

SMALL BUSINESS COMMISSION

Monday, August 3, 2009

Richmond, Virginia

Overview.

The Small Business Commission ("Commission") met in Richmond, Virginia, on August 3, 2009, and was presided over by the Commission's co-chairmen, Delegate Jeffrey M. Frederick and Senator W. Roscoe Reynolds.

Presentations.

I. House Bill 2121. Public Procurement Act; Verification of Legal Presence.

The Commission first considered Delegate Paul F. Nichols' bill, House Bill 2121. This bill would require all contractors with the Commonwealth and their subcontractors to register and participate in a federal Electronic Work Verification Program (E-Verify) to determine that their employees are legally eligible for employment in the United States. Contractors who do not register and participate in the registration program are ineligible for prequalification.

Bruce A. Morrison, former member of Congress and the Immigration Subcommittee of the Judiciary Committee and consultant to the Society for Human Resource Management, made a presentation regarding the E-Verify program. Mr. Morrison explained that the E-Verify program was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The E-Verify program is currently administered by the Department of Homeland Security.

Mr. Morrison explained the requirements imposed upon employers to verify their employees' eligibility for employment. Currently, employers are required to review various documents presented by employees demonstrating their identity and their authorization to work in the United States. The employer is then required to attest on Form I-9 that he or she has reviewed the requisite documents and that they appear to be authentic. Mr. Morrison testified that the I-9 verification process is time-consuming and burdensome for human resource professionals and that the process is prone to fraud, forgery, and identity theft.

In an effort to correct the problems with the I-9 process, Mr. Morrison explained, the United States Congress created the Basic Pilot program, now known as the E-Verify program. Mr. Morrison testified that the program, despite its intentions, is currently inadequate to meet the needs of mandated use by all employers. He noted that the program depends principally on the Social Security Administration database and that there is a 4.1 percent error rate in that database, thus affecting the reliability of the program. Mr. Morrison also testified that the E-Verify program results in many false positives and that approximately 4 percent of people who are lawfully eligible to work

get flagged as ineligible by the program. He further stated that such people have an eight-day window to contest such a finding and prove their citizenship.

Next, Delegate Nichols gave a brief overview of his bill. He also noted that President Barack Obama recently mandated that all federal contractors use the E-Verify program. Delegate Nichols then presented several witnesses to testify in favor of House Bill 2121. His first witness was Michael M. Hethmon, General Counsel for the Immigration Reform Law Institute. Mr. Hethmon testified that 12 states have adopted the E-Verify program for their public contractors. Relying on the written testimony of Gerri Ratliff, the Deputy Associate Director of the National Security and Records Verification Directorate, submitted to the United States Congress, Mr. Hethmon noted that an average of 1,000 employers enroll in the program each week and that only 2.8 percent of queries ultimately result in a mismatch or nonconfirmation of eligibility. Mr. Hethmon stressed that there were two primary issues that must be considered by states seeking to utilize the E-Verify program with public contractors: (1) to what extent should subcontractors be included, and (2) to what extent should contractors outside of the Commonwealth be included. Mr. Hethmon distributed proposed amendments to House Bill 2121 intended to address these issues, as well as to what extent certain types of contractors would be required to participate in the E-Verify program. Mr. Hethmon noted that these proposed amendments were based on model provisions and would have to be adjusted to better fit Virginia law.

Delegate Nichols' second witness was Maureen Wood who represented Save the Old Dominion. Ms. Wood reiterated many of the same points as Mr. Hethmon regarding the efficacy of the E-Verify program. She also stated that employees who are found to be ineligible for employment by the program have 21 days, not eight as Mr. Morrison stated, to contest such a finding. Ms. Wood also noted that businesses who employ unauthorized workers do not pay employment taxes on these employees, thus depriving the Commonwealth of tax revenue. Ms. Wood also testified that the unemployment rate in Virginia is currently at a 16-year high and that utilization of the E-Verify program will help to ensure the employment of citizens and authorized workers.

The third witness presented by Delegate Nichols was Michael J. McLaughlin from the American Council for Immigration Reform. Mr. McLaughlin likewise reiterated many statistics concerning the efficacy of the E-Verify program, stressing that only 0.4 percent of all E-Verify queries are about United States citizens who have to take action to resolve a tentative nonconfirmation. Mr. McLaughlin also provided the Commission with information regarding other states that require the use of the E-Verify program.

Delegate Nichols' final witness was William Buchanan who was also from the American Council for Immigration Reform. Mr. Buchanan provided the Commission with a list of 2,985 private firms in Virginia that are registered to use the E-Verify program.

The Commission then took testimony from those who were opposed to House Bill 2121. First, Nicole Riley, representing the Virginia Employers for Sensible Immigration Policy, explained that her organization supports an adequate, stable and legal workforce for Virginia employers and a federal system that allows employers to efficiently and effectively comply with federal immigration law. However, Ms. Riley stated her belief that laws relating to the employment of non-citizens was better left to the federal government. She also testified that Virginia employers should not bear the burden of enforcing federal immigration policy and that any attempt by the Commonwealth to require enforcing such policies that interfere with employment relations and impose mandates on employers beyond what federal law already requires would be counterproductive.

Travis Hill, also representing the Virginia Employers for Sensible Immigration Policy, testified that the federal rule requiring contractors with the federal government to use the E-Verify program goes into effect on September 8, 2009. He contended that, as the impact of this rule would not become apparent until the end of 2009, it would be better to wait and see how the new federal rule functions before action is taken in Virginia. He stated that he still had concerns about the accuracy of the E-Verify program as well as concerns about its capacity, noting that there will be 3.8 million employees enrolled in the program at the time the federal rule takes effect. Mr. Hill also remarked on a significant difference between the federal rule and House Bill 2121. The federal rule only requires that an employer use the E-Verify program if it is awarded a federal contract; House Bill 2121 would require employers to use the program in order to prequalify as public contractors.

Next, Julia Ciarlo Hammond, State Director, National Federation of Independent Business, expressed her organization's opposition to the bill. She emphasized that the estimated fiscal impact of House Bill 2121 was approximately \$90,000 per year. Ms. Hammond noted that there were also costs to the employers to participate in the E-Verify program. The initial year cost for an employer with up to 10 employees is \$1,300 and the initial year cost for an employer with up to 500 employees is \$25,000. She also testified that there could be even greater costs if contractors opted not to compete for public contracts due to the cost and complexity of participating in the E-Verify program. Ms. Hammond stated that the cost to the Commonwealth from this lack of competition for public contractors could be as high as \$50 million per year.

Keith Cheatham, Vice-President of Government Affairs, Virginia Chamber of Commerce, also testified regarding the Chamber's opposition to House Bill 2121. He noted that the United States Chamber of Commerce was recently successful in having a similar Oklahoma law struck down in federal court on the basis of preemption. Although the court decision is currently on appeal, Mr. Cheatham stated that the court's ruling demonstrates that the enactment of House Bill 2121 would likewise be subject to a strong argument that it is federally preempted. Mr. Cheatham concluded by stressing that immigration is primarily the responsibility of the federal government and, that until a comprehensive federal response to the issue is implemented, Virginia and other states should resist creating a patchwork of possibly unenforceable state laws.

Finally, Claire Guthrie Gastanaga, representing the National Association of Women Business Owners, testified that 98 percent of businesses in Virginia are small businesses and that the enactment of House Bill 2121 would have an adverse, disparate impact on small businesses.

II. House Bill 2026. Virginia Employee Voluntary Accounts Program.

The patron of House Bill 2026, Delegate Daniel W. Marshall, III, and the bill's co-patron, Delegate William R. Janis, briefly discussed the provisions of the bill. The bill would create the Virginia Employee Voluntary Accounts program (VEVA), a program in which small private employers would be able to enroll in and offer tax-deferred retirement plans to their employees using payroll deduction. The program would be administered by a new state agency created by the bill.

Delegate Marshall explained that the introduction of the bill was spurred by the fact that personal savings rates in the United States have declined steadily over the past 30 years and that people are not saving enough to support themselves in retirement. Delegate Marshall also explained that, in its current form, the structure of the program was based on that used by the Virginia College Savings Plan (VCSP). Both Delegate Marshall and Delegate Janis acknowledged that the bill needed some work before it would be ready to go forward and both requested that the Commission appoint a working group to look at the bill and bring its recommendations back to the Commission.

Before making a decision on the creation of a working group, the Commission took testimony on the bill. Madge Bush, Director of Advocacy, AARP Virginia, briefly gave an overview of the underlying purpose of the bill. She then turned the presentation over to Dr. Robert Schneider, also of AARP, who went into more detail about the reason for the bill and how the program would operate. Dr. Schneider reiterated that Americans are not saving and are generally unprepared for retirement.

He noted, however, that employees who have automatic payroll deductions available to them are more likely to save than those who do not. Dr. Schneider testified that the VEVA program takes advantage of this fact to encourage employees to save by enabling small employers to offer tax-deferred retirement plans. Dr. Schneider also stressed the benefits of the VEVA program, noting that the program would enable small employers to take advantage of economies of scale by allowing them to pool their assets in the program, thereby reducing the fees associated with such retirement plans below where they would be for individual small employers. Dr. Schneider also asserted that the VEVA program could potentially help providers of such retirement plans penetrate the small business market and create new business opportunities for providers.

Cynthia W. Comer, General Counsel for the VCSP, also testified on behalf of the bill. As the VEVA program was designed to mirror the VCSP, Ms. Comer gave a brief outline of how that plan was established and how it is managed.

Robert N. Bradshaw, Jr., President and CEO of the Independent Insurance Agents of Virginia (IIAV), testified in opposition to the bill, although he agreed that the level of personal savings is a problem. Mr. Bradshaw explained that he does not view the VEVA program as being comparable to the VCSP. Instead, Mr. Bradshaw stated that the VEVA program would require the private sector, which already offers tax-deferred retirement plans to individual small employers, to compete with the government. His testimony was echoed by two other members of the IIAV, John Woleben and Barton Pasco.

Finally, Julia Ciarlo Hammond distributed to the Commission two reports concerning legislation in other states to create similar programs to the VEVA program. Ms. Hammond noted that while similar plans have been considered in other states, no state has adopted such a plan.

III. Update from the Virginia Department of Business Assistance.

Lynda Sharp Anderson, Director of the Virginia Department of Business Assistance (VDBA), was asked to give an update on the activities of the VDBA since her presentation at the Commission's meeting on May 22, 2009. At that meeting, the Commission requested that Ms. Anderson come up with specific recommendations that the VDBA would like the Commission to consider.

Ms. Anderson noted that since the May 22 meeting, the VDBA has reviewed and analyzed its programs and convened a brainstorming session of 50 small business owners and resource providers. As a result of this review, the VDBA identified the following three issues as the top issues for Virginia small businesses:

- State credit/access to capital programs should be enhanced.
- Business One Stop should be used for more efficient service delivery.
- Awareness of existing business assistance programs should be expanded.

In addressing these issues, Ms. Anderson suggested two legislative proposals for the 2010 Session, both of which involved Business One Stop, which is an electronic portal that serves to consolidate the presentation of services from various agencies to new and existing small businesses. The first legislative proposal would authorize the VDBA to collect social security numbers from employers who utilize the Business One Stop. It was explained that this is necessary in order to track the services provided to certain sole proprietors who refuse to obtain a federal employer identification number. The second legislative proposal would mandate that all state governmental agencies or departments that deal with small businesses be required to participate in Business One Stop.

Ms. Anderson also addressed several possible legislative proposals for future sessions, including enhancing credit/financing programs for small businesses, offering tax credits to stimulate business investment, streamlining and consolidating programs, and expanding participation in the Virginia Jobs Investment Program.

Member Discussion and Work Plan.

The members of the Commission discussed House Bill 2121 and the E-Verify program and decided to take up the bill again at the next meeting. Senator Barker noted that the Virginia Commission on Immigration, on which he served, looked at the E-Verify program and reported on its findings. He requested that a copy of the report be sent to the members of the Commission prior to the next meeting.

The Commission also decided to form a working group to look at the VEVA program as requested by Delegates Marshall and Janis. Interested parties were instructed to contact staff to indicate whether they would like to participate in the working group. The names of these parties will be forwarded to the co-chairs who will then select the members of the working group.

Future Meetings.

The Commission plans to hold several more meetings prior to the start of the 2010 Session of the General Assembly.