner that violates *Kluger*.

Further, the Florida Supreme Court has repeatedly held that a statute that merely alters the standard of care owed by one party to another or increases the degree of negligence necessary to maintain a successful tort action does not abolish a preexisting right of access and does not, therefore, implicate Article I, section 21 of the State Constitution. In *Abdin v. Fischer*, the Court upheld a statute that exempted property owners from liability for injuries occurring on private property set aside for public recreation, unless the owner inflicted "deliberate, willful, or malicious injury to persons or property."⁶⁶ The Court explained that "[w]hat *Kluger* and *McMillan*[*v. Nelson*, 5 So. 2d 867 (1942)] make clear is that legislative action that alters standards of care need only be *reasonable* to be upheld."⁶⁷

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The mandatory use of E-Verify, effective July 1, 2012, by all employers may have an economic impact on private employers. However, there is no fee for the use of the Internet-based E-Verify Program, and employers are currently required to verify the work-eligibility status of new employees through the existing federal I-9 form process. In addition, the bill provides an exemption if the employer adopts an approach of requesting from each new employee a document that complies with the REAL ID Act of 2005 and checks the document using authentication technology. If the employer elects to follow the

⁶⁵ *Kluger*, 281 So. 2d at 4.

⁶⁶ *Abdin v. Fischer*, 374 So. 2d 1379, 1380-81 (Fla. 1979) (holding that to the extent the "statute alters the standard of care owed to plaintiff by defendants, this type of modification by the legislature is not prohibited by the constitution." The Florida Supreme Court noted in *Kluger* that there is a "distinction between abolishing a cause of action and merely changing a standard of care.").

⁶⁷ *Id.* at 1381 (emphasis added). See also *Eller v. Shova*, 630 So. 2d 537, 542 (Fla. 1993).

alternate procedure, the employer will incur costs related to purchase and maintenance of the authentication equipment and software.

Employers who fail to comply with the bill's requirement relating to verifying employment eligibility are subject to suspension of their licenses.

C. Government Sector Impact:

The bill encourages each county sheriff to explore the feasibility of entering into an agreement with the U.S. Department of Homeland Security to have law enforcement officers trained to help enforce federal immigration law. Costs related to evaluating the feasibility should not be significant. The bill does not require the sheriff to execute an agreement, and U.S. Immigration and Customs Enforcement (ICE) may decline to participate. A sheriff's office that chooses to enter into such an agreement may experience workload costs while any participating officers are not performing regular assignments during the period they are being trained by ICE.

The Department of Corrections may experience administrative costs in identifying new and existing inmates who are eligible for release and transfer to federal custody under the Rapid REPAT Program. However, these costs may be offset by savings to the state associated with reduced detention space and costs in the state prison system. The department estimates that it would need two additional FTE – a correctional services administrator and a correctional services analyst at a cost of approximately \$122,046 per year.⁶⁸

The Department of Corrections (DOC) and the Department of Law Enforcement (FDLE) may experience workload impacts from the requirement to report annually on activities undertaken as part of a 287(g) agreement with the U.S. Department of Homeland Security. The bill authorizes but does not require DOC to pursue such an agreement. If the DOC chose to enter into such an agreement, the department would experience workload costs while any participating personnel are not performing regular assignments during the period they are being trained by ICE. In addition, it would experience costs related to ongoing implementation of activities under the agreement. The DOC estimated that it “would need approximately twenty officers posted at various locations throughout the state in order to assume all of the functions currently performed by ICE agents related to the processing of criminal aliens into the state correctional system.”⁶⁹

The bill similarly authorizes FDLE to pursue an agreement; however, FDLE already has a 287(g) agreement.

The bill requires the Agency for Workforce Innovation (AWI or the agency) to conduct a study of the fiscal impacts of unauthorized immigration on the state. In addition, the bill requires AWI to request from the federal government reimbursement of those quantified cost or corresponding relief from moneys owed to the federal government from

⁶⁸ Fla. Dep't of Corrections, *2011 Bill Analysis: SB 2040 with amendments* (on file with the Senate Committee on Judiciary).

⁶⁹ *Id.*

borrowing related to the payment of unemployment compensation. The agency will incur costs related to preparation of the required study. To the extent the state is successful in securing federal reimbursement or other remuneration for costs related to unauthorized immigration, the state may benefit fiscally.

The Department of Highway Safety and Motor Vehicles may incur costs related to posting on its website information on states' compliance with the REAL ID Act of 2005 and related to adopting rules for the authentication technology to be used by employers who choose not to register with the E-Verify Program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on April 4, 2011:

The committee substitute differs principally from the original bill by:

- Narrowing the exemption from the requirement for employers to register with the E-Verify Program, to make the exemption apply if the employer receives a driver's license or identification card from the employee which complies with the REAL ID Act of 2005 and if the employer checks the document using authentication technology;
- Specifying that the exemption procedures are designed to combat fraud, may not be used for a discriminatory purpose, and may not be used selectively;
- Directing the Department of Highway Safety and Motor Vehicles (DHSMV) to list on its website detailed information on states' compliance with the REAL ID Act;
- Directing DHSMV to adopt rules relating to the authentication technology;
- Eliminating the requirement for the Attorney General to post on a website information on Florida employers that have registered with the E-Verify Program;
- Conforming the bill's protections for employers against liability for wrongful termination, to account for the revised exemption from the requirement to register with the E-Verify Program;
- Prescribing that the legislation does not compel a sheriff to execute a 287(g) agreement with the federal government relating to delegated authority to enforce immigration laws;
- Authorizing, rather than requiring, the Department of Corrections to pursue a 287(g) agreement with the federal government;

- Authorizing, rather than requiring, the Department of Law Enforcement to pursue a 287(g) agreement with the federal government;
- Replacing provisions that directed arresting agencies to determine the immigration status of detained persons with provisions directing a prison, jail, or other detention facility that has custody of a person *after* his or her conviction of a dangerous crime to make reasonable efforts to determine the person's nationality and whether he or she is present in the United States lawfully;
- Excluding leasing companies from the definition of "employer" for purposes of the employment verification requirements, if the leasing companies has an agreement for its client company to assume those responsibilities; and
- Including "whereas" clauses expressing legislative intent for the bill's provisions.

B. Amendments:

None.