

ORDINANCE 10-281

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MISSION VIEJO AMENDING AND RESTATING ORDINANCE NO. 07-247, AS AMENDED, AS SET FORTH IN CHAPTER 2.80 OF TITLE 2 OF THE MISSION VIEJO MUNICIPAL CODE.

THE CITY COUNCIL OF THE CITY OF MISSION VIEJO DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Chapter 2.80 of Title 2 of the Mission Viejo Municipal Code, as previously amended, is amended and restated to read, in its entirety, by the deletion, addition and revision of the text of the statute, as follows:

“Sections:

2.80.010	Reference.
2.80.020	Definitions.
2.80.030	Application of requirements.
2.80.040	Enforcement of contract terms.
2.80.050	E-Verify compliance statement.
2.80.060	Enforcement respecting E-Verify compliance statement.
2.80.070	Appeal of Administrative decisions.

“Sec. 2.80.010. Reference.

The ordinance shall be known and may be cited as the “City of Mission Viejo Lawful Hiring Compliance Ordinance.”

Sec. 2.80.020. Definitions.

When used in this chapter, the following words, terms and phrases shall have the meanings ascribed to them herein, and shall be construed so as to be consistent with state and federal law, including federal immigration law.

(a) *Business Entity.* Any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit with the City. The term Business Entity shall include, but not be limited to, self-employed individuals, partnerships, corporations, contractors, and subcontractors doing business with the City. No governmental agency shall be considered to be a business entity for purposes of this chapter.

(b) *City.* The City of Mission Viejo, a California general law city.

(c) *Contract, Product, Gift, Contribution, Grant, Franchise.* Only those contracts, gifts, contributions, grants, or franchises which are principally for work, labor, or services provided to the City by the Contractor's management, employees, and/or subcontractors, whether those enumerated workers are working within or outside the boundaries of the City; and excluding those Contracts, Products, Gifts, Contributions, Grants, or Franchises which are principally for purchases by the City of products that are not uniquely created for the City, and notwithstanding that the contractual terms may provide for delivery and/or installation of products, warranty coverage, or maintenance services provided by the Contractor's management, employees, and/or subcontractors.

(d) *Contractor.* A person, firm, employer or Business Entity that enters into a contract or an agreement with the City to perform any service or work or to provide a product as defined herein in exchange for valuable consideration. This definition shall include, but not be limited to, a subcontractor, contract employee, or a recruiting or staffing entity. No governmental agency shall be considered to be a Contractor for purposes of this chapter.

(e) *E-Verify Program.* The electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, P.L. 104-208, division C, section 403(a); and operated by the United States Department of Homeland Security (or a successor program established by the federal government). This shall include the program previously referenced as the Basic Pilot Program.

(f) *Unauthorized alien.* A person who is unauthorized to be lawfully employed in the United States, pursuant to 8 U.S.C. § 1324a(h)(3). The City shall not conclude that a person is an unauthorized alien unless and until an authorized representative of the City has verified with the federal government, pursuant to 8 U.S.C. § 1373(c), that the person is an unauthorized alien.

(g) *Unlawful worker.* A person who is an unauthorized alien as defined by United States Code Title 8, subsection 1324(h)(3).

(h) *Work.* Any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including provided to City all activities conducted by Business Entities and Contractors.

Sec. 2.80.030. Application of requirements.

(a) The City shall enroll and participate in the E-Verify Program, as amended. The City Manager shall oversee the City's participation in this program and shall ensure that it is applied to all persons to be hired by the City as City employees.

(b) As a condition for the award or renewal of any City Contract, Product, Contribution or Grant to a Business Entity or Contractor after July 1, 2007, for which the reasonable value of employment, labor or personal services shall exceed \$30,000.00, the Business Entity or Contractor shall enroll in the E-Verify program or its successor, and thereafter shall provide the City documentation affirming its enrollment and participation in the E-Verify program. The Business Entity or Contractor shall be required to continue its participation in the E-Verify program throughout the course of its business relationship with the City.

(c) As a condition for the award or renewal of any City Franchise made after July 1, 2007, the Business Entity shall provide documentation affirming its enrollment and participation in the E-Verify program prior to the award of said Franchise. The Business Entity or Contractor shall continue its participation in the E-Verify program throughout the term of its business relationship with the City.

(d) The City shall include specific written notice in all requests for bids that Business Entities will be required to enroll in the E-Verify program pursuant to this Chapter 2.80 of the Mission Viejo Municipal Code. Business Entities are exempt from subsection (b) if they received requests for bids without such notice.

(e) The City Manager shall require not less than an annual audit of the contracts the City has entered into that are within the jurisdiction of this Chapter 2.80. In March and September of each calendar year the City Manager shall provide a written report to the City Council detailing the City's review and enforcement program, including, but not limited to, a summary of the accomplished and proposed performance audits of Contractors and Business Entities, recommendations for further reviews, if any, and any recommendations for program refinement that the City Manager has identified in the course of applying this Chapter 2.80.

Sec. 2.80.040. Enforcement of contract terms.

(a) The City Manager shall implement procedures necessary to implement and enforce the requirements of this Chapter 2.80 into all Contracts the City enters into with Business Entities or Contractors. These procedures shall ensure that no Business Entity or Contractor engages in

discrimination based on national origin, ethnicity, race or any other classification deemed suspect by the City or any Public Agency or Court. To implement these policies the following provisions shall be included in all contracts within the jurisdiction of this Chapter 2.80:

(i) Upon a finding or determination by the United States Attorney General or the Secretary of Homeland Security that a Business Entity or Contractor is in violation of 8 U.S.C. §1324a, which finding or determination is not disputed by the Business Entity or Contractor, or which is disputed but culminates in a civil or criminal sanction against the Business Entity or Contractor under 8 U.S.C. §1324a or in any agreement with the federal government requiring any payment to the government and/or remedial action that brings the Business Entity or Contractor into compliance with federal law, the City's obligations under the contract, including the obligation to make payments due under the contract, shall be automatically suspended. The City's obligations shall remain suspended until one business day after a legal representative of the Business Entity or Contractor submits, at a city office designated by the City Manager, a declaration signed under penalty of perjury of the laws of the State of California, in the form provided by the City, stating that the violation of federal law has ended. Any obligations on the part of the City that were not performed during the period of suspension that can reasonably be performed shall then be performed by the City within a reasonable time. The City shall be relieved of any such obligation that cannot reasonably be performed. The City may modify the requirements of this subsection regarding automatic suspension of the contract in the same manner that subsections (e) and (f) of Sec. 2.80.060 allow for modifications respecting E-Verify Compliance Statements. Nothing in this chapter shall be interpreted to allow contractual terms that operate to suspend the contractual obligations of the Contractor under its contract with the City.

(ii) The City shall not suspend the contract of any Business Entity or Contractor if, prior to the date of the violation, the Business Entity or Contractor had verified the work authorization of any alleged unlawful workers using the E-Verify program and demonstrated the same to City.

(b) Every contract entered into by the City shall provide that the suspension for noncompliance with this chapter shall terminate one business day after a legal representative of the Business Entity or Contractor submits, at a City office designated by the City Manager, a declaration signed under penalty of perjury of the laws of the state, in the form provided by the City stating that the violation of federal law has ended.

Sec. 2.80.050. E-Verify compliance statement.

(a) The requirements of Sec. 2.80.030 that the Business Entity or Contractor provide to the City documentation affirming its enrollment and participation in E-Verify shall be met by the procedures set forth in this section.

(b) Business Entities or Contractors having contracts commencing on September 1, 2010 or thereafter, shall, within 30 days of the commencement of the contract, and thereafter each year during the month of January during the term of the Contract, provide to the City Manager, or his designee, a written E-Verify Compliance Statement as required by this Section.

(c) Business Entities or Contractors having contracts that commenced prior to September 1, 2010 shall, each year during the month of January during the term of the contract, either provide to the City Manager, or his designee, a written E-Verify Compliance Statement as required by this Section or, as an alternative, request that the City instead audit the Business Entities' or Contractors' compliance with the Contract that is then in force.

(d) An E-Verify Compliance Statement shall be signed under penalty of perjury, and shall be in substantially the following form:

I am a/the (corporate officer/job title) of (Business Entity/Contractor). I am familiar with the current hiring practices of (Business Entity/Contractor). (Business Entity/Contractor) is currently enrolled in the federal government's E-Verify program or predecessor program, and has been enrolled and participating continually since (date), and since that date has been in substantial compliance with the rules and requirements of the E-Verify program, including the Federal requirement that E-Verify be applied in conjunction with every new hire for purposes of confirming work eligibility, and the requirement that any new hire be dismissed if not confirmed as eligible for employment within the specified time limits, and the prohibition of illegal discrimination against work-authorized individuals.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on (date) at (place, e.g., city and state).
(Signature) (Corporate Office/Job Title)

(e) In the event the Federal government changes any rules of E-Verify relevant to the wording of the E-Verify Compliance Statement as set forth in subsection (d), or if the City Manager learns of any inconsistency

between the rules of E-Verify and the wording of the compliance statement as set forth in subsection (d), the City Manager shall modify the wording of the E-Verify Compliance Statement as set forth in subsection (d), so as to make it consistent with the E-Verify rules without further action by the City Council.

(f) The E-Verify Compliance Statement shall be signed on behalf of the Business Entity or Contractor by two corporate officers, if the entity is a corporation. It shall be signed on behalf of any other form of Business Entity by a general manager, managing partner, managing shareholder or the equivalent.

(g) The initial E-Verify Compliance Statement submitted by a Business Entity or Contractor shall be accompanied by a copy of its proof of enrollment in E-Verify, or equivalent document, if such a document is made available to the Business Entity or Contractor by the federal government. If no document exists a written statement to that effect shall be submitted by the Contractor.

(h) The City shall keep the E-Verify Compliance Statements submitted by its Contractors for a period of no less than five years. The City's retention schedule shall be amended to reflect this retention period. The City shall make the statements available to the public for inspection and copying pursuant to the Public Records Act.

Sec. 2.80.060. Enforcement respecting E-Verify compliance statement.

In all Contracts within the jurisdiction of this chapter the City shall require the following terms:

(a) If an E-Verify Compliance Statement required by Section 2.80.050 is not received by the City by the date specified therein, the City's obligations under the contract, including the obligation to make payments due under the contract, shall be automatically suspended, and shall remain suspended until an E-Verify Compliance Statement meeting the stated requirements is received by the City.

(b) The City Manager at his discretion may grant extensions of time for compliance, but no extension or extensions may allow a time for compliance beyond 60 days following the initial due date for the E-Verify Compliance Statement. Extensions may be granted by the City Manager only by written notice to the Business Entity or Contractor advising of the granting of the extension, the new deadline for compliance, and the fact that the automatic suspension will go into effect upon failure to provide the statement by the new deadline. During the extended time for

compliance, the automatic suspension of the City's obligations under the contract shall not be in effect, and the City's obligations under the Contract shall continue without interruption.

(c) The City Manager at his discretion and solely as a courtesy, may give Business Entities or Contractors notice, in writing or otherwise, respecting compliance statements, sanctions under this Chapter 2.80, and other matters relevant to this Chapter 2.80, but except as provided in subsection (d) of Section 2.80.030, the sanctions provided in this Chapter 2.80 shall be effective regardless of whether a Business Entity or Contractor receives any notices from the City.

(d) Upon the City's actual receipt of an E-Verify Compliance Statement that meets the requirements of Section 2.80.050 subsequent to a suspension of the City's obligations under the Contract, the City's obligations under the contract shall be immediately and automatically reinstated. Any obligations on the part of the City that were not performed during the period of suspension that can reasonably be performed shall then be performed by the City within a reasonable time. The City shall be relieved of any such obligation that cannot reasonably be performed.

(e) Despite the automatic suspension of the City's obligations upon failure to provide the City with an E-Verify Compliance Statement by the date it is due, the City Manager, at his discretion, may perform any of the City's obligations he considers to be matters of necessity to the City's interests until the date of the next City Council meeting at which he is able to consult the City Council. The City Manager shall, thereafter, act pursuant to the City Council's directions.

(f) Matters of compliance and automatic suspension in particular cases may be brought to the City Council by the City Manager or any party to the Contract and the City Council shall have discretion to grant extensions for compliance for any period of time, to continue performance of some or all of the City's contractual obligations, to postpone or cancel the automatic suspension of the City's obligations under the contract, or to take other action consistent with this chapter that it deems appropriate.

(g) Nothing in this section shall operate to suspend the contractual obligations of the Contractor under its contract with the City.

Sec. 2.80.070. Appeal of Administrative decisions.

(a) Any person aggrieved by any decision of an administrative officer or agency with respect to any decision authorized by this Chapter 2.80 ('Administrative Decision'), may appeal the Administrative Decision by filing an appeal in the Office of the City Clerk within fifteen (15) calendar days from the date notice of the Administrative Decision was mailed to the

Contractor. If the fifteenth (15th) day falls on a Saturday, Sunday or City holiday, the appeal may be filed on the next day the City Hall is open. The appeal document must be actually received in the Office of the City Clerk within the applicable time period and not just mailed within such time. The person who files such an appeal shall be known as the 'Appellant.'

1. The written appeal shall be accompanied by an appeal fee in an amount as set by City Council resolution. The appeal shall set forth the Administrative Decision being appealed and the reasons why the decision should be reversed or modified. The City Clerk shall promptly forward a copy of the appeal to the City Manager.

2. In the event an appeal is timely filed, an Administrative Decision shall not be effective until a final decision by the Hearing Officer has been made pursuant to this Section. Failure of any person to file an appeal in accordance with the provisions of this Section shall constitute a waiver of that person's right to an appeal. If no timely appeal is filed, the Administrative Decision shall become effective upon expiration of the period for filing an appeal.

3. Upon receipt of a timely appeal, the City Clerk shall make arrangements for the selection of a Hearing Officer to conduct the Appeal Hearing. The Hearing Officer shall be a person knowledgeable in municipal affairs, including but not limited to, attorneys, retired judges, a reputable firm providing mediators and arbitrators, local government officials, or the State Office of Administrative Hearings (or its successor office). Not less than fifteen (15) days prior to the Appeal Hearing, the City Clerk shall notify the City Manager and the Appellant of the name of the Hearing Officer who has been selected to hear the appeal. Within ten (10) days of the date of mailing the notice of the Hearing Officer, the Appellant may request the City Clerk recuse a hearing officer for reasons of actual prejudice against the party's cause. The City Clerk shall then request a mediation and arbitration firm or the Office of Administrative Hearings as the designated Hearing Officer for the Appeal Hearing. The Hearing Officer shall be fair and impartial and shall have no bias for or against the City or the Appellant.

4. At the Appeal Hearing, the Hearing Officer shall receive oral and written evidence from the City Manager and the Appellant.

a. The evidence presented need not comply with the strict rules of evidence set forth in the California Evidence Code but shall be the type of evidence upon which reasonable and prudent people rely upon in the conduct of serious affairs.

b. The Hearing Officer shall have broad authority to control the proceedings and to provide for cross examination of witness in a fair and impartial manner. The Hearing Officer shall have authority to administer oaths to those persons who will provide oral testimony.

c. The City Manager shall have the burden of proof to establish by clear and convincing evidence the facts upon which his or her decision is based.

d. The Appeal Hearing shall be recorded by audio recording. Any party may, at its sole cost and expense, utilize the services of a certified court reporter to prepare the verbatim record of the hearing. If a court reporter is used, the transcript prepared shall be made available for purchase to both parties.

e. The Hearing Officer may continue the Appeal Hearing from time to time, but only upon written motion of a party showing good cause for the continuance. The party requesting the continuance shall pay the costs of the Hearing Officer, if any, for the cancelled hearing.

5. The Hearing Officer may uphold, modify or reverse the Administrative Decision.

6. Within ten (10) days of the conclusion of the Appeal Hearing, the Hearing Officer shall render his or her decision and make written findings supporting the decision. The Hearing Officer shall send the decision to the City Clerk. Upon receipt of the Hearing Officer's Decision, the City Clerk shall notify the City Manager and the Appellant of the decision and provide them with a copy of the Hearing Officer Decision, along with a proof of mailing.

7. The Hearing Officer's decision shall be final and conclusive as to the City and the Appellant and no appeal to the City Council from the hearing Officer's Decision shall be available. Any legal action challenging the Hearing Officer's decision shall be filed within ninety (90) days of the date of the proof of service of mailing of the Hearing Officer's opinion, pursuant to § 1094.5, et seq. of the California Code of Civil Procedure.

(b) Any notices which either party may desire to give to the other party in connection with the Appeal under this Section must be in writing and may be given either by (i) personal service, (ii) delivery by a reputable document delivery service, such as but not limited to, Federal Express, that provides a receipt showing date and time of delivery, or (iii) mailing in the United States Mail, first class mail, postage prepaid, addressed to

the City at City Hall or to the Appellant at the address set forth in the notice of appeal. Notice shall be effective on the date of personal delivery or the date when the notice was deposited in the mail or reputable document delivery service.

(c) If the Hearing Officer overturns the Administrative Decision or substantially modifies it in favor of the Appellant, the appeal fee shall be refunded to the Appellant.

(d) The City Manager shall have the authority to establish all appropriate administrative regulations for the fair and efficient implementation of this section, conducting hearings and rendering decisions pursuant to this Section, 2.80.070.

(e) Notwithstanding the procedures set forth in this Section, the City Manager shall have the authority to enter into settlement agreements with an Appellant that justice may require and that are consistent with the purposes of this Chapter.”

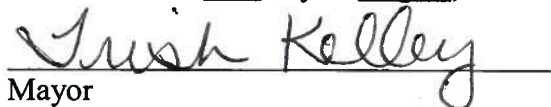
Section 2. The terms of this Ordinance shall supersede any previous resolutions of the Council or Council policies which may be in conflict or inconsistent with the terms of this Ordinance.

Section 3. The City Clerk of the City of Mission Viejo shall certify to the passage and adoption of this Ordinance and shall cause the same or a summary thereof to be published and posted in the manner required by law.

Section 4. If any section, subsection, sentence, clause or word of this Ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Mission Viejo hereby declares that it would have passed and adopted this Ordinance, and each and all provisions thereof, irrespective of the fact that one or more of said provisions may be declared to be invalid.

Section 5. The City Council hereby finds that this Ordinance is not subject to the California Environmental Quality Act pursuant to CEQA Guidelines Sections 15060(c)(2) and 15061(b)(3) as it can be seen with certainty that this Ordinance’s enactment will not have a significant effect on the environment.

PASSED, APPROVED and ADOPTED this 16th day of August, 2010.



Mayor

ATTEST:




City Clerk

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.
CITY OF MISSION VIEJO)

I, Karen Hamman, City Clerk of the City of Mission Viejo, do hereby certify that the foregoing Ordinance 10-281 was duly introduced and placed upon its first reading at a regular meeting of the City Council on the 6th day of July, 2010, and that thereafter, said Ordinance was duly adopted and passed at a regular meeting of the City Council on the 16th day of August, 2010 by the following vote, to wit:

AYES: Kelley, Leckness, Ledesma, Schlicht, and Ury
NOES: None
ABSENT: None



Karen Hamman, City Clerk

APPROVED AS TO FORM:



William P. Curley, III
City Attorney