

Nebraska Laws LB 403 (2009)
Verification Lawful Presence/Public Benefits and Employment
Office of the General Counsel Guidance

Neb. Rev. Stat. §§4-108 to 4-114 (Laws 2009 LB 403) is effective October 1, 2009. According to LB 403, its purpose in part is "to require verification of lawful presence for purposes of public benefits; to require verification of work eligibility status for purposes of public employment, [and] employment under public contracts." This Guidance is intended to provide some direction, advice, and support to those University offices responsible for compliance with the statute.

There are three compliance areas in the new law: (1) verifying that persons seeking "public benefits" are legally present in the United States; (2) verifying that new hires are legally present in the United States, and (3) requiring public contractors and their employees to be legally present in the United States. University personnel involved in any of these three functions would be well-advised to read the statutes, which may be found at:

http://nebraskalegislature.gov/laws/search_range_statute.php?begin_section=4-108&end_section=4-114

I. Public Benefits

A. General-Public Benefits and Attestation

Neb. Rev. Stat. §4-109 defines a public benefit as "any *grant, contract, loan, professional license, commercial license, welfare benefit, health payment or financial assistance benefit, disability benefit, public or assisted housing benefit, postsecondary education benefit involving direct payment of financial assistance* [emphasis supplied], food assistance benefit, or unemployment benefit or any other similar benefit" provided by a governmental agency, such as the University. There are limited exceptions to the definition of "public benefit" (Neb. Rev. Stat. §4-110), such as emergency health care services, short term noncash disaster relief, soup kitchens, and life safety services, among others. (See Section IV for exemptions pursuant to federal law.)

The statute requires any individual applying for one of the above public benefits to attest that he or she is either a U.S. citizen or a qualified alien. This attestation (except as indicated below with respect to student financial aid applicants) is to be achieved by completing the Department of Administrative Services ("DAS") form attached (Attachment "A"). This attestation may be created in hardcopy, electronically, or incorporated into another document, such as an application for the public benefit application. The related DAS guidance may be found at:

http://www.das.state.ne.us/lb403/attestation_form.pdf
http://www.das.state.ne.us/lb403/abc_memo_lb403_implementation.pdf
http://www.das.state.ne.us/lb403/lb403_contract_provision.pdf

If the benefit applicant attests that he or she is a qualified alien, and not a U.S. citizen, then the University is required to verify through the U.S. Department of Homeland Security's Systematic Alien Verification for Entitlements Program ("SAVE"), or an equivalent Homeland Security program, that the applicant is eligible to receive the benefit. Each University campus should learn about SAVE and implement those processes necessary to secure SAVE verifications.

It is important to note that the statute permits, pending the completion of the verification process, that the University may presume the information on the applicant's attestation is true, unless some separate state or federal law requires verification prior to providing the benefit. In other words, if we are in the process of confirming eligibility for the benefit with SAVE or its equivalent program, we can rely on the applicant's word and provide the benefit. However, the statute provides no direction concerning appropriate steps to take with respect to an applicant who later fails verification, after part or all of a benefit has been provided. Clearly, any benefits not yet conferred would be disallowed. Our obligations with respect to benefits granted prior to a failed verification will be addressed on a case-by-case basis with guidance from campus authorities and the Office of the General Counsel.

B. Student Financial Aid (Postsecondary Education Benefits)

Simply stated, the statute will not allow state-funded scholarships and similar financial aid to be awarded to persons who are not legally present in the United States. Due to the thousands of students applying annually for financial aid (only a very few do not), the *electronic* collection of the information required by the statute *at the time the student applies for admission* is the only effective and reliable means of collection. Fortunately, the electronic admissions application process already in place at the University collects the statute's attestation information, and further confirms the student's legal presence through the Student and Exchange Visitor Information System (SEVIS). As such, most or all of the required information is already collected and verification processes established.

Due to the need to coordinate the electronic collection of information in the University's present admissions process and the collection of the information required by Neb. Rev. Stat. §§4-108 to 4-114, the Chancellors of each campus, based upon the recommendations of their respective admissions and financial aid offices, have adopted procedures for electronic filing of the attestation, which are substantially similar to the format prescribed by DAS. Such procedures are on file at each campus's admissions and financial aid offices.

Note that the chief purpose of the statute is to prohibit payment of *public benefits* to persons not legally qualified to receive them. As such, the statute does not apply to privately funded scholarship benefits. And while the language of the statute provides that the University may not "provide public benefits to a person not lawfully present *in the United States*," the statute does not prohibit public benefits provided to students not present in the United States as a result of participating in a foreign study abroad program or a distance education program. Further, a student's rights to a multi-year scholarship award is vested for all award years, if granted prior to the effective date of the statute.

Lastly, the discussion in the last paragraph of Section I.A. above, concerning the award of benefits *pending verification*, also applies to student financial aid.

C. University Retirement Program

Neb. Rev. Stat. §4-108 provides that no employee of a state agency may participate in any retirement system, unless the employee is a U.S. citizen or qualified alien, legally present in the United States. Some have posited that the statute applies only to State of Nebraska-administered retirement systems such as those established by the Judges Retirement Act or the School Employees Retirement Act, whereas University employees participate in programs (TIAA/CREF; Fidelity) administered by private third party financial services companies that provide retirement programs. Regardless of

whether TIAA/CREF or Fidelity programs are included in the statute's mandates, the University's present processes of ensuring that its employees are legally present provide compliance. (Note that retirement contributions are not included as part of the statutory definition of "public benefit." As such, there is no need to seek attestation and verification, for each employer retirement contribution made for employees.)

II. Public Contracts

A. General-Contract Language

All University contracts deemed to be "public contracts," as defined under the statute must contain the following representation, or one substantially and substantively similar to the following:

Contractor shall use an electronic verification system to determine the work eligibility status of any new employees physically performing services within the State of Nebraska, as required pursuant to Neb. Rev. Stat. §§4-108 to 4-114 as of the effective date of this Contract, or as such law may be amended from time-to-time. Compliance with these Nebraska statutes shall be considered a material term of this Contract.

Must every University contract include this language? Again, there is not much detail to assist in interpretation. The statutory description of the term "public contract" indicates that it is a contract *for the physical performance of services within the State of Nebraska*. Therefore, the simple purchase of goods (not services), e.g. office supplies, equipment, and other commodities purchased through the p-card process, is not subject to the statute. Services performed outside the State of Nebraska are not required to comply. Note that where applicable, the required contract language may be incorporated into the contract by reference to other documents such as bid specifications, a request for proposals, a purchase order, or business office policies. It is advisable to include the requirement on any posted "terms and conditions" appearing on the related purchasing websites.

The statute provides that the new contract rules do not apply to contracts *awarded* prior to October 1, 2009. For a variety of reasons, a contract may be awarded prior to its execution. For example, it's possible that a bid process was complete and a contract awarded in July 2009, yet administrative approvals/final execution extended past September 2009. Since the contract was awarded before October 1, 2009, failure to secure the required contract language should not render the contract out of compliance. However, these situations should be relatively few, and execution should be secured as soon as possible. The University offices facing these situations should be careful to preserve documentation showing that the contract was indeed awarded prior to October 1, 2009. Persons with questions during this transition period surrounding the effective date of the law should not hesitate to seek assistance from the campus's Vice Chancellor of Business and Finance.

Finally, contracts which have the ability to be renewed or extended beyond the initial term, will comply by incorporating the required contract language into the renewal or extension.

B. Contracts with Sole Proprietors

In addition to the contract language discussed in "II. A. General-Contract Language" immediately above, remember that a contract awarded to a sole proprietor is also considered a "public benefit" requiring the attestation and verification processes set out in "I. Public Benefits; A.

General-Public Benefits and Attestation" found on the first page of this Guidance.

III. E-Verify and New Hires

The third area of compliance requires the University to register and use E-Verify (or an equivalent program of the Department of Homeland Security or other federal agency) for all new employees of the University, hired on or after October 1, 2009, physically performing services within the State of Nebraska. (As of the distribution date of this Guidance, Central Administration and campus Human Resources Offices are preparing E-Verify compliance processes with the support and review of the Office of the General Counsel.)

IV. Exemptions pursuant to Federal Law

A. Exemptions under PRWORA

The University is not required to verify citizenship status for "programs necessary for protection of life or safety" and other specific exemptions under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, except to the extent necessary to determine whether an exemption applies.

B. Honorarium

Consistent with exemptions under federal immigration regulations regarding accepting employment, the University is not required to verify citizenship status for one time honorarium payments and associated incidental expenses for "usual academic activity." See: Michael A. Pearson, Executive Association Commissioner, Office of Field Operations, Immigration and Naturalization Services, Memorandum re: Academic Honorarium for Visiting B Nonimmigrant Aliens, Nov. 30, 1999. (Source:http://www.uscis.gov/files/nativedocuments/Nonimmigrants_2006.pdf (Last accessed 9/10/2009))

V. Annual Report; Miscellaneous

Finally, the statute requires the University to report annually in writing, no later than January 31 for the prior calendar year, to the Governor and the Clerk of the Legislature, setting forth, but not limited to, the total number of applicants for public benefits and the number of such applicants rejected for failure to qualify for the benefits pursuant to the statute. Each of the four campuses shall submit such information, as shall be reasonably necessary to complete the annual report, to the University of Nebraska Director of Institutional Research and Planning, no later than January 15 of each year. Information will be gathered and reported for the partial year, consisting of the last quarter of 2009.

Individual campuses and Central Administration shall institute such processes and assign such responsibilities, as are appropriate to achieve compliance with Neb. Rev. Stat. §§4-108 to 4-114, taking into consideration the particular circumstances surrounding the impact of compliance on their particular campus, the individual organizational structure of their campus, and the resources available.

Attachment "A"

United States Citizenship Attestation Form

For the purpose of complying with Neb. Rev. Stat. §§ 4-108 through 4-114, I attest as follows:

I am a citizen of the United States.

— OR —

I am a qualified alien under the federal Immigration and Nationality Act, my immigration status and alien number are as follows: _____, and I agree to provide a copy of my USCIS documentation upon request.

I hereby attest that my response and the information provided on this form and any related application for public benefits are true, complete, and accurate and I understand that this information may be used to verify my lawful presence in the United States.

PRINT NAME _____

(first, middle, last)

SIGNATURE _____

DATE _____