

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 753 (Delegate McDonough)
Health and Government Operations

Procurement - Use of Federal Work Authorization Programs

This bill requires each State and local governmental entity, and each of their contractors and subcontractors, to register for and use a federal work authorization program to verify the employment eligibility of all newly hired employees. Each governmental entity must post the entity's federal user identification number and date of authorization on its website. The bill also bars each governmental entity from entering into a procurement contract with a contractor that is not registered with or authorized to use a federal work authorization program. The Board of Public Works (BPW) must adopt regulations to implement the bill and conduct a review of at least 100 procurement contracts each year for compliance.

Fiscal Summary

State Effect: BPW and State procurement units can carry out the bill's provisions with existing budgeted resources, including the review required by BPW. However, the bill may impose significant restrictions on the use of the State Corporate Purchasing Card for small purchases, if regulations require affidavits from each vendor from whom a purchase is made. The bill's penalty provisions do not have a material impact on State finances.

Local Effect: Although the bill mandates that local governments use E-Verify, its use is free and linked to existing work authorization requirements, so no additional operational or fiscal burden is placed on local governments. Local governmental procurement units can carry out the bill's provisions with existing resources. The criminal penalty provisions of the bill do not have a material impact on local revenues or expenditures.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: Local governmental entities include counties, municipal corporations, bicounty or multicounty agencies, public authorities, special taxing districts, county boards of education, county libraries that receive State funding, and any other political subdivision or unit of a political subdivision of the State.

State entities mean departments, boards, commissions, agencies, or subunits in the Executive Branch of the State.

A federal work authorization program means an electronic verification program operated by the U.S. Department of Homeland Security to verify information about the eligibility of an individual to work in the United States, in accordance with the Immigration Reform and Control Act of 1986.

Bidders or offerors for State or local procurement contracts must include a notarized affidavit with their bids or proposals that is signed by the contractor and attests that the contractor has registered with and is authorized to use, has used for at least six prior months, and will continue to use a federal work authorization program. Contractors must use only subcontractors that are similarly registered, and subcontractors must provide similar affidavits within five business days of entering into a subcontract with a contractor. Affidavits must be retained by a governmental entity for five years and are considered public records.

Any person who violates the bill's provisions is (1) guilty of a misdemeanor; (2) on conviction, is subject to a fine of up to \$2,500, imprisonment for up to one year, or both; and (3) barred from entering into a procurement contract with a State or local entity for one year.

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 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: It is assumed that the bill's intent is that governmental entities, contractors, and subcontractors use the E-Verify system described above. Registration and use of E-Verify is free and linked to existing work authorization procedures, so there is no cost to the State to comply with the provisions requiring use of E-Verify.

For competitive procurements, procurement units can incorporate the required contractor and subcontractor affidavits into the current procurement process at no additional cost. However, depending on the regulations adopted by BPW, the bill may impose significant administrative restrictions on the use of the State's Corporate Purchasing Card program because it may be necessary to obtain affidavits from every vendor prior to a purchase being made with the card.

BPW can handle the required review of procurement contracts with existing resources. The bill's criminal penalty provisions do not have a material impact on State finances.

Small Business Effect: Small businesses that are contractors and subcontractors and are convicted of violating the bill's requirements are barred from public procurement contracts for one year. In addition, small businesses that have not used a federal work authorization program for the prior six months may not participate in public procurements.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore, Charles, Frederick, and Montgomery counties; cities of Frederick and Havre de Grace; Board of Public Works; Department of Budget and Management; Maryland State Department of Education; 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

Fiscal Note History: First Reader - March 15, 2011
ncs/rhh

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