

Florida Requires Employers to Use E-Verify Beginning July 1, 2023

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Beginning July 1, 2023, Florida requires all private employers with 25 or more employees to use E-Verify to determine a new employee's eligibility to work in the United States. Florida has required public employers, contractors, and subcontractors to use E-Verify since 2021.

The law defines "employee" to mean an "individual filling a permanent position who performs labor or services under the control or direction of an employer . . ." The law does not define what "permanent" means and, therefore, creates an ambiguity as to whether the law applies to temporary, seasonal, or other employment classifications that are not deemed permanent.

Florida law precludes employment of "an alien who is not duly authorized to work" in the United States. Employers must determine the employment eligibility of new employees within three (3) business days after the first day that the new employee begins working for pay. Each employer required to use the E-Verify system must certify on its first RT-6 return each calendar year that it is in compliance with the E-Verify requirement or, if the E-Verify system is unavailable, the Form I-9 and associated documentation regarding the unavailability of E-Verify system.

What if the E-Verify system crashes or is otherwise unavailable?

If the E-Verify system is unavailable during the three (3) business days after an employee begins working for pay and an employer cannot access the system to verify a new employee's employment eligibility, the employer must use the Form I-9 to verify the new employee's employment eligibility. However, an employer must document the unavailability of the E-Verify system *for each day in question* through one of the following methods:

1. Retaining a screen shot from each day which shows the employer's lack of access to the system;
2. Retaining a public announcement that the E-Verify system is not available; or

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3. Retaining any other communication or notice recorded by the employer regarding the unavailability of the E-Verify system.

The employer must retain a copy of the documentation provided by the employee and any official verification generated, if applicable, for at least three (3) years.

An employer that uses E-Verify or, if the system is unavailable, the Form I-9 has established a rebuttable presumption that the employer has not violated Florida law precluding employment of “an alien who is not duly authorized to work” in the United States. Additionally, an employer that uses the same documentation that is required on the Form I-9 has established an affirmative defense that the employer has not violated Florida law precluding employment of “an alien who is not duly authorized to work” in the United States.

Does the law apply to independent contractors?

No. The law specifically provides that an “independent contractor, as defined in federal laws or regulations, hired to perform a specified portion of labor or services is not an employee.”

How will Florida enforce this law?

Starting July 1, 2024, the Florida Department of Economic Opportunity may notify an employer of a determination that the employer failed to use the E-Verify system to verify employment eligibility and provide the employer with 30 days to cure the noncompliance. If the DEO determines an employer is not in compliance three times in any 24-month period, the DEO must impose a fine of \$1,000 per day until the employer cures noncompliance. Noncompliance may also result in the suspension of licenses issued to the employer by a Florida licensing agency.

My company has more than 25 employees. Do we have to use E-Verify indefinitely?

Florida’s requirement that public employers, contractors, subcontractors, and private employers with 25 or more employees use E-Verify do not apply in any federal fiscal year in which the E-Verify system is not funded by the Federal Government. Further, Florida’s E-Verify law will expire 60 days after the E-Verify system is no longer a pilot program, and the Federal Government requires the use of E-Verify by all employers in the United States.

Employers should consult with counsel regarding any questions about the new law. Lowndes attorneys are available to assist with any questions or associated analyses and revisions required as a result of this legislation.