



Colorado's New Employment Verification Laws

By Steven Kaufmann and Stephanie Forbes

Colorado recently enacted new legislation designed to ensure compliance with federal laws that prohibit employing undocumented aliens. Indeed, Colorado's new laws go further than the federal laws to require enhanced employment verification procedures for Colorado employers. Of the recently enacted legislation, two statutes in particular will likely affect Colorado employers. The first law applies to all employers in hiring new employees, while the second law will only impact those that contract with any Colorado state agency or political subdivision. This brief summary addresses those laws and the changes employers will need to make in their employment verification and record-keeping procedures. Because the laws are new, a number of grey areas will need to be sorted out going forward.

First, Colorado Revised Statutes § 8-2-122 imposes heightened employment eligibility verification requirements on employers who hire new employees on or after January

1, 2007. Specifically, within 20 days after hiring a new employee, employers in Colorado must affirm that:

- (1) they have examined the employee's legal work status;
- (2) they have retained file copies of the identification documents reviewed to comply with the federal Immigration Reform and Control Act ("IRCA") (documents reviewed for completion of the I-9);
- (3) they have not altered or falsified the employee's identification documents; and
- (4) they have not knowingly hired an unauthorized alien.

The employer should keep the documentation showing compliance in a file, either paper or electronic, as long as the employee is employed. The employer need not send an affirmation to the Colorado Division of Labor ("DOL"), however, the Director of the DOL may conduct random audits of employer records and demand

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production of the files required to be kept under this act. Although the statute does not discuss how employers can show the requisite affirmation, the DOL has indicated that it does not plan to create an affirmation form. While logically an affirmation would consist of a statement of compliance, the DOL is at this point suggesting that adequate “affirmation” consists of a printout of the verification screens from the Basic Pilot Employment Verification Program website (<https://www.vis-dhs.com/EmployerRegistration>) and the U.S.

Social Security Number Verification Service website (<http://www.socialsecurity.gov/employer/ssnv.htm>). The statute mentions neither of these programs, but the statute applicable to public contractors (discussed in more detail below) provides for use of the Basic Pilot Program. An employer who, with reckless disregard, fails to provide the documentation or provides false or fraudulent documentation is subject to fines from \$5,000 to \$25,000, with the potential impact of aggregation of fines still being unclear.

This law differs from federal record-keeping requirements in two important respects. First, unlike the new Colorado law, the federal law does not require that employers keep copies of documents reviewed to complete the I-9 forms. Second, the federal law requires that employers retain the I-9 for three years after the date of hire or one year after termination, whichever is later. Colorado, on the other hand, requires employers to keep the I-9 form and copies of the I-9 and supporting documentation for the duration of the employment relationship, which presumably could be longer or shorter than the retention period required under federal law. Accordingly, until the conflict between the state and federal law can be sorted out, employers should consider

retaining two sets of files relating to employee immigration status checks. The first set, which must be kept for the duration of the employment relationship to comply with the Colorado statute, will include a copy of the I-9 form, copies of the documents in support of the I-9, and an affirmation of compliance, recognizing that the form of the affirmation remains unclear. The second file set, to comply with federal law, will contain the I-9 form only and must be retained for three years, or one year after termination, whichever is later. Future legal challenges to the Colorado law are likely because of its inherent conflict with the federal statutes.

Second, Colorado Revised Statutes § 8-17.5-101, which went into effect on August 9, 2006 (but will not be enforced until January 1, 2007), prohibits any Colorado state agency or political subdivision of the state from entering into or renewing public contracts with any contractor who knowingly employs or contracts with an “illegal alien” or who contracts with subcontractors who knowingly employ or contract with an “illegal alien.” While not clear on its face, this law likely applies to new hires and does not apply to employees currently employed by the contractor.

The definitions of terms used in this act are significant. “Contractor” is defined as any person having any type of agreement with a state agency or “political subdivision” for the procurement of “services.” “Political subdivision” is defined broadly to include cities, towns, counties, special districts, school districts, improvement districts, municipal corporation, quasi-municipal corporations, and public corporations. “State Agency” is defined as any department, commission, council, board, bureau, committee, institution of higher education, agency, or other governmental unit of the executive, legislative, or judicial branch of state government. “Services” is defined broadly to include “the furnishing of labor, time, or effort by a contractor or a subcontractor not involving the delivery of a specific end product other than reports that are merely incidental to the required performance.”

This new law has two important requirements. First, as a pre-condition to entering into or renewing a public contract for “services,” a prospective contractor must verify that it does not knowingly employ or contract with an illegal alien and that the contractor participated in or attempted to participate in the Basic Pilot Program. The Basic Pilot Program is

an automated program that verifies the employment authorization of all *newly hired employees* by accessing Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. To participate in the Program, an employer must register and sign a memorandum of understanding that sets forth the responsibilities of DHS, SSA, and the employer. The Basic Pilot Program may only be used to verify new employees, it cannot be used for current employees or potential

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hires. Potential contractors need only verify and certify for employees hired after the contractor enters into the memorandum of understanding.

As noted above, the standards for this program are still in flux and not yet well defined. Recommendations of the DOL may or may not ultimately carry

the day. Until the standards become clear, employers should consider keeping documentation of their registration and attempted registration with the Basic Pilot Program and retaining in the Colorado verification file a copy of the screen on the Basic Pilot Program website verifying each employee’s information. Contractors should consider asking certain subcontractors to provide verification of statutory compliance.

Second, the new law imposes requirements on the substance of

new or renewed public contracts. Specifically, the law requires that each public contract include specific provisions that the prospective contractor shall not (1) knowingly employ or contract with an illegal alien to perform work under the contract or (2) enter into a contract with a

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subcontractor that fails to certify to the contractor that it does not knowingly employ or contract with an illegal alien to perform work under the contract. If the contractor obtains actual knowledge that a subcontractor performing work under the public contract knowingly is employing illegal aliens, the contractor has three days to notify the subcontractor and the state agency or political subdivision letting the contract. Additionally, the contractor must terminate the contract with the subcontractor, unless within three days the subcontractor fires the illegal alien or certifies that he or she has not knowingly employed or contracted with the illegal alien.

Under this new law, the Colorado DOL may audit and investigate public contractors at any time. They may conduct onsite investigations and request and review documents proving citizenship. Non-compliance with the requirements of the law is equivalent to a breach of contract and the governmental entity can seek actual and consequential damages that

it suffers as a result of the termination of the contract arising from the contractor's non-compliance with the law. Additionally, if a contractor violates a provision of this law, the state agency or political subdivision must notify the Secretary of State, who shall maintain a list that includes the name of the contractor, the state agency or political subdivision that terminated the public contract, and the date of the termination. The Secretary of State shall maintain the contractor's name on this list for two years. Despite being placed on this list, the contractor is not absolutely barred from receiving public contracts for services. ■

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