

HOUSE BILL 1378

By Carr

AN ACT to amend Tennessee Code Annotated, Title 3;
Title 4; Title 5; Title 6; Title 7; Title 8; Title 12; Title
39 and Title 50, relative to employment of persons
unlawfully present in the United States.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 50-1-103, is amended by deleting the section in its entirety.

SECTION 2. Tennessee Code Annotated, Title 50, Chapter 1, is amended by adding the following language as a new part:

50-1-701.

This part shall be known and may be cited as the "Tennessee Lawful Employment Act".

50-1-702.

As used in this part:

(1) "Commissioner" means the commissioner of labor and workforce development, or the commissioner's designee, unless the context provides otherwise;

(2) "Department" means the department of labor and workforce development, unless the context provides otherwise;

(3) "Economic development incentive" means any grant, loan or performance-based incentive from any governmental entity;

(4) "Employee":

(A) Means any person for whom an employer must complete a Form I-9; and

(B) Does not include an independent contractor as defined by federal law and regulations;

(5) "Employer" means both private employers and public employers;

(6) "E-Verify program" means the federal electronic work authorization verification service provided by the United States department of homeland security pursuant to the federal Basic Pilot Program Extension and Expansion Act of 2003, P.L. 108-156, or any successor program designated by the federal government for verification that an employee is not an unauthorized alien;

(7) "General contractor" means the person responsible to the owner or developer for the supervision or performance of substantially all of the work, labor, and the furnishing of materials in furtherance of the construction, erection, remodeling, repair, improvement, alteration or demolition of a building, structure or other undertaking and who contracts directly with the owner or developer of the building, structure or other undertaking;

(8) "Governmental entity" means this state or any political subdivision of this state that receives and uses tax revenues;

(9) "Knowingly employ an unauthorized alien" has the same meaning prescribed in 8 U.S.C. § 1324a;

(10) "License" means any license, permit, certificate, approval, registration, charter or similar form of authorization required by law and issued by a governmental entity for the purpose of operating a business in this state;

(11) "Person" means an individual, corporation, partnership, association or any other legal entity;

(12) "Private employer" means any person or entity transacting business in this state, that holds or has applied for a license in this state and employs at least one (1) employee in this state;

(13) "Public employer" means this state or any political subdivision which exercises governmental powers under the laws of this state;

(14) "Subcontractor" means any person who enters into a contract:

(A) With a general contractor for the performance of any part of the general contractor's contract with the owner or developer; or

(B) With another contractor for the performance of any part of the other contractor's contract with either the general contractor or another contractor; and

(15) "Unauthorized alien" means an alien who is not authorized under federal law to be employed in the United States, as described in 8 U.S.C. § 1324a(h)(3).

50-1-703.

(a)

(1) All employers shall:

(A) Before October 1, 2011, enroll and maintain active participation in the E-Verify program;

(B) On or after October 1, 2011, verify the work authorization status of each employee hired on or after October 1, 2011, by using the E-Verify program; and

(C) On or after October 1, 2011, maintain records of all results including all confirmations, tentative nonconfirmations or final nonconfirmations, as applicable, generated by the E-Verify program

pursuant to the work authorization status check required by this subdivision (a)(1).

(2) Nothing in this section shall be construed to prevent an employer from contracting with or otherwise obtaining the services of a designated agent for the purpose of complying with this section.

(3) There is created within the department the office of employment verification assistance. The department is authorized to hire no more than one (1) full-time employee to staff the office of employment verification assistance. Such employee shall provide assistance to employers in this state who do not have access to the Internet by obtaining verification on behalf of such employers at no charge. Before the office of employment verification assistance obtains verification on behalf of an employer, the employer shall sign an affidavit, developed by the department, under penalty of perjury attesting to the employer's lack of access to the Internet. An employer shall not be in violation of subdivision (a)(1) as long as the employer has filed the affidavit with the office of employment verification assistance and has requested action be taken by the office to ensure the employer's compliance with this section.

(4) If an employer acquires access to the Internet subsequent to signing an affidavit pursuant to subdivision (a)(3), then the employer shall:

(A) Be subject to the verification procedures of subdivision (a)(1), and the penalties described in subsection (e), within thirty (30) days of acquiring such access; and

(B) Send written notice to the department.

(5) If an employer executes a fraudulent affidavit pursuant to subdivision (a)(3), or fails to send written notice pursuant to subdivision (a)(4), then the

department shall prosecute the employer under § 4-18-103. The commissioner shall promulgate rules and regulations for calculating the amount of damages that the state sustains because of such acts by employers.

(b) The commissioner shall develop a statewide random auditing program to inspect employers for compliance with this section. Such auditing program may be conducted either as separate from or in conjunction with any pending inspection or investigation of the employer by the department pursuant to state law.

(c) In addition to the statewide random auditing program established in subsection (b):

(1) The commissioner shall prescribe a complaint form for any person who is a lawful resident of this state to allege a violation of subdivision (a)(1). The prescribed complaint form shall, at a minimum, require the name of the person filing the complaint but shall not require such person to list the person's own social security number or to have the form notarized.

(2) On receipt of a complaint on a prescribed complaint form, the commissioner shall:

(A) Investigate, either as separate from or in conjunction with any pending inspection or investigation of the employer by the department pursuant to state law, whether the employer has violated subdivision (a)(1);

(B) Inform the employer against whom the complaint is made that the employer may request:

(i) The name of the person filing the complaint; or

(ii) If the complaint is filed by an agency or entity, then the name of the person who caused the complaint to be filed;

(C) If requested pursuant to subdivision (c)(2)(B), provide the name requested.

(3) A person who knowingly files a false and frivolous complaint under this subsection (c) shall be subject to a civil penalty of five hundred dollars (\$500). All moneys collected pursuant to this subdivision (c)(3) shall be deposited into the lawful employment enforcement fund, as created by § 50-1-712.

(d)

(1) If, after the investigation described in subdivision (c)(2)(A), the commissioner determines that a complaint against a private employer is not false and frivolous, then the commissioner shall issue a preliminary order to the private employer that shall include, at a minimum:

(A) The commissioner's findings from the investigation;

(B) The penalties that the commissioner will apply to the private employer if a final order is issued;

(C) The process by which the private employer may request a contested case hearing; and

(D) The process by which the commissioner may waive the penalties if the private employer remedies the violation as provided in subdivision (g)(1).

(2) The commissioner shall promulgate rules and regulations to implement a contested case hearing process whereby the private employer may challenge the commissioner's findings if the private employer sends written notice to the commissioner within ten (10) business days of the date of the preliminary order. If the private employer fails to send written notice pursuant to

this subdivision (d)(2), then the private employer shall have waived the contested case hearing process. Any contested case hearing shall be completed within sixty (60) days following the date of the preliminary order. All rules and regulations promulgated pursuant to this subdivision (d)(2) shall be in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(3) The commissioner shall issue a final order to a private employer, and assess penalties pursuant to subsection (e), after whichever of the following time periods is longer:

(A) The private employer exhausts or waives the contested case hearing process described in subdivision (d)(2); or

(B) Thirty (30) days from the date of the preliminary order.

(e)

(1) For a first violation of subdivision (a)(1), the commissioner shall:

(A) Assess a civil penalty of one thousand dollars (\$1,000) to the private employer. All moneys collected pursuant to this subdivision (e)(1)(A) shall be deposited in the lawful employment enforcement fund, created by § 50-1-712;

(B) Include in the final order, written notice to the private employer that all licenses held by the private employer shall be suspended for thirty (30) days from the date of the final order; and

(C) Issue an order to all applicable governmental entities that all licenses held by the private employer shall be suspended for thirty (30) days from the date of the final order.

(2) For a second violation of subdivision (a)(1), the commissioner shall:

(A) Assess a civil penalty in accordance with subdivision (e)(1)(A);

(B) Include in the final order, written notice to the private employer that all licenses held by the private employer shall be suspended for one (1) year from the date of the final order; and

(C) Issue an order to all applicable governmental entities that all licenses held by the private employer shall be suspended for one (1) year from the date of the final order.

(3) For a third violation of subdivision (a)(1), the commissioner shall:

(A) Assess a civil penalty in accordance with subdivision (e)(1)(A);

(B) Include in the final order, written notice to the private employer that all licenses held by the private employer shall be permanently revoked as of the date of the final order; and

(C) Issue an order to all applicable governmental entities that all licenses held by the private employer shall be permanently revoked as of the date of the final order.

(4) For purposes of this subsection (e), a second or third violation shall accrue from an investigation separate from any prior investigation conducted pursuant to subdivision (c)(2)(A).

(5) For purposes of assessing the civil penalties described in subdivisions (e)(1)(A), (e)(2)(A) and (e)(3)(A), if the violation is a violation of subdivision (a)(1)(B), then a separate civil penalty shall be assessed for each employee hired on or after October 1, 2011, that is not verified.

(f) The penalties described in subsection (e) shall not be mutually exclusive, and may be imposed in conjunction with any applicable penalties levied pursuant to this part.

(g) The commissioner shall issue a warning in lieu of the penalties listed in subdivision (e)(1) if:

(1) The private employer remedies the violation of subdivision (a)(1) within thirty (30) days of the date of the preliminary order; and

(2) The commissioner determines that the violation of subdivision (a)(1) was unintentional.

(h) If, after the investigation described in subdivision (c)(2)(A), the commissioner determines that a complaint against a public employer is not false and frivolous, then the commissioner shall post notice of the public employer's violation pursuant to § 50-1-705. 50-1-704.

(a) No employer shall knowingly:

(1) Employ an unauthorized alien; or

(2) Use a contract, subcontract, independent contractor agreement or other such contract or agreement to obtain the labor of an unauthorized alien.

(b)

(1) For employees hired on or after October 1, 2011, an employer shall not be in violation of subsection (a):

(A) While complying with the verification requirements of § 50-1-703;

(B) While complying with federal requirements to assist an employee in contesting a tentative nonconfirmation;

(C) While awaiting a final nonconfirmation from the E-Verify program; or

(D) While awaiting action to be taken by the office of employment verification assistance pursuant to § 50-1-703(a)(3).

(2) For employees hired before October 1, 2011, a employer shall not be in violation of subsection (a) if:

(A)

(i) The employer requested from the employee, received, and documented in the employee record, at least fourteen (14) calendar days after commencement of employment, lawful resident verification information consistent with employer requirements under the Immigration Reform and Control Act of 1986, compiled in 8 U.S.C. § 1101 et seq.; and

(ii) The lawful resident verification information provided by the employee later was determined to be false; or

(B) The employer verified the work authorization status of the employee by using the E-Verify program.

(c)

(1) The commissioner shall prescribe a complaint form for any person who is a lawful resident of this state to allege a violation of subsection (a). The prescribed complaint form shall, at a minimum, require the name of the person filing the complaint but shall not require such person to list the person's own social security number or to have the form notarized.

(2) On receipt of a complaint on a prescribed complaint form, the commissioner shall:

(A) Investigate, either as separate from or in conjunction with any pending inspection or investigation of the employer pursuant to state law, as to whether the employer has violated subsection (a);

(B) Inform the employer against whom the complaint is made that the employer may request:

(i) The name of the person filing the complaint; or

(ii) If the complaint is filed by an agency or entity, the name of the person who caused the complaint to be filed; and

(C) If requested pursuant to subdivision (c)(2)(B), provide the name requested.

(3) The commissioner shall not investigate complaints that are based solely on race, color or national origin.

(4) When investigating a complaint, the commissioner shall verify the work authorization status of the alleged unauthorized alien with the federal government pursuant to 8 USC § 1373(c). The commissioner shall not attempt to independently make a final determination as to whether a person is authorized to work in the United States.

(5) A person who knowingly files a false and frivolous complaint under this subsection (c) shall be subject to a civil penalty of five hundred dollars (\$500). All moneys collected pursuant to this subdivision shall be deposited in the lawful employment enforcement fund, created pursuant to § 50-1-712.

(d)

(1) If, after the investigation described in subdivision (c)(2)(A), the commissioner determines that the complaint against the private employer is not

false and frivolous, then the commissioner shall issue a preliminary order to the private employer that shall include, at a minimum:

- (A) The commissioner's findings from the investigation;
- (B) The penalties that the commissioner will apply to the private employer if a final order is issued; and
- (C) The process by which the private employer may request a contested case hearing.

(2) The commissioner shall promulgate rules and regulations to implement a contested case hearing process whereby the private employer may challenge the commissioner's findings if the private employer sends written notice to the commissioner within ten (10) business days of the date of the preliminary order. If the private employer fails to send written notice pursuant to this subdivision (d)(2), then the private employer shall have waived the contested case hearing process. Any contested case hearing shall be completed within sixty (60) days following the date of the preliminary order. All rules and regulations promulgated pursuant to this subdivision shall be in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(3) After a private employer exhausts or waives the contested case hearing process described in subdivision (d)(2), the commissioner shall issue a final order to the private employer and take action as described in subsection (e).

(e)

(1) For a first violation of subsection (a), the commissioner:

(A) Shall issue a final order to the private employer to:

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

(ii) Require the private employer to be subject to a three-year probationary period, during which time the private employer shall file quarterly reports with the commissioner of each new employee who is hired by the private employer; and

(iii) Require the private employer to file a signed sworn affidavit under penalty of perjury with the commissioner within five (5) business days after the date of the final order, which shall state that the employer has corrected the violation by:

(a) Terminating the employment of all known unauthorized aliens and confirming that the private employer shall not knowingly employ any additional unauthorized aliens in this state;

(b) Requesting, after consultation with the employee, that the commissioner do a secondary or additional verification of employment authorization with the federal government; or

(c) Attempting to terminate the unauthorized alien's employment, and such termination has been challenged in a court of competent jurisdiction;

(B) Include in the final order, written notice to the private employer that all licenses held by the private employer shall be suspended for thirty (30) days from the date of the final order; and

(C) Issue an order to all applicable governmental entities that all licenses held by the private employer shall be suspended for thirty (30) days from the date of the final order.

(2) For a second violation of subsection (a), the commissioner shall:

(A) Include in the final order, written notice to the private employer that all licenses held by the private employer shall be suspended for one (1) year from the date of the final order; and

(B) Issue an order to all applicable governmental entities that all licenses held by the private employer shall be suspended for one (1) year from the date of the final order.

(3) For a third violation of subsection (a), the commissioner shall:

(A) Include in the final order, written notice to the private employer that all licenses held by the private employer shall be permanently revoked as of the date of the final order; and

(B) Issue an order to all applicable governmental entities that all licenses held by the private employer shall be permanently revoked as of the date of the final order.

(4) For purposes of this subsection (e), a second or third violation shall accrue from an investigation separate from any prior investigation conducted pursuant to subdivision (c)(2)(A).

(f) If, after the investigation described in subdivision (c)(2)(A), the commissioner determines that the complaint against a public employer is not false and frivolous, then the commissioner shall post notice of the public employer's violation pursuant to § 50-1-705.

(g) The penalties described in subsections (e) and (f) shall not be mutually exclusive, and may be imposed in conjunction with any applicable penalties levied pursuant to this part.

(h) Failure to complete a signed sworn affidavit pursuant to subdivision (e)(1)(A)(iii) shall result in the commissioner issuing an order to all applicable governmental entities to suspend all licenses held by the private employer until the private employer files the signed sworn affidavit. The commissioner shall notify all applicable governmental entities when the private employer has filed the signed sworn affidavit. The governmental entities shall reinstate suspended licenses within ten (10) business days of receiving notice from the commissioner of the private employer's compliance.

(i) The commissioner shall notify the commissioner of finance and administration or the chief procurement officer, as applicable, of a private employer's violation of subsection (a) for the purpose of making a declaration pursuant to § 12-4-124.

(j) For purposes of this section, proof of verifying the work authorization status of an employee through the E-Verify program in accordance with § 50-1-703, creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.

50-1-705.

Beginning November 1, 2011, and on a monthly basis thereafter, the commissioner shall post a publicly accessible list on the department's web site of the employers that have violated §§ 50-1-703 and 50-1-704. The list shall state, at a minimum, the name of the employer, the place of business where the violation occurred, a brief description of the violation, whether the violation is a first or subsequent violation, any penalties assessed to the employer, and any steps that the employer has taken to remedy the violation. The monthly lists shall remain on the web site until such time as deemed appropriate by the commissioner.

50-1-706.

Any person filing a complaint against an employer with the commissioner pursuant to this part shall have all protections guaranteed under §§ 50-1-304 and 8-50-116, as applicable, and any other protections under state law.

50-1-707.

While administering the statewide random auditing program pursuant to § 50-1-703(b) and any investigation pursuant to this part, the commissioner and department employees, upon proper presentation of credentials to the employer, may enter at reasonable times and have the right to question an employer and the employer's employees, and to inspect, investigate, reproduce or photograph original business records relevant to determining compliance with this section. Any document of an employer reproduced or otherwise copied pursuant to this section shall not be deemed a public record unless the document is a public record prior to the investigation.

50-1-708.

(a)

(1) If a general contractor or subcontractor enters a contract with another contractor, then the general contractor or subcontractor shall require:

(A) A signed affidavit from the other contractor:

(i) Certifying current and continued compliance with §§ 50-1-703 and 50-1-704 for the duration of the contract term;

(ii) Certifying that the contractor signing the affidavit is a United States citizen or alien lawfully present in the United States;

(iii) Acknowledging that if the contractor does not maintain current and continued compliance with §§ 50-1-703 and 50-1-704 for the duration of the contract term, then the general contractor or

subcontractor may terminate the contract without incurring any liability for damages resulting from such termination; and

(iv) Acknowledging that if the contractor fraudulently claims to be a United States citizen, then the contractor shall be subject to prosecution under 18 U.S.C. § 911;

(B) Copies of all records, maintained pursuant to § 50-1-703(a)(1)(C), of any employee working pursuant to the contract during the contract term; and

(C) Copies of any one (1) of the following documents for any person classified as or claiming to be an independent contractor, including, but not limited to, the contractor signing the affidavit:

(i) A valid Tennessee driver license or photo identification license issued by the department of safety; or

(ii) A valid driver license or photo identification license from another state where the issuance requirements are at least as strict as those in Tennessee, as determined by the department. The commissioner, in consultation with the department of safety, shall determine which states have issuance requirements that are at least as strict as Tennessee, and shall develop, and periodically update, a list of such states on the department's web site.

(2) A general contractor or subcontractor shall maintain a copy of the documents presented pursuant to subdivision (a)(1) for the duration of the contract term, and for one (1) year thereafter.

(b) If a general contractor or subcontractor terminates a contract with another contractor pursuant to this section, then such general contractor or subcontractor shall not be in breach of contract, nor be liable for any damages resulting therefrom.

(c) A subcontractor may file an action with a court having jurisdiction to determine whether a contract was correctly terminated pursuant to this section. Such action must be filed no later than thirty (30) days after the date on which the contract is terminated.

(d) If any person is classified as or claims to be an independent contractor but is later determined to be an employee of a contractor, then a general contractor or subcontractor who contracted with such contractor shall be deemed an employer of the person for purposes of this part unless the general contractor or subcontractor maintained documentation pursuant to subdivision (a)(2).

50-1-709.

(a) On or after October 1, 2011, in addition to any other requirement for a private employer to receive an economic development incentive from a governmental entity, the private employer shall be in compliance with § 50-1-703.

(b) Before receiving the economic development incentive, the private employer shall provide proof to the governmental entity that the private employer is in compliance with § 50-1-703.

(c) If the governmental entity determines that the private employer is not in compliance with § 50-1-703, then the governmental entity shall notify the private employer by certified mail of the governmental entity's determination of noncompliance and the private employer's right to appeal the determination.

50-1-710.

(a) The department shall notify the United States immigration and customs enforcement of any employer found in violation of § 50-1-704.

(b) If the department discovers an unauthorized alien working for an employer in this state, then the department shall notify:

(1) The United States immigration and customs enforcement; and

(2) The local law enforcement agency in the area where the unauthorized alien resides or presumably resides.

50-1-711.

An employer who terminates an employee to comply with this part shall not be subject to a civil action for wrongful termination of the employee as provided by law.

50-1-712.

(a) There is created in the state treasury a fund to be known as the lawful employment enforcement fund. Moneys collected by the commissioner pursuant to this part shall be deposited in this fund and shall only be used by the commissioner to implement and administer the purposes set forth in this part. Moneys in the fund shall not revert to the general fund of the state, but shall remain available to be used as provided for in this section.

(b) Interest accruing on investments and deposits of the lawful employment enforcement fund shall be credited to such account, shall not revert to the general fund, and shall be carried forward into each subsequent fiscal year.

(c) Moneys in the lawful employment enforcement fund account shall be invested by the state treasurer in accordance with § 9-4-603.

50-1-713.

This part is enforceable without regard to race, color, or national origin.

50-1-714.

Nothing in this part shall be construed to abrogate any obligations by an employer to comply with federal immigration law, including, but not limited to, the proper completing and maintaining of federal employment eligibility verification forms or documents.

50-1-715.

This chapter shall be interpreted so as to be fully consistent with all federal laws, including, but not limited to, federal laws regulating immigration and labor, and all state laws.

SECTION 3. Tennessee Code Annotated, Section 67-4-706(c), is amended by deleting the subsection in its entirety and by substituting instead the following language:

(c) Notwithstanding subsection (a), every person taxable under §§ 67-4-705 and 67-4-709(5) shall, prior to engaging in business as defined in § 67-4-702, register with the commissioner in a manner prescribed by the commissioner; provided, that the commissioner shall not register a person whose license is permanently revoked pursuant to § 50-1-703 or § 50-1-704.

SECTION 4. The commissioner shall every three (3) months request from the United States department of homeland security a list of all employers from this state that are registered with the E-Verify program. On receipt of the list of employers, the commissioner shall make the list available on the department's web site.

SECTION 5. The commissioners of labor and workforce development, revenue, and safety are authorized to promulgate rules and regulations to effectuate the purposes of this section. All rules and regulations shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

SECTION 6. If the federal electronic work authorization verification service provided by the United States department of homeland security pursuant to the federal Basic Pilot Program

Extension and Expansion Act of 2003, P.L. 108-156, or any successor program, expires and a successor program is not implemented prior to such expiration date, then any new sections created by this act shall cease to be effective as of such expiration date and any existing section of Tennessee Code Annotated affected by this act shall read as the section appeared immediately prior to the effective date of this act.

SECTION 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 8. For purposes of promulgating rules and regulations, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect October 1, 2011, the public welfare requiring it.