

1 HOUSE BILL NO. 297

2 INTRODUCED BY HOWARD, ARTHUN, BOULANGER, BRODEHL, HAGAN, HARRIS, KARY,
3 WARBURTON, WASHBURN, WEBB

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT MAKING EMPLOYMENT OF UNAUTHORIZED ALIENS UNLAWFUL
6 UNDER STATE LAW; REQUIRING EMPLOYERS TO VERIFY EMPLOYMENT ELIGIBILITY; PROVIDING
7 ENFORCEMENT PROCEDURES AND PENALTIES; PROVIDING FOR THE SUSPENSION OF BUSINESS
8 LICENSES OF EMPLOYERS WHO EMPLOY UNAUTHORIZED ALIENS; PROVIDING THAT AN EMPLOYER
9 HAS NOT UNLAWFULLY HIRED AN UNAUTHORIZED ALIEN IF THE EMPLOYER VERIFIES THE ALLEGED
10 UNAUTHORIZED ALIEN'S EMPLOYMENT STATUS THROUGH THE FEDERAL EMPLOYMENT
11 AUTHORIZATION PROGRAM OR OTHER APPLICABLE FEDERAL LAW; ~~PROVIDING AN AFFIRMATIVE~~
12 ~~DEFENSE FOR EMPLOYERS WHO HAVE COMPLIED IN GOOD FAITH WITH THE REQUIREMENTS OF~~
13 ~~FEDERAL LAW~~; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 1-1-411, MCA; REPEALING
14 SECTION 39-2-305, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17
18 NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 7], the following definitions
19 apply:

20 (1) "Agency" means any state, county, city, or other local government agency, department, board, or
21 commission that issues a license for purposes of operating a business in this state.

22 (2) "Department" means the department of justice provided for in 2-15-2001.

23 (3) "Employee" means any person who performs employment services within the state for an employer
24 pursuant to an employment relationship between the employee and employer.

25 (4) "Employer" means any individual or organization that transacts business in this state, that holds or
26 has applied for a license issued by an agency in this state, and that employs individuals who perform employment
27 services in this state. The term does not include an entity that hires an independent contractor to perform work
28 or the occupant or owner of a private residence who hires casual, domestic labor to perform work customarily
29 performed by a homeowner entirely within a private residence.

30 (5) "Employment authorization program" means the federal electronic verification of work authorization

1 program, known as the e-verify program as authorized by 8 U.S.C. 1324a, formally the basic pilot program under
 2 Public Law 104-208, or any successor program designated by the federal government for verification that an
 3 employee is not an unauthorized alien.

4 (6) "Knowingly employ an unauthorized alien" means to employ an unauthorized alien in violation of 8
 5 U.S.C. 1324a. This term must be interpreted consistently with that section and any federal rules and regulations
 6 adopted pursuant to that section.

7 (7) "License" means any agency license, permit, certificate, approval, registration, charter, or similar form
 8 of authorization that is required by law and that is issued by any agency for the purposes of operating a business
 9 in this state, except a license exempted under the provisions of [section 6], and includes articles of incorporation,
 10 certificates of partnership, and partnership registrations required to be filed with the secretary of state under Title
 11 35.

12 (8) "Unauthorized alien" has the meaning provided in 8 U.S.C. 1324a(h)(3).
 13

14 **NEW SECTION. Section 2. Verification of employment eligibility -- e-verify program.** (1) An
 15 employer shall, after making an offer of employment that has been accepted by an employee, verify the
 16 employment eligibility of each prospective employee:

17 (a) through the employment authorization program; ~~and~~ OR

18 (b) by requesting, receiving, and documenting lawful resident verification information from the
 19 prospective employee in compliance with the requirements of 8 U.S.C. 1324a(b).

20 (2) The verification pursuant to subsection (1) must be made within the time period stipulated by federal
 21 law after the person is hired. An employee hired prior to [the effective date of this act] that continues to be
 22 employed after [the effective date of this act] is exempt from [sections 1 through 7].
 23

24 **NEW SECTION. Section 3. Employment of unauthorized aliens -- prohibition -- false and frivolous**
 25 **complaints.** (1) An employer may not knowingly employ an unauthorized alien.

26 (2) (a) If a person has actual or constructive knowledge that an employer employs or has within 90 days
 27 employed an unauthorized alien, the person may file a complaint with the department.

28 (b) A person who knowingly files a false or frivolous complaint under subsection (2)(a) is, upon
 29 conviction, guilty of a misdemeanor.

30 (3) Upon receipt of a complaint filed under subsection (2)(a), the department shall:

1 ~~_____ (a) notify the employer that a complaint has been filed AND THAT THE EMPLOYER HAS 15 DAYS TO RESPOND~~
 2 ~~TO THE COMPLAINT;~~

3 ~~_____ (b) direct the employer to notify any employee referred to in the complaint that a complaint has been~~
 4 ~~filed; and~~

5 ~~_____ (c) investigate whether a violation of subsection (1) has occurred.~~

6 (4) When investigating whether a violation of subsection (1) has occurred, the department shall request
 7 the federal government to verify, pursuant to 8 U.S.C. 1373(c), the employment authorization status of the alleged
 8 unauthorized alien referred to in the complaint. The department may not attempt to independently make a final
 9 determination of whether an alien is authorized to work in the United States.

10 (5) If the department determines that the complaint is not false or frivolous, the department shall:

11 ~~(A) NOTIFY THE EMPLOYER THAT A COMPLAINT HAS BEEN FILED AND THAT THE EMPLOYER HAS 15 DAYS TO~~
 12 ~~RESPOND TO THE COMPLAINT. INFORMATION INCLUDED IN THE NOTIFICATION MUST INCLUDE THE NAME AND CONTACT~~
 13 ~~INFORMATION OF THE PERSON SUBMITTING THE COMPLAINT TO THE DEPARTMENT.~~

14 ~~(~~a~~)(B)~~ notify the United States immigration and customs enforcement agency of the identity of the
 15 unauthorized alien and the alien's address or location in the state, if known;

16 ~~(~~b~~)(C)~~ notify the local law enforcement agency of the presence of the unauthorized alien in the
 17 jurisdiction; and

18 ~~(~~e~~)(D)~~ hold an administrative hearing, SUBJECT TO THE CONTESTED CASE PROVISIONS OF THE MONTANA
 19 ADMINISTRATIVE PROCEDURE ACT, at which the employer may present information regarding the alleged violation
 20 of subsection (1).

21 (6) An employer has not violated this section if the employer verified the employment authorization status
 22 of the employee by using the employment authorization program. ~~An employer who establishes that OR the~~
 23 ~~employer has complied in good faith with the requirements of 8 U.S.C. 1324a(b) establishes an affirmative~~
 24 ~~defense that the employer did not violate subsection (1).~~ An employer is considered to have complied with the
 25 requirements of 8 U.S.C. 1324a(b) THIS SUBSECTION, notwithstanding an isolated, sporadic, or accidental technical
 26 or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

27
 28 NEW SECTION. Section 4. Violations -- penalties -- orders -- affidavit -- license suspension --
 29 enforcement. (1) If after holding a hearing the department finds that an employer has violated [section 3(1)], the
 30 department shall immediately issue a cease and desist order requiring the employer:

- 1 (a) to terminate the employment of all unauthorized aliens in the state; and
- 2 (b) except as provided in subsection (3), to file a signed sworn affidavit with the department within 10
- 3 business days after the order is issued attesting that the employer has corrected the violation by:
- 4 (i) terminating the employment of unauthorized aliens;
- 5 (ii) after consultation with the employee, requesting a secondary or additional verification of employment
- 6 authorization ~~using the employment authorization program~~; or
- 7 (iii) demonstrating that an attempt to terminate the employment of any unauthorized alien has been
- 8 challenged in a court of competent jurisdiction.
- 9 (2) If the employer fails to file the affidavit as required in this section, the department shall order the
- 10 appropriate agencies to suspend all licenses subject to suspension under subsection (4) that are held by the
- 11 employer. Except as provided in subsection (5):
- 12 (a) all licenses that are suspended under this subsection (2) remain suspended until the required affidavit
- 13 has been filed with the department; and
- 14 (b) upon filing of the affidavit, the suspended licenses must be automatically reinstated.
- 15 (3) The 10-day period for filing an affidavit must be tolled:
- 16 (a) during the pendency of an action under subsection (1)(b)(iii); and
- 17 (b) during any period in which the federal government allows an alien to challenge the federal
- 18 government's determination of the alien's immigration status or employment authorization.
- 19 (4) (A) Licenses that are subject to suspension under this section are all licenses that are held by the
- 20 employer and that are necessary to operate the employer's business at the employer's business location where
- 21 the unauthorized alien performed work.
- 22 (B) If a license is not necessary to operate the employer's business at the specific location where the
- 23 unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the
- 24 licenses that are subject to suspension under this section include all licenses held by the employer at the
- 25 employer's principal place of business.
- 26 (5) (A) Upon determining that there is evidence of a second or subsequent violation of [section 3] within
- 27 a 2-year period, the department shall, after providing an opportunity for a hearing as provided in [section 3], order
- 28 the appropriate agencies to suspend, ~~for at least 30 days or for a longer period of time~~ as directed by the
- 29 department PURSUANT TO SUBSECTION (5)(B), all licenses held by the employer that are necessary to operate the
- 30 employer's business at the employer's business location where the unauthorized alien performed work. If a

1 ~~license is not necessary to operate the employer's business at the specific location where the unauthorized alien~~
 2 ~~performed work, but a license is necessary to operate the employer's business in general~~ THE PROVISIONS OF
 3 SUBSECTION (4)(B) APPLY, the department shall order the appropriate agencies to suspend all licenses held by the
 4 employer at the employer's primary place of business. On receipt of an order, an agency shall immediately
 5 suspend a license ~~for at least 30 days or for a longer period~~ as directed by the department PURSUANT TO
 6 SUBSECTION (5)(B).

7 (B) (I) FOR A SECOND OFFENSE THAT IS SUBJECT TO THE PROVISIONS OF SUBSECTION (5)(A), THE EMPLOYER'S
 8 LICENSES MUST BE SUSPENDED FOR A 1-DAY PERIOD.

9 (II) FOR A THIRD OFFENSE THAT IS SUBJECT TO THE PROVISIONS OF SUBSECTION (5)(A), THE EMPLOYER'S
 10 LICENSES MUST BE SUSPENDED FOR A 3-DAY PERIOD.

11 (III) FOR A FOURTH OR SUBSEQUENT OFFENSE THAT IS SUBJECT TO THE PROVISIONS OF SUBSECTION (5)(A), THE
 12 EMPLOYER'S LICENSES MUST BE SUSPENDED FOR A 10-DAY PERIOD.

13 ~~—— (6) The department shall maintain a database of the employers who have violated [section 3(1)],~~
 14 ~~including the number and location of violations.~~

15 ~~(7)(6)~~ If an agency or employer refuses to comply with an order issued by the department under this
 16 section, the department may file an action in the district court with jurisdiction over the agency or employer for
 17 an order directing the agency or employer to comply with the department's order.

18
 19 NEW SECTION. Section 5. District court jurisdiction. The district courts have jurisdiction to decide
 20 challenges against the enforcement of [sections 1 through 7] brought by an employer subject to a complaint under
 21 [sections 1 through 7] or by the employee who is alleged to be an unauthorized alien and to enforce an order of
 22 the department as provided in [section 4].

23
 24 NEW SECTION. Section 6. License exemption -- length of suspension -- rules. The department
 25 shall, no later than 12 months after [the effective date of this act], adopt rules:

- 26 (1) establishing a procedure to be used by an agency to exempt certain licenses issued by the agency
 27 from the provisions of [sections 1 through 7] that have been determined, with the concurrence of the department,
 28 to be unrelated to operating a business in this state;
- 29 (2) establishing guidelines for the length of suspensions under [section 4(5)]; and
- 30 (3) establishing investigation, notice, and hearing procedures.

1
2 **NEW SECTION. Section 7. Construction.** The provisions of [sections 1 through 7] must be construed
3 without regard to race or national origin and in a manner that is fully consistent with applicable federal law.

4
5 **SECTION 8. SECTION 1-1-411, MCA, IS AMENDED TO READ:**

6 **"1-1-411. Certain state services denied to ~~illegal~~ unauthorized aliens.** (1) To the extent allowed by
7 federal law and the Montana constitution and notwithstanding any other state law, a state agency may not provide
8 a state service to an ~~illegal~~ unauthorized alien and shall comply with the requirements of this section.

9 (2) To determine whether an applicant for a state service is an ~~illegal~~ unauthorized alien, the agency may
10 use the systematic alien verification for entitlements program provided by the United States department of
11 homeland security or any other lawful method of making the determination.

12 (3) A state agency shall notify appropriate personnel in immigration and customs enforcement under the
13 United States department of homeland security or its successor of any ~~illegal~~ unauthorized alien applying for a
14 state service.

15 (4) An agency shall require a person seeking a state service to provide proof of United States citizenship
16 or legal alien status.

17 (5) A state agency shall execute any written agreement required by federal law to implement this section.

18 (6) As used in this section, the following definitions apply:

19 (a) "Agency" means a department, board, commission, committee, authority, or office of the legislative
20 or executive branches of state government, including a unit of the Montana university system.

21 (b) ~~"Illegal "Unauthorized~~ alien" means an individual who is not a citizen of the United States and who
22 ~~has unlawfully entered or remains unlawfully in the United States~~ is not a "qualified alien" pursuant to 8 U.S.C.
23 1641.

24 (c) "State service" means a payment of money, the grant of a state license or permit, or the provision
25 of another valuable item or service under any of the following programs and provisions of law:

26 (i) employment with a state agency;

27 (ii) qualification as a student in the university system for the purposes of a public education, as provided
28 in 20-25-502;

29 (iii) student financial assistance, as provided in Title 20, chapter 26;

30 (iv) issuance of a state license or permit to practice a trade or profession, as provided in Title 37;

- 1 (v) unemployment insurance benefits, as provided in Title 39, chapter 51;
2 (vi) vocational rehabilitation, as provided in Title 53, chapter 7;
3 (vii) services for victims of crime, as provided in Title 53, chapter 9;
4 (viii) services for the physically disabled, as provided in Title 53, chapter 19, parts 3 and 4;
5 (ix) a grant, as provided in Title 90."
6

7 **NEW SECTION. Section 9. Repealer.** The following section of the Montana Code Annotated is
8 repealed:

9 39-2-305. Employment of aliens not lawfully authorized to accept employment prohibited.
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11 **NEW SECTION. Section 10. Codification instruction.** [Sections 1 through 7] are intended to be
12 codified as an integral part of Title 30, and the provisions of Title 30 apply to [sections 1 through 7].
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14 **NEW SECTION. Section 11. Severability.** If a part of [this act] is invalid, all valid parts that are
15 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
16 the part remains in effect in all valid applications that are severable from the invalid applications.
17

18 **NEW SECTION. Section 12. Effective date.** [This act] is effective 6 months after the date of passage
19 and approval.
20

21 **NEW SECTION. Section 13. Applicability.** [This act] applies to employment decisions made on or after
22 [the effective date of this act]. The department may not act upon a complaint against an employer for a violation
23 that occurs prior to [the effective date of this act].
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- END -