

CONSTRUCTION AND THE LAW IN TEXAS

E-Verify in Texas – What You Need to Know

The E-Verify system screens for undocumented workers by comparing information from an employee's I-9 form with records maintained by the Department of Homeland Security and the Social Security Administration. A new law that took effect on September 1st makes it clear that private-sector contractors that work for the Texas Department of Transportation (TxDOT) or the Texas Railroad Commission (the TRC) must enroll in E-Verify.

For contractors doing business with the state of Texas, it is important to understand what is required for compliance under the current law and the background of mandatory E-Verify in Texas to anticipate new E-Verify legislation that may be on the horizon and have a voice in the process.

The History of E-Verify in Texas

In late 2014, Rick Perry issued Executive Order RP-80, requiring state agencies and the companies they contract with to use the federal E-Verify system to substantiate the eligibility of their employees to work in the United States. The problem with this executive order was that it applied to "all persons employed during the contract term to perform duties within Texas." Accordingly, private employers contracting with the state were required to use E-Verify for all employees in Texas, including those hired before winning a state contract. Under federal E-Verify rules, most employers can only use E-Verify for employees hired after the company's enrollment in the program.

Additionally, there was no means to enforce RP-80 because there were no penalties for failure to comply and no agency in charge of monitoring for compliance. Essentially, private companies were operating on the "honor system" with regards to the E-Verify requirements mandated in the executive order.

In 2015, the Legislature refined and partially codified RP-80 with the passage of Senate Bill 374. SB 374 limited mandatory E-Verify participation to new state agency employees. The business community did not oppose SB 374 because, unlike in the executive order, the bill did not extend

E-Verify to private-sector businesses contracting with the state. This was the first piece of E-Verify legislation passed in Texas.

The clarity SB 374 appeared to provide was short lived. In March 2016, in response to a request by TxDOT's Executive Director, the Texas Attorney General issued an opinion stating that the provision of RP-80 requiring contractors doing business with state agencies to enroll in and use E-Verify was not superseded by HB 374. Thus, the attorney general's opinion reinforced the prior order that private-sector contractors of any tier performing work for a state agency under a contract executed after December 2014 must comply with the E-Verify requirements from RP-80.

E-Verify in Texas Today

In 2017, the author of SB 374 introduced SB 23 – a bill that would have expanded mandatory enrollment in E-Verify to private businesses contracting with any state agency. This bill also included stiff penalties for contractors that did not enroll in E-Verify or failed to participate in the program during the term of their contract. Under SB 23, a contractor that failed to comply with E-Verify requirements would be barred from participating in state contracts for a term up to five years. Although this 2017 legislation was a priority for Lt. Governor Dan Patrick, it never made it to the Senate floor for final passage.

While SB 23 is not law today, the TxDOT Sunset Bill became what is referred to as a "Christmas tree" (i.e. a bill that gets "lit up" with several amendments). One ornament on that bill was a House floor amendment that prohibits TxDOT from awarding contracts to contractors and any subcontractors that do not participate in E-Verify. The amendment originally contained the same penalty provisions as those in SB 23. However, Representative Paul Workman successfully struck the penalty provisions from the amendment. A very similar E-Verify requirement was tacked onto the legislation that continued the Texas Railroad Commission. These new E-Verify requirements became law on September 1st.

To implement the new law, beginning



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with the October 2017 letting, TxDOT will require all prime and subcontractors to submit an affirmation of registration and participation in the E-Verify system. Below are the steps prime contractors and subcontractors must follow to bid on TxDOT projects:

- Follow the link on TxDOT's website and enroll in E-Verify via the webpage operated by the U.S. Department of Homeland Security;
- Once enrolled, a "E-Verify Employment Verification Memorandum of Understanding" (the MOU), which is the official participation agreement between the company and U.S. Citizenship and Immigration Services, will be automatically created;
- Complete TxDOT's E-Verify Affirmation of Registration (TxDOT Form 2678); and
- Comply with TxDOT's instructions for submitting the MOU and Affirmation of Registration.

Upon proper submission of the MOU and TxDOT Form 2678, a company will be added to TxDOT's list of "Contractors Confirmed as participating in E-Verify." Prime contractors and subcontractors who do not provide this required documentation will be penalized as follows: (i) TxDOT will reject the prime contractor's prequalification applications for failure to include the documentation, (ii) otherwise qualified prime contractors will not be able to access bid proposals; and (iii) subcontractors will not be allowed to work on TxDOT projects until the documentation has been provided.

After enrolling in the E-Verify system,



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A Balanced Approach to Construction Law.

employers must use E-Verify for all new employees. E-Verify cannot be used to verify employees hired before the effective date of the MOU or for pre-employment screening. An employer may submit verification only after an individual accepts an offer of employment and after their I-9 Form is completed. Verification must be submitted within three business days of a new hire's actual start date.

Although passage of this legislation provides some clarity to contractors and subcontractors, unanswered questions remain for private contractors doing business with other state agencies. Also, given the activity of the last two legislative sessions. We can expect E-Verify to continue to evolve in Texas. We can expect renewed attempts to expand E-Verify and to impose penalties for noncompliance. In the meantime, contractors should carefully monitor the TRC for updates and new developments as that agency has not yet promulgated rules like TxDOT for enrollment.

