

# Department of Legislative Services

## Maryland General Assembly

### 2012 Session

## FISCAL AND POLICY NOTE

House Bill 355 (Delegate Schuh, *et al.*)  
Health and Government Operations

## **Employment and State Procurement - Use of the Federal E-Verify Program (Better Maryland - Immigration Reform)**

This bill phases in a requirement that all employers in the State, including governmental units, register and participate in the federal E-Verify program, and verify through the program the work authorization of each new employee hired by the employer. It also forbids employers from knowingly employing or continuing to employ an unauthorized alien. Similar provisions apply to all State and local contractors, subcontractors, and grant recipients. The bill establishes enforcement mechanisms and penalties for employers who do not comply with the bill's provisions.

The bill takes effect July 1, 2012.

## Fiscal Summary

**State Effect:** General fund expenditures by the Department of Labor, Licensing, and Regulation (DLLR) increase by \$436,300 in FY 2013 for enforcement; they increase by \$965,700 in FY 2014, reflecting the phasing in of the bill's application to State employers. Special fund expenditures increase by \$100,000 in FY 2014. Out-year expenditures reflect full salaries, inflation, and employee turnover, as well as fees for hearing services provided by the Office of Administrative Hearings (OAH). Special fund revenues for the new Lawful Employment Enforcement Fund begin accruing gradually in FY 2014 due to the bill's penalty provisions, allowing use of special funds to cover a portion of expenditures, but then begin declining in FY 2016 due to increased employer compliance with the bill. DLLR can carry out the bill's monitoring, reporting, and public disclosure requirements with the additional staff provided.

(in dollars)	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
SF Revenue	\$0	\$100,000	\$215,800	\$194,200	\$174,800
GF Expenditure	\$436,300	\$965,700	\$944,400	\$1,110,500	\$1,176,600
SF Expenditure	\$0	\$100,000	\$215,800	\$194,200	\$174,800
Net Effect	(\$436,300)	(\$965,700)	(\$944,400)	(\$1,110,500)	(\$1,176,600)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** None. The bill imposes administrative burdens on local governments, but they should be able to handle the requirements with existing budgeted resources.

**Small Business Effect:** Minimal.

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## Analysis

### **Bill Summary:**

#### *Employment of Unauthorized Aliens*

The bill applies to employers in the State with more 500 employees beginning on December 31, 2012, to employers with between 200 and 500 employees beginning June 30, 2013, and to all employers beginning January 1, 2014. The bill establishes an Office of Employment Verification Assistance within DLLR's Division of Labor and Industry to obtain employment verifications from E-Verify for employers who do not have access to the Internet.

An employer subject to the bill may not knowingly employ or continue to employ an individual who is an unauthorized alien or use a contract, subcontract, independent contractor agreement, or other similar contract to obtain the labor of an unauthorized alien. Use of E-Verify to confirm the employment eligibility of an individual creates a rebuttable presumption that the employer did not knowingly hire an unauthorized alien. Also, an employer is not considered in violation of this prohibition if the employer:

- complies with the requirement to use E-Verify to verify the work authorization of an individual;
- assists an employee in contesting a tentative nonconfirmation from E-Verify;
- is waiting for a final nonconfirmation from E-Verify; or
- is awaiting action by the Office of Employment Verification Assistance.

The bill includes procedures for contractors to follow to ensure that subcontractors comply with the bill's requirements, as well as protections from civil litigation for

employers and contractors who appropriately terminate an employee or subcontractor to comply with the bill's provisions.

#### *Enforcement and Special Fund*

The Lawful Employment Enforcement Fund is established within DLLR to cover the cost of enforcing the bill's provisions. The fund consists of penalties assessed against employers, money appropriated in the State budget, investment earnings, and any other funds provided to the fund. Expenditures from the fund may be made only in accordance with the State budget.

To enforce the bill's provisions, the Commissioner of Labor and Industry within DLLR must develop a statewide random auditing program of employer records. The auditing program may be conducted in conjunction with or separate from another employer inspection or investigation conducted under State law. The commissioner must also investigate complaints submitted by lawful State residents, except that complaints based solely on race, color, or national origin may not be investigated. While investigating a complaint, the commissioner must verify the work authorization of each alleged unauthorized alien, but the commissioner may not attempt to independently make a final determination as to whether an individual is an unauthorized alien.

If the commissioner determines that an employer has not complied with the bill's employment verification provisions, the commissioner must issue a preliminary order. If the violation is deemed to be unintentional and the employer remedies the violation within 30 days of the preliminary order, the commissioner must issue a warning but does not assess any further penalties against the employer.

Otherwise, the employer has 10 days to request a hearing on the preliminary order; failure to request a hearing within 10 days constitutes a waiving of the right for a hearing. A hearing must be conducted within 60 days of the issuance of the preliminary order, and a final order must be issued within 60 days of the hearing. If a hearing is not held, a final order must be issued within 30 days of the preliminary order. The commissioner must develop regulations establishing a hearing process that is consistent with the Administrative Procedure Act.

Nongovernmental employers who are found to have violated the bill's employment verification requirements are subject to increasingly severe penalties for each violation (unless they remedy the violation as described above). All monetary penalties are payable to the Lawful Employment Enforcement Fund. The penalties are:

- for a first offense, a civil penalty of up to \$1,000 for each employee employed in violation of the bill's requirements and a 30-day suspension of all business licenses held by the employer at the location where the violation occurred;
- for a second offense, a civil penalty of up to \$5,000 for each employee and a one-year suspension of business licenses;
- for a third offense, a civil penalty of up to \$10,000 for each employee and permanent revocation of all business licenses.

Nongovernmental employers are subject to additional civil penalties of up to \$10,000 for violations related to fraud or failure to comply with specified reporting requirements.

Nongovernmental employers who are found to have knowingly employed an unauthorized alien:

- must terminate the employment of the unauthorized alien;
- are subject to a three-year probationary period during which the employer must file quarterly reports with the commissioner identifying each new employee hired during that time;
- are required to file a sworn affidavit with the commissioner that states that the employer has corrected the violation in accordance with specified procedures. Failure to submit the affidavit results in suspension of all business licenses until the affidavit is filed.

Employers are also subject to increasing periods of suspension or revocation of business licenses for each successive offense. Licenses are suspended for 30 days for a first offense, one year for a second offense, and permanently for a third offense.

State or local contractors, subcontractors, or grant recipients, including those not located in the State and, therefore, not subject to the bill's other provisions, that violate the bill's provisions may not bid on a contract, apply for a grant, or receive a contract or grant for three years.

#### *Reporting, Disclosure, and Recordkeeping Requirements*

Every three months, the commissioner must obtain from the U.S. Department of Homeland Security a list of all State employers that are registered with E-Verify and post the list on DLLR's website.

Employers must maintain records of all E-Verify results indefinitely. Contractors must keep documentation provided by subcontractors related to the subcontractors' compliance with the bill's provisions for one year after the contract ends.

Beginning November 2012, the commissioner must post on DLLR's website a list with the names of employers, and other specified information, who violate the bill's employment verification requirements or prohibitions against knowingly employing an unauthorized alien. The list must be updated monthly, and it must remain on the website until the commissioner deems that it is appropriate to remove it.

For each employer that is found to have knowingly hired an unauthorized alien, the commissioner must notify (1) the chief procurement officer of each State and local entity, for the purpose of determining whether the employer also violated the provisions applying to contractors, subcontractors, and grantees; and (2) the U.S. Immigration and Customs Enforcement and the local law enforcement agency where the individual resides.

Before a State or local agency approves payment to a contractor, subcontractor, or grant recipient, the payee must affirm that it has verified the work authorization for all employees hired during the performance period of the contract or grant.

**Current Law:** Federal immigration law preempts any state law with respect to civil and criminal penalties for knowingly hiring unauthorized aliens, but it 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."

**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.

An analysis of E-Verify cases from federal fiscal 2010 found that 98.3% of queries were confirmed as work authorized. Of the nearly 225,000 cases that were initially found not to be authorized, almost 47,000 (21%) were later confirmed as work eligible on appeal; the vast majority of the remaining cases were not contested. Other reports, particularly a 2010 report by GAO, have found continued challenges in recognizing fraud and potential capacity challenges if E-Verify participation is required of all employers.

In federal fiscal 2011, E-Verify processed more than 17 million queries, an increase of 4 million cases over fiscal 2010. More than 300,000 employers currently use E-Verify, and about 5,000 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 September 8, 2009. Seventeen states require at least some employers to use E-Verify, either through statute or executive order, but requirements vary. In six states (Alabama, Arizona, Georgia, Mississippi, South Carolina, and Tennessee), the requirement extends to all public and private employers; the remaining 11 states require different combinations of state agencies or state contractors and subcontractors to use E-Verify.

Arizona has received heightened attention for its E-Verify legislation because the Legal Arizona Workers Act (LAWA) was the first to require that all employers use E-Verify (this bill is based loosely on LAWA). The Arizona legislation took effect in January 2008, and it has been credited with reducing the state's working-age Hispanic noncitizen population by 17%, or 92,000 individuals, most of whom are presumed by the evaluation to be unauthorized. These effects are in addition to any reduction in the same population due to the economic recession that was concurrent with LAWA's

implementation. The evaluation of LAWA by the Public Policy Institute of California (PPIC) also found that the law likely pushed many Hispanic noncitizens into the informal or underground economy as self-employed independent contractors so they would not be subject to E-Verify searches. PPIC also concluded that LAWA had neither positive nor negative effects on employment rates for either American- or foreign-born citizens.

In March 2011, the U.S. Citizenship and Immigration Services unveiled the Self Check program, a web-based portal that allows individuals to confirm their own work eligibility status. Self Check was initially available in just 5 states but was later expanded to an additional 16 states, including Maryland.

**State Fiscal Effect:** The Commissioner of Labor and Industry is tasked with enforcing the bill's provisions primarily using the assets from the Lawful Employment and Enforcement Fund. Enforcement primarily entails conducting random audits of employer records, presumably for every employer in the State, and responding to complaints received from lawful State residents. Based on available U.S. Census Bureau figures, there are approximately 110,000 employers in the State, including local governments. Of those, almost 3,000 have more than 500 employees and would be subject to the bill during the first year (fiscal 2013).

In fiscal 2014, all employers in the State become subject to the bill's requirements. Assuming that each employer is audited once every 10 years, and the commissioner receives 200 complaints annually that require investigations, the Division of Labor and Industry must conduct 11,200 audits or investigations every year; the Department of Legislative Services (DLS) assumes that at least one-third of the audits are conducted on-site and the remainder are done by mail. An enforcement office of that size requires a program manager to establish and oversee investigation procedures, an assistant Attorney General to process and participate in hearings, and administrative support. Additional expenses for vehicle use are also incurred to enable investigators to visit job sites to inspect records and assess compliance. Assuming that mandated hearings are referred to OAH, additional expenditures are necessary to cover the reimbursable fees assessed by OAH.

Therefore, expenditures by DLLR increase by \$436,280 in fiscal 2013, which accounts for a 90-day delay from the bill's July 1, 2012 effective date. This estimate reflects the cost of hiring a program manager, assistant Attorney General, four investigators to conduct random employer audits and to investigate complaints related to employers with more than 500 employees, and administrative support staff. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses, including vehicle costs. Expenditures increase by an additional \$629,383 in fiscal 2014, largely due to the hiring of eight additional investigators when all employers in the State become subject to

the bill's requirements and enforcement provisions. In developing these estimates, Legislative Services used the following assumptions:

- each investigator can conduct 1,000 audits or investigations of employer records each year (between four and five for each working day, including on-site audits);
- hiring of investigators begins in October 2012 even though the first cohort of employers is not subject to the bill until December 31, 2012, so that the investigators may begin training to carry out their new responsibilities;
- all 3,000 large employers in the first cohort are audited in fiscal 2013; after that, each employer is subject to a random audit once every 10 years (about 11,000 audits per year);
- the commissioner receives 200 complaints annually that require an investigation;
- there are no OAH charges in fiscal 2013 because OAH assesses fees based on the prior year's caseload; the OAH caseload grows for each of the first three years before stabilizing in fiscal 2016. It likely declines some time after that, assuming greater compliance with the law, but that occurs beyond the five-year scope of this fiscal and policy note.

Positions	8
Salaries and Fringe Benefits	\$335,590
Vehicle Expenses	31,000
Other Operating Expenses	69,690
<b>Total FY 2013 State Expenditures</b>	<b>\$436,280</b>

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses. Expenditures for fiscal 2014 and each successive year also reflect OAH charges based on the prior year's caseload of hearings.

Enforcement expenses are paid out of the Lawful Employment Enforcement Fund, but there is no penalty revenue payable to the fund until enforcement activity begins in January 2013. Therefore, all enforcement expenses in fiscal 2013 are general funds allocated to the fund. To the extent that enforcement activity in fiscal 2013 generates penalty revenue, the costs of enforcement in fiscal 2014 are partially offset by those revenues. However, enforcement does not begin until mid-way through fiscal 2013 (January 2013), and is subject to the bill's hearing provisions, which require up to 120 days to pass before an order of the commissioner becomes final. Therefore, DLS

does not anticipate substantial penalty revenue to accrue to the fund during fiscal 2013 that can be appropriated in fiscal 2014. As a result, the bulk of enforcement expenditures for fiscal 2014 are likely also general funds. By fiscal 2015, there may be more substantial penalty revenue accruing to the fund to offset enforcement costs. However, PPIC's evaluation noted that, in the first three years following LAWA's enactment, a total of three employers had faced prosecution, and all three were in one county. Also, the bill includes several provisions that mitigate the assessment of penalties to firms that do not comply. To the extent that Maryland's experience mirrors that of Arizona, or that many firms avoid incurring penalties due to the bill's mitigating language, penalty revenue may not materialize. As employer compliance with the bill increases over time, DLS projects that penalty revenue begins a gradual decline in fiscal 2016.

Based on the small number of employers who likely do not have access to the Internet, and the limited role that the Office of Employment Verification Assistance plays, DLS believes that the additional enforcement staff already provided by this analysis can carry out the functions of the office and all of the bill's monitoring and reporting requirements.

**Local Fiscal Effect:** The bill requires local governments to (1) register with and use E-Verify to confirm the employment eligibility of individuals they hire; (2) obtain and maintain affidavits from contractors and grantees attesting that they do not employ unauthorized aliens; (3) receive notifications from the commissioner of employers who have been found to have knowingly employed unauthorized aliens and determine whether those employers are contractors or subcontractors; and (4) be subject to enforcement audits conducted by the commissioner. These responsibilities impose administrative burdens on local governments, but local governments should be able to carry out these functions with existing budgeted resources.

**Small Business Effect:** Assuming the vast majority of employers comply with the bill and are not subject to penalties for noncompliance, the only effect on employers is the requirement to register with and use E-Verify to verify the employment eligibility of individuals they hire. Contractors who use subcontractors must also obtain the necessary documentation from their subcontractors confirming that the subcontractors comply with the bill's requirements. Employers without Internet access can use the Office of Employment Verification Assistance without incurring additional costs. E-Verify is a free service and requires minimal time and effort to use, so there is minimal effect on small businesses.

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## Additional Information

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Kent, Montgomery, Washington, and Worcester counties; National Conference of State Legislatures; U.S. Citizenship and Immigration Services; Public Policy Institute of California; Board of Public Works; 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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