



Texas Department of Transportation

SEP 25 2015

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OPINION COMMITTEE

September 18, 2015

FILE # ML-47825-15

I.D. # 47825

RQ-0055-KP

Honorable Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Attorney General Opinion re: E-Verify Program Requirements

Dear Opinion Committee Members:

On December 3, 2014, Governor Rick Perry issued Executive Order No. RP-80, requiring all agencies under the direction of the governor (executive agencies), including the Texas Department of Transportation (TxDOT), to utilize the U.S. Department of Homeland Security's E-Verify program (E-Verify) to determine the employment eligibility of certain executive agency employees and contractor employees. A copy of Executive Order No. RP-80 is attached for your review. The governor's office later provided a guidance letter to executive agencies that generally explained that the Executive Order applied to new employees but not to current employees. A copy of the guidance letter is also attached for your review. Executive Order No. RP-80 pertains to two categories of employees, requiring that employment eligibility be verified through E-Verify for: 1) executive agency employees; and 2) all contractors and subcontractors performing work under a contract for services with executive agencies.

Thereafter, the 84th Texas Legislature passed Senate Bill 374, effective September 1, 2015, requiring all state agencies to participate in the federal E-verify program. A copy of Senate Bill 374 is attached for your review. Unlike Executive Order No. RP-80, Senate Bill 374 requires that employment eligibility be verified through E-Verify for all new state agency employees, executive or otherwise. However, Senate Bill 374 did not address the employment eligibility verification requirement for contractors and subcontractors performing work under a contract for services with executive agencies.

Considering the differences between Executive Order No. RP-80 and Senate Bill 374 regarding the requirements of the E-Verify program, on behalf of TxDOT, I respectfully request that the Attorney General issue an Opinion with respect to the following issues:

- a) Does Senate Bill 374, passed into law after Executive Order No. RP-80, supersede and completely replace all aspects of Executive Order No. RP-80?
- b) If not superseded entirely, does Executive Order No. RP-80's requirement that the employment eligibility of all contractors and subcontractors performing work under a contract for services with executive agencies is to be verified through E-Verify still apply to executive agencies?

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Honorable Ken Paxton

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September 18, 2015

Thank you for your consideration, and if you have any questions or need any additional information to render your Opinion, please contact Allan Meesey in TxDOT's Office of General Counsel at (512) 463-8630.

Sincerely,

A handwritten signature in black ink, appearing to read "J.F. Weber", written over a horizontal line.

LtGen J.F. Weber, USMC (Ret)
Executive Director

Enclosures

U.S. Certified Mail No. 7011 0470 0002 1476 7447
Return Receipt Requested

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Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
December 3, 2014

EXECUTIVE ORDER
RP 80

*Relating to state agencies using the U.S. Department of Homeland Security's
E-Verify System*

WHEREAS, federal law requires employers to employ only individuals eligible to work in the United States, and the U.S. Department of Homeland Security's E-Verify system allows employers to quickly verify employee eligibility in an efficient and cost-effective manner; and

WHEREAS, various necessary improvements have been made to the E-Verify system since its implementation that make it more effective and secure, assure a higher percentage of employees can be confirmed as "work authorized" within 24 hours, and reduce the number of eligible workers who are erroneously designated as "unauthorized workers;" and

WHEREAS, E-Verify's ability to identify "unauthorized workers" and prevent them from entering the workforce has significantly improved; and

WHEREAS, seventeen Texas state entities, including the Office of the Governor, major state agencies and universities, are currently utilizing E-Verify; and

WHEREAS, other states have successfully mandated the use of E-Verify by government agencies and by companies contracting with government agencies;

NOW, THEREFORE, I, Rick Perry, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following:

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.

All agencies under the direction of the governor to include, as a condition of all state contracts for services, a requirement that contractors utilize the U.S. Department of Homeland Security's E-Verify system to determine the eligibility of:

1. All persons employed during the contract term to perform duties within Texas; and
2. All persons (including subcontractors) assigned by the contractor to

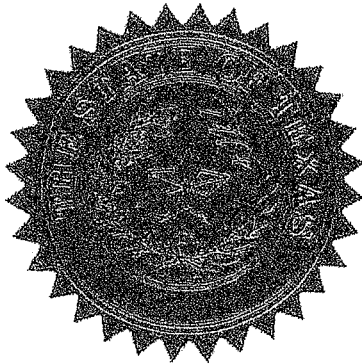
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SECRETARY OF STATE
10:20 AM O'CLOCK

DEC 03 2014

perform work pursuant to the contract.

Agencies not under the direction of the governor are encouraged to verify the employment eligibility of their current and prospective employees utilizing the E-Verify system and require contractors to utilize the E-Verify system to verify the employment eligibility of their employees and subcontractors.

This executive order shall take effect immediately and supersedes all previous orders inconsistent with its terms and shall remain in effect and in full force until modified, amended, rescinded or superseded by me or by a succeeding governor.



Given under my hand this the
3rd day of December, 2014.

Rick Perry
RICK PERRY
Governor

Attested by:

NANDITA BERRY
NANDITA BERRY
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
10:30 AM O'CLOCK
DEC 03 2014

Please distribute the following information to your HR coordinators and others within your agency as appropriate.

Dear Agency:

The Governor issued Executive Order RP-80 directing state agencies under his control to implement E-Verify in hiring and contracting practices. We have received numerous inquiries from agencies seeking further guidance.

This letter provides that guidance.

The executive order applies to all executive branch agencies except those agencies that are led by an elected official. The executive order does not apply to legislative and judicial branch agencies. However, all agencies that do not fall under the directive are encouraged to use the E-Verify system.

Based on the U.S. Department of Homeland Security's (DHS) current rules, the directive to verify your employees' employment eligibility through E-Verify applies only to employees hired after your agency has signed E-Verify's Memorandum of Understanding for Employers (MOU). At this time DHS limits use of the E-Verify system for employees between the time the employee accepts an offer of employment and the third business day after the employee begins work for pay.

Similarly, in contracts for services that you have entered after the issuance of the Executive Order, you must require that those contractors—and their subcontractors performing work pursuant to the state contract—use E-Verify, according to DHS's rules, for their employees hired between the start of the contract and its conclusion.

Should E-Verify be expanded to include checks for current employees, EO RP-80 is broad enough to allow state agencies to apply the system to all existing employees.

For additional information, please refer to Executive Order No. RP-80 and the E-Verify website (<http://www.uscis.gov/e-verify>).

AN ACT

1
2 relating to requiring state agencies to participate in the federal
3 electronic verification of employment authorization program, or
4 E-verify.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Subtitle B, Title 6, Government Code, is amended
7 by adding Chapter 673 to read as follows:

8 CHAPTER 673. VERIFICATION OF EMPLOYEE INFORMATION

9 Sec. 673.001. DEFINITIONS. In this chapter:

10 (1) "E-verify program" means the electronic
11 verification of employment authorization program of the federal
12 Illegal Immigration Reform and Immigrant Responsibility Act of 1996
13 (Pub. L. No. 104-208, reprinted in note, 8 U.S.C. Section 1324a),
14 operated by the United States Department of Homeland Security, or a
15 successor employment authorization program designated by the
16 United States Department of Homeland Security or other federal
17 agency authorized to verify the employment authorization status of
18 newly hired employees under the federal Immigration Reform and
19 Control Act of 1986 (8 U.S.C. Section 1101 et seq.).

20 (2) "State agency" has the meaning assigned by Section
21 659.101.

22 Sec. 673.002. VERIFICATION. A state agency shall register
23 and participate in the E-verify program to verify information of
24 all new employees.

1 Sec. 673.003. RULES. The Texas Workforce Commission shall
2 adopt rules and prescribe forms to implement this chapter.

3 SECTION 2. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 374 passed the Senate on
May 7, 2015, by the following vote: Yeas 20, Nays 11.

Secretary of the Senate

I hereby certify that S.B. No. 374 passed the House on
May 26, 2015, by the following vote: Yeas 122, Nays 21, one
present not voting.

Chief Clerk of the House

Approved:

Date

Governor