

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/SB 664

INTRODUCER: Judiciary Committee and Senators Lee, Gruters, and Harrell

SUBJECT: Verification of Employment Eligibility

DATE: February 13, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	<b>Fav/CS</b>
2.			CM	
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 664 requires private employers to register with E-Verify or an approved alternative. The bill also requires some contractors and subcontractors to use an employment verification system to maintain eligibility to enter into contracts with a department, agency, or political subdivision of the state.

The private-employer requirement, after it is fully phased-in, will generally apply to nonagricultural employers having 150 or more employees. 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. For a failure to register by this deadline, an employer could have its business licenses suspended.

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. And if E-Verify indicated an employee was authorized to work in the United States, the indication creates a rebuttable presumption that the employer did not knowingly employ an unauthorized alien.

As to the requirements relating to public contracts, the bill requires public employers and certain contractors and subcontractors to register with and use an employment verification system. The requirements to use an employment verification system apply to contractors or subcontractors

that have more than 10 employees and have contracts valued in excess of \$195,000 or subcontracts valued in excess of \$65,000.

## 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 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 an Internet-based system through which an employer can verify that a newly hired employee is authorized to work in the United States.<sup>1</sup> 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.<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 United States 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, 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.<sup>7</sup>

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<sup>1</sup> 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 Jan. 27, 2020).

<sup>2</sup> *Id.*

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

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

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

<sup>6</sup> Section 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>.

## 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 Act.<sup>9</sup>

The IRCA established a procedure that employers must follow to verify that employees are authorized to work in the United States.<sup>10</sup> 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.<sup>11</sup> The IRCA provides sanctions to be imposed on employers who knowingly employ 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 United States 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, 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.<sup>16</sup>

## 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.<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

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<sup>8</sup> Public Law 99-603, 100 Stat. 3359.

<sup>9</sup> 8 U.S.C. s. 1324a.

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

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

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

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

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

<sup>15</sup> Public Law 104-208.

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

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD> (last visited Jan. 28, 2020).

<sup>17</sup> 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. 5, 2020).

name, address, Social Security Number, 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. 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.<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 the U.S. Department of Homeland Security and the Social Security Administration, 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 United States. However, in a given case, the system might issue one of several other results:

- **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.<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" 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.<sup>27</sup>

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<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> Department of Homeland Security and USCIS, *The Enrollment Process*, <https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process> (last visited Jan. 27, 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 Jan. 27, 2020).

<sup>22</sup> Department of Homeland Security and USCIS, *ABOUT E-Verify*, <https://www.e-verify.gov/about-e-verify> (last visited Jan. 27, 2020).

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

<sup>24</sup> Department of Homeland Security and USCIS, *Verification Process*, <https://www.e-verify.gov/employers/verification-process> (last visited Jan. 27, 2020).

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

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

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

### ***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.”<sup>28</sup>

In the remaining 1.27% of cases, the employees were not found to be authorized to work in the United States.<sup>29</sup> 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.”<sup>30</sup>

### ***Accuracy***

The most recent independent report of E-Verify’s accuracy appears to have been done 2012 by the firm Westat.<sup>31</sup> The report relied on data from 2009 and before.<sup>32</sup>

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.<sup>33</sup>

### ***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.”<sup>34</sup> These same users rated their overall satisfaction with E-Verify at “85.”<sup>35</sup>

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

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<sup>28</sup> 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 Jan. 27, 2020).

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

<sup>30</sup> *Id.*

<sup>31</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>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 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>.

<sup>35</sup> *Id.* This rating is in line with prior years’ ratings, which have fluctuated between 85 and 87 since 2011.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

### **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>39</sup>
- Mississippi<sup>40</sup>
- Georgia<sup>41</sup>
- Arizona<sup>42</sup>
- Alabama<sup>43</sup>
- Utah<sup>44</sup>
- South Carolina<sup>45</sup>

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

- Indiana<sup>46</sup>
- Nebraska<sup>47</sup>
- Missouri<sup>48</sup>
- Colorado<sup>49</sup>
- Oklahoma<sup>50</sup>
- Texas<sup>51</sup>
- Virginia<sup>52</sup>

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.<sup>53</sup> Pennsylvania requires public contractors and private *construction* employers to use E-Verify.<sup>54</sup> In Michigan, only contractors of the Michigan Department of Transportation must use E-Verify.<sup>55</sup> Finally,

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<sup>39</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>40</sup> Miss. Code § 71-11-3.

<sup>41</sup> Ga. Code § 13-10-91 (public employers and contractors); 36-60-6 (private employers that have more than 10 employees).

<sup>42</sup> Ariz. Rev. Stat. § 41-4401 (public contractors); 23-214 (private and public employers).

<sup>43</sup> Ala. Code § 31-13-15.

<sup>44</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>45</sup> S.C. Code § 41-8-20 (private employers); 8-14-20 (public employers and contractors).

<sup>46</sup> Ind. Code § 22-5-1.7-11.1.

<sup>47</sup> Nev. Rev. St. § 4-114.

<sup>48</sup> Miss. Stat. § 285.530.

<sup>49</sup> Colo. Rev. Stat. § 8-17.5-102.

<sup>50</sup> 25 Okl. St. § 1313 (public employers and contractors must use E-Verify or another federal verification program).

<sup>51</sup> Tex. Nat. Res. Code § 81.072 (public contractors); Tex. Gov. Code § 673.002 (state agencies)

<sup>52</sup> Va. Code § 40.1-11.2 (state agencies), 2.2-4308.2 (public contractors).

<sup>53</sup> Tenn. Code § 50-1-703.

<sup>54</sup> 43 Penn. Stat. § 167.3 (public contractors); 43 Penn. Stat. § 168.3 (private construction employers).

<sup>55</sup> Act 200, Public Acts of 2012, Sec. 381.

West Virginia requires contractors whose employees work on the Capitol grounds to use E-Verify.<sup>56</sup>

### III. Effect of Proposed Changes:

The bill requires private employers<sup>57</sup> to register with E-Verify or an approved alternative, and prohibits public employers, and certain contractors, and subcontractors from entering into a contract unless the other parties register with and use an approved employment-verification system.

The requirement for private employers to register with an employment verification system will generally apply to nonagricultural employers<sup>58</sup> having 150 or more employees once fully phased-in. The requirement applies to employers having 500 or more employees beginning on January 1, 2021. When fully phased-in on January 1, 2022, the requirement will apply to employers having 150 or more employees.

If an employer fails to register, it could face a fine of up to \$500 and be required to register within 30 days. For a failure to register by this deadline, the Department of Economic Opportunity may order the suspension of 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. And if E-Verify indicates that an employee is authorized to work in the United States, the indication creates a rebuttable presumption that the employer did not knowingly employ an unauthorized alien.

As to the requirements relating to public contracts, the bill requires public employers and certain contractors and subcontractors to register with and use an employment verification system. The requirements to use an employment verification system apply to contractors or subcontractors having more than 10 employees and have contracts valued in excess of \$195,000 or subcontracts valued in excess of \$65,000.

Finally, the bill requires the Department of Economic Opportunity to adopt rules to identify any E-Verify alternative that is at least as effective as E-Verify in identifying unauthorized aliens and persons authorized to work in the United States.

The bill takes effect July 1, 2020.

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<sup>56</sup> W. Va. Code, § 15-2D-3.

<sup>57</sup> 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 agricultural employers, 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.

<sup>58</sup> The description of agricultural employer in the bill closely tracks the definition of "agricultural employer" in 29 U.S.C. s. 1802(2).

**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:

The bill could increase costs to contractors and subcontractors. Though the federal government does not charge a fee for the use of E-Verify, using E-Verify could increase the labor involved in onboarding an employee, especially if the initial response for that employee is not "Employment Authorized."

Additionally, the use of E-Verify can, at least in some cases, detect the use of fraudulent documents that would not be detected otherwise. By minimizing the employment of unauthorized aliens, authorized workers and citizens may have more employment opportunities and better wages.

## C. Government Sector Impact:

The bill creates new responsibilities for the Department of Economic Opportunity.

**VI. Technical Deficiencies:**

None.



**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

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 Judiciary on February 11, 2020:**

The committee substitute:

- Authorizes the Department of Economic Opportunity 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.