

# Legislative Analysis

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## E-VERIFY: ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM

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**House Bills 4024 and 4026**  
**Sponsor: Rep. Dave Agema**  
**Committee: Commerce**

**Complete to 6-20-11**

### A SUMMARY OF HOUSE BILLS 4024 AND 4026 AS INTRODUCED

House Bill 4024 would, among other things, require 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 4026 would prohibit personnel agencies from referring an individual for employment without having verified the individual's employment eligibility through the E-Verify system (or a successor system).

#### **House Bill 4024 - 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 documentation 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. "E-Verify" would mean the electronic verification of work authorization program of 8 USC 1324a operated by the U.S. Department of Homeland Security or any other designated federal agency authorized to verify the documentation of newly hired employees pursuant to the federal Immigration Reform and Control Act.

Impact on public employers. A public employer would have to register and participate in the E-Verify system to verify the documentation of each new employee. Documentation of existing employees would not be required under the bill. In addition, 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 documentation 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 documentation of all new employees. In addition, the contractor or subcontractor would have to agree to notify the public employer of all new employees assigned by the

contractor or subcontractor to work on the contract. "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.

Civil immunity for employers. An employer, public employer, or contractor who used the E-Verify system for its intended purpose would not be civilly or criminally liable under any law for any action taken in good faith based on information provided through the E-Verify confirmation system.

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 a Form I-9 executed by the individual under penalty of perjury stating that the individual is a U.S. citizen or a qualified alien under the federal Immigration and Nationality Act. In the case of an independent contractor, the employing entity would have to obtain an affidavit (instead of the Form I-9) executed, under penalty of perjury by the independent contractor and each employee of that independent contractor that stated the same information required for the Form I-9.

The entity would have to further verify the status of the individual who executed the Form I-9 or affidavit through the E-Verify system. Until the eligibility verification was made, the Form I-9 or affidavit would be presumed to be proof of lawful presence for purposes of this provision.

"Form I-9" is defined to mean the employment verification form that fulfills the employment verification obligations under federal requirements (8 CFR 274a.2).

Penalties. 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.)

An individual who willfully and repeatedly violated the act would be responsible for a state civil infraction. A court would have to order the individual to pay a civil fine of not less than \$100 but not more than \$1,000 per violation. (It is not clear how many violations would be needed before this penalty would be triggered. For instance, would an individual who violated the act twice be considered to have met the threshold of "repeatedly" being in violation, or would it take a third or subsequent violation before the penalty would be triggered? It also is unclear if the penalty only applies to a job applicant who made a false statement on an I-9 form or affidavit, or if it would also encompass actions by employers, contractors, and subcontractors. )

Bar to a public contract. Failure of a contractor or subcontractor to register with and participate in the E-Verify system prior to entering into a contract with a public employer

would result in that contractor or subcontractor being excluded from contracting with any public body in the state for one year from the date of the final determination of the violation by a public body or a court of law.

A public employer would have to immediately terminate for default the public contract or subcontract of any business, including a subcontractor, found to have employed two or more unauthorized aliens during the period in which the business had failed to register with and participate in the E-Verify system.

However, an employer who had registered with and participated in the E-Verify system, including cooperation with an investigation of an alleged violation by a subcontractor, would not be subject to the one-year exclusion from contracting with a public employer for the actions of a subcontractor or individual independent contractor.

### **House Bill 4026 - 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.*

[Note: Section 1003 of the code exempts several types of entities providing employment counseling and services from regulation under Article 10. Included in the exemption are persons under a contract with the state to provide employment services and professional employment organizations (PEO). However, the term "staffing agency" contained in the definition of "subcontractor" in House Bill 4024 may encompass both of those entities.]

### **BACKGROUND INFORMATION:**

**E-Verify system.** Employers can voluntarily verify the employment eligibility of their employees through an Internet-based system called E-Verify. 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. (See the DHS/USCIS E-Verify website, <http://www.uscis.gov/e-verify>.)

On September 8, 2009, a new federal rule took effect that requires 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

persons performing work within the U.S. on the federal contract (this includes current employees). The rule applies to contracts entered into after the rule took effect.<sup>1</sup>

According to the National Conference of State Legislatures, 16 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.<sup>2</sup> On May 25, 2011, the U.S. Supreme Court upheld a 2007 Arizona law that required all employers to use E-Verify with the failure to comply with this requirement punishable by the suspension or revocation of the employer's business license.<sup>3</sup>

## **FISCAL IMPACT:**

### **House Bill 4024 - 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. The average cost of prison incarceration is roughly \$34,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. Costs of parole and felony probation supervision, exclusive of the cost of electronic tether, average about \$2,100 per supervised offender per year. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

### **House Bill 4024 – Civil infraction fine**

The bill would have an indeterminate fiscal impact on the judiciary. Any fiscal impact would be the result of increased caseloads for violation of the provisions under the act. Any civil fine revenue collected under the provisions of the act will be dedicated to the support of public libraries and county law libraries.

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<sup>1</sup> 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>.

<sup>2</sup> *E-Verify: Frequently Asked Questions* (revised June 9, 2011), 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 May 17, 2011, <http://www.worksite-compliance.com/library/files/E-Verify-State-by-State-Legislation.PDF>.

<sup>3</sup> <http://www.supremecourt.gov/opinions/10pdf/09-115.pdf>.

## House Bill 4024 - 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.<sup>4</sup> 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.

Employers (public and private) participate in the program by completing an E-Verify registration and entering into a Memorandum of Understanding (MOU)<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

The use of the E-Verify system requires that employers have a computer and Internet access. Presumably, employers affected by the bill 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.<sup>8</sup>

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<sup>4</sup> 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>.

<sup>5</sup> *The 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/E-Verify%20DA%20MOU%20111609-%20Final\\_Rev1.pdf](http://www.uscis.gov/files/nativedocuments/E-Verify%20DA%20MOU%20111609-%20Final_Rev1.pdf).

<sup>6</sup> Regulatory Impact Analysis, Employment Eligibility Verification, Federal Acquisition Case 2007-013, Final Rule, October 1, 2008, <http://www.regulations.gov/#!documentDetail;D=FAR-FAR-2008-0001-1609>. 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).

<sup>7</sup> 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 3 hours for program administrators (HR managers).

<sup>8</sup> 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



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).<sup>9</sup> If an individual's work eligibility has 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).<sup>10</sup> Employees may contest a TNC by going, in person, to the local Social Security Administration Office, incurring some travel expenses.<sup>11</sup> 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 Licensing and Regulatory Affairs 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 have no fiscal impact on the department, including the Office of Regulatory Reform, or the Legislative Service Bureau (which review proposed administrative rules).

The bill would have an indeterminate impact on the Department of Technology, Management and Budget, which has general responsibility over state procurement practices. If DTMB were required to alter procurement practices to ensure compliance with the bill, there may be additional administrative costs involved. Moreover, if DTMB were forced to terminate an existing contract and renegotiate a contract in its place, there would likely be an associated fiscal impact depending upon the terms of the new contract. 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

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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 belying the claim that requiring all new hires be subject to E-Verify would "simplify" employment practices.)"

<sup>9</sup> Regulatory Impact Analysis, Employment Eligibility Verification, FAR Case 2007-013, Final Rule, October 1, 2008. The RIA also 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.

<sup>10</sup> 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.

<sup>11</sup> There are 50 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.

sourcing requirements.<sup>12</sup> The contracting activities of many local units of government would be similarly affected. Any associated costs are also mitigated to the extent that the affected employers are voluntarily participating in the E-Verify program, are also federal contractors and to be subject to E-Verify under federal rules, or are exempt from the E-verify check because of the number of employees it has per the bill's requirements.

The impact of the bill on local units of government is also mitigated to the extent that individual local units are already 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.<sup>13</sup>

### **House Bill 4026 - Occupational Code, Article 10 (Personnel Agencies)**

The bill would have an indeterminate impact on the Department of Licensing and Regulatory Affairs (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.

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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.

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<sup>12</sup> 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](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.

<sup>13</sup> 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/>].