



E-Verify and Worksite Enforcement

Overview of the Legal Workforce Act

H.R. 1772 Voted out of House Judiciary Committee 6/26/2013

Comparison of H.R. 1772 to S. 744 (Senate comprehensive bill)

- Legal Workforce Act (LWA) has stronger good faith defense language because it shifts the burden of proof to the government if DHS wants to allege that the good faith defense does not apply. The government must prove by “clear and convincing evidence” that the employer knowingly hired an unauthorized alien before an employer can be penalized.
- LWA does not expand the rights of employees to contest tentative nonconfirmations or expand the rights of employees regarding final nonconfirmations beyond the existing USCIS review process.
- LWA does not amend any provisions relating to discrimination or unfair immigration-related employment practices.
- LWA generally provides more protection for employers.
- Both bills mandate and phase-in the use of an electronic employment verification system, and both bills increase the penalties for noncompliance with the system.
- The LWA implementation schedule is much more accelerated than the one in the Senate bill. The LWA is keyed to the date of enactment, as opposed to the date of the regulations, and would require use of E-verify over about half the time as provided in the Senate bill.
- The Senate bill provides more protection for individuals who do not receive initial confirmations under the system than does the LWA with long timelines for appeals and ALJ procedures.
- The Senate bill increases the role of the Office of Special Counsel (OSC) in DOJ’s Civil Rights Division, creates many new unfair immigration-related employment practices, removes intent as a prerequisite for unfair immigration-related employment practices, and generally expands enforcement.

Preemption

- As of the date of enactment, all state and local laws and policies that relate to employment verification are invalidated, including any state or local statute or rule establishing a criminal or civil fine or penalty structure.
- This provision, overruling the Supreme Court’s *Whiting* (131 S.Ct. 1968) decision from 2011, is a balancing of many competing interests. State and local governments may exercise their authority over business licensing (and similar laws) as a penalty upon a business after confirming that such business has not enrolled in E-Verify when mandated to do so under federal law. However, states and localities do not have their own enforcement or investigative authority regarding employment verification obligations. While state (or local) business licensing authority does not allow states to set up an enforcement scheme parallel to the federal government’s regarding employment verification obligations, state (and local) business licensing applications may require confirmation of whether or not an employer is participating in the electronic verification system (E-Verify) once the employer is required to participate.

No Reverification of Current Workforce

- Most employers will be required to use the System only to verify all *new* hires and for reverification of expiring work authorizations.
- Certain employers such as federal contractors, employers in critical infrastructure sector and those employers found to have committed violations may be required by the Secretary to use the System to verify current employees.
- No authority for DHS to expand reverification to current workforce.

Use of I-9 Form Retained But Integrated Into E-Verify

- DHS required to electronically integrate the verification form with the verification system process, and provide both a fully electronic verification system as well as telephonic access.
- Employees and employers will still be required to complete an attestation, equivalent to today's I-9 form, in which the employee will be required to attest to his or her work eligibility and immigration status and the employer will be required to attest that the employer reviewed the employees documents demonstrating the employee's identity and work authorization.
- Employees will be required to present documentation demonstrating identity and employment eligibility and employer will be required to examine documentation and potentially use additional verification procedures such as a photo-tool to review the picture on the document provided with a photo provided by the verification System.
- Civil and criminal penalties are substantially increased related to errors or omissions on the verification form and knowingly hiring or continuing to employ any unauthorized aliens.
- Employers will be required to retain forms as they are required to retain I-9 forms today in paper, electronic format or microform or microfiche.

Good Faith and Safe Harbor

- Establishes an affirmative defense to a charge of unlawful hiring or employing an unauthorized alien if employer complies in good faith with the requirements of the System, with the burden shifting to the government to prove knowing hire by clear and convincing evidence.
- Recognizes good faith compliance with the requirements of the System unless employer had knowledge an individual was not authorized for employment.
- Establishes compliance with verification requirements even if there is a technical or procedural error so long as the employer made good faith efforts to comply. However, the good faith compliance provision will not apply if the violation is not *de minimis*, DHS has explained why the violation is not *de minimis*, the employer has been provided at least 30 days to correct the violation, and the employer fails to correct the violation during that period.
- Failure to use the system or failure to use the System once mandated will be considered a penalty (equivalent to a paperwork violation) for each employee involved, creating a rebuttable presumption that the employer knowingly hired or employed an individual if it is determined that he or she is not employment authorized.
- Does not create any private right of action.