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To: Local Surety Associations
Subject: State Legislatures Addressing Immigration Issues with E Verify

With most states facing shortfalls in their fiscal 2011 budgets and for the fiscal 2012 budget that they must enact this session, there is no funding to enact broad based immigration laws like the one enacted in Arizona in 2010. Instead, SFAA is seeing a lot of legislation to require those awarded state and local contracts to use the federal E Verify program to determine the legal status of employees, and much of it would permit or require a contractor to be terminated for failure to use E Verify.

SFAA reviews state immigration legislation for the penalties that could be imposed on contractors. Terminating a financially sound and well performing contractor from a public project if one undocumented worker is found on the job benefits no one. The public owner and taxpayers bear the delays and extra completion costs. We work with the local contractor groups to amend these laws to include more reasonable penalties. The contractor should first be permitted to cure the violation. For further violations, the contractor might be debarred from additional public projects for up to a year, depending on the number of repeat violations. Some civil fines in lieu of debarment also make more sense than termination. The local contractor groups generally are taking the lead in addressing these bills. The local surety associations in most cases are in contact with the contractor associations at the local level. The following is a summary of immigration that SFAA currently is addressing.

Bills on the Move

Indiana SB 590 is Arizona copycat legislation. The bill has been amended and it has passed the Senate. As originally drafted, all employers in the State would have been required to use E Verify. The amended law prohibits employers from taking tax credits for new hires and deducting expenses for employees that are ineligible. Employers that use E Verify would be exempt from the limits on tax credits and exemptions, but as SB 590 now is drafted, it is unclear if the eligibility of only newly hired employees must be verified or whether the status of all current employees must be verified. The bill would authorize state agencies to bring civil actions against employers to obtain reimbursement for any state benefits, such as unemployment insurance, paid to an ineligible employee, plus reasonable costs and attorneys' fees. Civil actions cannot be filed against employers using E Verify.

The provisions for public contractors, however, remain the same as the original bill draft. The bill applies to all public service contracts, which means any contract between any state or local government agency and a contractor for the procurement of services. Under SB 590, state contracting entities will not be permitted to enter or renew public contracts for services unless the contract requires the contractor to participate in E Verify and to check the eligibility of newly hired employees. The contractor also must sign an affidavit that it does not knowingly employ undocumented workers. A rebuttable presumption

would be created under the bill that a contractor did not knowingly hire an undocumented worker if the contractor verified their status on E Verify.

If a violation is found, the contractor gets 30 days to remedy the problem. If the contractor does not remedy, then the state contracting entity must terminate the contract for breach of the contract. The state contracting entity can allow the contractor to stay on the job until a replacement contractor can be found. The contractor is liable for actual damages resulting from its termination.

If subcontractors are used on the job, they must certify to the contractor that, at the time of certification, they do not employ any unauthorized alien and that they are registered and participating in E Verify. If the contractor determines that the subcontractor is in violation of the law, the contractor may terminate the subcontractor but such termination will not constitute a breach of contract. *The bill has passed the Senate.*

Kentucky HB 3 would prohibit any state or local contracting entity from awarding a public construction project until the bidder submits: 1) a list of all subcontractors on any tier; 2) a sworn affidavit that the bidder has no unauthorized employees and is participating in E Verify; and 3) a sworn affidavit from all subcontractors, whatever tier, that the subcontractor has no unauthorized employees and that the subcontractor is participating in E Verify. The bill would require state and local contracting entities to cancel and pay only the documented actual costs up to the cancellation if the contractor or any subcontractor fails to maintain its registration and participation in the E Verify program throughout the contract. Prior to receiving the final payment, the contractor must submit another sworn affidavit and affidavits from all its subcontractors. The bill would provide that a subcontractor must indemnify and hold the general contractor harmless against all claims, damages, losses and expenses, including attorneys' fees, arising out of the subcontractor's failure to comply with the E Verify requirements. Any employer, contractor or subcontractor that pleads guilty or is found guilty of intentionally or knowingly hiring an unauthorized alien shall be banned from public contracting for one year for the first offense and five years for a second offense and any subsequent offense. *The bill has passed the House, but may face opposition in the Senate.*

Virginia SB 1049 would require all government contractors and subcontractors to participate in the federal Electronic Work Verification Program (E Verify) to verify information of newly hired employees. As originally drafted, any business that violated this requirement would have had their contract or subcontract terminated immediately and would have been debarred for one year from participating in public contracting. As amended, the bill would apply the E Verify requirement to any employer with an average of 50 employees for the previous 12 months that enters into a contract with an agency in excess of \$50,000. Only newly hired employees that perform work under the public contract would have to be verified. An employer that fails to comply would be debarred from contracting with any state agency for a period of up to one year. Such debarment would end upon the employer's registration and participation in E Verify. *The bill has passed both chambers.*

Recent Introductions

Kansas HB 2223 would give employers in the State the option of using E Verify. If an employer chooses to use E Verify and hires an illegal alien, the employer will not lose its license to do business in the State provided it is taking steps to correct the information gathered when hiring an employee and in terminating illegal aliens upon discovering their status. Any employer that knowingly, intentionally and consistently in the ordinary course of business engages in the practice of hiring illegal aliens will lose its license to do business in Kansas. The bill also would prohibit any state or local government agency from awarding a public works contract if the bidder, employer or contractor does not verify the eligibility of its employees. Such bidder, employer or contractor shall require its subcontractors on a public works project to provide a written statement that verified the employment eligibility of the employees of the subcontractor. A bidder, contractor or employer that has such a written statement from its subcontractors shall not be responsible for result or omission of the subcontractor. No bidder shall have their contract revoked unless the bidder is found to knowingly, intentionally and consistently in the course of doing business hiring illegal aliens or ignoring the E Verify reports on the status of its employees. *The bill was referred to the Committee on Federal and State Affairs.*

Maryland HB 760 would require any one that enters into a contract in excess of \$10,000 with the state or local government, as well as subcontractors of such contractors with contracts exceeding \$10,000, to register and participate in E Verify. Before the contracting agency approves any payment, such contractors and subcontractors must affirm to the contracting agency, under penalty of perjury, that employment authorization has been made for all employees hired during the performance period of the contract (apparently even if they do not work on the public project) and that the social security number of any current employee who will perform work under the contract has been verified using the Social Security Administration's program for this. As a condition of the contract, the general contractor must require the subcontractor to comply with these requirements. The contract that gave rise to the violation shall be terminated immediately and the contractor also will be debarred from further public work for a year. *The bill was heard in the Health and Government Operations Committee.*

Maryland HB 761 is similar to HB 760, with some key differences. It creates a \$100,000 threshold for application of the E Verify requirement to contractors and subcontractors. It also does not contain the requirement to check social security numbers of current employees. There is no termination of the contractor if a violation is found. Rather, there are civil penalties—up to \$1,000 for each employee that is undocumented. The amount of the civil penalty increases if the violation is knowing. Contractors still would be required to make the certifications of compliance before each payment. *The bill was referred to the Health and Government Operations Committee.*

North Carolina HB 36 would prohibit the award of public contracts for construction, goods and services to a contractor who knowingly employs or contracts with an illegal immigrant. The contractor would have to verify each employee's status using the federal E-Verify program. Contractors violating the law would be subject to contract termination

and a one-year debarment period. Contracts to be terminated could be continued in some cases where undue harm would be caused until alternatives could be arranged. ***Recently Introduced; No committee assignment.***

As a pre-condition of being awarded a public construction project in excess of \$25,000, **Pennsylvania SB 637** would require the general contractor to provide the contracting entity with a verification statement that the eligibility of all the general contractor's employees has been verified through the Social Security Number Verification System (NVS), and the eligibility of new employees hired prior to commencement of the work has been verified through the federal E Verify program. The general contractor has to provide the contracting entity with these verification statements from each subcontractor used on the job before any subcontractor commences work. The bill would require subcontractors to provide the general contractor with these verification statements. Violations of this law include: 1) employment by contractors or subcontractors of a person that has not been vetted by NVS or E Verify as required; 2) use of a subcontractor on a public project prior to submission of the required verification statement; 3) commencement of work by a subcontractor before the required verifications have been submitted; and 4) false statement or misrepresentations on the required verification statements. For the first violation a warning letter will be sent and posted on the Secretary of Labor's website. The contracting agency may terminate the contract and that right cannot be waived. The general contractor may terminate the subcontractor without recourse against or penalty to the general contractor and that right cannot be waived. If the violation of the contractor or subcontractor is willful, they may be debarred from further public work for a year, have their contract terminated without recourse against or penalty to the public contracting entity and fined up to \$2,000. A contractor or subcontractor that relies in good faith on the NVS and E Verify procedures to verify the eligibility of its employees is immune from the sanctions if incorrect information was given to them. ***The bill was referred to the State Government Committee.***

Texas HB 202 would prohibit states agencies from awarding any contract for goods and services to a contractor unless the contractor and any subcontractor are registered and participating in the federal E Verify program. The bill contains a specific certification that must be signed with each state contract in which the contractor certifies that it is eligible to receive the contract and that the contractor understands that if the certification is inaccurate or becomes inaccurate during the term of the contract, the contractor may be debarred from state contracts. The certification states that if the contractor was: 1) ineligible to be awarded the contract; 2) ceased to participate in E Verify; or 3) if a subcontractor is not registered with E Verify, the state contracting entity will refer the matter to the State Comptroller for action. This makes the general contractor responsible for actions of its subcontractors in terms of E Verify as the comptroller can debar the contractor from state work for up to a year for any of these three violations. Contracts for goods and service in the context of this bill may not include construction projects. ***The bill was referred to the State Affairs Committee.***