State Mandatory E-Verify Bills
An Analysis of Kentucky’s HB 5 (2012)

Overview

Beginning January 1, 2013, HB 5 requires all bidders for public contracts (including grants and other agreements with public agencies) to submit sworn affidavits that they (1) do not currently employ any unauthorized workers, including as independent contractors; and (2) use the E-Verify program. These bidders must also require the same of their subcontractors. The bill does not exclude nonprofit employers. Bidders who do not comply cannot receive these public contracts, and those who receive contracts and do not maintain their compliance with E-Verify automatically lose the contract and are paid only documented, actual costs. (Section 2)

Public contractors or subcontractors who intentionally, knowingly or wantonly hire an unauthorized worker (including as an independent contractor) in Kentucky are banned from contracting with a public agency for different lengths of time depending on the severity of the offense. An employee’s work authorization must be verified by the federal government simply upon receipt of a complaint made by any person that an employer has violated this Section. HB 5 contains no prohibition on false or frivolous complaints. (Section 3)

The bill also requires all public agencies in the state to use the E-Verify program for all newly hired employees (including independent contractors) beginning January 1, 2013. (Section 5)

Public agencies are prohibited from revoking, limiting or restricting the requirements of this act. (Section 6)

Legal Analysis

Background on Federal Laws Regulating Employment of Unauthorized Workers

The federal Immigration Reform and Control Act of 1986 (IRCA) already prohibits most employers from knowingly hiring an individual who is not lawfully present or is not authorized to work in the United States. IRCA sets up an extensive employment verification system, whereby it requires employers to review documents presented by new employees to establish their work eligibility and to report this information on the federal form I-9. IRCA further provides penalties and sanctions for employers who

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1 “Contract‖ is defined in Section 1(2).
2 Section 1(4) states that the term “employee” includes “a person who works for or contracts with another person and receives a Federal Income Tax Form 1099 for the work done.”
3 As used in Section 3, “employer” means any individual or organization who contracts with the Commonwealth or a public agency and employs one (1) or more individuals who perform employment services under a contract with a public agency and includes all subcontractors to a contractor.” Section 1(5).
4 Section 4(1) states that the term “employee” includes “a person who works for or contracts with another person and receives a Federal Income Tax Form 1099 for the work done.”
5 8 U.S.C. Section 1324a(b); 8 C.F.R. Section 274a.2(b).
knowingly violate the law. Finally, IRCA expressly prevents states from passing any law “imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.” IRCA thus creates a comprehensive scheme for regulating the employment of unauthorized workers, with only one specific and narrow carve-out for limited state action.

The paper-based I-9 system was the exclusive employment verification procedure under federal law until the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Pursuant to IIRIRA, Congress directed the Attorney General to establish three pilot programs to verify new employee’s eligibility for employment. Of the three pilot programs, only the Basic Pilot Program (now called “E-Verify”) exists. E-Verify is an internet-based system of employment verification. It is merely one of the ways for an employer to meet its IRCA responsibilities.

Both IIRIRA and IRCA contain strong nondiscrimination provisions, prohibiting employers from using E-Verify or the I-9 process in a way that discriminates against employees based on their citizenship, immigration status, or national origin.

Congress chose to make the E-Verify pilot program voluntary for most employers. Pursuant to an Executive Order and subsequent federal rule, federal contractors must now use the E-Verify program in order to receive their contracts.

Last year, the U.S. Supreme Court upheld a 2007 state employer sanctions law called the “Legal Arizona Workers Act” (LAWA).

Those who challenged LAWA in court argued that the law unconstitutionally stepped into the exclusively federal power to regulate immigration. They also argued that LAWA would obstruct federal execution of federal immigration policies.

But the majority of Justices on the Supreme Court disagreed. LAWA’s business license penalty for employers is constitutional, they held, because it fits into a narrow and explicitly protected sphere for states to act to punish the employment of unauthorized workers. Federal immigration law expressly prevents states from passing any law “imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.” Because LAWA revokes the business licenses of employers who hire unauthorized workers, the Court held that the law falls within this exception.

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7 8 U.S.C. Section 1324a(h)(2).
8 GAO Report; see also Brief of Amicus Curiae Asian American Justice Center, a member of the Asian American Center for Advancing Justice, et. al., in Support of Petitioners, Chamber of Commerce v. Whiting, p. 16-17 http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdf/09_10_09_115_PetitionerAmC uAAJCand14CivilRightsGrps.authcheckdam.pdf
11 8 U.S.C. Section 1324a(h)(2).
Nor is it unconstitutional, the Supreme Court held, for LAWA to mandate that employers in the state use the E-Verify system. Such a state law is not explicitly blocked by IIRIRA, nor would it conflict with the overall federal scheme regulating the employment of unauthorized workers. Critical to the Supreme Court’s analysis of this last point was the fact that the consequences under LAWA for employers who do not use E-Verify were the same as the consequences stated in IIRIRA: the employer can no longer avail himself of the rebuttable presumption that he complied with the law.

This Supreme Court decision opens the door for states to pass laws that penalize employers for employing unauthorized workers by revoking their business licenses and that mandate use of E-Verify in the way Arizona did.

Application of HR 5

First, HB 5 is different from LAWA. HB 5 conditions the receipt of public contracts on use of the E-Verify program; LAWA does not. Nonetheless, state laws like HB 5 that require entities to use E-Verify as a condition of receiving a public contract are probably (though not certainly) constitutional. While the Supreme Court’s decision in Chamber of Commerce v. Whiting itself may not mandate that outcome, other federal courts’ consideration of similar mandates (one by the Executive Branch for certain federal contractors, the other by the state of Oklahoma for state contractors) tends to support their constitutionality. These courts have differed in their reasoning but have generally held that mandates to use E-Verify as a condition of receiving a public contract are not preempted by federal law.

Second, HR 5 punishes more conduct than IRCA does and therefore is not on solid constitutional ground. IRCA only sanctions those employers who have knowledge of the employees unauthorized status; HB 5, however, punishes those who “wantonly” hire unauthorized workers. HB 5 points to the definition of “wantonly” contained in Kentucky Revised Statutes Section 501.020, which states that a person acts wantonly “when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” Thus, conscious disregard of a substantial risk that a person is not authorized to work captures a broader sphere of action than actual knowledge of a person’s unauthorized status.

Third, HB 5 sanctions the employment of independent contractors, when IRCA exempts them from the need to be verified. Including independent contractors in the definition of employee exponentially expands the breadth of the employment relationships regulated by this bill and arguably conflicts with the clear intent of Congress to leave independent contractors out of the mix.

12 The Supreme Court noted that IIRIRA includes only one specific restriction regarding laws that would make E-Verify mandatory: the Secretary of the U.S. Department of Homeland Security must receive Congressional authorization before making the E-Verify program mandatory for any entity outside of the federal government.


14 8 U.S.C. Section 1324(a)(1)(A); 8 C.F.R. Section 274a.1(f) (excluding independent contractors from the definition of employee); 8 C.F.R. Section 274a.1(g) (employers not responsible for verifying work authorization of independent contractors).
Policy Analysis

In addition to the fact that HB 5 may be constitutionally problematic, there are strong arguments that HB 5 is not good policy.

1. Mandatory E-Verify in Kentucky would discourage economic activity in the state.

Unauthorized workers and their family members (who may be lawfully present or even citizens) are critical actors in Kentucky’s economy as taxpayers, consumers, and entrepreneurs. The following are facts collected by the Immigration Policy Center:13

- **The 2010 purchasing power of Latinos in Kentucky totaled $2.6 billion**—an increase of 1,037.3% since 1990. **Asian buying power totaled $2 billion**—an increase of 596.9% since 1990, according to the Selig Center for Economic Growth at the University of Georgia.

- Kentucky’s 5,559 **Asian-owned businesses had sales and receipts of $2.1 billion and employed 16,941 people** in 2007, the last year for which data is available. The state’s 3,663 **Latino-owned businesses had sales and receipts of $906.9 million and employed 6,705 people** in 2007, according to the U.S. Census Bureau’s Survey of Business Owners.

- Unauthorized immigrants in Kentucky paid **$85.1 million** in state and local taxes in 2010, according to data from the Institute for Taxation and Economic Policy, which includes:
  - $29.5 million in state income taxes.
  - $5.7 million in property taxes.
  - $49.9 million in sales taxes.

- If all unauthorized immigrants were removed from Kentucky, the state would lose **$1.7 billion in economic activity, $756.8 million in gross state product, and approximately 12,059 jobs**, even accounting for adequate market adjustment time, according to a report by the Perryman Group.

Arizona provides the clearest test case for state employer sanctions proposals. LAWA has been costly for Arizona. It has not stopped unauthorized work but has simply grown the size of the cash-based, underground economy. In 2008, the first year LAWA was in effect, **income tax collection dropped 13%** from the year before.16

2. Mandatory E-Verify is costly, particularly for small businesses.

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To comply with HB 5, individual employers will need to dedicate staff to understand the requirements of the proposed law and to implement E-Verify. These employers may need to make upgrades in hardware or software in order to access E-Verify. Additionally, although the E-Verify program does not charge fees to participate, contractors and subcontractors are required to establish secure procedures for using E-Verify. Program administrators and other users are required to complete training and periodic refresher training courses on the use of E-Verify.

Small businesses, which create most of the nation’s new jobs, cannot afford to set up and use E-Verify, especially at this time when the economy is fragile and sluggish. Unlike large companies, they lack human resources departments to help their employees resolve E-verify errors. According to the National Immigration Law Center, small businesses would face the biggest impact from mandatory E-Verify laws. Nationally, data shows that if use of E-Verify had been mandatory in fiscal year 2010, it would have cost small businesses $2.6 billion. In 2011, the Main Street Alliance, a national network of small business owners, wrote to House Judiciary Committee Chairman Lamar Smith to oppose his mandatory E-Verify proposal.

3. Mandatory E-Verify without comprehensive federal immigration reform hits children and families hardest.

In 2009, 81.6% of children in Asian families in Kentucky were U.S. citizens, as were 89.3% of children in Latino families. Hurting the ability of Kentucky’s relatively small population of undocumented workers to provide for themselves and their families will have huge collateral consequences for lawful residents and U.S. citizens, and these consequences hit children hardest.

If one of these parents is deported, the emotional and financial damage to the family members left behind can be devastating. Economic insecurity and health insecurity are documented consequences of increased enforcement of our currently broken federal immigration system, and these consequences hit children hardest. Parents in immigration detention often face the loss of their parental rights while incarcerated, since they may not receive notice of court proceedings, may not have adequate legal counsel, cannot comply with the terms of family reunification plans mandated by the child welfare system, and are often not even told where their children are. Children of undocumented immigrants suffer terribly as a result of the enforcement of our currently broken immigration laws. The Urban Institute has shown that

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21 National Immigrant Justice Center, Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court (September 2010): 8-10. The report found that several factors contributed to inadequate counsel for those in immigration detention including the geographic isolation of many detention facilities, inadequate phone access, and inadequate legal aid resources.
“Parent-child separations pose serious risks to children’s immediate safety, economic security, well-being, and longer term development.”23 The report continues:

Most families in our sample lost a working parent, because they were detained, deported, or released but not allowed to work. Following job loss, households experienced steep declines in income and hardships such as housing instability and food insufficiency. Many families experienced prolonged hardship in part due to extended efforts to contest deportation that took months and often more than a year to adjudicate.24

4. E-Verify has significant error rates that will cause Americans to lose their jobs.

Errors generated by the E-Verify program result in citizens and others who are legally authorized to work in this country being wrongfully denied jobs.25 Many of the errors are due to problems of data entry that occur more often for individuals with ethnic surnames – particularly for those of Hispanic and Arab origin, the Government Accountability Office has reported – and for individuals whose names have changed due to marriage and/or divorce. “According to USCIS, of 22,512 TNCs [Temporary Non-Confirmation of employment eligibility] resulting from name mismatches in fiscal year 2009, approximately 76 percent, or 17,098, were for citizens.”26 This number will get much bigger if E-Verify is made mandatory.

Here are some examples, raised with Congress in April 2011 by the National Immigration Law Center:

“A U.S. citizen born in Florida was hired for a good-paying telecommunications position in October 2010. After hire, she was run through E-Verify and received a TNC. Her employer did not ... explain any of her rights. The worker went to her local SSA office twice to try and resolve the situation, but despite SSA telling her that her information had been updated, the employer told her that she was still not confirmed. She ultimately received an FNC [Final Non-Confirmation] and was fired. After her termination, she has gone to great lengths to try and correct this error, but has been unable to do so....”27

“A U.S. citizen applied for a position with a temporary agency in California, only to be turned away because E-Verify was unable to confirm her work authorization. The employer did not advise her of her right to contest the finding and violated the law by asking her to show additional documents. She was unemployed for over four months without health insurance and was diagnosed with a serious illness during that time.”28

23 The Urban Institute, Children in the Aftermath of Immigration Enforcement (February 2010). http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf
24 Ibid. at vii–viii.
28 Ibid. (citing summary of charge filed with the Dept. of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices in 2008).
The other troubling error rate is that 54% of the time, E-Verify failed to catch unauthorized workers entered into the system, according to a report from the U.S. Citizenship and Immigration Service (USCIS).\(^29\) Thus, E-Verify is not an effective tool to curb unauthorized work.

5. The federal government currently does a poor job of monitoring employer fraud.

There are many ways in which an unscrupulous employer might illegally use E-Verify. For example, he might prescreen job applicants based on racially and culturally discriminatory criteria. He might selectively re-verify the employment eligibility of existing employees. He might refuse to notify employees of their TNCs or fail to provide the necessary referral letters to enable them to contest the decision. He might even use threats of deportation as a weapon to coerce work as leverage in labor negotiations.\(^30\) USCIS, which administers the E-Verify program, admits that its ability to root out employer fraud is limited. “Right now, frankly, it’s a little clumsy,” Theresa C. Bertucci, Associate Director for the Enterprise Services Directorate of USCIS, recently conceded regarding her office’s ability to monitor compliance by employers who are currently registered with the E-Verify program.\(^31\)

6. This bill will increase fear and distrust in immigrant communities.

This law turns neighbors into immigration agents by permitting the state to receive (and requiring it to act on) complaints by individuals that the covered employers have violated the act. This will significantly increase fear and distrust in immigrant communities in the state, and make it harder for police to do their job. HB 5 further wastes limited state resources by requiring state attorneys to track down the validity of these complaints that can be made by anyone, anytime.

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