



GUIDANCE

TO AGC OF MISSOURI MEMBERS on

EMPLOYER REQUIREMENTS

Of HB 1549

(THE "OMNIBUS IMMIGRATION BILL")

AS ENACTED BY THE 2008 MISSOURI
GENERAL ASSEMBLY

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EFFECTIVE JANUARY 1, 2009

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EXECUTIVE SUMMARY

The following sections of this Guidance provide an “Overview” of statutory requirements and detailed information on HB 1549 specific to the construction industry and the federal “E-Verify” program in a “Frequently Asked Questions” format. Sections of HB 1549 concerning “*employer immigration requirements become effective January 1, 2009.*”

The following summarizes important conclusions based on the sections of the Guidance:

Prime Contractors:

- All *prime contractors* awarded a contract exceeding \$5,000 *on a public works project* must be *enrolled and participating in E-Verify for contracts awarded on or after January 1, 2009.*
- *Prime contractors* must sign a statutorily required “*contract clause*” and submit an “*affidavit*” regarding their compliance for all contracts awarded on or after January 1, 2009.

Subcontractors:

- Construction contractors that work primarily as subcontractors, but also occasionally contract directly with a public entity are for purposes of HB 1549 “prime” contractors required to participate in “E-Verify” by January 1, 2009.
- Even if a construction company functions exclusively as a subcontractor *AGC advises the subcontractor to participate in E-Verify* because subcontractors are held to the most stringent requirements of any Missouri employer. Subcontractors are required to swear that all “*employees are lawfully present in the United States*” subject to felony penalties of “perjury.” Participation in “E-Verify” demonstrates the subcontractor is not “knowingly” hiring unauthorized aliens.
- In addition to construction companies, “*materials suppliers*” are also *probably subcontractors* under HB 1549 and “*service providers*” (insurance, bonding, etc.) are *possibly subcontractors* under HB 1549. AGC suggests “materials suppliers” also consider participating in “E-Verify”. “Service providers” who desire to proceed with an abundance of caution to avoid violations may also consider participating in “E-Verify.”

“E-Verify”:

- *Federal law and regulations* of the US Department of Homeland Security *govern participation in and operation of “E-Verify”*. For federal purposes “E-Verify” is a voluntary program. However, Missouri law enacted by HB 1549 requires prime “contractors” to belong to “E-Verify.” AGC believes it is advisable that many “subcontractors” also participate in “E-Verify.”
- HB 1549 provisions regarding “E-Verify” are effective January 1, 2009.
- It will require a *half-day to a full-day* of concentrated time *for registration and qualification* to use “E-Verify”.
- *As of the effective date of enrollment in “E-Verify”* under a “Memorandum of Understanding” required by the US Department of Homeland Security, the *work eligibility of “new hires” must be verified through the “E-Verify” program.*
- “E-Verify” is *prohibited* from being used for certain purposes, including *pre-screening* applicants for employment *and selective verification* of certain employees. All “new hires” must be verified.

The following sections of this Guidance answer numerous other detailed questions about HB 1549 and federal requirements. Contact the AGC Office for any other questions and we will try to get the answer for you.

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I. OVERVIEW

A. FEDERAL LAW

1) Form I-9 (Revised 6/5/07).

- Employee must attest and present documents demonstrating authorization to work, when hired.
- Employer must examine documents presented by employee. Documents must establish identity and work eligibility either by presentation of more than one document or by presenting one document establishing both.
- Employer **may require only one document** from the employee for each purpose.
- Employer is responsible for completion of Form I-9 within three business days of employment.

(8 USC 1324a)

2) Prohibition of “Knowingly” Employing Unauthorized Worker or “Having Reason to Know” .

- Under federal law it is unlawful for a person to:
“hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . .”
Or
“to hire for employment in the United States an individual without complying with the requirements [for completion of Form I-9]
Or
“to continue to employ the alien [after having reason to know the individual] is an unauthorized alien with respect to such employment.”

(8 USC Section 1324a)

3) “Affirmative Defense” Under Federal Law.

- Any person who has complied “in good faith” with the requirements to complete Form I-9 “has established an affirmative defense” that the person or entity has not violated federal law unless it is shown the employer has “actual” or “constructive knowledge” of the unauthorized status of the employee.

(8 USC Section 1324a)

B. STATE LAW (EFFECTIVE 1/1/09)

1) All Employers.

a) Prohibition Against Hiring Unauthorized Workers.

A provision very similar to the federal prohibition explained on page G-2 is enforceable against all employers in Missouri under the Missouri “Omnibus Immigration Law”:

“No business entity or employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the state of Missouri.”

(285.530.1 RSMo)

b) Federal Work Authorization Program.

Any Missouri employer *may* enroll in a Federal Work Authorization Program operated by the US Department of Homeland Security providing “*electronic verification . . . to verify information of newly hired employees . . .*”

(285.530.4 RSMo)

c) “Safe Harbor” for Employers Under State Law.

Federal law provides an “affirmative defense” to employers who have properly completed Form I-9. An “affirmative defense” is an absolute defense which can only be overcome by prosecutors proving that facts on which it is based are false.

However, Missouri state law gives no “safe harbor” or “affirmative defense” based on compliance with federal law. The Omnibus Immigration Bill (HB 1549) only grants an “affirmative defense” if the employer participates in a Federal Work Authorization Program. HB 1549 provides:

“Any business entity that participates in such [Federal Work Authorization] program shall have an affirmative defense that such business entity has not violated subsection 1 of this section [“knowingly” hiring unauthorized aliens].

(285.530.4 RSMo)

2) Public Contractors and Business Entities Receiving Loans or Tax Credits From Public Entities.

Who is a public contractor?

Such business entities include:

- Business entities that act as public contractors in receiving “award of any contract or grant in excess of five thousand dollars by the state or by any political subdivision of the state . . .”; **and**
- Business entities “receiving a state-administered or subsidized tax credit, tax abatement or loan from the state . . .”

(285.530.2 RSMo)

What must public contractors do to comply with the new state law?

In addition to the general prohibition against all employers barring employment of unauthorized aliens (285.530.1 RSMo), such business entities are required to:

- Provide the contracting public entity with a “sworn affidavit and . . . documentation affirm[ing] its enrollment and participation in a federal work authorization program . . .”; **and**
- “Sign an affidavit affirming it does not knowingly employ any person who is an unauthorized alien . . .” and provide such affidavit to the contracting public entity.

(285.530.2 RSMo)

- 3) Subcontractors to Public Project Contractors and Business Entities Receiving Public Loans and Tax Credits, and Subcontractors to Private Project Contractors.

What are the basic requirements for subcontractors?

The most stringent state requirements on employers are applied to “subcontractors.” Subcontractors, in connection with performance of work for the immediately upper-tiered contractor or subcontractor may be required to:

- Sign a contract clause which “affirmatively states that the direct subcontractor is not knowingly in violation of subsection 1 of this section [knowingly employing unauthorized aliens to perform work within the State of Missouri] and shall not henceforth be in such violation . . .”; **and**
- Submit an “affidavit under the penalty of perjury” to the upper-tiered contractor or subcontractor “attesting to the fact that the direct subcontractor’s employees are lawfully present in the United States.”

(285.530.5 RSMo)

See Section III. B., page G-12, for analysis of when, how and what business entities are likely to become subject to these requirements for “subcontractors”.

II. PENALTIES AND ENFORCEMENT

B. PENALTIES

1) All Employers.

a. Any “*business entity*” is subject to the following penalties for violation:

- Suspension of city or county business licenses, permits and exemptions as provided in the complaint and enforcement process set by statute:
 - Upon a first violation the business entity may correct the violation and terminate suspension by filing an affidavit the violation has ended. (285.535.7 RSMo)
 - If a business entity is found by a court to have violated the prohibition of employing an unauthorized alien for the second time, the court shall direct the applicable municipality or county to suspend licenses, permits or exemptions for one year. (285.535.8 RSMo)
 - For subsequent violations such permits, licenses and exemptions are permanently suspended. (285.535.8 RSMo)

2) Public Project Contractors and Business Entities Receiving Loans or Tax Credits from Public Entities.

- Public project contractors are subject to the same license sanctions as other business entities, but are also subject to the following additional penalties:
 - First Violation – Business entity “*shall*” be deemed in breach of contract and the state “*may*” terminate the contract and suspend or debar the business entity from state work for three years. Upon termination the state may withhold up to 25% of the amount owed on the contract.
 - Second or Subsequent Violation – Business entity “*shall*” be deemed in breach of contract and the state “*may*” terminate the contract and permanently suspend or debar the business entity from doing business with the state. Upon termination of contract the state may withhold 25% of the amount owed.

(285.535.9 RSMo)

- 3) "Safe Harbor" or "Affirmative Defense".
 - If there is a complaint and the federal government responds to the Attorney General that an employee is not authorized to work and the business entity participates in a Federal Work Authorization Program *"there shall be a rebuttable presumption that the employer met the requirements for an affirmative defense . . ."* (285.535.5(1) RSMo)

B. ENFORCEMENT

1) Attorney General:

The Attorney General has the following duties under the statute:

- Investigate and commence enforcement actions of violations under the process and penalties set out for *"business entities"* in general and additional penalties for public contractors. (285.535 RSMo)
- Promulgate rules to implement the provisions of sections 285.525 to 285.550 (employer provisions of HB 1549 in their entirety). (285.540 RSMo)
- Maintain a database of those business entities whose local business licenses, permits or exemptions have been suspended and public contractors whose state contracts have been terminated. (285.543 RSMo).

3) Enforcement Process (285.535 RSMo):

- A *"written signed complaint under penalty of perjury"* may be submitted to the Attorney General by any *"state official, business entity or state resident."* The complaint must include a description of the alleged violations and the *"actions constituting the violation"* and the *"date and locations where such actions occurred."* A complaint based *"solely or primarily"* on *"national origin, ethnicity or race"* shall be deemed as invalid. (285.535.2 RSMo)

A written complaint which the Attorney General determines to be valid triggers steps in a detailed enforcement process which may result in the complaint being dismissed or by the Attorney General initiating actions to impose sanctions regarding city or county business licenses and/or termination of public contracts and suspension of public contractors.

For a detailed step by step explanation of the enforcement process see the attached ***Explanation of Penalties and Enforcement Process (Enclosure #1, pages 1 thru 3)*** prepared by AGC of Missouri.

III. COMPLIANCE – ANSWERS TO QUESTIONS SPECIFIC TO THE CONSTRUCTION INDUSTRY

A. BUSINESS ENTITY ACTING AS A “CONTRACTOR”

1) QUESTION: What construction companies, materials suppliers and service providers are subject to requirements for “contractors” under employer provisions of HB 1549 (285.525 – 285.555 RSMo)?

ANSWER: Any business entity which has a direct contract with a state agency, political subdivision or other public entity ***in excess of \$5,000*** is subject to requirements for “contractors.”

“Contractor” is defined as a business entity which enters a contract to provide any of the following:

- “Any service”; **or**
- “Work”, which is further defined to include:
 - “any job” or “task”;
 - “labor or personal services”;
 - “or any other activity for which compensation is provided”; **or**
- “A certain product in exchange for valuable consideration”.

(285.525 (2) & (11) RSMo)

Any construction company which enters a contract exceeding \$5,000 as a prime contractor is subject to contractor requirements. However, other types of businesses which enter contracts directly with a state agency, political subdivision or other public entity for any of the following are also “contractors”:

- Any product or materials;
- Provision of any “service” to the public entity:

AGC believes businesses such as construction materials suppliers, insurance brokers, providers of municipal bonds, consultants and others who directly contract with public entities are subject to requirements as “contractors”.

2) QUESTION: When is the requirement for “contractors” effective?

ANSWER: Requirements for “contractors” are effective January 1, 2009.

- 3) QUESTION: Must contracts already signed and in effect on January 1, 2009 be amended to meet the new requirements?

ANSWER: No. The state law specifies that requirements shall be “a condition for the award of any contract . . .” (285.530.2 RSMo). AGC does not believe that the requirements can be applied retroactively to contracts entered before the effective date. That was also the unofficial view of the Attorney General’s staff during a meeting on August 26, 2008. The MoDOT Counsel’s Office advises that contracts with MoDOT will also only incorporate requirements regarding HB 1549 on a prospective basis on and after January 1.

- 4) QUESTION: Who will provide the affidavits required of “contractors” when entering a contract with a state agency, political subdivision or other public entity?

ANSWER: In many cases, large public owners will provide affidavit(s) to the contractor. MoDOT will provide the required affidavit with other contract documents. The Missouri Municipal League is preparing a “model affidavit” to be provided to cities who are members. AGC also knows of certain counties which are drafting their own affidavit form.

- 5) QUESTION: What if the public owner fails to provide an affidavit to the contractor to comply with the statute? Is the contractor still required to provide the public entity with an affidavit?

ANSWER: Yes. AGC’s attorney at Armstrong Teasdale advises that a contractor who failed to provide an affidavit with the signed contract would be in violation of the statute even if the public entity did not require it. Please see the attached **Affidavit Form 1 (Enclosure #2, pages 1-4)**, which was drafted by Armstrong Teasdale for that purpose.

Unfortunately, AGC believes the owner’s failure to provide affidavit forms will be a common occurrence with smaller political subdivisions which may be totally unaware of the new state law.

- 6) QUESTION: Who may sign an affidavit?

ANSWER: Any agent of the corporation or company who is authorized to make statements on behalf of the company would be authorized to sign the affidavit. However, Armstrong Teasdale advises that “best practice” dictates that the company have a corporate resolution on file in the company records authorizing specific individuals to sign affidavits. If your company does not already have such a resolution on file, please see **Resolution Form 1 (Enclosure #3, page 1)**, for that purpose.

7) QUESTION: Can only one person in the company sign the affidavit?

ANSWER: No. The company may authorize multiple individuals. For practical purposes it may be most convenient to authorize the employee(s) who would normally sign bids or contracts for the company to sign the affidavit.

8) QUESTION: Must all affidavits be notarized?

ANSWER: Yes. Banks, law offices, title companies and certain other businesses have notaries available to the general public. However, since this affidavit must be submitted with every public contract, if you do not have a notary within your company you may wish to register someone as a notary with the Missouri Secretary of State. Information on becoming a notary is available from the Secretary of State's Office at <http://www.sos.mo.gov/business/commissions/pubs/notary>

9) QUESTION: Are "contractors" responsible for the compliance of direct subcontractors?

ANSWER: Probably, unless they impose certain requirements on their direct subcontractors. The new statute does not directly state contractors are responsible for violations of subcontractors. However, the statute provides:

*"A general contractor or subcontractor of any tier **shall not be liable** under Section 285.525 to 285.550 when such general contractor or subcontractor contracts with its direct subcontractor who violates subsection 1 of this section ["knowingly" employing unauthorized aliens] . . ." if certain requirements are imposed on the direct subcontractor. (285.530.5 RSMo)*

10) QUESTION: What requirements must a contractor impose on direct subcontractors "not to be liable"?

ANSWER: The statute requires the contractor to include a specific "contract clause" in the contract with the direct subcontractor **and** obtain a "sworn affidavit" from the subcontractor:

"Contract Clause": The contract clause must state that the direct subcontractor *"is not knowingly in violation of subsection 1 of this section ["knowingly" employing unauthorized aliens] and shall not henceforth be in such violation."* (285.530.5 RSMo).

It is unlikely that the public owner will provide such a contract clause to the prime contractor. In fact, MoDOT's contract documents will not deal with subcontractor requirements at all.

At the request of AGC, Armstrong Teasdale has drafted **Contract Clause 1 (See Enclosure #4&5, pages 1 & 3)** to meet this requirement.

“Sworn Affidavit”: The prime contractor or upper tiered subcontractor must also require a “*sworn affidavit under penalty of perjury*”, in addition to the “contract clause”: “*attesting to the fact that the direct subcontractor’s employees are lawfully present in the United States.*” (285.530.5 RSMo)

Again the prime contractor or upper-tiered sub will have to obtain a signed “affidavit form” from their direct subcontractor to obtain the protection of “not being liable” for the direct subcontractor’s compliance. Armstrong Teasdale has drafted **Affidavit Form 2** for your use for this purpose. **(See Enclosure #4&5, pages 4&5.)**

- 11) **QUESTION**: What is the “contractor’s” responsibility if the subcontractor signs a “contract clause” and submits an affidavit, but is actually employing unauthorized aliens?

ANSWER: The difficulty for the general contractor comes from the use of the term “knowingly” in section 285.530.1 RSMo. As “knowingly” is defined, if a general contractor would have reason to believe that the affidavit he has received is false, or that the subcontractor does, in fact, employ illegal aliens, he could not hide behind the false affidavit. Therefore, if the general contractor were to receive actual knowledge or factual information causing the general contractor to believe that one of the subcontractor’s employees is not lawfully present in the United States, the general contractor would then be required to insist that those persons not work on the job or risk penalties by virtue of the fact that the general contractor would have knowingly permitted an unauthorized alien to perform work.

- 12) **QUESTION**: Should a prime contractor or upper tiered subcontractor impose the above requirements on subcontractors for all public projects?

ANSWER: Probably Yes. Although the statute may be interpreted to offer the prime contractor or upper-tiered subcontractor the “option” of requiring direct subcontractors to meet these requirements in order “*not to be held liable*”, due to the expected scrutiny of public projects in enforcement of HB 1549, subcontractor compliance should be viewed as a requirement. AGC and Armstrong Teasdale advise that the upper-tiered contractor require the “contract clause” and “affidavit” from direct subcontractors on all public works projects and projects which are publicly funded with state or local loans on tax credits.

13) QUESTION: Do provisions for prime contractors or upper-tiered subs apply only to public projects?

ANSWER: No. A prime contractor or upper-tiered sub could also require the “contract clause” and “affidavit” from a direct subcontractor in order to achieve protection of “not being liable” for direct subcontractors on projects for private owners.

14) QUESTION: Is a prime contractor or upper-tiered subcontractor responsible for obtaining or confirming that a “contract clause” and “affidavit” have been obtained from subcontractors to his or her direct subcontractor and their sub-subs?

ANSWER: No. The upper-tiered contractor is responsible only for his or her direct subcontractor. The statute is very clear that the responsibility for compliance of “subs” moves up only one tier in the contracting chain. The concept is that each contractor in the contracting chain is responsible only for obtaining the contract clause and affidavit from the subcontractor with which that company has a direct contract.

15) QUESTION: Are “contractors” or “upper-tiered” subcontractors responsible for their direct subcontractors’ actual compliance with the “contract clause” and “affidavit”?

ANSWER: No, unless they have “actual” or “constructive” knowledge the subcontractor employs unauthorized aliens. AGC and Armstrong Teasdale believe that if specified contract documents have been obtained from the direct subcontractor in connection with the contract, the upper-tiered contractor would not be in violation if those promises by the direct subcontractor are violated by knowingly employing “unauthorized aliens” or employing individuals who are not lawfully present, unless the contractor knew or had reason to know the illegal workers were being employed by the subcontractor. (Also see Question 11, page G-10.)

B. BUSINESS ENTITY ACTING AS A "SUBCONTRACTOR"

1) QUESTION: Who is defined as a subcontractor?

ANSWER: Unfortunately the employer provisions of HB 1549 do not define the term "*subcontractor*". However, the statute defines the term "*business entity*" to include "*contractors and subcontractors*". (285.525 (1) RSMo).

The statute further defines "*contractor*" to include any "*business entity*" which: "*enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration.*" "*Contractor*" is also specifically defined by the statute to include "*subcontractors.*" (285.525 (2) RSMo)

2) QUESTION: Will "subcontractors" be required by the upper tiered contractor on public projects to sign a "contract clause" that they are not "knowingly" employing unauthorized aliens and an "affidavit under the penalty of perjury" that all of their employees are "lawfully present in the United States"?

ANSWER: Probably Yes. HB 1549 will likely be interpreted to impose these subcontractor requirements on all public projects. Some contract documents being drafted by local governments require by contract that the prime contractor impose these requirements on their direct subcontractor. A probable enforcement focus on "contracts with public entities" also indicates these assurances by subcontractors will be mandatory.

See Q & A for Question 10, 11 and 12 regarding "contractors" (pages G-9 & G-10 of this Guidance) for further explanation.

3) QUESTION: What are the "penalties for perjury" regarding the affidavit that all "employees are lawfully present"?

ANSWER: Perjury is a crime described in section 575.040 RSMo. A person commits the crime of perjury if, with the purpose to deceive, he "knowingly" makes a false statement of material fact in an affidavit. Perjury is a class D felony which is punishable by a term of imprisonment of one to four years and a fine up to \$5,000 dollars.

The potential penalty for perjury is the mechanism by which compliance of lower tiered subcontractors is compelled. In all likelihood, if a false affidavit is supplied, the general contractor would be absolved from liability by receipt of the false affidavit but the maker of the false affidavit and the company he works for, would be subject to penalties of perjury.

- 4) QUESTION: If the upper tiered contractor or subcontractor fails to provide the specified "contract clause" and "affidavit" form to their direct subcontractor, is the subcontractor required to amend the contract and provide their own affidavit form to the upper tiered contractor?

ANSWER: No. Subcontractors are only subject to signing or providing these documents as required of them by the upper tiered contractor.

- 5) QUESTION: May such requirements on subcontractors on public contracts also be required of subcontractors by the prime contractor or an upper tiered subcontractor on projects for private owners?

ANSWER: Yes. Upper tiered contractors on private projects may also opt to provide themselves with the protection of "not being liable" for subcontractors' violations by applying these requirements to subcontractors the next tier down in the contracting chain.

- 6) QUESTION: Can "materials suppliers" who contract with construction contractors or subcontractors to provide materials for a public or private project be deemed to be "subcontractors"?

ANSWER: Probably Yes. How a court will rule in interpreting a poorly written statute is uncertain. However, "contractor" is defined to include "business entities" which "provide a certain product in exchange for valuable consideration." "Contractor" is also specifically defined to include "subcontractors." (285.525 (1) & (2) RSMo)

- 7) QUESTION: Can "service providers" be deemed subcontractors?

ANSWER: Possibly Yes. Again the statutory definition of "business entity" includes the term "contractor" which is defined to include persons who "perform any service." "Contractor" is defined to include any "subcontractor." (285.525 (1) and (2) RSMo)

- 8) QUESTION: Would a "materials supplier" providing materials for a subcontractor to stockpile in his yard or a "service provider" which contracts for services in general support of a contractor's business be likely to be deemed to be a subcontractor? What if products or services are provided for a specific public project?

ANSWER: For public projects imposition of the requirements of HB 1549 for prime contractors is triggered by “award of any contract by the state or any political subdivision of the state . . .” (285.530.2 RSMo). Likewise requirements on subcontractors would probably be triggered by a contract with the prime contractor or upper tiered subcontractor to provide products or services for that specific project.

For example, a quarry operator who sells aggregate to a contractor to be stockpiled by the contractor for use on multiple jobs would likely not be deemed a “subcontractor” for a specific public project. However, if the quarry operator quotes a price for providing aggregate for purposes of a specific public project, most likely that company is a subcontractor for purposes of the contract with the state or a political subdivision. Surety agents who provide a bond for a specific public project may also be held to be subcontractors.

- 9) QUESTION: What about “materials suppliers” or “service providers” which quote a specific price for a product or service for a private project?

ANSWER: Likewise, if an insurance broker writes a workers compensation policy or commercial general liability policy for overall coverage of a contractor, the insurance broker is likely not a subcontractor. However, if the insurance broker provides a “builders risk” or other policy specific to the public project upon which the contractor is performing work, the company may be deemed to be a subcontractor.

- 10) QUESTION: Are “subcontractors” (construction contractors acting as subcontractors, probably materials suppliers and possibly service providers) required to participate in a Federal Work Authorization Program?

ANSWER: No. There is nothing in HB 1549 which specifically states that subcontractors must participate in a Federal Work Authorization program.

- 11) QUESTION: Should “subcontractors” (as described under Question 10 above) participate in a Federal Work Authorization Program?

ANSWER: Yes. Subcontractors do not control when the requirements to sign the “contract clause” and provide the “affidavit” will be required from them on a public or private project. Those requirements are decided by the application of HB 1549 to a public project, contract specifications of the project owner, or a contractor’s decision to impose those requirements on a private project.

Participating in a Federal Work Authorization Program will help the subcontractor prove that the “company” did not “knowingly” hire unauthorized aliens by providing an “affirmative defense” to that effect.

- 12) QUESTION: Does participation in a Federal Work Authorization Program assure that all of the subcontractor’s employees are “lawfully present in the United States”?

ANSWER: No. The only Federal Work Authorization Program currently in operation by the US Department of Homeland Security is known as “E-Verify.” “E-Verify” has been shown by various studies, including studies by the US Governmental Accountability Office, to have a significantly high error rate due to inaccuracies in the Social Security Administration database through which it operates and its lack of capability to detect “identity fraud” as perpetrated by an employee through phony documents.

The state requirement upon subcontractors to attest that “*all employees are lawfully present*” goes far beyond federal law. Federal law provides an “affirmative defense” from federal prosecution to employers complying with the Form I-9 process and only prohibits “knowingly” employing unauthorized aliens. HB 1549 applies penalties to subcontractors regardless of whether having an unauthorized worker in their workforce is a “knowing” violation, a simple mistake by the employer or E-Verify, or a fraud by the employee.

- 13) QUESTION: If belonging to E-Verify does not assure every employee is “lawfully present”, why should subcontractors belong to E-Verify?

ANSWER: Because perjury is a “knowing” violation (swearing to a fact which the person signing the affidavit knows to be false). If the subcontractor is processing all new hires through E-Verify, a defense can be made that the employer made every effort to avoid hiring unauthorized workers.

C. STATE LAW (HB 1549) AS RELATED TO REQUIREMENTS OF "FEDERAL WORK AUTHORIZATION PROGRAMS" ("FWAPs")

1. QUESTION: When must contractors or subcontractors using an FWAP in relation to HB 1549 be enrolled and processing employees through the program?

ANSWER: HB 1549 provisions are effective January 1, 2009, so the employer should be enrolled and using the electronic verification system on or prior to January 1. However, rules of the US Department of Homeland Security require that new employees be processed through the system starting on the date the Memorandum of Understanding (**See Questions 3 & 4 in Section IV, pages G-19 & G-20**) is signed by the representatives of the employer, the Department and the Social Security Administration. (**See Enclosure #6.**) For example, if an employer enrolled and the MOU was effective on December 10, 2008, all employees hired from that date forward would have to be verified, even though HB 1549 does not become effective until January 1, 2009.

2. QUESTION: Is there more than one "FWAP" in which any employer can enroll to satisfy the provisions of HB 1549?

ANSWER: No. HB 1549 defines a "Federal Work Authorization Program" as "*any of the work authorization programs operated by the United States Department of Homeland Security . . .*" (285.525 (6) RSMo), implying that an employer has a choice from multiple federal electronic verification programs. However, the federal government has only ever operated one program, which is still in effect and is now known as "E-Verify".

The original authorization for "E-Verify" expired in mid-November 2008, but has temporarily been extended by the US Congress through March 6, 2009. AGC of America advises that "E-Verify" is expected to be permanently renewed and there are no other federal electronic work authorization programs on the horizon. Therefore, although HB 1549 offers an employer a choice of programs, in reality there is only one program, "E-Verify".

3. QUESTION: Do provisions of HB 1549 for public projects require that all employees of a contractor or subcontractor be processed through "E-Verify", or must only the work eligibility of "new hires" be confirmed through the system?

ANSWER: New hires only. There has been debate about whether the language “employees working in connection with contracted services” in the provision regarding the contractor’s affidavit (285.530.2 RSMo) requires verification of all company employees. However, the provision of HB 1549 regarding voluntary participation in an FWAP by employers who are not public contractors requires verification of the “employment eligibility of every employee in the employer’s hire **whose employment commences after the employer enrolls in a federal work authorization program.**” (285.530.4 RSMo) This is a clear statement that HB 1549 only requires electronic verification of “new hires.” Furthermore, the Memorandum of Understanding required by the US Department of Homeland Security for employers using “E-Verify” requires:

*“The employer agrees not to use E-Verify procedures for re-verification, or for employees hired before this MOU was in effect.”
(Item C. (8) US Department of Homeland Security E-Verify MOU,
Revised July 18, 2007)*

4. **QUESTION:** What about administrative personnel or crews hired on or after January 1, 2009, who work only in the office or on private projects – do company employees hired for those purposes also have to be “E-Verified”?

ANSWER: Yes. Although HB 1549 provides that only employees hired for the public project are required to be E-Verified, the Memorandum of Understanding required by US Department of Homeland Security requires that all new hires of an employer enrolled in “E-Verify” must be processed through the system.

5. **QUESTION:** What determines the steps an employer must take if a newly hired employee’s work eligibility is not confirmed by “E-Verify” – state law and state enforcement authorities or federal regulations and the US Department of Homeland Security?

ANSWER: Both state law and the Attorney General and local Missouri licensing authorities with enforcement responsibilities and US Department of Homeland Security regulations regarding operation of E-Verify and federal immigration laws would operate in resolution of ineligibility issues, steps required of the employer and sanctions if there are violations. See the attached ***Explanation of Penalties and Enforcement Process (Enclosure #1, pages 1 thru 3)*** regarding HB 1549.

HB 1549 also provides:

“Section 285.525 to 285.550 [the employer provisions of HB 1549 in their entirety] shall not be construed to deny any procedural mechanisms or legal defenses included in a federal work authorization program.” (285.535.10 RSMo)

(See Enclosure #6).

See Question # 7, page G-20, in Section IV for references to information on the operation of federal law regarding “E-Verify.”

IV. ENROLLMENT AND COMPLIANCE WITH "E-VERIFY" – QUESTIONS AND ANSWERS

- 1) QUESTION: What is my company required to do by federal law and regulation to participate in "E-Verify"?

ANSWER: The basic steps for an employer are:

- Read and sign a nine-page Memorandum of Understanding (MOU) specifying the responsibilities of the US Department of Homeland Security, the Social Security Administration and the employing company. **(See Enclosure #6 for a complete copy of the MOU.)**
- Require any "Employer Representative" who will perform employment verification queries to complete an on-line "E-Verify Tutorial" which includes a test which must be passed to activate the system.
- Display notices provided by the US Department of Homeland Security notifying prospective employees of the employer's participation in the system.

- 2) QUESTION: How long will it take my company to complete the steps for enrollment in "E-Verify"?

ANSWER: AGC member companies who have previously voluntarily enrolled report varying amounts of time depending on the individual and on how much uninterrupted time the individual can devote to enrollment and the tutorial. However, if an uninterrupted concentrated period of time can be devoted to the task by an individual accustomed to dealing with governmental regulations, the process can be completed in one day and possibly as little as one-half day.

- 3) QUESTION: What must my company do regarding new employees once enrolled?

ANSWER: The employer must initiate the "E-Verify" verification procedures within three "employer business days" after each new employee has been hired. The requirement to process all "new hires" through "E-Verify" commences on the date the MOU is signed by all parties.

4) What can't employers do in use of E-Verify?

ANSWER: Federal law and regulation and the employer's MOU **prohibits:**

- Using "E-Verify" as a screening device for prospective employees by initiating a query before the individual is actually hired.
- Selectively processing newly hired employees through "E-Verify." All new employees regardless of citizenship status must be submitted to "E-Verify." It is a violation of federal discrimination laws to selectively submit employees to "E-Verify" based on ethnicity, national origin, foreign appearance or language spoken.
- Use of E-Verify to verify or re-verify the work authorization status of employees hired before the MOU was in effect. Except for requirements imposed by Federal Acquisitions Regulations on certain federal contractors, E-Verify must be used for new employees only and is prohibited from being used for the company's entire workforce.

5) What if my company hires employees through several different branch offices?

ANSWER: See I Am an Employer, How Do I Use E-Verify (U.S. Citizenship and Immigration Services, M-655, September, 2007) which is enclosed. **(See Enclosure #7).**

6) QUESTION: Can I process new employees through "E-Verify" through a third party administrator, rather than using company employees?

ANSWER: Yes, if the administrator meets qualifications set by the US Citizenship and Immigration Services. **(See Enclosure #7).**

7) QUESTION: Is everything in the federal I Am an Employer bulletin applicable to Missouri employers, under HB 1549?

ANSWER: No. The federal bulletin states "E-Verify" is a voluntary program, which is not correct for Missouri employers required to use "E-Verify" by HB 1549.

8) QUESTION: What do I do if a new employee's employment eligibility is not initially confirmed by E-Verify:

ANSWER: Both federal and state laws set out a process to resolve employment status:

Federal Law:

- See Article II.C. and Article III of the "Memorandum of Understanding" (**See Enclosure #6**).
- Also consult the "**E-Verify User Manual**" (**US Citizenship and Immigration Services, M-574, April 2008**) which can be accessed at http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf

State Law:

- See **Explanation of Penalties and Enforcement Process** (**See Enclosure #1, page 1 thru 3**).

9) QUESTION: Does participation in "E-Verify" excuse my company from completion of "Form I-9" for new employees?

ANSWER: No. Federal law and regulation and the employer's Memorandum of Understanding upon enrolling in "E-Verify" require that E-Verify is in addition to Form I-9. All employers must complete a Form I-9 within three business days of hiring a new employee whether they participate in "E-Verify" or not.

ENCLOSURE LIST

AGC of Missouri GUIDANCE

EMPLOYER REQUIREMENTS OF HB 1549

<u>Explanation Of Penalties And Enforcement Process</u>	Enclosure #1
Instructions & Affidavit Form 1	Enclosure #2
Resolution Form 1	Enclosure #3
Contract Clause 1	Enclosure #4
Instructions & Affidavit Form 2	Enclosure #5
“E-Verify” Memorandum of Understanding	Enclosure #6
<u>I Am an Employer</u> , (US Citizenship and Immigration Service)	Enclosure #7