

Amendment No. 2 to SB1669

McNally
Signature of Sponsor

AMEND Senate Bill No. 1669

House Bill No. 1378*

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Section 50-1-103(c), is amended by deleting the subsection in its entirety and substituting instead the following:

(c) A person has not violated subsection (b) with respect to a particular employee if the person requested from the employee, received, and documented in the employee record, 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.

SECTION 2. Tennessee Code Annotated, Section 50-1-103, is amended by deleting subsection (d) in its entirety and by substituting instead the following:

(d) A person has not violated subsection (b) with respect to a particular employee if the person verified the work authorization status of the employee by using 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 thereto, and the verification service returned a confirmation showing that:

- (1) Such employee was eligible to work;
- (2) Such employee was ineligible to work, but the employee has appealed such confirmation and the appeal has not been resolved; or
- (3) Such employee was ineligible to work, the employee has not appealed such confirmation and the time for such employee to appeal pursuant to federal law has not expired.

SECTION 3. Tennessee Code Annotated, Section 50-1-103(e)(1), is amended by deleting the language "Upon receipt of the complaint," and substituting instead the following:

Upon receipt of a complaint by a federal, state or local governmental agency, officer, employee or entity,

SECTION 4. Tennessee Code Annotated, Section 50-1-103, is further amended by adding the following language as new, appropriately designated subsections:

() The department shall notify the appropriate official making declarations pursuant to § 12-4-124 of a person's violation of this section.

() The department shall notify the department of homeland security of any person found in violation of this section.

SECTION 5. 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;

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

(3) "Department of homeland security" means the United States department of homeland security, or the appropriate agency or division within such department, or any successor department, agency, or division thereto;

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

(5) "Employee" means any individual for whom an employer must complete a Form I-9 pursuant to federal law and regulations, and does not include an independent contractor as defined by 8 U.S.C. § 1324a and its regulations;

(6) "Employer" means private employers and governmental entities;

(7) "E-Verify program" means the federal electronic work authorization verification service provided by the 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 thereto;

(8) "Governmental entity" means this state or any political subdivision which exercises governmental powers under the laws of this state and uses tax revenues;

(9) "Internet access" means Internet service that is installed and accessible at an employer's place of business;

(10) "License" means any certificate, approval, registration, or similar form of permission issued by a local government with respect to business licensure as described in title 67, chapter 4;

(11) "Non-employee" means any individual, other than an employee, paid directly by the employer in exchange for the individual's labor or services;

(12) "Person" means an individual, corporation, partnership, or other legal entity;

(13) "Private employer" means any person who is required by federal law and regulations to report, for any purpose, remuneration paid to at least six (6) employees; and

(14) "Tax form" means any form issued by the U.S. Department of Revenue, including, but not limited to, Form W-2, Form-1099 or Form-1040.

50-1-703.

(a)

(1) Employers shall:

(A) For non-employees, request and maintain a copy, pursuant to subdivision (a)(3), of any one (1) of the following documents prior to the non-employee providing labor or services on or after the phase-in period applicable to the particular size employer described in subsection (b):

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

(ii) A valid driver license or photo identification license issued by 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 publicly accessible list of such states on the department's web site;

(iii) An official birth certificate issued by a U.S. state, jurisdiction or territory;

(iv) A U.S. government-issued certified birth certificate;

(v) A valid, unexpired U.S. passport;

(vi) A U.S. certificate of birth abroad (DS-1350 or FS-545);

(vii) A report of birth abroad of a citizen of the U.S. (FS-240);

(viii) A certificate of citizenship (N560 or N561);

(ix) A certificate of naturalization (N550, N570 or N578);

(x) A U.S. citizen identification card (I-197 or I-179); or

(xi) Valid alien registration documentation or other proof of current immigration registration recognized by the United States department of homeland security that contains the individual's complete legal name and current alien admission number or alien file number (or numbers if the individual has more than one number); and

(B) For employees, either:

(i) Request and maintain a copy, pursuant to subdivision (a)(3), of any one (1) of the documents described in (a)(1)(A)(i) -- (xi) prior to the employee providing labor or services on or after

the phase-in period applicable to the particular size employer described in subsection (b); or

(ii)

(a) Enroll in the E-Verify program prior to hiring an employee on or after the applicable phase-in period described in subsection (b);

(b) Verify the work authorization status of the employee hired by using the E-Verify program; and

(c) Maintain a record of any results generated by the E-Verify program for that particular employee in a manner consistent with subdivision (a)(3).

(C)

(i) An employer who verifies the work authorization status of an employee pursuant to subdivision (a)(1)(B)(ii) has not violated § 50-1-103(b) with respect to the particular employee if the employer meets the requirements in § 50-1-103(d).

(ii) No employer shall prevail in any proceeding where a violation of § 50-1-103 is alleged if the sole evidence presented by the employer is evidence of compliance with subdivisions (a)(1)(A) or (a)(1)(B)(i).

(2) No employer shall be in violation of subdivision (a)(1)(B) if the employer has requested, but has not received, assistance pursuant to subdivision (a)(5).

(3) An employer shall maintain:

(A) A record of results generated by the E-Verify program pursuant to (a)(1)(B)(ii) with respect to an employee for three (3) years after the date of the employee's hire or for one (1) year after the employee's employment is terminated, whichever is later; and

(B) Documentation received pursuant to subdivision (a)(1)(A) and (a)(1)(B)(i) for three (3) years after the documentation is received by the employer or for one (1) year after the employee or non-employee ceases to provide labor or services for the employer, whichever is later.

(4) Nothing in this section shall be construed to prevent an employer from contracting with or otherwise obtaining the services of an E-Verify employer agent, or similar third party, for the purpose of complying with subdivision (a)(1)(B)(ii).

(5) There is created within the department the office of employment verification assistance. The department is authorized to enter into any memorandum of understanding or other agreement required by the E-Verify program to operate this office, and shall create no more than one (1) full-time administrative position to staff the office. If an employer does not have Internet access, then the office shall, at no charge to the employer, enroll the employer in the E-Verify program or conduct work authorization status checks of the employer's employees by using the E-Verify program; provided, that the employer signs a prescribed form, under penalty of perjury, attesting to the employer's lack of Internet access and completes any paperwork required by the E-Verify program to permit the office to provide such assistance.

(6) Except as otherwise provided in subsection (c), the department shall conduct an inquiry concerning an employer's compliance with subdivision (a)(1) in conjunction with any pending inquiry, investigation, or inspection of the employer by the department's division of labor standards or workers' compensation division, or any successor divisions thereto. When conducting an inquiry, the commissioner shall provide written notification to the employer of the inquiry and a request for documentation establishing compliance with subdivision (a)(1). The employer shall provide such documentation to the commissioner within thirty (30) days from the date the employer received the department's

request. If the employer fails to respond with documentation establishing compliance with subdivision (a)(1) within the thirty-day period, then the commissioner shall issue an initial order pursuant to subsection (d).

(b)

(1) On or after January 1, 2012, subsection (a) shall apply to:

(A) Governmental entities; and

(B) Private employers with employees of five hundred (500) or more;

(2) On or after July 1, 2012, subsection (a) shall apply to private employers with employees of two hundred (200) to four hundred ninety-nine (499); and

(3) On or after January 1, 2013, subsection (a) shall apply to private employers with employees of six (6) to one hundred ninety-nine (199).

(c)

(1) Any lawful resident of this state or employee of a federal agency may file a complaint alleging a violation of subdivision (a)(1) to the department. The complaint shall, at a minimum, include the name of the individual filing the complaint, and satisfactory evidence of a violation as determined by the commissioner.

(2) On receipt of a complaint, the commissioner shall determine if the complaint contains satisfactory evidence of a violation of subdivision (a)(1); provided, that the commissioner shall inform the individual filing the complaint the basis for such determination. The commissioner shall not investigate complaints that are based solely on race, color or national origin.

(3) If the commissioner determines that the complaint contains satisfactory evidence of a violation of subdivision (a)(1), then the commissioner shall conduct an inquiry. When conducting an inquiry, the commissioner shall provide written notification to the employer of the alleged violation of subdivision

(a)(1) and a request for documentation establishing compliance with subdivision (a)(1). The employer shall provide such documentation to the commissioner within thirty (30) days from the date the employer received the department's request. Upon request by the employer, the department shall provide the employer with the name of the individual filing a complaint.

(4) Upon the expiration of the thirty-day period in subdivision (c)(3), the commissioner shall make a determination of whether a violation of subdivision (a)(1) occurred. If the employer fails to provide documentation establishing compliance with subdivision (a)(1) within the thirty-day period, then the commissioner shall issue an initial order pursuant to subdivision (d)(1). If documentation is submitted within the thirty-day period, then the commissioner shall determine whether there is clear and convincing evidence of a violation of subdivision (a)(1) based on the documentation submitted, the evidence from the complaint, and other applicable evidence.

(d)

(1) If the commissioner determines that an employer has violated subdivision (a)(1) pursuant to subdivision (a)(6) or (c)(4), or determines that an employer has violated § 50-1-704, then the commissioner shall issue an initial order that shall include, at a minimum:

- (A) The commissioner's findings and determinations;
- (B) The penalties that will apply if a final order is issued;
- (C) The process to request a contested case hearing; and
- (D) The process by which the commissioner shall waive all

penalties for a first violation as provided in subdivision (d)(3).

(2) An employer shall have the right to appeal, pursuant to the Uniform Administrative Procedures Act, compiled at title 4, chapter 5, an initial order issued by the commissioner pursuant to this section; provided, that the employer sends written notice to the commissioner within thirty (30) days of the date of the

initial order. If the employer fails to send such written notice, then the contested case hearing process is waived.

(3) The commissioner shall issue a warning in lieu of all penalties for a first violation of subdivision (a)(1) if:

(A) The employer complies with all remedial action requested by the department to remedy the violation of subdivision (a)(1) within sixty (60) days of the date of the initial order; and

(B) The commissioner determines that the violation of subdivision (a)(1) was not a knowing violation.

(e) If the commissioner does not issue a warning in lieu of penalties pursuant to subdivision (d)(3), then the commissioner shall issue a final order on the date the contested case hearing concludes or is waived and assess penalties in accordance with subsections (f) - (j). The final order shall include, at a minimum, the types of evidence required from the private employer in order to avoid suspension of the private employer's license under subdivision (f)(3).

(f)

(1) If the commissioner issues a final order for a violation of subdivision (a)(1) by a private employer, or a violation of § 50-1-704, then the commissioner shall assess the following civil penalties:

(A) Five hundred dollars (\$500) for a first violation;

(B) One thousand dollars (\$1,000) for a second violation; or

(C) Two thousand five hundred dollars (\$2,500) for a third or subsequent violation.

(2) In addition to the civil penalties provided in subdivision (f)(1), the commissioner shall also assess the following civil penalties:

(A) For a first violation, five hundred dollars (\$500) for each employee or non-employee not verified pursuant to (a)(1)(A) and (B);

(B) For a second violation, one thousand dollars (\$1,000) for each employee or non-employee not verified pursuant to (a)(1)(A) and (B); or

(C) For a third or subsequent violation, two thousand five hundred dollars (\$2,500) for each employee or non-employee not verified pursuant to (a)(1)(A) and (B).

(3) The private employer shall submit to the commissioner evidence of compliance with subdivision (a)(1) within sixty (60) days of the final order. If the private employer fails to submit such documentation, then the commissioner shall request an order consistent with § 4-5-320, requiring the appropriate local government with respect to business licensure pursuant to title 67, chapter 4, to suspend the private employer's license until the employer remedies the violation; provided, however, if the private employer's license has also been suspended pursuant to § 50-1-103(e)(1)(A) or (B), then the license shall remain suspended until the expiration of the period provided for in § 50-1-103(e)(1)(A) or (B).

(g) A second or subsequent violation of subdivision (a)(1) shall accrue from a separate inquiry conducted under subdivision (a)(6) or (c)(3).

(h) All moneys collected pursuant to this section shall be deposited into the lawful employment enforcement fund created by § 50-1-708.

(i) The penalties described in this section shall not be mutually exclusive, and may be imposed in conjunction with any applicable penalties as provided by law.

(j) If the commissioner issues a final order for a violation of subdivision (a)(1) by a governmental entity, then the commissioner shall post the violation on the department's web site as provided in § 50-1-705.

50-1-704.

(a) If the department determines that an employer knowingly misclassified an individual in order to avoid the requirements of this part or title 50, chapters 1, 2, 6 or 7, then the department shall:

(1) Share the findings and information from its investigations with divisions within the department and with the department of commerce and insurance; and

(2) Pursue appropriate sanctions against the employer as provided by law including, but not limited to, sanctions provided in this part, and title 50, chapters 1, 2, 6 and 7.

(b) The department and its divisions are hereby authorized to execute any necessary memorandums of understanding to allow the sharing of such findings and information as required by this section.

50-1-705.

(a) Beginning February 1, 2012, and on a monthly basis thereafter, the department shall post a publicly accessible list on the department's web site of any employer against whom a final order has been issued pursuant to this part.

(b) The list required to be posted pursuant to this section shall state, at a minimum, the employer's name, the place of business of a private employer where the violation occurred, a brief description of the violation, a designation of the violation as a first or subsequent violation, and any penalties that have been assessed against the employer.

(c) The list shall remain on the web site for such time as determined by the commissioner.

50-1-706. Any individual alleging a violation of this part shall have all protections under § 50-1-304 and § 8-50-116, and any other applicable protections as provided by law.

50-1-707. On or after January 1, 2012, in addition to any other requirement to receive an economic development incentive, a private employer shall be in compliance with this part.

50-1-708.

(a) There is created in the state treasury a fund to be known as the lawful employment enforcement fund. Moneys collected by the department pursuant to this part shall be deposited in this fund and shall only be used by the department to

implement and administer the purposes set forth in this part, including, but not limited to, enforcement and education. 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.

50-1-709. If an employer fails to terminate the employment of any individual for whom the employer receives a final non-confirmation result from the E-Verify program, then the department may consider such fact when making a determination pursuant to § 50-1-103.

50-1-710. This part shall be enforced without regard to race, color, or national origin.

50-1-711. 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.

50-1-712. This part shall be interpreted so as to be fully consistent with all federal laws, including, but not limited to, federal laws regulating immigration and labor.

50-1-713. An employer shall not be in violation of this part during any time period in which the E-Verify program is suspended or not operational.

SECTION 6. The commissioners of labor and workforce development and safety are authorized to promulgate rules and regulations to effectuate the purposes of this act. All rules and regulations shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

SECTION 7. 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 Section 6 of this act shall cease to be effective as of such expiration date.

SECTION 8. 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 9. 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 January 1, 2012, the public welfare requiring it.