



# State Contracting and the Federal Immigration Reform and Control Act



## In Brief

At its October 2010 meeting, the Joint Legislative Audit and Review Commission (JLARC) approved a resolution directing staff to study the policies that State agencies use to ensure that contractors verify whether their employees are authorized to work in the United States.

The federal Immigration Reform and Control Act of 1986 (IRCA) requires employers to hire only workers authorized to work in the United States. The U.S. Immigration and Customs Enforcement agency (ICE) is responsible for monitoring and enforcing compliance with IRCA. Consequently, State agencies play a comparatively minimal role in IRCA compliance.

The primary means by which most Virginia agencies address whether State contractors comply with IRCA is to incorporate various terms and conditions into State contracts. These terms and conditions vary depending on the agency and the type of good or service being procured.

The majority of State agencies take no action other than using standard contractual terms and conditions to address IRCA compliance.

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July 5, 2011

The Honorable Charles J. Colgan  
Chair  
Joint Legislative Audit and Review Commission  
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Dear Senator Colgan:

At its October 2010 meeting, the Joint Legislative Audit and Review Commission approved a resolution directing staff to study the policies that State agencies use to ensure that contractors verify whether their employees are authorized to work in the United States. This final report was briefed to the Commission and authorized for printing on June 13, 2011.

I would like to thank the staff at the Department of General Services for their assistance during this study. I would also like to express our appreciation to other State agency staff who participated in interviews and surveys during this review.

Sincerely,

A handwritten signature in black ink that reads "Glen S. Tittermary".

Glen S. Tittermary  
Director

GST/jcb



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# State Contracting and the Federal Immigration Reform and Control Act

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## In Summary

- The federal Immigration Reform and Control Act of 1986 (IRCA) requires employers to hire only workers authorized to work in the United States. The U.S. Immigration and Customs Enforcement agency (ICE) is responsible for monitoring and enforcing compliance with IRCA. Consequently, State agencies play a comparatively minimal role in IRCA compliance.
- Given the State's minimal role, the primary means by which most Virginia agencies address whether State contractors comply with IRCA is to incorporate various terms and conditions into State contracts. These terms and conditions vary depending on the agency and the type of good or service being procured.
- The majority of State agencies take no additional action to monitor or verify whether State contractors comply with IRCA.
- Recent action by the General Assembly will require State agencies in 2012, and certain State contractors in 2013, to use the federal E-Verify system for newly-hired employees. E-Verify is a free, Internet-based system maintained by the federal government that employers can use to complement—but not replace—the paper-based employment eligibility verification process that IRCA requires.

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At its October 2010 meeting, the Joint Legislative Audit and Review Commission (JLARC) approved a resolution directing staff to study the policies that State agencies use to ensure that contractors verify whether their employees are authorized to work in the United States (Appendix A). Research methods used in conducting the review are described in Appendix B.

### **U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY MONITORS AND ENFORCES COMPLIANCE WITH FEDERAL IMMIGRATION REFORM AND CONTROL ACT OF 1986**

The federal Immigration Reform and Control Act of 1986 (IRCA) was enacted to address a variety of issues related to immigration. The provisions of IRCA most relevant for this JLARC staff review concern employer sanctions. The employer sanctions provisions were subsequently amended in the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The primary purpose of these is to require employers to hire only individuals who may legally work in the United States. These are U.S. citizens, non-citizen nationals, lawful permanent residents, and aliens authorized to work. For the purposes of this

***... employers must verify the identity and employment authorization of each person they hire.***

report, individuals not in the above categories will be referred to as unauthorized workers.

To comply with the employer sanctions provisions, employers must verify the identity and employment authorization of each person they hire. This verification is done using the federal employment eligibility verification form (I-9). The I-9 form requires the employer to attest that it has verified the employee's work status by examining official government-issued documents, such as a passport or birth certificate (Appendix C lists all acceptable documents). The I-9 form also requires the employee to similarly attest that he or she is authorized to work in the United States. Employers are then required to keep the I-9 form for three years and/or one year after employment ends.

In general, the U.S. Immigration and Customs Enforcement agency (ICE) takes the lead role in monitoring and enforcing IRCA compliance. ICE has a standard process for inspections, which is initiated with a notice of inspection compelling an employer to produce valid I-9 forms for each worker. According to ICE, its worksite enforcement activities can be initiated by tips from the public, reports from a company's current or former employees, or referrals from other law enforcement agencies. ICE uses a variety of techniques to investigate allegations of employing unauthorized workers, including undercover agents, confidential informants, and surveillance.

ICE criminally prosecutes employers that knowingly hire unauthorized workers and also arrests unauthorized workers that it finds through its worksite enforcement activities. In recent years, only a small portion of ICE's total enforcement actions have been directed at employers. For example, in FY 2008 (the most recent year for which data is available), ICE made more than 1,100 criminal arrests through its worksite enforcement investigations, but only 135 involved owners, managers, supervisors, or human resource employees facing charges including harboring or knowingly hiring unauthorized workers. There are also financial penalties for employers that knowingly employ unauthorized workers. The penalties range from \$375 to \$16,000 per violation, with repeat offenders being penalized at the higher end of the range.

### **VIRGINIA STATE AGENCIES PLAY A COMPARATIVELY MINIMAL ROLE IN ENFORCING IRCA COMPLIANCE**

Complying with IRCA is the responsibility of the employer and employee, and the federal government takes the lead role in IRCA compliance and enforcement activities. Given that IRCA is a federal law enforced by a federal agency, Virginia and all states play a subordinate role and typically cannot preempt federal law with

### Federal Role Is Preemptive

Governor Kaine's Commission on Immigration released its final report in 2009, which noted the preemptive role of federal law on state law as a limiting factor to any Virginia-specific initiative on immigration. Similarly, the State Crime Commission's Illegal Immigration Task Force also cited numerous examples of how the preemptive role of federal law affects Virginia's ability to address immigration in a comprehensive manner.

their own laws. Several recent Virginia commissions and task forces have emphasized this point (see sidebar). As is discussed in subsequent sections of this report, Virginia's comparatively minimal role in enforcing IRCA compliance sets the backdrop for a passive approach to addressing whether State contractors are complying with IRCA.

### MOST STATE AGENCIES' PRIMARY METHOD OF ENSURING CONTRACTORS COMPLY WITH IRCA IS TO USE CONTRACTUAL TERMS AND CONDITIONS REQUIRING IRCA COMPLIANCE

The study mandate directs JLARC staff to study the policies and procedures used by State agencies to ensure that contractors and subcontractors comply with the Immigration Reform and Control Act of 1986 by verifying whether employees are authorized to work in the United States. In most cases, State agencies' primary means of ensuring that contractors comply with IRCA is to incorporate terms and conditions into State contracts. These contractual terms and conditions vary depending on the type of agency and/or the type of good or service being procured. The applicable statutes, policy manuals, and terms and conditions are summarized in Table 1, and discussed in more detail below.

**Table 1: Virginia's Procurement Statute, Policy Manuals, and Terms and Conditions**

Statute	Policy Manual(s)	Terms & Conditions
§2.2-43 (Virginia Public Procurement Act)	<i>Agency Procurement and Surplus Property Manual</i>	General Terms and Conditions: Goods and Non-Professional Services
	<i>Construction and Professional Services Manual</i>	General Conditions of the Construction Contract
	<i>IT Procurement Policy Manual: BUY IT</i>	Core Contractual Terms as in Effect July 1, 2010 through June 30, 2011
	<i>Road and Bridge Specifications</i>	Division I – General Provisions, Section 107 – Legal Responsibilities
§23-38 (Restructured Higher Education Financial and Administrative Operations Act)	<i>Commonwealth of Virginia Purchasing Manual for Institutions of Higher Education and Their Vendors</i>	Varies
§56-575.16 (Public Private Education Facilities and Infrastructure Act)	None, though guidance and checklists are available	Varies

Source: JLARC staff analysis and interviews.

### VPPA Exemptions

Certain higher education institutions are exempted from the VPPA. The VPPA also includes certain other exemptions, such as investment services procured by the Virginia Retirement System and State Treasurer.

### Most State Agencies Subject to the Virginia Public Procurement Act, Which Requires Contractors to Comply With IRCA

The Virginia Public Procurement Act (VPPA) includes a provision addressing contractor compliance with federal, State, and local laws and federal immigration law. Specifically, §2.2-4311.1 of the *Code of Virginia* was added in 2008, which stipulates that

All public bodies shall provide in every written contract that the contractor does not, and shall not during the per-

formance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986.

#### JLARC Staff Survey of State Agencies

In late February and early March 2011, JLARC staff administered a survey of State agency procurement officials. The survey collected information about the procurement manuals agencies use, any additional IRCA compliance activities, and procurement officials' insight into characteristics of contractors. JLARC staff received 130 survey responses, 78 percent of all agencies that were sent a survey.

The above section of the VPPA is further articulated in three different procurement manuals that agencies are to use when purchasing goods and non-professional services, construction services, and information technology services. When asked on a JLARC staff survey, agency procurement officials reported in nearly all cases that they incorporate the standard terms and conditions included in these manuals into their contracts. The exceptions are agencies that are exempt from the VPPA or when one agency coordinates with another on a cooperative procurement, thereby using an existing contract.

***Agency Procurement and Surplus Property Manual Includes Required Terms and Conditions Referencing IRCA.*** Agencies are required to use the *Agency Procurement and Surplus Property Manual* (APSPM) when procuring goods and any non-professional services, such as food services or trash removal. Appendix B of the APSPM contains standard language agencies are to use when drafting the general terms and conditions for any contracts. One of the required general terms and conditions is that by entering into the contract, the contractor is certifying that it is not knowingly employing unauthorized workers as defined under IRCA (Table 2).

**Table 2: Terms and Conditions Included in Procurement Manuals That Reference IRCA**

Procurement Manual	Section Referencing IRCA	Term and Condition Referencing IRCA
<i>Agency Procurement and Surplus Property Manual</i>	Appendix B, Section I. Required General Terms and Conditions Goods and Non-Professional Services, (E)	"Immigration Reform and Control Act of 1986: By entering into a written contract with the Commonwealth of Virginia, the Contractor certifies that the Contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986."
<i>Construction and Professional Services Manual</i>	General Conditions of the Construction Contract, Section 3. Laws and Regulations, (c)	"Immigration Reform and Control Act of 1986: By signing this Contract, the Contractor certifies that it does not and shall not during the performance of this Contract violate the provisions of the Federal Immigration Reform and Control Act of 1986, which prohibits employment of illegal aliens, or knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986."
<i>IT Procurement Policy Manual: BUY IT</i>	Core Contractual Terms as in Effect July 1, 2010 through June 30, 2011; 3. Immigration	"Contractor does not, and shall not during the performance of this Contract, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986."

Source: JLARC staff analysis of APSPM, CPSM, and "BUY IT" procurement manuals.

***Construction and Professional Services Manual Includes General Terms and Conditions Referencing IRCA.*** Agencies are required to use the *Construction and Professional Services Manual* (CPSM) when procuring professional design and construction services. These services include structural engineering, architecture, and building construction. The CPSM includes general conditions for construction contracts, which agencies are to use when drafting construction or professional services contracts. As with the APSPM, one of the general conditions is that the contractor certifies it will not violate the provisions of IRCA (Table 2). The language varies slightly from the language used in the APSPM, but appears to have the same intent.

***Information Technology Procurement Policy Manual Includes Core Contractual Terms Referencing IRCA.*** The Virginia Information Technologies Agency (VITA) has developed a procurement manual for agencies to use when acquiring information technology products and services. The manual includes core contractual terms for agencies to use when drafting contracts. One of the core terms is that the contractor shall not knowingly employ an unauthorized worker as defined in IRCA (Table 2). The language varies slightly from the language used in the APSPM and CPSM, but appears to have the same intent.

***Contractual Terms and Conditions Do Not Necessarily Apply to Subcontractors in All Circumstances.*** The IRCA-related contractual terms and conditions summarized above address the relationship between the State and prime contractors directly under contract with the State. The terms and conditions do not necessarily, however, cascade down to the relationship between a contractor and any subcontractors. While the VPPA specifically requires a contractor to include in any subcontracts certain provisions, such as drug-free workplace requirements, no similar provision exists to address IRCA requirements.

In response to the JLARC staff survey, agencies cited new building construction among the types of services for which State contractors typically use subcontractors. To this end, the CPSM includes a general condition of the construction contract stipulating that the contractor shall be fully responsible for all acts and omissions of all succeeding tiers of subcontractors performing or furnishing any of the work. In contrast, the APSPM used for goods and non-professional services does not include a similar general term and condition, but does include a special term and condition that agencies are directed to use when contractors will be permitted to subcontract. The special term and condition essentially clarifies that a prime contractor is responsible for any subcontractors, which would make the prime contractor accountable for whether subcontractors comply with IRCA.

## **MANUALS USED BY VIRGINIA DEPARTMENT OF TRANSPORTATION FOR HIGHWAY CONSTRUCTION AND CERTAIN HIGHER EDUCATION INSTITUTIONS DO NOT SPECIFICALLY REFERENCE IRCA**

In contrast to most agencies as discussed above, the Virginia Department of Transportation (VDOT) and certain higher education institutions do not include contract language that specifically references IRCA.

### **Virginia Department of Transportation Uses the *Road and Bridge Specifications* for Highway Construction, Which Reference a Contractor’s Legal Responsibilities—but Not IRCA Specifically**

The Virginia Department of Transportation (VDOT) uses a separate procurement manual to govern the procurement of highway construction services. The manual, *Road and Bridge Specifications*, does not have separate language re-enforcing the VPPA requirement for contractors to follow IRCA. According to VDOT staff, this is because §2.2-4301 of the *Code* defines “construction” separately from “goods” and “services.” VDOT staff asserted that these separate definitions exempt highway construction contracts from the IRCA provision of the VPPA because it specifies “during the performance of the contract for goods and services,” but does not specifically mention “construction.”

The *Road and Bridge Specifications* manual does, however, include section 107.01 – Laws to be observed, which states

The Contractor shall keep fully informed of federal, state, and local laws, bylaws, ordinances, orders, decrees, and regulations of governing bodies, courts, and agencies having any jurisdiction or authority that affects those engaged or employed on the work, the conduct of the work, or the execution of any documents in connection with the work.

That same section of the manual also requires contractors to (1) observe and comply with laws; (2) execute and file the documents, statements, and affidavits required; and (3) permit examination of any records made subject to examination. Collectively, this language requires contractors to keep informed of, and comply with, any applicable laws, including IRCA.

### **Certain Higher Education Institutions Are Exempt from the Virginia Public Procurement Act and Procurement Manual Does Not Specifically Reference IRCA**

The Restructured Higher Education Financial and Administrative Operations Act (§23-38 of the *Code of Virginia*) grants certain higher education institutions exemptions from the VPPA. These institutions are either Level II or Level III. Level III institutions

have operational flexibility for capital outlay, leases, information technology, procurement, human resources, and finance. The University of Virginia, Virginia Tech, the College of William and Mary, and Virginia Commonwealth University are Level III institutions. Level II institutions can seek flexibility for two of the above aspects of their operations, but not all.

Level II and III institutions participate in the Virginia Association of State College and University Purchasing Professionals (VASCUPP). VASCUPP has developed the *Commonwealth of Virginia Purchasing Manual for Institutions of Higher Education and their Vendors*. The manual indicates it was developed to comply with the principles of the VPPA. However, the manual does not include standard contract language or any terms and conditions to be included in contracts that specifically reference IRCA.

### **Requiring VDOT and Certain Higher Education Institutions to Update Procurement Manuals to Specifically Address IRCA in Contracts Would Likely Have Limited Impact**

In the abstract, it would seem that requiring VDOT and certain higher education institutions to specifically reference IRCA in their contracts would be worth the administrative effort of updating procurement manuals and contract document templates. This is primarily for two reasons. First, the 2008 update to the VPPA requiring most agencies to reference IRCA has an underlying assumption that (a) complying with IRCA is a policy goal worth addressing separately through the State's procurement processes and (b) adding the required language to State contracts would have a cause and effect relationship with reducing the number of unauthorized workers employed by State contractors. Second, as is highlighted at the end of this report, both VDOT and higher education institutions have contracts totaling hundreds of millions of dollars in service areas identified by the Pew Hispanic Center as being at-risk for employing unauthorized workers.

However, when asked on a JLARC staff survey, only one agency reported being informed of a potential IRCA violation during the last five years. This underscores the lack of a structured mechanism for agencies to be informed of an IRCA violation should one occur. Without knowing whether a contractor has violated IRCA, it is in all practicality not feasible for an agency to enforce the contractor provision referencing IRCA. To this end, agency staff were unaware of any instance in which the State had terminated a contract or sought damages because of an IRCA violation. This suggests that requiring VDOT and higher education institutions to include language in contracts addressing IRCA compliance—which again is the responsibility of the employer and employee and only

enforceable by the federal government—would have limited impact.

### **MAJORITY OF STATE AGENCIES TAKE NO ADDITIONAL ACTION TO MONITOR OR VERIFY WHETHER STATE CONTRACTORS COMPLY WITH IRCA**

About two-thirds of agencies responding to the JLARC staff survey reported they conduct no additional activities to monitor IRCA compliance beyond using standard contractual terms and conditions. In fact, only two agencies responding reported any additional activities directly aimed at IRCA compliance. The Virginia Port Authority noted that the Maritime Safety and Transportation Act requires contract employees to have transportation workers identification credentials before having access to Virginia Port Authority terminals. A contract employee cannot obtain these credentials unless he or she can demonstrate U.S. citizenship. The Department of Aviation (DOAv) noted that some contractor employees must have credentials from the Capital Region Airport Commission to work on airport property. According to DOAv, these contractor employees must submit an I-9 form to receive these credentials.

Agencies also reported to JLARC staff certain activities that are not necessarily designed to monitor IRCA compliance specifically, but may uncover an IRCA violation. Chief among these activities are background checks. For example, the Department of Corrections (DOC) conducts background checks on employees of contractors that work inside their facilities, may have access to sensitive material, or may pose some other security concern. When warranted, according to DOC, it does contact ICE during the background check process.

Finally, agencies in certain cases audit State contractors. The ASPSM includes a special term and condition that, when included, allows the State to review certain records and documents pertaining to the contract. However, according to the Department of General Services (DGS), an agency will typically use the clause only when it has questions about product quality or pricing.

Agencies with substantial amounts of contract spending interviewed by JLARC staff cited several reasons for taking no action to monitor or verify IRCA compliance. Chief among these reasons was that IRCA compliance is the responsibility of the contractor and its employees, and that the federal government takes the lead role in monitoring IRCA compliance. Furthermore, agencies cited the additional resources that would be required to monitor IRCA compliance themselves, and also questioned whether they could actually compel a contractor to submit I-9 forms to the agency for verification.

## **E-VERIFY IS AN ADDITIONAL RESOURCE EMPLOYERS CAN USE TO VERIFY WHETHER NEW EMPLOYEES ARE AUTHORIZED TO WORK IN THE UNITED STATES**

### **Potential Implementation Challenges of HB 1859 / SB 1049**

Currently, information about which companies are registered for E-Verify is not available. Consequently, State agencies will not be able to easily verify whether a contractor is using the E-Verify system for newly-hired employees as required. Additional challenges may also include distinguishing employees who work on a State contract from those that do not, as well as implementing the requirement to debar any contractors that do not use E-Verify. DGS also noted that a possible weakness of E-Verify is that it is only to be used on newly-hired employees.

E-Verify is a free, Internet-based system that employers can use to help determine whether a new worker is authorized for employment in the United States. The U.S. Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA) jointly manage E-Verify. To use the system, an employer must first register for E-Verify, then enter the information from a newly-hired employee's I-9 form into the system. E-Verify will then notify the requesting employer whether the employee is authorized to work, or whether the employee may not be authorized. In these cases where an employee may not be authorized, E-Verify issues a tentative non-confirmation (TNC).

The 2011 General Assembly passed HB 1859 and the identical SB 1049. The bills require that any company under a State contract in excess of \$50,000 and with more than 50 employees must register and participate in the E-Verify program. Contractors that fail to comply would be debarred from contracting with the State for a period of up to one year or until the employer participates in E-Verify. HB 1859 and SB 1049 will go into effect in December 2013. Previously, the 2010 General Assembly passed HB 737, requiring State agencies to use E-Verify for each newly-hired employee by December 2012. On March 21, 2011, the Governor announced he was ordering executive branch agencies to meet this requirement by June 1, 2011. In FY 2010, E-Verify received 14.9 million queries nationally and nearly 482,000 queries from Virginia employers.

### **GAO Recently Assessed E-Verify, Noting Both System Improvements and Challenges That Still Remain**

The E-Verify system is a complement to the paper-based I-9 form process. Although using E-Verify in addition to the paper-based I-9 form process can provide a greater degree of assurance about whether an employee is authorized to work in the United States, it still does not provide a guarantee. A 2010 U.S. Government Accountability Office (GAO) report noted both strengths and weaknesses of the E-Verify system (Table 3).

In terms of system accuracy, GAO reported that 97.4 percent of recent E-Verify queries received an automatic confirmation that the employee was authorized. The remaining 2.6 percent of queries resulted in a TNC. A small percentage of these TNCs were reversed after either the employer or employee contested the result. Erroneous TNCs can be caused by inaccuracies and inconsistencies in how personal information is recorded on employee documents, in government databases, or both. Furthermore, an employee receiv-

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**Table 3: The E-Verify System Has Both Strengths and Weaknesses**

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	<b>E-Verify Strengths</b>	<b>E-Verify Weaknesses</b>
System Accuracy	Becoming more accurate through access to additional databases and quality control	<ul style="list-style-type: none"><li>• Cannot always detect inaccuracies on employer forms and government documents</li><li>• Resolving TNCs can be problematic and takes time, delaying staffing decisions</li></ul>
Administrative Benefit / Burden	Complements the paper-based I-9 form process by matching information an employee provides with various government databases	<ul style="list-style-type: none"><li>• Does not replace the paper-based I-9 form process, thereby creating additional administrative burden for employers</li></ul>
Vulnerability to Fraud	Matches employee photographs on passports and several other prominent forms of acceptable identification	<ul style="list-style-type: none"><li>• Cannot detect whether an unscrupulous employer knowingly hires an unauthorized worker</li><li>• Cannot necessarily detect when an employee has stolen someone else's identity, which could allow an unauthorized worker to still receive an automatic confirmation</li></ul>

Note: TNC, tentative non-confirmation of employee authorization to work in the United States.

Source: *Employment Verification: Federal Agencies Have Improved E-Verify, but Significant Challenges Remain*, U.S. Government Accountability Office, 2010.

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ing a TNC is often unable to determine the data source responsible for the error. Despite these limitations, GAO emphasized that E-Verify is becoming more accurate. E-Verify now accesses more databases and uses quality control procedures to help detect data entry errors, which has helped reduce the likelihood of an erroneous TNC.

Using E-Verify gives an employer the benefit of additional assurance about whether an employee is authorized to work in the United States, but that assurance comes at the cost of additional administrative burden. E-Verify strengthens the paper-based I-9 form process because it matches information the employee provides with various government-maintained databases. However because using E-Verify complements, but does not replace the I-9 form process, employers using E-Verify add another administrative task to the process of hiring new employees.

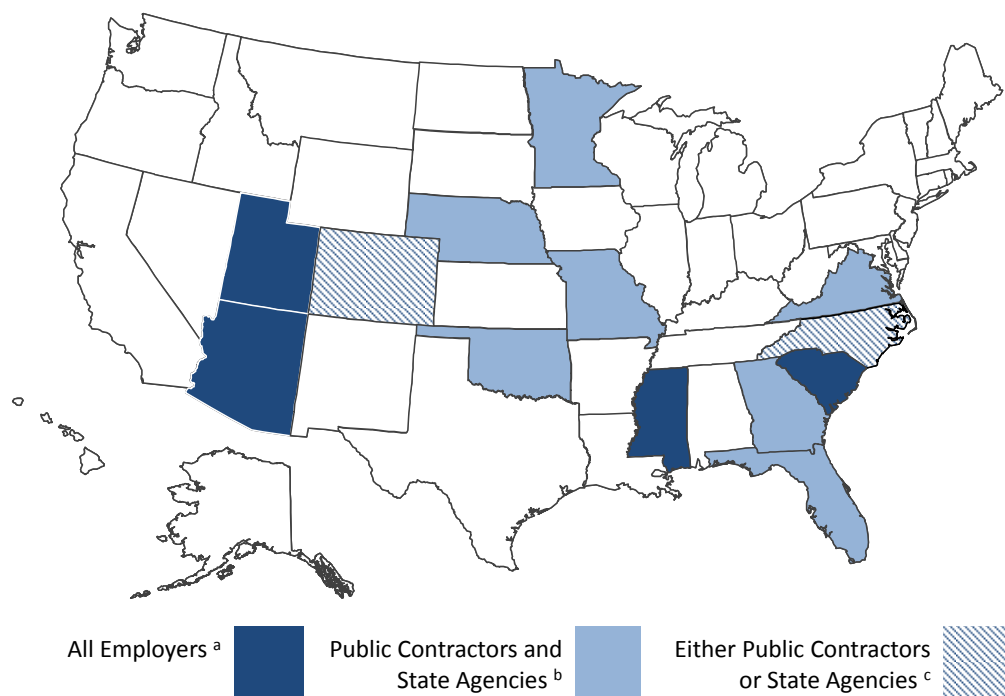
Finally, as with the paper-based I-9 form process, E-Verify is also still vulnerable to various types of fraud. GAO found that the system cannot detect when an unscrupulous employer helps an unauthorized worker obtain confirmation, or when an employer still retains an employee after receiving a TNC from E-Verify. E-Verify is also susceptible to identity fraud because employers are often unable to determine whether an employee is presenting authentic identification that has not been stolen. GAO noted, however, that E-Verify can now match photographs on passports and several other documents that are commonly possessed by foreign-born in-

dividuals. This makes it easier for an employer to detect if an employee has submitted identification with a different photograph.

### States Are Now Requiring Certain Employers to Use E-Verify

Currently, 13 states (including Virginia) have passed laws or executive orders requiring at least certain employers to use E-Verify (Figure 1). Colorado was the first state to implement an E-Verify requirement, when in 2006 it required state contractors to use the system to determine whether new employees were authorized to work in the United States. Of the requirements passed by the 13 states, most are limited to new employees of state agencies and/or state contractors, though several apply more broadly. For example, North Carolina requires state agencies to use E-Verify for new employees. South Carolina requires all employers to use E-Verify, but only for new employees. Interestingly, Tennessee does not require employers to use E-Verify, but does have a law that shields employers from sanctions if they use either the paper-based I-9 process or E-Verify.

**Figure 1: Thirteen States Have Required At Least Some Employers to Use E-Verify**



<sup>a</sup> Utah requires all state agencies, state contractors, and employers with over 15 employees to use E-Verify when hiring.

<sup>b</sup> Virginia will require E-Verify use for all new hires by State agencies beginning in June 2011, and by all State contractors (above certain employment or dollar thresholds) beginning in December 2013.

<sup>c</sup> Colorado requires E-Verify for all public contractor new hires and North Carolina requires it for all state agency new hires.

Notes: As of spring 2011, the executive order in Minnesota requiring E-Verify use had not been renewed by the state's new governor. Tennessee does not require E-Verify, but does shield employers that use either E-Verify or the I-9 form from sanctions.

Source: JLARC staff analysis of other state statutes, data from Verifications Inc., and other documentation.

## **NO ESTIMATE EXISTS OF NUMBER OF UNAUTHORIZED WORKERS THAT COULD BE EMPLOYED BY STATE CONTRACTORS**

It is reasonable to be concerned about the number of unauthorized workers that could be employed by State contractors. To this end, agencies were asked on the JLARC staff survey whether contractors in selected service areas could potentially be “at risk” for employing unauthorized workers. The majority of agencies responded that they did not know. This is likely because agency procurement officials typically lack information about the day-to-day operations of contractors, and specifically about their hiring and employment practices. Because (1) IRCA compliance is a federal activity and (2) agencies do little in addition to incorporating standard terms and conditions into their contracts, the lack of information reported by most agencies is to be expected.

### **Pew Hispanic Center Estimates That About Four Percent of Virginia's Workforce Could Be Unauthorized Workers**

#### **Pew Hispanic Center Estimates**

The Pew Hispanic Center estimated the number of unauthorized workers using the March 2010 Current Population Survey from the U.S. Census Bureau. Pew emphasizes that because these estimates are derived from sample surveys, they are subject to uncertainty from sampling error and other types of error. Each estimate of the unauthorized population is the mid-point within a range.

The Pew Hispanic Center periodically releases estimates of how many unauthorized workers there could be nationally, and in each state. According to Pew, nationally there could be approximately eight million unauthorized workers. This accounts for about five percent of the national workforce. This estimated unauthorized worker population is highly concentrated in certain states. In fact, Pew estimated that about half of all unauthorized workers reside in California, Texas, Florida, and New York.

Pew estimates that approximately 3.9 percent of Virginia's workforce could be unauthorized workers. Pew notes that Virginia could be home to an estimated 160,000 unauthorized workers, or about two percent of their projection of unauthorized workers in the country. Virginia ranked 12<sup>th</sup> highest out of all states in the total number of unauthorized workers as estimated by Pew and 22<sup>nd</sup> highest in unauthorized workers as a share of the workforce. Importantly, Pew emphasizes that its state-level estimates should be used with caution (see sidebar).

The above estimate of the number of unauthorized workers in Virginia theoretically includes any that are working for employers on State contracts. However a defensible estimate for how many unauthorized workers State contractors could be employing is not possible without surveying contractors directly to determine the number of employees they have working under a given State contract. Without knowing the number of State contractor employees, there is no base number to apportion using the Pew Hispanic Center estimates. Furthermore, it may not be reasonable to assume that the proportion of unauthorized workers in the broader workforce could be extrapolated to State contractor employees.

## State Agencies Contract in Certain Service Areas Which Are More Likely to Be “At Risk” for Employing Unauthorized Workers

Although there is no information about the number of contract employees (and therefore how many could be unauthorized workers), JLARC staff were able to calculate the value of State contracts in certain service areas that may be at greater risk of employing unauthorized workers. To do so, JLARC staff aligned the 2009 Pew Hispanic Center estimates of industries and occupations with the National Institute of Government Purchasing (NIGP) goods and services commodity codes. JLARC staff then used the NIGP codes to determine annual contract value in certain service areas as included in the eVA database. (eVA is the electronic system that supports the State’s procurement processes.)

As shown in Table 4, in 2010 State agencies managed contracts totaling substantial amounts in service areas identified by the Pew Hispanic Center at the national level as having a higher than average proportion of unauthorized workers. These “at-risk” service areas include road and bridge construction, maintenance, and repair; new building construction; other construction-related trades; food services; and roadside and grounds services. Large agencies such as VDOT, Department of Behavioral Health and Developmental Services (DBHDS), DOC, and higher education institutions tended to have the highest contract value in these services areas.

**Table 4: Agencies Manage Contracts of Substantial Value in “At-Risk” Service Areas Identified by Pew Hispanic Center as Having Higher Proportion of Unauthorized Workers**

“At Risk” Service Areas <sup>a</sup>	State Contract Value in Service Area (2010) <sup>b</sup>	Agencies With Largest Contract Value(s) in Service Area
Road and bridge construction, maintenance, and repair	\$773 Million	VDOT
New building construction	\$727 Million	DBHDS, Higher Education
Maintenance and repair of existing structures	\$239 Million	DBHDS, DGS, Higher Education
Roadside and grounds maintenance (including mowing and plant/tree trimming)	\$43 Million	VDOT, DBHDS
Food services	\$33 Million	Higher Education
Construction-related trades (including roofing, tile and marble)	\$23 Million	Various
Other (including custodial, refuse collection, laundry, bus and taxi services)	\$19 Million	VDOT, Higher Education, DOC

<sup>a</sup> JLARC staff aggregation of industries and occupations identified by the Pew Hispanic Center as employing a higher than average proportion of unauthorized workers.

<sup>b</sup> Aggregated contract value within various National Institute of Government Purchasing commodity codes included in the eVA database, based on 2010 data. Value shown includes materials, labor, and other categories.

Source: JLARC staff analysis of Pew Hispanic Center estimates and eVA database.

## CONCLUSION

As discussed in this report, most Virginia agencies address State contractors' compliance with IRCA by incorporating various terms and conditions into State contracts. The majority of agencies take no other action (and are not required to do so) to address IRCA compliance. If the General Assembly wishes to enhance State agencies' activities to monitor whether State contractors comply with IRCA, it would need to address at least two key issues:

- Through what mechanism would State agencies monitor IRCA compliance? There is currently no defined way for State agencies to either (1) be informed of an IRCA violation should one occur or (2) ascertain whether an employer is violating IRCA by hiring unauthorized workers. The General Assembly would most likely need to provide State agencies with additional authority to audit contractor records, in particular I-9 forms, with the intent of monitoring IRCA compliance. Given the federal role in IRCA compliance, however, this could be problematic. Larger agencies would also likely need additional resources to implement the newly-created monitoring function.
- What penalties or sanctions, if any, would the State impose on contractors that are not complying with IRCA? Other than potentially terminating a contract or seeking damages (which, as discussed above, no State agencies have reported doing in recent years), it is unclear how a State agency would proceed if it was made aware of, or discovered on its own, that a contractor was not complying with IRCA. Consequently, the General Assembly would need to determine the penalty for not complying with IRCA, such as debarment from contracting with the State.

## Study Mandate

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**A Resolution of the Joint Legislative Audit and Review Commission directing staff to study the policies and procedures used by State agencies to ensure that contractors verify the legal resident status of employees.**

WHEREAS, the federal Immigration Reform and Control Act of 1986 was passed in order to control and deter illegal immigration to the United States, and

WHEREAS, the Immigration Reform and Control Act requires every employer to verify that every new employee is a U.S. citizen or legal immigrant entitled to work in the United States (I-9 form), and

WHEREAS, the Immigration Reform and Control Act provides sanctions for employers who knowingly hire undocumented workers, and

WHEREAS, the Department of General Services' *Agency Procurement and Surplus Property Manual* requires that every State contract include a provision that contractors certify that they will not knowingly employ an unauthorized alien as defined in the Immigration Reform and Control Act, now therefore, be it

RESOLVED, that the staff be directed to study the policies and procedures used by State agencies to ensure that contractors and subcontractors comply with the Immigration Reform and Control Act of 1986 by verifying the legal resident status of employees. The staff shall complete its work and submit a report of its findings and recommendations to the Commission by June 30, 2011.

Approved by the Commission, October 12, 2010



## Research Activities and Methods

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JLARC staff conducted the following research activities during this study:

- Reviewed applicable federal and State statutes, procurement manuals, contractual terms and conditions, literature on unauthorized workers, and reports on the federal E-Verify system;
- Interviewed and surveyed agency procurement staff; and
- Analyzed various datasets to estimate the value of State contracts in service areas more likely to be “at risk” for employing unauthorized workers.

### Review of Statutes, Procurement Manuals, and Literature

To define the applicable statutory framework related to the hiring of unauthorized workers, JLARC staff reviewed federal and Virginia statutes, chiefly the Immigration Reform and Control Act of 1986 (IRCA) and the Virginia Public Procurement Act. JLARC staff also reviewed the Virginia Restructured Higher Education Financial and Administrative Operations Act and the Public Private Education Facilities Infrastructure Act.

Staff then identified and reviewed the various procurement manuals used by State agency staff, including the: *Agency Procurement and Surplus Property Manual*, *Construction and Professional Services Manual*, *IT Procurement Policy Manual*, *Road and Bridge Specifications*, and *Commonwealth of Virginia Purchasing Manual for Institutions of Higher Education and their Vendors*. The purpose of these reviews was to determine whether the manuals included any terms or conditions that specifically referenced contractor compliance with IRCA.

To learn about issues related to the hiring of unauthorized workers, staff reviewed various reports published by the Pew Hispanic Center. To learn about the relationship between the federal government and states on immigration, staff reviewed various reports published by previous Virginia task forces on immigration. These included Governor Kaine’s Commission on Immigration and the State Crime Commission’s Illegal Immigration Task Force.

Finally, JLARC staff conducted research on the federal E-Verify system that employers can use to help determine whether a new

worker is authorized for employment in the United States. This research included reviewing the E-Verify website and a 2010 U.S. Government Accountability Office report *Employment Verification: Federal Agencies Have Improved E-Verify, But Significant Challenges Remain*. JLARC staff also used information posted on the Verifications Inc. website and contacted several states to learn about their requirements for various employers to use E-Verify.

### **Interviews and Survey of Agency Procurement Staff**

To better understand the extent to which agencies monitor and enforce contractor compliance with IRCA through their procurement practices, JLARC staff interviewed several agencies with substantial procurement spending. These agencies were the Department of General Services (DGS), Department of Medical Assistance Services, Department of Corrections, Department of Transportation, and the University of Virginia.

To better understand the State's legal position with respect to IRCA and contracting, JLARC staff also interviewed staff from the Office of the Attorney General. To better understand the employer's perspective on IRCA and E-Verify, JLARC staff interviewed staff from the Virginia Chamber of Commerce.

To gain further understanding of the issues related to State agency contracting and IRCA, JLARC staff also administered a survey of State agency procurement staff. The survey was developed and administered online using the Checkbox survey software. The survey included questions for agency staff regarding

- the procurement manuals agencies use and the extent to which agencies incorporate the standard contractual terms and conditions included in those manuals;
- activities agencies take (in addition to incorporating contractual terms and conditions) to monitor and/or enforce IRCA compliance; and
- the degree of insight agency procurement staff had into contractor operations, including the degree of employee turnover and risk the contractor could potentially present of employing unauthorized workers.

Staff pre-tested the survey with several agencies, then made several minor revisions based on the pre-test feedback. In late February 2011, JLARC staff notified agency procurement directors through an e-mail that the survey was available. Agency staff had approximately two weeks to complete the survey. Of the 167 agencies notified, 130 completed a survey. The resultant response rate

was 78 percent. There were no significant patterns in terms of agency mission or size among the agencies that did not respond.

### **Analysis of Data on Value of State Contracts More Likely to Be “At Risk” for Employing Unauthorized Workers**

To calculate the value of State contracts in certain service areas that may be at greater risk of employing unauthorized workers, JLARC staff combined data from three sources. First, JLARC staff used estimates made by the Pew Hispanic Center of the number of unauthorized workers in various industries and occupations. Pew made these estimates using Current Population Survey data from the U.S. Census Bureau. The estimates for industries and occupations were national estimates, and therefore instructive but not specific to either Virginia or State contracting. Second, JLARC staff aligned the Pew Hispanic Center estimates with the National Institute of Government Purchasing (NIGP) goods and services commodity codes. This was necessary to facilitate the third and final step, which was extracting from the DGS eVA database the value of State contracts in 2010 based on the associated NIGP code. eVA is the electronic system managed by DGS that supports the State’s procurement processes. The result was total State contracting value in the various service areas deemed to be “at risk” for employing a higher than average number of unauthorized workers.



# Acceptable Documents for Verifying Employment Authorization

According to the U.S. Citizenship and Immigration Services, employers are required to complete an I-9 form for each person hired after 1986. The form requires the employer to examine official documentation of whether the potential employee is authorized to work in the U.S. Table B-1 lists documents that establish both identity and employment authorization, and only one of the documents listed is necessary. Tables B-2 and B-3 list acceptable documents that establish identity and employment authorization, respectively.

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**Table B-1: Documents That Establish Both Identity and Employment Authorization**

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1. U.S. Passport or Passport Card
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa (MRIV)
4. Employment Authorization Document (Card) that contains a photograph (Form I-766)
5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI
7. In the Commonwealth of the Northern Mariana Islands (CNMI) only, a foreign passport along with special documents issued by the CNMI

Source: U.S. Citizenship and Immigration Services.

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**Table B-2: Documents That Establish Identity**

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**For individuals 18 years of age or older:**

1. Driver's license or identification card issued by a state or outlying possession of the United States, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
2. ID card issued by federal, state, or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
3. School ID card with a photograph
4. Voter's registration card
5. U.S. military card or draft record
6. Military dependent's ID card
7. U.S. Coast Guard Merchant Mariner Card
8. Native American tribal document
9. Driver's license issued by a Canadian government authority

**For persons under age 18 who are unable to present a document listed above:**

10. School record or report card
11. Clinic, doctor, or hospital record
12. Day-care or nursery school record

Source: U.S. Citizenship and Immigration Services.

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**Table B-3: Documents That Establish Employment Authorization**

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1. U.S. Social Security account number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States. *Note: A copy (such as a metal or plastic reproduction) is not acceptable.*
2. Certification of Birth Abroad issued by the U.S. Department of State (Form FS-545)
3. Certification of Report of Birth issued by the U.S. Department of State (Form DS-1350)
4. Original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying possession of the United States bearing an official seal
5. Native American tribal document
6. U.S. Citizen Identification Card (Form I-197)
7. Identification Card for Use of Resident Citizen in the United States (Form I-179)
8. Employment authorization document issued by the U.S. Department of Homeland Security

Source: U.S. Citizenship and Immigration Services.

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# Appendix **D**

## Agency Response

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As part of an extensive validation process, State agencies and other entities involved in a JLARC assessment are given the opportunity to comment on an exposure draft of the report. JLARC staff provided an exposure draft of this report to the Department of General Services. Appropriate technical corrections resulting from comments provided by the agency have been made in this version of the report. This appendix includes the written response letter that was submitted.





# COMMONWEALTH of VIRGINIA

## Department of General Services

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May 18, 2011

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Mr. Glen S. Tittermary  
Director, Joint Legislative Audit and Review Commission  
Suite 1100, General Assembly Building, Capitol Square  
Richmond, VA 23219

Dear Mr. Tittermary:

In a May 10, 2011, letter to me you asked that I review a draft of the report *State Contracting and the Federal Immigration Reform and Control Act*.

The Department of General Services completed its review and provides the following comments for your consideration:

- Page 8 – sentence is awkward. Third paragraph "... (DOC) conducts background checks on employees of contractors that work inside their facilities, may have access to sensitive material....."
- Page 9 – first section - specifically top paragraph: "...can use to help determine whether a worker is authorized..." check out the provided web-site. It clearly states that E-verify can not be used for a worker currently working for an employer. Thinking this section may want to be re-worked to be clear E-verify only applies to NEW HIRES not existing workers. See link below:  
<http://www.uscis.gov/files/nativedocuments/e-ver-employee-rights.pdf>
- Page 10 – chart at top of page: May want to consider "weakness" that E-Verify can only be used on NEW hires. This may be seen as a weakness to some, specifically with contractors that have a low turn over rate.

Thank you for the opportunity to comment on this report.

Sincerely,

  
Richard F. Sliwoski, P. E.



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