

Representative Christopher N. Herrod proposes the following substitute bill:

EMPLOYMENT OF UNAUTHORIZED ALIENS

2011 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Christopher N. Herrod

Senate Sponsor: D. Chris Butters

LONG TITLE

General Description:

This bill modifies provisions related to labor to address verification of an individual's eligibility under federal law to be employed.

Highlighted Provisions:

This bill:

- ▶ enacts the Employment of Unauthorized Aliens Act, including:
 - defining terms;
 - addressing construction, severability, and compliance with federal and state law;
 - prohibiting the knowing or intentional employment of unauthorized aliens;
 - requiring verification of employment eligibility;
 - imposing verification requirements for economic development incentives;
 - providing for voluntary registration;
 - addressing enforcement; and
 - requiring certification by government entities of compliance with verification

requirements; and

- ▶ repeals the Private Employer Verification Act.

Money Appropriated in this Bill:

None



26 **Other Special Clauses:**

27 This bill takes effect on July 1, 2011.

28 **Utah Code Sections Affected:**

29 ENACTS:

- 30 **34A-12-101**, Utah Code Annotated 1953
- 31 **34A-12-102**, Utah Code Annotated 1953
- 32 **34A-12-103**, Utah Code Annotated 1953
- 33 **34A-12-201**, Utah Code Annotated 1953
- 34 **34A-12-202**, Utah Code Annotated 1953
- 35 **34A-12-203**, Utah Code Annotated 1953
- 36 **34A-12-204**, Utah Code Annotated 1953
- 37 **34A-12-205**, Utah Code Annotated 1953
- 38 **34A-12-301**, Utah Code Annotated 1953
- 39 **34A-12-302**, Utah Code Annotated 1953
- 40 **34A-12-303**, Utah Code Annotated 1953
- 41 **34A-12-304**, Utah Code Annotated 1953

42 REPEALS:

- 43 **13-47-101**, as enacted by Laws of Utah 2010, Chapter 403
- 44 **13-47-102**, as enacted by Laws of Utah 2010, Chapter 403
- 45 **13-47-103**, as enacted by Laws of Utah 2010, Chapter 403
- 46 **13-47-201**, as enacted by Laws of Utah 2010, Chapter 403
- 47 **13-47-202**, as enacted by Laws of Utah 2010, Chapter 403
- 48 **13-47-203**, as enacted by Laws of Utah 2010, Chapter 403
- 49 **13-47-204**, as enacted by Laws of Utah 2010, Chapter 403



51 *Be it enacted by the Legislature of the state of Utah:*

52 Section 1. Section **34A-12-101** is enacted to read:

53 **CHAPTER 12. EMPLOYMENT OF UNAUTHORIZED ALIENS ACT**

54 **Part 1. General Provisions**

55 **34A-12-101. Title.**

56 This chapter is known as the "Employment of Unauthorized Aliens Act."

57 Section 2. Section **34A-12-102** is enacted to read:

58 **34A-12-102. Definitions.**

59 As used in this chapter:

60 (1) "Agency" means:

61 (a) an agency, department, board, or commission of this state;

62 (b) a political subdivision that issues a license in this state; or

63 (c) an agency, department, board, or commission of a political subdivision described in

64 Subsection (1)(b).

65 (2) "Appropriate agency" means an agency that issues a license to an employer who is
66 subject to an order under Part 3, Enforcement.

67 (3) "Employ" means to hire an employee on or after July 1, 2011.

68 (4) (a) "Employee" means an individual who provides services or labor for an employer
69 in this state for wages or other remuneration.

70 (b) "Employee" does not include an independent contractor.

71 (5) (a) "Employer" means:

72 (i) the state;

73 (ii) a political subdivision of the state;

74 (iii) a self-employed person; and

75 (iv) a person that:

76 (A) transacts business in this state;

77 (B) is issued a license by an agency; and

78 (C) employs one or more employees in this state.

79 (b) For purposes of an independent contractor, "employer" means the independent
80 contractor and does not mean the person that uses the contract labor.

81 (6) (a) "Independent contractor" means a person who:

82 (i) carries on an independent business;

83 (ii) contracts to do a piece of work according to the person's own means and methods;

84 and

85 (iii) is subject to control only as to results.

86 (b) Whether a person entity is an independent contractor is determined on a

87 case-by-case basis through various factors, including whether the person:

- 88 (i) supplies the tools or materials;
89 (ii) makes services available to the general public;
90 (iii) works or may work for a number of clients at the same time;
91 (iv) has an opportunity for profit or loss as a result of labor or service provided;
92 (v) invests in the facilities for work;
93 (vi) directs the order or sequence in which the work is completed; or
94 (vii) determines the hours when the work is completed.
95 (c) "Independent contractor" includes an individual who performs services and is not
96 an employee pursuant to Section 3508, Internal Revenue Code.
97 (7) "Intentionally" is as defined in Section 76-2-103.
98 (8) (a) "Knowingly employ an unauthorized alien" means an action described in 8
99 U.S.C. Sec. 1324a.
100 (b) "Knowingly employ an unauthorized alien" is to be interpreted consistently with 8
101 U.S.C. Sec. 1324a and applicable federal regulations.
102 (9) (a) "License" means a permit, certificate, approval, registration, charter, or similar
103 form of authorization that is:
104 (i) required by law; and
105 (ii) issued by any agency for the purposes of operating a business in this state.
106 (b) "License" includes:
107 (i) articles of incorporation or articles of organization under Title 16, Corporations, or
108 Title 48, Partnership; and
109 (ii) a license issued under Title 59, Revenue and Taxation.
110 (c) "License" does not include a professional license.
111 (10) "Private employer" means a person listed in Subsection (5)(a)(iii) or (iv).
112 (11) "Professional license" means a license, certificate, or registration issued under:
113 (a) Title 4, Utah Agricultural Code;
114 (b) Title 7, Financial Institutions Act;
115 (c) Title 19, Environmental Quality Code;
116 (d) Title 26, Utah Health Code;
117 (e) Title 31A, Insurance Code;
118 (f) Title 58, Occupational and Professional Licensing;

119 (g) Title 61, Securities Division - Real Estate Division;

120 (h) Title 73, Water and Irrigation; or

121 (i) a license, certificate, or registration similar to one described in this Subsection (12).

122 (12) "Social Security number verification service" means the program administered by

123 the Social Security Administration or any of its successor programs.

124 (13) (a) "Status verification system" means an electronic system operated by the federal

125 government, through which a person may verify the citizenship or immigration status of an

126 individual within the jurisdiction of the agency or political subdivision for a purpose authorized

127 under this section.

128 (b) "Status verification system" includes:

129 (i) the electronic verification of the work authorization program of the Illegal

130 Immigration Reform and Immigration Responsibility Act of 1996, 8 U.S.C., Sec. 1324a,

131 known as the E-verify Program;

132 (ii) an equivalent federal program designated by the United States Department of

133 Homeland Security or other federal agency authorized to verify the work eligibility status of a

134 newly hired employee pursuant to the Immigration Reform and Control Act of 1986;

135 (iii) the Social Security Number Verification Service or similar online verification

136 process implemented by the United States Social Security Administration; or

137 (iv) an independent third-party system with an equal or higher degree of reliability as

138 the programs, systems, or processes described in Subsection (1)(b)(i), (ii), or (iii).

139 (14) "Unauthorized alien" is as defined in 8 U.S.C. Sec. 1324a(h)(3).

140 Section 3. Section **34A-12-103** is enacted to read:

141 **34A-12-103. Construction -- Federal and state law compliance -- Severability.**

142 (1) A term used in this chapter is to be construed to have the meaning given to the term

143 under federal laws regulating immigration.

144 (2) This chapter is to be implemented in a manner consistent with:

145 (a) federal laws regulating immigration;

146 (b) protecting the civil rights of all persons; and

147 (c) respecting the privileges and immunities of United States citizens.

148 (3) This chapter may not be implemented or construed to implement or establish the

149 REAL ID Act of 2005, Pub. L. 109-13, division B, 119 Stat. 302, including the use of a radio

150 frequency identification chip.

151 (4) This chapter may not be construed to require an employer to take any action that the
152 employer believes in good faith violates federal or state law.

153 (5) If any provision of this chapter or the application of this chapter to any person or
154 circumstance is for any reason held invalid, the remainder of the chapter and the application of
155 the provision to other persons or circumstances shall be given effect without the invalid
156 provision or application. The provisions of this chapter are severable.

157 Section 4. Section **34A-12-201** is enacted to read:

158 **Part 2. Employment Practices**

159 **34A-12-201. Employing unauthorized alien.**

160 (1) (a) An employer may not knowingly employ an unauthorized alien.

161 (b) When an employer uses a contract, subcontract, or other independent contractor
162 agreement to obtain the labor of an alien in this state, the employer may not knowingly contract
163 with an unauthorized alien or with a person who employs or contracts with an unauthorized
164 alien to perform the labor.

165 (2) (a) An employer may not intentionally employ an unauthorized alien.

166 (b) When an employer uses a contract, subcontract, or other independent contractor
167 agreement to obtain the labor of an alien in this state, the employer may not intentionally
168 contract with an unauthorized alien or with a person who employs or contracts with an
169 unauthorized alien to perform the labor.

170 Section 5. Section **34A-12-202** is enacted to read:

171 **34A-12-202. Verification of employment eligibility.**

172 (1) On and after July 1, 2011, a private employer employing 5 or more employees
173 within the state for each working day in each of 20 calendar weeks or more in the current or
174 preceding calendar year shall verify the employment eligibility of an employee through a status
175 verification system.

176 (2) A private employer shall keep a record of the verification required by Subsection
177 (1) for the longer of:

178 (a) the duration of the employee's employment; or

179 (b) at least three years from the date of verification.

180 Section 6. Section **34A-12-203** is enacted to read:

181 **34A-12-203. Verification a requirement for economic development incentive.**

182 (1) As used in this section:

183 (a) (i) "Economic development incentive" means a grant, loan, or performance-based
184 incentive from any government entity that is awarded on or after July 1, 2011.

185 (ii) "Economic development incentive" does not include an incentive provided under
186 Title 59, Revenue and Taxation.

187 (b) "Government entity" means:

188 (i) the state; or

189 (ii) a political subdivision of this state that receives and uses tax revenues.

190 (2) In addition to any other requirement for an employer to receive an economic
191 development incentive from a government entity, the employer shall register with and
192 participate in a status verification system.

193 (3) (a) Before receiving the economic development incentive, the employer shall
194 provide proof to the government entity that the employer is registered with and is participating
195 in a status verification system.

196 (b) If a government entity determines that the employer is not complying with this
197 section, the government entity shall notify the employer by certified mail of the government
198 entity's determination of noncompliance and the employer's right to appeal the determination in
199 accordance with Title 63G, Chapter 4, Administrative Procedures Act.

200 (c) On a final determination of noncompliance, the employer shall repay the money the
201 employer receives as an economic development incentive to the government entity within 30
202 days of the day on which a determination under this section becomes final.

203 Section 7. Section **34A-12-204** is enacted to read:

204 **34A-12-204. Voluntary registration by private employer certifying participation**
205 **in verification.**

206 (1) (a) A private employer may register with the Department of Commerce certifying
207 that the private employer is in compliance with Section 34A-12-202.

208 (b) A private employer may register with the Department of Commerce under this
209 section regardless of whether the private employer is required to comply with Section
210 34A-12-202.

211 (2) To register or renew a registration with the Department of Commerce under this

212 section, a private employer shall:

213 (a) file a registration statement with the Department of Commerce that certifies
214 compliance with Section 34A-12-202; and

215 (b) pay a fee established by the department in accordance with Section 63J-1-504 that
216 reflects the cost of registering employers under this section and publishing the list described in
217 Subsection (5).

218 (3) A registration under this section expires every two years on the anniversary of the
219 day on which the registration is filed with the Department of Commerce.

220 (4) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
221 Department of Commerce may make rules to provide for:

222 (a) the form of a registration statement under this section;

223 (b) the process of filing a registration statement under this section; and

224 (c) the process of renewing a registration statement under this section.

225 (5) The Department of Commerce shall publish electronically a list of private
226 employers who register under this section on a website accessible to the general public without
227 a charge.

228 Section 8. Section **34A-12-205** is enacted to read:

229 **34A-12-205. Liability protections.**

230 (1) An employer may not be held civilly liable under state law in a cause of action for
231 the employer's unlawful hiring of an unauthorized alien, as defined in 8 U.S.C. Sec. 1324a, if:

232 (a) the private employer complies with Section 34A-12-202 or 63G-11-103; and

233 (b) the information obtained in accordance with the status verification system indicates
234 that the employee's federal legal status allows the employer to hire the employee.

235 (2) An employer may not be held civilly liable under state law in a cause of action for
236 the employer's refusal to hire an individual if:

237 (a) the employer complies with Section 34A-12-202 or 63G-11-103; and

238 (b) the information obtained in accordance with the status verification system indicates
239 that the individual's federal legal status is that of an unauthorized alien as defined in 8 U.S.C.

240 Sec. 1324a.

241 Section 9. Section **34A-12-301** is enacted to read:

242 **Part 3. Enforcement**

243 Section 10. Section **34A-12-301** is enacted to read:

244 **34A-12-301. Investigation process.**

245 (1) The attorney general or county attorney may not investigate a complaint that is
246 based solely on race, color, or national origin.

247 (2) The county sheriff or any other local law enforcement agency may assist in
248 investigating a complaint.

249 (3) (a) When investigating a complaint, the attorney general or county attorney may
250 only verify the work authorization of the alleged unauthorized alien with the federal
251 government pursuant to 8 U.S.C. Sec. 1373(c).

252 (b) The state or a county, city, or town official may not attempt to independently make
253 a final determination on whether an alien is authorized to work in the United States. An alien's
254 immigration status or work authorization status may only be verified with the federal
255 government pursuant to 8 U.S.C. Sec. 1373(c).

256 (4) If, after an investigation, the attorney general or county attorney determines that a
257 complaint is not false and frivolous:

258 (a) the attorney general or county attorney may notify the United States Immigration
259 and Customs Enforcement of the unauthorized alien;

260 (b) the attorney general or county attorney may notify the local law enforcement agency
261 of the unauthorized alien; and

262 (c) the attorney general may notify the appropriate county attorney to bring an action
263 pursuant to Section 34A-12-303 if the complaint was originally filed with the attorney general.

264 Section 11. Section **34A-12-302** is enacted to read:

265 **34A-12-302. Enforcement action.**

266 (1) The county attorney in the county where an unauthorized alien employee is or was
267 employed by an employer may bring an action against the employer for a violation of Section
268 34A-12-201. A county attorney may not bring an action against any employer for a violation of
269 Section 34A-12-201 that occurs before July 1, 2011.

270 (2) (a) To determine whether an employee is an unauthorized alien, the court shall
271 consider only the federal government's determination pursuant to 8 U.S.C. Sec. 1373(c).

272 (b) The federal government's determination creates a rebuttable presumption of the
273 employee's lawful status. The court may:

274 (i) take judicial notice of the federal government's determination; and
275 (ii) request the federal government to provide automated or testimonial verification
276 pursuant to 8 U.S.C. Sec. 1373(c).

277 (3) For the purposes of this section, proof of verifying the employment authorization of
278 an employee through a status verification system creates a rebuttable presumption that an
279 employer did not knowingly employ an unauthorized alien.

280 (4) (a) For the purposes of this section, an employer that establishes that the employer
281 has complied in good faith with the requirements of 8 U.S.C. Sec. 1324a(b) establishes an
282 affirmative defense that the employer did not knowingly employ an unauthorized alien.

283 (b) An employer is considered to have complied with the requirements of 8 U.S.C. Sec.
284 1324a(b), notwithstanding an isolated, sporadic, or accidental technical or procedural failure to
285 meet the requirements, if there is a good faith attempt to comply with the requirements.

286 (5) (a) It is an affirmative defense to a violation of Subsection 34A-12-201(1) that an
287 employer is entrapped.

288 (b) To claim entrapment, an employer shall admit by the employer's testimony or other
289 evidence the substantial elements of the violation.

290 (c) An employer who asserts an entrapment defense has the burden of proving the
291 following by a preponderance of the evidence:

292 (i) the idea of committing the violation starts with a law enforcement officer or agent
293 rather than with the employer;

294 (ii) the law enforcement officer or agent urges and induces the employer to commit the
295 violation; and

296 (iii) the employer is not predisposed to commit the violation before the law
297 enforcement officer or agent urges and induces the employer to commit the violation.

298 (d) An employer does not establish entrapment if the employer is predisposed to
299 violate Subsection 34A-12-201(1) and the law enforcement officer or agent merely provides
300 the employer with an opportunity to commit the violation.

301 (e) It is not entrapment for a law enforcement officer or agent to use a ruse or to
302 conceal the law enforcement officer's or agent's identity. The conduct of a law enforcement
303 officer or agent may be considered in determining if an employer proves entrapment.

304 Section 12. Section **34A-12-303** is enacted to read:

305 34A-12-303. Penalties.306 If a court finds a violation of Section 34A-12-201, the following applies:307 (1) (a) For a first violation, the court shall order:308 (i) the employer to terminate the employment of unauthorized aliens;309 (ii) the employer to file a quarterly report in the form provided in Section 35A-7-104310 with the county attorney for an employee who is hired by the employer at the business location311 where the unauthorized alien performed work during:312 (A) for a violation of Subsection 34A-12-201(1), a three-year probationary period; or313 (B) for a violation of Subsection 34A-12-201(2), a five-year probationary period;314 (iii) the employer to file a signed sworn affidavit with the county attorney within 15315 days after the order is issued that states that the employer:316 (A) has terminated the employment of any unauthorized alien in this state; and317 (B) will not intentionally or knowingly employ an unauthorized alien in this state; and318 (iv) the appropriate agencies to suspend each license described in Subsection (4) held319 by the employer:320 (A) for a violation of Subsection 34A-12-201(1), if the employer fails to file a signed321 sworn affidavit with the county attorney within 15 days after the order is issued; or322 (B) for a violation of Subsection 34a-12-201(2), for a minimum of three days.323 (b) For a first violation of Subsection 34A-12-201(1), in addition to the penalties under324 Subsection (1)(a), a court may order the appropriate agencies to suspend each license described325 in Subsection (4) held by the employer for a period not to exceed three days.326 (c) For a second violation, the court shall order an appropriate agency to permanently327 revoke each license described in Subsection (4) held by the employer.328 (d) On receipt of an order under this Subsection (1)(c) and notwithstanding any other329 law, an appropriate agency shall immediately revoke a license according to the court's order.330 (2) (a) On receipt of a court's order and notwithstanding any other law, an appropriate331 agency shall suspend a license according to the court's order.332 (b) A license that is suspended under Subsection (1)(a)(iv)(A) shall remain suspended333 until the employer files a signed sworn affidavit with the county attorney.334 (c) Notwithstanding any other law, for a license suspended under Subsection335 (1)(a)(iv)(A), once an employer files an affidavit as required by Subsection (1)(a)(iii), an

336 appropriate agency shall reinstate a suspended license immediately.

337 (3) For purposes of Subsection (1)(a)(iv)(B) or (1)(b), a court shall base the court's
338 decision on the length of the suspension under this section on evidence or information
339 submitted to the court during the action for a violation of Section 34A-12-201, and consider the
340 following factors, if relevant:

341 (a) the number of unauthorized aliens employed by the employer;

342 (b) prior misconduct by the employer;

343 (c) the degree of harm resulting from the violation;

344 (d) whether the employer made good faith efforts to comply with any applicable
345 requirements;

346 (e) the duration of the violation;

347 (f) the role of the directors, officers, or principals of the employer in the violation; and

348 (g) any other factor the court considers appropriate.

349 (4) (a) For the purposes of this section, a license that is subject to suspension or
350 revocation under this section is a license that is:

351 (i) held by an employer; and

352 (ii) specific to the business location where an unauthorized alien performs work.

353 (b) Notwithstanding Subsection (4)(a), if an employer does not hold a license specific
354 to the business location where an unauthorized alien performs work, but a license is necessary
355 to operate the employer's business in general, a license that is subject to suspension or
356 revocation under this section is a license that is held by the employer at the employer's primary
357 place of business.

358 (5) A court shall send a copy of the court's order to the attorney general and the
359 attorney general shall maintain the copy pursuant to Subsection (7).

360 (6) (a) A violation is considered:

361 (i) a first violation by an employer at a business location if the violation does not occur
362 during a probationary period ordered by the court under Subsection (1)(a) for that employer's
363 business location; or

364 (ii) a second violation by an employer at a business location if the violation occurs
365 during a probationary period ordered by the court under Subsection (1)(a) for that employer's
366 business location.

367 (b) A second violation of this section shall be based only on an unauthorized alien who
368 is or was employed by the employer after an action has been brought for a violation of Section
369 34A-12-201.

370 Section 13. Section **34A-12-304** is enacted to read:

371 **34A-12-304. Government entity verification enforcement.**

372 (1) As used in this section:

373 (a) "Government entity" means:

374 (i) the state, including:

375 (A) a department;

376 (B) an institution;

377 (C) a board;

378 (D) a division;

379 (E) a bureau;

380 (F) an office;

381 (G) a commission;

382 (H) a committee; or

383 (I) an elected official; and

384 (ii) a political subdivision of the state, including:

385 (A) a county;

386 (B) a city;

387 (C) a town;

388 (D) a school district;

389 (E) a public transit district; or

390 (F) a special improvement district.

391 (b) "Verification requirement" means a requirement imposed on a government entity
392 under this chapter or Section 63G-11-103.

393 (2) (a) The chief executive officer of a government entity shall in writing annually
394 certify on behalf of the government entity whether the government entity was in compliance
395 with the verification requirements in the previous calendar year.

396 (b) A chief executive officer who certifies that a government entity was in compliance
397 with the verification requirements for the previous calendar year knowing that the government

398 entity was not in compliance is guilty of violating Section 76-8-504.

399 (3) If a government entity is otherwise required to prepare an annual report or audit, the
400 government entity shall include the certification required under Subsection (2) in the annual
401 report or audit.

402 (4) A government entity shall provide a copy of the certification to a person at the
403 request of the person.

404 Section 14. **Repealer.**

405 This bill repeals:

406 Section 13-47-101, **Title.**

407 Section 13-47-102, **Definitions.**

408 Section 13-47-103, **Scope of chapter.**

409 Section 13-47-201, **Verification required for new hires.**

410 Section 13-47-202, **Liability protections.**

411 Section 13-47-203, **Voluntary registration by private employer certifying**
412 **participation in verification.**

413 Section 13-47-204, **Department to publish list of registered private employers.**

414 Section 15. **Effective date.**

415 This bill takes effect on July 1, 2011.

FISCAL NOTE

H.B. 253 1st Sub. (Buff)

SHORT TITLE: **Employment of Unauthorized Aliens**

SPONSOR: **Herrod, C.**

2011 GENERAL SESSION, STATE OF UTAH

STATE GOVERNMENT (UCA 36-12-13(2)(b))

Enactment of this bill likely will not materially impact the state budget.

LOCAL GOVERNMENTS (UCA 36-12-13(2)(c))

Enactment of this bill likely will not result in direct, measurable costs for local governments.

DIRECT EXPENDITURES BY UTAH RESIDENTS AND BUSINESSES (UCA 36-12-13(2)(d))

Enactment of this bill likely will not result in direct, measurable expenditures by Utah residents or businesses.