Employment Verification and Public Contracts for Services Laws
Division of Labor
Department of Labor and Employment

Performance Audit
October 2011

OFFICE OF THE
STATE AUDITOR

LEGISLATIVE AUDIT COMMITTEE
2011 MEMBERS

Senator Lois Tochtrop
Chair

Representative Cindy Acree
Vice-Chair

Representative Deb Gardner
Senator Lucia Guzman
Representative Jim Kerr
Senator Steve King
Representative Joe Miklosi
Senator Scott Renfroe

OFFICE OF THE STATE AUDITOR

Dianne E. Ray
State Auditor

Monica Bowers
Deputy State Auditor

Greg Fugate
Legislative Audit Manager

Christopher Harless
Anne Jordan
Heidi Schaefer
Legislative Auditors

The mission of the Office of the State Auditor is to improve the efficiency, effectiveness, and transparency of government for the people of Colorado by providing objective information, quality services, and solution-based recommendations.

Office of the State Auditor

Dianne E. Ray, CPA
State Auditor

October 18, 2011

Members of the Legislative Audit Committee:

This report contains the results of a performance audit of the Division of Labor's activities under the Employment Verification and the Public Contracts for Services Laws. The audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The report presents our findings, conclusions, and recommendations, and the responses of the Division of Labor, the Department of Personnel & Administration, and the Office of the State Controller.

Legislative Services Building • 200 East 14th Avenue • Denver, Colorado 80203-2211
Ph. 303.869.2800 • Fax: 303.869.3060

TABLE OF CONTENTS

Glossary of Terms and Abbreviations

Department – Department of Labor and Employment

Division – Division of Labor

DPA – Department of Personnel & Administration

EMPLOYMENT VERIFICATION AND PUBLIC CONTRACTS FOR SERVICES LAWS

Performance Audit, October 2011
Report Highlights

Dianne E. Ray, CPA
State Auditor

Division of Labor
Department of Labor and Employment

PURPOSE

Examine the Division of Labor's auditing, enforcement, and employer education and outreach activities to implement the Employment Verification Law and the Public Contracts for Services Law.

BACKGROUND

- Employment is often the magnet that attracts individuals to reside in the United States illegally.
- Colorado employers are responsible for verifying new employees' employment eligibility using a process that is governed by both federal and state laws.
- Colorado's Employment Verification Law was enacted to help ensure that individuals hired to work in the state are authorized to work in the United States by requiring employers to take steps beyond the federal Form I-9 process.
- Colorado's Public Contracts for Services Law was enacted to help ensure that state agencies and political subdivisions do not procure services from entities that knowingly hire illegal aliens.
- The Division of Labor audits and investigates employers to determine their compliance with state employment verification requirements.

KEY RECOMMENDATIONS

The Division of Labor should:

- Ensure that compliance determinations are appropriate and have adequate support.
- Ensure that fine assessments are handled appropriately and consistently for all employers on the basis of clearly defined standards.
- Incorporate risk-based principles when selecting employers for audit.

The Division of Labor agreed with all of our recommendations.

EVALUATION CONCERN

- **In Calendar Year 2010, approximately 48 percent of audited employers with newly hired employees were noncompliant with the Employment Verification Law.**
- **The Division of Labor faces many challenges in monitoring for compliance with the Public Contracts for Services Law.**

KEY FACTS AND FINDINGS

- The Division of Labor needs to make a number of improvements to help ensure and promote employers' compliance with the Employment Verification Law. We found:
  - Compliance determinations were not appropriate for 13 of 35 employer audits we reviewed. The Division of Labor's compliance officers:
    - Missed relevant facts, such as late and unsigned employer affirmations.
    - Did not utilize evidence of backdated employer affirmations.
    - Did not maintain sufficient documentation of the tests performed or judgments made during the audits.
  - The Division of Labor does not have a well-structured or transparent approach for assessing monetary fines against noncompliant employers:
    - Four noncompliant employers met the Division of Labor's fine assessment criteria, yet no fine was assessed.
    - Fine assessment notices took an average of 155 days, or about 5 months, to issue.
    - One fine assessment totaling $50,700 may have exceeded the statutorily allowable maximum fine amount.
    - Fines for 22 of the 45 employers that were originally assessed a fine as of March 2011 were subsequently reduced or dismissed. The total dollar amount of the fines was reduced by 58 percent, from $226,100 to $94,100.
  - The process for selecting employers for audit is not well targeted to ensure that resources are spent auditing those employers with the greatest potential to be noncompliant.
- Several practical and legal factors limit the Division of Labor's role with respect to monitoring for compliance with the Public Contracts for Services Law.
- The Department of Personnel & Administration and the Office of the State Controller, respectively, can make improvements to help ensure that state agencies comply with the Employment Verification Law when hiring new state employees and the Public Contracts for Services Law when purchasing services of $5,000 or less.

For further information about this report, contact the Office of the State Auditor
303.869.2800 - www.state.co.us/auditor

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
1	24	Ensure that compliance determinations are appropriate and have adequate support by (a) ensuring that compliance officers adhere to new documentation review standards and utilize the Division of Labor's (the Division) new testing spreadsheet when conducting employer audits; (b) establishing a formal written policy specifying documentation standards and expectations, including the minimum level of supporting documentation that compliance officers must maintain in hard copy files and the Division's eComp system when conducting an audit; (c) instituting a quality review process whereby a supervisor and/or another compliance officer routinely reviews a sample of completed audits for adherence to established standards; and (d) finding employers to be noncompliant when there is evidence that employers have submitted backdated affirmations.	Division of Labor	a. Agree b. Agree c. Agree d. Agree	a. Implemented and Ongoing b. Implemented c. February 2012 d. February 2012

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
2	30	Ensure that monetary fines assessed as a result of noncompliance are handled appropriately and consistently for all employers on the basis of clearly defined standards by (a) fully specifying in state rules those circumstances or situations in which an employer's actions or noncompliance meet the "reckless disregard" standard and warrant a fine; (b) defining a schedule or matrix in state rule that directly and clearly aligns the different factors considered when assessing a fine with the resulting total fine amount; (c) obtaining an informal or formal legal opinion from the Office of the Attorney General to clarify the total maximum amount the Division may fine an employer on a single audit; and (d) developing a formal process in state rules for evaluating employers' appeals of fine assessments, including the standards and criteria by which an appealed fine assessment may be reduced or dismissed.	Division of Labor	a. Agree b. Agree c. Agree d. Agree	a. July 2012 b. July 2012 c. December 2011 d. July 2012
3	34	Help facilitate employers' compliance with the affirmation requirement by (a) updating the Division's affirmation form to include a version number and/or effective date, and (b) amending state rules to require employers to use the Division's approved affirmation form.	Division of Labor	a. Agree b. Agree	a. December 2011 b. July 2012

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
4	40	Incorporate risk-based principles when selecting employers for audit by (a) utilizing and leveraging the unemployment insurance tax data to better identify the population of employers that are likely to have newly hired employees before randomly selecting specific employers for audit, (b) tracking noncompliance rates by industry and selecting for random audit a greater proportion of employers in those industries with historically higher rates of noncompliance, and (c) resuming re-audits of noncompliant employers.	Division of Labor	a. Agree b. Agree c. Agree	a. December 2011 b. April 2012 c. October 2011
5	45	Build on existing efforts to educate and help promote employers' compliance with the Employment Verification Law by (a) working with state and federal agencies and private-sector organizations that are likely to be points of contact for employers and business owners in Colorado to try to increase the availability and visibility of information about the Employment Verification Law and its requirements, and (b) improving written technical guidance to clarify how key provisions in the Employment Verification Law should be implemented and adhered to, especially in those situations in which the Employment Verification Law departs from federal regulations and guidance related to the Form I-9 process.	Division of Labor	a. Agree b. Agree	a. November 2011 and Ongoing b. February 2012

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
6	48	Strengthen the audit process, including communication with audited employers, by (a) requesting that audited employers provide a list of all current employees and their corresponding hire dates and using these lists to ensure that employers provide copies of completed affirmations and identity and employment eligibility documents for all employees hired on or after January 1, 2007; (b) requiring compliance officers to use the Division's eComp system to generate an official closure letter for each initiated audit; and (c) providing better instructions in the audit initiation letter for those circumstances in which the employer may not have obtained or maintained the required documentation.	Division of Labor	a. Agree b. Agree c. Agree	a. Implemented and Ongoing b. Implemented c. February 2012
7	52	Help ensure that the State of Colorado, as an employer, complies with the Employment Verification Law for state classified employees by (a) expanding technical guidance to more clearly and comprehensively explain the requirements of the Employment Verification Law and how they go beyond or are different from the federal Form I-9 process; (b) providing training to human resources personnel at state agencies and higher education institutions on employment eligibility verification requirements and processes for state classified employees; (c) encouraging human resources personnel at state agencies and higher education institutions to use the employment verification self-audit form; and (d) conducting targeted reviews of state agencies and higher education institutions, as necessary, for compliance with the Employment Verification Law.	Department of Personnel & Administration	Agree	April 2012

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
8	62	Ensure a valid list of participants in the Department Program for audit purposes by (a) following up with the contracting state agency or political subdivision when it receives a notice of participation from a contractor, and (b) improving technical guidance for contractors and contracting agencies to clarify that bidders and subcontractors are ineligible for participation in the Department Program.	Division of Labor	a. Agree b. Agree	a. January 2012 and Ongoing b. January 2012
9	65	Develop and implement a method for state agencies to comply with the Public Contracts for Services Law for small-dollar purchases for services when a written purchase order or contract is not required.	Office of the State Controller	Agree	December 2011

This page intentionally left blank.

Overview

Chapter 1

Employment is often the magnet that attracts individuals to reside in the United States illegally. According to a February 2011 report by the Pew Hispanic Center, which is part of the nonpartisan Pew Research Center, unauthorized immigrants were estimated to make up about 3.7 percent of the nation's population and about 5.2 percent of the nation's labor force as of March 2010. This same study estimated that unauthorized immigrants made up about 3.6 percent of Colorado's population and about 4.6 percent of its labor force as of March 2010.

Immigration reform has been part of the national policy debate for much of the last decade. In recent years, state legislatures have displayed an unprecedented level of activity by passing immigration-related legislation as they grapple with how best to respond to the influx of unauthorized immigrants into their state populations. However, not every state has taken the same approach. In 2006, Colorado's General Assembly passed a series of laws aimed at preventing unauthorized immigrants from seeking employment or State-sponsored benefits and services. Among the bills that the General Assembly passed and the Governor signed were House Bill 06S-1017, which we refer to as the Employment Verification Law, and House Bill 06-1343, which we refer to as the Public Contracts for Services Law.

Division of Labor

The Division of Labor (the Division) within the Department of Labor and Employment (the Department) is the organizational unit responsible for administering the Employment Verification and Public Contracts for Services Laws. Specifically, the Division has assigned four of its 15 total appropriated full-time-equivalent staff positions as compliance officers responsible for conducting audits, investigating complaints, providing technical assistance to employers, and performing other administrative duties related to the Employment Verification and Public Contracts for Services Laws. The Division has promulgated state rules (7 C.C.R., 1103-3) that further implement the provisions of the Employment Verification Law. Although the Division has rulemaking authority, it has not promulgated any state rules pertaining to the Public Contracts for Services Law.

The Division had Fiscal Year 2011 expenditures totaling approximately $1.2 million, which have not increased or decreased significantly over the past 3 fiscal years. About 95 percent of the Division's Fiscal Year 2011 expenditures

were for personal services, and the remaining 5 percent was for operating and travel costs. The Division is completely cash funded through revenue from the Employment Support Fund [Section 8-77-109(1), C.R.S.].

Federal and State Employment Eligibility Verification Laws

In Colorado, employers' responsibility to verify employment eligibility for each newly hired employee is governed by federal and state laws. Generally speaking, Colorado's Employment Verification and Public Contracts for Services Laws complement and expand on requirements and processes established under federal law. As described in the following sections, there are some distinct differences between the federal and state laws; however, there are also considerable similarities.

Federal Employment Eligibility Verification Requirements

Pursuant to the federal Immigration Reform and Control Act of 1986, it is unlawful for an employer to knowingly hire a person who is not authorized to work in the United States. Among those individuals who are authorized for employment in the United States are U.S. citizens and nationals, and aliens who have been lawfully admitted for permanent residence or granted authorization for employment by the U.S. Citizenship and Immigration Services, which is the federal agency that oversees lawful immigration. Aliens admitted to the United States as asylees, refugees, or on the basis of a temporary work visa may also be authorized for employment. Immigrants who enter the United States without valid documents or who arrive with valid visas but stay past their visa expiration dates are not authorized for employment.

Federal law [8 USC 1324a(b)] requires employers to examine certain approved documents that are intended to prove the identity and employment authorization for newly hired employees. For example, a passport or permanent resident card (i.e., green card) establishes both identity and employment authorization. A driver's license or other state-issued identification card establishes only identity. A social security card or birth certificate establishes only employment authorization. All documents must be unexpired and original; however, a certified copy of a birth certificate is acceptable.

The employer must ensure that each new employee completes a portion of the federal Form I-9 by his or her first day of paid work. The employer must then review the employee's identity and employment authorization documents and

complete the remaining sections of the Form I-9 within 3 business days of the new employee's first day of paid work. Specifically, the Form I-9 includes lines for the employer to record the title, number, expiration date, and issuing authority for the identity and employment authorization documents presented by the employee. The Form I-9 also includes a section wherein the employer must attest that:

- The employer has examined the employee's documents.
- The documents appear to be genuine and relate to the employee.
- The employee began employment on the date entered on the form.
- To the best of the employer's knowledge, the employee is authorized to work in the United States.

The employer must retain the Form I-9 for at least 3 years after the employee's date of hire or 1 year after the date employment ends, whichever is later. Employers *may* make copies of the employee's identity and employment authorization documents, but federal law does not require them to do so. An employer that chooses to photocopy identity and employment authorization documents must do so for all employees.

E-Verify

The Form I-9 process for verifying employment eligibility should not be confused with the federal E-Verify Program. E-Verify is an Internet-based system that compares information from an employee's Form I-9 to records maintained by the U.S. Department of Homeland Security and the U.S. Social Security Administration. E-Verify is intended to complement the Form I-9 process by providing employers with greater assurance that the identity and employment authorization documents presented by employees are valid. Completion of the Form I-9 is required of all employers. Participation in E-Verify is voluntary for most employers; however, the federal government and 18 states, including Colorado, have various requirements that certain employers use E-Verify. For example, the federal government requires participation in E-Verify for contractors and subcontractors working on certain federal contracts. Several states, such as Alabama, Arizona, Mississippi, and South Carolina, have passed legislation requiring all employers to use E-Verify. Colorado's Public Contracts for Services Law, which we discuss later in this chapter and in Chapter 3, requires contractors working under public contracts for services to use E-Verify in certain conditions.

Colorado's Employment Verification Law

Codified in Section 8-2-122, C.R.S., Colorado's Employment Verification Law became effective on July 31, 2006, and applies to employees hired on or after January 1, 2007. The Employment Verification Law was enacted to help provide assurance that individuals hired to work in Colorado are authorized to work in the United States. The law seeks this assurance by (1) requiring employers to take additional steps beyond the requirements of federal law to verify and document the employment eligibility of newly hired employees, and (2) vesting the State with the authority to audit employers for compliance with these requirements.

The Employment Verification Law requires employers to maintain two types of documents in addition to those required by federal law. First, all employers in the state are required to make and retain copies of the identity and employment authorization documents that newly hired employees present to complete the Form I-9. Thus, to comply with the Employment Verification Law, employers must first comply with the federal Form I-9 requirements. Second, employers must, within 20 days of hiring a new employee, compose an affirmation stating that the employer has:

- Examined the legal work status of the newly hired employee.
- Retained copies of the identity and employment authorization documents required by federal law.
- Not altered or falsified the employee's identification documents.
- Not knowingly hired an unauthorized alien. (The Employment Verification Law defines the term "unauthorized alien" consistently with federal law to mean an alien who has not been lawfully admitted for permanent residence or granted authorization for employment.)

Employers must retain a written or electronic copy of this affirmation and copies of the employee's identity and employment authorization documents for the term of the employee's employment.

The full text of the Employment Verification Law is provided in Appendix A for reference. We discuss the Employment Verification Law in more detail in Chapter 2.

Administration

Pursuant to its authority granted by the Employment Verification Law, the Division conducts three types of audits, each of which involves reviewing copies of the completed affirmation and identity and employment authorization documents that Colorado employers are required to keep for newly hired employees:

- **Complaint-based audits** are conducted in response to formal written complaints submitted to the Division. In accordance with state rule, the Division does not accept anonymous complaints.

- **Random audits** are conducted on employers selected by the Division from a randomized list of employers.

- **Re-audits** are conducted on employers that have previously been found to be noncompliant with the Employment Verification Law through either a complaint-based audit or a random audit. In general, the Division only considers conducting a re-audit if at least 6 months have elapsed since the closure date of the previous audit.

According to the Division, the number, frequency, and duration of audits vary based on several factors, such as staff resources, the number and nature of ongoing audits, and other workload demands. Complaint-based audits are given the highest priority; however, complaint-based audits are relatively few in number. Thus, the majority of compliance officers' time is spent conducting random audits. Re-audits are initiated as resources permit.

Throughout this report, we use the term "initiated audit" to refer to those instances in which the Division contacts an employer that was selected for audit and requests copies of the documentation required by the Employment Verification Law. However, the Division may administratively close an audit without making a compliance determination (i.e., a finding of compliance or noncompliance). This generally occurs when an employer that is selected for audit cannot be reached, is no longer in business, or reports having hired no new employees since January 1, 2007. We reserve use of the term "completed audit" specifically to refer to those audits in which the Division made a compliance determination.

The following table shows the Division's audit activity for Calendar Years 2007 through 2010. In total, the Division received 141 complaints, which resulted in 109 complaint-based audits. Not all complaints result in an audit. For example, the Division may be unable to initiate an audit when a complainant is unresponsive to requests for additional information. The Division may also combine multiple complaints regarding the same employer into a single audit. The

Division initiated more than 2,400 random audits, of which 1,140 (47 percent) were completed (i.e., resulted in a compliance determination). Finally, the Division initiated re-audits with 215 previously noncompliant employers. The number of random audits initiated was generally lower in 2009 due to the higher number of re-audits performed. The Division suspended conducting re-audits of employers as of October 2009 to devote time to conducting new random audits and tending to other administrative matters, such as promulgating rules, revising policies and procedures, and training staff. As of the end of our audit, the Division had not resumed conducting re-audits of previously noncompliant employers.

Colorado Division of Labor
Employment Verification Law
Audit Activity by Year
Calendar Years 2007 Through 2010

	2007	2008	2009	2010	Total 2007-2010
Complaints Received	23	46	31	41	141
Complaint-Based Audits Initiated	10	38	30	31	109
Random Audits Initiated[1]	259	962	434	788	2,443
Random Audits Completed[2]	136	367	233	404	1,140
Re-Audits Initiated[3]	0	56	159	0	215

Source: Office of the State Auditor's analysis of data provided by the Division of Labor.
[1]The Division began initiating random audits in October 2007.
[2]Includes only those audits that resulted in a compliance determination. Excludes those audits that were closed administratively because the employers that were selected for audit could not be reached, were no longer in business, or reported having hired no new employees since January 1, 2007.
[3]To allow a sufficient amount of time to elapse from the completion of its initial round of audits, the Division began re-auditing previously noncompliant employers in October 2008. The Division suspended conducting re-audits in October 2009.

The Employment Verification Law grants the Division authority to assess monetary fines for noncompliance. Monies collected from fines are credited to the Employment Verification Cash Fund and may be used by the Division to implement, administer, and enforce the Employment Verification Law. As of June 30, 2011, the Division had collected about $22,400 in fines and was expecting payment for an additional $49,600 in fines. To date, funds have not been appropriated from the fund, and the Division has made no expenditures from the fund.

Colorado's Public Contracts for Services Law

Codified in Sections 8-17.5-101 and 102, C.R.S., Colorado's Public Contracts for Services Law became effective on August 7, 2006. The Public Contracts for Services Law was enacted to help provide assurance that state agencies and political subdivisions do not procure services from entities that knowingly hire illegal aliens. The Public Contracts for Services Law does not specifically define the term "illegal alien." However, given the context of the law, the term illegal alien appears to be substantively similar to how the term "unauthorized alien" is defined in the Employment Verification Law—an alien who has not been lawfully admitted for permanent residence or granted authorization for employment.

Prior to entering into a public contract for services, each prospective contractor must certify that it does not knowingly employ or contract with an illegal alien who will perform work under the contract. The contractor must also certify that it will confirm the employment eligibility of new employees who are hired to perform work under the contract by participating in either the federal E-Verify Program or an alternative program, called the "Department Program," managed by the Division. Further, the Public Contracts for Services Law requires that this certification and other related commitments be included as provisions in all public contracts for services issued by state agencies or political subdivisions.

Originally, the Public Contracts for Services Law required all contractors to use E-Verify. However, in response to complaints from contractors, the General Assembly amended the Public Contracts for Services Law during the 2008 Legislative Session and created the Department Program, which consists of the following notification and affirmation requirements:

- The contractor must notify the Division of Labor and the contracting state agency or political subdivision of its participation in the Department Program. Unless such notification is made, it is assumed that the contractor is participating in E-Verify.

- Within 20 days of hiring a new employee to perform work under a public contract for services, the contractor must compose an affirmation stating that it has:

    - Examined the legal work status of the new employee.

    - Retained file copies of the identity and employment authorization documents used to complete the employee's federal Form I-9.

    - Not altered or falsified the employee's identification documents.

The contractor must also have the affirmation notarized and send a copy to the contracting state agency or political subdivision.

The Public Contracts for Services Law sets up the Department Program as an alternative option to the federal E-Verify Program for the purpose of confirming the employment eligibility of new employees who are hired to perform work under a public contract for services. However, it is important to note that the two programs are not identical in the level of assurance provided. E-Verify relies on automated matches to federal databases to validate the identity and employment authorization documents that newly hired employees present as part of the federal Form I-9 process. Under the Department Program, the employer must examine and retain copies of employees' identity and employment authorization documents; however, no independent validation takes place.

The full text of the Public Contracts for Services Law is included in Appendix B for reference. We discuss the Public Contracts for Services Law in more detail in Chapter 3.

Administration

The Public Contracts for Services Law grants the Division authority to investigate whether a contractor has violated any of the required provisions of a public contract for services. Such investigations may include conducting onsite inspections where work on the public contract for services is being performed. Investigations may be initiated either by a formal complaint or at the Division's discretion. The Public Contracts for Services Law also grants the Division authority to conduct random audits of contractors that are enrolled in the Department Program to review the notarized affirmations and copies of identity and employment authorization documents that the contractors are required to keep for newly hired employees. As we discuss in more detail in Chapter 3, the Public Contracts for Services Law does not authorize the Division to assess monetary fines or take other enforcement action for noncompliance.

As of January 2011, the Division had received and investigated a total of six complaints against employers suspected of violating a required provision of a public contract for services. At the time of our audit, the Division had not initiated any non-complaint-based investigations or audited any contractors participating in the Department Program.

Audit Scope and Methodology

We conducted this performance audit in response to a legislative request. Audit work was performed from July 2010 through October 2011. Our testwork

generally covered the Division's data, policies, procedures, and processes in place and operating for the period January 2009 through March 2011. During our audit, the Division began modifying policies, procedures, and processes in many of the areas covered by our audit work and related to our findings and recommendations. We did not perform additional testwork against these newly implemented policies, procedures, and processes. We acknowledge the cooperation and assistance provided by management and staff at the Department of Labor and Employment, the Department of Personnel & Administration, the Office of the State Controller, and our sampled agencies.

The overall objective of this audit was to examine the Division's auditing, enforcement, and education and outreach activities to implement the Employment Verification Law and the Public Contracts for Services Law. Specifically, we evaluated:

- The adequacy of the Division's audit planning and audit selection activities.
- The overall quality of the Division's auditing and enforcement activities.
- The Division's efforts to encourage improved levels of compliance among employers.

Another objective of the audit was to evaluate the adequacy of the controls intended to ensure the State of Colorado's compliance with the Employment Verification Law when hiring new state employees, and the Public Contracts for Services Law when entering into public contracts for services.

We planned our audit work to assess the effectiveness of those internal controls that were significant to our audit objectives. Our conclusions on the effectiveness of those controls are described in the audit findings and recommendations. We noted certain other matters that we reported to Department and Division management in a separate letter dated October 13, 2011.

To accomplish our audit objectives, we researched federal and state laws, rules, and regulations pertaining to employment verification requirements; interviewed Division managers and staff and other stakeholders; reviewed the Division's policies and procedures; analyzed data from the Division's electronic information system; and reviewed the Division's hard copy documentation. Specific details about the audit work supporting our findings and recommendations are described in the body of the report.

We relied on sampling techniques to support our audit work and help provide sufficient, appropriate evidence for the purpose of concluding on our audit

objectives. The results of our sample testwork cannot be projected to the entire populations from which the samples were drawn. We used sampling techniques in two specific areas:

- We reviewed electronic and hard copy documentation for a random, nonstatistical sample of 35 audits—seven complaint-based audits, 16 random audits, and 12 re-audits—the Division completed between January 1, 2009, and January 20, 2011. We selected our sample to provide sufficient coverage of the different types of audits the Division conducts pursuant to its authority under the Employment Verification Law for the purpose of evaluating the Division's audit activities based on our audit objectives.

- We reviewed employment documentation for a nonstatistical sample of 75 state employees who were hired in Calendar Years 2009 and 2010. We selected 15 employees at random from each of four state agencies (Departments of Corrections, Human Services, Natural Resources, and Transportation) and one higher education institution (University of Colorado Denver). In addition to our review of sampled employee files, we examined documentation and interviewed agency staff about their procurement policies and practices. We selected the four state agencies and one higher education institution to provide sufficient coverage of different agencies, agencies with a large number of newly hired employees, and agencies with a large number of contracts for the purpose of evaluating the State's compliance with the Employment Verification Law and the Public Contracts for Services Law based on our audit objectives.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Employment Verification Law

Chapter 2

Colorado's Employment Verification Law (Section 8-2-122, C.R.S.) became effective on July 31, 2006, and applies to all employees hired on or after January 1, 2007. As described in more detail in Chapter 1, the law requires employers in Colorado to take additional steps beyond the requirements of federal law to verify and document the employment eligibility of newly hired employees. The law also grants the Division of Labor (the Division) within the Department of Labor and Employment (the Department) the authority to conduct audits of Colorado employers to determine their compliance with the law's requirements.

The Division selects employers for audit (1) on the basis of complaints; (2) through a random selection process, which we discuss in more detail in Recommendation No. 4; or (3) from a list of employers that were previously audited and found to be noncompliant with the Employment Verification Law. At the start of the audit process, the Division contacts the employer that was selected for audit and requests copies of completed affirmations and copies of the identity and employment authorization documents used to complete the federal Form I-9 for each current employee hired since January 1, 2007, or, in the case of a re-audit, since the close of the initial audit. State rules afford the employer at least 10 business days to respond with the requested documentation; time extensions may be granted at the Division Director's discretion. Once all requested documentation has been received, one of the Division's compliance officers performs a desk audit of the documentation. For example, the compliance officer verifies that affirmations were completed within 20 days after each employee's hire date and that the identity and employment authorization documents provided appear to relate to each employee, appear to be genuine, and are included in the list of acceptable documents for the Form I-9. No onsite review takes place at the employer's location. Additionally, as mentioned in Chapter 1, the compliance officer administratively closes an audit without making a compliance determination when an employer that is selected for audit cannot be reached, is no longer in business, or reports having hired no new employees since January 1, 2007.

At the completion of the audit, the compliance officer notifies the employer of the findings (i.e., compliant or noncompliant) and any assessed fines. A finding of noncompliance does not necessarily mean that an employer has hired an unauthorized worker. Noncompliance means only that the employer (1) has failed to complete the affirmation or retain copies of identity and employment authorization documents for employees hired on or after January 1, 2007, or

(2) has failed to respond to the Division's request for documentation. Conversely, a finding of compliance does not necessarily mean that an employer has *not* hired an unauthorized worker. Compliance means only that the employer has completed affirmations and retained copies of identity and employment authorization documents for its newly hired employees.

Employers' compliance with the Employment Verification Law is critical for ensuring that the employment eligibility status of newly hired employees has been verified. We analyzed data on the results of the Division's random audits to calculate an overall noncompliance rate for each year since the Employment Verification Law became effective. As shown in the following table, we found that, although the noncompliance rate has decreased since 2007, a little less than half of audited employers with newly hired employees were noncompliant with the Employment Verification Law in Calendar Year 2010. This noncompliance rate suggests that a substantial number of Colorado employers may not be complying with the law 4 years after its enactment.

Colorado Division of Labor
Employment Verification Law
Random Audit Noncompliance Rates by Year
Calendar Years 2007 Through 2010

	2007	2008	2009	2010	4-Year Total
Number of Employers Audited[1]	136	367	233	404	1,140
Number of Audited Employers Deemed Noncompliant	92	235	107	194	628
Noncompliance Rate	**68%**	**64%**	**46%**	**48%**	**55%**

Source: Office of the State Auditor's analysis of data provided by the Division of Labor.
[1]Excludes those audits that were closed administratively because the employers that were selected for audit could not be reached, were no longer in business, or reported having hired no new employees since January 1, 2007.

During our audit, we reviewed the Division's auditing, enforcement, and employer education activities under the Employment Verification Law. Overall, we identified a number of improvements the Division needs to make to help ensure and promote employers' compliance with the Employment Verification Law's requirements. Specifically, the Division (1) lacks assurance that its compliance determinations are appropriate and have adequate support, (2) does not have a well-structured or transparent approach when assessing monetary fines, (3) does not require employers to use a Division-approved affirmation form, (4) does not utilize a risk-based approach when selecting employers for audit, (5) has not issued sufficient written technical guidance for employers, and (6) lacks adequate communication with employers during the audit process. We also reviewed the State of Colorado's efforts as an employer to verify the employment eligibility of newly hired state employees, and we identified instances of noncompliance with the Employment Verification Law.

Compliance Determinations and Fine Assessments

At the conclusion of an audit, the Division's compliance officers must determine whether an employer is compliant or noncompliant with the Employment Verification Law. For those employers that are determined to be noncompliant, the Division must also determine whether a monetary fine is warranted and, if so, the fine amount. It is reasonable to afford compliance officers a degree of discretion and judgment when evaluating each employer's unique circumstances. However, as discussed in the following sections, we found that the Division lacks sufficient controls to ensure that its compliance determinations and fine assessments are handled appropriately and consistently for all employers on the basis of clearly defined standards. Compliance determinations and fine assessments that are inconsistent, inappropriate, or lack adequate support are problematic because they can undermine the Division's legitimacy and, ultimately, compromise its ability to successfully ensure employers' compliance with the Employment Verification Law. Moreover, the Division risks appearing unfair in its treatment of employers and diminishing the deterrent effect of its audits.

Compliance Determinations

The Division relies on hard copy files as well as an electronic database called "eComp" to maintain a record of the documents obtained, tests performed, judgments made, conclusions reached, and actions taken during an employer audit. *Government Auditing Standards*, which are the professional standards used by many government auditors at the federal, state, and local levels, highlight the importance of documentation as an essential element that (1) provides the principal support for findings and conclusions, (2) aids in the conduct and supervision of the work, and (3) allows for the review of audit quality. The Division is not bound by *Government Auditing Standards*; however, as a best practice, the Division's supporting documentation should be thorough and complete and substantiate its compliance determinations.

During our audit, we reviewed the supporting documentation for a nonstatistical sample of 35 audits the Division completed between January 1, 2009, and January 20, 2011. Overall, we found problems with the Division's compliance determination for 13 of the 35 sampled audits. The problems we identified fell into three areas.

- **Lack of Due Care.** In four sampled audits, the Division's compliance officers were not thorough or complete in their review of the employers' documentation and, as a result, inadvertently missed facts that were

significant to the compliance determination. The compliance officers inappropriately found the employers to be compliant with the Employment Verification Law. Specifically:

- In two audits, the affirmations for two out of three total employees were completed 74 and 388 days, respectively, after the employees' hire dates. However, the Employment Verification Law requires employers to complete an affirmation within 20 days of hiring a new employee.

- In two audits, the affirmations for seven out of 14 total employees were not signed. However, state rules require affirmations to be complete, and the Division's internal policies state that affirmations must be signed by the employer or the employer's authorized representative in order to be deemed compliant.

- **Backdated Affirmations.** In six sampled audits, the Division's compliance officers did not utilize evidence of backdated affirmations for 16 of 27 total employees when determining compliance with the Employment Verification Law. Specifically, the compliance officers found all six employers to be compliant, despite the fact that the employers submitted completed affirmations for employees using a version of the Division's affirmation form that was not available as of the date the employer reportedly completed the affirmation. In other words, there is evidence in the Division's documentation that the employers did not complete the affirmations within the 20-day statutorily required time frame and attempted to remedy the situation by completing the affirmation after the fact.

- **Incomplete Documentation.** In three sampled audits, the Division's compliance officers did not maintain sufficient documentation of the tests performed or judgments made during the course of performing the audits. As a result, we were unable to independently verify the appropriateness of the resulting compliance determinations. Specifically:

  - In one audit, the compliance officer reviewed affirmations and identity and employment eligibility documents for a sample of 78 of the employer's 151 reported new employees. The Division's policies permit sampling when the employer has more than 25 employees. The compliance officer found this employer to be compliant; however, the supporting documentation contained no record of the sampling methodology used or the specific employees selected for review. Because we were unable to determine from the supporting documentation which employees the compliance officer reviewed, we selected and reviewed documentation for our own random sample of

25 employees for this employer. We found that the employer was noncompliant with respect to four of the 25 sampled employees. Specifically, three employees' affirmations were completed more than 20 days after their dates of hire, and one employee's affirmation was missing the date of the affirmation.

- In two audits, the compliance officers did not maintain copies of the affirmations submitted by the employers. The compliance officers' notes indicated that both employers had submitted copies of the required affirmations. One employer was found to be compliant, and one employer was found to be noncompliant. However, without copies of the affirmations in the file, we were unable to determine the basis for these two compliance determinations.

Overall, the problems we identified occurred as a result of insufficient controls in four key areas. First, for the time period of audits we sampled and reviewed, the Division's compliance officers did not use a standard checklist or other similar mechanism when reviewing employer-submitted documents for compliance with the Employment Verification Law's requirements. Consequently, the Division could not ensure that compliance officers were thorough when performing their audit and that employers' deviations from established requirements were identified. In response to the results of our file review, the Division implemented documentation review standards and a corresponding testing spreadsheet (i.e., a checklist) in June 2011 to help compliance officers document the scope and results of their reviews of employer-submitted documentation. For example, the Division's new testing spreadsheet prompts compliance officers to confirm for each employee certain attributes, such as (1) the date of the affirmation versus the date of hire, (2) that the affirmation was signed by the employer or his or her authorized representative, and (3) that the employee's identity and employment authorization documents were valid. The Division's new documentation review standards and corresponding testing spreadsheet appear to be comprehensive and will likely help compliance officers identify deviations from established requirements and prevent the types of problems we found during our file review from occurring in the future.

Second, although the Division has established an overall work flow and policies for conducting employer audits, the Division does not have a formal written policy regarding the supporting documentation that compliance officers must maintain in hard copy files and the Division's eComp system when conducting an audit. Thus, the Division has little assurance of completeness or consistency in the audit documentation supporting the Division's compliance determinations. The supporting documentation is driven instead by each individual compliance officer's work practices.

Third, the Division lacks a quality control process, such as review by a supervisor and/or another compliance officer, once audits have been completed. For example, routine review of at least a sample of completed audits could identify problems with supporting documentation and conclusions or other errors that may have occurred in the audit process. Without some type of routine monitoring, the Division is unable to ensure that compliance officers adhere to established standards, including that compliance determinations are appropriate and that all required supporting documentation has been maintained. Division managers also lack a means of providing performance feedback to staff.

Finally, regarding the backdating of employer affirmations, Division staff reported that the Department's policy has historically been to disregard evidence of backdating when determining compliance with the Employment Verification Law. We disagree with this approach. Backdated affirmations are a serious concern because they signify that the employer has not complied with the provision of the Employment Verification Law requiring that affirmations be completed within 20 days of hiring a new employee, and that the employer is knowingly submitting false or fraudulent documentation to the Division in response to an audit. Backdating of employer affirmations is a practice that should not be ignored as a matter of policy, nor should the Division find employers to be compliant with the Employment Verification Law when evidence of backdating is present. In Recommendation No. 3, we discuss the use of a standard affirmation form as a way to better identify and substantiate backdating.

Recommendation No. 1:

The Division of Labor (the Division) should ensure that its compliance determinations are appropriate and have adequate support by:

a. Ensuring that compliance officers adhere to new documentation review standards and utilize the Division's new testing spreadsheet when conducting employer audits.

b. Establishing a formal written policy specifying documentation standards and expectations, including the minimum level of supporting documentation that compliance officers must maintain in hard copy files and the Division's eComp system when conducting an audit.

c. Instituting a quality review process whereby a supervisor and/or another compliance officer routinely reviews a sample of completed audits for adherence to established standards.

d. Finding employers to be noncompliant with the Employment Verification Law when there is evidence that an employer has submitted backdated affirmations.

Division of Labor Response:

a. Agree. Implementation date: Implemented and Ongoing.

In June 2011, the Division created and implemented a large number and variety of new processes and policies. We will continue to ensure that compliance officers adhere to new documentation review standards and utilize the Division's new testing spreadsheet when conducting employer audits.

b. Agree. Implementation date: Implemented.

In June 2011, the Division established formal written policies specifying documentation standards and expectations, including the minimum level of supporting documentation that compliance officers must maintain in hard copy files and the Division's eComp system when conducting an audit.

c. Agree. Implementation date: February 2012.

The Division will institute a quality review process whereby a supervisor and/or another compliance officer routinely reviews a sample of completed audits for adherence to established standards.

d. Agree. Implementation date: February 2012.

The Division will find employers to be noncompliant with the Employment Verification Law when there is evidence that an employer has submitted backdated affirmations.

Fine Assessments

The Employment Verification Law grants the Division authority to assess monetary fines against an employer that, with "reckless disregard," fails to submit the required documentation or submits false or fraudulent documentation in response to an audit request by the Division. The law sets a maximum fine amount of $5,000 for a first offense and $25,000 for the second and any subsequent offense. Additionally, state rules allow the Division to take into account a variety of factors when determining the amount of a fine, such as the

size of the employer, the scope and seriousness of the violations observed, the results of previous audits, and the employer's cooperation and timeliness when responding to the audit request.

The "reckless disregard" standard established in the Employment Verification Law is a high legal threshold that requires intentional, knowing, or willful conduct on the part of the employer, which effectively prevents the Division from assessing fines for employer negligence or lesser technical violations. Accordingly, the Division's general policy is to assess a monetary fine when an employer (1) fails to respond to the Division's repeated attempts, including attempted contact via certified mail, to initiate an audit, or (2) is found to be noncompliant on a re-audit. As mentioned in Chapter 1, employers are only subject to a re-audit if they have previously been found to be noncompliant through either a complaint-based audit or a random audit.

As of March 2011, the Division had assessed 45 fines totaling $226,100 since the Employment Verification Law went into effect. In 44 cases, the fines were assessed in accordance with the Division's general policy. In the one remaining case, the Division assessed a fine on an initial audit after first determining that the facts of the case met the "reckless disregard" standard. During our audit, we analyzed data for approximately 700 audits in which the Division found the employer to be noncompliant with the Employment Verification Law, and we examined documentation related to all 45 monetary fines the Division had assessed as of March 2011. As described in the following bullet points, we identified problems with the Division's fine assessment practices in four areas.

- **No Fines.** We identified four audits out of the 700 audits we analyzed that met the Division's criteria for assessing fines, yet the Division did not assess a fine. Specifically, one employer failed to respond to repeated requests by the Division to submit documentation demonstrating compliance with the law. Consistent with its policy, the Division requested the documentation via certified letter, which the employer signed for. The remaining three employers were found to be noncompliant on a re-audit. Although four out of 700 audits is a small number, the Division's treatment of these cases is nonetheless inconsistent with its policy on assessing fines and how it has treated other employers under similar circumstances. The Division reported that the nonresponsive employer should have been fined in accordance with the Division's policy. The Division reported that fines were not assessed against the three re-audited employers that were found to be noncompliant due to the less serious nature of the findings or the small number of employees involved. State rules allow the Division to take into account certain factors when determining the amount of a fine; however, determining the amount of a fine is different from determining whether to assess a fine in the first

place. We found that the Division assessed fines against all other 13 employers that were found to be noncompliant on a re-audit.

- **Timeliness of Fine Assessments.** We analyzed data for all audits from the Division's eComp database to determine the timeliness of the Division's communication of audit results to employers. For the 45 audits in which a fine had been assessed as of March 2011, we found that it took the Division an average of 155 days, or about 5 months, to close the audit and issue a fine assessment notice to the employer. By comparison, when no fines are assessed, our analysis showed that the Division typically closes audits and communicates the results within 28 days. Historically, Division managers reviewed and discussed the details of the audits with the compliance officers prior to issuing fines. Due to difficulties in coordinating schedules for these meetings, the Division issued fines in batches only about three times per year, resulting in delays for some assessments. However, failure to officially communicate the results of an audit in a timely manner, especially when creating a financial liability for the employer, is not good business practice. Delays in assessing monetary fines may also lead employers to form false conclusions that they are compliant with the Employment Verification Law.

- **Fine Amounts.** We identified one audit out of the 45 audits with monetary fines in which the Division may have exceeded the statutorily allowable maximum fine amount. Specifically, the Division fined an employer $50,700 on a first offense, which is $45,700 above the maximum $5,000 fine amount set by the Employment Verification Law for a first offense. The Division arrived at this fine amount because it assessed a fine of $300 for each of the 169 employees for whom the employer was noncompliant. The employer subsequently challenged the fine in court, arguing that the amount exceeded the statutory limit. The Division settled with the employer out of court, agreeing to reduce the fine to $5,000.

  Notwithstanding this out-of-court settlement, the Division maintains that it has the authority to fine for a first offense up to $5,000 for *each* employee, with no limit to the total amount of the fine. However, we believe that the maximum allowable fine amounts established in the Employment Verification Law are absolute limits, regardless of the number of per-employee violations that may be identified during an audit. We listened to the archived recordings of the House Business Affairs and Labor Committee when the bill that created the Employment Verification Law (House Bill 06S-1017) was being debated. During the committee hearing, the House sponsor specifically testified that the maximum fine amounts were intended to be a maximum per audit, not a maximum per employee. In addition, this interpretation is consistent with how U.S. Immigration and Customs Enforcement, which is the agency responsible for enforcing

federal immigration laws, handles civil penalties for employers that are noncompliant with federal Form I-9 requirements. Although an employer may incur multiple per-employee violations within the context of a single investigatory proceeding or determination, federal regulations [Aliens and Nationality, 8 C.F.R., pt. 274a.10(b)] state that such violations with Form I-9 requirements will be counted as a single offense for the purpose of assessing fines. However, it should be noted that federal regulations do not specify a maximum fine amount for a single offense.

- **Fine Reductions or Dismissals.** The Division considers its monetary fine assessments to be a "final agency action." However, the Division also receives appeals of fine assessments from employers and may reduce or dismiss a fine as a result of an appeal. We found the Division reduced or dismissed fines for 22 employers, nearly half of the 45 employers that were originally assessed a monetary fine as of March 2011. The total dollar amount of the fines was reduced by 58 percent, from $226,100 to $94,100. These are significant reductions. We examined the Division's documentation to determine the basis for these 22 fine reductions or dismissals and identified several concerns, as follows:

  - **Inconsistencies and Inequities.** The Division dismissed or reduced fines from $35,000 to $2,000 for seven employers that, after being assessed a fine for nonresponse to an audit request, subsequently provided the Division with the requested documentation. However, the Division was inconsistent in its treatment of the seven employers by dismissing the fine outright for three employers and reducing the fine to $500 for four employers. Additionally, although the fine assessment notices appeared to be effective at getting the employers' attention, dismissing the fine outright for three employers was unfair to those employers that responded to the Division's audit requests in a timely manner (i.e., within the required 10-day time frame). Without maintaining some type of negative sanction, the Division gives employers little incentive to comply with document submission requirements.

  - **Timing of the Fine Adjustment.** The Division reduced a fine from $1,500 to $500 for one employer on the grounds that the business was very small and had few employees. State rules allow the Division to take into account certain mitigating factors, such as the employer's size, when determining the amount of a fine. However, the Division should have considered this information and adjusted the employer's fine amount at the time the fine was originally assessed.

  - **Lack of Documentation.** The Division dismissed fines totaling $8,600 for two employers. However, the Division did not maintain sufficient

documentation indicating why the employers appealed the fines or why the fines were ultimately dismissed. The Division reported that it does not know why the fines were dismissed for these two employers. In one case, the Division could not locate the hard copy file for the employer's audit.

Generally speaking, the Division does not have a well-structured or transparent approach for assessing monetary fines. First, the Employment Verification Law establishes a "reckless disregard" standard that must be met in order to assess a fine. However, the Division has not fully specified in rule those situations or circumstances in which an employer's actions or noncompliance meet the "reckless disregard" standard. State rules establish that this standard is presumed to be met for nonresponsive employers. However, the rules do not mention the Division's additional policy of assessing fines for noncompliance on a re-audit. By fully defining its criteria in rule, the Division would make it more transparent to employers all conditions in which a fine assessment is warranted.

The Division should also expand its criteria for assessing a monetary fine to include backdating of affirmation forms. As discussed in Recommendation No. 1, the Division does not presently consider backdating of affirmation forms to be noncompliant; therefore, backdating is also not a fineable offense. However, when an employer backdates an affirmation for an employee, the employer is knowingly submitting false or fraudulent documentation to the Division in response to an audit. We believe that such action on the part of the employer reasonably constitutes "reckless disregard" under the Employment Verification Law and warrants a monetary fine. As a means of comparison, when conducting workplace enforcement audits, U.S. Immigration and Customs Enforcement officials treat backdating of the Form I-9 as a fineable offense.

Second, for the time period we reviewed, the Division did not have a defined schedule or matrix that guided the Division in determining the fine amount based on different factors (e.g., size of the employer, scope and seriousness of violations, results of previous audits). Consequently, the Division was unable to ensure the consistent and appropriate treatment of employers when assessing fines, and employers lacked a transparent way to understand how their fine amounts were determined. For example, when inspecting employers' compliance with the Form I-9 requirements, U.S. Immigration and Customs Enforcement officials use a matrix whereby fine amounts increase depending on the percentage of employees for whom the employer is noncompliant and whether the employer is a first-, second-, or third-time violator. Total fine amounts are adjusted upward or downward by a certain percentage (i.e., 25 percent maximum upward or downward adjustment) based on mitigating factors, such as the size of the employer, compliance history, and whether the employer made a good faith effort to comply. During our audit, in late April 2011, the Division took several steps toward adopting a fine schedule similar to that used by U.S. Immigration and

Customs Enforcement. The Division made subsequent revisions to this fine schedule in June 2011. In addition to promoting consistency and transparency, relying on a defined fine schedule should help the Division assess fines in a more timely manner, because it alleviates the need for Division managers and compliance officers to meet and discuss every case.

Third, although the Division has obtained legal guidance supporting its practice of fining employers on a per-employee basis, the Division has not specifically sought clarification on the maximum amount it can fine an employer on a single audit. That is, the Division has not obtained a legal opinion on whether the statutory maximums of $5,000 for a first offense and $25,000 for the second and any subsequent offense are maximums per audit. We believe the Division's interpretation places it at risk of assessing total monetary fines that exceed the maximum amounts contemplated in the Employment Verification Law. To ensure that its fine assessments have a solid basis, the Division should seek additional legal analysis from the Office of the Attorney General on this issue.

Finally, the Division has not established a formal process for evaluating employers' appeals of fine assessments, nor has the Division specified the acceptable reasons and/or circumstances for which assessed fines may be reduced or dismissed. Without a well-defined process, standards, or criteria, the Division cannot ensure that employers are treated equitably and consistently, that all information is considered appropriately, or that adequate supporting documentation is maintained. Having a well-defined appeals process could also help eliminate any incentive that employers have to "game" the system simply by appealing a fine, although we did not find evidence of this occurring.

We believe that by outlining its fine assessment policies and processes in state rules, the Division would provide more operational definition to its statutory enforcement authority and, therefore, ensure transparency to employers and the consistent application of standards. Additionally, the rulemaking process affords employers and other affected parties the opportunity to have input, which is something they might not otherwise have if the Division only revised its internal policies.

Recommendation No. 2:

The Division of Labor (the Division) should ensure that monetary fines assessed as a result of noncompliance with the Employment Verification Law are handled appropriately and consistently for all employers on the basis of clearly defined standards. Specifically, the Division should:

a. Fully specify in state rules those circumstances or situations in which an employer's actions or noncompliance meet the "reckless disregard"

standard established in the Employment Verification Law and, therefore, warrant a fine assessment. This should include making the backdating of affirmations a finable offense.

b. Define a schedule or matrix in state rules that directly and clearly aligns the different factors considered when assessing a fine with the resulting total fine amount.

c. Obtain an informal or formal legal opinion from the Office of the Attorney General to clarify the total maximum amount the Division may fine an employer on a single audit under the Employment Verification Law.

d. Develop a formal process in state rules for evaluating employers' appeals of fine assessments, including the standards and criteria by which an appealed fine assessment may be reduced or dismissed.

Division of Labor Response:

a. Agree. Implementation date: July 2012.

The Division will fully specify in state rules those circumstances or situations in which an employer's actions or noncompliance meet the reckless disregard standard established in the Employment Verification Law and, therefore, warrant a fine assessment. Backdating of affirmations shall be a finable offense.

b. Agree. Implementation date: July 2012.

In June 2011, the Division created and implemented internal schedules and matrices that directly and clearly align the different factors considered when assessing a fine with the resulting total fine amount. The Division will formally adopt these schedules and matrices in state rules.

c. Agree. Implementation date: December 2011.

The Division will obtain an informal or formal legal opinion from the Office of the Attorney General to clarify the total maximum amount the Division may fine an employer on a single audit under the Employment Verification Law.

d. Agree. Implementation date: July 2012.

The Division will develop a formal process in state rules for evaluating employers' appeals of fine assessments, including the standards and

criteria by which an appealed fine assessment may be reduced or dismissed.

Affirmation Form

Earlier in this chapter, we presented data on compliance rates from the Division's random audits indicating that a substantial number of Colorado employers may not be complying with the Employment Verification Law 4 years after its enactment. One of the key requirements for employers under the law is the affirmation requirement. Specifically, employers must affirm four separate statements for each new employee, including that the employer has examined the legal work status of the newly hired employee. The affirmation must be completed within 20 days of hiring a new employee, and a written or electronic copy of the affirmation must be retained for the duration of the employee's employment. The affirmation is part of the documentation that the Division's compliance officers review when determining an employer's compliance with the law.

As a courtesy to employers, the Division has developed an affirmation form that is available on its website for employers to download and use. However, the Division does not require that employers use this form. As discussed in the following bullet points, we believe that requiring employers to use a Division-approved affirmation form would benefit employers by helping them comply with the Employment Verification Law's affirmation requirement.

- **Providing Required Information.** Requiring employers to use a Division-approved affirmation form would provide employers with a direct and readily accessible means of complying with the affirmation requirement while providing the Division with the information it needs to conduct audits. Other than specifying the four statements that must be affirmed, the Employment Verification Law outlines no further requirements regarding the affirmation. State rules outline a number of elements the Division examines when reviewing employers' affirmations, including (1) the legibility, completeness, and accuracy of information contained in the affirmation; (2) who completed the affirmation; and (3) whether the affirmation was completed within 20 days after hiring each new employee. Thus, to effectively determine an employer's compliance with the affirmation requirement, the affirmation must contain the employee's name and date of hire, the employer's name, a signature of the person making the affirmation, and the date the affirmation was made. Omission of this required information generally results in a finding of noncompliance, and employers are potentially more likely to omit this

required information when they do not use the Division's affirmation form.

- **Communication.** Requiring employers to use a Division-approved affirmation form would help communicate to employers that the federal Form I-9 is insufficient for satisfying the affirmation requirement under Colorado's Employment Verification Law. The federal Form I-9 includes statements that are nearly identical in substance to three of the four statements that employers must affirm under the Employment Verification Law. This similarity could reasonably create confusion among employers. Division staff reported that employers often will send the Division copies of employees' Form I-9s in response to an audit request. For example, in our sample of 35 audits, we identified two employers that sent the Division copies of employees' Form I-9s and identity and employment authorization documents. Nonetheless, the Division found these employers to be noncompliant because, under the Employment Verification Law, employers must affirm that they have retained copies of the employees' identity and employment authorization documents. This affirmation does not appear on the Form I-9.

- **Backdating.** Requiring employers to use a Division-approved affirmation form would provide the Division with a solid and transparent basis for evaluating suspected cases of backdated affirmations and citing noncompliance. As discussed in Recommendation No. 1, the Division's audits revealed cases in which the employer submitted an affirmation using a more recent version of the Division's affirmation form that was *not* available on the date the employer reportedly completed the affirmation. We analyzed compliance officers' notes entered into the Division's eComp database and identified at least 122 audits in which the compliance officer suspected the employer of backdating affirmations. The Division reported that it does not pursue backdating as a noncompliant activity largely because there is no overt acknowledgement, such as a version number or effective date, on the Division's affirmation form to signal to employers that different versions of the form exist. Moreover, the Division is unable to detect backdating when employers do not use the Division's affirmation form.

  In order for the Division to effectively and equitably pursue backdating as a noncompliant activity, all employers need to be held to the same standard. Without a common required form, future efforts by the Division to take action against employers that backdate affirmations would likely give employers an incentive *not* to use the Division's affirmation form, thereby making backdating more difficult to detect.

Statute [Section 8-1-107(2)(p), C.R.S.] vests the Division Director with the authority to adopt rules and regulations relative to the exercise of his powers and to govern the Division's proceedings. Requiring employers to use a Division-approved affirmation form is a reasonable step the Division should take to implement the provisions of the Employment Verification Law and help facilitate employers' compliance with the affirmation requirement.

Recommendation No. 3:

The Division of Labor (the Division) should help facilitate employers' compliance with the Employment Verification Law's affirmation requirement by:

a. Updating the Division's affirmation form to include a version number and/or effective date.

b. Amending state rules to require employers to use the Division's approved affirmation form.

Division of Labor Response:

a. Agree. Implementation date: December 2011.

The Division will update the Division's affirmation form to include a version number and/or effective date.

b. Agree. Implementation date: July 2012.

The Division will amend state rules to require employers to use the Division's approved affirmation form.

Audit Selection

The Employment Verification Law grants the Division authority to conduct random audits to ensure that employers have retained completed affirmations and copies of identity and employment authorization documents for all newly hired employees. Accordingly, the Division utilizes a random selection process as the primary means by which employers are identified for audit. As of December 31, 2010, the Division had selected a total of more than 2,400 employers (about 2 percent of all Colorado employers) for random audit since the Division began conducting random audits in October 2007. As discussed in Chapter 1, the

Division also conducts complaint-based audits as well as re-audits of employers that have previously been found to be noncompliant in either a complaint-based audit or a random audit. However, random audits represent the majority of the Division's auditing activity.

The Division utilizes the State's unemployment insurance tax database as the source data for its audit selection process. Thus, those employers that pay unemployment insurance taxes constitute the universe of employers potentially subject to a random audit. The unemployment insurance tax database contains more than 147,000 employer records and is a readily accessible source of data on Colorado employers. Approximately three to four times per year, the Division requests a data extract from the unemployment insurance tax database whereby records are selected at random to produce a list of employers for audit. Typically, the resulting list includes about 250 employers, which the Division's compliance officers work through in sequential order until all employers on the list have been contacted for audit. Once the list of employers has been depleted, which usually takes about 3 to 6 months, a new list of employers is extracted from the unemployment insurance tax database.

Risk-Based Audit Approach

Risk-based audit approaches are widely established as a best practice and an effective means of setting priorities and targeting often limited audit resources. For example, although they are not applicable to the Division's audits, *Government Auditing Standards*, which are the standards used by many government auditors at the federal, state, and local levels, as well as the Institute of Internal Auditors' *International Professional Practices Framework*, which are the standards used by many internal auditors in the public and private sectors, require the application of risk-based audit approaches.

During the 4-year period from Calendar Years 2007 through 2010, the Division selected a total of about 2,400 employers, or an average of about 600 employers per year, for random audit. Assuming all other variables remained the same, at this rate it would take the Division approximately 245 years to work its way through the approximately 147,000 employers in Colorado. Without the ability to audit every employer, the Division must utilize an alternative means of setting priorities and targeting limited audit resources. Risk-based principles can easily be incorporated into the Division's existing random selection process.

Within the context of the Employment Verification Law, "high-risk" employers are those employers that are at greatest risk of noncompliance with the law's requirements. For example, high-risk employers could include those employers that (1) have new employees, (2) are in industries with historically high noncompliance rates, and (3) have been previously audited by the Division and

found to be noncompliant. We evaluated the Division's audit selection process and, as described in the following bullet points, found that the Division does not utilize an approach that targets employers in these three categories for audit.

- **The Division does not target employers that are likely to have new employees**. The purpose of the Division's audits is to determine whether employers adhere to the documentation requirements specified in the Employment Verification Law. However, employers without any current employees who were hired on or after January 1, 2007, have a zero risk of noncompliance. It is also the case that the Division has no documentation to audit when it selects employers without any new employees. As shown in the following table, we found that about 43 percent (271 out of 634) of the employers the Division selected for random audit between February 2010 and January 2011 reported having hired no new employees since January 1, 2007. Consequently, the Division administratively closed the audits of these employers. This high percentage rate is a concern because it indicates that the Division routinely expends its resources contacting employers and initiating audits that do not materialize.

Colorado Division of Labor
Employment Verification Law
Results of Initial Contact with Employers Selected for Random Audit
February 2010 Through January 2011

Number of Employers Selected for Random Audit	634
Number of Selected Employers Reporting No New Employees[1]	271
Percentage of Selected Employers Reporting No New Employees	43%

Source: Office of the State Auditor's analysis of data provided by the Division of Labor.
[1]The Employment Verification Law applies only to those employees hired on or after January 1, 2007.

Historically, the Division has not requested that the list of employers generated from the unemployment insurance tax database for random audit be targeted based on employer characteristics, such as payroll size or the total number of employees. However, in January 2011, during our audit, the Division began using the unemployment insurance tax data to filter and exclude those employers reporting no employees or $0 in chargeable wages (i.e., wages on which an employer is required to pay unemployment insurance premiums) from being selected for audit. To test the effectiveness of the Division's filter, we applied it to the 634 employers that the Division selected for random audit between February 2010 and January 2011. We found that the filter would have reduced the percentage of selected employers reporting no new employees from 43 percent to 40 percent, a three percentage point decrease.

Although the Division's filter yielded some improvement, we conducted further analysis of the unemployment insurance tax data and found that a more aggressive filter—one that excludes those employers reporting fewer than three total employees or $20,000 or less in chargeable wages—would yield further reductions in the percentage of selected employers reporting no new employees. Specifically, we applied our filter to the 634 employers the Division selected for random audit between February 2010 and January 2011 and found that our filter would have reduced the percentage of selected employers reporting no new employees from 43 percent to 13 percent, a 30 percentage point decrease. We chose our filter through a trial-and-error process based on those employer characteristics that appeared to yield the greatest reduction in the percentage of selected employers reporting no new employees. The Division should evaluate the use of more aggressive filters, similar to our analysis, as a way to better target its audit selection process and avoid initiating audits of employers with no new employees.

The previous examples are based on using employer-level data from the unemployment insurance tax database. However, the database also contains employee-level data. On a quarterly basis, employers must file a report with the Unemployment Insurance Division that includes the social security number, name, and gross wages for each covered employee. Although this is not a report on the number of newly hired employees, the Division could analyze these quarterly data over time (e.g., compare employee names or social security numbers from one quarter to the next) to identify when employees first appear in the data to get a general understanding of probable hiring trends by employers. This type of trend analysis could help the Division identify and select for audit those employers that are likely to have newly hired employees.

- **The Division does not target employers in industries with historically higher rates of noncompliance.** We matched data from the unemployment insurance tax database to the Division's records for about 1,100 random audits conducted from October 2007 through January 2011. As shown in the following table, noncompliance rates vary by industry, ranging from a high of 67 percent to a low of 35 percent. These noncompliance rates cannot be projected to each industry group as a whole, since the Division does not select its audits to be representative of particular industry groups. The number of employers audited in each industry group reflected in the table is merely a function of the Division's random selection process. However, the fact that noncompliance rates among audited employers vary by industry means that the Division could use this information when selecting employers for audit and allocate more of its audit resources toward potentially higher-risk employers. For example, the Division could randomly select relatively more employers

for audit from those industries with higher-than-average rates of noncompliance and/or industries in which a lower-than-average number of audits have been conducted. The Division would need to monitor the results of its audits on an ongoing basis and periodically make adjustments to its audit selection process as the number of audits completed and the noncompliance rates by industry change over time.

Colorado Division of Labor
Employment Verification Law
Random Audits Completed and Noncompliance Rates by Industry
October 2007 Through January 2011

Industry Group[1]	Number of Random Audits Completed (Percentage of Total)	Noncompliance Rate[2] (Percentage)
Mining, Quarrying, and Oil and Gas Extraction	3 (<1%)	67%
Accommodation and Food Services	82 (8)	63
Educational Services	19 (2)	63
Other Services (except Public Administration)	92 (9)	63
Retail Trade	114 (11)	61
Transportation and Warehousing	20 (2)	60
Construction	118 (11)	59
Wholesale Trade	72 (7)	58
Administrative and Support and Waste Management and Remediation Services	59 (6)	58
Real Estate and Rental and Leasing	44 (4)	57
Agriculture, Forestry, Fishing, and Hunting	11 (1)	55
Arts, Entertainment, and Recreation	19 (2)	53
Professional, Scientific, and Technical Services	139 (13)	50
Management of Companies and Enterprises	2 (<1)	50
Manufacturing	70 (7)	50
Utilities	6 (<1)	50
Health Care and Social Assistance	113 (11)	50
Public Administration	15 (1)	40
Finance and Insurance	41 (4)	39
Information	17 (2%)	35%
Total Number of Audits Completed[3]	**1,056**	
Average Number of Audits Completed Per Industry Group	**53**	
Overall Noncompliance Rate[4]	**55%**	

Source: Office of the State Auditor's analysis of data provided by the Division of Labor.

[1] Industry groups are based on the North American Industry Classification System, which is the standard used by federal agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

[2] Equals the total number of employers in the industry group that the Division found to be noncompliant, divided by the total number of employers in the industry category that the Division audited. Excludes employers that were selected for audit but could not be reached, were no longer in business, or reported having hired no new employees since January 1, 2007.

[3] Excludes 89 audits that the Division completed during this time frame but that we were unable to match to an industry group based on available data.

[4] Equals the total number of employers that the Division found to be noncompliant, divided by the total number of employers that the Division audited. Excludes employers that were selected for audit but could not be reached, were no longer in business, or reported having hired no new employees since January 1, 2007.

- **The Division suspended conducting re-audits of employers.** State rules establish that the Division may re-audit employers that were found in a

previous audit to be in violation of the Employment Verification Law. In October 2008, the Division began re-auditing all employers that it had previously found to be noncompliant, waiting at least 6 months between the initial audit and the re-audit. The Division had initiated 215 re-audits as of October 2009. However, the Division suspended conducting re-audits in October 2009 to devote time to conducting random audits and tending to administrative matters, such as promulgating rules, revising policies and procedures, and training staff. Approximately 140 noncompliant employers remained on the re-audit list as of October 2009. The number of noncompliant employers eligible for re-audit grew to 340 by January 2011. Suspending re-audits is a concern because re-audits are, by definition, audits of a high-risk group—those employers previously found to be noncompliant. Without re-audits, the Division lacks a follow-up mechanism to ensure that previously noncompliant employers have made the appropriate changes on a going-forward basis to comply with the Employment Verification Law for all new employees hired since the close of the previous audit. Moreover, as discussed in Recommendation No. 2, a finding of noncompliance on a re-audit is currently one of the Division's only two criteria for determining that an employer is recklessly disregarding the law's requirements. As of the end of our audit, the Division had not resumed conducting re-audits of previously noncompliant employers. If re-auditing all noncompliant employers is not feasible given current resources, the Division could prioritize employers for re-audit based on the nature or scope of their noncompliance.

Fundamentally, risk-based audit approaches are intended to ensure the cost-effective use of available resources. Currently, the Division's audit selection process is not well targeted to ensure that the Division spends its resources auditing those employers with the greatest potential to be noncompliant with the Employment Verification Law.

Recommendation No. 4:

The Division of Labor (the Division) should ensure that it conducts audits of employers that are at higher risk of noncompliance with the Employment Verification Law by incorporating risk-based principles when selecting employers for audit. Specifically, the Division should:

a. Utilize and leverage the unemployment insurance tax data to better identify the population of employers that are likely to have newly hired employees covered by the Employment Verification Law before randomly selecting specific employers for audit.

b. Track noncompliance rates by industry and select for random audit a greater proportion of employers in those industries with historically higher rates of noncompliance.

c. Resume re-audits of noncompliant employers.

Division of Labor Response:

a. Agree. Implementation date: December 2011.

The Division will utilize and leverage unemployment insurance tax data to better identify the population of employers that are likely to have newly hired employees covered by the Employment Verification Law before randomly selecting specific employers for audit.

b. Agree. Implementation date: April 2012.

The Division will track noncompliance rates by industry and select for random audit a greater proportion of employers in those industries with historically higher rates of noncompliance.

c. Agree. Implementation date: October 2011.

The Division will resume re-auditing noncompliant employers.

Employer Education

In addition to conducting audits, the Division devotes staff resources to activities that are intended to improve awareness and educate employers about the Employment Verification Law. The Division's activities have included managing a public website, compiling employer guides and fact sheets, sending mass mailings to employers, and giving presentations to key stakeholder groups. For example, the Division periodically includes information about the Employment Verification Law in quarterly newsletters that the Unemployment Insurance Division sends to employers or makes available online. Also, since the Employment Verification Law's enactment, Division staff have attended conferences and given trainings or presentations to about 20 different trade organizations, attorney groups, bar associations, chambers of commerce, and other organizations that have advisory relationships with employers. All of this activity is important for promoting employers' compliance with the Employment Verification Law.

Although the Division has engaged in a number of employer education activities, it appears that employers' lack of awareness about the law and its requirements remains a significant barrier to achieving compliance. As discussed earlier in this chapter, 48 percent of audited employers with newly hired employees were noncompliant in Calendar Year 2010. During our audit, Division staff reported that the primary reason employers are noncompliant is that they do not know about the Employment Verification Law and what it requires them to do. In our file review, the compliance officers' notes for 11 of the 35 sampled audits we reviewed indicated the employer was unaware of the law prior to being contacted by the Division for an audit. Compliance officers reported they often spend considerable time at the beginning of each audit simply educating employers about the Employment Verification Law and explaining what documentation the employer should have maintained.

As the state agency responsible for monitoring employers' compliance with the Employment Verification Law, the Division remains a central source of authoritative guidance about employers' legal responsibilities under the law. As described in the following sections, we identified two areas in which the Division could augment its efforts to increase awareness and provide better technical guidance to employers, thereby helping to promote compliance.

Increasing Awareness

The Division's public website is the primary source of information available about the Employment Verification Law. However, the apparent ongoing lack of awareness that employers have about the law suggests that the Division should focus some of its attention reaching out to those employers that may not otherwise be exposed to the Division's resources.

We examined the public websites of 13 governmental and nongovernmental agencies and organizations, not including the Department or the Division, that provide general information about employment law, hiring employees, or simply starting a business in Colorado. However, we found that none of the 13 public websites we reviewed presented information about the Employment Verification Law. For example:

- The Governor's Office of Economic Development and International Trade's website includes a comprehensive "Colorado Business Resource Guide" that, among other things, contains information on what Colorado businesses need to do when hiring new employees. The guide explains various responsibilities, such as withholding payroll taxes, paying unemployment insurance, and establishing a workers' compensation insurance account. The guide also mentions the need to fill out a federal Form I-9 for new employees and to report newly hired employees to the

Colorado Department of Human Services for child support enforcement purposes. However, the guide includes no information about Colorado's Employment Verification Law or what employers must do to comply.

- The U.S. Small Business Administration's website contains a guide specifically aimed at new small business owners operating in Colorado. This guide was developed by the Colorado District Office, which serves the State of Colorado. The guide mentions the federal Form I-9 as well as the E-Verify program as a resource that employers can use to verify employment eligibility for new hires. However, the guide does not mention any of the responsibilities that Colorado employers have with respect to the Employment Verification Law.

- The Colorado Secretary of State's website is where individuals go to register a new corporation or trade name, convert from one type of business to another (e.g., limited liability company to a corporation), or modify an existing business filing. The website contains a number of resources pertaining to business organizations operating in Colorado; however, the website contains no information regarding businesses' responsibilities as employers under the Employment Verification Law.

A number of other state and federal agencies and private sector organizations are likely to be points of contact for Colorado employers and business owners. The Division should work proactively with these agencies and organizations to try to increase the availability and visibility of information about the Employment Verification Law and its requirements.

Technical Guidance

One key to promoting compliance with the Employment Verification Law is providing employers with the information and tools they need to comply. Through the Division's website, employers can access information, such as the full text of the Employment Verification Law, applicable state rules, a summary fact sheet, and an employer guide. The Division's website also provides an affirmation form for employers and a complaint form for citizens who may believe that a particular employer has violated the Employment Verification Law.

We acknowledge the Division's efforts to increase employers' awareness of their responsibilities under the Employment Verification Law. However, we found that the available technical guidance generally reiterates the language of the law itself without elaborating on the practical steps employers need to take to ensure their compliance with the law. In other words, the Division's technical guidance provides information on *what* the Employment Verification Law requires without necessarily helping employers understand *how* to comply with it. For example,

during our audit, we identified some unanswered questions about how employers should implement and adhere to certain provisions in the Employment Verification Law when verifying employees' employment eligibility.

- *Is it allowable to complete the required affirmation in advance of a newly hired employee's start date?* The Employment Verification Law requires the affirmation to be completed "within 20 days after hiring a new employee." Federal regulations require employers to complete the Form I-9 "within three business days of the hire." According to federal guidance, it is permissible to complete the Form I-9 prior to the employee's start date as long as an offer of employment has been made and accepted and the employer is not using the employment verification process to conduct pre-employment screening. The Division has provided no guidance to employers on whether the Employment Verification Law is similarly permissive.

  We encountered this question during our review of employment files for a sample of 75 state employees, which we describe in more detail later in this chapter. Specifically, we identified 29 employees in our sample for whom the state hiring agency completed the required affirmation as little as 1 day or as many as 272 days prior to the employees' start dates. The Division reported that it would not consider these cases to be noncompliant with the Employment Verification Law because this practice is allowable under the Form I-9 process. However, the Division should provide guidance to clarify this question for employers, especially since there are different allowable time frames for completing the Form I-9 and the required affirmation under Colorado's Employment Verification Law.

- *Do employers need to complete new affirmations when (1) rehiring former employees or (2) reverifying employees whose identity and employment authorization documents have expired?* According to federal regulations, employers may be able to forego examining an employee's identity and employment authorization documents if the employee previously worked for the employer and the rehire date is within 3 years of when the employer originally completed the Form I-9. An employer in such circumstances may be able simply to sign, date, and record the date of the rehire on a special section of the original Form I-9, unless the employee's original employment authorization documents have expired. The Division has provided no guidance to employers on how to handle rehired employees in such cases under the Employment Verification Law.

  Again, we encountered this question during our review of employment files for a sample of 75 state employees. Specifically, we identified seven sampled employees whom the State rehired within 3 years of their

previous hire date, and, in all seven cases, human resources staff at the hiring agency completed a new affirmation under Colorado's Employment Verification Law. The Division reported that it would not consider these cases to be noncompliant solely for having another affirmation on file for a given employee. However, employers need guidance on this issue because the risk remains that an employer might request copies of the rehired employee's identity and employment authorization documents to complete a new affirmation under the Employment Verification Law, even when reverifying the employee is not necessary under the Form I-9 process. Conversely, employers must reverify an employee under the Form I-9 process when the employee's employment authorization documents expire. Yet it is unclear whether employers also need to complete a new affirmation and make copies of the new employment authorization documents to maintain compliance with the Employment Verification Law.

In general, the Division has not issued sufficient written technical guidance for employers that clarifies key provisions in the Employment Verification Law and how they should be implemented and adhered to. During our audit, the Division reported that providing accurate guidance to employers about specific circumstances or situations often requires a full legal analysis, which can be resource intensive. Although some legal analysis may be necessary, the Division already has a starting place for providing more technical guidance to all Colorado employers. Specifically, the Division currently uses its eComp system to log questions it receives from employers and the responses it provides in return. As of January 2011, this database showed 126 questions related to either the Employment Verification Law or the Public Contracts for Services Law (see Chapter 3) that had been answered by Division staff. However, the Division has not taken the next step to compile and make this information available as a frequently asked questions document on its website. Only those employers that call the Division are currently in a position to receive this additional guidance.

Most of the time, verifying an employee's employment authorization will be relatively straightforward and uncomplicated. However, it is also the case that employers will face certain circumstances or situations with employees in which more guidance is needed. A lack of clarity will ultimately create confusion and otherwise complicate employers' efforts to comply with both federal and state employment verification laws.

Recommendation No. 5:

The Division of Labor (the Division) should build on its existing efforts to educate and help promote employers' compliance with the Employment Verification Law by:

a. Working with state and federal agencies and private-sector organizations that are likely to be points of contact for employers and business owners in Colorado to try to increase the availability and visibility of information about the Employment Verification Law and its requirements.

b. Improving written technical guidance to clarify how key provisions in the Employment Verification Law should be implemented and adhered to, especially in those situations in which the Employment Verification Law departs from federal regulations and guidance related to the Form I-9 process. As a starting place, the Division should develop and make a frequently asked questions guide available on its website.

Division of Labor Response:

a. Agree. Implementation date: November 2011 and Ongoing.

The Division will expand upon its existing collaborative educational efforts to include additional state and federal agencies and private-sector organizations that are likely to be points of contact for employers and business owners in Colorado to try to increase the availability and visibility of information about the Employment Verification Law and its requirements.

b. Agree. Implementation date: February 2012.

The Division will improve written technical guidance to clarify for employers how key provisions of the Employment Verification Law must be implemented and adhered to, especially in those situations in which the Employment Verification Law departs from federal regulations and guidance related to the Form I-9 process. The Division will develop and make a frequently asked questions guide available on its website.

Audit Process

The Division's audit process, which we described in more detail at the beginning of this chapter, is generally the same regardless of whether an employer is selected for a random audit, a complaint-based audit, or a re-audit. To evaluate the adequacy of the Division's audit process, we reviewed the Division's electronic and hard copy records for a nonjudgmental sample of 35 audits the Division completed between January 1, 2009, and January 20, 2011. In addition to our file review, we reviewed the Division's policies, procedures, and practices for

conducting audits and corresponding with employers. Overall, as described in the following bullet points, we found that the Division lacks adequate procedures or communication with audited employers in three areas.

- **Corroborating the Number of New Employees.** We found that the Division does not obtain sufficiently detailed information from audited employers to fully determine compliance with the Employment Verification Law. This is because the Division does not obtain a list of all current employees and their corresponding hire dates. Instead, the Division requests that employers report only the total *number* of current employees on the payroll. Without a list of employees and their hire dates, the compliance officers must assume, but cannot verify, that audited employers are providing copies of completed affirmation forms and copies of identity and employment authorization documents for all newly hired employees, as required by the law. Additionally, without the ability to identify each employer's newly hired employees, compliance officers are at a heightened risk of deeming employers compliant that may not be compliant. In response to the results of our review, in August 2011, the Division started requiring audited employers to provide a list of all current employees and their corresponding hire dates.

- **Communication of Audit Results.** State rules require the Division to notify the employer in writing of the results of an audit. We identified three out of 35 sampled audits in which there was no record that the Division had notified the employer of the results of the audit. In one audit, the employer was found to be noncompliant. In the remaining two audits, the employers were found to be compliant. At the time of our audit, compliance officers could use the Division's eComp system to generate and issue an official audit closure letter; however, compliance officers were not required to use this system. Compliance officers were permitted to communicate the results of certain audits (e.g., when the employer reported having no new employees) via email and, based on our interviews with compliance officers, we found that some compliance officers generated audit closure letters outside of the system using templates on their own computers. The eComp system logs activity in the database, such as when an audit closure letter is generated, and can be easily monitored by Division managers. However, without requiring compliance officers to use the Division's eComp system to generate an official closure letter for each initiated audit, the Division lacks assurance that all employers receive appropriate communication about the results of the audit, or, in the case of employers reporting no new employees, that the audit was administratively closed. In response to the results of our review, since August 2011, the Division has required compliance officers to use the eComp system to generate an official closure letter for each initiated audit.

- **Initial Instructions to Employers.** We noted that the Division's standard letter used to officially inform employers of a pending audit does not contain any instructions for those circumstances in which the employer may not have obtained or maintained the required documentation. In particular, the Division's letter does not address attempts to falsely demonstrate compliance with the Employment Verification Law. Such attempts could include:

  - Filling out new affirmations and backdating them so that they appear to have been completed within the 20-day statutory deadline. This may occur if the employer did not complete an affirmation within 20 days of hiring a new employee. However, if the Division implements our recommendations, employers that backdate affirmations would be deemed noncompliant and assessed a monetary fine.

  - Asking employees to provide their identity and employment authorization documents a second time. This may occur if the employer failed to make and keep copies of these documents when completing the federal Form I-9 within 3 days of hiring a new employee. However, such attempts to reverify employees could expose the employer to accusations of engaging in unfair immigration-related employment practices under federal law.

  Part of the underlying reason why an employer might take either of the actions described above is a fear of being found noncompliant and assessed a monetary fine. Lack of clear instructions from the Division only adds to employers' fears. Thus, the Division's audit initiation letter needs to provide more detail on whether employers that self-report they have not obtained or maintained the required documentation are likely to be assessed a fine. The Division's letter should also make it clear that corrective action generally can be applied only on a going-forward basis and specifically caution employers against and explain the possible repercussions of backdating affirmations and reverifying employees.

Recommendation No. 6:

The Division of Labor (the Division) should strengthen its audit process, including communication with audited employers, by:

a. Requesting that audited employers provide a list of all current employees and their corresponding hire dates. The Division should use these lists to ensure that employers provide copies of completed affirmations and

identity and employment eligibility documents for all employees hired on or after January 1, 2007.

b. Requiring compliance officers to use the Division's eComp system to generate an official closure letter for each initiated audit.

c. Providing better instructions in the audit initiation letter for those circumstances in which the employer may not have obtained or maintained the required documentation.

Division of Labor Response:

a. Agree. Implementation date: Implemented and Ongoing.

In August 2011, the Division implemented new processes, policies, and audit letters that request that audited employers provide a list of all current employees and their corresponding hire dates. The Division is using these lists to ensure that the employer provides copies of completed affirmations and identity and employment eligibility documents for all employees hired on or after January 1, 2007.

b. Agree. Implementation date: Implemented.

In August 2011, the Division implemented new processes, policies, and audit letters that require compliance officers to use the Division's eComp system to generate an official closure letter for each initiated audit.

c. Agree. Implementation date: February 2012.

The Division will provide better instructions in the audit initiation letter for those circumstances in which the employer may not have obtained or maintained the required documentation.

State of Colorado Compliance

State government is one of the largest employers in Colorado. The Department of Personnel & Administration (DPA) is responsible for carrying out the daily administration, oversight, and management of the state personnel system and its approximately 33,000 classified employees. DPA provides a range of services to human resources personnel in state agencies and higher education institutions, including technical assistance and training on the proper application of federal

and state employment laws, rules, and other requirements to mitigate the State's employee liability risk.

As an employer, the State must comply with federal and state laws governing verification of employment authorization for newly hired state employees. During our audit, we reviewed employment documentation for a nonstatistical sample of 75 state employees who were hired in Calendar Years 2009 and 2010 to evaluate the State's compliance with the Employment Verification Law. We selected 15 employees at random from each of four state agencies (Departments of Corrections, Human Services, Natural Resources, and Transportation) and one higher education institution (University of Colorado Denver). Overall, we found that the files for 71 of the 75 sampled employees were compliant with the Employment Verification Law. That is, where applicable, the files contained the required copies of completed affirmations and identity and employment authorization documents. However, we also found that some state agencies were not fully compliant with the Employment Verification Law for their employees, as described in the following bullet points.

- **Missing Identity and Employment Authorization Documents.** As a result of our file review, we learned that one state agency halted its process for photocopying new employees' identity and employment authorization documents during Calendar Year 2010. Consequently, the agency did not comply with the Employment Verification Law for the 390 new employees—including one employee in our sample—the agency hired during this 1-year period. According to human resources staff we interviewed, the agency received guidance from U.S. Citizenship and Immigration Services officials that it did not need to retain copies of identity and employment authorization documents, which is why the agency stopped making photocopies. Although this guidance was appropriate regarding the federal Form I-9 process, Colorado's Employment Verification Law makes it mandatory to retain copies of identity and employment authorization documents for all employees hired on or after January 1, 2007. Had the agency's human resources staff also consulted with DPA for guidance, this problem could have been avoided. The agency has since resumed making copies of new employees' identity and employment authorization documents.

- **Invalid Identity and Employment Authorization Documents.** The Employment Verification Law requires employers to retain file copies of the identity and employment authorization documents that are required by federal law. Two employee files at a second state agency were noncompliant with the Employment Verification Law because the files contained copies of identity and employment authorization documents that are not allowable for completing the federal Form I-9. Specifically, one employee's file contained a copy of a receipt from the U.S. Social Security

Administration stating that the employee had requested a replacement social security card. However, the file did not contain a copy of the employee's replacement social security card, which must be presented within 90 days of completing the Form I-9. The second employee's file contained a copy of an expired driver's license. However, expired identity documents are not valid for completing the Form I-9.

- **Incomplete Affirmations.** One employee file at a third state agency contained an affirmation that was undated and did not indicate the name or signature of the agency representative who filled it out. The Division deems employers noncompliant if the affirmation is incomplete, because, without details such as the name of the person making the affirmation and the date of the affirmation, it is impossible to determine whether an authorized employer representative completed the affirmation within 20 days after the date of hire, as required by the Employment Verification Law.

Overall, the cases of noncompliance we identified appeared to be the result of a lack of awareness or due diligence on the part of human resources personnel at the individual agencies. We recognize that DPA is not solely responsible for ensuring the State complies with the Employment Verification Law. Human resources personnel at individual state agencies and higher education institutions also have a responsibility to understand and adhere to established requirements. Nonetheless, we identified several areas in which DPA, within the scope of its responsibilities for the oversight of the state personnel system, can promote compliance and help ensure that human resources personnel at state agencies and higher education institutions are aware of their responsibilities under the Employment Verification Law.

Improve Guidance and Offer Training. DPA could expand its technical assistance guide on employment eligibility verification for newly hired state employees. Although this guide provides some information and instruction about the Employment Verification Law, we noted that the guide's primary focus is how to comply with the federal Form I-9 process. For example, the guide does not alert readers from the beginning that there are two employment verification laws—one federal and one state—that the State must comply with when verifying employment eligibility for new employees. Additionally, DPA's guide does not clearly describe how the Employment Verification Law's requirements go beyond or are different from federal requirements. We also noted that the guide has not been updated to reflect changes in the acceptability of expired documents and receipts for replacement documents when completing the Form I-9. Finally, DPA has not offered training to human resources personnel at state agencies and higher education institutions about employment eligibility verification requirements and processes for state classified employees. Training can be an effective means of

reemphasizing technical guidance, providing targeted instruction on key processes, and highlighting those areas that are at greater risk of noncompliance.

Encourage Self-Reviews. We noted that DPA has a number of "mini self-audit" forms available on its website, one of which is specifically related to the federal Form I-9 process and Colorado's Employment Verification Law. These one-page forms are intended to be used by human resources personnel as a diagnostic tool, whereby answering "no" to any of the items on the form may indicate noncompliance with law, rule, or recommended practice and that follow up is warranted. Conducting self-audits is an additional means of ensuring compliance with federal and state employment verification laws. DPA should encourage use of this self-audit form among human resources personnel at state agencies and higher education institutions.

Conduct Reviews. DPA could conduct reviews of state agencies and higher education institutions to evaluate compliance with the Employment Verification Law. DPA has statutory authority to conduct compliance reviews of state agencies' and higher education institutions' human resources management and operations. Although DPA has conducted comprehensive reviews to assess state agencies' and higher education institutions' compliance with the federal Form I-9 process, these reviews predated the enactment of Colorado's Employment Verification Law. Conducting a review of all state agencies and higher education institutions is likely to be a resource-intensive endeavor. Therefore, this option may be best suited for use on a more targeted basis.

Recommendation No. 7:

The Department of Personnel & Administration (DPA) should help ensure that the State of Colorado, as an employer, complies with the Employment Verification Law for state classified employees by:

a. Expanding technical guidance to more clearly and comprehensively explain the requirements of the Employment Verification Law and how they go beyond or are different from the federal Form I-9 process. Technical guidance should be kept current to reflect changes in applicable federal and state requirements.

b. Providing training to human resources personnel at state agencies and higher education institutions on employment eligibility verification requirements and processes for state classified employees.

c. Encouraging human resources personnel at state agencies and higher education institutions to use the employment verification self-audit form.

d. Conducting targeted reviews of state agencies and higher education institutions, as necessary, for compliance with the Employment Verification Law.

Department of Personnel & Administration Response:

Agree. Implementation date: April 2012.

a. DPA will revise its technical guidance to more clearly and comprehensively explain the requirements of the Employment Verification Law, distinguishing them from the related requirements of the federal Form I-9 process.

b. DPA will develop training for human resources personnel who carry out the verification process for new employees.

c. DPA will remind human resources personnel about the self-audit tool available on its website and encourage departments to evaluate their own processes.

d. DPA will consider ways to use its limited existing resources in order to conduct targeted reviews of state departments for compliance with the Employment Verification Law.

This page intentionally left blank.

Public Contracts for Services Law

Chapter 3

Colorado's Public Contracts for Services Law (Sections 8-17.5-101 and 102, C.R.S.) became effective on August 7, 2006. As described in more detail in Chapter 1, the law was enacted to help provide assurance that state agencies and political subdivisions do not procure services from entities that knowingly hire illegal aliens.

The Public Contracts for Services Law defines "services" to include the furnishing of time, labor, or effort by a contractor or subcontractor that does not involve the delivery of a specific end product. For example, this might include document shredding services; maintenance and custodial services; landscaping services; or services to install, set up, or provide training associated with purchased equipment.

The law has broad applicability, as evidenced through the following statutory definitions:

- "Public contract for services means any type of agreement, regardless of what the agreement may be called, between a state agency or political subdivision and a contractor for the procurement of services." The only exclusions are those specifically provided for in the law, such as agreements for information technology services or products and services, agreements for investment advisory and fund management services, and intergovernmental agreements. The law does not establish any dollar thresholds regarding the value of the purchased services that are covered.

- "State agency means any department, commission, council, board, bureau, committee, institution of higher education, agency, or other governmental unit of the Executive, Legislative, or Judicial Branch of government."

- "Political subdivision means any city, county, city and county, town, special district, school district, local improvement district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law."

At the core of the Public Contracts for Services Law is a requirement that state agencies and political subdivisions incorporate certain provisions outlined in the

law into all public contracts for services. For example, some of the required provisions include:

- The contractor shall not knowingly employ or contract with an illegal alien to perform work under the public contract for services.

- The contractor shall not enter into a contract with a subcontractor that fails to certify to the contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under the public contract for services.

- The contractor will confirm the employment eligibility of all employees that are newly hired for employment to perform work under the public contract for services through participation in either the federal E-Verify Program or an alternative program, called the Department Program, established by the law.

It is through the required provisions and, ultimately, the requirements they place on contractors that the contracting state agency or political subdivision gains assurance that contractors providing services do not knowingly hire illegal aliens to perform work under the contract. The required provisions also provide the contracting state agency or political subdivision with a means of recourse if the contractor violates the terms—termination for breach of contract and assessment of liability for actual and consequential damages.

The Public Contracts for Services Law grants the Department of Labor and Employment (the Department) a certain amount of oversight authority, which the Department has delegated to the Division of Labor (the Division) to administer. Specifically, the Division:

- May investigate through its own initiative or on the basis of a complaint whether a contractor is complying with the required provisions of a public contract for services.

- May conduct random audits of those contractors that choose to participate in the Department Program for the purpose of confirming employees' employment eligibility.

- Shall notify the contracting state agency or political subdivision if the Division suspects that there has been a breach of any of the required provisions of a public contract for services or a requirement of the Department Program.

During our audit, we reviewed the statutory provisions of the Public Contracts for Services Law as well as the Division's investigation and audit activities under the law. We also reviewed the State of Colorado's efforts as a contracting entity to comply with the law's requirement that certain provisions be included in all public contracts for services. Overall, we found that (1) the Division's role with respect to monitoring compliance with the Public Contracts for Services Law is limited due to both practical and legal factors, (2) the Division does not actively manage the Department Program to ensure a valid list of participants, and (3) the State of Colorado is at risk of noncompliance with the Public Contracts for Services Law in certain circumstances.

Investigations and Audits

The Public Contracts for Services Law places several different requirements on contracting agencies and contractors that are engaged in public contracts for services. The law also grants the Division authority to conduct investigations and audits as a means of ensuring contractors' compliance with the law's requirements. At the time of our audit, the extent of the Division's investigation and audit activity under the Public Contracts for Services Law was limited. Specifically, the Division had received and investigated a total of six complaints alleging contractor violations of a required provision of a public contract for services. The Division had not initiated any investigations of its own accord, nor had the Division audited any contractors opting to participate in the Department Program. As described in the following bullet points, we identified several practical and legal factors that limit the Division's role with respect to monitoring for compliance with the Public Contracts for Services Law.

- **The Division has limited ability to identify the population of public contracts for services and related contractors.** The Public Contracts for Services Law grants the Division authority to investigate contractors for compliance with the required provisions of a public contract for services. However, practically speaking, there is no straightforward way for the Division to proactively identify all public contracts for services or those contractors that are performing work under such contracts. For example, at the state level, there is no single database that encompasses all contracts, purchase orders, or other agreements for services. The Office of the State Controller maintains the Contract Management System, which is a database of contracts for Executive Branch agencies. However, this database excludes contracts at higher education institutions as well as the Legislative and Judicial Branches. At the political subdivision level, there is a similar fragmentation because each political subdivision is its own legal entity with its own procurement process. The Division would have to compile and update these contract data itself, which could be administratively costly. The Division only knows that a public contract for

services exists when it receives (1) a complaint alleging that a contractor has violated a required provision of a public contract for services, or (2) notification from a contractor performing work under a public contract for services that it intends to participate in the Department Program. Thus, although the Division has the statutory authority to investigate all contractors performing work under a public contract for services, the Division is limited in its practical ability to conduct non-complaint-based investigations under the Public Contracts for Services Law.

- **The Division lacks authority to verify that public contracts for services include the required provisions.** A key component of the Public Contracts for Services Law is the requirement that state agencies and political subdivisions include certain provisions in all public contracts for services. However, even if the Division could identify the population of all public contracts for services, the law does not grant the Division authority to investigate or audit contracts or agreements made by other state agencies or political subdivisions. Consequently, the Division plays no role in ensuring that contracting state agencies and political subdivisions include the required provisions in their public contracts for services. The law relies solely on state agencies and political subdivisions to self-monitor for compliance.

- **The Division lacks enforcement authority for suspected cases of contract violations.** Unlike the Employment Verification Law, which authorizes the Division to assess fines for noncompliance, the Division has no enforcement authority under the Public Contracts for Services Law. The law specifically states that "the results of any investigation shall not constitute final agency action." The Division's only responsibility under the Public Contracts for Services Law is to notify the contracting state agency or political subdivision if the Division suspects that a contractor is noncompliant with the required provisions of a public contract for services or has violated a requirement of the Department Program. Enforcement action ultimately rests with the contracting state agency or political subdivision.

  If the contracting state agency or political subdivision finds that a contractor has violated a required provision of a public contract for services, the contracting state agency or political subdivision *may* terminate the contract but is not required to do so. During our audit, we found that the Division has only referred one case to a political subdivision, and, according to the Division, the political subdivision did not choose to terminate the contract. When a public contract for services is terminated due to a violation of a required provision, the Public Contracts for Services Law requires the contracting state agency or political subdivision to notify the Secretary of State, who will maintain a list of

such contractors. According to the Secretary of State's Office, there have been no contract terminations under the Public Contracts for Services Law since its enactment in 2006.

- **The Division is limited in its ability to determine whether contractors are using E-Verify.** The Public Contracts for Services Law requires contractors to certify that they will use either the federal E-Verify Program or the Department Program to confirm the employment eligibility of all newly hired employees who will perform work under a public contract for services. The law grants the Division authority to audit contractors that participate in the Department Program. However, until recently, the Division has been limited in its ability to confirm that those contractors that do *not* participate in the Department Program are using E-Verify. This is because the U.S. Department of Homeland Security, which administers E-Verify, imposes limitations on how information from the E-Verify system can be disclosed and used. Historically, the Division has only been allowed to ask contractors for a copy of the agreement demonstrating that they have signed up for E-Verify. However, a copy of the agreement does not provide sufficient information for the Division to confirm that the contractor is actually using E-Verify to check its employees' employment eligibility status.

  In September 2011, the Division received formal permission and guidance from U.S. Citizenship and Immigration Services officials that the Division may access data on E-Verify usage by contractors working under public contracts for services. However, it is yet to be determined how this new level of access will affect the Division's investigations going forward.

Legislative Intent

Overall, our analysis of the law's provisions and our review of the Division's investigation and audit activities raise questions about the Division's oversight role as contemplated by the Public Contracts for Services Law. To date, the Division's investigation and audit activities under the Public Contracts for Services Law have been limited. Some policymakers may view this lack of activity as problematic, whereas others may not. For example, if the General Assembly intended that the Division play a proactive role in monitoring and enforcing compliance with the Public Contracts for Services Law, this has not happened because the practical and legal limitations discussed in the previous section are barriers to the Division's ability to comprehensively and effectively carry out such a role. If, however, the General Assembly intended that the Division play a more limited investigatory role in which the burden of ensuring compliance with the law's requirements should fall to the contracting agencies and contractors themselves, this has largely been accomplished. Currently, the

Division primarily relies on complaints to trigger when additional oversight is warranted. From this perspective, the Division's lack of widespread investigation and audit activity is not necessarily problematic and is consistent with the manner in which the law was constructed. It may be appropriate for the General Assembly to further clarify the Division's intended oversight role under the Public Contracts for Services Law; however, such policy considerations are beyond the scope of this audit. We make no recommendations in this area.

Department Program

The Public Contracts for Services Law was amended in 2008 to create the Department Program. As discussed in Chapter 1, the Department Program consists of two primary provisions, a notification and an affirmation requirement. First, contractors that perform work under a public contract for services and choose *not* to use the federal E-Verify Program must notify the Division and the contracting state agency or political subdivision of their participation in the Department Program. As of January 2011, the Division had received notices of participation in the Department Program from 71 businesses. Notices from six businesses referenced contracts with state agencies, notices from 63 businesses referenced contracts with political subdivisions, and notices from two businesses referenced contracts with both state agencies and political subdivisions.

Second, contractors that participate in the Department Program must, within 20 days of hiring a new employee to perform work under a public contract for services, compose an affirmation stating that the contractor has:

- Examined the legal work status of the new employee.
- Retained file copies of the identity and employment authorization documents used to complete the employee's federal Form I-9.
- Not altered or falsified the employee's identification documents.

The contractor must have the affirmation notarized and send a copy to the contracting state agency or political subdivision.

The Public Contracts for Services Law grants the Division authority to randomly audit contractors participating in the Department Program to ensure that they have retained the required notarized affirmations and copies of identity and employment authorization documents for all new employees hired to work under a public contract for services.

During our audit, we reviewed the notices of participation that the Division received as of January 2011 from all eight businesses referencing contracts with state agencies. We found that the Division does not actively manage the Department Program to ensure a valid list of participants. Specifically, in only one case did we find that the business submitting the notice of participation (1) was the primary contractor on the public contract for services and (2) provided the required notice to the Division and the contracting agency. We identified problems with notices of participation from the remaining seven businesses as follows:

- One business bid on a public contract for services but was not ultimately awarded the contract. Only those contractors performing work under a public contract for services are eligible to participate in the Department Program.

- Three businesses were subcontractors; however, subcontractors are not eligible to participate in the Department Program. If a contractor chooses to enlist a subcontractor to perform work under a public contract for services, the Public Contracts for Services Law requires the subcontractor to certify *to the contractor* that it does not knowingly employ or contract with an unauthorized worker.

- Three businesses provided a notice of participation to the Division but did not also provide notice to the contracting state agency. Absent a corresponding notice to the contracting state agency, the contractors did not complete all the steps required by the Public Contracts for Services Law to participate in the Department Program.

The problems we identified with the notices of participation could be addressed through improved communication and guidance from the Division. First, although the Division sends a confirmation letter to any business from which it receives a notice of participation, the Division does not follow up with the contracting state agency or political subdivision to confirm whether it received a copy of the notice. The Division also does not follow up with the contracting state agency or political subdivision to determine whether the entity submitting the notice of participation is the primary contractor (i.e., not a subcontractor). Confirming these facts would help the Division better manage the list of contractors participating in the Department Program for audit purposes. Moreover, this follow-up contact would provide the Division an opportunity to alert the contracting agency of the possibility that it may receive notarized affirmations from the contractor and that the notice of participation and any notarized affirmations should be retained as part of the agency's contract files for audit purposes.

Second, the Division's technical guidance for contractors and contracting agencies does not clarify that subcontractors are ineligible for the Department Program and should not submit notices of participation. Clarifying this one item in its technical guidance could help reduce the number of invalid notices of participation the Division receives.

Although the Division has not audited any participants in the Department Program to date, the Division will nonetheless be limited in its ability to effectively conduct such audits in the future without a valid list of Department Program participants.

Recommendation No. 8:

The Division of Labor (the Division) should ensure a valid list of participants in the Department Program for audit purposes by:

a. Following up with the contracting state agency or political subdivision when it receives a notice of participation from a contractor. At a minimum, the Division should confirm whether the contracting state agency or political subdivision received a copy of the notice of participation and obtain sufficient details to determine whether the entity submitting the notice is the primary contractor on the public contract for services.

b. Improving technical guidance for contractors and contracting agencies to clarify that bidders and subcontractors are ineligible for participation in the Department Program.

Division of Labor Response:

a. Agree. Implementation date: January 2012 and Ongoing.

   The Division will follow up with the contracting state agency or political subdivision when it receives a notice of participation from a contractor. The Division will confirm whether the contracting state agency or political subdivision received a copy of the notice of participation and obtain sufficient details to determine whether the entity submitting the notice is the primary contractor on the public contract for services.

b. Agree. Implementation date: January 2012.

The Division will improve technical guidance for contractors and contracting agencies to clarify that bidders and subcontractors are ineligible for participation in the Department Program.

State of Colorado Compliance

As a contracting entity, the State of Colorado must comply with the Public Contracts for Services Law. That is, the State must take steps to ensure that agreements to purchase services, regardless of what the agreements are called or their dollar amount, include the provisions required by the law. We reviewed the adequacy of controls intended to ensure that the State's contracts, purchase orders, and other agreements include the required provisions. We did not perform audit work to test contract language at any political subdivision. However, to help establish that political subdivisions are at least aware of the law's requirements, we contacted a number of stakeholder groups (i.e., Colorado Counties Inc., Colorado Municipal League, Colorado Association of School Boards, and Special District Association of Colorado) that confirmed their members were given notice of the newly required provisions subsequent to the Public Contracts for Services Law's enactment.

The Office of the State Controller provides management, monitoring, and oversight of the State's financial affairs. The State Controller has established a model contract as well as other purchasing templates and documentation requirements for the purchase of goods and services. State Fiscal Rules, which Executive Branch agencies are required to follow, establish the following documentation requirements and dollar thresholds for the purchase of services:

- Purchases for services exceeding $100,000 require a contract.

- Purchases for services between $5,001 and $100,000 require a purchase order. Agencies may still choose to use a contract depending on the size, complexity, or sensitivity of the services required.

- Purchases for services of $5,000 or less do not require a purchase order or contract; however, other supporting documentation (e.g., invoice, billing, receipt) must be maintained. Agencies may still choose to use a purchase order or a contract depending on the size, complexity, or sensitivity of the services required.

- Purchases for professional services (i.e., architects, engineers, industrial hygienists, landscape architects, and land surveyors) require a contract, no matter the dollar amount.

Some higher education institutions, as well as the Legislative and Judicial Branches, are exempt from State Fiscal Rules and, therefore, are not required to adhere to these thresholds.

To evaluate the State's compliance with the Public Contracts for Services Law, we interviewed staff at the Office of the State Controller, the Office of the State Architect, the State Purchasing Office, and a nonstatistical sample of five state agencies about applicable procurement policies and practices. We also reviewed documentation to verify whether model contracts, purchase orders, or other forms and templates being used by state agencies when procuring services included the provisions required by the Public Contracts for Services Law. Overall, we found that the Office of the State Controller has controls in place that provide reasonable assurance of the State's compliance with the Public Contracts for Services Law's requirements. However, as described in the following section, we identified one specific area in which the State is at risk of noncompliance and further consideration is warranted.

Purchases of $5,000 or Less

The Office of the State Controller, in concert with the Office of the Attorney General, has developed standard language that must be included in most state contracts (i.e., expenditure contracts, grant contracts and intergovernmental agreements involving the pass through of funds, debt contracts, price agreements, and capital construction contracts) and all purchase orders. These "contract special provisions" and "purchase order terms and conditions" cover a number of different requirements that apply to entities doing business with the State.

One section of the contract special provisions and the purchase order terms and conditions specifically addresses the requirements of the Public Contracts for Services Law. However, State Fiscal Rules do not require a written purchase order or contract for purchases of $5,000 or less, which means that the contract special provisions and purchase order terms and conditions that incorporate the Public Contracts for Services Law's provisions are not applicable. To address this gap, the Office of the State Controller provides a certification and affidavit form on its website for state agencies to use when purchasing services from a vendor and a written contract or purchase order is not required.

Based on our audit work, we concluded that the State is at risk of noncompliance with the Public Contracts for Services Law for purchases of services of $5,000 or less. None of the five agencies we sampled had a process for including the

required provisions in agreements when purchasing services other than through the use of a contract or purchase order. Specifically, purchasing and contract unit officials at all of our sampled agencies reported that they do not use the certification and affidavit form provided by the Office of the State Controller for such purchases and were generally unaware of the requirements for its use. At two agencies we visited, staff questioned the applicability of the Public Contracts for Services Law to small-dollar purchases made without a written purchase order or contract.

The lack of awareness about or use of the certification and affidavit form among officials at the agencies we sampled may be partially explained by the fact that, while the Office of the State Controller has issued some guidance on its website, State Fiscal Rules do not officially require state agencies to use the certification and affidavit form. The form's use is also not discussed in the State Controller's Policies or the State Procurement Manual.

Through our analysis and interviews with staff at both the Office of the State Controller and the State Purchasing Office, we found there are tradeoffs to mandating a special form for small-dollar purchases that need to be weighed. Threshold-based procurement processes, such as the one utilized by the State, involve well-established controls that are meant to mitigate financial and legal risks to the procuring agency while maintaining administrative efficiencies. By design, these processes allow less extensive documentation and review for small-dollar purchases, because there are fewer financial and/or legal risks that must be mitigated. Requiring the use of a certification and affidavit form for small-dollar purchases for services could potentially add to agencies' administrative burden and introduce inefficiencies to the procurement process.

Although we found the State to be at risk of noncompliance with the Public Contracts for Services Law, we also recognize the practical challenges in applying the law's requirements to small-dollar purchases for services that do not involve a written purchase order or a contract while also maintaining an efficient and effective procurement process. If a solution to this dilemma proves elusive, the Office of the State Controller may have cause to seek additional legal guidance from the Office of the Attorney General or direction from the General Assembly on the intended scope of applicability for the Public Contracts for Services Law.

Recommendation No. 9:

The Office of the State Controller should develop and implement a method for state agencies to comply with the Public Contracts for Services Law for small-dollar purchases for services when a written purchase order or contract is not required.

Office of the State Controller Response:

Agree. Implementation date: December 2011.

The Office of the State Controller agrees that it should develop and implement a method of promoting compliance with the Public Contracts for Services Law for small-dollar purchases not involving contracts or purchase order standard provisions or terms and conditions. We will attempt to increase awareness of the certification and affidavit form by directly notifying agencies and conducting training at the Colorado Contracts Improvement Team meetings. We will encourage state agencies to consistently use the form by policy and by referencing the form in the State's Procurement Manual. However, as pointed out in the report, in using the form there are tradeoffs regarding compliance and administrative efficiencies.

Appendices

Appendix A

Employment Verification Law

8-2-122. Employment verification requirements - audits - fine for fraudulent documents - cash fund created - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Director" means the director of the division.

(b) "Division" means the division of labor in the department of labor and employment.

(c) "Employer" means a person or entity that:

(I) Transacts business in Colorado;

(II) At any time, employs another person to perform services of any nature; and

(III) Has control of the payment of wages for such services or is the officer, agent, or employee of the person or entity having control of the payment of wages.

(d) "Unauthorized alien" has the same meaning as set forth in 8 U.S.C. sec. 1324a (h) (3).

(2) On and after January 1, 2007, within twenty days after hiring a new employee, each employer in Colorado shall affirm that the employer has examined the legal work status of such newly hired employee and has retained file copies of the documents required by 8 U.S.C. sec. 1324a; that the employer has not altered or falsified the employee's identification documents; and that the employer has not knowingly hired an unauthorized alien. The employer shall keep a written or electronic copy of the affirmation, and of the documents required by 8 U.S.C. sec. 1324a, for the term of employment of each employee.

(3) Upon the request of the director, an employer shall submit documentation to the director that demonstrates that the employer is in compliance with the employment verification requirements specified in 8 U.S.C. sec. 1324a (b) and documentation that the employer has complied with the requirements of subsection (2) of this section. The director or the director's designee may conduct random audits of employers in Colorado to obtain the documentation. When the director has reason to believe that an employer has not complied with the employment verification and examination requirements, the director shall request the employer to submit the documentation.

(4) An employer who, with reckless disregard, fails to submit the documentation required by this section, or who, with reckless disregard, submits false or fraudulent documentation, shall be subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense. The moneys collected pursuant to this subsection (4) shall be deposited in the employment verification cash fund,

which is hereby created in the state treasury. The moneys in the fund shall be appropriated to the department of labor and employment for the purpose of implementing, administering, and enforcing this section. The moneys in the fund shall remain in the fund and not revert to the general fund or any other fund at the end of any fiscal year.

(5) It is the public policy of Colorado that this section shall be enforced without regard to race, religion, gender, ethnicity, national origin, or disability.

Source: Colorado Revised Statutes.

Appendix B

Public Contracts for Services Law

8-17.5-101. Definitions.

As used in this article, unless the context otherwise requires:

(1) (Deleted by amendment, L. 2008, p. 736, § 1, effective May 13, 2008.)

(2) "Contractor" means a person having a public contract for services with a state agency or political subdivision of the state.

(3) "Department" means the department of labor and employment.

(3.3) "Department program" means the employment verification program established pursuant to section 8-17.5-102 (5) (c).

(3.7) "E-verify program" means the electronic employment verification program created in Public Law 104-208, as amended, and expanded in Public Law 108-156, as amended, and jointly administered by the United States department of homeland security and the social security administration, or its successor program.

(4) "Executive director" means the executive director of the department of labor and employment.

(4.5) "Newly hired for employment" means hired to work in the United States since the effective date of the public contract for services.

(5) "Political subdivision" means any city, county, city and county, town, special district, school district, local improvement district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law.

(6) (a) "Public contract for services" means any type of agreement, regardless of what the agreement may be called, between a state agency or political subdivision and a contractor for the procurement of services.

(b) "Public contract for services" does not include:

(I) Agreements relating to the offer, issuance, or sale of securities, including but not limited to agreements pertaining to:

(A) Underwriting, marketing, remarketing, paying, transferring, rating, or registering securities; or

(B) The provision of credit enhancement, liquidity support, interest rate exchanges, or trustee or financial consulting services in connection with securities;

(II) Agreements for investment advisory services or fund management services;

(III) Any grant, award, or contract funded by any federal or private entity for any research or sponsored project activity of an institution of higher education or an affiliate of an institution of higher education that is funded from moneys that are restricted by the entity under the grant, award, or contract. For purposes of this subparagraph (III), "sponsored project" means an agreement between an institution of higher education and another party that provides restricted funding and requires oversight responsibilities for research and development or other specified programmatic activities that are sponsored by federal or private agencies and organizations.

(IV) Intergovernmental agreements; or

(V) Agreements for information technology services or products and services.

(7) "Services" means the furnishing of labor, time, or effort by a contractor or a subcontractor not involving the delivery of a specific end product other than reports that are merely incidental to the required performance.

(8) "State agency" means any department, commission, council, board, bureau, committee, institution of higher education, agency, or other governmental unit of the executive, legislative, or judicial branch of state government.

8-17.5-102. Illegal aliens - prohibition - public contracts for services - rules.

(1) A state agency or political subdivision shall not enter into or renew a public contract for services with a contractor who knowingly employs or contracts with an illegal alien to perform work under the contract or who knowingly contracts with a subcontractor who knowingly employs or contracts with an illegal alien to perform work under the contract. Prior to executing a public contract for services, each prospective contractor shall certify that, at the time of the certification, it does not knowingly employ or contract with an illegal alien who will perform work under the public contract for services and that the contractor will participate in the e-verify program or department program in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services.

(2) (a) Each public contract for services shall include a provision that the contractor shall not:

(I) Knowingly employ or contract with an illegal alien to perform work under the public contract for services; or

(II) Enter into a contract with a subcontractor that fails to certify to the contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under the public contract for services.

(b) Each public contract for services shall also include the following provisions:

(I) A provision stating that the contractor has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services through participation in either the e-verify program or the department program;

(II) A provision that prohibits the contractor from using either the e-verify program or the department program procedures to undertake preemployment screening of job applicants while the public contract for services is being performed;

(III) A provision that, if the contractor obtains actual knowledge that a subcontractor performing work under the public contract for services knowingly employs or contracts with an illegal alien, the contractor shall be required to:

(A) Notify the subcontractor and the contracting state agency or political subdivision within three days that the contractor has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and

(B) Terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to sub-subparagraph (A) of this subparagraph (III) the subcontractor does not stop employing or contracting with the illegal alien; except that the contractor shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien;

(IV) A provision that requires the contractor to comply with any reasonable request by the department made in the course of an investigation that the department is undertaking pursuant to the authority established in subsection (5) of this section.

(3) If a contractor violates a provision of the public contract for services required pursuant to subsection (2) of this section, the state agency or political subdivision may terminate the contract for a breach of the contract. If the contract is so terminated, the contractor shall be liable for actual and consequential damages to the state agency or political subdivision.

(4) A state agency or political subdivision shall notify the office of the secretary of state if a contractor violates a provision of a public contract for services required pursuant to subsection (2) of this section and the state agency or political subdivision terminates the contract for such breach. Based on this notification, the secretary of state shall maintain a list that includes the name of the contractor, the state agency or political subdivision that terminated the public contract for services, and the date of the termination. A contractor shall be removed from the list if two years have passed since the date the contract was terminated, or if a court of competent jurisdiction determines that there has not been a violation of the provision of the public contract for services required pursuant to subsection (2) of this section. A state agency or political subdivision shall notify the office of the secretary of state if a court has made such a determination. The list shall be available for public inspection at the office of the secretary of

state and shall be published on the internet on the web site maintained by the office of the secretary of state.

(5) (a) The department may investigate whether a contractor is complying with the provisions of a public contract for services required pursuant to subsection (2) of this section. The department may conduct on-site inspections where a public contract for services is being performed within the state of Colorado, request and review documentation that proves the citizenship of any person performing work on a public contract for services, or take any other reasonable steps that are necessary to determine whether a contractor is complying with the provisions of a public contract for services required pursuant to subsection (2) of this section. The department shall receive complaints of suspected violations of a provision of a public contract for services required pursuant to subsection (2) of this section and shall have discretion to determine which complaints, if any, are to be investigated. The results of any investigation shall not constitute final agency action. The department is authorized to promulgate rules in accordance with article 4 of title 24, C.R.S., to implement the provisions of this subsection (5).

(b) The executive director shall notify a state agency or political subdivision if he or she suspects that there has been a breach of a provision in a public contract for services required pursuant to subsection (2) of this section.

(c) (I) There is hereby created the department program. Any contractor who participates in the department program shall notify the department and the contracting state agency or political subdivision of such participation. A participating contractor shall comply with the provisions of subparagraph (II) of this paragraph (c) and shall consent to department audits conducted in accordance with subparagraph (III) of this paragraph (c). Failure to meet either of these obligations shall constitute a violation of the department program. The executive director shall notify a contracting state agency or political subdivision of such violation.

(II) A participating contractor shall, within twenty days after hiring an employee who is newly hired for employment to perform work under the public contract for services, affirm that the contractor has examined the legal work status of such employee, retained file copies of the documents required by 8 U.S.C. sec. 1324a, and not altered or falsified the identification documents for such employees. The contractor shall provide a written, notarized copy of the affirmation to the contracting state agency or political subdivision.

(III) The department may conduct random audits of state agencies or political subdivisions to review the affidavits and of contractors to review copies of the documents required by subparagraph (II) of this paragraph (c). Audits shall not violate federal law.

(6) Nothing in this section shall be construed as requiring a contractor to violate any terms of participation in the e-verify program.

Source: Colorado Revised Statutes.

The electronic version of this report is available on the website of the
Office of the State Auditor
www.state.co.us/auditor

A bound report may be obtained by calling the
Office of the State Auditor
303.869.2800

Please refer to the Report Control Number below when requesting this report.

Report Control Number 2129

Report Control Number 2129