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M E M O R A N D U M

July 19, 2006

TO: Jon Anderson, Chief Counsel to the Governor

FROM: Cynthia Coffman, Chief Deputy Attorney General
Jason Dunn, Deputy Attorney General

RE: Implementation of House Bill 1023

In response to questions posed by the Governor's office, State agencies and political subdivisions, we are conducting an analysis as to how governmental entities should implement House Bill 1023. Given the short period of time before the law goes into effect on August 1, we are providing a preliminary response to some of the more frequently asked questions applicable to a wide range of agencies and political subdivisions. We will provide more answers over the coming days and weeks as unique situations arise. One critical questions not answered here is what type of government services or benefits qualify as a "professional license" or "commercial license" as those terms are used in federal law (8 U.S.C. 1611(c)(1)(A) and 1621(c)(1)(A)). We are researching that question and hope to have an answer in the next few days.

Question #1: How should agencies and political subdivisions administering state/federal programs reconcile the identification requirements in H.B. 1023 with federal identification requirements relating to the same program?

House Bill 1023 generally requires applicants to produce one of four types of identification. Often times, however, federal laws relating to the state administration of federal benefits specify certain identification requirements. Where these laws conflict, traditional rules of preemption apply. Thus, if the federal law expressly prohibits state intervention in that area, or if the federal law specifically enumerates identification requirements, H.B. 1023 does not apply and the state entity should continue to follow federal law. Where federal law does not specifically speak to identification requirements or expressly states that state entities may add further requirements,

H.B. 1023 requirements will likely apply. Ultimately, this requires a case by case analysis. For specific guidance on how the identification requirements of H.B. 1023 affect their individual programs, State agencies should consult with the Attorney General's office while political subdivisions should consult their counsel's office.

Question #2: Does H.B. 1023 apply retroactively to existing benefit recipients, or just new applicants?

House Bill 1023 applies "on or after August 1, 2006" to any natural persons eighteen years of age or older "who applies for" federal, state or local public benefits. Thus, agencies and political subdivisions are required to verify the lawful presence in the United States of any such applicant. Furthermore, when an existing beneficiary reapplies for the continuation of those benefits, which typically occurs on an annual basis, or for new benefits, their lawful presence must be verified and the required affidavit obtained. Verification of existing beneficiaries is not required.

Question #3: Must the required affidavit be notarized?

An affidavit need not be notarized, but must include: (1) a statement that the signatory is a United States citizen, legal permanent resident, or otherwise lawfully present in the United States pursuant to federal law, and (2) that the person swears or affirms under penalty of perjury that the statement made in the affidavit is true and complete. Sample language is below. If an agency or political subdivision utilizes an online application process, the application form should include a method of collecting the applicant's electronic signature (for example, by checking a box or clicking on an "I agree" button).

As noted in H.B. 1023, the agency or political subdivision may adopt other affidavit procedures if necessary to improve efficiency or reduce delay in the verification process or to avoid unusual hardship on legal residents, but such procedures must be no less stringent than those required by H.B. 1023. Agencies and political subdivisions should consult with legal counsel prior to implementing an alternative affidavit procedure.

SAMPLE AFFIDAVIT

I, _____, swear or affirm under penalty of perjury under the laws of the State of Colorado that (check one):

- I am a United States citizen, or
- I am a Permanent Resident of the United States, or
- I am lawfully present in the United States pursuant to Federal law.

I understand that this sworn statement is required by law because I have applied for a public benefit. I understand that state law requires me to provide proof that I am lawfully present in the United States prior to receipt of this public benefit. I further acknowledge that making a false, fictitious, or fraudulent statement or representation in this sworn affidavit is punishable under the criminal laws of Colorado as perjury in the second degree under Colorado Revised Statute 18-8-503 and it shall constitute a separate criminal offense each time a public benefit is fraudulently received.

Signature

Date

Question #4: Must the required identification and affidavit be submitted in person?

Personal appearance is not required but the agencies and political subdivisions must institute procedures for verifying that the person applying for the benefit is the person described in the submitted identification and affidavit. The method of meeting this requirement is left to the discretion of the agency or political subdivision. For example, an agency may require the applicant to appear in person or to submit a notarized copy of an authorized identification, or have an alternative mechanism in place that ensures the identification is being produced by the rightful owner of that identification. As long as the identification procedures allow verification of lawful presence, the process is likely acceptable under H.B. 1023. It should also be noted that if federal guidelines require a public entity to acquire and retain copies of eligibility documentation (Medicaid, Food Stamps, TANF, etc.), H.B. 1023 does not modify that requirement and the public entity must continue to follow the federal requirements.

Question #5: Do the requirements of H.B. 1023 apply to parents seeking public benefits for their minor children?

No. H.B. 1023 applies to the person receiving the public benefit. Where a parent submits an application on behalf of his or her child for benefits to be received by the child, the agency and political subdivisions need not verify the lawful presence of the parent. Moreover, because H.B. 1023 applies only to persons over eighteen years of age, the agency or political subdivision need not verify the lawful presence of the child.

Question #6: Does H.B. 1023 apply to both people and entities contracting with the State or political subdivision to provide services to that entity?

H.B. 1023 defines a public benefit by reference to 8 U.S.C. 1611 and 1621, which in turn defines a public benefit as including any “contract.” H.B. 1023, however, applies only to “natural persons” over the age of eighteen. A natural person is a human being, not a corporation, partnership, or any other entity. Thus, the requirements of H.B. 1023 must be applied to any natural person contracting with the State or a political subdivision. The Attorney General’s office is currently working with the State Controller to issue a standard provision to be included in state contracts to ensure this requirement is made known to, and followed by, individuals contracting with the state.



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M E M O R A N D U M

July 28, 2006

TO: Jon Anderson, Chief Counsel to the Governor

FROM: Cynthia Coffman, Chief Deputy Attorney General
Jason Dunn, Deputy Attorney General

RE: Implementation of House Bill 1023 and related statutes (Part 2)

In our continuing effort to provide legal assistance to state agencies and political subdivisions regarding the implementation of House Bill 1023 and other related statutes, this memorandum contains answers to some of the other more frequently asked questions. Further questions relating to specific programs or state agencies should be directed to the Attorney General's Office. Likewise, political subdivisions should consult with their attorney's office for further legal analysis. Should issues of statewide concern arise, the Attorney General's Office may issue further memoranda.

Question #1: If a State agency or political subdivision issues a license pursuant to HB 1009, must it also comply with HB 1023?

No. House Bill 1009 provides specific verification requirements for licenses and other authorizations issued by the Department of Regulatory Agencies under Titles 10, 11, and 12 of the Colorado Revised Statutes, or by any political subdivision. For such authorizations, HB 1009 is the exclusive means of verification of lawful presence. Other *state* professional and commercial licenses, including those falling under DORA but outside of Titles 10, 11 and 12, may require compliance with HB 1023, as discussed in Question #2 below.

Question #2: What professional or business licenses or permits fall within the requirements of HB 1023?

In the context of professional or commercial licenses not governed by the provisions of HB 1009, HB 1023 applies to certain government authorizations required to conduct business. More specifically, House Bill 1023 applies to “state or local public benefits” as defined by federal law (8 U.S.C. § 1621). That law defines “state or local public benefits” to include “any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government.” 8 U.S.C. § 1621(c)(1)(A). Some State laws may require an approval or authorization process to engage in a profession or business but use a term other than “license,” such as permit, registration or certificate. The provisions of the bill, however, should be construed to cover natural persons in a professional or commercial business, rather than the name given to the government-issued document.

Therefore, “professional license or commercial license” applies to any government authorization or approval required by state or local law to engage in a profession or business. Agencies or political subdivisions should verify the lawful presence in the United States of natural persons who must obtain such authorization or approval regardless of whether the document evidencing the authorization or approval is called a “license.” This definition does not include authorization required for recreational or non-business activity, such as a recreational hunting or fishing license, nor those licenses or permits ancillary to a profession or commercial enterprise. Thus, for example, the Department of Regulatory Agencies must verify the lawful presence of a person applying for an electrician’s license under HB 1023, but a city need not verify that person’s lawful presence when he applies for a project-specific permit (under HB 1023 or HB 1009).

Question #3: Does HB 1023 apply to benefits provided by state agencies or political subdivisions through third-party intermediaries?

Yes. House Bill 1023 requires “each agency or political subdivision of the state” to verify the lawful presence in the United States of every applicant for public benefits. In some circumstances, public benefits are administered by a non-governmental third-party intermediary or grantee rather than directly by a state agency or political subdivision. In general, the requirements of House Bill 1023 will apply to these benefits. The term “public benefit” is defined to include both benefits “provided by” the federal, state and local government and benefits provided “by appropriated funds” of the federal, state and local government. 8 U.S.C. § 1611(c)(1) and § 1621(c)(1). This makes clear that the definition of “public benefits” includes both programs administered by government agencies and programs administered by non-governmental organizations with public funds, and is covered by HB 1023 if the benefit flows directly to natural persons.

House Bill 1023 imposes no duty on non-governmental agencies to verify an applicant's lawful presence in the United States. That duty is imposed solely on State agencies and political subdivisions. Each agency and subdivision must determine how it will comply with the requirements of House Bill 1023 for those programs administered by private third-party intermediaries. In general, an agency may comply with the requirements either by requiring the third party (by contract or otherwise) to perform the required verification or by performing the verification itself. It is our understanding that the State Controller is drafting language to be inserted into affected state contracts.

It is important to further note several exceptions to verification requirements involving non-profits. First, House Bill 1023 only applies to "applicants" for public benefits. If a non-governmental organization provides publicly funded benefits to persons without an individualized application process, the persons who receive the benefits are not "applicants" and the requirements of House Bill 1023 do not apply. Second, House Bill 1023 does not apply to benefits that are exempted from verification requirements under either federal law or the terms of HB 1023 itself. Finally, the requirements do not apply to programs or services that are exempt from the definition of "federal public benefit" or "state and local public benefit" under federal law.

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LEGAL MEMORANDUM

TO: Interested Persons

FROM: Office Of Legislative Legal Services

DATE: July 20, 2006

SUBJECT: Responses to frequently asked questions concerning House Bill 06B-1023¹

This Office has received a number of questions relating to the impact that House Bill 06B-1023 may have. The following responds to these inquiries by providing answers to basic questions we anticipate interested parties may have about the requirements of the bill and related matters. The following responses are provided as general background information based upon the language and legislative history of House Bill 06-1023. They are not intended to be legal advice. For individual circumstances, an attorney should be consulted.

1. What documents does a person need to show to get benefits?

Pursuant to House Bill 06B-1023, any person eighteen years of age or older applying for a federal, state, or local public benefit must produce one of the specified forms of identification. The forms of identification include a Colorado driver's license or identification card, a United States military identification or dependent's identification card, a United States coast guard merchant mariner card, or a Native American tribal document. Additionally, the Executive Director of the Department of Revenue is authorized to issue an emergency rule specifying other forms of identification or a waiver process to allow lawful residents to establish their lawful presence.

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

2. What happens if a person is here legally, but does not have the necessary documents?

A person will need to obtain one of the specified forms of identification or follow the waiver process if established by the Executive Director of the Department of Revenue.

3. What happens if a person is caught trying to receive services for which the person is not entitled?

Prior to the enactment of House Bill 06B-1023, there were penalties for a person who received public benefits to which the person was not entitled. For example, section 26-1-127, Colorado Revised Statutes, provides that obtaining public assistance or medical assistance to which the person is not entitled constitutes theft that is between a class 3 misdemeanor and a class 4 felony depending on the amount of assistance unlawfully received. Additionally, section 26-1-127, Colorado Revised Statutes, provides that a person violating that section is disqualified from receiving any public assistance for one year for a first offense, two years for a second offense, and permanently for a third or subsequent offense.

House Bill 06B-1023 specified that submitting a false affidavit concerning a person's lawful presence constitutes perjury in the second degree which is a class 1 misdemeanor. It also clarified that each time a person receives a benefit because of that false affidavit constitutes a separate offense.

4. What happens to a state or local entity that does not ask for the necessary documents?

House Bill 06B-1023 did not create any specific penalty against a state agency or local government for not requiring the specified forms of identification. Under existing law, a person with standing could sue the state agency or local government and receive a court order requiring the state agency or local government to follow the requirements of the law.

5. Can a homeless person still receive public benefits, even if the person does not have proof of citizenship?

House Bill 06B-1023 authorized the Executive Director of the Department of Revenue to adopt emergency rules establishing a waiver process to allow persons, such as the homeless, to establish their lawful presence without one of the required forms of identification.

6. Will children in K-12 now be asked about their citizenship status at school?

House Bill 06B-1023 incorporated the definition of "state or local public benefit" found in federal law. Federal law currently requires a child to

be educated in kindergarten and in grades 1 through 12 regardless the child's lawful presence in the United States. As that is a federal requirement, House Bill 06B-1023 does not change this requirement. Therefore, there should be no need to ask students in K-12 about their lawful presence or citizenship status.

7. Can everyone still get emergency medical services and immunizations?

House Bill 06B-1023 incorporated the definition of "state or local public benefit" found in federal law. The federal definition specifically exempts treatment of an emergency medical condition and public health assistance for immunizations and for testing and treatment of symptoms of communicable diseases from the definition of a state or local benefit.

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LEGAL MEMORANDUM

TO: Representative Andrew Romanoff
FROM: Office Of Legislative Legal Services
DATE: July 21, 2006
SUBJECT: Responses to questions from municipalities concerning House Bill 06S-1023¹

You have asked this office for help in responding to certain questions that have been raised by municipal officials concerning House Bill 06S-1023. The following responses are based upon the language and legislative history of House Bill 06S-1023. They are not intended to be legal advice. Prior to the enactment of House Bill 06S-1023, federal law prohibited "state and local public benefits" from being provided to persons who are not lawfully present in the United States. House Bill 06S-1023 establishes a procedure for state agencies and political subdivision to verify compliance with federal law. As state agencies are also required to comply with the provisions of House Bill 06S-1023, the municipal officials may check with state agencies or the attorney general's office on how the state is complying with those provisions.

1. Does the legislation apply to the renewal of *current* contractor licenses? This is commonly done by mail which may not be possible any more.

The verification requirements of House Bill 06S-1023 are triggered whenever a natural person eighteen years of age or older applies for state or local public benefits. We believe that this applies whenever such a person applies or reapplies for covered benefits. This should include the renewal of covered licenses.

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

2. Does 1023 apply to the issuance of building permits? In addition to issuing licenses, the language mentions any "contract" – this could be construed to apply to permits also. Does a “permit” constitute a “contract?”

House Bill 06S-1023 incorporates the federal definition of "state or local public benefit". We are not aware of any court that has ruled on whether a "building permit" constitutes a "contract" that would constitute a public benefit under this definition. We believe that the contracts intended to be covered by the definition would be contracts whereby state or local money would go to another party. We do not believe that a building permit that authorized work to be performed on private property would constitute a contract under this definition, but a court might interpret this provision differently.

3. Does the legislation apply to liquor licenses?

The federal law refers to any "professional license or commercial license" We are not aware of any case interpreting whether this covers a liquor license. As a liquor license would be an authorization to engage in a business, we believe that a liquor license would be considered a "commercial license".

3. Do you have an example of the required affidavit form that we could use?

We have not developed a form of an affidavit.

4. Will the affidavit form need to be notarized?

House Bill 06S-1023 does not specifically require the affidavit to be notarized. In other statutes, the General Assembly has specifically stated when an affidavit must be notarized. For example, for affidavits accompanying a petition to place an issue on the ballot, in section 1-4-905, C.R.S., the General Assembly specifically required "a signed, notarized, and dated affidavit". While in section 1-2-225, C.R.S., for affidavits requesting a change of polling place due to a disability, the General Assembly only required an "affidavit". It would appear that when the General Assembly requires a notarized affidavit, it so specifies in the statute.

5. How will this affect the issuance of a permit to a homeowner? Typically a homeowner is not required to be a licensed contractor if the permit is for work on their primary residence.

It is unclear whether a permit is a "contract" constituting a state or local benefit requiring the verification. See the response to Question 2., above. If

it is not, no verification of lawful presence is required for its issuance, and House Bill 06S-1023 should not affect this situation.

6. Some local governments issue permits online and effect contractor license renewals online. Is it possible under this legislation to have electronic verification of the ID and the affidavit?

House Bill 06S-1023 is silent on whether the production of some form of identification and execution of an affidavit may be made electronically. To the extent that a local government believes that it can verify that the person applying for the benefit is who the person claims to be and that the person is "producing" a form of identification and executing an affidavit, House Bill 06S-1023 does not appear to prohibit on-line applications for benefits.

7. How long and in what manner is a local government required to maintain the ID verification paperwork for contractor licenses? Is this information considered a public record or is another means of storage required?

House Bill 06S-1023 does not specify how long or in what manner documentation must be maintained. Unless the subject of some exemption, the verification paper work would constitute a public record.

8. Will local governments need to verify the citizenship of all people that receive a reduced fare benefit on COLT – for example, low income, ADA, or other categories?

We are not aware of any case interpreting whether a transit benefit is a "state or local public benefit" as defined in federal law. It does not appear to be a "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any similar benefit", but a court may interpret it differently.

9. Do library cards fall under the definition of state or local benefit or federal benefit?

We are not aware of any case interpreting whether a library card is a "state or local public benefit" as defined in federal law. The legislative history of House Bill 06S-1023 indicated that it was not intended to cover library cards. Library cards do not appear to be a "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any similar benefit", but a court may interpret it differently.

10. Does a contract RFP response constitute an application triggering

1023? What if the contractor is out of state, do they have to get a Colorado ID?

House Bill 06S-1023 does not specify exactly when a person is "applying" for benefits. Contracts are one of the items specifically listed in the federal definition of "state or local public benefit". The submission by a natural person eighteen years of age or older of a response to a request for proposals *may* be considered applying for the contract triggering the verification requirement. Certainly, sometime before entering into a contract with such a natural person, a state agency or political subdivision would need to conduct the verification.

11. Can the state come up with examples/samples of the IDs listed in subsection 8 of HB 1023?

Section 24-76.5-103 (8), C.R.S., as enacted in House Bill 06S-1023 authorizes variations of the requirements of Section 24-76.5-103 (4) (b), C.R.S. Paragraph (4) (b) contains the requirement of an affidavit, not a variation of the production of one of the specified forms of identification. We do not believe that subsection (8) authorizes alternative forms of identification.

12. How are we to deal with the different effective dates and different ID requirements in 1023 & 1009? If 1023 already covers licenses, what does 1009 do?

Both House Bill 06S-1009 and House Bill 06S-1023 appear to cover commercial licenses as defined as a "state or local public benefit" in federal law. The governor has not yet signed or allowed to become law either House Bill 06S-1009 or House Bill 06S-1023, so it is unclear whether there will be any overlap. Assuming both bills become law, governmental agencies will have to comply with the provisions of both. House Bill 06S-1023 will require verification of lawful presence starting August 1, 2006, while House Bill 06S-1009 is not effective until January 1, 2007. House Bill 06S-1023 is more restrictive in its description of permissible forms of identification, but also contains an exception pursuant to an emergency rule of the Executive Director of the Department of Revenue. House Bill 06S-1009 authorizes the use of any form of secure and verifiable document which is broader than the list in House Bill 06S-1023, but does not contain the exception for the emergency rule.

It would appear that if a governmental agency complied with the provision of House Bill 06S-1023 by the use of the forms of identification listed in that bill and did not rely upon any alternative forms of identification allowed pursuant to the emergency rule unless the alternative form of identification was a secure and verifiable document, the agency would be complying with the provisions of both bills.