

QUESTIONS

1) How does the statute apply to a contractor who is an individual with no employees?

O.C.G.A. § 13-10-90(2) defines “contractor” as “a person or entity that enters into a contract for the physical performance of services.”

O.C.G.A. § 13-10-91(b)(5) further provides, in part, as follows:

[i]n lieu of the affidavit required by this subsection, a contractor, subcontractor, or sub-subcontractor *who has no employees* and does not hire or intend to hire employees for purposes of satisfying or completing the terms and conditions of any part or all of the original contract with the public employer *shall instead provide a copy of the state issued driver’s license or state issued identification card of such contracting party* and a copy of the state issued driver’s license or identification card of each independent contractor utilized in the satisfaction of part or all of the original contract with a public employer. A driver’s license or identification card shall only be accepted in lieu of an affidavit if it is issued by a state within the United States and such state verifies lawful immigration status prior to issuing a driver’s license or identification card. . . .

(Emphasis added). Thus, a public employer must require a contractor with no employees to submit a copy of his or her driver’s license or state issued identification card before entering into an agreement for the performance of labor or services as a result of a bidding process or where the labor or services exceed \$2,499.99. *See* O.C.G.A. § 13-10-91(b)(1). A public employer should also be aware that O.C.G.A. § 13-10-91(b)(5) provides that “[i]n the event that a contractor, sub-contractor, sub-subcontractor later determines that he or she will need to hire employees to satisfy or complete the physical performance of services under an applicable contract, then he or she shall first be required to comply with the affidavit requirements of this subsection.” In sum, a solo contractor must provide a state agency with a valid driver’s license or state issued identification card prior to entering into a contract for the physical performance of services and should the contractor need to hire employees to complete the terms of the contracts then the contractor is required to submit an affidavit attesting to his or her compliance with E-verify.

2) Does the statute apply only to contracts that are solely for services or also to contracts for goods that include ancillary services, such as copier maintenance or software with IT support services (often provided from overseas)?

Whether a contract is for “performance of labor or services . . . using a bidding process or by contract wherein the labor or services exceed \$2,499.99,” as provided for in O.C.G.A. § 13-10-90(4), will depend on the facts of the particular situation. When in doubt, it would be prudent to err on the side of caution and obtain an affidavit from the contractor in accordance with the E-verify requirements of O.C.G.A. § 13-10-91(b)(1).

Given the limited information provided for each of the hypothetical situations described above, it is difficult to determine whether the E-verify requirements as revised in Senate Bill 160 would apply to the proposed contracts. Arguably, an agreement that provides “maintenance” or “support” services in addition to the actual goods received, could be construed as a contract for “labor and services” from the vendor providing maintenance services. Whether such an agreement is subject to E-verify requirements also depends on if the contract is for the “physical performance of services,” namely, is the contract subject to a bidding process or does the cost of the contract exceed \$2,499.99. *See* O.C.G.A. §§ 13-10-91(b)(1) and 13-10-90(4). Should a contract meet these requirements, it would appear that compliance with E-verify is required and a public employer entering such an agreement is urged to obtain an affidavit from the contractor pursuant to O.C.G.A. § 13-10-91(b)(1). If you have a question regarding compliance requirements related to a specific contract, please forward a description of the transaction along with the underlying agreement so that our office can evaluate the applicability of E-verify.

- 3) Does the statute apply to a foreign national or foreign group that does not have US employees and would not/could not register with eVerify? Examples would include a foreign symphony orchestra that performs on campus, shipment of scientific equipment on campus, IT services provided from abroad. These are often sole source transactions.**

If the literal language of O.C.G.A. § 13-10-91(b)(1) as amended by Senate Bill 160 were followed, a foreign symphony, whose musicians are presumably residents of a foreign country and usually perform outside the United States, would be required to obtain an E-verify affidavit in order to perform at a university in Georgia. Such a result would arguably be an absurdity, which could not have been intended by the General Assembly.³

As the issue is presented in this question, it would not appear reasonable to require an affidavit from the foreign symphony. The contracting state entity should take steps to ensure that the

symphony musicians are otherwise authorized by law to perform in the United States, including but not limited to having an appropriate visa.

Likewise, requiring a state entity to comply with E-verify requirements when receiving a shipment of equipment from a foreign country or obtaining IT services that are performed in a foreign country would appear to be unreasonable, as it would require a state entity to obtain an E-verify affidavit from a resident of a foreign country who is performing work in that foreign country. E-verify is a tool to assist employers in determining whether an employee is eligible to work in the United States, as employment of an unauthorized alien is unlawful under federal law. *See* 8 U.S.C.S. § 1324(a). Common sense dictates that it is irrelevant whether a resident of a foreign country performing work in that foreign country is eligible to work in the United States. Thus, requiring an E-verify affidavit in such a situation would produce an absurd result, which could not have been intended by the General Assembly.

Given that the stated purpose of Senate Bill 160 is to ensure a legal and eligible workforce in accordance with federal immigration and employment, requiring compliance with E-verify in this instance would not promote the purpose of the statute. Work performed in a foreign country by a resident of that country would not appear to implicate federal immigration and employment laws at all. As the issue is presented in this question, it does not appear reasonable to require a contractor, whose employees are residents of a foreign country and performing labor or services in that foreign country, to comply with the requirements of E-verify. Again, should you have questions regarding the applicability of E-verify to specific contracts similar to these hypothetical situations, please feel free to forward descriptions of the transactions and the underlying agreements to our office so that we can provide more specific advice regarding the applicability of E-verify to each contract and fact situation.