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HOUSE BILL NO. 928

Offered January 9, 2008

Prefiled January 8, 2008

A *BILL to amend and reenact §§ 2.2-4317, 23-9.2:3, 52-1, 53.1-218, and 58.1-462 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 2 of Title 2.2 a section numbered 2.2-202.1, by adding a section numbered 2.2-4308.2, by adding in Title 2.2 a chapter numbered 55.3, consisting of sections numbered 2.2-5514 and 2.2-5515, by adding in Title 9.1 a chapter numbered 13, consisting of sections numbered 9.1-1300 through 9.1-1304, and by adding sections numbered 18.2-201.1, 23-7.4:01, and 52-8.1:2, relating to illegal immigration; penalty.*

Patrons—Gilbert, Athey, Byron, Carrico, Cline, Cole, Cosgrove, Frederick, Ingram, Lingamfelter, Massie, Merricks, Miller, J.H. and Sherwood

Referred to Committee on Rules

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4317, 23-9.2:3, 52-1, 53.1-218, and 58.1-462 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 2 of Title 2.2 a section numbered 2.2-202.1, by adding a section numbered 2.2-4308.2, by adding in Title 2.2 a chapter numbered 55.3, consisting of sections numbered 2.2-5514 and 2.2-5515, by adding in Title 9.1 a chapter numbered 13, consisting of sections numbered 9.1-1300 through 9.1-1304, and by adding sections numbered 18.2-201.1, 23-7.4:01, and 52-8.1:2 as follows:

§ 2.2-202.1. Compliance with the Virginia Immigration Services Act.

Each of the Governor's Secretaries shall be responsible for ensuring that their respective agencies implement the provisions of the Virginia Immigration Services Act (§ 2.2-5514 et seq.).

§ 2.2-4308.2. Registration in federal work authorization program required; required provisions.

A. Every public body shall register and participate in a federal work authorization program to verify information on all new employees. No public body shall enter into a contract for the provision of goods, services, or construction that will be produced or performed within the Commonwealth unless the contractor registers and participates in a federal work authorization program to verify information on all new employees. For purposes of this section, "federal work authorization program" means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees pursuant to the Immigration Reform and Control Act of 1986 (8 USC 1101 et seq.).

B. No potential bidder or offeror shall be eligible to enter into any state contract for the provision of goods, services, or construction that will be produced or performed in the United States who fails to obtain in any aspect of the bidder's or offeror's business activities in the United States, documentation of employment eligibility verification as specified in Department of Homeland Security Form I-9 from prospective employees that they are legally eligible for employment. Information submitted by a bidder or offeror in connection with a state procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall include an affidavit certifying compliance with this subsection.

C. All state public bodies shall include in every contract for such goods, services, or construction the following provisions:

1. During the performance of this contract, the contractor agrees that he will post in conspicuous places, available to employees and applicants for employment, a statement notifying such persons that only persons who can provide employment eligibility verification documentation as specified in Department of Homeland Security Form I-9 will be hired to provide the goods or perform the services under the contract or any subcontract of such contract; and

2. The contractor will include the provisions of the foregoing clause in every subcontract or purchase order, so that the provisions will be binding upon each subcontractor or vendor.

D. No potential bidder or offeror who is convicted of a violation of the federal Immigration Reform and Control Act of 1986 (8 USC 1101 et seq.) or § 40.1-11.1 shall be eligible to enter into any state contract for the provision of goods, services, or construction.

§ 2.2-4317. Prequalification generally; prequalification for construction.

A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any

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58 prequalification procedure shall be established in writing and sufficiently in advance of its
59 implementation to allow potential contractors a fair opportunity to complete the process.

60 B. Any prequalification of prospective contractors for construction by a public body shall be pursuant
61 to a prequalification process for construction projects adopted by the public body. The process shall be
62 consistent with the provisions of this section.

63 The application form used in such process shall set forth the criteria upon which the qualifications of
64 prospective contractors will be evaluated. The application form shall request of prospective contractors
65 only such information as is appropriate for an objective evaluation of all prospective contractors
66 pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to
67 request, by checking the appropriate box, that all information voluntarily submitted by the contractor
68 pursuant to this subsection shall be considered a trade secret or proprietary information subject to the
69 provisions of subsection D of § 2.2-4342.

70 In all instances in which the public body requires prequalification of potential contractors for
71 construction projects, advance notice shall be given of the deadline for the submission of
72 prequalification applications. The deadline for submission shall be sufficiently in advance of the date set
73 for the submission of bids for such construction so as to allow the procedures set forth in this subsection
74 to be accomplished.

75 At least thirty days prior to the date established for submission of bids or proposals under the
76 procurement of the contract for which the prequalification applies, the public body shall advise in
77 writing each contractor who submitted an application whether that contractor has been prequalified. In
78 the event that a contractor is denied prequalification, the written notification to the contractor shall state
79 the reasons for the denial of prequalification and the factual basis of such reasons.

80 A decision by a public body denying prequalification under the provisions of this subsection shall be
81 final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

82 C. A public body may deny prequalification to any contractor only if the public body finds one of
83 the following:

84 1. The contractor does not have sufficient financial ability to perform the contract that would result
85 from such procurement. If a bond is required to ensure performance of a contract, evidence that the
86 contractor can acquire a surety bond from a corporation included on the United States Treasury list of
87 acceptable surety corporations in the amount and type required by the public body shall be sufficient to
88 establish the financial ability of the contractor to perform the contract resulting from such procurement;

89 2. The contractor does not have appropriate experience to perform the construction project in
90 question;

91 3. The contractor or any officer, director or owner thereof has had judgments entered against him
92 within the past ten years for the breach of contracts for governmental or nongovernmental construction,
93 including, but not limited to, design-build or construction management;

94 4. The contractor has been in substantial noncompliance with the terms and conditions of prior
95 construction contracts with a public body without good cause. If the public body has not contracted with
96 a contractor in any prior construction contracts, the public body may deny prequalification if the
97 contractor has been in substantial noncompliance with the terms and conditions of comparable
98 construction contracts with another public body without good cause. A public body may not utilize this
99 provision to deny prequalification unless the facts underlying such substantial noncompliance were
100 documented in writing in the prior construction project file and such information relating thereto given
101 to the contractor at that time, with the opportunity to respond;

102 5. The contractor or any officer, director, owner, project manager, procurement manager or chief
103 financial official thereof has been convicted within the past ten years of a crime related to governmental
104 or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6
105 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii)
106 Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States
107 or another state;

108 6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an
109 established debarment procedure from bidding or contracting by any public body, agency of another
110 state or agency of the federal government; and

111 7. The contractor failed to provide to the public body in a timely manner any information requested
112 by the public body relevant to subdivisions 1 through 6 of this subsection.

113 D. If a public body has a prequalification ordinance that provides for minority participation in
114 municipal construction contracts, that public body may also deny prequalification based on minority
115 participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority
116 participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are
117 in accordance with the Constitution and laws of the United States and the Commonwealth.

118 E. *A state public body shall deny prequalification to any contractor who fails to register and*
119 *participate in the federal electronic work verification program or similar electronic verification of work*

authorization program operated by the United States Department of Homeland Security as required by § 2.2-4308.2.

F. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let under § 33.1-12.

CHAPTER 55.3. VIRGINIA IMMIGRATION SERVICES ACT.

§ 2.2-5514. Definition.

As used in this chapter:

"Agency" means any agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth or of any unit of local government including counties, cities, towns, regional governments, political subdivisions, and the departments thereof, and includes constitutional officers, except as otherwise expressly provided by law.

§ 2.2-5515. Application of chapter.

A. Except as provided in subsection C or where exempted by federal law, every agency shall verify the lawful presence in the United States of any natural person 14 years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C. § 1621, or for federal public benefits, as defined in 8 U.S.C. § 1611, that is administered by an agency or a political subdivision of this Commonwealth.

B. The provisions of this chapter shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

C. Verification of lawful presence under the provisions of this chapter shall not be required for:

1. Any purpose for which lawful presence in the United States is not restricted by law, ordinance, or regulation;

2. Assistance for health care items and services that are necessary for the treatment of an emergency medical condition, as defined in 42 U.S.C. § 1396b(v)(3), of the alien involved and are not related to an organ transplant procedure;

3. Short-term, noncash, in-kind emergency disaster relief;

4. Public health assistance for immunizations with respect to diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease; or

5. Programs, services, or assistance such as soup kitchens, crisis counseling and intervention, and short-term shelter specified by the United States Attorney General, in the sole and unreviewable discretion of the United States Attorney General after consultation with appropriate federal agencies and departments, which:

a. Deliver in-kind services at the community level, including through public or private nonprofit agencies,

b. Do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the income or resources of the individual recipient, and

c. Are necessary for the protection of life or safety.

D. Verification of lawful presence in the United States by the agency or political subdivision required to make such verification shall require that the applicant execute an affidavit under penalty of perjury that:

1. He is a United States citizen; or

2. He is a qualified alien under the federal Immigration and Nationality Act and is lawfully present in the United States.

The agency or political subdivision providing the state or local public benefits shall provide notary public services at no cost to the applicant.

E. For any applicant who has executed the affidavit described in subdivision D 2, eligibility for benefits shall be verified through the Systematic Alien Verification for Entitlements (SAVE) Program operated by the United States Department of Homeland Security or an equivalent program designated by the United States Department of Homeland Security. Until such eligibility verification is made, the affidavit may be presumed to be proof of lawful presence for the purposes of this chapter.

F. Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement of representation in an affidavit executed pursuant to subsection D may be subject to criminal penalties pursuant to §§ 18.2-168, 18.2-178, 18.2-186, 18.2-186.2, 18.2-204.1, and 18.2-434 for fraudulently obtaining public assistance program benefits. If the affidavit constitutes a false claim of U.S. citizenship under 18 U.S.C. § 911, a complaint shall be filed by the agency requiring the affidavit with the United States Attorney General for the applicable district based upon the venue in which the affidavit was executed.

G. Agencies may adopt variations to the requirements of the provisions of this chapter, which demonstrably improve the efficiency or reduce delay in the verification process, or to provide for adjudication of unique individual circumstances where the verification procedures in this chapter would

181 impose unusual hardship on a legal resident of Virginia.

182 H. It shall be unlawful for any agency to provide any state, local, or federal benefit, as defined in 8
183 U.S.C. § 1621 or 8 U.S.C. § 1611, in violation of the provisions of this chapter.

184 I. Each state agency or department that administers any program of state or local public benefits
185 shall provide an annual report to the Governor and the General Assembly with respect to its compliance
186 with the provisions of this chapter. Each agency or department shall monitor the Systematic Alien
187 Verification for Entitlements Program for application verification errors and significant delays and shall
188 provide an annual public report on such errors and significant delays and recommendations to ensure
189 that the application of the Systematic Alien Verification of Entitlements Program is not erroneously
190 denying benefits to legal residents of Virginia. Errors shall also be reported to the United States
191 Department of Homeland Security by each agency or department.

192 CHAPTER 13.

193 ENFORCEMENT OF FEDERAL IMMIGRATION LAWS.

194 § 9.1-1300. Memorandum of understanding.

195 A. The Attorney General is authorized to direct and negotiate the terms of a memorandum of
196 understanding between the Commonwealth and the United States Department of Homeland Security,
197 Immigration and Customs Enforcement, concerning the enforcement of federal immigration and customs
198 laws, detention, and removals, and investigations of such in the Commonwealth.

199 B. The memorandum of understanding negotiated pursuant to subsection A shall be signed on behalf
200 of the Commonwealth by the Governor or other appropriate official, as required by federal law.

201 § 9.1-1301. Prohibition on local action.

202 No governing body, department, or agency of a political subdivision shall enact any ordinance or
203 policy, nor shall any elected official, appointee, employee, or agent of a political subdivision take any
204 administrative action that limits or prohibits a law-enforcement officer, elected official, employee, or
205 agent of the political subdivision from communicating or cooperating with federal officials with regard
206 to the immigration status of any person within the Commonwealth.

207 § 9.1-1302. Prohibition on state action.

208 No department, agency, authority, board, commission, council, or other state entity shall adopt any
209 rule, regulation, or policy, nor shall any official, appointee, employee, or agent of the Commonwealth
210 take any administrative action that limits or prohibits a law-enforcement officer, elected official,
211 employee, or agent of the Commonwealth from communicating or cooperating with federal officials with
212 regard to the immigration status of any person within the Commonwealth.

213 § 9.1-1303. Sharing information.

214 Notwithstanding any other provision of law, no official, appointee, employee, or agent of the
215 Commonwealth or of a political subdivision thereof may prohibit or otherwise restrict any other official,
216 appointee, employee, or agent of the Commonwealth or of a political subdivision thereof from doing any
217 of the following with respect to information regarding the immigration status, lawful or unlawful, of any
218 individual:

219 1. Sending such information to, or requesting or receiving such information from, the United States
220 Department of Homeland Security;

221 2. Maintaining such information; or

222 3. Exchanging such information with any other federal, state, or local government entity.

223 § 9.1-1304. Right of action.

224 The provisions of this chapter shall allow for a private right of action by any natural or legal person
225 lawfully domiciled in the Commonwealth to file for a writ of mandamus to compel any noncooperating
226 state or local entity to comply with this chapter.

227 § 18.2-201.1. Concealing certain aliens; penalty.

228 Any person, knowing or having reason to know an alien is in the United States in violation of law,
229 who, in furtherance of violating the immigration laws of the United States (i) transports or moves or
230 attempts to transport or move that alien into or within the Commonwealth; (ii) conceals or shields from
231 detection or attempts to conceal or shield from detection that alien in any place, including any building
232 or any vehicle, vessel or other thing used as a means for transporting people; or (iii) engages in any
233 conspiracy to commit any of the acts in clauses (i) or (ii), is guilty of a Class 6 felony.

234 Nothing in this section shall be construed to prohibit or restrict the provision of any state or local
235 public benefit described in 8 U.S.C. § 1621 (b) or regulated public health services provided by a private
236 charity using private funds.

237 § 23-7.4:01. Alien in-state tuition.

238 An alien who is unlawfully present in the United States, and therefore ineligible to establish domicile
239 pursuant to § 23-7.4, shall not be eligible on the basis of residency within Virginia for any
240 postsecondary educational benefit, including in-state tuition, unless citizens or nationals of the United
241 States are eligible for such benefits in no less an amount, duration, and scope, without regard to
242 whether such citizens or nationals are Virginia residents.

§ 23-9.2:3. Power of governing body of educational institution to establish rules and regulations; offenses occurring on property of institution; state direct student financial assistance.

A. In addition to the powers now enjoyed by it, the board of visitors or other governing body of every educational institution shall have the power:

1. To establish rules and regulations for the acceptance and assistance of students except that (i) individuals who have failed to meet the federal requirement to register for the selective service shall not be eligible to receive any state direct student assistance; (ii) *individuals who are not citizens or nationals of the United States or are unlawfully present in the United States or do not possess a valid visa issued by the Department of Homeland Security to permit study in the United States shall not be eligible for in-state tuition rates at any public institution of higher education in the Commonwealth*; (iii) the accreditation status of a Virginia public high school shall not be considered in making admissions determinations for students who have earned a diploma pursuant to the requirements established by the Board of Education; and ~~(iii)~~ (iv) the governing boards of the four-year institutions shall establish policies providing for the admission of certain graduates of Virginia community colleges as set forth in § 23-9.2:3.02.

2. To establish rules and regulations for the conduct of students while attending such institution.

3. To establish programs, in cooperation with the State Council of Higher Education and the Office of the Attorney General, to promote compliance among students with the Commonwealth's laws relating to the use of alcoholic beverages.

4. To establish rules and regulations for the rescission or restriction of financial aid, within the discretionary authority provided to the institution by federal or state law and regulations, and the suspension and dismissal of students who fail or refuse to abide by such rules and regulations for the conduct of students.

5. To establish rules and regulations for the employment of professors, teachers, instructors and all other employees and provide for their dismissal for failure to abide by such rules and regulations.

6. To provide parking and traffic rules and regulations on property owned by such institution.

7. To establish guidelines for the initiation or induction into any social fraternity or sorority in accordance with § 18.2-56.

8. To establish programs, in cooperation with the State Council of Higher Education for Virginia and the Office of the Attorney General, to promote the awareness and prevention of sexual crimes committed upon students.

B. Upon receipt of an appropriate resolution of the board of visitors or other governing body of an educational institution, the governing body of a political subdivision which is contiguous to the institution shall enforce state statutes and local ordinances with respect to offenses occurring on the property of the institution.

The governing bodies of the public institutions of higher education shall assist the State Council of Higher Education in enforcing the provisions related to eligibility for financial aid.

C. In order to improve the quality of the Commonwealth's work force and educational programs, the governing bodies of the public institutions of higher education shall establish programs to seek to ensure that all graduates have the technology skills necessary to compete in the 21st Century and, particularly, that all students matriculating in teacher-training programs receive instruction in the effective use of educational technology.

§ 52-1. Establishment of Department headed by Superintendent; Bureau of Criminal Investigation and division of drug law enforcement and investigation within Department.

There is hereby established as a separate department, a Department of State Police headed by the Superintendent of State Police. There shall be established within the Department of State Police, in addition to any other divisions or bureaus that may be established by statute or otherwise, a Bureau of Criminal Investigation, ~~and~~ a division for drug law enforcement and investigation, *and a division for fraudulent document identification*.

§ 52-8.1:2. Powers and duties of fraudulent document identification division.

In addition to any other powers and duties that may be provided by statute or otherwise, the division of fraudulent document identification shall have the power to investigate persons or entities that participate in the sale or distribution of fraudulent documents used for identification purposes, and to enforce the laws of the Commonwealth related to fraudulent document use and production. The division shall focus attention on investigations related to documents created and prepared for persons who are unlawfully residing within the Commonwealth.

§ 53.1-218. Duty of officer in charge to inquire as to citizenship; notice to federal immigration officer of commitment of alien.

Whenever any person is *arrested upon suspicion that he has committed a felony or a violation of § 18.2-266 and is confined in, or if he is otherwise* committed to, a correctional facility, ~~it shall be the duty of the director, sheriff or other officer in charge of such facility to~~ *shall* inquire as to whether the

304 person is a citizen of the United States, and if he is not, such director, sheriff or other officer shall
305 inquire *within 48 hours of the arrest or commitment of the Law Enforcement Support Center of the*
306 *Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security*
307 as to the person's alien status.

308 If it appears that the person is an alien, the director, sheriff or other officer in charge of the facility
309 shall immediately notify the Central Criminal Records Exchange. However, notification need not be
310 made if it is apparent that a report on alien status has previously been made to the Exchange pursuant to
311 § 19.2-294.2.

312 § 58.1-462. Withholding tables.

313 A. ~~The~~ *Except as provided in subsection B, the amount of tax to be withheld for each individual shall*
314 *be based upon tables to be prepared and distributed by the Tax Commissioner. The tables shall be*
315 *computed for the several permissible withholding periods and shall take account of the number of*
316 *exemptions allowed under the laws of the United States relating to federal income taxes and the*
317 *standard deduction as provided in § 58.1-461. The amounts computed for withholding shall be such that*
318 *the amount withheld for any individual during his taxable year shall approximate in the aggregate as*
319 *closely as practicable the tax which is levied and imposed under this chapter for that taxable year, upon*
320 *his salary, wages or compensation for personal services of any kind for the employer.*

321 B. *If an individual independent contractor, contracting for the physical performance of services, fails*
322 *to provide to the contracting entity documentation to verify the independent contractor's employment*
323 *authorization, pursuant to the prohibition against the use of unauthorized alien labor through contract*
324 *set forth in 8 U.S.C. § 1324a (a) (4), the contracting entity shall be required to withhold state income*
325 *tax at the top marginal income tax rate, as provided in § 58.1-320, as applied to compensation paid to*
326 *such individual for the performance of such services within the Commonwealth that exceeds the*
327 *minimum amount of compensation the contracting entity is required to report as income on IRS Form*
328 *1099.*

329 C. *Any contracting entity that fails to comply with the withholding requirements of subsection B shall*
330 *be liable for the taxes required to have been withheld unless such contracting entity is exempt from*
331 *federal withholding with respect to such individual pursuant to a properly filed IRS Form 8233 or its*
332 *equivalent. Nothing in this subsection or subsection B is intended to create or should be construed as*
333 *creating an employer-employee relationship between a contracting entity and an individual independent*
334 *contractor.*

335 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
336 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
337 **be determined for periods of imprisonment in state adult correctional facilities and cannot be**
338 **determined for periods of commitment to the custody of the Department of Juvenile Justice.**