

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1265 Verification of Employment Eligibility  
**SPONSOR(S):** Commerce Committee; Byrd; Fitzenhagen and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1822

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Commerce Committee	15 Y, 8 N, As CS	Willson	Hamon
2) State Affairs Committee	16 Y, 7 N	Toliver	Williamson

### SUMMARY ANALYSIS

Both Florida and federal law prohibit employers from hiring a person who is not authorized to work in the United States. Federal law requires most employers to verify the eligibility of new hires using certain employee-provided documents. Additionally, federal law requires some employers to use E-Verify, an Internet-based system designed to allow employers to electronically confirm the employment eligibility of newly hired employees in the United States. In Florida, state agencies under the direction of the Governor must use E-Verify for all newly hired employees, and contractors and subcontractors are required to use E-Verify for all new hires for the duration of a contract.

The bill provides that, beginning January 1, 2021, public employers, contractors, and subcontractors must register with and use the E-Verify system to verify the work authorization status of all newly hired employees. A public employer, contractor, or subcontractor may not enter into a contract unless each party to the contract registers with and uses the E-Verify system.

The bill provides that, beginning January 1, 2021, a private employer must verify the employment eligibility of a person who has accepted an offer of employment or a contract employee upon the renewal or extension of his or her contract by either using the E-Verify system or requiring the person to provide the same documentation required by the United States Citizenship and Immigration Services on its Employment Eligibility Verification form (Form I-9).

The bill provides that if a private employer does not verify the employment eligibility of a current or future employee, the Department of Economic Opportunity (DEO) must require the private employer to provide an affidavit stating:

- The private employer will comply with the employee verification requirements;
- The private employer has terminated the employment of all unauthorized aliens in this state; and
- The employer will not intentionally or knowingly employ an unauthorized alien in this state.

If a private employer does not provide the required affidavit within 30 days, the bill requires DEO to order the appropriate agency to suspend all applicable licenses held by the private employer until the private employer provides DEO with the required affidavit. If a private employer violates the verification of employment eligibility requirements three times within a 36 month period, the bill requires permanent revocation of all licenses held by the private employer specific to the business location where the unauthorized alien performed work.

The bill appears to have an indeterminate, insignificant fiscal impact on the state or local government.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Overview

Both federal and Florida law prohibit a person from employing a person who is not authorized to work in the United States. Additionally, federal law requires some employers to use E-Verify and requires most employers to verify the eligibility of new hires using certain employee-provided documents.

E-Verify is a free, Internet-based system through which an employer can verify that a newly hired employee is authorized to work in the U.S.<sup>1</sup> E-Verify electronically compares the information from an employee's Form I-9 with records available to the Social Security Administration (SSA) and the U.S. Department of Homeland Security (DHS) to verify the identity and employment eligibility of newly hired employees.<sup>2</sup>

##### Florida Law

A person may not knowingly employ, hire, recruit, or refer an alien for private or public employment within the state if the alien is not authorized to work under the immigration laws or by the U.S. Attorney General.<sup>3</sup> A first offense of this prohibition is a noncriminal violation punishable by a fine of up to \$500; each subsequent offense is a second degree misdemeanor,<sup>4</sup> punishable by up to 60 days in jail<sup>5</sup> and a fine not to exceed \$500.<sup>6</sup>

Moreover, Executive Order 11-116 (2011) requires state agencies under the direction of the Governor to use E-Verify for all newly hired employees. The executive order also requires an agency to include a provision in each contract requiring a contractor to use E-Verify for all new hires. These same requirements must be included in the contractor's contracts with subcontractors.<sup>7</sup>

##### Federal Law

The federal Immigration Reform and Control Act of 1986 (IRCA)<sup>8</sup> 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 IRCA.<sup>9</sup>

The IRCA established a procedure employers must follow to verify that employees are authorized to work in the U.S.<sup>10</sup> The procedure requires employees to present documents establishing both the worker's identity and eligibility to work, and requires employers to complete a Form I-9 for each new employee hired.<sup>11</sup> The IRCA provides for sanctions to be imposed on employers who knowingly employ

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<sup>1</sup> U.S. Citizenship and Immigration Services (USCIS), *How do I use E-Verify?* <https://www.e-verify.gov/sites/default/files/everify/guides/E4en.pdf> (last visited Mar. 1, 2020).

<sup>2</sup> DHS and USCIS, *E-Verify User Manual*, <https://www.e-verify.gov/e-verify-user-manual-10-introduction/11-background-and-overview> (last visited Mar. 1, 2020).

<sup>3</sup> S. 448.09(1), F.S.

<sup>4</sup> S. 448.09(2), F.S.

<sup>5</sup> S. 775.082(4)(b), F.S.

<sup>6</sup> S. 775.083(1)(e), F.S.

<sup>7</sup> Exec. Order No. 11-116 (May 2011), available at <http://edocs.dlis.state.fl.us/fldocs/governor/orders/2011/11-116-suspend.pdf> (last visited Mar. 1, 2020).

<sup>8</sup> P.L. 99-603, 100 Stat. 3359.

<sup>9</sup> 8 U.S.C. § 1324a.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

aliens who are not authorized to work.<sup>12</sup> Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation.<sup>13</sup> The U.S. Citizenship and Immigration Services (USCIS) enforces these provisions.<sup>14</sup>

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>15</sup> which 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 was 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 50 states. In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify.<sup>16</sup>

## Using E-Verify

### *The Process*

E-Verify is the last step in a larger eligibility-verification process. This process begins when an employee accepts an offer of employment.<sup>17</sup> Between this point and the employee's first day on the job, he or she must complete Section 1 of the Form I-9, which requires providing his or her name, address, social security number (SSN), and citizenship status under penalty of perjury.<sup>18</sup> By the end of the third day on the job, the employer is required to complete Section 2, stating under penalty of perjury that he or she has reviewed certain employee-provided documents that establish the employee's eligibility.<sup>19</sup> This is where the required verification of employment eligibility stops for most employers.

Before using E-Verify for the first time, an employer must enroll via DHS's website.<sup>20</sup> At the end of the enrollment process, the employer must sign a Memorandum of Understanding that provides the terms of agreement between the employer and DHS.<sup>21</sup>

Once enrolled, an employer uses E-Verify by opening a "case" for an employee and entering basic information from the employee's Form I-9 (name, address, SSN) into the case.<sup>22</sup> Then E-Verify compares that information to records available to DHS and the SSA, and usually within seconds, issues one of several possible results to the employer.<sup>23</sup> A result of "Employment Authorized" indicates that the employee may work in the U.S. Other results include:

- Verification In Process - This case was referred to DHS for further verification.
- Tentative Nonconfirmation (TNC) - Information did not match records available to SSA or DHS. Additional action is required.
- Case in Continuance - The employee has visited an SSA field office or contacted DHS, but more time is needed to determine a final case result.
- Close Case and Resubmit - SSA or DHS requires the employer to close the case and create a new case for this employee. This result may be issued when the employee's U.S. passport, passport card, or driver license information is incorrect.

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<sup>12</sup> *Id.* at 1324a(a)(1)-(2).

<sup>13</sup> *Id.* at 1324c.

<sup>14</sup> *Id.* at 1324a.

<sup>15</sup> P.L. 104-208.

<sup>16</sup> DHS and USCIS, *History and Milestones [of E-Verify]*,

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD> (last visited Feb. 22, 2020).

<sup>17</sup> USCIS, *Complete and Correct Form I-9*, <https://www.uscis.gov/i-9-central/complete-and-correct-form-i-9>, (last visited Feb. 22, 2020).

<sup>18</sup> See 8 C.F.R. § 274a.2(b)(1)(i)(A).

<sup>19</sup> See 8 C.F.R. § 274a.2(b)(1)(ii).

<sup>20</sup> DHS and USCIS, *The Enrollment Process*, <https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process> (last visited Feb. 22, 2020).

<sup>21</sup> *The E-Verify Memorandum for Employers*, available at <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf> (last visited Mar. 1, 2020).

<sup>22</sup> DHS and USCIS, *ABOUT E-Verify*, <https://www.e-verify.gov/about-e-verify> (last visited Mar. 1, 2020).

<sup>23</sup> *Id.*

- Final Nonconfirmation - E-Verify cannot confirm the employee's employment eligibility after the employee visited SSA or contacted DHS.<sup>24</sup>

If the result is TNC, the employer must notify the employee, who must take further action to verify his or her eligibility.<sup>25</sup> If the result is Verification in Process or Case in Continuance, the E-Verify system needs more time to process the case.<sup>26</sup> Lastly, a result of "Final Nonconfirmation" (FNC) indicates there is no further action to be taken by any party and that E-Verify will not confirm that the employee is authorized to work in the U.S.<sup>27</sup>

#### *Results in Fiscal Year 2019*

In fiscal year 2019, E-Verify processed 38,930,405 cases, 98.51 percent of which were automatically confirmed as "work authorized" and another 0.23 percent were confirmed after an initial "mismatch."<sup>28</sup> For the remaining 1.27 percent of cases, the employees were not found to be authorized to work in the U.S.<sup>29</sup>

#### *Accuracy*

The most recent independent report of E-Verify's accuracy appears to have been completed in 2012, relying on data from 2009 and before.<sup>30</sup> The report found that E-Verify was 94 percent accurate in its final disposition of cases. E-Verify confirmed 94 percent of employees who were in fact authorized to work in the U.S.; 94 percent of FNCs issued were for people who were not authorized to work. As such, according to the report, 6 percent of people who were authorized to work in the U.S. received a FNC from E-Verify.<sup>31</sup>

#### Mandatory Use of E-Verify in Other States

At least 19 other states require the use of E-Verify by public employers, contractors or subcontractors of public employers, or private employers. The following states require private employers, as well as public employers and their contractors and subcontractors, to use E-Verify:

- North Carolina<sup>32</sup>
- Mississippi<sup>33</sup>
- Georgia<sup>34</sup>
- Arizona<sup>35</sup>
- Alabama<sup>36</sup>
- Utah<sup>37</sup>
- South Carolina<sup>38</sup>

The following states require only public employers and their contractors to use E-Verify:

<sup>24</sup> DHS and USCIS, *Verification Process*, <https://www.e-verify.gov/employers/verification-process> (last visited Mar. 1, 2020).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> DHS and USCIS, *E-Verify Performance*, <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited Mar. 1, 2020).

<sup>29</sup> *Id.*

<sup>30</sup> Westat, *Evaluation of the Accuracy of E-Verify Findings*, (July, 2012) available at <https://www.e-verify.gov/sites/default/files/everify/data/FindingsEVerifyAccuracyEval2012.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> N.C.G.S. § 160A-169.1 (municipalities); 153A-99.1 (counties); 143-48.5, 143-133.3 (public contractors); 64-26 (private employers that have more than 25 employees); 126-7.1 (state agencies).

<sup>33</sup> Miss. Code § 71-11-3.

<sup>34</sup> Ga. Code § 13-10-91 (public employers and contractors); 36-60-6 (private employers that have more than 10 employees).

<sup>35</sup> Ariz. Rev. Stat. § 41-4401 (public contractors); 23-214 (private and public employers).

<sup>36</sup> Ala. Code § 31-13-15.

<sup>37</sup> Utah Code § 63G-12-301 (private employers having 15 or more employees, unless the employee has a guest worker permit), 63G-12-302 (public employers and contractors). Under both statutes, the employers may use E-Verify or another federal verification program.

<sup>38</sup> S.C. Code § 41-8-20 (private employers); 8-14-20 (public employers and contractors).

- Indiana<sup>39</sup>
- Nebraska<sup>40</sup>
- Missouri<sup>41</sup>
- Colorado<sup>42</sup>
- Oklahoma<sup>43</sup>
- Texas<sup>44</sup>
- Virginia<sup>45</sup>

Approaches by some states do not fall squarely into the above categories. For example, Tennessee requires only private employers that have 50 or more employees to use E-Verify.<sup>46</sup> Pennsylvania requires public contractors and private *construction* employers to use E-Verify.<sup>47</sup> In Michigan, only contractors of the Michigan Department of Transportation must use E-Verify.<sup>48</sup> Finally, West Virginia requires contractors whose employees work on the Capitol grounds to use E-Verify.<sup>49</sup>

## Effect of the Bill

### Public Employers, Contractors, and Subcontractors

The bill provides that, beginning January 1, 2021, public employers,<sup>50</sup> contractors,<sup>51</sup> and subcontractors<sup>52</sup> must register with and use the E-Verify system to verify the work authorization status of all newly hired employees.<sup>53</sup> The bill specifies that a public employer, contractor, or subcontractor may not enter into a contract unless each party to the contract registers with and uses the E-Verify system.

Subcontractors must provide contractors with an affidavit stating that the subcontractor does not employ, contract with, or subcontract with an unauthorized alien, and the contractor must maintain a copy of the affidavit for the duration of the contract.

The bill provides that a public employer, contractor, or subcontractor who has a good faith belief that a person or entity with which it is contracting has knowingly employed, hired, recruited or referred an unauthorized alien<sup>54</sup> must terminate the contract with the person or entity. Furthermore, if a public employer has a good faith belief that a subcontractor has knowingly violated relevant portions of the bill, but the contractor has otherwise complied, the public employer must promptly notify the contractor

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<sup>39</sup> Ind. Code § 22-5-1.7-11.1.

<sup>40</sup> Nev. Rev. St. § 4-114.

<sup>41</sup> Miss. Stat. § 285.530.

<sup>42</sup> Colo. Rev. Stat. § 8-17.5-102.

<sup>43</sup> 25 Okl. St. § 1313 (public employers and contractors must use E-Verify or another federal verification program).

<sup>44</sup> Tex. Nat. Res. Code § 81.072 (public contractors); Tex. Gov. Code § 673.002 (state agencies)

<sup>45</sup> Va. Code § 40.1-11.2 (state agencies), 2.2-4308.2 (public contractors).

<sup>46</sup> Tenn. Code § 50-1-703.

<sup>47</sup> 43 Penn. Stat. § 167.3 (public contractors); 43 Penn. Stat. § 168.3 (private construction employers).

<sup>48</sup> Act 200, Public Acts of 2012, Sec. 381.

<sup>49</sup> W. Va. Code, § 15-2D-3.

<sup>50</sup> The bill defines the term “public employer” to mean an agency within state, regional, county, local, or municipal government, whether executive, judicial, or legislative, or any public school, community college, or state university that employs persons who perform labor or services for that employer in exchange for salary, wages, or other remuneration or that enters or attempts to enter into a contract with a contractor.

<sup>51</sup> The bill defines the term “contractor” to mean a person or entity that has entered or is attempting to enter into a contract with a public employer to provide labor, supplies, or services to such employer in exchange for salary, wages, or other remuneration.

<sup>52</sup> The bill defines the term “subcontractor” to mean a person or entity that provides labor, supplies, or services to or for a contractor or another subcontractor in exchange for salary, wages, or other remuneration.

<sup>53</sup> The bill defines the term “employees” to mean a person filling an authorized and established position who performs labor or services for a public or private employer in exchange for salary, wages, or other remuneration.

<sup>54</sup> The bill defines the term “unauthorized alien” to mean a person who is not authorized under federal law to be employed in the U.S., as described in 8 U.S.C. § 1324a(h)(3). The term shall be interpreted consistently with that section and any applicable federal rules or regulations.

and order the contractor to immediately terminate the contract with the subcontractor. The bill specifies that a termination of a contract for either of these reasons may not be considered a breach of contract.

Actions to challenge such terminations must be filed no later than 20 calendar days after the termination date. If a public employer terminates a contract with a contractor, the contractor may not be awarded a public contract for at least one year after the date on which the contract was terminated, and the contractor is liable for any additional costs incurred by the public employer as a result of the contract termination.

### Private Employers

The bill provides that, beginning January 1, 2021, a private employer<sup>55</sup> must verify the employment eligibility of a person who has accepted an offer of employment or a contract employee upon the renewal or extension of his or her contract. The bill specifies that private employers are not required to verify the employment eligibility of employees hired before January 1, 2021.

A private employer must verify a person's employment eligibility by:

- Using the E-Verify system; or
- Requiring the person to provide the same documentation that is required by USCIS on its Employment Eligibility Verification form (Form I-9).

The private employer must retain a copy of such documentation for at least three years after the person's initial date of employment.

The bill provides that a private employer who complies with the requirements of the bill may not be held civilly or criminally liable under state law for hiring, continuing to employ, or refusing to hire an unauthorized alien if the proper protocol was followed to verify that the person's work authorization status was not that of an unauthorized alien. The bill specifies that compliance with proper protocol creates a rebuttable presumption that a private employer did not knowingly employ an unauthorized alien.

The bill requires a private employer to provide copies of any document used to verify a person's employment eligibility, upon request, to the following state entities:

- The Department of Law Enforcement.
- The Attorney General.
- The state attorney.
- The statewide prosecutor.

These entities must rely upon the federal government to verify a person's employment eligibility, and may not independently make a final determination as to whether a person is an unauthorized alien.

The bill provides that, if a private employer does not verify the employment eligibility of a current or future employee in accordance with the requirements above, DEO must require the private employer to provide DEO with an affidavit stating:

- The private employer will comply with the employee verification requirements,
- The private employer has terminated the employment of all unauthorized aliens in this state, and
- The employer will not intentionally or knowingly employ an unauthorized alien in this state.

If the private employer does not provide the required affidavit within 30 days, the bill requires DEO to order the appropriate agency to suspend all applicable licenses<sup>56</sup> held by the private employer until the

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<sup>55</sup> The bill defines the term "private employer" to mean a person or entity that transacts business in this state, that has a license issued by an agency in this state, and that employs persons to perform labor or services in exchange for salary, wages, or other remuneration.

<sup>56</sup> The bill defines the term "license" to mean a franchise, a permit, a certificate, an approval, a registration, a charter, or any similar form of authorization required by state law and issued by an agency for the purpose of operating a business in this state.

private employer provides DEO with the required affidavit. The bill specifies that the licenses subject to suspension include all licenses held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to that business location, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension are all licenses that are held by the employer at the employer's primary place of business.

For any private employer found to have violated the above requirements three times within any 36 month period, DEO must order the appropriate agencies to permanently revoke all licenses held by the private employer specific to the business location where the unauthorized alien performed work. If the private employer does not hold a license specific to that business location, but a license is necessary to operate the private employer's business in general, DEO must order the appropriate agencies to permanently revoke all licenses held by the private employer at the private employer's primary place of business.

The bill specifies that the requirements provided for in the bill be enforced without regard to race, color, or national origin and be construed in a manner so as to be fully consistent with any applicable federal laws or regulations.

#### Economic Development Incentives

The bill amends s. 288.061, F.S., relating to the economic development incentive application process. Beginning July 1, 2020, the bill specifies that the executive director of DEO may not approve an economic development incentive application unless the application includes proof that the applicant is registered with and uses the E-Verify system to verify the work authorization status of all newly hired employees. If DEO determines that an awardee is not complying with this requirement, DEO must notify the awardee by certified mail of its determination of noncompliance and the awardee's right to appeal the determination. On a final determination of noncompliance, the awardee must repay DEO all monies received as an economic development incentive within 30 days of the final determination.

#### B. SECTION DIRECTORY:

- Section 1 Amends s. 288.061, F.S., requiring that certain information be included in the economic development incentive application process.
- Section 2 Amends s. 448.095, F.S., relating to the verification of employment eligibility by certain employers.
- Section 3 Provides an effective date of July 1, 2020.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The bill requires DEO to enforce the suspension of the license of an employer that fails to verify a person's employment eligibility. This enforcement may occur at the local government level and at specific state agencies. This additional enforcement duty will likely result in additional costs to DEO.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could increase costs for employers that do not currently verify a person's employment eligibility. Using E-Verify or requiring an employer to verify an individual's employment eligibility by means of document review could increase the labor involved in hiring an employee, especially if E-Verify is used and the initial response for that employee is not "Employment Authorized."

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not confer any rulemaking authority nor require the promulgation of rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 27, 2020, the Commerce Committee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS:

- Specified use of the E-Verify system for new hires as a condition for the approval of economic development incentive applications.
- Defined the terms "agency", "department", and "license".
- Provided clarification relating to the documentation that a private employer may use to verify a person's employment eligibility.
- Streamlined redundant language relating to private employers as contractors.
- Authorized FDLE, the Attorney General, the state attorney, and the statewide prosecutor to request copies of any document used by a private employer to verify a person's employment eligibility.
  - Such entities must rely upon the federal government to verify a person's employment eligibility, and may not independently make a final determination as to whether a person is an unauthorized alien.
- Added the affidavit and license sanction provisions for certain violations relating to private employer compliance with employment eligibility verification requirements.

This analysis is drafted to the committee substitute as approved by the Commerce Committee.