

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 Committee on Commerce and Tourism

BILL: CS/CS/SB 664

INTRODUCER: Commerce and Tourism Committee; Judiciary Committee; and Senator Lee and others

SUBJECT: Verification of Employment Eligibility

DATE: February 19, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 664 requires specific private employers to register with E-Verify or an alternative employment verification system. The bill also requires certain public employers and their contractors and subcontractors to register with and use an employment verification system to ensure the work authorization status of all new employees and identify whether an employee is an unauthorized alien.

The private-employer requirement, after it is fully phased-in, will generally apply to employers that have 20 or more employees in Florida. If a private employer fails to comply with the registration requirement, it could face a \$500 fine and be required to register within 30 days. If an employer fails to register by this deadline, the DEO must order the appropriate agency to suspend the employer's business licenses.

The bill also provides immunity from civil or criminal liability for an employer's reliance on an approved employment verification system. For instance, an employer who relies on E-Verify's indication that a person is unauthorized may not be sued for refusing to hire the person. Conversely, if E-Verify indicates that an employee is authorized to work in the United States, there is a rebuttable presumption that the employer did not knowingly employ an unauthorized alien.

Certain public employers and certain contractors and subcontractors who enter into a contract with a public employer must register with and use an employment verification system.

Contractors or subcontractors that have less than 10 employees in Florida, and that have contracts valued under \$35,000 are exempt from the employment verification process.

II. Present 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 certain employers to use E-Verify and requires most employers to verify the eligibility of new hires using employee-provided documents.

E-Verify is an Internet-based system through which an employer can verify that a newly hired employee is authorized to work in the United States.¹ E-Verify is

operated by U.S. Citizenship and Immigration Services, part of the Department of Homeland Security (DHS), in partnership with the Social Security Administration. E-Verify is free and easy to use. E-Verify provides an automated link to government records to help employers confirm the employment eligibility of new hires.²

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 United States Attorney General.³ 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,⁴ punishable by up to 60 days in jail⁵ and a fine not to exceed \$500.⁶

Moreover, pursuant to Executive Order 11-116, state agencies that are under the direction of the Governor must use E-Verify for all newly hired employees. The order also requires an agency to include in its contracts a provision that requires a contractor to use E-Verify for all new hires for the duration of the contract. These same requirements must be included in a subcontractor’s contract who performs work under the contractor.⁷

¹ U.S. Citizenship and Immigration Services, *How do I use E-Verify?* <https://www.e-verify.gov/sites/default/files/everify/guides/E4en.pdf> (last visited Feb. 18, 2020).

² *Id.*

³ Section 448.09(1), F.S.

⁴ Section 448.09(2), F.S.

⁵ Section 775.082(4)(b), F.S.

⁶ Section 775.083(1)(e), F.S.

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

Federal Law

Under the Immigration Reform and Control Act of 1986 (IRCA),⁸ it is 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.⁹

The IRCA established a procedure that employers must use to verify that employees are authorized to work in the United States.¹⁰ The procedure requires employees to present documents that establish his or her identity and eligibility to work,¹¹ and requires employers to complete a Form I-9 for each new employee hired.¹² The IRCA provides sanctions to be imposed on employers who knowingly employ aliens who are not authorized to work.¹³ Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation.¹⁴ The United States Citizenship and Immigration Services (USCIS) enforces these provisions.¹⁵

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹⁶ which, among other provisions, 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 4 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.¹⁷

⁸ Public Law 99-603, 100 Stat. 3359.

⁹ 8 U.S.C. s. 1324a.

¹⁰ *Id.*

¹¹ An employer may rely on a U.S. passport; resident alien card, alien registration card, or other document designated by the Attorney General that contains a photograph and other personal identifying information, authorizes employment in the U.S., and is tamper resistant. Alternative, an employer may review a combination of documents that establish the individual's identity, e.g., a social security number, and a document that establishes the individual's identity, e.g., a driver's license.

¹² *Id.*

¹³ *Id.* s. 1324a(a)(1)-(2).

¹⁴ *Id.* s. 1324c.

¹⁵ *Id.* s. 1324a.

¹⁶ Public Law 104-208.

¹⁷ Department of Homeland Security and USCIS, *History and Milestones [of E-Verify]*, <http://www.uscis.gov/portal/site/uscis/menuitem.eyJd4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD> (last visited Feb. 18, 2020).

Using E-Verify

The Process, in Context

E-Verify is the last step in a larger eligibility-verification process. This process begins when an employee accepts an offer of employment.¹⁸ 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, and citizenship status under penalty of perjury.¹⁹ By the end of the third day on the job, the *employer* is required to complete Section 2, which states under penalty of perjury that he or she has reviewed certain employee-provided documents that establish the employee's eligibility.²⁰ Most employers are not required to continue the verification of employment eligibility process beyond this step. However, for those who choose to use or are required to use E-Verify, the process continues.

Before using E-Verify for the first time, an employer must enroll via the DHS's website.²¹ 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 the DHS.²²

Once enrolled, an employer opens a "case" for the employee on the E-Verify system and enters basic information from the employee's Form I-9 (name, address, SSN) into the case.²³ Then, E-Verify compares the submitted information to records that are available to the DHS and the Social Security Administration, and usually within seconds, issues one of several possible results to the employer.²⁴ A result of "Employment Authorized" indicates that the employee may work in the United States. However, in a given case, the system might issue one of several other results:

- **Verification In Process** – This case was referred to the DHS for further verification.
- **Tentative Nonconfirmation (TNC)** – Information did not match records available to the SSA or the DHS. Additional action is required.
- **Case in Continuance** – The employee has visited an SSA field office or contacted the DHS, but more time is needed to determine a final case result.
- **Close Case and Resubmit** – The SSA or the DHS requires that the employer 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's license information is incorrect.²⁵
- **Final Nonconfirmation** – 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 United States.²⁶

¹⁸ United States Citizenship and Immigration Services, *Complete and Correct Form I-9*, <https://www.uscis.gov/i-9-central/complete-and-correct-form-i-9>, (last visited Feb. 18, 2020).

¹⁹ See 8 C.F.R. § 274a.2(b)(1)(i)(A).

²⁰ See 8 C.F.R. § 274a.2(b)(1)(ii).

²¹ Department of Homeland Security and USCIS, *The Enrollment Process*, <https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process> (last visited Feb. 18, 2020).

²² *The E-Verify Memorandum for Employers*, available at <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf> (last visited Feb. 18, 2020).

²³ Department of Homeland Security and USCIS, *ABOUT E-Verify*, <https://www.e-verify.gov/about-e-verify> (last visited Feb. 18, 2020).

²⁴ *Id.*

²⁵ Department of Homeland Security and USCIS, *Verification Process*, <https://www.e-verify.gov/employers/verification-process> (last visited Feb. 18, 2020).

²⁶ *Id.*

If the result is TNC, the employer must notify the employee, who must take further action to verify his or her eligibility.²⁷ If the result is Verification in Process or Case in Continuance, the E-Verify system needs more time to process the case.²⁸

Results in FY 2019

In FY 2019, E-Verify processed 38,930,405 cases, 98.51% of which were automatically confirmed as “work authorized” and another 0.23% were confirmed after an initial “mismatch.”²⁹

In the remaining 1.27% of cases, the employees were not found to be authorized to work in the United States.³⁰ The vast majority of this 1.27% (0.97%) were cases that were not resolved by the end of FY 2019 for various reasons, including because the case was awaiting further action by either the employer or employee at the end of the fiscal year or because the employer closed the case as “self-terminated.”³¹

Accuracy

The most recent independent report of E-Verify’s accuracy appears to have been done 2012 by the firm Westat.³² The report relied on data from 2009 and before.³³

Westat found that E-Verify was 94% accurate in its final disposition of cases—E-Verify confirmed 94% of employees who were in fact authorized to work in the United States; 94% of the Final Nonconfirmations (FNCs) issued were for people who were in fact not authorized to work in the United States. As such, according to Westat, 6% of people who were in fact authorized to work in the United States received a FNC from E-Verify.³⁴

User Satisfaction

According to the Department of Homeland Security’s most recent customer service report, which was published in 2018 regarding users’ experiences in 2017, employers rated their experience of “using E-Verify” at “90,” based on subcategories such as “ease of use” and “speed of response.”³⁵ These same users rated their overall satisfaction with E-Verify at “85.”³⁶

²⁷ *Id.*

²⁸ *Id.*

²⁹ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *E-Verify Performance*, <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited Feb. 18, 2020).

³⁰ *Id.*

³¹ *Id.*

³² 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> (last visited Feb. 18, 2020).

³³ *Id.*

³⁴ *Id.*

³⁵ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Annual Customer Satisfaction Survey 2017*, (Mar. 2018), available at <https://www.e-verify.gov/sites/default/files/everify/data/EVerifyCustomerSatisfactionSurvey2017.pdf> (last visited Feb. 18, 2020).

³⁶ *Id.* This rating is in line with prior years’ ratings, which have fluctuated between 85 and 87 since 2011.

In 2017, 13 percent of employers contacted E-Verify by phone for customer service.³⁷ These employers rated their experience at “89.”³⁸ And 96 percent of those who contacted customer service reported having their issue resolved, usually on the first call (89 percent).³⁹

Operational Disturbances

During the January 2019, partial federal government shut down, the E-Verify system was unavailable. As a result, employers were unable to enroll in E-Verify, contact customer support representatives, create an E-Verify case, or view or take action on a case, among other functions.⁴⁰ The DHS issued guidance that extended the 3-day rule to permit employers additional time to submit new employee information to E-Verify, and gave employees additional time to resolve a TNC.⁴¹

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 Carolina⁴²
- Mississippi⁴³
- Georgia⁴⁴
- Arizona⁴⁵
- Alabama⁴⁶
- Utah⁴⁷
- South Carolina⁴⁸

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ National Law Review, *When the Government Shuts Down: The Impact on E-Verify, I-9's, and Visas*, (Jan. 25, 2019), <https://www.natlawreview.com/article/when-government-shuts-down-impact-e-verify-i-9-s-and-visas> (last visited Feb. 18, 2020).

⁴¹ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *E-Verify Resumes Operation*, (Jan. 27, 2019), <https://www.e-verify.gov/e-verify-resumes-operation> (last visited Feb. 17, 2020). Due to the lapse in federal funding, the E-Verify system was not in operation from December 22, 2018 to January 26, 2019. E-Verify restarted on Sunday, January 27, 2019. U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *January 2019, E-Verify Incidents*, (Apr. 23, 2019), <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-enhancements/january-2019> (last visited Feb. 18, 2020).

⁴² 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).

⁴³ Miss. Code § 71-11-3.

⁴⁴ Ga. Code § 13-10-91 (public employers and contractors); 36-60-6 (private employers that have more than 10 employees).

⁴⁵ Ariz. Rev. Stat. § 41-4401 (public contractors); 23-214 (private and public employers).

⁴⁶ Ala. Code § 31-13-15.

⁴⁷ 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.

⁴⁸ S.C. Code § 41-8-20 (private employers); 8-14-20 (public employers and contractors).

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

- Indiana⁴⁹
- Nebraska⁵⁰
- Missouri⁵¹
- Colorado⁵²
- Oklahoma⁵³
- Texas⁵⁴
- Virginia⁵⁵

Some states' approaches 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.⁵⁶ Pennsylvania requires public contractors and private *construction* employers to use E-Verify.⁵⁷ In Michigan, only contractors of the Michigan Department of Transportation must use E-Verify.⁵⁸ Finally, West Virginia requires contractors whose employees work on the Capitol grounds to use E-Verify.⁵⁹

III. Effect of Proposed Changes:

The bill requires private employers⁶⁰ to register with E-Verify, or an alternative employment verification system, and use it to verify a new hire's work authorization status. A private employer is not required to verify the employment eligibility of a continuing employee hired before the employer registered to use an employment verification system.

Pursuant to the bill, an employer must use one of the following employment authorization systems to verify a new hire's employment eligibility:

- An Internet-based system that is operated by the U.S. Department of Homeland Security which allows participating employers to electronically verify the employment eligibility of newly hired employees;⁶¹ or
- A system that an employer certifies, under penalty of perjury, on a form provided by the DEO as a substantially equivalent to E-Verify; or

⁴⁹ Ind. Code § 22-5-1.7-11.1.

⁵⁰ Nev. Rev. St. § 4-114.

⁵¹ Miss. Stat. § 285.530.

⁵² Colo. Rev. Stat. § 8-17.5-102.

⁵³ 25 Okl. St. § 1313 (public employers and contractors must use E-Verify or another federal verification program).

⁵⁴ Tex. Nat. Res. Code § 81.072 (public contractors); Tex. Gov. Code § 673.002 (state agencies)

⁵⁵ Va. Code § 40.1-11.2 (state agencies), 2.2-4308.2 (public contractors).

⁵⁶ Tenn. Code § 50-1-703.

⁵⁷ 43 Penn. Stat. § 167.3 (public contractors); 43 Penn. Stat. § 168.3 (private construction employers).

⁵⁸ Act 200, Public Acts of 2012, Sec. 381.

⁵⁹ W. Va. Code, § 15-2D-3.

⁶⁰ The bill specifically provides that a few types of people or entities are not "employers," and are thus exempt from using an employment verification system. These include a homeowner who hires "casual labor" to be performed at the home, and a homeowner who hires a licensed independent contractor to perform "a specified portion of labor or services." The bill also exempts employee leasing companies to the extent they operate under a contract that puts the primary burden for compliance with the bill on the client company.

⁶¹ Currently, the U.S. Department of Homeland Security operates E-Verify to allow employers to electronically verify their new hire's employment eligibility.

- A system that complies with IRCA,⁶² if the employer also maintains complete copies of all the records it used to establish an employee's identity and employment authorization under the IRCA for at least 3 years, or for 1 year after the employee ceases to provide services to the employer, whichever is later.

The requirement that private employers use an employment verification system will generally apply to employers that have 20 or more Florida employees once it has been phased-in on the following schedule:

- On January 1, 2021, for private employers with at least 500 employees;
- On July 1, 2021, for private employers with at least 100 Florida employees; and
- On January 1, 2022, for private employers with at least 20 or more Florida employees.

If an employer fails to register with an employment verification system, it could face a fine of up to \$500 and be required to register within 30 days. The Department of Economic Opportunity (DEO) must order the appropriate agency to suspend all of the employer's applicable licenses if the business fails to register by this deadline.

The bill also provides immunity from civil or criminal liability for decisions made by an employer based on its reliance on an employment-verification system. For instance, an employer who relies on E-Verify's indication that a person is unauthorized may not be sued for refusing to hire the person. If E-Verify indicates that an employee is authorized to work in the United States, there is a rebuttable presumption that the employer did not knowingly employ an unauthorized alien. However, this immunity does not apply to a government employer under the bill.

The bill further requires public employers that enter into contracts in excess of \$35,000 to register with and use an employment verification system to validate the work authorization status of all new employees and identify whether an employee is an unauthorized alien. Additionally, certain contractors and subcontractors who have entered into, or are attempting to enter into, a contract with a public employer must register with and use an employment verification system. Only those contractors or subcontractors that have more than 10 employees in Florida and that have contracts with a public employer that are valued in excess of \$35,000 are required to comply with these requirements. A public employer or contractor or subcontractor is prohibited from entering into a contract unless each party registers with and uses an employment verification system. These requirements take effect on public employers and their contractors and subcontractors on July 1, 2021.

Additionally, specific state contracts in excess of \$35,000 in value must include a provision that requires the contractor or subcontractor that performs work under the contract to register with and use an employment verification system for all new employees it hires in Florida during the contract's term.

Finally, the bill requires the DEO to adopt rules that outline the qualifications of an alternative employment authorization system that is at least as effective as E-Verify in identifying unauthorized aliens and persons authorized to work in the United States.

⁶² 8 U.S.C. 1324a

The bill takes effect July 1, 2020, but phases in use requirements through July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that an employer does not currently use an employment verification system, the bill could increase costs to employers of 20 or more employees in Florida. Though the federal government does not charge a fee for the use of E-Verify, using E-Verify or another employment verification system could increase the labor involved in onboarding an employee, especially if the initial response for that employee is not “Employment Authorized.”

C. Government Sector Impact:

The DEO is required to enforce the suspension of the license of an employer that fails to register with an employment verification system. 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 the DEO.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill has a requirement that a public employer and contractor and subcontractor must all register with and use an employment verification system prior to entering into contracts above certain dollar thresholds. The definition of a contractor at lines 116-119 includes those who “entered into, or is attempting to enter into” a contract with a public employer. When read together, this may have the effect of requiring any contractor who has contracted with a public employer to use an employment verification system indefinitely. The bill further includes a provision that may be inconsistent with the above requirement, which requires contractors and subcontractors who perform work pursuant to a contract valued in excess of \$35,000 with the state to submit any new employees they hire in Florida *during the pendency of the contract* to an employment verification system. It is therefore unclear how long a contractor must continue its use of an employment verification system.

Lines 141-144 require public employers, contractors, and subcontractors to “register with and use an employment verification system to verify the work authorization status of all new employees *and identify whether an employee is an unauthorized alien.*” When read in conjunction with lines 95-99, it appears that the intent of the italicized language is related to the verification of new employees. The italicized language could be clarified or deleted, if the intent is not to create a duty to verify the work status of existing employees.

Some provisions in the bill require an employer to “register with and use” an employment verification system, while other provisions require an employer to “use” an employment verification system. It is unclear if it is possible to register with the system contemplated in lines 193-198.

VIII. Statutes Affected:

This bill amends section 287.058 of the Florida Statutes.

This bill creates sections 287.137 and 448.093 of the Florida Statutes.

IX. Additional Information:

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

CS by Commerce and Tourism on February 18, 2020:

- Clarifies that employee thresholds in the bill are based on only those employees in Florida;
- Requires agricultural employers to use an employment verification system;
- Revises the employee threshold and implementation dates as follows:
 - Public employers and their contractors and subcontractors must register with and use a system by July 1, 2021, and
 - Private employers of 100 or more employees must register with a system by July 1, 2021, and
 - Private employers of 20 or more employees must register with a system by January 1, 2022.

- Reduces the contract value threshold which subjects a contractor or subcontractor who works with a public employer to the verification requirements from \$195,000 and \$65,000 per contract, respectively, to \$35,000 per contract;
- Requires all state contracts valued in excess of \$35,000 to include a provision that requires a contractor or subcontractor who performs work pursuant to the contract to register with and use an employment verification system for all of its new employees hired in Florida during the term of the contract; and
- Provides for alternate employment verification systems, including a system that the employer certifies is substantially equivalent to E-Verify or a system that complies with IRCA.

CS by Judiciary on February 11, 2020:

The committee substitute:

- Authorizes the DEO to designate an alternative (non-E-Verify) employment verification system;
- Phases in the required use of an employment verification system by private employers, based on number of employees (largest employers first);
- Exempts agricultural employers from the use of an employment verification system;
- Requires contractors and subcontractors having a contract with a department, agency, political subdivision of the state to use an employee verification system only if they meet certain thresholds, including contract value;
- Alters the penalties for failing to use an employment verification system;
- Removes penalties provided in the bill for knowingly employing an unauthorized alien (these penalties were additional to those already provided in law);
- Removes the bill's requirement that DEO act on complaints that an employer had failed to use E-Verify;
- Removes the bill's provisions expressly authorizing an employer or employee to seek an injunction against the bill's enforcement provisions;
- Removes the bill's provisions making it an unfair trade practice to terminate an authorized employee while employing an unauthorized alien; and
- Removes several of the bill's provisions regarding parties to public contracts, including the:
 - Required termination of a contract by a party who believes another party is not using E-Verify.
 - Prohibition on a contractor's entering into a public contract for one year if the contractor fails to use E-Verify.

B. Amendments:

None.