



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Albert C. Pollard, Jr.
Member, House of Delegates
Post Office Box 508
Lively, Virginia 22507

Dear Delegate Pollard:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire about the scope of the duty imposed under a recently enacted law¹ upon certain employers who transact business with the Commonwealth. This law will go into effect on December 1, 2013.² Using the hypothetical of a purchase of tomatoes by an agency of the Commonwealth, you ask whether § 2.2-4308.2 will require the contractor to use E-Verify to confirm the employment eligibility of employees who pick the tomatoes as well as employees who drive the delivery truck. In addition, you ask whether § 2.2-4308.2 applies to subcontractors under a State contract. Finally, you ask whether a contractor must treat seasonal workers as “newly hired” for purposes of E-Verify when they return to the contractor’s work site after leaving and lawfully re-entering the country.

Response

It is my opinion that § 2.2-4308.2 does not apply to state contracts that are primarily for the acquisition of goods but that it can apply if the contract is primarily to acquire services. It is further my opinion that § 2.2-4308.2 does not apply to subcontractors. Finally, it is my opinion that seasonal workers, who return to a contractor’s work site after having left the country and lawfully re-entered, are “newly hired” for purposes of E-Verify if they did not have at all times a reasonable expectation of resuming employment.

Applicable Law and Discussion

Federal law generally prohibits the employment of unauthorized aliens within the United States.³ As an enforcement measure, federal law requires employers to verify the eligibility status of individuals

¹ 2011 Va. Acts ch. 573; 2011 Va. Acts ch. 583. *Id.* cl. 2.

² *Id.* cl. 2.

³ 8 U.S.C. § 1324a(a) (2006).

they hire.⁴ To facilitate the verification process, Congress directed the Secretary of Homeland Security to implement an E-Verify program to enable employers to confirm employment eligibility of new hires.⁵ The Secretary, in turn, has issued regulations governing the program.⁶

While participation in E-Verify is voluntary for most businesses, companies may be required by state law or federal regulation to use E-Verify.⁷ In its 2011 Session, the General Assembly of Virginia enacted a law requiring certain employers to register and participate in the E-Verify program.⁸

Section 2.2-4308.2 amends the Virginia Public Procurement Act⁹ to require the use of E-Verify by certain employers who enter into certain contracts with agencies of the Commonwealth. Specifically, it provides that

Any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of \$50,000 with any agency of the Commonwealth to *perform work or provide services* pursuant to such contract shall register and participate in the E-Verify program to verify information and work authorization of its newly hired employees performing work pursuant to such public contract.^[10]

“E-Verify program” refers to “the electronic verification ... program of the Illegal Immigration Reform and Immigration Responsibility Act [], as amended, operated by the U.S. Department of Homeland Security ... to verify the work authorization status of newly hired employees[.]”¹¹

While the scope of the new provision is broader than its placement among sections of the Virginia Public Procurement Act pertaining to construction¹² might suggest, the plain language of the enactment limits its application to contracts “to perform work or provide services.” The Virginia Public Procurement Act defines “services” as “any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials...”¹³ It is my opinion that, given the plain language of the statute, the requirement found in § 2.2-4308.2 to register and participate in E-Verify is triggered only when the performance required by the contract emphasizes services rather than goods. A contract that is primarily for the acquisition of goods will not trigger the new requirement.

Your hypothetical scenario concerning a contract to purchase tomatoes involves primarily an acquisition of goods, even if it involves some incidental service elements, such as a requirement to deliver the goods purchased. In response to your first question concerning a hypothetical purchase of tomatoes by the Commonwealth, I therefore conclude that a contract to purchase tomatoes does not trigger the

⁴ 8 U.S.C. §§ 1324a(a)(1)(B); 1324a(b) (2006).

⁵ See Illegal Immigration Reform and Immigration Responsibility Act of 1996 §§ 401 through 404, 8 U.S.C.S. § 1324a note (LexisNexis 2011).

⁶ 8 C.F.R. §§ 274a.1 through 274a.11.

⁷ See *Chamber of Commerce v. Whiting*, No. 09-115, 2011 U.S. LEXIS 4018, at *45 (U.S., May 26, 2011).

⁸ See 2011 Va. Acts ch. 573, cl. 1; 2011 Va. Acts ch. 583, cl. 1. The law has a delayed effective date of December 1, 2013. *Id.* cl. 2.

⁹ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2008 & Supp. 2010).

¹⁰ 2011 Va. Acts ch. 573, cl. 1; 2011 Va. Acts ch. 583, cl. 1 (emphasis added).

¹¹ *Id.*

¹² See §§ 2.2-4305 through 2.2-4308.1 (2008 & Supp. 2010). Chapters 573 and 583 add a new provision, § 2.2-4308.2, and amend § 2.2-4317.

¹³ Section 2.2-4301 (Supp. 2010).

requirements of § 2.2-4308.2 and, therefore, in that situation the contractor is not required to use E-Verify to confirm the employment eligibility of employees who pick the tomatoes or who drive the delivery truck.

In your second question, you raise the possibility that a prime contractor covered by § 2.2-4308.2 might subcontract the work to another company, and in such circumstances, you ask whether the employment eligibility of the employees who perform the subcontracted work must be confirmed through E-Verify. By its terms, § 2.2-4308.2 applies only to companies that enter into a contract with an agency of the Commonwealth. In other provisions of the Virginia Public Procurement Act, the General Assembly has made requirements applicable not only to the prime contractor but also to its subcontractors.¹⁴ Section 2.2-4308.2 does not include any such provision. Moreover, by its terms, § 2.2-4308.2 requires the contractor to use E-Verify to confirm the employment eligibility of “its” employees. It does not require the Contractor to use E-Verify to confirm eligibility of workers employed by subcontractors. It is therefore my opinion that § 2.2-4308.2 does not apply to subcontractors. Although § 2.2-4308.2 does not require a contractor to check E-Verify for subcontractors, I would further note, however, that agencies of the Commonwealth are free to refuse to do business with businesses that are engaged in unethical or illegal business practices.

Finally, you ask whether seasonal workers, who return to a contractor’s work site after having left the country and lawfully re-entered, are considered “newly hired” under the E-Verify program. Because statutes relating to the same subject matter are to be read *in pari materia*,¹⁵ I find that the federal regulations governing the implementation of the federal law cited in the Virginia statute provide guidance in interpreting the phrase.¹⁶ The regulations issued by the Department of Homeland Security specifically address the application of the federal statute to seasonal employees.¹⁷ Those regulations provide that:

An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.^[18]

The regulation further provides that “[a]n individual is continuing in his or her employment” when “an individual is engaged in seasonal employment.”¹⁹ Nonetheless, “[t]he employer who is claiming that an individual is continuing in his or her employment must also establish that the individual expected to resume employment at all times and that the individual’s expectation is reasonable.”²⁰

¹⁴ See, e.g., §§ 2.2-4311, 2.2-4312 & 2.2-4354 (2008).

¹⁵ See 2008 Op. Va. Att’y Gen. 52, 53-54 (“where legislation dealing with a particular subject consists of a system of related general provisions indicative of settled policy, new enactments . . . are to be taken as intended to fit into the existing system . . . and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation”) (citations omitted).

¹⁶ See 1982-83 Op. Va. Att’y Gen. 484, 485 (interpreting Virginia statute’s use of “work experience program component” in harmony with the nearly identical language contained in a related federal statute). The federal law requires the use of the confirmation system “to seek confirmation of the identity and employment eligibility of an individual, by not later than the end of 3 working days (as specified by the Secretary of Homeland Security) after the date of the hiring. . . .” See note 5, *supra*, at § 403(a)(3)(A).

¹⁷ See 8 C.F.R. § 274a.2(b)(viii)(A)(8).

¹⁸ 8 C.F.R. § 274a.2(b)(viii).

¹⁹ 8 C.F.R. § 274a.2(b)(viii)(A).

²⁰ 8 C.F.R. § 274a.2(b)(viii)(B).

In light of this authority, I conclude that a seasonal worker, who returns to a contractor's work site after having left the country and lawfully re-entered, is "newly hired" for purposes of E-Verify if he did not have at all times a reasonable expectation of resuming employment. Conversely, a seasonal worker would not be "newly hired" if he in fact did at all times have a reasonable expectation of resuming employment. The determination of whether there was a reasonable expectation of resuming employment must be made on a case-by-case basis, considering all relevant factors.²¹

Conclusion

Accordingly, it is my opinion that § 2.2-4308.2 does not apply to contracts that are primarily for the acquisition of goods, including tomatoes, but that it can apply if the contract is primarily to acquire services. It is further my opinion that § 2.2-4308.2 does not apply to subcontractors. Finally, it is my opinion that seasonal workers, who return to a contractor's work site after having left the country and lawfully re-entered, are "newly hired" for purposes of E-Verify if they did not have at all times a reasonable expectation of resuming employment.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

²¹ See *id.* (providing a non-exclusive list of seven factors that would indicate that an individual has a reasonable expectation of resuming employment).