

Legislative Analysis



ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION

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House Bills 4355 and 4969
Sponsor: Rep. David Agema
Committee: Judiciary

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A SUMMARY OF HOUSE BILL 4355 AS INTRODUCED 2-19-09 AND HOUSE BILL 4969 AS INTRODUCED 5-19-09

House Bill 4355 would require, among other things, certain employers who contract or subcontract with public agencies to verify the employment eligibility of new employees through the E-Verify system. (That system is explained in the Background Information section.)

House Bill 4969 would prohibit personnel agencies from referring an individual to a public agency for hire without first verifying the individual's employment eligibility through the E-Verify system.

House Bill 4355 - Public Contract and Employment Eligibility Verification Act

The bill would create the Public Contract and Employment Eligibility Verification Act to require a public employer to register and participate in the E-Verify system to verify the work authorization status of each new employee. "Public employer" would be defined to mean a department, agency, or instrumentality of the state or a political subdivision of the state. The Department of Energy, Labor, and Economic Growth would be required to promulgate departmental rules to implement the new act.

Impact on public employers. A public employer could only enter into a contract for services performed within the state with a contractor who was registered with and who participates in the E-Verify system to verify the work authorization status of all new employees.

Impact on contractors. A contractor or subcontractor could not enter into a contract or subcontract with a public employer – concerning services to be performed within Michigan – unless first registering with and participating in the E-Verify system to verify the work authorization status of all new employees. "Subcontractor" would include a subcontractor, contract employee, staffing agency, and a contractor.

An employer – defined to mean a person who employs for compensation ten or more individuals at one time during the calendar year – could not discharge an employee who is a citizen or permanent resident alien if, on the date of the discharge, the employer knowingly employed an alien who was not authorized to work in the U.S. If this

provision were violated, the discharged employee would have a private cause of action against the employer. The provision would not apply to a discharge for cause.

Verifying an employee's employment eligibility. To verify the lawful presence of an individual in the U.S. as required by the bill, an employer, an agency, or political subdivision of the state would have to obtain an affidavit executed by the individual under penalty of perjury stating that he or she is a U.S. citizen or a qualified alien under the federal Immigration and Nationality Act.

The entity would have to further verify the status of the individual who executed the affidavit through the E-Verify system. Until the eligibility verification was made, the affidavit would be presumed to be proof of lawful presence for purposes of this provision.

Penalty. An individual who knowingly and willfully made a false, fictitious, or fraudulent statement or representation in the required affidavit would be guilty of perjury punishable as provided in Section 423 of the Michigan Penal Code. (Under Section 423, perjury is a felony punishable by no more than 15 years in a state prison.)

House Bill 4969 - Occupational Code, Article 10 (Personnel Agencies)

The bill would amend Article 10 (Personnel Agencies) of the Occupational Code (MCL 339.1019). Section 1019 prohibits a personnel agency, or any licensed agent or other agent or employee of a personnel agency from engaging in listed acts. For example, using any name other than the name in which the personnel agency is licensed or persuading, inducing, or soliciting an employer to discharge an employee.

House Bill 4969 would add the following to the list of prohibited conduct: *referring an individual for employment without having verified through the E-Verify system (or its successor) that the individual is authorized to work in the U.S.*

BACKGROUND INFORMATION:

Employers can voluntarily verify the employment eligibility of their employees through an Internet-based system called E-Verify¹. The program is operated by the Department of Homeland Security's U.S. Citizenship and Immigration Services (DHS/USCIS) in partnership with the Social Security Administration (SSA). Under the program, an employer submits information about new hires from a form completed by the new employee (e.g., name, date of birth, Social Security number, immigration/citizenship status, and alien number – if applicable). E-Verify then checks the information against information contained in SSA and DHS databases.

On September 8, 2009, a new federal rule will take effect that will require certain federal contractors (a contract more than \$100,000) and subcontractors (more than \$3,000) to confirm the employment eligibility of all persons hired during the contract term and all

¹ See the DHS/USCIS E-Verify website, [<http://www.uscis.gov/e-verify>].

persons performing work within the U.S. on the federal contract (this includes current employees). The rule will apply to contracts entered into after the rule takes effect.²

According to the National Conference of State Legislatures, 12 states have enacted some form of an E-Verify mandate, either by legislation or executive order. The laws differ as to applicability, with some applying only to state contractors and others applying to all employers – both public and private.³

FISCAL IMPACT:

House Bill 4355 - Perjury Felony

False representation under the bill would be punishable as perjury, which is a felony punishable by imprisonment for up to 15 years. To the extent that offenders were convicted of violations of the bill that would not otherwise be criminal offenses, the bill could increase costs for state and local corrections systems, the amount of which would depend on the number of convictions and the severity of sentences. There are no data to indicate how many offenders might be convicted under the bill.

Perjury is a Class E offense. Exclusive of sentences for habitual offenders, the sentencing guidelines recommended range for the minimum sentence for a Class E offense varies from 0-3 months, for which a prison sentence is mandated. To the extent that the bill increased the number of offenders sentenced to prison, the state could incur increased costs of prison incarceration, which currently average about \$32,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. To the extent that more offenders were sentenced to felony probation supervision, the state could incur increased costs of felony probation supervision; parole and probation supervision average about \$2,100 per supervised offender per year, exclusive of the costs of electronic tether. To the extent that more offenders received jail sentences, affected counties could incur increased costs; jail costs vary by county.

House Bill 4355 - Public Contract and Employment Eligibility Verification Act

The bill would have varying cost implications on the state, local governments, private employers, and employees subject to an E-Verify check.⁴ There are few actual direct costs (outlays) imposed on employers (public or private) by the federal government simply to enroll in the E-verify program.

² See, Federal Acquisition Regulation; FAR Case 2007-13, Employment Eligibility Verification, 73 FR 67651-67705 (November 14, 2008), [<http://edocket.access.gpo.gov/2008/pdf/E8-26904.pdf>].

³ *E-Verify: Frequently Asked Questions* (revised June 30, 2009), National Conference of State Legislatures, Immigrant Policy Project, [<http://www.ncsl.org/?tabid=13127>]. See, also, *E-Verify State-by-State Legislation Survey*, Klasko, Rulon, Stock & Seltzer, LLP, updated April 28, 2009, [<http://www.worksite-compliance.com/library/files/E-Verify-State-by-State-Legislation.PDF>]

⁴ It is not immediately clear whether the bill would apply only to new hires after the bill's effective date or to incumbent employees as well. In any case, however, employees hired prior to November 6, 1986 are not subject to employment verification under Section 274a of the Immigration and Nationality Act (8 USC 1324a), as added by the Immigration Reform and Control Act, PL 99-603. See, Department of Homeland Security, U.S. Citizenship and Immigration Services, *Form I-9, Employment Eligibility Verification*, [<http://www.uscis.gov/files/form/i-9.pdf>].

Employers (public and private) participate in the program by completing an E-Verify registration and entering into a Memorandum of Understanding (MOU)⁵ with the Department of Homeland Security (DHS), where the employer agrees to comply with current legal hiring practices and to not discriminate against employees based on the results of an employment verification. While the registration and MOU impose no direct costs, employers would incur some indirect (opportunity) costs related to the use of staff time and resources to review and complete the registration and MOU.⁶

After an employer signs the MOU, employees responsible for interacting with the E-Verify system participate in an online training tutorial, also provided by USCIS at no cost to the employer. Again, employers would incur some indirect (opportunity) costs related to the use of staff time and resources to complete the training tutorial.⁷

The use of the E-Verify system requires that employers have a computer and Internet access. Presumably, employers affected by the bill (i.e., private employers with at least 10 employees and public agencies) would already have the necessary technology requirements to comply with the bill and, as such, the bill would impose no significant initial start-up IT costs. In the event that there are employers who do not currently have the required technology to comply with the bill and utilize E-Verify, start-up costs could be upward of \$1,500 per employer.⁸

Upon hiring a new employee, and completing and reviewing the requisite forms, the employer submits a query to the E-Verify system. There is no associated cost on employers for querying the E-Verify system. (The cost of each query, borne by the federal government, is estimated to be \$0.26).⁹ If an individual's work eligibility has

⁵The E-Verify Program for Employment Verification Memorandum of Understanding, Department of Homeland Security, U.S. Citizenship and Immigration Services, [<http://www.uscis.gov/files/nativedocuments/MOU.pdf>].

⁶ Regulatory Impact Analysis, Employment Eligibility Verification, Federal Acquisition Case 2007-013, Final Rule, October 1, 2008, [<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064808082cf>]. The analysis notes that the registration takes approximately 10 minutes to complete, and would likely be completed by a human resources manager. The MOU would be reviewed by the HR manager (approximately taking 90 minutes), as well as a general manager (one hour) and legal counsel (two hours).

⁷ The Regulatory Impact Analysis notes that would take about 2 hours for general users (HR specialists) and corporate administrators (general managers) to complete the training, and three hours for program administrators (HR managers).

⁸ See, *Electronic Employment Verification Systems*, prepared by the U.S. Chamber of Commerce. The report notes, "although the popular conception exists that business is 'plugged into' the Internet, we expect that many small businesses operate profitably without relying on the Internet. These include many 'cash and carry' retail vendors and many service providers - especially those who rely on word-of-mouth business (e.g. plumbers, electricians, roofers, landscapers, and gardeners). But for the mandated use of [E-Verify], these businesses would not be otherwise incurring the expense of a computer and Internet service." The Regulatory Impact Analysis (RIA) accompanying FAR Case 2007-013, estimates that 2% of employers (federal contractors) would be required to purchase a computer and Internet access to comply with the proposed rule mandating the use of E-Verify by federal contractors. Additionally, comments submitted by the Essential Worker Immigration Council in FAR Case 2007-013 note that, "not all contractors have computers at all sites at which they engage in hiring. Consequently, they will incur unduly large costs to computerize and establish Internet accessibility for every facility at which they hire employees - irrespective of that location's connection to the government contract. (If they do not do this, they will have to entirely restructure their hiring and employment practices to centralize a traditionally decentralized function, thus further believing the claim that requiring all new hires be subject to E-Verify would "simplify" employment practices.)"

⁹ Regulatory Impact Analysis, Employment Eligibility Verification, FAR Case 2007-013, Final Rule, October 1, 2008, [<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064808082cf>]. The RIA also

been confirmed, a confirmation screen appears, and the employer can write the confirmation number on the I-9 Form or can print out the screen (and incur some associated printing costs). If the E-Verify system returns a "SSA Tentative Nonconfirmation" (TNC), the employer would generally verify that the entered information is indeed correct or, if it is, provide the employee with a TNC notice (incurring some associated printing costs).¹⁰ Employees may contest a TNC by going, in-person, to the local Social Security Administration Office, incurring some travel expenses along the way.¹¹ A similar process exists when a non-citizen employee utilizes a Photo Screening Tool and E-Verify returns a "DHS tentative non-confirmation."

The bill would also grant the Department of Energy, Labor, and Economic Growth with rule-making authority to carry out the provisions of the bill. At this point, it is not entirely clear what, if any, additional rules would be required to carry out the bill, particularly given that primary administration of the E-verify program is a responsibility of the federal government. In this regard, the bill would appear to have no fiscal impact on the department, including the State Office of Administrative Rules, or the Legislative Service Bureau (which reviews proposed administrative rules). However, the bill could potentially have an impact on the Department of Management and Budget, which has general responsibility over state procurement practices, to the extent that DMB would be required to alter its procurement practices to ensure compliance with the bill. Other departments with separate procurement authority would be similarly impacted.¹² It could also be the case that the costs incurred by a contractor to comply with the bill's requirements would be incorporated into the cost of public contracts, although any such increase is mitigated somewhat to the extent that a contract is subject to competitive sourcing requirements.¹³ The contracting activities of many local units of government would be similarly affected. Also, any such impacts on state or local contracts would be mitigated to a large extent because of the requirement in the bill that all Michigan employers would be subject to the E-Verify system, so that the marginal benefit provided

notes that it takes approximately 5 minutes for a user to enter information from the I-9 Form into the E-Verify system, and takes another 5 minutes if the user utilizes the Photo Screening Tool to determine the eligibility of non-citizens.

¹⁰ The Regulatory Impact Analysis notes that it would take approximately 5 minutes to re-verify information and print out the TNC notice, and another 10 minutes for both the employer and the employee to review and sign the TNC notice. The RIA also estimates, based on FY 2007 data (through the voluntary participation of employers), that approximately 3.7% of employees subject to an E-Verify check will receive a TNC, and 2.3% of employees subject to an E-Verify check will contest the TNC notice.

¹¹ There are 49 SSA offices in Michigan. [<http://www.ssa.gov/chicago/michigan.htm>]. The Regulatory Impact Analysis notes that approximately 0.9% of employees subject to an E-Verify check actually go to the SSA office to contest a TNC. It also notes, based on findings from the Westat study, that the time it takes to resolve a TNC dispute ranges from 2-8 hours.

¹² Presumably the bill would apply to public contracts initially entered into or renewed after the bill's effective date.

¹³ See, *Peer Review of Regulatory Impact Analysis, Federal Acquisition Regulation Case 2007-13*, Appendix to comments submitted by the U.S. Chamber of Commerce on August 11, 2008, in response to FAR Case 2007-013, [http://www.uschamber.com/issues/comments/2008/080811_everify.htm]. The analysis states, "[r]enegotiating these contracts would be expensive and time-consuming for government contract officers, and their agencies would have to offer contractors consideration in return for agreeing to these changes [participating in E-Verify]. As a first approximation, the amount of consideration would have to be no less than the added cost contractors would have to bear to comply with E-Verify. The practical effect, of course, would be to shift the full cost of complying with E-Verify to the federal contracting agencies." While the analysis reviewed the impact on renegotiating existing contracts, which may or may not occur under the bill here, the point raised (i.e. the cost implications of E-Verify requirements on public contracts), seems to also be applicable to the negotiation of future contracts, including renewals.

by applying the E-Verify requirements to state and local contractors is that it would also include certain out-of-state firms, which may not necessarily be subject to E-Verify under the laws of their home state. Any associated costs are also mitigated to the extent that the affected public contractors and private employers are voluntarily participating in the E-Verify program or are also federal contractors and soon to be subject to E-Verify under federal rules.

The impact of the bill on local units of government is also mitigated to the extent that individual local units are taking action on their own to require the use of E-Verify. Reportedly, the boards of Macomb and Oakland counties have recently adopted policies requiring county contractors to use E-Verify.¹⁴

House Bill 4969 - Occupational Code, Article 10 (Personnel Agencies)

The bill would have an indeterminate impact on the Department of Energy, Labor, and Economic Growth (Bureau of Commercial Services) relevant to the enforcement of the E-Verify requirement placed on personnel agencies, depending on the extent to which personnel agencies refer individuals for employment, without subjecting them to an E-Verify check. Articles 5 and 6 of the Occupational Code provides the Bureau of Commercial Services with the authority to receive complaints and conduct investigations of alleged violations of the code, and to impose a variety of administrative penalties upon determining that a violation occurred. These penalties include the issuance of cease and desist orders, suspension and revocation of licenses, and the issuance of fines, which may generally not exceed \$10,000.

Further Reading:

1. *Electronic Employment Eligibility Verification*, Congressional Research Service, R40446 (March 13, 2009), [http://assets.opencrs.com/rpts/R40446_20090313.pdf].
2. *Electronic Employment Verification Systems*, U.S. Chamber of Commerce - Labor, Immigration and Employee Benefits Division, April 2009, [http://www.uschamber.com/assets/labor/090331_EEVS_book.pdf].
3. National Immigration Law Center, [<http://www.nilc.org/immsemplymnt/index.htm>]
4. *Findings of the Web Basic Pilot Evaluation*, Westat, prepared for the U.S. Department of Homeland Security, September 2007, [<http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>].
5. *Employment Eligibility Verification Systems*, U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Social Security, June 7, 2007, Serial No. 110-45, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:47008.wais.pdf]

¹⁴ See, Chad Selweski, "County won't hire illegals." *Macomb Daily* (online), July 30, 2009, [<http://www.macombdaily.com/articles/2009/07/30/news/srv0000005979454.txt>]. See, also, John Wisely, "Oakland County service providers must verify workers are legal", *Detroit Free Press* (online), July 31, 2009, [<http://www.freep.com/article/20090731/NEWS06/907310381/>].

6. *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Misuse*, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, April 27, 2007, Serial No. 110-18, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34927.pdf]
7. *Problems in the Current Employment Verification and Worksite Enforcement System*, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, April 24, 2007, Serial No. 110-17, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34925.pdf].
8. *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Misuse*, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, June 10, 2008, Serial No. 110-132, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:42826.wais.pdf].
9. *Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?*, U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Citizenship, July 21, 2009, [<http://judiciary.senate.gov/hearings/hearing.cfm?id=3982>].
10. *E-Verify: Challenges and Opportunities*, U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Government Management, Organization, and Procurement, July 23, 2009, [<http://governmentmanagement.oversight.house.gov/story.asp?ID=2552>]
11. *Hearing on Employment Eligibility Verification Systems and the Potential Impacts on SSA's Ability to Serve Retirees, People with Disabilities, and Workers*, U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Social Security, May 8, 2008, [<http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=629>].

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.