HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1265 Verification of Employment Eligibility
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee		Willson	Hamon

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 that are under the direction of the Governor must use E-Verify for all newly hired employees, and must require contractors and subcontractors 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. A private employer must verify a person's employment eligibility by either using the E-Verify system or requiring the person to provide the same documentation that is 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 DEO with an affidavit stating that:

- the private employer will comply with the employee verification requirements described above,
- 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 an indeterminate, insignificant fiscal impact on state or local government.

The bill provides an effective date of July 1, 2020.

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. Moreover, by executive order of Governor Scott, state agencies under the direction of the Governor, as well as their contractors and subcontractors, must use E-Verify.

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 United States.[1] 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.[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 jail[5] and a fine not to exceed $500.[6]

Moreover, by 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 a contract a provision requiring a contractor to use E-Verify for all new hires for the duration of the contract. These same requirements must be included in the contractor's contracts with subcontractors.[7]

Federal Law

The federal Immigration Reform and Control Act of 1986 (IRCA)[8] 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.[9]

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[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. 22, 2020).
[2] DHS and USCIS, *E-Verify User Manual,* https://www.e-verify.gov/e-verify-user-manual-10-introduction/11-background-and-overview (last visited Feb. 22, 2020).
[3] S. 448.09(1), F.S.
[4] S. 448.09(2), F.S.
[5] S. 775.082(4)(b), F.S.
[6] S. 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 (last visited Feb. 22, 2020).
[8] Public Law 99-603, 100 Stat. 3359.
[9] 8 U.S.C. § 1324a.

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

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[15] 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 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.[16]

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.[17] 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.[18] 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.[19] 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 the DHS's website.[20] 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.[21]

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.[22] Then E-Verify compares that information to records available to the U.S. Department of Homeland Security and the Social Security Administration, and usually within seconds, issues one of several possible results to the

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[10] *Id.*
[11] *Id.*
[12] *Id*. at 1324a(a)(1)-(2).
[13] *Id*. at 1324c.
[14] *Id.* at 1324a.
[15] Public Law 104-208.
[16] Department of Homeland Security and USCIS, *History and Milestones [of E-Verify*], http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD (last visited Feb. 22, 2020).
[17] 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. 22, 2020).
[18] *See* 8 C.F.R. § 274a.2(b)(1)(i)(A).
[19] *See* 8 C.F.R. § 274a.2(b)(1)(ii).
[20] 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. 22, 2020).
[21] *The E-Verify Memorandum for Employers*, available at https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf (last visited Feb. 22, 2020).
[22] Department of Homeland Security and USCIS, *ABOUT E-Verify*, https://www.e-verify.gov/about-e-verify (last visited Feb. 22, 2020).

employer.[23] A result of "Employment Authorized" indicates that the employee may work in the United States. 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 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.
- Final Nonconfirmation - E-Verify cannot confirm the employee's employment eligibility after the employee visited SSA or contacted DHS.[24]

If the result is TNC, the employer must notify the employee, who must take further action to verify his or her eligibility.[25] If the result is Verification in Process or Case in Continuance, the E-Verify system needs more time to process the case.[26] Lastly, a result of "Final Nonconfirmation" indicates that 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.[27]

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."[28]

For the remaining 1.27% of cases, the employees were not found to be authorized to work in the United States.[29] 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."[30]

Accuracy

The most recent independent report of E-Verify's accuracy appears to have been done 2012 by the firm Westat.[31] The report relied on data from 2009 and before.[32]

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.[33]

User Satisfaction

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[23] *Id*.
[24] Department of Homeland Security and USCIS, *Verification Process*, https://www.e-verify.gov/employers/verification-process (last visited Feb. 22, 2020).
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] Department of Homeland Security and USCIS, *E-Verify Performance*, https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance (last visited Feb. 22, 2020).
[29] *Id*.
[30] *Id*.
[31] 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.
[32] *Id*.
[33] *Id*.

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."[34] These same users rated their overall satisfaction with E-Verify at "85."[35]

In 2017, 13 percent of employers contacted E-Verify by phone for customer service.[36] These employers rated their experience at "89."[37] And 96 percent of those who contacted customer service reported having their issue resolved, usually on the first call (89 percent).[38]

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[39]
- Mississippi[40]
- Georgia[41]
- Arizona[42]
- Alabama[43]
- Utah[44]
- South Carolina[45]

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

- Indiana[46]
- Nebraska[47]
- Missouri[48]
- Colorado[49]
- Oklahoma[50]
- Texas[51]
- Virginia[52]

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[34] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Annual Customer Satisfaction Survey 2017*, (Mar. 2018), https://www.e-verify.gov/sites/default/files/everify/data/EVerifyCustomerSatisfactionSurvey2017.pdf (last visited Feb. 22, 2020).
[35] *Id*. This rating is in line with prior years' ratings, which have fluctuated between 85 and 87 since 2011.
[36] *Id*.
[37] *Id*.
[38] *Id.*
[39] 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).
[40] Miss. Code § 71-11-3.
[41] Ga. Code § 13-10-91 (public employers and contractors); 36-60-6 (private employers that have more than 10 employees).
[42] Ariz. Rev. Stat. § 41-4401 (public contractors); 23-214 (private and public employers).
[43] Ala. Code § 31-13-15.
[44] 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.
[45] S.C. Code § 41-8-20 (private employers); 8-14-20 (public employers and contractors).
[46] Ind. Code § 22-5-1.7-11.1.
[47] Nev. Rev. St. § 4-114.
[48] Miss. Stat. § 285.530.
[49] Colo. Rev. Stat. § 8-17.5-102.
[50] 25 Okl. St. § 1313 (public employers and contractors must use E-Verify or another federal verification program).
[51] Tex. Nat. Res. Code § 81.072 (public contractors); Tex. Gov. Code § 673.002 (state agencies)
[52] Va. Code § 40.1-11.2 (state agencies), 2.2-4308.2 (public contractors).

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.[53] Pennsylvania requires public contractors and private *construction* employers to use E-Verify.[54] In Michigan, only contractors of the Michigan Department of Transportation must use E-Verify.[55] Finally, West Virginia requires contractors whose employees work on the Capitol grounds to use E-Verify.[56]

Effect of the Bill

Definitions

The bill defines the following terms:

- "Agency" means an agency, a department, a board, or a commission of this state or a county or municipality which issues a license to operate a business in this state.
- "Department" means the Department of Economic Opportunity.
- "Contractor" means 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.
- "Employee" means 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.
- "E-Verify system" means an Internet-based system operated by the United States Department of Homeland Security that allows participating employers to electronically verify the employment eligibility of newly hired employees.
- "Legal alien" means a person who is or was lawfully present or permanently residing legally in the United States and allowed to work at the time of employment and remains so throughout the duration of that employment.
- "License" means 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. The term includes, but is not limited to:
    - An article of incorporation.
    - A certificate of partnership, a partnership registration, or an article of organization.
    - A grant of authority issued pursuant to state or federal law.
    - A transaction privilege tax license.
- "Private employer" means 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. The term does not include:
    - A public employer;
    - The occupant or owner of a private residence who hires:
        - Casual labor, as defined in s. 443.036, F.S., to be performed entirely within the private residence; or
        - A licensed independent contractor, as defined in federal laws or regulations, to perform a specified portion of labor or services; or

[53] Tenn. Code § 50-1-703.
[54] 43 Penn. Stat. § 167.3 (public contractors); 43 Penn. Stat. §168.3 (private construction employers).
[55] Act 200, Public Acts of 2012, Sec. 381.
[56] W. Va. Code, § 15-2D-3.

- An employee leasing company licensed under part XI of ch. 468, F.S., that enters into a written agreement or understanding with a client company which places the primary obligation for compliance with this section upon the client company. In the absence of a written agreement or understanding, the employee leasing company is responsible for compliance with this section. Such employee leasing company shall, at all times, remain an employer as otherwise defined in federal laws or regulations.

- "Public employer" means 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.

- "Subcontractor" means 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.

- "Unauthorized alien" means a person who is not authorized under federal law to be employed in the United States, 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.

Public Employers, Contractors, and Subcontractors

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. 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.

Additional requirements include:
- 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 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 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 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 the United States Citizenship and Immigration Services on its Employment Eligibility Verification form (Form I-9).

The private employer must retain a copy of such documentation for at least 3 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 by:

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

The bill specifies that the entities listed above 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 that:

- the private employer will comply with the employee verification requirements listed above,
- 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 held by the private employer until the 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 the business location where the unauthorized alien performed work, 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 requirements relating to the verification of employment eligibility for current or future employees three times within any 36 month period, DEO must order the appropriate agencies to permanently revoke all licenses that are 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 the business location where the unauthorized alien performed work, but a license is necessary to operate the private employer's business in general, the bill directs DEO to order the appropriate agencies to permanently revoke all licenses that are 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 shall 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 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 their 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 thirty days of the final determination.

The bill provides for an effective date of July 1, 2020.

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.

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. Though the federal government does not charge a fee for the use of E-Verify, 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:

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES