

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB JDC 11-01 Immigration

**SPONSOR(S):** Judiciary Committee

**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE                        | ACTION | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|----------------------------------|--------|---------|--|
| Orig. Comm.: Judiciary Committee |        | Thomas  | Havlicak                                 |

### SUMMARY ANALYSIS

The bill creates the Florida Immigration Enforcement Act. The Act:

- prohibits state and local governments from limiting the enforcement of federal immigration laws or restricting the maintaining or exchanging of information regarding immigration status;
- authorizes a law enforcement officer to determine immigration status of any person who is the subject of a criminal investigation where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States; requires such verification for persons who have been arrested where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States;
- provides that an alien who is in Florida and is unlawfully present in the United States commits a misdemeanor of the second degree;
- prohibits law enforcement officers from using race, color or national origin as a determining factor in enforcement;
- requires every private employer to use the federal E-Verify system to verify the employment eligibility of each employee on or after July 1, 2012 for employers with 100 or more employees, and for all other employers on July 1, 2013;
- provides that an employer may not knowingly employ an unauthorized alien;
- creates a "safe-harbor" provision to protect employers who use E-Verify by establishing a rebuttable presumption that an employer using E-Verify did not knowingly employ an unauthorized alien; and
- authorizes the filing of complaints with the licensing agency, state attorney or attorney general; provides for suspension of license and civil penalties for businesses knowingly employing an unauthorized alien.

The bill further requires public employers to use the federal E-Verify system to verify the employment eligibility of all newly hired employees; prohibits public employers and their contractors and subcontractors from knowingly employing an unauthorized alien; and prohibits public employers from entering into contracts for services unless the contractor and its subcontractors register with and participate in the federal E-Verify system.

The bill requires a court, when determining whether to release a defendant on bail or other conditions, to consider the defendant's legal residency status in the United States.

The bill authorizes a law enforcement officer to make a warrantless arrest if probable cause exists that the person to be arrested is unlawfully in the United States.

The bill provides for enhanced criminal penalties when a criminal offense is committed by an alien unlawfully present in the United States.

There may be a fiscal impact on local governments because the bill creates a new misdemeanor offense that may impact current jail capacity; however, the impact is indeterminate. There may be a fiscal impact to state and local licensing agencies should they be called upon to investigate and enforce employee verification requirements.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb01.JDC

DATE: 3/9/2011

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **BACKGROUND**

Immigration into the United States is largely governed by the Immigration and Nationality Act (“INA”).<sup>1</sup> The INA utilizes several federal agencies, including the Department of Justice, Department of Homeland Security (DHS), and Department of State to administer and enforce federal immigration policies.<sup>2</sup> An alien is a person present in the United States who is not a citizen of the United States.<sup>3</sup> The INA provides for the conditions whereby an alien may be admitted to and remain in the United States<sup>4</sup> and provides a registration system to monitor the entry and movement of aliens in the United States.<sup>5</sup> An alien may be subject to removal for certain actions, including entering the United States without inspection, presenting fraudulent documents at a port of entry, health reasons, violating the conditions of admission, or engaging in certain other proscribed conduct.<sup>6</sup>

Various categories of legal immigration status exist that include students, workers, tourists, research professors, diplomats, and others.<sup>7</sup> These categories are based on the type and duration of permission granted to be present in the United States, and expire based on those conditions. All lawfully present aliens must have appropriate documentation based on status.<sup>8</sup>

It has been reported that an estimated 825,000 unauthorized immigrants were present in Florida in 2010, representing 4.5% of Florida’s population of 18,492,000, a decline from 1.05 million in 2007.<sup>9</sup> Nevertheless, Florida continued to rank third among states in the size of its unauthorized immigrant population.<sup>10</sup> Of Florida’s 9,064,000 total work force, 600,000 are unauthorized immigrants, which represents 6.6% of the work force (above the national average of 5.2%).<sup>11</sup>

##### **GOVERNOR’S EXECUTIVE ORDER**

On January 4, 2011, Governor Scott issued Executive Order 11-02. This order

- Directs “all agencies under the direction of the Governor to verify the employment eligibility of all current and prospective agency employees through the U.S. Department of Homeland Security’s E-Verify system.”
- Directs “all agencies under the direction of the Governor to include, as a condition of all state contracts, an express requirement that contractors utilize the U.S. Department of Homeland Security’s E-Verify system to verify the employment eligibility of: (a) all persons employed during the contract term by the contractor to perform employment duties within Florida; and (b) all persons (including subcontractors) assigned by the contractor to perform work pursuant to the contract with the state agency.”
- Encourages cabinet agencies to use E-Verify.

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<sup>1</sup> 8 U.S.C. s. 1101, et seq.

<sup>2</sup> See, e.g., id. ss. 1103-1104.

<sup>3</sup> Id. s. 1101(a)(3).

<sup>4</sup> Id. ss. 1181-1182, 1184.

<sup>5</sup> Id. ss. 1201(b), 1301-1306.

<sup>6</sup> Id. ss. 1225, 1227, 1228, 1229, 1229c, 1231.

<sup>7</sup> Id. ss. 201 – 210.

<sup>8</sup> Id. s. 221.

<sup>9</sup> Jeffrey S. Passel and D’Vera Cohn. “Unauthorized Immigrant Population: National and State Trends, 2010.” Washington, DC: Pew Hispanic Center (February 1, 2011).

<sup>10</sup> Id.

<sup>11</sup> Id.

**ENFORCEMENT** - State and local law enforcement officers do not inherently have the authority to enforce federal immigration laws. The INA authorizes areas of cooperation in enforcement between federal, state and local government authorities.<sup>12</sup>

The Secretary of DHS, acting through the Assistant Secretary of Immigration and Customs Enforcement (“ICE”), may enter into written agreements with a State or any political subdivision of a State so that qualified personnel can perform certain functions of an immigration officer.<sup>13</sup> ICE trains and cross-designates state and local officers to enforce immigration laws as authorized through section 287(g) of the Immigration and Nationality Act. An officer who is trained and cross-designated through the 287(g) program can interview and initiate removal proceedings of aliens processed through the officer’s detention facility. Local law enforcement agencies without a 287(g) officer must notify ICE of a foreign-born detainee and an ICE officer must conduct an interview to determine the alienage of the suspect and initiate removal proceedings, if appropriate. Since January 2006, the 287(g) program has been credited with identifying more than 79,000 individuals, mostly in jails, who are suspected of being in the country illegally.<sup>14</sup> Florida currently has 4 law enforcement agencies that participate in the 287(g) program: the Florida Department of Law Enforcement (FDLE), and the sheriff’s offices of Bay, Collier, and Duval counties.

Within the Department of Homeland Security is the Law Enforcement Support Center (“LESC”), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESC twenty-four hours a day, seven days a week. Significant statistics from LESC for FY 2008:

- The number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESC placed 16,423 detainers on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESC confirmed 8,440 NCIC hits during FY 2008.<sup>15</sup>

**EMPLOYMENT** - The federal Immigration Reform and Control Act of 1986 (IRCA)<sup>16</sup> made it illegal for any U.S. employer to knowingly:

- Hire, recruit or refer for a fee an alien knowing he or she is unauthorized to work;
- Continue to employ an alien knowing he or she has become unauthorized; or
- Hire, recruit or refer for a fee, any person (citizen or alien) without following the record keeping requirements of the Act.<sup>17</sup>

The law established a procedure that employers must follow to verify that employees are authorized to work in the United States.<sup>18</sup> The procedure requires employees to present documents that establish

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<sup>12</sup> See *id.* s. 1357(g)(1)-(9) (permitting the Department of Homeland Security to enter into agreements whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities); *id.* s. 1373 (establishing parameters for information-sharing between state and local officials and federal immigration officials); *id.* s. 1252c (authorizing state and local law enforcement officials to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported).

<sup>13</sup> Section 287(g) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296.

<sup>14</sup> Details taken from information provided on the website of ICE - <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited March 8, 2011).

<sup>15</sup> Details taken from information provided on the website of ICE - <http://www.ice.gov/news/library/factsheets/lesc.htm> (last visited March 8, 2011).

<sup>16</sup> Public Law 99-603, 100 Stat. 3359.

<sup>17</sup> 8 U.S.C. s. 1324a.

both the worker's identity and eligibility to work, and requires employers to complete an "I-9" form for each new employee hired.<sup>19</sup> The IRCA provides sanctions to be implemented against employers who knowingly employ aliens who are not authorized to work.<sup>20</sup> Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation.<sup>21</sup> The United States Citizenship and Immigration Services (USCIS - formerly the INS and now part of the Department of Homeland Security) enforces these provisions.<sup>22</sup>

### ***E-Verify***

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")<sup>23</sup>, which, among other things, created various employment eligibility verification programs, including the Basic Pilot program. Originally, the Basic Pilot program (now referred to as E-Verify) was available in five of the seven States that had the highest populations of unauthorized aliens and initially authorized for only four years. However, Congress has consistently extended the program's life. It expanded the program in 2003, making it available in all fifty States. In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify.<sup>24</sup>

E-Verify allows employers to ensure that they are hiring authorized workers by electronically comparing the identification and authorization information that employees provide with information contained in federal Social Security Administration ("SSA") and Department of Homeland Security ("DHS") databases. To participate in E-Verify, the employer must sign a memorandum of understanding that governs the system's operation. After enrolling in E-Verify, employers must still complete the I-9 verification process.

If the information that the employer submits matches the records in the federal databases, E-Verify immediately notifies the employer that the individual is employment authorized. If the information the employee has provided does not match the information in the federal databases, E-Verify issues a tentative nonconfirmation. Before issuing a tentative nonconfirmation, however, E-Verify will ask the employer to confirm that the information submitted is accurate to avoid inaccurate results based on typographical errors.

If a tentative nonconfirmation is issued, the employee is notified and given an opportunity to contact SSA or DHS to resolve any potential problem. Until there is a final determination, the employer may not terminate the employee for being unauthorized. Upon receipt of a final nonconfirmation, an employer must terminate the employee per the E-Verify memorandum of understanding. Other information regarding E-Verify:

- Free to employers; must register and agree to an MOU.
- Used by more than 243,000 employers.
- On average, 1,000 new employers enroll each week with the program.
- In FY 2010, the E-verify Program ran more than 16 million queries.<sup>25</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* s. 1324a(a)(1)-(2).

<sup>21</sup> *Id.* s. 1324c.

<sup>22</sup> *Id.* s. 1324a.

<sup>23</sup> Public Law 104-208.

<sup>24</sup> History taken from information provided on the website of the Department of Homeland Security.

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM1000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD> (last visited March 8, 2011).

<sup>25</sup> Program description taken from information provided on the website of the Department of Homeland Security.

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a16988e60a405110VgnVCM100004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD> (last visited March 8, 2011).

E-Verify was the subject of an independent evaluation in 2009. This study concluded that E-Verify was 95.9% accurate in its initial determination regarding employment authorization.<sup>26</sup> E-Verify participants reported minimal costs to participate and were generally satisfied with the program.<sup>27</sup>

The following statistics, updated by the United States Citizenship and Immigration Services within the Department of Homeland Security based on E-Verify cases in Fiscal Year 2010 (October 2009 through September 2010) found:

- Most employees are automatically confirmed as work authorized.
  - 98.3 percent of employees are automatically confirmed as authorized to work ("work authorized") either instantly or within 24 hours, requiring no employee or employer action.
  - 1.7 percent of employees receive initial system mismatches.
- Of the 1.7% of employees who receive initial system mismatches:
  - 0.3 percent are later confirmed as work authorized after contesting and resolving the mismatch.
  - 1.43 percent are not found work authorized.
- Of the 1.43% of employees not found to be work authorized:
  - 1.3 percent of employees who receive initial mismatches do not contest the mismatch either because they do not choose to or are unaware of the opportunity to contest and as a result are not found work authorized.
  - 0.01 percent of employees who receive initial mismatches contest the mismatch and are not found work authorized.
  - 0.14 percent of employees with initial mismatches are unresolved because the employer closed the cases as "self-terminated" or as requiring further action by either the employer or employee at the end of FY10.<sup>28</sup>

**UNAUTHORIZED ALIENS IN PRISONS** - Information is not available to determine the total number of criminal aliens who are in jails and prisons in the United States. However, ICE estimates that 300,000 to 450,000 criminal aliens who are potentially removable are detained each year nationwide at federal, state, and local prisons and jails. These include illegal aliens in the United States who are convicted of any crime and lawful permanent residents who are convicted of a removable offense.

***Unauthorized Aliens in Florida Prisons*** – Florida Model Jail Standard 4.01 provides in part “[w]hen a foreign citizen is received/admitted to a detention facility for any reason, the detention facility shall make notification using the guidelines as set forth by the U.S. Department of State.”<sup>29</sup> Generally, when a person is booked into a local jail, jail officials use the information given by the detainee to help determine the person’s citizenship status. If a detainee admits he or she is not a U.S. citizen, or if there is reason to believe a detainee is not a U.S. citizen, jail officials attempt to determine the detainee’s citizenship status by submitting the detainee’s identification information through LESC.

ICE agents working in Florida prison reception centers investigate newly admitted inmates to identify those who may be aliens. If ICE notifies the Department of Corrections that they want to take an alien inmate into custody, the inmate is released into ICE custody when his or her sentence is completed. ICE may refuse to take custody of an alien inmate in some cases, such as when the alien is from a

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<sup>26</sup> United States Citizenship and Immigration Services; 2009 Westat Report at 116. [http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf) (last visited March 8, 2011).

<sup>27</sup> 2009 Westat Report at 169.

<sup>28</sup> From information provided on the website of U.S. Citizenship and Immigration Services of Department of Homeland Security <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7c579589cdb76210VgnVCM10000b92ca60aRCRD&vgnnextchannel=7c579589cdb76210VgnVCM100000b92ca60aRCRD> (last visited March 8, 2011).

<sup>29</sup> [http://www.flsheriffs.org/our\\_program/florida-model-jail-standards/?index.cfm/referer/content.contentList/ID/408/](http://www.flsheriffs.org/our_program/florida-model-jail-standards/?index.cfm/referer/content.contentList/ID/408/) (last visited March 8, 2011).

country to which he or she cannot be deported. Most alien inmates who complete their sentences in Florida prisons are released to ICE for further immigration processing, including possible deportation. These inmates are deported promptly after release from prison if they have been ordered out of the country and have no further appeals of their final deportation order.

The chart below shows the number of alien inmates released from Florida custody to ICE from 2000 through 2007:

| YEAR OF RELEASE | EXPIRATION OF SENTENCE | COMMUNITY SUPERVISION | TOTAL        |
|-----------------|------------------------|-----------------------|--------------|
| 2000            | 433                    | 169                   | 602          |
| 2001            | 730                    | 326                   | 1,056        |
| 2002            | 793                    | 323                   | 1,116        |
| 2003            | 798                    | 383                   | 1,181        |
| 2004            | 752                    | 348                   | 1,100        |
| 2005            | 746                    | 326                   | 1,072        |
| 2006            | 754                    | 354                   | 1,108        |
| 2007            | 799                    | 321                   | 1,120        |
| 2008            | 885                    | 337                   | 1,222        |
| <b>TOTAL</b>    | <b>6,690</b>           | <b>2,887</b>          | <b>9,577</b> |

Confirmed Aliens in Florida Prisons as of November 30, 2010<sup>30</sup>

| PRIMARY OFFENSE             | NUMBER OF CONFIRMED ALIENS | Percent       |
|-----------------------------|----------------------------|---------------|
| MURDER/MANSLAUGHTER         | 1,278                      | 22.66         |
| SEXUAL/LEWD BEHAVIOR        | 1,000                      | 17.73         |
| ROBBERY                     | 433                        | 7.68          |
| VIOLENT, OTHER              | 765                        | 13.56         |
| BURGLARY                    | 733                        | 12.99         |
| PROPERTY THEFT/FRAUD/DAMAGE | 220                        | 3.90          |
| DRUGS                       | 976                        | 17.30         |
| WEAPONS                     | 86                         | 1.52          |
| OTHER                       | 150                        | 2.66          |
| <b>TOTAL</b>                | <b>5,641</b>               | <b>100.00</b> |

**STATE AND LOCAL RESTRICTIONS**

Current federal law prohibits any federal, state, or local law from prohibiting or restricting any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status of an individual.<sup>31</sup> Likewise, no person or agency may prohibit or restrict a federal, state, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

<sup>30</sup> Supplied by the Florida Department of Corrections.

<sup>31</sup> 8 U.S.C. s. 1373(a).

- Maintaining such information.
- Exchanging such information with any other Federal, State, or local government entity.<sup>32</sup>

## **WARRANTLESS ARRESTS**

Section 901.15, F.S., delineates when a warrant is not required for a law enforcement officer to arrest a person. Generally, a warrant is not required when the offense is committed in the presence of the officer or, if the offense is a felony, the officer reasonably believes that the person committed or is committing the offense. In addition, the statute provides certain specific additional situations where a warrant is not needed.

## **CRITERIA FOR BAIL DETERMINATION**

Article I, section 14, of the Florida Constitution provides, with some exceptions, that every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions. Courts may impose any number of conditions of pretrial release that are intended to ensure the defendant's presence at trial, including requiring the payment of bail. If a defendant released on bail fails to appear before the court at the appointed place and time, the bail is forfeited.

When determining whether to release a defendant on bail or other conditions, s. 903.046, F.S., requires courts to consider the following:

- The nature and circumstances of the offense charged.
- The weight of the evidence against the defendant.
- The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition.
- The defendant's past and present conduct.
- The nature and probability of danger which the defendant's release poses to the community.
- The source of funds used to post bail.
- Whether the defendant is already on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence.
- The street value of any drug or controlled substance connected to the criminal charge.
- The nature and probability of intimidation and danger to victims.
- Whether there is probable cause to believe that the defendant committed a new crime while on pretrial release.
- Any other facts that the court considers relevant.
- Whether the crime charged is a violation of chapter 874 (criminal gang enforcement) or alleged to be subject to enhanced punishment under chapter 874.<sup>33</sup>

## **EFFECT OF THE BILL**

### **SHORT TITLE AND INTENT**

The bill provides that ss. 448.081, 448.082, 448.083, 448.084, and 448.09, F.S., are entitled the Florida Immigration Enforcement Act. The bill provides a legislative finding that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Florida.

### **STATE AND LOCAL GOVERNMENT ENFORCEMENT**

The newly created provisions in s. 448.083(1), F.S., prohibit all state and local governments from limiting or restricting the enforcement of federal immigration laws to the full extent permitted by federal

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<sup>32</sup> 8 U.S.C. s. 1373(b).

<sup>33</sup> Section 903.046, F.S.

law. These provisions also prohibit all state and local governments from restricting the sending, receiving or maintaining information relating to a person's immigration status or restricting the exchanging of such information for:

- Determining eligibility for any public benefit, service or license provided by the federal government or any state or local government.
- Verifying any claim of residence or domicile if determination of residence or domicile is required under federal law, the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding.
- If the person is an alien, determining whether the person is in compliance with the registration laws prescribed by the Federal Immigration and Nationality Act.
- Pursuant to 8 United States Code s. 1373 and 8 United States Code s. 1644.

The Attorney General is authorized to enforce these provisions if there is reasonable cause to believe they have been violated. If a violation is found, the court shall order a civil penalty of not less than five hundred dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action by the Attorney General. Any civil penalty collected must be deposited into the Violent Crime Investigative Emergency and Drug Control Strategy Implementation Account within the Department of Law Enforcement Operating Trust Fund created pursuant to s. 943.042, F.S.

The newly created provisions in s. 448.083(2), F.S., authorize a law enforcement officer to determine immigration status of any person who is the subject of a criminal investigation where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States. A law enforcement officer or law enforcement agency must perform such verification if there is reasonable suspicion that a person who has been arrested is an alien and is unlawfully present in the United States. The verification status must be verified with the federal government pursuant to 8 United States Code s. 1373(c).

If the person's status is reported as unlawfully present in the United States, the officer or law enforcement agency must, as soon as practicable, report that person to the United States Immigration and Customs Enforcement or the United States Customs and Border Protection. A correctional facility is to immediately notify ICE or the United States Customs and Border Protection prior to the discharge of an alien unlawfully present in the United States.

A law enforcement officer may not use race, color or national origin as a determining factor in enforcement of these provisions. An alien's immigration status must be determined by a law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status or the United States Immigration and Customs Enforcement or the United States Customs and Border Protection. The Act is to be implemented consistent with federal laws, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

The newly created provisions in s. 448.083(3), F.S., create a new criminal penalty. It provides that an alien who is in Florida and is unlawfully present in the United States commits a misdemeanor of the second degree. Any person convicted of this offense may not be fined more than \$100, and for a first violation, may not be sentenced to more than twenty days in jail. For a second or subsequent violation the court may not sentence the person to more than thirty days in jail.

## **E-VERIFY**

### *Private Employers*

The newly created provisions in s. 448.084, F.S., require every private employer to use the federal E-Verify system to verify the employment eligibility of each newly hired employee. However, an employer is not required to verify the immigration status of a continuing employee hired before the date of the applicability of the requirement. Employers with 100 or more employees must comply with this



verification requirement by July 1, 2012. All other employers must comply by July 1, 2013. The bill provides that a private employer may not knowingly employ an unauthorized alien. For purposes of these requirements, the term "private employer" does not include public employers, the occupant or owner of a private residence that hires casual domestic labor to perform work customarily performed by a homeowner entirely within the private residence, and labor and services provided to a person or entity by a licensed independent contractor.

The bill creates a rebuttable presumption that an employer using E-Verify has not knowingly employed an unauthorized alien. Any employer that complies in good faith with the verification provisions establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien. An employer is considered to have complied with these requirements, notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

The bill provides that a complaint may be filed by a person who has actual or constructive knowledge that an employer employs, or has within the last 90 days employed, an unauthorized alien. The complaint may be filed with the state attorney, the attorney general, or the agency that issued a license to the employer. A complaint may not be based on race, color, or national origin, except to the extent permitted by the United States Constitution or the State Constitution. Any person who knowingly files a false and frivolous complaint commits a misdemeanor of the second degree.

The licensing agency includes any agency, department, board, or commission of the state or a county, municipality, or political subdivision that issues a license for the purpose of operating a business in this state. A "license" includes a license, permit, certificate, approval, registration, charter, or similar form of authorization required by law and issued by a state or local agency for the purpose of operating a business and includes, but is not limited to:

1. Articles of incorporation.
2. A certificate of partnership, a partnership registration, or articles of organization.
3. A grant of authority issued pursuant to state or federal law.
4. A transaction privilege tax license.

If the licensing agency has reasonable cause to believe that the employer has employed an unauthorized alien, the entity must notify the local law enforcement agency of the presence of the unauthorized alien in the jurisdiction. If a licensing agency finds that an employer has hired an unauthorized alien, the agency shall order the employer to terminate the employment of all unauthorized aliens and file a sworn affidavit with the agency within 10 days after the receipt of the order. The affidavit must state that the employer has corrected the violation. If the employer fails to file the required affidavit, the agency must suspend all applicable licenses held by the employer until the sworn affidavit is filed. Upon finding a second or subsequent violation during a 2-year period, the agency must suspend all applicable licenses for at least 30 days.

If a state attorney or attorney general finds that an employer has hired an unauthorized alien, it may commence a civil or administrative action to enforce these employment provisions. If a court finds that an employer has hired an unauthorized alien, the court must fine the employer not less than five hundred dollars and not more than five thousand dollars. Any such penalty collected must be deposited into the the Violent Crime Investigative Emergency and Drug Control Strategy Implementation Account within the Department of Law Enforcement Operating Trust Fund pursuant to s. 943.042, F.S.

### *Public Employers*

The newly created provisions in s. 287.135, F.S., require public employers, effective January 1, 2012, to use the federal E-Verify system to verify the employment eligibility of each newly hired employee. However, a public employer is not required to verify the immigration status of a continuing employee hired before January 1, 2012. The bill provides that a public employer may not knowingly employ an

unauthorized alien. A "public employer" includes any department, agency, county, municipality, or political subdivision of the state.

The bill creates a rebuttable presumption that a public employer using E-Verify has not knowingly employed an unauthorized alien. Any public employer that complies in good faith with the verification provisions establishes an affirmative defense that the public employer did not knowingly employ an unauthorized alien. A public employer is considered to have complied with these requirements, notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

### *Public Contracts*

The newly created provisions in ss. 287.135 and 337.163, F.S., require all public contracts entered into for the physical performance of services on, or after, January 1, 2012, to require the contractor and subcontractors to register and participate in the E-Verify system. These provisions require all such contractors and subcontractors to use the federal E-Verify system and prohibit them from knowingly employing an unauthorized alien. The bill creates a rebuttable presumption that such contractors and subcontractors using E-Verify have not knowingly employed an unauthorized alien. Any such contractor or subcontractor that complies in good faith with the verification provisions establishes an affirmative defense that the contractor or subcontractor did not knowingly employ an unauthorized alien. A contractor or subcontractor is considered to have complied with these requirements, notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

If a contractor knows that a subcontractor is not in compliance with the E-Verify requirements, it must terminate the contract with the subcontractor. If a public employer knows that a contractor is knowingly in violation of the E-Verify requirements, it must immediately terminate the contract with the contractor and the contractor is not eligible for public contracts for 1 year after the date of termination. If the public employer has knowledge that a subcontractor is in violation of the E-Verify requirements, and the contractor is otherwise in compliance, the public employer must promptly notify the contractor and order the contractor to terminate the contract with the noncompliant subcontractor. Contracts terminated pursuant to these provisions are not to be considered a breach of contract.

### **WARRANTLESS ARREST**

The bill amends s. 901.15, F.S., to authorize a law enforcement officer to make a warrantless arrest if probable cause exists that the person to be arrested is unlawfully in the United States.

### **BAIL DETERMINATION**

The bill amends s. 901.15, F.S., to require a court, when determining whether to release a defendant on bail or other conditions, to consider the defendant's legal residency status in the United States.

### **ENHANCED CRIMINAL PENALTIES**

The bill creates s. 921.245, F.S., to provide for enhanced criminal penalties when an offense is committed by an alien unlawfully present in the United States. If the fact finder determines beyond a reasonable doubt that the the defendant committed a charged criminal offense while the defendant is an alien and is unlawfully present in the United States, the penalty for any felony or misdemeanor, or any delinquent act or violation of law that would be a felony or misdemeanor if committed by an adult, may be enhanced. The enhancement affects only the applicable statutory maximum penalty, not the minimum. The enhancement is:

- A misdemeanor of the second degree may be punished as if it were a misdemeanor of the first degree.
- A misdemeanor of the first degree may be punished as if it were a felony of the third degree.
- A felony of the third degree may be punished as if it were a felony of the second degree.
- A felony of the second degree may be punished as if it were a felony of the first degree.
- A felony of the first degree may be punished as if it were a life felony.

Penalties for criminal offenses are generally provided in ss. 775.082 and 775.083, F.S. 775.082. The penalties are as follows:

775.082, F.S. - Incarceration

(3)(a)3. .... for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

(3)(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) (a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

775.083, F.S. - Fines

(1) (a) \$15,000, when the conviction is of a life felony.

(b) \$10,000, when the conviction is of a felony of the first or second degree.

(c) \$5,000, when the conviction is of a felony of the third degree.

(d) \$1,000, when the conviction is of a misdemeanor of the first degree.

(e) \$500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.

## EFFECTIVE DATE

The bill provides an effective date of October 1, 2011, except as otherwise provided in the bill itself.

## B. SECTION DIRECTORY:

Section 1 creates s. 448.081, F.S., relating to a short title.

Section 2 creates s. 448.082, F.S., relating to intent.

Section 3 creates s. 448.083, F.S., relating to cooperation and assistance in enforcement of immigration laws.

Section 4 creates s. 448.084, F.S., relating to use of E-Verify system required for private employers; licensing enforcement.

Section 5 creates s. 287.135, F.S., relating to verification of immigration status; public employers.

Section 6 creates s. 337.163, F.S., relating to compliance with federal work-authorization program.

Section 7 amends s. 901.15, F.S., relating to when arrest by officer without warrant is lawful.

Section 8 amends s. 903.046, F.S., relating to purpose of and criteria for bail determination.

Section 9 creates s. 921.245, F.S., relating to Illegal alien multiplier; enhanced penalties.

Section 10 provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state government revenues.

#### 2. Expenditures:

The bill may have an indeterminate fiscal impact on state government expenditures. See D. FISCAL COMMENTS below.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill may have an indeterminate fiscal impact on local government expenditures. See D. FISCAL COMMENTS below.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The mandatory use of E-Verify by all private employers will have an impact on the private sector. However, there is no fee for the use of E-Verify and employers are already required to verify immigration status of employees.

Requiring public contractors and subcontractors to use E-Verify may have an economic impact. However, the Governor's Executive Order has already implemented this requirement for much of state government.

The fiscal impact on the private sector is not known. Private contractors and subcontractors not presently in compliance with the federal work authorization program may have to expend funds to come into compliance.

### D. FISCAL COMMENTS:

**LAW ENFORCEMENT** - The determination of a person's immigration status may have some fiscal impact. If the person's status is reported as unlawfully present in the United States, the officer or law enforcement agency must report that person to ICE or Customs and Border Protection. A correctional facility must immediately notify ICE or the Customs and Border Protection prior to the discharge of an alien unlawfully present in the United States. These provisions may have a slight impact on a local or state law enforcement agency, however, the determination of immigration status is permissive for persons under criminal investigation. Also, it is understood that most law enforcement agencies are presently doing this at the time of arrest. In addition, there is not a fee for the verification from the federal government. It is anticipated that this can be implemented within existing resources.

**EMPLOYMENT VERIFICATION** - There is more uncertainty in regard to enforcing the E-Verify provisions for private employers. It is unknown how many complaints may be made to licensing entities, state attorneys, and the attorney general. Depending on this volume and the compliance rate of employers, there may be an impact on agency workload. However, since employee verification is an

existing federal requirement on employers (though using E-Verify is optional), it is anticipated that compliance with this bill by employers will be high.

The bill creates a second degree misdemeanor for illegal aliens present in Florida. This may have an impact on local jails.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The mandates provision does not appear to apply because this bill is not expected to require counties and municipalities to spend funds or to take an action requiring the expenditure of funds, reduce the percentage of a state tax shared with counties or municipalities, or reduce the authority that municipalities have to raise revenue. See II.D. FISCAL COMMENTS above.

##### 2. Other:

States are generally free to legislate in areas not controlled by federal law. "Congress has the power under the Supremacy Clause of Article VI of the [United States] Constitution to preempt state law."<sup>34</sup> Provisions similar to those in this bill have been passed in other states and have faced legal challenges under the federal preemption doctrine. For instance, the employment verification provision in Arizona's 2007 law is currently pending before the United States Supreme Court.<sup>35</sup>

In determining whether a state law is preempted, "the purpose of Congress is the ultimate touchstone."<sup>36</sup> In the Immigration Reform and Control Act of 1986, Congress provided, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."<sup>37</sup> The provisions relating to employment verification and checking the legal status of one who is the subject of a criminal investigation may face similar legal challenges under the federal preemption doctrine.

#### B. RULE-MAKING AUTHORITY:

The bill does not require any rulemaking.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>34</sup> *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

<sup>35</sup> See *Chamber of Commerce of the United States, et. al. v. Whiting* (Case No. 09-115; argued before the U.S. Supreme Court on December 8, 2010).

<sup>36</sup> *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).

<sup>37</sup> See 8 U.S.C. § 1324a(h)(2)—Unlawful employment of aliens.