

Department of Legislative Services  
2011 Session

FISCAL AND POLICY NOTE

House Bill 760 (Delegate McDonough, *et al.*)  
Health and Government Operations

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**State Procurement - Use of Federal E-Verify Program to Prevent Employment of Unauthorized Alien Workers**

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This bill declares it to be public policy that government agencies or government contractors may not perform or allow the performance of a contract or provide a State grant if unauthorized alien workers are to be used in any manner in the performance of the contract or grant. It also requires all State and local government contractors and subcontractors and any person receiving a State or local grant, subject to specified exemptions, to register and use the federal E-Verify program.

The bill applies to public contracts executed, or public grants paid, on or after October 1, 2011.

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**Fiscal Summary**

**State Effect:** None. The State Board of Contract Appeals (SBCA) and State procurement units and agencies can handle the bill's requirements with existing budgeted resources.

**Local Effect:** All local governments must require all public contractors, subcontractors, and grantees to use E-Verify to confirm the employment eligibility of candidates for employment. Employer use of E-Verify is free and linked to existing employment verification requirements, so local governments can implement that provision with existing resources. Several local governments have advised in the past that they already use E-Verify.

**Small Business Effect:** Potential meaningful.

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## Analysis

**Bill Summary:** The bill bars State and local government contractors, subcontractors, and grantees from hiring or contracting independently with an individual who is not eligible to work lawfully in the United States.

Exemptions from the requirement to use E-Verify are made for:

- contracts, subcontracts, and grants valued at less than \$10,000 that will not pay an employee more than \$600;
- contracts performed entirely by individuals not subject to employment verification under federal law;
- contracts for the supply of commercially available off-the-shelf items or items sold in substantial quantities in the commercial marketplace and offered to the State in the same form as they are commercially available; and
- contracts for food or agricultural products shipped as bulk cargo.

Government agencies may not prequalify a nonexempt contractor who fails to register and participate in E-Verify. Before receiving payment, nonexempt employers must certify under the penalty of perjury that employment authorization and Social Security number verification has been obtained for all employees hired to work on the contract or grant.

Employers who violate the terms of the bill are subject to automatic cancellation of their contract or grant and are automatically debarred from State and local procurement for one year. However, contractors and grantees that cooperate with an administrative or criminal investigation of a subcontractor or subgrantee are not subject to these penalties. Sanctioned employers may appeal to SBCA, unless administrative appeal has been delegated by law to another body.

**Current Law:** Federal immigration law preempts any state law with respect to civil and criminal penalties for knowingly hiring unauthorized aliens, but reserves for states the right to impose other penalties.

Federal law defines an unauthorized alien with respect to employment as an alien who is either not lawfully admitted to the country for permanent residence, or not authorized to be so employed. It is illegal to hire an individual without first making a good faith effort to verify that the individual is not an unauthorized alien. Verification means ensuring that the individual has either:

- a U.S. passport, resident alien card, or other document that verifies the individual's eligibility to work; or
- both a Social Security card or equivalent document and a driver's license or other photo identification approved by the Attorney General.

Under federal law, employers who hire unauthorized aliens are subject to civil and criminal penalties, including fines and/or imprisonment. The severity of the penalties escalates for repeat offenders. The maximum fine is \$10,000 for each unauthorized alien hired, and the maximum prison term is six months "for the entire pattern or practice."

A person is subject to automatic debarment from procurement with any public body in the State only if the person has been convicted under the laws of the State for bribery, attempted bribery, or conspiracy to bribe, committed in the furtherance of obtaining a contract with a public body. In all other cases, debarment is subject to the determination of the Board of Public Works (BPW), based on evidence provided by the Office of the Attorney General following an investigation. Except for automatic debarments described above, a person has a right to a hearing before BPW before being debarred.

**Background:** Employers certify on federal Form I-9 that they have reviewed employees' documentation and that the documents appear genuine. Employers are not responsible if those documents are later found to be false. According to the U.S. Government Accountability Office (GAO), numerous studies have found that document and identity fraud are prevalent and often sophisticated, and that employers have few tools available to them to combat it.

The federal Basic Pilot Program began in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act. The program is an attempt to combat the prevalence of document and identity fraud in the employment verification process by providing a voluntary means for employers to verify employee status electronically against federal Social Security and immigration databases. In 2007, the program was expanded and renamed the E-Verify program. Authorization for E-Verify has been renewed multiple times, most recently in 2009. It is scheduled to terminate in September 2012.

A 2009 evaluation of the E-Verify program commissioned by the U.S. Department of Homeland Security raised concerns about its effectiveness. The evaluation found that 96% of E-Verify results for cases submitted between April and June 2008 were consistent with a worker's true employment status. However, of workers who are *not* eligible for employment, the system authorized more than half (54%) as eligible to work. The evaluation blamed identity fraud for the system's poor results.

A more recent evaluation by GAO found that the E-Verify program had reduced the number of temporary nonconfirmations, which it issues when it cannot confirm an

applicant's eligibility to work, from 8% from 2004 to 2007 to 2.6% in fiscal 2009. Conversely, 97.4% of newly hired employees were immediately confirmed for employment. However, the report found continued challenges in recognizing fraud and potential capacity challenges if E-Verify participation is required of all employers.

In federal fiscal 2010, E-Verify processed more than 16 million queries, almost a 100% increase over fiscal 2009. More than 243,000 employers currently use E-Verify, and about 1,000 new employers enroll every week.

An executive order signed in June 2008 requires all federal contractors with contracts worth more than \$100,000 or subcontracts worth more than \$3,000 to verify employment eligibility using E-Verify effective January 15, 2009. Implementation of the executive order was delayed, but it took effect September 8, 2009. Thirteen states require at least some employers to use E-Verify, but requirements vary. In three states (Arizona, Mississippi, and South Carolina), the requirement extends to all public and private employers; the remaining 10 states require different combinations of state agencies, all public employers, and state contractors or subcontractors to use E-Verify.

**State Fiscal Effect:** The bill has no direct fiscal effect on the State because, in accordance with federal immigration law, there are no civil or criminal fines or prison terms associated with violations of the bill's provisions. Procurement units can handle the additional level of certifications that contractors must make regarding employment verification with existing budgeted resources.

The bill may result in an increase in the number of debarment appeals before SBCA. The Department of Legislative Services (DLS) notes that, under current law, debarment hearings are typically the domain of BPW, not SBCA. In the absence of active monitoring and enforcement of the bill's requirements, which are not provided for in the bill, DLS anticipates only a minimal increase in SBCA's caseload because of the bill. Therefore, SBCA can handle the bill's requirements with existing resources.

**Small Business Effect:** Small businesses that are public contractors or receive public grants and violate the bill's requirements are subject to the cancellation of their contract or grant and debarment. Contractors and firms that receive public grants must use E-Verify to confirm the employment eligibility of employees who work on such contracts.

## **Additional Information**

**Prior Introductions:** HB 721 of 2010 was heard by the House Health and Government Operations Committee, but no further action was taken. Its nonidentical cross file, SB 844 was heard by the Senate Education, Health, and Environmental Affairs Committee and then was referred to interim study. HB 502 of 2009, a similar bill, received an unfavorable report from the House Health and Government Operations Committee. Its cross file, SB 696, received an unfavorable report from the Senate Education, Health, and Environmental Affairs Committee.

**Cross File:** None.

**Information Source(s):** Harford, Montgomery, and Talbot counties; cities of Baltimore, Frederick, and Havre de Grace; State Board of Contract Appeals; Department of Budget and Management; Department of General Services; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; University System of Maryland; Department of Legislative Services

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Analysis by: Michael C. Rubenstein

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510