



Materials Management Division

Executive Order 08-01 Regarding Illegal Immigration - FAQs



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Executive Order 08-01 Regarding Illegal Immigration

Frequently Asked Questions (FAQs)

Note: These FAQs relate solely to the second provision in Executive Order 08-01 regarding state contracts.

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contracts?

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30. **Why does the EO address all employees in the United States rather than just in Minnesota?**
31. **New 10/14/2008** Does the EO apply to contracts or memorandums of understanding between government entities?
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Frequently Asked Questions (FAQs)

1. What does Executive Order 08-01 (EO) require with respect to state contracts?

To the extent consistent with the Commissioner of Administration's authority over state procurement as set forth in [Minnesota Statutes, Chapter 16C](#), and the applicable administrative rules, the Commissioner of Administration will implement procedures to ensure that future state contracts in excess of \$50,000 are awarded to vendors which are in compliance with federal employment verification laws including:

- a. Developing language for state contracts that requires vendors and subcontractors to certify compliance with the Immigration Reform and Control Act of 1986 in relation to employees performing work in the United States, and that the vendor and subcontractors do not knowingly employ persons in violation of the United States immigration laws.
- b. Requiring certification from vendors and subcontractors that, as of the date services on behalf of the State of Minnesota will be performed, the vendor and all subcontractors have implemented or are in the process of implementing the E-Verify program for all newly hired employees in the United States who will perform work on behalf of the State of Minnesota.
- c. Developing language for state contracts that allows the state to terminate the contract and/or debar the vendor if the Commissioner of Administration determines that the vendor or subcontractor within the control of the contract vendor has knowingly employed ineligible workers in violation of the federal immigration laws.

2. When did the EO go into effect?

January 29, 2008 (15 days after publication of the EO in the *State Register*).

3. Do businesses with existing state contracts valued above \$50,000 need to take immediate action to comply with the EO?

No. Businesses with existing contracts are not required to take any immediate action. However, a business wishing to be proactive could take steps to implement the E-Verify program before it becomes a condition of eligibility for future state contracts.

4. When does the EO impact companies already doing business with the state?

The EO is not retroactive. State vendors will be asked to certify compliance with the EO when and if (1) they respond to a solicitation for a new state contract or (2) their existing contract is extended or otherwise amended after January 29, 2008.

5. Does the EO apply to contracts with executive branch state agencies other than the Department of Administration?

Yes. The EO applies to all "agencies" as defined in Minn. Stat. 16C.02, Subd. 2: "'Agency' means any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of government. Unless otherwise provided elsewhere in this chapter, agency does not include the Minnesota State Colleges and Universities."

6. Does the EO apply to the Department of Human Services' "provider agreements" with medical vendors?

No. Provider agreements are defined as the applications and participation agreements that all Minnesota Health Care Program (MHCP) providers must sign and submit to the Minnesota Department of Human Services in order to enroll as an MHCP provider, as required by 42 CFR 431.107 and Minn. Rules, Part 9505.0195, Subp. 2. Provider agreements are exempt from a number of requirements relevant to state contracts.

7. Does the EO apply to the Department of Human Services' other medical service contracts?

"Alternative Payment System" contracts are paid through designated grant funds on behalf of third-party beneficiaries and not subject to the EO. However, some other medical services contracts are included within the scope of the EO.

Vendors wishing to be proactive may seek clarification from the Department of Human Services. (Contact **Rae Bly** at 651.431.3596 or **Jay Brunner** at 651.431.3599.) Alternatively, vendors could wait to see if they will be asked by the agency to certify participation in E-Verify as a condition of a contract award or amendment.

8. Does the EO apply to the Department of Transportation's (Mn/DOT's) highway construction contracts?

The EO does not apply to the highway construction and maintenance contracts awarded by Mn/DOT under Minn. Stat. Chapter 161. It does apply to professional/technical contracts, including highway engineering contracts, and others awarded under Minn. Stat. Chapter 16C. Vendors wishing to be proactive may wish to seek clarification from the department to determine which category applies to a specific contract. Alternatively, vendors could wait to see if they will be asked by Mn/DOT to certify participation in E-Verify as a condition of a contract award or amendment.

9. **Does the EO apply to contracts awarded by metropolitan agencies (e.g. Metropolitan Council, Metropolitan Airports Commission)?**

No. Metropolitan agencies are not state agencies as defined in #5 above.

10. **Does the EO apply to contracts awarded by the University of Minnesota?**

No. The U of M is not an executive branch agency.

11. **Does the EO apply to contracts awarded by Minnesota State Colleges and Universities (MnSCU)?**

No. MnSCU is not a state agency as defined in Minn. Stat. Chapter 16C unless explicitly included as such.

12. **Does the EO apply to contracts awarded by constitutional offices, the legislature or the state judicial system?**

No. These entities are not executive branch "agencies" as defined in #5 above.

13. **Does the EO apply to contracts awarded by local units of government in Minnesota?**

No. The EO only applies to executive branch "agencies as defined in #5 above.

14. **Does the EO apply to grant recipients?**

No. The EO does not apply to "grants" as defined in Minn. Stat. 16B.97: "A grant agreement is a written instrument or electronic document defining a legal relationship between a granting

agency and a grantee when the projected purpose of the relationship is to transfer cash or something of value to the recipient to support a public purpose authorized by law instead of acquiring by professional or technical contract, purchase, lease, or barter property or services for the direct benefit or use of the granting agency." If receiving a business subsidy from the Department of Employment and Economic Development, see 15 below.

15. Does the provision of the EO regarding state contracts apply to companies receiving business subsidies from the department of employment and economic development?

Yes. A separate provision of the EO relates specifically to these businesses and creates an incentive for them to use E-Verify. However, the contract-related provision applies if they enter into contracts to provide goods or services to the state.

16. How is it determined which contracts will be "in excess of \$50,000"?

EO language requiring the Commissioner of Administration to "ensure that state contracts in excess of \$50,000 are given to vendors which are in compliance," indicates that any judgment calls should err on the side of inclusion. Contracting officials will indicate in the relevant procurement documents whether a contract and any anticipated amendments may exceed \$50,000.

17. How are "vendors" defined for purposes of the EO?

Minn. Rule 1230.0150 defines "vendor" as "a natural person or a business and includes both if the natural person is engaged in a business.

18. How are "subcontractors" defined for purposes of the EO?

"Subcontractors" are not defined in state procurement law. However, a "contractor" is defined in Minn. Rule 1230.0150 as "a business that is engaged in construction such as general, mechanical, or electrical contracting, or that provides a specific service such as trash removal, snow removal, janitorial services, or professional or technical services."

Given the legal definition of "contractor," it is reasonable to conclude that "subcontractors" for purposes of the EO are (1) businesses that meet the definition of "contractor" above, (2) will participate in the performance of the state contract, and (3) have a contractual relationship with an entity other than the state.

For purposes of the EO, subcontractors do NOT include suppliers of goods.

The EO intends to assure that prime vendors retain accountability for any subcontractors and to assure that the policy is not evaded by using chains of multiple subcontractors. Therefore, lower-tier subcontractors could be required to certify their compliance. The issue is whether the subcontractor's employees are participating in the performance of the state contract, not how many layers of contractual relationships separate the subcontractor from the prime vendor.

Businesses will need to determine which subcontractors and how many layers of subcontractors require certification of compliance. If their decisions are subsequently challenged by a competitor or others, the business would be expected to defend its judgments as reasonable and consistent with good faith efforts to implement the EO.

19. How do vendors and subcontractors certify their compliance with the EO?

Vendors certify compliance by signing the state form at <http://www.mmd.admin.state.mn.us/doc/immstatcert.doc>. Vendors are responsible for obtaining certification forms from any subcontractors participating in performance of the contract. Vendors should be prepared to provide subcontractor certifications to the state or its agents if requested. Minn Stat. 16C.05, Subd. 5, requires all such contractual documents to be available for audit for a period of six years beyond the life of the contract.

20. What must a business do to be "in the process of implementing the E-Verify program" by the date of its product or service delivery?

Vendors and subcontractors must be able to document that have signed the E-Verify memorandum of understanding (MOU) which commits them to implementation of the program. The MOU can be reviewed at <http://www.uscis.gov/files/nativedocuments/MOU.pdf>.

21. How will the state verify compliance with the EO?

The state procurement staff does not intend to make independent judgments as to whether employers are in violation of federal immigration law. The state will follow up when it receives allegations of violations. Most frequently, the follow-up would include inspection of subcontractor certifications or documentation of participation in E-Verify. Follow-up could also include referral to immigration authorities.

State agency compliance with the EO could potentially be reviewed in the course of contract audits by the department of Administration, the Office of the Legislative Auditor or other agents of the state.

22. What are the consequences for a vendor or subcontractor who does not certify compliance with the EO?

Certification is a requirement for receipt of state contracts. In most cases, the vendor would not receive the state contract in question. In rare situations, the state could proceed to award the contract to a noncompliant vendor if it was determined by the Commissioner of Administration to be in the state's best interest.

23. What are the consequences for a vendor or subcontractor who falsely certifies compliance with the EO?

The matter would be reviewed for the appropriate action, which could include termination of the contract, referral to federal immigration authorities, and/or suspension or debarment of the vendor from future state procurement opportunities.

24. How will the state determine the consequences of non-compliance?

The Commissioner of Administration will need to make a fact-specific assessment on a case-by-case basis. Two factors which would be considered are (1) any evidence as to whether the noncompliance was willful or unintentional and (2) adverse consequences for the state if the contract is cancelled or the vendor is debarred.

25. Can vendors or subcontractors request to be exempt from the EO?

No.

26. How can a business learn about its obligations under the Immigration Reform and Control Act of 1986 and other relevant federal immigration laws?

The specific law referenced in the EO is at:

<http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=2b289cf41dd6b70a61a078a9fbfbc379>.

A comprehensive reference to all federal immigration laws is found on the "immigration legal page" of the U.S. Citizenship and Immigration Services website:

<http://www.uscis.gov/portal/site/uscis/menuitem. eb1d4c2a3e5b9ac89243c6a7543f6d1a/? vgnnextoid=02729c7755cb9010VgnVCM10000045f3d6a1RCRD& vgnnextchannel=02729c7755cb9010VgnVCM10000045f3d6a1RCRD>.

27. How can a company learn more about the E-Verify program?

Complete program information and registration instructions are at the U.S. Citizenship and Immigration Services web-site:

<http://www.uscis.gov/portal/site/uscis/menuitem. eb1d4c2a3e5b9ac89243c6a7543f6d1a/? vgnnextoid=6a0988e60a405110VgnVCM1000004718190aRCRD& vgnnextchannel=6a0988e60a405110VgnVCM1000004718190aRCRD>.

28. Can a vendor or subcontractor limit its participation in E-Verify to its newly hired employees who will work on the state contract?

No. The federal instructional bulletin "I am an Employer..., How Do I Use E-Verify?" states that the employer "can choose which sites to enroll. However, each site that has signed an MOU must verify the status of **all** new hires for that site."

Any time the state requirements outlined in the EO are less stringent than the formal requirements of the federal E-Verify system, the federal requirements will apply.

As with the subcontractor issue, the scope of a vendor's participation in E-Verify may involve case-specific judgment calls. Again, if those judgments are subsequently challenged by a competitor or others, the vendor or subcontractor would be expected to defend its judgments as reasonable and consistent with good faith efforts to implement the EO.

29. If a manufacturer has multiple plants whose products are purchased by the State of Minnesota, must all the locations participate in E-Verify?

Yes. The EO requires use of E-Verify "for all newly hired employees in the US who will perform work on behalf of the State of Minnesota."

30. **Why does the EO address all employees in the United States rather than just in Minnesota?**

The EO intends to use the state's purchasing power to assist enforcement of federal immigration laws - an issue that is not contained within one state's borders. Additionally, if the EO was limited to employees at Minnesota locations, it could provide an unfair competitive advantage to businesses outside of Minnesota and could provide an incentive for vendors with operations in both Minnesota and other states to have state contract work performed in those other states rather than in Minnesota.

31. **Does the EO apply to contracts or memorandums of understanding between government entities?**

No. If all parties to an agreement are governmental units, the EO does not apply.

32. **Are any other types of contracts exempt from the EO?**

Yes. Investment professional/technical contracts of the MN State Investment Board are exempt.

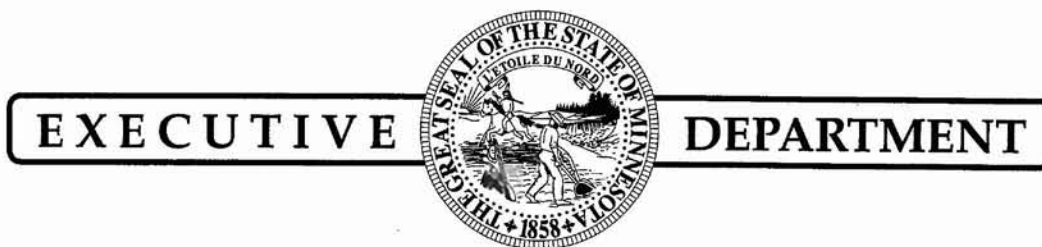
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STATE of MINNESOTA



TIM PAWLENTY
GOVERNOR

EXECUTIVE ORDER 08-01

**REQUIRING USE OF E-VERIFY FOR NEWLY
HIRED EMPLOYEES IN THE EXECUTIVE BRANCH AND
REQUIRING CERTIFICATION OF COMPLIANCE
WITH FEDERAL IMMIGRATION LAWS FOR
STATE CONTRACT VENDORS AND EMPLOYERS
RECEIVING BUSINESS SUBSIDIES**

I, TIM PAWLENTY, GOVERNOR OF THE STATE OF MINNESOTA, by virtue of the authority vested in me by the Minnesota Constitution and applicable statutes, do hereby issue this executive order:

WHEREAS, the federal Immigration Reform and Control Act of 1986, as amended, requires all employers, including the state, to verify and maintain documentation that every newly hired employee is legally entitled to work in the United States; and

WHEREAS, the state of Minnesota must comply with federal immigration laws as an employer, however, the state should also use its role as a purchaser of goods and services and use state procedures for granting business incentives to ensure that employers that receive benefits funded by state tax dollars comply with federal immigration laws; and

WHEREAS, the federal Department of Homeland Security, the Social Security Administration and the United States Citizenship and Immigration Service have created an electronic employment verification system called *E-Verify* to assist employers in electronically verifying the employment eligibility of newly hired employees; and

WHEREAS, *E-Verify* allows employers to compare certain types of work eligibility documentation required by the federal Immigration Reform and Control Act of 1986, with certain records maintained by the Social Security Administration and Department of Homeland Security, and includes a new photo screening tool which allows an employer to check the photo of a newly hired employee against certain immigration related photo databases; and

WHEREAS, although *E-Verify* may not be a perfect system, it represents the best technology currently available to employers for complying with federal laws requiring employers to verify legal work eligibility.

NOW, THEREFORE, I hereby order:

1. Consistent with the Commissioner of Employee Relations' authority in relation to employees of the executive branch pursuant to Minnesota Statutes, Chapter 43A, the Commissioner of Employee Relations will implement measures to ensure that all newly hired executive branch employees are legally eligible to work, including:
 - a. Requiring all hiring authorities within the executive branch of state government to use the federal electronic work verification program ("*E-Verify*.”)
 - b. Oversee training for state executive branch appointing authorities on use of *E-Verify*.
 - c. Conduct annual random audits of appointing authorities in the executive branch to ensure compliance with this Order.
2. To the extent consistent with the Commissioner of Administration's authority over state procurement as set forth in Minnesota Statutes, Chapter 16C and the applicable administrative rules, the Commissioner of Administration will implement procedures to ensure that state contracts in excess of \$50,000 are given to vendors which are in compliance with federal employment verification laws including:
 - a. Developing language for state contracts that requires vendors and subcontractors to certify compliance with the Immigration Reform and Control Act of 1986 in relation to employees performing work in the United States, and that the vendor and subcontractors do not knowingly employ persons in violation of the United States immigration laws.
 - b. Requiring certification from vendors and subcontractors that, as of the date services on behalf of the State of Minnesota will be performed, the vendor and all subcontractors have implemented or are in the process of implementing the *E-Verify* program for all newly hired employees in the United States who will perform work on behalf of the State of Minnesota.
 - c. Developing language for state contracts that allows the state to terminate the contract and/or debar the vendor if the Commissioner of Administration determines that the vendor or subcontractor within the control of the contract vendor has knowingly employed ineligible workers in violation of the federal immigration laws.
3. To the extent consistent with state law, the Commissioner of Employment and Economic Development will establish procedures for recipients of business subsidies to certify their compliance with the Immigration Reform and Control Act in relation to employees performing work in the United States. The Commissioner will also create a scoring incentive in competitive programs for businesses which implement the *E-Verify* program for newly hired employees performing work in Minnesota.

Pursuant to Minnesota Statutes 2006, Section 4.035, Subdivision 2, this Executive Order will be effective fifteen (15) after publication in the State Register and filing with the Secretary of State and will remain in effect until is rescinded by proper authority or it expires in accordance with Minnesota Statutes 2006, Section 4.035, Subdivision 3.

IN TESTIMONY WHEREOF, I have set my hand this seventh day of January, 2008.



TIM PAWLENTY
Governor

File According to Law



MARK RITCHIE
Secretary of State

