



What Does the 2011 E-Verify Legislation Mean for Local Governments and Employers?

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The 2011 General Assembly enacted legislation requiring counties, municipalities, and businesses that employ 25 or more workers to use the federal E-Verify program to verify the work authorization of new hires. This bulletin first describes the provisions of the new legislation, which will be phased in over a two-year period. Second, the bulletin provides information on the requirements of E-Verify and describes how the program works. Third, the bulletin discusses the impact of a recent U.S. Supreme Court decision and whether the new legislation may conflict with federal law.

What Does the New Legislation Require?

The new legislation includes three main components: (1) a requirement that certain employers use the federal E-verify system, (2) a new system for filing complaints about potential violators, and (3) penalties for noncompliance. The law is included in the appendix at the end of this bulletin.

New Requirements for Counties, Municipalities, and Private Employers

The new legislation, S.L. 2011-263 (H 36), requires counties and municipalities to register and participate in the federal E-Verify program to verify the work authorization of new hires, effective October 1, 2011.¹ The verification requirement does not apply to existing employees.

Private employers that employ 25 or more employees in North Carolina must also verify the work authorization of new hires through the E-Verify program.² Private employers must retain the record of the work verification through the duration of the worker's employment and for one year after the employment has ceased. The verification requirement does not apply to a seasonal temporary employee employed for 90 days or less during a 12-month period.

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1. S.L. 2011-263 (H 36) (enacting new N.C. GEN. STAT. (hereinafter G.S.) § 153A-99.1 and G.S. 160A-169.1).

2. S.L. 2011-263 (enacting new G.S. 64-26).

The new requirements are effective October 1, 2012, for private employers that employ 500 or more employees; January 1, 2013, for private employers that employ 100 or more but less than 500 employees; and July 1, 2013, for private employers that employ 25 or more but less than 100 employees.

Complaints

The legislation permits any individual with a good faith belief that a private employer is not complying with the verification requirement to file a complaint with the North Carolina Commissioner of Labor (the Commissioner).³ The law does not appear to provide the Commissioner with authority to investigate complaints against state agencies, counties, municipalities, or other government entities. The Commissioner must investigate any complaint of noncompliance not based solely on race, religion, gender, ethnicity, or national origin.⁴ If, after an investigation, the Commissioner determines the complaint is not false or frivolous, the Commissioner must hold a hearing to determine whether the private employer has complied with the law's verification requirements.⁵

Penalties

For a first-time violation, the private employer must file a signed sworn affidavit that the private employer has requested a verification of work authorization through E-Verify. The affidavit must be filed with the Commissioner within three business days of the finding of noncompliance. The failure to file a timely affidavit will result in a civil penalty of \$10,000.⁶

For a second violation, private employers face a flat fine of \$1,000 in addition to the affidavit requirement.⁷ For all subsequent violations, private employers face a \$2,000 fine for each employee the employer failed to screen in addition to the affidavit requirement.⁸ A private employer has the right to file an appeal within 15 days of the Commissioner's order.⁹ The legislation provides the Commissioner with rule-making authority necessary to implement this legislation.¹⁰

What Is the E-Verify Program, and What Does It Require?

E-Verify is a web-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment authorization of newly hired employees. Since 2007 the North Carolina General Statutes have required all state agencies, departments, institutions,

3. S.L. 2011-263 (enacting new G.S. 64-28).

4. S.L. 2011-263 (enacting new G.S. 64-29). The legislation provides the Commissioner with authority to subpoena employment records that relate to recruitment, hiring, employment, termination policies or practices, or acts of employment as part of the investigation of a valid complaint. The Commissioner may also seek the assistance of the State Bureau of Investigation in investigating a complaint.

5. S.L. 2011-263 (enacting new G.S. 64-30).

6. S.L. 2011-263 (enacting new G.S. 64-31).

7. S.L. 2011-263 (enacting new G.S. 64-32).

8. S.L. 2011-263 (enacting new G.S. 64-33).

9. S.L. 2011-263 (enacting new G.S. 64-36).

10. S.L. 2011-263 (enacting new G.S. 64-37).

universities, and local education agencies to use E-Verify to check the work authorization of new employees.¹¹

An employer may not initiate verification procedures through E-Verify before an employee has been hired and the Form I-9 completed. An employer may not use E-Verify to re-verify the authorization of an existing employee unless the employer has been awarded a federal contract. Employers must also continue to comply with applicable civil rights laws¹² by not discriminating unlawfully against any individual in hiring, firing, or recruitment or referral practices because of the individual's national origin or, in the case of a protected individual (as defined by federal law), his or her citizenship status.

The E-Verify program is provided to employers free of charge by the DHS.¹³ To participate in E-Verify, an employer or government entity must enter into a written agreement, called a memorandum of understanding (MOU), with the DHS and SSA.¹⁴ The MOU sets up a contractual obligation, whether the employer is voluntarily electing to use the program or is required to use it under North Carolina law.

Employers must agree to the terms of the MOU and take the following steps with respect to each new employee:

- The employer must first complete an I-9 form, Employment Eligibility Verification. E-Verify does not replace the legal requirement to complete and retain these forms.
- The employer then enters the new worker's information from the I-9 form into E-Verify, and the worker's information is checked against data contained in federal databases.
- If the data and the information being compared do not match, an employer will receive a "tentative nonconfirmation" notice. In that case, the employer must promptly provide the employee with written referral instructions on how to challenge the information mismatch.¹⁵ The employee then has eight workdays to contact the appropriate federal agency (either the SSA or DHS) to resolve the discrepancy.
- If the worker contacts the SSA or DHS to resolve the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker (including denying, reducing, or extending work hours; delaying or preventing training; requiring an employee to work in poorer conditions; or otherwise subjecting the employee to anything indicating the employee is unauthorized to work) while awaiting a final resolution from the government agency, even if resolving the matter takes longer than the normal resolution time of ten business days.
- If the employee does not contest the charge within eight days, the employer can find the employee is not work authorized and terminate employment. E-Verify, however, does not

11. G.S. 126-7.1.

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2010) and 8 U.S.C. § 1324b (2010).

13. The enrollment website is <https://e-verify.uscis.gov/enroll/>.

14. For a sample MOU, see www.uscis.gov/files/nativedocuments/E-Verify%20DA%20MOU%20111609-%20Final_Rev1.pdf.

15. According to the Social Security Administration, a mismatch may be due to a typographical error, failure of the employee to report a name change, or submission of a blank or incomplete Form W-2. In a December 2009 evaluation of E-Verify commissioned by the Department of Homeland Security, it was estimated that around 1 percent of authorized workers are not initially found to be employment authorized. See Westat, *Findings of the E-Verify Program* (Rockville, MD: Westat, 2007), 30, www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

require termination if the employee opts not to contest a charge. If an employer chooses not to terminate the employee, the employer must notify the DHS of this decision.

- If the SSA or DHS resolves the matter and issues a “final nonconfirmation” notice indicating the person is not lawfully authorized to work, the employer may terminate the worker’s employment. If an employer continues to employ a worker after the employer has received a final nonconfirmation, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of federal law.

Resources to assist employers with E-Verify, including training, webinars, and a dedicated hot-line, are available from the DHS.¹⁶

Will the Supreme Court’s Decision in *Chamber of Commerce of U.S. v. Whiting* Affect the New Legislation?

Until recently there was a question as to whether state and local governments could legally require private employers or government contractors to use E-Verify or whether doing so would violate federal law. On May 26, 2011, the United States Supreme Court issued its decision on the matter in *Chamber of Commerce of U.S. v. Whiting*, holding that a 2007 Arizona law prohibiting the employment of unauthorized workers did not violate federal law.¹⁷

In addition to prohibiting the employment of unauthorized workers, the Legal Arizona Workers Act of 2007 requires all employers in the state of Arizona to use E-Verify to confirm that their employees are legally authorized to work.¹⁸ The question the Court considered was whether federal immigration law “preempts” or takes precedence over the Arizona law. A state or local law is preempted and invalidated when Congress has asserted its exclusive authority in an area or the law conflicts with federal legislation.¹⁹ The Court ruled that Arizona’s requirement that all employers participate in E-Verify was not preempted by federal law.

As discussed above, E-Verify is structured as a voluntary program operated by the DHS and SSA. The DHS encourages the use of E-Verify, but the agency is not allowed to require employers, other than federal agencies and contractors, to use it.²⁰ The Court concluded that the federal law did not, however, limit state action; there was no indication that Congress intended to prevent the states from requiring participation in E-Verify. The Court further found no conflict between Arizona’s E-Verify requirement and federal law, as the only consequence²¹ of not using

16. E-Verify resources are available here: www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD.

17. ___ U.S. ___, ___ S. Ct. ___, 179 L. Ed.2d 1031 (2011).

18. ARIZ. REV. STAT. ANN. § 23-214(A) (West Supp. 2010).

19. See, e.g., *De Canas v. Bica*, 424 U.S. 351 (1976). Preemption is a doctrine rooted in the Supremacy Clause of the U.S. Constitution. It has come to mean that the federal government, in exercising any of the powers enumerated in the Constitution, trumps a conflicting or inconsistent state exercise of power. For a more detailed discussion of preemption, see Sejal Zota, “Do State and Local Immigration Laws Violate Federal Law?” *Popular Government*, Spring/Summer 2009, 22.

20. Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-656 (1996) (“the Secretary of Homeland Security may not require any person or other entity to participate in [E-Verify].”).

21. When first enacted, the Arizona law contained no penalty for failure to comply with the E-Verify requirement. The law was later amended to include penalties such as the loss of state-allocated economic

E-Verify is the same under both laws—an employer forfeits the rebuttable presumption that the employer did not knowingly employ an unauthorized alien.²²

North Carolina's new law is similar to the Arizona law in that it requires local governments and certain private employers to participate in the E-Verify program. It differs from the version of the Arizona law considered by the Court in *Whiting* with respect to penalties—under the Arizona law, employers faced no sanction for failure to comply with the E-Verify requirement but under the North Carolina law, certain employers may face civil penalties for failing to do so. The Court in *Whiting* noted this lack of penalty in Arizona as support for finding no conflict between that state's E-Verify requirement and federal law. It is unclear from the opinion whether this was a significant consideration for the Court, but it does raise a possibility that the imposition of civil penalties in North Carolina conflicts with federal law.

development incentives, but because those penalties were not part of the statute when the lawsuit was initially filed, the U.S. Supreme Court did not address their interaction with federal law. *Whiting*, ___ U.S. at ___ n. 10, ___ S. Ct. at ___ n. 10, 179 L. Ed.2d at 1056 n. 10.

22. ARIZ. REV. STAT. ANN. § 23-212(I) (West Supp. 2010) (“[P]roof of verifying the employment authorization of an employee through the E-Verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.”).

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Appendix. S.L. 2011-263 (H 36)

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011**

**SESSION LAW 2011-263
HOUSE BILL 36**

AN ACT TO REQUIRE COUNTIES, CITIES, AND EMPLOYERS TO USE THE FEDERAL E-VERIFY PROGRAM TO VERIFY THE WORK AUTHORIZATION OF NEWLY HIRED EMPLOYEES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 64 of the General Statutes is amended by adding a new Article to read:

"Article 1.
Various Provisions Related to Aliens."

SECTION 2. G.S. 64-1 through G.S. 64-5 are recodified as Article 1 of Chapter 64 of the General Statutes, as created by Section 1 of this act.

SECTION 3. Chapter 64 of the General Statutes is amended by adding a new Article to read:

"Article 2.
"Verification of Work Authorization."

"§ 64-25. Definitions.

The following definitions apply in this Article:

- (1) Commissioner. – The North Carolina Commissioner of Labor.
- (2) Employ. – Hire an employee.
- (3) Employee. – Any individual who provides services or labor for an employer in this State for wages or other remuneration.
- (4) Employer. – Any person, business entity, or other organization that transacts business in this State and that employs 25 or more employees in this State. This term does not include State agencies, counties, municipalities, or other governmental bodies.
- (5) E-Verify. – The federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law.
- (6) Unauthorized alien. – As defined in 8 U.S.C. § 1324a(h)(3).

"§ 64-26. Verification of employee work authorization.

(a) Employers Must Use E-Verify. – Each employer, after hiring an employee to work in the United States, shall verify the work authorization of the employee through E-Verify.

(b) Employer Preservation of E-Verify Forms. – Each employer shall retain the record of the verification of work authorization required by this section while the employee is employed and for one year thereafter.

(c) Exemption. – Subsection (a) of this section shall not apply with respect to a seasonal temporary employee who is employed for 90 or fewer days during a 12-consecutive-month period.

"§ 64-27. Commissioner of Labor to prepare complaint form.

(a) Preparation of Form. – The Commissioner shall prescribe a complaint form for a person to allege a violation of G.S. 64-26. The form shall clearly state that completed forms may be sent to the Commissioner.

(b) Certain Information Not Required. – The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint notarized.

"§ 64-28. Reporting of complaints.



S.L. 2011-263 (H 36) (continued)

(a) Filing of Complaint. – Any person with a good faith belief that an employer is violating or has violated G.S. 64-26 may file a complaint with the Commissioner setting forth the basis for that belief. The complaint may be on a form prescribed by the Commissioner pursuant to G.S. 64-27 or may be made in any other form that gives the Commissioner information that is sufficient to proceed with an investigation pursuant to G.S. 64-29. Nothing in this section shall be construed to prohibit the filing of anonymous complaints that are not submitted on a prescribed complaint form.

(b) False Statements a Misdemeanor. – A person who knowingly files a false and frivolous complaint under this section is guilty of a Class 2 misdemeanor.

§ 64-29. Investigation of complaints.

(a) Investigation. – Upon receipt of a complaint pursuant to G.S. 64-28 that an employer is allegedly violating or has allegedly violated G.S. 64-26, the Commissioner shall investigate whether the employer has in fact violated G.S. 64-26.

(b) Certain Complaints Shall Not Be Investigated. – The Commissioner shall not investigate complaints that are based solely on race, religion, gender, ethnicity, or national origin.

(c) Assistance by Law Enforcement. – The Commissioner may request that the State Bureau of Investigation assist in investigating a complaint under this section.

(d) Subpoena for Production of Documents. – The Commissioner may issue a subpoena for production of employment records that relate to the recruitment, hiring, employment, or termination policies, practices, or acts of employment as part of the investigation of a valid complaint under this section.

§ 64-30. Actions to be taken; hearing.

If, after an investigation, the Commissioner determines that the complaint is not false and frivolous:

- (1) The Commissioner shall hold a hearing to determine if a violation of G.S. 64-26 has occurred and, if appropriate, impose civil penalties in accordance with the provisions of this Article.
- (2) If, during the course of the hearing required by subdivision (1) of this section, the Commissioner concludes that there is a reasonable likelihood that an employee is an unauthorized alien, the Commissioner shall notify the following entities of the possible presence of an unauthorized alien:
 - a. United States Immigration and Customs Enforcement.
 - b. Local law enforcement agencies.

§ 64-31. Consequences of first violation.

(a) Affidavit Must Be Filed. – For a first violation of G.S. 64-26, the Commissioner shall order the employer to file a signed sworn affidavit with the Commissioner within three business days after the order issued pursuant to this subsection is issued. The affidavit shall state with specificity that the employer has, after consultation with the employee, requested a verification of work authorization through E-Verify.

(b) Effect of Failure to File Affidavit. – If an employer fails to timely file an affidavit required by subsection (a) of this section or by G.S. 64-32 or G.S. 64-33, the Commissioner shall order the employer to pay a civil penalty of ten thousand dollars (\$10,000).

§ 64-32. Consequences of second violation.

For a violation of G.S. 64-26 that occurs after an order has been issued pursuant to G.S. 64-31, the Commissioner shall order the measures required by G.S. 64-31(a) and shall also order the employer to pay a civil penalty of one thousand dollars (\$1,000), regardless of the number of required employee verifications the employer failed to make.

§ 64-33. Consequences of third or subsequent violation.

For a violation of G.S. 64-26 that occurs after an order has been issued pursuant to G.S. 64-32, the Commissioner shall order the measures required by G.S. 64-31(a), and shall also order the employer to pay a civil penalty of two thousand dollars (\$2,000) for each required employee verification the employer failed to make.

§ 64-34. Commissioner to maintain copies of orders.

The Commissioner shall maintain copies of orders issued pursuant to G.S. 64-31, 64-32, and 64-33, and shall maintain a database of the employers and business locations that have a violation of G.S. 64-26 and make the orders available on the Commissioner's Web site.

§ 64-35. Work authorization shall be verified through the federal government.

S.L. 2011-263 (H 36) (continued)

When investigating a complaint under this Article, the Commissioner shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 U.S.C. § 1373(c). The Commissioner shall not attempt to independently make a final determination of whether an alien is authorized to work in the United States.

"§ 64-36. Appeal of Commissioner's order.

A determination by the Commissioner pursuant to this Article shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the employer charged with the violation takes exception to the determination, in which event final determination shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150B of the General Statutes and in a judicial proceeding pursuant to Article 4 of Chapter 150B of the General Statutes.

"§ 64-37. Rules.

The Commissioner may adopt rules needed to implement this Article.

"§ 64-38. Article does not require action that is contrary to federal or State law.

This Article shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or State law."

SECTION 4. Article 5 of Chapter 153A of the General Statutes is amended by adding a new section to read:

"§ 153A-99.1. County verification of employee work authorization.

(a) Counties Must Use E-Verify. – Each county shall register and participate in E-Verify to verify the work authorization of new employees hired to work in the United States.

(b) E-Verify Defined. – As used in this section, the term 'E-Verify' means the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law.

(c) Nondiscrimination. – This section shall be enforced without regard to race, religion, gender, ethnicity, or national origin."

SECTION 5. Article 7 of Chapter 160A of the General Statutes is amended by adding a new section to read:

"§ 160A-169.1. Municipality verification of employee work authorization.

(a) Municipalities Must Use E-Verify. – Each municipality shall register and participate in E-Verify to verify the work authorization of new employees hired to work in the United States.

(b) E-Verify Defined. – As used in this section, the term 'E-Verify' means the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law.

(c) Nondiscrimination. – This section shall be enforced without regard to race, religion, gender, ethnicity, or national origin."

S.L. 2011-263 (H 36) (continued)

SECTION 6. Sections 4, 5, and 6 of this act become effective October 1, 2011. The remainder of this act becomes effective in accordance with the following schedule:

- (1) October 1, 2012, for employers that employ 500 or more employees.
- (2) January 1, 2013, for employers that employ 100 or more but less than 500 employees.
- (3) July 1, 2013, for employers that employ 25 or more but less than 100 employees.

In the General Assembly read three times and ratified this the 18th day of June, 2011.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 4:50 p.m. this 23rd day of June, 2011