

Senate Bill 40

By: Senators Murphy of the 27th, Rogers of the 21st, Mullis of the 53rd, Gooch of the 51st, Miller of the 49th and others

AS PASSED SENATE

**A BILL TO BE ENTITLED
AN ACT**

1 To amend Article 3 of Chapter 10 of Title 13 of the Official Code of Georgia Annotated,
2 relating to security and immigration compliance, so as to provide penalties for the failure of
3 a public employer to utilize the federal work authorization program; to require certain private
4 employers to utilize the federal work authorization program; to provide for review by the
5 state auditor and the Department of Labor; to provide for definitions; to amend Chapter 5 of
6 Title 17 of the Official Code of Georgia Annotated, relating to searches and seizures, so as
7 to provide for the investigation of the failure of an alien to carry a certificate of registration
8 as required by federal law; to clarify the authority to detain and arrest illegal aliens; to amend
9 Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to the
10 imposition, rate, computation, and exemptions for revenue and taxation, so as to limit a
11 business's income tax deduction where such business fails to use the federal employment
12 eligibility verification program; to amend Code Section 50-36-1 of the Official Code of
13 Georgia Annotated, relating to verification of lawful presence within the United States for
14 receipt of certain government benefits, so as to provide penalties for the failure of an agency
15 head to verify the lawful immigration status of certain applicants for public benefits; to
16 provide for related matters; to provide for an effective date and applicability; to repeal
17 conflicting laws; and for other purposes.

18 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

19 **SECTION 1.**

20 Article 3 of Chapter 10 of Title 13 of the Official Code of Georgia Annotated, relating to
21 security and immigration compliance, is amended by revising Code Section 13-10-90,
22 relating to definitions, as follows:

23 "13-10-90.

24 As used in this article, the term:

25 (1) 'Commissioner' means the Commissioner of ~~the Georgia Department of Labor.~~

26 (2) 'Contractor' means a person or entity that enters into a contract for the physical
 27 performance of services with a public employer.

28 ~~(2)(3)~~ 'Federal work authorization program' means any of the electronic verification of
 29 work authorization programs operated by the United States Department of Homeland
 30 Security or any equivalent federal work authorization program operated by the United
 31 States Department of Homeland Security to verify employment eligibility information of
 32 newly hired employees, ~~pursuant to the Immigration Reform and Control Act of 1986~~
 33 ~~(IRCA), D.L. 99-603~~ commonly known as E-Verify.

34 ~~(2.1)(4)~~ 'Physical performance of services' means the building, altering, repairing,
 35 improving, or demolishing of any public structure or building or other public
 36 improvements of any kind to public real property within this state, including the
 37 construction, reconstruction, or maintenance of all or part of a public road; or any other
 38 performance of labor for a public employer within this state under a contract or other
 39 bidding process.

40 ~~(3)(5)~~ 'Public employer' means every department, agency, or instrumentality of the state
 41 or a political subdivision of the state.

42 ~~(4)(6)~~ 'Subcontractor' ~~includes a subcontractor, contract employee, staffing agency, or~~
 43 ~~any contractor regardless of its tier~~ means a person or entity having privity of contract
 44 with a contractor.

45 (7) 'Sub-subcontractor' means a person or entity having privity of contract with a
 46 subcontractor or privity of contract with another person or entity contracting with a
 47 subcontractor or sub-subcontractor."

48 SECTION 2.

49 Said article is further amended by revising subsection (b) of Code Section 13-10-91, relating
 50 to the verification of new employee eligibility, applicability, and rules and regulations, as
 51 follows:

52 "(b)(1) No A public employer shall not enter into a contract pursuant to this chapter for
 53 the physical performance of services within this state unless the contractor registers and
 54 participates in the federal work authorization program to verify information of all newly
 55 hired employees or subcontractors. Before a bid for any such service is considered by a
 56 public employer, the bid shall include a signed, notarized affidavit from the contractor
 57 attesting to the following:

58 (A) The affiant has registered with ~~and~~, is authorized to use, and uses the federal work
 59 authorization program;

60 (B) The user identification number and date of authorization for the affiant; ~~and~~

61 (C) The affiant ~~is using and~~ will continue to use the federal work authorization
62 program throughout the contract period; and

63 (D) The affiant will contract for the physical performance of services in satisfaction of
64 such contract only with subcontractors who present an affidavit to the contractor with
65 the same information required by subparagraphs (A), (B), and (C) of this paragraph.

66 An affidavit required by this subsection shall be considered an open public record once
67 a public employer has entered into a contract for physical performance of services;
68 provided, however, that any information protected from public disclosure by federal law
69 or by Article 4 of Chapter 18 of Title 50 shall be redacted. Affidavits shall be maintained
70 by the public employer for five years from the date of receipt.

71 ~~(2) A contractor shall not enter into any contract with a public employer for No~~
72 ~~contractor or subcontractor who enters a contract pursuant to this chapter with a public~~
73 ~~employer or a contractor of a public employer shall enter into such a contract or~~
74 ~~subcontract in connection with the physical performance of services within this state~~
75 ~~unless the contractor or subcontractor registers and participates in the federal work~~
76 ~~authorization program to verify information of all newly hired employees. Any~~
77 ~~employee, contractor, or subcontractor of such contractor or subcontractor shall also be~~
78 ~~required to satisfy the requirements of this paragraph.~~

79 ~~(3) Upon contracting with a new subcontractor, a contractor or subcontractor shall, as a~~
80 ~~condition of any contract or subcontract entered into pursuant to this chapter, provide a~~
81 ~~public employer with notice of the identity of any and all subsequent subcontractors hired~~
82 ~~or contracted by that contractor or subcontractor. Such notice shall be provided within~~
83 ~~five business days of entering into a contract or agreement for hire with any~~
84 ~~subcontractor. Such notice shall include an affidavit from each subsequent contractor~~
85 ~~attesting to the subcontractor's name, address, user identification number, and date of~~
86 ~~authorization to use the federal work authorization program.~~

87 (3) A subcontractor shall not enter into any contract with a contractor unless such
88 subcontractor registers and participates in the federal work authorization program. A
89 subcontractor shall submit, at the time of such contract, an affidavit to the contractor in
90 the same manner and with the same information required in paragraph (1) of this
91 subsection. It shall be the duty of any subcontractor receiving an affidavit from a
92 sub-subcontractor to forward notice to the contractor of the receipt, within five business
93 days of receipt, of such affidavit. It shall be the duty of a subcontractor receiving notice
94 of receipt of an affidavit from any sub-subcontractor that has contracted with a
95 sub-subcontractor to forward, within five business days of receipt, a copy of such notice
96 to the contractor.

97 (4) A sub-subcontractor shall not enter into any contract with a subcontractor or
98 sub-subcontractor unless such sub-subcontractor registers and participates in the federal
99 work authorization program. A sub-subcontractor shall submit, at the time of such
100 contract, an affidavit to the subcontractor or sub-subcontractor with whom such
101 sub-subcontractor has privity of contract, in the same manner and with the same
102 information required in paragraph (1) of this subsection. It shall be the duty of any
103 sub-subcontractor to forward notice of receipt of any affidavit from a sub-subcontractor
104 to the subcontractor or sub-subcontractor with whom such receiving sub-subcontractor
105 has privity of contract.

106 (5) In lieu of the affidavit required by this subsection, a contractor, subcontractor, or
107 sub-subcontractor who has no employees and does not hire or intend to hire employees
108 for purposes of satisfying or completing the terms and conditions of any part or all of the
109 original contract with the public employer shall instead provide a copy of the state issued
110 driver's license or state issued identification card of such contracting party and a copy of
111 the state issued driver's license or identification card of each independent contractor
112 utilized in the satisfaction of part or all of the original contract with a public employer.
113 A driver's license or identification card shall only be accepted in lieu of an affidavit if it
114 is issued by a state within the United States and such state verifies lawful immigration
115 status prior to issuing a driver's license or identification card. For purposes of satisfying
116 the requirements of this subsection, copies of such driver's license or identification card
117 shall be forwarded to the public employer, contractor, subcontractor, or sub-subcontractor
118 in the same manner as an affidavit and notice of receipt of an affidavit as required by
119 paragraphs (1), (3), and (4) of this subsection. Not later than July 1, 2011, the Attorney
120 General shall provide a list of the states that verify immigration status prior to the
121 issuance of a driver's license or identification card and that only issue licenses or
122 identification cards to persons lawfully present in the United States. The list of verified
123 state drivers' licenses and identification cards shall be posted on the website of the State
124 Law Department and updated annually thereafter. In the event that a contractor,
125 subcontractor, or sub-subcontractor later determines that he or she will need to hire
126 employees to satisfy or complete the physical performance of services under an
127 applicable contract, then he or she shall first be required to comply with the affidavit
128 requirements of this subsection.

129 (6)(A) Not later than December 31 of each year, a public employer shall submit a
130 compliance report to the state auditor certifying compliance with the provisions of this
131 subsection. Such compliance report shall contain the public employer's federal work
132 authorization program verification user number and date of authorization and the legal
133 name, address, and federal work authorization program user number of the contractor and

134 the date of the contract between the contractor and public employer. Subject to available
 135 funding, the state auditor shall conduct annual compliance audits on a minimum of at
 136 least one-half of the reporting agencies and publish the results of such audits annually on
 137 the department's website on or before September 30.

138 (B) If the state auditor finds a political subdivision to be in violation of this subsection,
 139 such political subdivision shall be provided 30 days to demonstrate to the state auditor
 140 that such political subdivision has corrected all deficiencies and is in compliance with
 141 this subsection. If, after 30 days, the political subdivision has failed to correct all
 142 deficiencies, such political subdivision shall be excluded from the list of qualified local
 143 governments under Chapter 8 of Title 50 until such time as the political subdivision
 144 demonstrates to the state auditor that such political subdivision has corrected all
 145 deficiencies and is in compliance with this subsection.

146 (C)(i) At any time after the state auditor finds a political subdivision to be in violation
 147 of this subsection, such political subdivision may seek administrative relief through the
 148 Office of State Administrative Hearings. If a political subdivision seeks administrative
 149 relief, the time for correcting deficiencies shall be tolled, and any action to exclude the
 150 political subdivision from the list of qualified governments under Chapter 8 of Title 50
 151 shall be suspended until such time as a final ruling upholding the findings of the state
 152 auditor is issued.

153 (ii) A new compliance report submitted to the state auditor by the political
 154 subdivision shall be deemed satisfactory and shall correct the prior deficient
 155 compliance report so long as the new report fully complies with this subsection.

156 (iii) No political subdivision of this state shall be found to be in violation of this
 157 subsection by the state auditor as a result of any actions of a county constitutional
 158 officer.

159 (D) If the state auditor finds any political subdivision which is a state department or
 160 agency to be in violation of the provisions of this subsection twice in a five-year period,
 161 the funds appropriated to such state department or agency for the fiscal year following
 162 the year in which the agency was found to be in violation for the second time shall be
 163 not greater than 90 percent of the amount so appropriated in the second year of such
 164 noncompliance. Any political subdivision found to be in violation shall be listed on
 165 www.open.georgia.gov or another official state website with an indication and
 166 explanation of each violation.

167 ~~(4)~~(7) Contingent upon appropriation or approval of necessary funding and in order to
 168 verify compliance with the provisions of this subsection, each year the Commissioner
 169 shall conduct no fewer than 100 random audits of public employers and contractors or
 170 may conduct such an audit upon reasonable grounds to suspect a violation of this

171 subsection. The results of the audits shall be published on the www.open.georgia.gov
 172 website and on the Georgia Department of Labor's website no later than December 31 of
 173 each year. The Georgia Department of Labor shall seek funding from the United States
 174 Secretary of Labor to the extent such funding is available.

175 ~~(5)~~(8) Any person who knowingly and willfully makes a false, fictitious, or fraudulent
 176 statement in an affidavit submitted pursuant to this subsection shall be guilty of a
 177 violation of Code Section 16-10-20 and, upon conviction, shall be punished as provided
 178 in such Code section. Contractors and subcontractors convicted for false statements
 179 based on a violation of this subsection shall be prohibited from bidding on or entering
 180 into any public contract for 12 months following such conviction. A contractor,
 181 subcontractor, or sub-contractor that has been found to have violated this subsection shall
 182 be listed by the Department of Labor on www.open.georgia.gov or other official website
 183 of the state with public information regarding such violation, including the identity of the
 184 violation, the nature of the contract, and the date of conviction.

185 (9) There shall be a rebuttable presumption that a public employer, contractor,
 186 subcontractor, or sub-subcontractor receiving and acting upon an affidavit conforming
 187 to the content requirements of this subsection does so in good faith, and such public
 188 employer, contractor, subcontractor, or sub-subcontractor may rely upon such affidavit
 189 as being true and correct. The affidavit shall be admissible in any court of law for the
 190 purpose of establishing such presumption."

191 SECTION 3.

192 Said article is further amended by adding a new Code section to read as follows:

193 "13-10-92.

194 (a) Every private employer with five or more employees shall register with and utilize the
 195 federal work authorization program to verify whether newly hired employees are
 196 authorized to work. The requirements of this subsection shall be effective on July 1, 2011,
 197 as to employers with 500 or more employees, on January 1, 2012, as to employers with 100
 198 or more employees, and on July 1, 2012, as to employers with five or more employees.
 199 Verification shall be conducted within three business days after employing a new employee
 200 or as otherwise provided by the federal work authorization program requirements.
 201 Documentation demonstrating the verification of a newly hired employee shall be
 202 maintained by an employer for a minimum of five years or as required by federal law,
 203 whichever is longer, and shall be provided to the Commissioner upon his or her request.
 204 (b) Upon being notified of an alleged potential violation of this Code section, a business
 205 shall have five business days to correct the alleged violation and register with the federal

206 work authorization program and begin using such system to verify the employment
 207 eligibility of newly hired employees.

208 (c) The Commissioner shall be responsible for the enforcement of the provisions of this
 209 Code section and for the review and verification of use of the federal work authorization
 210 program by applicable employers. The Commissioner shall adopt rules and regulations for
 211 the implementation and enforcement of this Code section consistent with the purposes of
 212 this article. The Commissioner shall have subpoena power for the limited purpose of
 213 obtaining documents relating to a public or private employer's use of the federal work
 214 authorization program. The Attorney General shall be authorized, at the request of the
 215 Commissioner, to bring an action for injunctive or other relief for the enforcement of the
 216 provisions of this Code section. In the event that an order is entered against an employer,
 217 the state shall be awarded attorney's fees and expenses of litigation incurred in bringing
 218 such an action and investigating such violation.

219 (d) Beginning January 1, 2013, and every six months thereafter, the Commissioner shall
 220 request from the United States Department of Homeland Security, or successor agency, a
 221 list of employers from this state that are registered with the federal work authorization
 222 program. Upon receipt of the list of employers, the Commissioner shall make the list
 223 available on the department's website.

224

SECTION 4.

225 Chapter 5 of Title 17 of the Official Code of Georgia Annotated, relating to searches and
 226 seizures, is amended by adding a new Code section to read as follows:

227 "17-5-100.

228 (a) As used in this Code section, the term:

229 (1) 'Certificate of registration' means any certificate of alien registration or alien
 230 registration receipt card issued to an alien pursuant to subsection (d) of 8 U.S.C. 1304 or
 231 other federal provision as a requirement of lawful entry into the United States.

232 (2) 'Register' means the registration that every alien who plans to remain in the United
 233 States for 30 days or longer is required to complete pursuant to 8 U.S.C. 1302 or other
 234 federal registration required for an alien entering the United States.

235 (b) Every alien, 18 years of age and over, required to register pursuant to federal law and
 236 issued a certificate of registration shall at all times carry with him or her and have in his or
 237 her personal possession any valid certificate of registration issued to such person. Any alien
 238 who fails to comply with the provisions of this Code section shall be subject to verification
 239 of such alien's immigration status pursuant to subsection (c) of Code Section 17-5-101.

240 (c) This Code section shall not be enforced against any person who in good faith contacts
 241 a state or local law enforcement officer or state prosecutor for the purpose of acting as a

242 witness to a crime, to report criminal activity, or to seek assistance as a victim to a crime
 243 during the time that such contact is made. No information received during or arising from
 244 such contact shall be used against such person as a basis for a violation of this Code
 245 section."

246 **SECTION 5.**

247 Said chapter is further amended by adding a new article to read as follows:

248 "ARTICLE 5

249 17-5-101.

250 (a) As used in this Code section, the term 'illegal alien' means a person who is verified by
 251 the federal government to be present in the United States in violation of federal
 252 immigration law.

253 (b) Except as provided in subsection (f) of this Code section, during any investigation of
 254 a criminal suspect by a peace officer, when such officer has probable cause to believe that
 255 a suspect has committed a criminal offense, including any traffic offense, the officer shall
 256 be authorized to seek to verify such suspect's immigration status when the suspect is unable
 257 to provide one of the following:

258 (1) A valid Georgia driver's license;

259 (2) A valid Georgia identification card issued by the Department of Driver Services;

260 (3) If the entity requires proof of legal presence in the United States before issuance, any
 261 valid driver's license from a state or district of the United States or any valid
 262 identification document issued by the United States federal government; or

263 (4) Other information as to the suspect's identity that is sufficient to allow the peace
 264 officer to independently identify the suspect.

265 (c) When attempting to determine the immigration status of a suspect pursuant to
 266 subsection (b) of this Code section, a peace officer shall be authorized to use any
 267 reasonable means available to determine the immigration status of the suspect, including:

268 (1) Use of any authorized federal identification data base;

269 (2) Identification methods authorized by federal law, including those authorized by 8
 270 USCA 1373(c), 8 USCA 1644;

271 (3) Use of electronic fingerprint readers or similar devices; or

272 (4) Contacting an appropriate federal agency.

273 (d) A peace officer shall not consider race, color, or national origin in implementing the
 274 requirements of this Code section except to the extent permitted by the Constitutions of
 275 Georgia and of the United States.

276 (e) If during the course of the investigation into such suspect's identity, a peace officer
 277 receives verification that such suspect is an illegal alien, then such peace officer may take
 278 any action authorized by state and federal law, including, but not limited to, detaining such
 279 suspected illegal alien, securely transporting such suspect to any authorized federal or state
 280 detention facility, or notifying the United States Department of Homeland Security or
 281 successor agency. Nothing in this Code section shall be construed to hinder or prevent a
 282 peace officer or law enforcement agency from arresting or detaining any criminal suspect
 283 on other criminal charges.

284 (f) No person who in good faith contacts or has contact with a state or local peace officer
 285 or prosecuting attorney or member of the staff of a prosecuting attorney for the purpose of
 286 acting as a witness to a crime, to report criminal activity, or to seek assistance as a victim
 287 to a crime shall have his or her immigration status investigated based on such contact or
 288 based on information arising from such contact.

289 (g) A peace officer, prosecuting attorney, and local governing authority acting in good
 290 faith to carry out any provision of this Code section shall have immunity from damages or
 291 liability from such actions."

292 **SECTION 6.**

293 Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to the
 294 imposition, rate, computation, and exemptions for revenue and taxation, is amended by
 295 adding a new Code section to read as follows:

296 "48-7-21.2.

297 (a) As used in this Code section, the term:

298 (1) 'Authorized employee' means:

299 (A) An individual who holds and presents to the taxpayer a valid driver's license or
 300 identification card issued by a state or outlying possession of the United States that only
 301 issues licenses or identification cards to persons lawfully present in the United States;
 302 and

303 (B) An individual authorized for employment in the United States through the federal
 304 employment eligibility verification system known as E-Verify.

305 (2) 'Labor services' means the physical performance of services in this state.

306 (b) On or after January 1, 2012, no wages or remuneration for labor services to an
 307 individual of \$600.00 or more per annum may be claimed and allowed as a deductible
 308 business expense for state income tax purposes by a taxpayer unless such individual is an
 309 authorized employee.

310 (c) This Code section shall not apply to any business domiciled in this state which is
 311 exempt from compliance with federal employment verification procedures under federal
 312 law.

313 (d) This Code section shall not apply to any individual hired by the taxpayer prior to
 314 January 1, 2012.

315 (e) This Code section shall not apply to any taxpayer where the individual being paid is
 316 not directly compensated or employed by said taxpayer.

317 (f) The commissioner shall be authorized to prescribe forms and promulgate rules and
 318 regulations deemed necessary in order to administer and effectuate this Code section."

319 **SECTION 7.**

320 Code Section 50-36-1 of the Official Code of Georgia Annotated, relating to verification of
 321 lawful presence within the United States for receipt of certain government benefits, is
 322 amended in subsection (a) by renumbering paragraphs (1) through (3) as paragraphs (2)
 323 through (4), respectively, and by adding a new paragraph (1) to read as follows:

324 "(1) 'Agency head' means a director, commissioner, chairperson, mayor, councilmember,
 325 board member, or other executive official responsible for establishing policy for a public
 326 employer."

327 **SECTION 8.**

328 Said Code section is further amended by revising subsection (o) as follows:

329 "(o) No employer, agency, or political subdivision shall be subject to lawsuit or liability
 330 arising from any act to comply with the requirements of this chapter; provided, however,
 331 that the intentional and knowing failure of any agency head to abide by the provisions of
 332 this chapter shall:

333 (1) Be a violation of the code of ethics for government service established in Code
 334 Section 45-10-1 and subject such agency head to the penalties provided for in Code
 335 Section 45-10-28 for violations of Code Sections 45-10-22, 45-10-23, 45-10-24, or
 336 45-10-26, including removal from office and a fine not to exceed \$10,000.00; and

337 (2) Be a high and aggravated misdemeanor offense where such agency head acts to
 338 willfully violate the provisions of this Code section or acts so as to intentionally and
 339 deliberately interfere with the implementation of the requirements of this Code section.

340 In addition to any other person authorized by law, the Attorney General shall have the
 341 authority to conduct a criminal and civil investigation of an alleged violation of this chapter
 342 by an agency or agency head and to bring a prosecution or civil action against an agency
 343 or agency head for all cases of violations under this chapter. In the event that an order is

344 entered against an employer, the state shall be awarded attorney's fees and expenses of
345 litigation incurred in bringing such an action and investigating such violation."

346 **SECTION 9.**

347 (a) If any provision or part of any provision of this Act or the application of the same is
348 held invalid or unconstitutional, the invalidity shall not affect the other provisions or
349 applications of this Act or any other part of this Act that can be given effect without the
350 invalid provision or application, and to this end, the provisions of this Act are severable.

351 (b) The terms of this Act regarding immigration shall be construed to have the meanings
352 consistent with such terms under federal immigration law.

353 (c) The provisions of this Act shall be implemented in a manner consistent with federal
354 laws governing immigration and civil rights.

355 **SECTION 10.**

356 This Act shall become effective on July 1, 2011, and shall apply to offenses and violations
357 occurring on or after such date.

358 **SECTION 11.**

359 All laws and parts of laws in conflict with this Act are repealed.