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H.B. 327
135th General Assembly

Bill Analysis

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Version: As Reported by House Commerce and Labor

Primary Sponsors: Reps. Wiggam and Swearingen

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SUMMARY

E-verify requirements for certain employers and contractors

- Requires a public employer, a private employer employing 75 individuals within Ohio, and a nonresidential construction contractor to verify each new employee's work eligibility through the federal E-verify program and keep a record of the verification for the duration of the employee's employment or three years, whichever is longer.
- Requires contracts for nonresidential construction projects to include a provision requiring the contractor responsible for the project and any subcontractor, regardless of tier, to use E-verify to confirm the identity and work eligibility of any tradesperson assigned to perform work on the project.

E-verify in public construction and maintenance contracts

- Requires a contract for the construction or maintenance of a public improvement entered into by a state agency or political subdivision to contain a provision requiring the contractor and any subcontractor to use E-verify to confirm the identity and legal work status of specified individuals hired by the contractor or subcontractor.
- Voids any contract for the construction or maintenance of a public improvement that fails to include the provision.
- Requires the Attorney General to conduct periodic reviews to ensure compliance by state agencies and political subdivisions.
- Requires a state agency or political subdivision be fined \$5,000 for each instance of noncompliance.

Investigations and enforcement

- Requires the Attorney General to investigate alleged violations of the bill's requirements and of required contract provisions.

- Requires, if reasonable evidence of a violation exists, the Attorney General to order the violator to pay a fine and submit satisfactory proof of compliance.
- Requires, if an individual or entity does not comply with an order within 30 days of issuance, the Attorney General to sue the individual or entity in a court of common pleas.
- Requires the court to determine whether a violation occurred and whether the violator acted “recklessly” as defined in the bill.
- Requires the court to fine a violator, disqualify the violator from participation in state contracts, or both, depending on whether the violator acted recklessly.
- Creates the E-Verify Enforcement Fund to be used by the Attorney General for the bill’s enforcement.

DETAILED ANALYSIS

E-verify requirements for certain employers and contractors

The bill requires the state, any political subdivision, any employer employing 75 individuals within Ohio, and any nonresidential construction contractor employing one or more individuals within Ohio (an “employer”) to do both of the following:

- Except as described below, after hiring an employee, verify the employee’s employment eligibility through the E-verify program (see “**Background – employee work eligibility and E-verify,**” below);
- Keep a record of the verification for the duration of the employee’s employment or three years, whichever is longer.¹

For purposes of the bill, a “nonresidential construction contractor” is any individual or company that satisfies both of the following:

- Is responsible for the means, method, and manner of construction, improvement, renovation, repair, or maintenance on a nonresidential construction project with respect to one or more trades and represents that the individual or company is permitted or qualified to perform or have responsibility for one or more trades on the project;
- Performs construction, improvement, or renovation on a nonresidential construction project with respect to the individual’s or company’s trade or employs or assigns tradespersons who perform the construction, improvement, or renovation.

¹ R.C. 4151.01 and 4151.04(A)(1).

A “nonresidential construction project” is any construction project involving a building or structure subject to the Ohio Building Code (commercial buildings), except that it does not include an industrialized unit.²

In addition, all contracts for a nonresidential construction project entered into on or after the bill’s effective date must require the contractor responsible for the project and any subcontractor, regardless of tier, to use E-verify to confirm the identity and work eligibility of any tradesperson assigned to work on the project.³

Exemption and waiver for certain workers

The bill exempts an employer from the E-verify requirements when both of the following apply:

- The employer previously used E-verify to verify the employee’s or tradesperson’s work eligibility;
- The employer is not required to verify or reverify the employee’s or tradesperson’s eligibility to work under the federal Immigration Reform and Control Act of 1986 (IRCA) (see “**Background – employee work eligibility and E-verify,**” below).

A contract for a nonresidential construction project also may contain a provision waiving the E-verify requirements under the circumstances described above.⁴

E-verify in public construction and maintenance contracts

The bill requires a state agency or political subdivision desiring to enter into or renew a contract for the construction or maintenance of a public improvement on or after the bill’s effective date to include in the contract a provision that the contractor and any subcontractor will use E-verify to confirm the identity and legal working status of each of the following types of employees:

- An individual hired during the term of the contract to perform duties in Ohio;
- An individual assigned by the contractor or subcontractor to perform work on the contract in Ohio.

The public contractor must use E-verify to confirm the identity and legal working status of each employee hired by the public contractor. A subcontractor must use E-verify to confirm the identity and legal working status of each employee hired by the subcontractor. (See “**COMMENT,**” below).

Under the bill, any contract for the construction or maintenance of a public improvement entered into in violation of the requirement is void.

² R.C. 4151.01(J) and (K).

³ R.C. 4151.04(B)(1).

⁴ R.C. 4151.04(A)(2) and (B)(2).

A contract for the construction or maintenance of a public improvement may contain a provision waiving the E-verify requirements under the circumstances described under **“Exemption and waiver for certain workers,”** above.⁵

For purposes of the bill, a “public improvement” means any of the following:

- A road, bridge, highway, street, or tunnel;
- A waste water treatment system or water supply system;
- A solid waste disposal facility or a storm water and sanitary collection, storage, and treatment facility;
- Any structure or work constructed by or on behalf of a state agency or political subdivision pursuant to a contract.

“Maintenance” means any activity necessary to keep a public improvement, its fixtures, and its components in proper working condition. Maintenance includes janitorial services, disinfection, snow removal, landscaping, repairs, equipment testing, and scheduled replacement of parts, components, or materials. Maintenance does not include utilities, waste management, software systems, or information technology services.⁶

The Attorney General must conduct periodic reviews to ensure state agency and political subdivision contracts include the E-verify provisions described above. Any state agency or political subdivision found to be in violation of the requirements is subject to a \$5,000 fine per violation.⁷

Investigation and enforcement

The Attorney General must prescribe a form an individual may use to allege a violation of the bill’s employer E-verify requirements or a required contract provision. The Attorney General cannot require an individual filing a complaint to list the individual’s Social Security number or have the form notarized.

The bill requires the Attorney General to investigate any violation alleged in a prescribed form filed with the Attorney General. An individual may file a complaint using a different form, but the Attorney General is not obligated to investigate a complaint filed using a nonprescribed form. The Attorney General cannot investigate a complaint based solely on race, color, or national origin. A local law enforcement officer may assist the Attorney General’s investigation.

⁵ R.C. 4151.02.

⁶ R.C. 4151.01, by reference to R.C. 9.75, not in the bill.

⁷ R.C. 4151.03.

If the Attorney General investigates a complaint and finds reasonable evidence exists of a violation, the Attorney General must, after providing notice and an opportunity for a hearing in accordance with the Administrative Procedure Act,⁸ do both of the following:

- Order the violator to pay a fine;
- Order the violator to provide the Attorney General with satisfactory proof that any violation has been corrected.

The amount of the fine the Attorney General must order varies depending on the number of violations revealed by the investigation. For a single violation, the fine is \$1,000. In the case of two violations, the fine is \$1,000 for the first violation and \$2,500 for the second. If the Attorney General's investigation reveals three or more violations, the Attorney General must order a fine of \$5,000 for each violation beyond the second.⁹

If an individual or entity fails to comply with the Attorney General's order within 30 days after issuance, the Attorney General must sue the person in the court of common pleas of the county where the individual or entity is located or does business.¹⁰

If the court determines an individual or entity has violated the bill's requirements or a required contract provision, the court must do both of the following:

- Order the violator to pay \$5,000 for each violation;
- Order the violator to otherwise comply with the Attorney General's order.¹¹

The court also must determine whether the individual or entity acted "recklessly" when violating a requirement or a contract provision. In the event of a reckless violation, the court must order a \$10,000 fine per violation and order the violator to be disqualified from bidding on or participating in any contract for goods, services, or construction paid for in whole or in part with state funds (a "state contract") for a period of one year. Under the bill, an individual or entity acts "recklessly" when the individual or entity conducted business in bad faith and has acted with conscious disregard or indifference to the E-verify program.¹²

Where a violation of a required contract provision and a violation of the bill's E-Verify requirements arise from the same facts and circumstances, a court may fine an individual or entity for only one of the violations.¹³

⁸ R.C. Chapter 119.

⁹ R.C. 4151.05(D).

¹⁰ R.C. 4151.05(E) and 4151.06(A).

¹¹ R.C. 4151.06(B)(1).

¹² R.C. 4151.06(B)(2) and (E) and 4151.01(H) by reference to R.C. 9.242, not in the bill.

¹³ R.C. 4151.06(D).

After the one-year period described above elapses, a disqualified individual or entity may be eligible to bid for and participate in state contracts if the individual or entity files a sworn affidavit with the Director of Administrative Services that one year or more has elapsed since the disqualification and the individual or entity has not violated the E-verify requirements during the period. The Director must maintain a list of all individuals and entities ineligible to bid for or participate in state contracts due to a violation. The Director must remove an individual or entity from the list when the one-year period ends, unless the individual or entity has an unpaid fine levied under the bill. A court must provide the Director with a copy of any disqualification order, and the Department must maintain a record of all orders and affidavits filed with the Director.¹⁴

E-verify Enforcement Fund

The bill creates the E-Verify Enforcement Fund in the state treasury. Fines collected under the bill must be deposited to the credit of the fund. The Attorney General must use the fund to administer and enforce the bill.¹⁵

Background – employee work eligibility and E-verify

The IRCA prohibits hiring or employing an alien who is not authorized to perform the type of job for which the alien is hired or employed. The IRCA establishes penalties for employers found hiring unauthorized workers.¹⁶ To comply with the IRCA requirements, an employer and a new employee must complete the “I-9 Employment Eligibility Verification Form,” the “I-9 form.”¹⁷ An employer and all new employees must complete this form during the first three days of employment. The form must be completed for all new employees, citizens and noncitizens alike. In addition, as part of the required verification of employment eligibility, the employer must examine specified documents the employee provides.¹⁸

As an option in the verification process, the employer may register in the “E-Verify program” and use the E-Verify verification system.¹⁹ The E-Verify program is an Internet-based program that uses information from the I-9 form to help employers verify the eligibility for

¹⁴ R.C. 4151.06(B)(3) and (4) and (C).

¹⁵ R.C. 4151.06(F).

¹⁶ 8 United States Code (U.S.C.) 1324a.

¹⁷ See [OMB No. 1615-0047 \(PDF\)](#), which may be accessed by conducting a keyword “I-9 form” search on the U.S. Citizenship and Immigration Services (USCIS) website: www.uscis.gov.

¹⁸ 8 Code of Federal Regulations (C.F.R.) 274a.2. See also [Handbook for Employers M-274](#), sections [2.0](#), [3.0](#), and [4.0](#), which may be accessed by conducting a keyword “employer handbook” search on the USCIS website and clicking on the link for the desired section.

¹⁹ Originally known as the Basic Pilot/Employment Eligibility Verification Program, the program was renamed E-Verify in 2007.

employment of newly hired employees. Participation in E-Verify is voluntary, unless participation is required by state or federal laws or regulations.²⁰

The E-Verify program was established pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996²¹ and is administered by the U.S. Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA).²²

COMMENT

If the bill were challenged with respect to the Ohio Constitution's Home Rule Amendment, a reviewing court might consider whether a municipal or charter county ordinance or resolution requiring a local agency or contractor to use a method other than E-verify to confirm an employee's eligibility to work is an exercise of local self-government. If that is the case, the ordinance or resolution prevails over the bill even if it conflicts with the bill's requirement. The Ohio Supreme Court has generally held that establishing the terms of public employment and contracting for goods, services, and construction are matters of local self-government under the Home Rule Amendment to the Ohio Constitution. With respect to a matter of local self-government, a municipality or charter county may adopt an ordinance or resolution that conflicts with state law.²³

On the other hand, the Constitution also grants the General Assembly the power to pass laws fixing and regulating the hours of labor, establishing the minimum wage, and providing for the general welfare of all employees. No other provision of the Constitution may impair or limit this power.²⁴ The Court has held that this power allows the General Assembly to provide for the welfare of Ohio's employees. When the General Assembly enacts a law to protect employees, it is not limited by a municipality's or charter county's exercise of the power of local self-government.²⁵ Thus, one could also argue that the bill is for the protection of employees and cannot be limited by a conflicting local ordinance or resolution.

HISTORY

²⁰ See, e.g., 48 C.F.R. 22.1802 and [E-Verify Requirements Status](#), which may be accessed by conducting a keyword "E-verify" search on the World Population Review website: www.worldpopulationreview.com.

²¹ Pub. L. 104-208, Div. C, 110 Stat. 3009-546, 8 U.S.C. 1324a.

²² R.C. 4151.01(C); see also [About E-Verify](#), which may be accessed by clicking the "About E-Verify" link on the E-Verify website: www.e-verify.gov.

²³ Ohio Constitution, Article XVIII, Section 3. See, e.g., *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma*, 61 Ohio St.2d 375, 383 (1980) ("[T]he ability to determine the salaries paid to city employees is a fundamental power of local self-government.") and *Dies Electric Co v. Akron*, 62 Ohio St.2d 322, 326-327 (1980) (holding that a municipality may enact retainage provisions applicable to contracts for public improvements that differ from state law).

²⁴ Ohio Const., art. II, sec. 34.

²⁵ *City of Cleveland v. State*, 2019-Ohio-3820 ¶23, 31.

Action	Date
Introduced	11-13-23
Reported, H. Commerce and Labor	05-22-24
