

No. 2019-75

AN ACT

HB 1170

Prohibiting the employment of unauthorized employees; requiring construction industry employers to verify the Social Security numbers of employees; and imposing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Construction Industry Employee Verification Act.

Section 2. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Agency." An agency, department, board or commission of the Commonwealth or of a municipality that issues a license for purposes of operating a business in this Commonwealth.

"Construction industry." The industry which engages in the erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work or maintenance work done on real property or premises under a contract, including work for a public body or work paid for from public funds.

"Construction industry employer." As follows:

(1) An individual, entity or organization in the construction industry, which:

- (i) transacts business in this Commonwealth; and
- (ii) employs at least one employee in this Commonwealth.

(2) The term includes a staffing agency that supplies workers to a construction industry employer.

"Department." The Department of Labor and Industry of the Commonwealth.

"Employ." To enter into an employer-employee relationship with an individual or to use a contract, subcontract or exchange with an individual to obtain labor.

"Employee." An individual who has entered into an employer-employee relationship with a construction industry employer or enters into a contract, subcontract or exchange with a construction industry employer to provide labor.

"Employer." A construction industry employer.

"E-Verify program." The Internet-based program administered by the United States Department of Homeland Security and the United States Social Security Administration which allows employers to verify an employee's work-authorization status. The term includes any successor program.

"License." As follows:

(1) A permit, certificate, approval, registration, charter or similar form of authorization that is required by law and issued by an agency for the purposes of:

- (i) operating a business in this Commonwealth;
- (ii) conducting operations in the construction industry; or
- (iii) completing a specific construction project.

(2) The term includes articles of incorporation and domestic or foreign entity registrations under 15 Pa.C.S. (relating to corporations and unincorporated associations).

(3) The term does not include a professional or occupational license or certificate granted to an individual to engage in a profession or trade.

"Subcontractor." A person regardless of tier, including, but not limited to, a staffing agency that supplies workers to a construction industry employer under a contract. The term shall not include persons that are material suppliers for a project.

"Unauthorized employee." An individual who does not have the legal right or authorization under Federal law to work in the United States.

Section 3. Prohibited employment.

(a) Prohibition.—An employer may not knowingly employ an unauthorized employee.

(b) Verification.—On and after the effective date of this section, each employer who hires an employee shall verify the employment eligibility of the employee through the E-Verify program and shall keep a record of the verification for the duration of the employee's employment or three years, whichever is longer.

(c) Staffing agencies.—If a staffing agency supplies workers to multiple industries, subsections (a) and (b) shall only apply to workers supplied for the construction industry.

Section 4. Procedures, presumptions and defenses.

(a) Complaints.—A complaint about a violation of section 3(a) may be submitted to the department. The department shall have the authority to investigate complaints under this act. Pursuant to an investigation of a complaint, the department may:

(1) Enter and inspect the place of business or place of employment of any employer of employees in any occupation in this Commonwealth at any reasonable time for the purpose of examining and inspecting records of the employer that in any way relate to compliance with this act.

(2) Copy any or all records as the department may deem necessary or appropriate.

(3) Require from an employer full and accurate statements in writing, at such times as the department may deem necessary, of the work authorization verification process for all employees in the employer's employment.

(4) Interrogate persons for the purpose of ascertaining whether an employer has complied with this act.

(b) Form.—The department shall prescribe a complaint form for an individual to allege a violation of section 3(a). An individual who knowingly provides materially false information in a complaint form under this

subsection shall be subject to punishment under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

(c) Duty to investigate.—Upon receipt of a complaint on a prescribed complaint form alleging that an employer knowingly employs an unauthorized employee, the department shall investigate whether the employer has violated section 3(a) if all the information required to complete the form has been provided, including the name of the person filing the complaint.

(d) Authority to investigate.—The department may investigate a complaint that is not submitted on a prescribed complaint form, including an anonymous complaint.

(e) Prohibition.—The department may not investigate a complaint that is based solely on race, color or national origin.

(f) Verification.—If investigating a complaint, the department shall verify the work authorization of the alleged unauthorized employee with the Federal Government under section 642(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 8 U.S.C. § 1373(c)). A Commonwealth or local official may not attempt to independently make a final determination on whether an unauthorized employee is authorized to work in the United States.

(g) Notification and action.—If, after an investigation, the department determines that the alleged employee is an unauthorized employee, the department shall do all of the following:

(1) For a first violation, the department shall issue a warning letter detailing the violation and informing the construction industry employer of the provisions of this act. Notwithstanding paragraph (2), a violation by a construction industry employer that occurs 10 years or more after a prior violation shall be deemed a first violation. The following shall apply:

(i) The department may not issue a warning letter if the employer demonstrates that the employment eligibility of the unauthorized employee was verified in good faith through the E-Verify program in accordance with section 3(b).

(ii) After the issuance of a warning letter, the employer shall verify in writing to the department within 10 business days that the employer has terminated the employment of each unauthorized employee in this Commonwealth. If the employer fails to provide such verification, the violation shall constitute a second violation, and the department shall make a referral to the Attorney General under paragraph (2).

(iii) The employer may appeal the issuance of the warning letter under the provisions of 2 Pa.C.S. (relating to administrative law and procedure).

(2) For a second or subsequent violation, the department shall refer the case to the Attorney General for enforcement. The Attorney General shall bring an action against the employer in the county where the unauthorized employee is or was employed by the employer. The Attorney General shall not bring an action against an employer for a violation that occurred before the effective date of this section.

(h) Expedited action.—Upon docketing, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

(i) Determination.—In determining whether an employee is an unauthorized employee, the court shall consider only the Federal Government's determination under section 642(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Federal Government's determination shall create a rebuttable presumption of the employee's status. The court may take judicial notice of the Federal Government's determination and may request the Federal Government to provide automated or testimonial verification under section 642(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(j) Rebuttable presumption.—Proof that the employer verified the employment authorization of an employee through the E-Verify program shall create a rebuttable presumption that an employer did not knowingly employ an unauthorized employee.

(k) Affirmative defense.—For the purposes of this section, it shall be an affirmative defense if the employer demonstrates that it has complied in good faith with section 274A(b) of the Immigration and Nationality Act (66 Stat. 163, 8 U.S.C. § 1324a(b)). An employer shall be considered to have complied with section 274A(b) of the Immigration and Nationality Act, notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if the employer establishes a good faith attempt to comply with section 274A(b) of the Immigration and Nationality Act.

Section 5. Penalties and remedial orders.

(a) Order.—Upon a finding of a violation under section 3(a) pursuant to an action brought by the Attorney General under this act, the court shall order all of the following:

(1) The employer to terminate the employment of each unauthorized employee.

(2) The employer to a three-year probationary period for each business location where the unauthorized employee performed work. During the probationary period the employer:

(i) shall file quarterly reports with the department of each new employee who is hired by the employer at the business location where the unauthorized employee performed work; and

(ii) may not knowingly employ an unauthorized employee.

(3) The employer, within five business days, to verify in writing to the department that the employer has terminated the employment of each unauthorized employee in this Commonwealth.

(4) Agencies to suspend each license that is held by the employer if the employer fails to timely submit the verification. Each license that is suspended under this paragraph shall remain suspended until the employer complies. Notwithstanding any other law, on filing of the verification, each license shall be reinstated immediately by the appropriate agency. For the purposes of this paragraph, a license that is subject to suspension under this paragraph shall include each license that is held by the employer specific to the business location where the unauthorized employee performed work. If the employer does not hold a

license specific to the business location where the unauthorized employee performed work, the court shall order suspension of each license that is held by the employer pertaining to operations anywhere within this Commonwealth.

(b) Duration.—The following shall apply:

(1) For a second violation of section 3(a), the court may order the agency to suspend each license described under subsection (a)(4) that is held by the employer for a period not to exceed 30 business days.

(2) For a subsequent violation of section 3(a) or a violation occurring during a three-year probationary period under subsection (a)(2), the court shall order suspension for a term not less than one year up to the permanent revocation of each license.

(c) Factors.—In determining whether to order suspension or the duration of a suspension, the court shall consider the following factors:

(1) The number of unauthorized employees employed by the employer.

(2) Any prior misconduct by the employer.

(3) The degree of harm resulting from the violation.

(4) Whether the employer made good faith efforts to comply with any applicable requirements.

(5) The duration of the violation.

(6) The role of the directors, officers or principals of the employer in the violation.

(7) Any other factors the court deems appropriate.

(d) Suspension and reinstatement fees.—Nothing in this act shall prohibit an agency from charging any applicable fee for the suspension or reinstatement of a license.

Section 6. Protection from retaliation.

(a) General rule.—It shall be unlawful for a construction industry employer to discharge, threaten or otherwise retaliate or discriminate against an employee regarding compensation or other terms or conditions of employment because the employee:

(1) participates in an investigation, hearing or inquiry held by the Secretary of Labor and Industry or any other governmental authority under this act; or

(2) reports or makes a complaint regarding the violation of this act to a construction industry employer or governmental authority.

(b) Actions.—

(1) An employee who suffers retaliation or discrimination in violation of this section may bring an action in a court of common pleas in accordance with established civil procedures of this Commonwealth.

(2) The action must be brought within three years from the date the employee knew of the retaliation or discrimination.

(c) Relief.—If an employee prevails in an action commenced under this section, the employee shall be entitled to the following relief:

(1) Reinstatement of the employee, if applicable.

(2) Restitution equal to three times the amount of the employee's wages and fringe benefits calculated from the date of the retaliation or discrimination.

(3) Reasonable attorney fees and costs of the action.

(4) Any other legal and equitable relief as the court deems appropriate.

Section 7. Immunity and compliance.

(a) Immunity.—A construction industry employer that relies in good faith on the E-Verify program to verify employment eligibility of new employees under this act shall have no liability to an individual who is not hired or who is discharged from employment if incorrect information has been provided to the construction industry employer.

(b) Contractor and subcontractor compliance.—Except as provided in subsection (c), nothing in this act may be construed to render a contractor responsible for a violation of section 3(a) by a subcontractor or a subcontractor responsible for a violation by another subcontractor.

(c) General contractor responsibility.—A contractor shall not be considered in violation of section 3(a) when a subcontractor has knowingly employed an unauthorized employee, if the contractor has done the following:

(1) Required compliance with this act in the contract with the subcontractor, including providing for the termination of the contract upon court-ordered sanctions for a violation of this act by the subcontractor.

(2) Obtained written verification from the subcontractor that the subcontractor is aware of the provisions of this act and is responsible for compliance.

Section 8. Effective date.

This act shall take effect in one year.

Office of the Secretary of the Commonwealth

Harrisburg, Jan. 21, 2020

I do certify that the attached bill, House Bill 1170, P.N.2129, was presented to the Governor on the 26th day of September 2019 and was not returned within ten days after it had been presented to him. Wherefore, on October 7, 2019, the attached bill has become law in like manner as if the Governor had signed it, in accordance with Art. IV § 15 of the Constitution of this Commonwealth and has been assigned Act 75 of 2019.

KATHY BOOCKVAR
Secretary of the Commonwealth