

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 Judiciary

BILL: SB 664

INTRODUCER: Senators Lee, Gruters, and Harrell

SUBJECT: Verification of Employment Eligibility

DATE: February 10, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	Pre-meeting
2.			CM	
3.			RC	

I. Summary:

SB 664 requires a private or public employer, as well as a contractor or subcontractor of a public employer, to use E-Verify to confirm that a newly hired employee is authorized to work in the United States. The failure of a private employer to use E-Verify can result in the suspension of any of its licenses to do business. The suspension will end when the employer provides the Department of Economic Opportunity with an affidavit stating that the employer has registered to use E-Verify.

Moreover, a party to a public contract must terminate its contract with a party that has knowingly failed to register with and use E-Verify. If a contractor has its contract terminated for failing to use E-Verify, it may not enter into another public contract for one year.

Much like the penalties for an employer's failure to use E-Verify, the bill authorizes DEO to order the suspension of business licenses of an employer who knowingly employs an unauthorized alien. However, an employer who is alleged to have knowingly employed an unauthorized alien or an employee who is alleged to be an unauthorized alien is authorized to seek an injunction against the enforcement of the bill's provisions.

Additionally, the bill provides that an employer commits a "deceptive and unfair trade practice" by terminating an authorized employee while knowingly employing an unauthorized alien. The terminated employee has a private cause of action against the employer, in which he or she may seek reinstatement, back pay, court costs, and attorney fees.

The bill also requires DEO to keep a public database of violations of the ban on employing unauthorized aliens. Finally, the bill expressly provides that its provisions relating to the employment of unauthorized aliens "shall 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."

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.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, 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:

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 Jan. 27, 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>.

⁸ Public Law 99-603, 100 Stat. 3359.

- 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

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

⁹ 8 U.S.C. s. 1324a.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* s. 1324a(a)(1)-(2).

¹³ *Id.* s. 1324c.

¹⁴ *Id.* s. 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/?vgnnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD> (last visited Jan. 28, 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. 5, 2020).

¹⁸ See 8 C.F.R. § 274a.2(b)(1)(i)(A).

¹⁹ See 8 C.F.R. § 274a.2(b)(1)(ii).

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.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 employer.²³ 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.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

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 Jan. 27, 2020).

²¹ *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).

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

²³ *Id.*

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

In 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

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:

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.*

³⁴ 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>.

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.*

- North Carolina³⁹
- Mississippi⁴⁰
- Georgia⁴¹
- Arizona⁴²
- Alabama⁴³
- Utah⁴⁴
- South Carolina⁴⁵

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

- Indiana⁴⁶
- Nebraska⁴⁷
- Missouri⁴⁸
- Colorado⁴⁹
- Oklahoma⁵⁰
- Texas⁵¹
- Virginia⁵²

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

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).

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.

III. Effect of Proposed Changes:

The bill requires a private⁵⁷ or public employer, as well as a contractor or subcontractor of a public employer, to use E-Verify to confirm that a newly hired employee is authorized to work in the United States. To enforce the E-Verify requirement with respect to a private employer, the bill authorizes the Department of Economic Opportunity to order the suspension of any licenses to do business held by the employer. A suspension will end when the employer provides the Department of Economic Opportunity with an affidavit stating that the employer has registered to use E-Verify.

Moreover, a party to a public contract must terminate its contract with a party that has knowingly failed to register with and use E-Verify. If a contractor has its contract terminated for failing to use E-Verify, it may not enter into another public contract for one year.

The bill reiterates the current law's prohibition on a person knowingly employing an unauthorized alien.⁵⁸ However, the bill provides additional penalties for the prohibition. For the first offense, an employer must attempt to terminate all unauthorized aliens and also must file an affidavit with DEO stating that the employer has terminated the employees or that its attempt to do so is in litigation. For subsequent offenses within 2 years, the employer's license to operate at the location of the violation must be suspended for at least 30 days; if no license is required at this location, then the license to operate at the employer's primary place of business must be suspended.

Additionally, the bill provides that an employer commits a "deceptive and unfair trade practice" by terminating an authorized employee while knowingly employing an unauthorized alien. The terminated employee has a private cause of action against the employer, in which he or she may seek reinstatement, back pay, court costs, and attorney fees.

The bill also requires DEO to keep a public database of violations of the ban on employing unauthorized aliens. Finally, the bill expressly provides that its provisions relating to the employment of unauthorized aliens "shall 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."

The bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

⁵⁷ The bill specifically provides that a few types of people or entities are not "employers," and are thus exempt from using E-Verify. These include a homeowner who hires "casual labor" to be performed at the home, as well as 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.

⁵⁸ See the discussion of Florida Law in the Present Situation for the current penalties for knowingly employing and unauthorized alien.

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 businesses. 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 several new responsibilities for the Department of Economic Opportunity. Additionally, the bill provides several new means by which a person may enter the court system. As such, the bill might increase costs to the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 287.137 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
