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## Sunshine (State) Surprise

Governor Rick Scott wasted no time in making the state of Florida the 14th the nation to have a mandatory E-Verify requirement. Only minutes after being sworn in, the governor signed his second executive order of the day—the first created the Office of Fiscal Accountability and Regulatory Reform to review regulations in the Sunshine State. Scott had touted ideas about mandating E-Verify during his heated primary fight with former Attorney General Bill McCollum but the magnitude of the actual order caught many by surprise.



### Executive Order No. 11-02 requires:

- 1) All agencies under the direction of the governor to verify the employment eligibility of ALL current and prospective agency employees through the U.S. Department of Homeland Security's E-Verify system;
- 2) All agencies under the direction of the governor to include, as a condition of all state contracts, an express requirement that contractors utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of:
  - a) all persons employed during the contract term by the contractor to perform employment duties within Florida; and
  - b) all persons (including subcontractors) assigned by the contractor to perform work pursuant to the contract with the state agency.
- 3) Agencies not under the direction of the governor are encouraged to verify the employment eligibility of their current and prospective employees utilizing the E-Verify system, and to require contractors to utilize the E-Verify system to verify the employment eligibility of their employees and subcontractors.

E-Verify is web-based, voluntary program that compares an employee's Form I-9 information with the Social Security Administration and Department of Homeland Security databases. E-Verify is considered a best practice by the government in terms of immigration compliance, has recently been upgraded to include a photo-matching component for U.S. passports, and will soon debut a driver's license pilot program. In September of 2009, Congress required that all federal contractors and their subs use E-Verify for new employees (new hires) and all existing employees assigned to a federal contract. This was

the only instance where E-Verify was authorized to use to verify a current workforce—until now.

Scott's Executive Order requiring re-verification of **current and prospective employees** transcends what is legally allowed under current federal law, and is therefore likely to face an immediate court challenge. *Prospective* employees? Lawyers over at the Office of Special Counsel for Immigration-Related Unfair Employment Practices (the part of the Department of Justice that enforces the anti-discrimination provisions of the Immigration and Nationality Act) are likely reeling from the breadth of the Order. And, the Verification Division at USCIS—the agency responsible for running the E-Verify program—may also be scrambling to determine whether to help Floridian employers implement compliance practices under these terms. As



proposed, this represents a third type of E-Verify for them to administer: normal, FAR-impacted and Florida. It is unclear who will be responsible to pay for development of the application on these terms. How might it work? Does this harken back to the Arizona question again—can the state trump the federal government on immigration requirements?

Ironically, Rhode Island Governor Lincoln Chafee rescinded Rhode Island Executive Order 08-01 that required the state, as well as contractors and vendors doing business with Rhode Island, to register and use E-Verify for all new hires. Chafee called the use of E-Verify a “divisive issue.”

Regardless of the future, Florida's state agencies now need to be aware of the E-Verify process and should—like all other employers participating in E-Verify—undergo a comprehensive I-9 training, conducted by competent counsel, so that each of the designated E-Verify specialists may become experienced in the intricacies of employment eligibility verification. The verification process has become increasingly complex. Florida's governor just complicated E-Verify even more. Any missteps by employees charged with verification compliance could be deadly. Employers must recognize that even the most well-intentioned individuals could attract both civil and criminal liability, not only upon themselves, but also upon their employers for failing to follow the verification process accurately and completely.

[Greenberg Traurig's Business Immigration and Compliance Group](#) has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions, I-9 Audits and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers' responsibilities when faced traditional no-match situations as well as more serious workplace identity theft or other alleged misrepresentations made by employees.

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