

HB0253S01 compared with HB0253

~~{deleted text}~~ shows text that was in HB0253 but was deleted in HB0253S01.

inserted text shows text that was not in HB0253 but was inserted into HB0253S01.

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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: _____

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;

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- addressing enforcement; and
- requiring certification by government entities of compliance with verification requirements; and

~~{ providing for enforcement; and~~

~~‡~~ ▶ repeals the Private Employer Verification Act.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill takes effect on July 1, 2011.

Utah Code Sections Affected:

ENACTS:

34A-12-101, Utah Code Annotated 1953

34A-12-102, Utah Code Annotated 1953

34A-12-103, Utah Code Annotated 1953

34A-12-201, Utah Code Annotated 1953

34A-12-202, Utah Code Annotated 1953

34A-12-203, Utah Code Annotated 1953

34A-12-204, Utah Code Annotated 1953

34A-12-205, Utah Code Annotated 1953

34A-12-301, Utah Code Annotated 1953

34A-12-302, Utah Code Annotated 1953

34A-12-303, Utah Code Annotated 1953

34A-12-304, Utah Code Annotated 1953

~~{ 34A-12-305, Utah Code Annotated 1953~~

~~‡~~REPEALS:

13-47-101, as enacted by Laws of Utah 2010, Chapter 403

13-47-102, as enacted by Laws of Utah 2010, Chapter 403

13-47-103, as enacted by Laws of Utah 2010, Chapter 403

13-47-201, as enacted by Laws of Utah 2010, Chapter 403

13-47-202, as enacted by Laws of Utah 2010, Chapter 403

13-47-203, as enacted by Laws of Utah 2010, Chapter 403

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13-47-204, as enacted by Laws of Utah 2010, Chapter 403

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

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

CHAPTER 12. EMPLOYMENT OF UNAUTHORIZED ALIENS ACT

Part 1. General Provisions

34A-12-101. Title.

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

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

34A-12-102. Definitions.

As used in this chapter:

(1) "Agency" means:

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

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

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

Subsection (1)(b).

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

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

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

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

(5) (a) "Employer" means:

(i) the state;

(ii) a political subdivision of the state;

(iii) a self-employed person; and

(iv) a person that:

(A) transacts business in this state;

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

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

(b) For purposes of an independent contractor, "employer" means the independent

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contractor and does not mean the person that uses the contract labor.

~~{~~ (6) "E-verify program" means the employment verification pilot program as jointly administered by the United States Department of Homeland Security and the Social Security Administration or any of its successor programs.

† (~~7~~6) (a) "Independent contractor" means a person who:

(i) carries on an independent business;

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

and

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

(b) Whether a person entity is an independent contractor is determined on a case-by-case basis through various factors, including whether the person:

(i) supplies the tools or materials;

(ii) makes services available to the general public;

(iii) works or may work for a number of clients at the same time;

(iv) has an opportunity for profit or loss as a result of labor or service provided;

(v) invests in the facilities for work;

(vi) directs the order or sequence in which the work is completed; or

(vii) determines the hours when the work is completed.

(c) "Independent contractor" includes an individual who performs services and is not an employee pursuant to Section 3508, Internal Revenue Code.

(~~8~~7) "Intentionally" is as defined in Section 76-2-103.

(~~9~~8) (a) "Knowingly employ an unauthorized alien" means an action described in 8 U.S.C. Sec. 1324a.

(b) "Knowingly employ an unauthorized alien" is to be interpreted consistently with 8 U.S.C. Sec. 1324a and applicable federal regulations.

(~~10~~9) (a) "License" means a permit, certificate, approval, registration, charter, or similar form of authorization that is:

(i) required by law; and

(ii) issued by any agency for the purposes of operating a business in this state.

(b) "License" includes:

(i) articles of incorporation or articles of organization under Title 16, Corporations, or

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Title 48, Partnership; and

(ii) a license issued under Title 59, Revenue and Taxation.

(c) "License" does not include a professional license.

(~~f11~~10) "Private employer" means a person listed in Subsection (5)(a)(iii) or (iv).

(~~f12~~11) "Professional license" means a license, certificate, or registration issued

under:

(a) Title 4, Utah Agricultural Code;

(b) Title 7, Financial Institutions Act;

(c) Title 19, Environmental Quality Code;

(d) Title 26, Utah Health Code;

(e) Title 31A, Insurance Code;

(f) Title 58, Occupational and Professional Licensing;

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

(h) Title 73, Water and Irrigation; or

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

(~~f13~~12) "Social Security number verification service" means the program

administered by the Social Security Administration or any of its successor programs.

(13) (a) "Status verification system" means an electronic system operated by the federal government, through which a person may verify the citizenship or immigration status of an individual within the jurisdiction of the agency or political subdivision for a purpose authorized under this section.

(b) "Status verification system" includes:

(i) the electronic verification of the work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, 8 U.S.C., Sec. 1324a, known as the E-verify Program;

(ii) an equivalent federal program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work eligibility status of a newly hired employee pursuant to the Immigration Reform and Control Act of 1986;

(iii) the Social Security Number Verification Service or similar online verification process implemented by the United States Social Security Administration; or

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

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

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

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

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

(1) A term used in this chapter is to be construed to have the meaning given to the term under federal laws regulating immigration.

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

(a) federal laws regulating immigration;

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

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

(3) This chapter may not be implemented or construed to implement or establish the REAL ID Act of 2005, Pub. L. 109-13, division B, 119 Stat. 302, including the use of a radio frequency identification chip.

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

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

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

Part 2. Employment Practices

34A-12-201. Employing unauthorized alien.

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

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

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

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

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unauthorized alien to perform the labor.

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

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

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

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

- (a) the duration of the employee's employment; or
- (b) at least three years from the date of verification.

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

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

(1) As used in this section:

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

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

(b) "Government entity" means:

- (i) the state; or
- (ii) a political subdivision of this state that receives and uses tax revenues.

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

(3) (a) Before receiving the economic development incentive, the employer shall provide proof to the government entity that the employer is registered with and is participating in ~~the e-verify program~~ a status verification system.

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

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

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

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

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

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

(2) To register or renew a registration with the Department of Commerce under this section, a private employer shall:

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

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

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

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

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

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

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

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

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

34A-12-205. Liability protections.

(1) An employer may not be held civilly liable under state law in a cause of action for

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the employer's unlawful hiring of an unauthorized alien, as defined in 8 U.S.C. Sec. 1324a, if:

- (a) the private employer complies with Section 34A-12-202 or 63G-11-103; and
- (b) the information obtained in accordance with the ~~{e-verify program}~~status

verification system indicates that the employee's federal legal status allows the employer to hire the employee.

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

- (a) the employer complies with Section 34A-12-202 or 63G-11-103; and
- (b) the information obtained in accordance with the ~~{e-verify program}~~status

verification system indicates that the individual's federal legal status is that of an unauthorized alien as defined in 8 U.S.C. Sec. 1324a.

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

Part 3. Enforcement

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

34A-12-301. ~~{~~ Complaint process.

~~(1) The attorney general shall prescribe a complaint form for a person to allege a violation of Section 34A-12-201. The attorney general may not require a complainant to:~~

- ~~(a) list the complainant's Social Security number on the complaint form; or~~
- ~~(b) have a complaint form notarized.~~

~~(2) On receipt of a complaint on a prescribed complaint form alleging that an employer has violated Section 34A-12-201, the attorney general or county attorney shall investigate whether the employer has violated Section 34A-12-201.~~

~~(3) (a) If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated Section 34A-12-201.~~

~~(b) This Subsection (3) may not be construed to prohibit the filing of an anonymous complaint that is not submitted on a prescribed complaint form.~~

~~(4) **Investigation process.**~~

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

~~(5) If a person submits a complaint to a county attorney, the person shall submit the~~

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complaint to the county attorney in the county in which the alleged unauthorized alien is or was employed by the employer.

— (6) A person who knowingly files a false and frivolous complaint under this section is guilty of a class C misdemeanor.

— Section 10. Section ~~34A-12-302~~ is enacted to read:

— ~~34A-12-302. Investigation process.~~

— ~~(1)2~~ The county sheriff or any other local law enforcement agency may assist in investigating a complaint.

~~(2)3~~ (a) When investigating a complaint, the attorney general or county attorney ~~shall~~ may only verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 U.S.C. Sec. 1373(c).

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

~~(3)4~~ If, after an investigation, the attorney general or county attorney determines that a complaint is not false and frivolous:

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

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

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

Section 11. Section ~~{34A-12-303}~~ 34A-12-302 is enacted to read:

~~{34A-12-303}~~ 34A-12-302. Enforcement action.

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

(2) (a) To determine whether an employee is an unauthorized alien, the court shall

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consider only the federal government's determination pursuant to 8 U.S.C. Sec. 1373(c).

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

(i) take judicial notice of the federal government's determination; and

(ii) request the federal government to provide automated or testimonial verification pursuant to 8 U.S.C. Sec. 1373(c).

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

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

(b) An employer is considered to have complied with the requirements of 8 U.S.C. Sec. 1324a(b), 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.

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

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

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

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

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

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

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

(e) It is not entrapment for a law enforcement officer or agent to use a ruse or to

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conceal the law enforcement officer's or agent's identity. The conduct of a law enforcement officer or agent may be considered in determining if an employer proves entrapment.

Section 12. Section ~~{34A-12-304}~~34A-12-303 is enacted to read:

~~{34A-12-304}~~34A-12-303. **Penalties.**

If a court finds a violation of Section 34A-12-201, the following applies:

(1) (a) For a first violation, the court shall order:

(i) the employer to terminate the employment of unauthorized aliens;

(ii) the employer to file a quarterly report in the form provided in Section 35A-7-104

with the county attorney for an employee who is hired by the employer at the business location where the unauthorized alien performed work during:

(A) for a violation of Subsection 34A-12-201(1), a three-year probationary period; or

(B) for a violation of Subsection 34A-12-201(2), a five-year probationary period;

(iii) the employer to file a signed sworn affidavit with the county attorney within ~~{three business}~~15 days after the order is issued that states that the employer:

(A) has terminated the employment of any unauthorized alien in this state; and

(B) will not intentionally or knowingly employ an unauthorized alien in this state; and

(iv) the appropriate agencies to suspend each license described in Subsection (4) held by the employer:

(A) for a violation of Subsection 34A-12-201(1), if the employer fails to file a signed sworn affidavit with the county attorney within ~~{three business}~~15 days after the order is issued; or

(B) for a violation of Subsection 34a-12-201(2), for a minimum of ~~{10}~~three days.

(b) For a first violation of Subsection 34A-12-201(1), in addition to the penalties under Subsection (1)(a), a court may order the appropriate agencies to suspend each license described in Subsection (4) held by the employer for a period not to exceed ~~{10}~~three days.

(c) For a second violation, the court shall order an appropriate agency to permanently revoke each license described in Subsection (4) held by the employer.

(d) On receipt of an order under this Subsection (1)(c) and notwithstanding any other law, an appropriate agency shall immediately revoke a license according to the court's order.

(2) (a) On receipt of a court's order and notwithstanding any other law, an appropriate agency shall suspend a license according to the court's order.

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(b) A license that is suspended under Subsection (1)(a)(iv)(A) shall remain suspended until the employer files a signed sworn affidavit with the county attorney.

(c) Notwithstanding any other law, for a license suspended under Subsection (1)(a)(iv)(A), once an employer files an affidavit as required by Subsection (1)(a)(iii), an appropriate agency shall reinstate a suspended license immediately.

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

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

(b) prior misconduct by the employer;

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

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

(e) the duration of the violation;

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

(g) any other factor the court considers appropriate.

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

(i) held by an employer; and

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

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

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

(6) (a) A violation is considered:

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

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business location; or

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

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

~~{ (7) The attorney general shall:~~

~~— (a) maintain a copy of a court order that is received pursuant to this section;~~

~~— (b) maintain a database of the employers and business locations that have a first violation of Subsection 34A-12-201(1); and~~

~~— (c) make a court order available on the attorney general's website.~~

‡ Section 13. Section ~~{34A-12-305}~~34A-12-304 is enacted to read:

~~{34A-12-305}~~34A-12-304. **Government entity verification enforcement.**

(1) As used in this section:

(a) "Government entity" means:

(i) the state, including:

(A) a department;

(B) an institution;

(C) a board;

(D) a division;

(E) a bureau;

(F) an office;

(G) a commission;

(H) a committee; or

(I) an elected official; and

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

(A) a county;

(B) a city;

(C) a town;

(D) a school district;

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(E) a public transit district; or

(F) a special improvement district.

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

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

(b) A chief executive officer who certifies that a government entity was in compliance with the verification requirements for the previous calendar year knowing that the government entity was not in compliance is guilty of violating Section 76-8-504.

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

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

Section 14. **Repealer.**

This bill repeals:

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

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

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

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

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

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

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

Section 15. **Effective date.**

This bill takes effect on July 1, 2011.

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Legislative Review Note

~~as of 1-26-11 11:58 AM~~

~~Office of Legislative Research and General Counsel~~