

Section-by-Section Summary of “Legal Workforce Act”

*Prepared by the American Immigration Lawyers Association
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On June 14, 2011, Rep. Lamar Smith (R-TX) introduced H.R. 2164, The Legal Workforce Act, which would create a new employment verification system, the Employment Eligibility Verification System (EEVS), mandating compliance nationwide within 2 years. On September 12, Chairman Smith introduced a revised version of the bill under the same name as H.R. 2885.

Section 1 – Title – Legal Workforce Act

Section 2 – Employment Eligibility Verification Process

This bill amends INA § 274A by replacing all of subsection (b) with new provisions governing the verification of individuals for employment. The newly proposed section (b)(1)(A) requires that verification occur on the “date of hire” as defined in the bill. Specifically the employer must sign and attest on a DHS form established by regulation that the employer has verified that the individual is not an unauthorized alien by: 1) obtaining and recording the prospective employee’s social security number if he or she claims to have one, or if the individual does not claim to be a U.S. citizen, obtaining and recording the identification number designated by DHS; and 2) examining the prescribed documents that establish identity and employment authorization.

The bill reduces the documents that demonstrate both employment authorization and identity (List A on the “List of Acceptable Documents”) to the following: 1) unexpired U.S. passport or passport card; 2) unexpired I-551 permanent resident card with a photo; 3) unexpired I-766 employment authorization card with a photo; 4) in the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94, Form I-94A, or documents designated by DHS with certain limitations; 5) passport from Micronesia or the Marshall Islands with Form I-94, Form I-94A, or documents designated by DHS; other documentation as designated by DHS if it contains a photo, the required biometric data as specified by DHS, evidence of employment authorization, and fraud resistant security features.

Identity documents (List B) are also reduced significantly to the following: 1) unexpired State issued driver’s license or ID card, if it contains a photo and other identifying personal data; 2) Unexpired Military identification card 3) Native American tribal ID card; 4) attestation of identity by a parent for minors under 16 years-old (or under 18 in states that do not issue ID cards other than a driver’s license).

The bill significantly reduces the list of acceptable documents that demonstrate employment authorization (List C) to: 1) a social security card; or 2) a certificate of birth abroad issued by the State Department.

The bill gives DHS authority to restrict the use of documents it finds unreliable.

Individual attestation of employment authorization. The bill requires the individual to attest by signature that he or she is a U.S. citizen, lawful permanent resident, or noncitizen authorized to work in the U.S. The individual is required to provide information demonstrating identity and employment authorization as specified above, as well as his or her social security number, if he or she claims to have one.

Felony crime for misuse of Social Security number. The bill creates a new crime punishable by fine and/or a sentence of not less than 1 year up to 15 years for knowingly providing a social security number or other ID number established by DHS that does not belong to the individual. Whoever commits this crime in connection with a felony under 18 U.S.C. § 1028A (aggravated identity theft) shall be punished with a fine and/or sentence of 2 years in addition to any punishment for the felony under § 1028A. The bill prohibits placing on probation a person convicted for this crime and prohibits the sentence for this crime from running concurrently with the sentence for any other crime. Courts would be prohibited from sentencing individuals convicted of a felony under 18 U.S.C. § 1028A to a reduced term to compensate for any sentence imposed for this new crime. The only exception to the rule prohibiting concurrent running of sentences is if the individual commits more than one violation of this crime.

Retention of verification form and verification. Employers would be required to retain a copy or electronic version of the DHS verification form and make it available for inspection 3 years after the date of recruiting or referral. For hires the employer must retain the form for either 3 years after the date verification is completed or 1 year after termination, whichever is later.

Confirmation. Employers must verify the identity and employment eligibility during the defined “verification period”.

- **Confirmation received.** The bill requires that if the employer receives confirmation of the individual’s identity and work authorization, the employer shall record it on the verification form.
- **Tentative nonconfirmation.** The bill requires that if the employer receives a tentative nonconfirmation, the employer shall notify the individual in question. If the individual does not contest the tentative nonconfirmation within the specified time period, the tentative nonconfirmation would be considered final. The bill prescribes a process for individuals who contest the tentative nonconfirmation. Until nonconfirmation becomes final, the bill prohibits employers from terminating an employee for the failure to confirm identity and work eligibility. Until nonconfirmation becomes final, the bill prohibits an employer from rescinding an offer.
- **Final confirmation or nonconfirmation.** The bill requires employers to record final confirmations and nonconfirmations.
- **Extension of time.** If the employer makes a good faith effort to make an inquiry but EEVS registers that not all inquiries were received within the required time frame, the bill gives the employer one more working day to submit another inquiry.
- **Consequences of nonconfirmation.** Upon receiving final nonconfirmation, the employer would be required either to terminate employment (or decline to recruit or refer the individual) or notify DHS as specified. Failure to notify DHS would be

deemed a violation of INA § 274(a)(1)(A). Continued employment after nonconfirmation constitutes a rebuttable presumption of a violation of INA § 274(a)(1)(A).

Exception for seasonal agricultural employment. The bill does not treat as new hires those employed in seasonal agricultural work, who return to work for an employer that previously employed them.

Effective dates of new EEVS – staged roll-out. The bill establishes the following timeline for compliance:

- Employers with 10,000 or more employees: 6 months after enactment
- Employers with 500-9,999 employees: 12 months after enactment
- Employers with 20-499 employees: 18 months after enactment
- Employers with 1-19 employees: 2 years after enactment
- Companies that recruit and refer: 12 months after enactment
- Employees performing agricultural labor or services or recruited or referred by a farm labor contractor: 36 months after enactment

Transition rule. Until EEVS takes effect on the effective dates, listed above INA § 274A(b) as currently written shall remain in effect. Subtitle A of title IV of IIRAIRA and any other law requiring employers in the E-Verify program as described in § 403(b) of IIRAIRA will remain in effect until 3 years after enactment of the bill (including Executive Order 13465 relating to government procurement).

Definition of verification period. The verification period for recruitment or referrals is the period before recruiting or referring begins. For hires, the period begins when an offer is made until 3 days after the date of hire. **Special Rule.** In the case of an individual who is authorized to work and who provides evidence from the SSA that he or she has applied for a social security number, the verification period ends 3 business days after the alien receives his or her social security number.

Conditional offers. The bill authorizes employers to condition offers on final verification.

Mandatory reverification for individuals with limited work authorization. Using the same effective dates as the phased-in implementation plan for EEVS, the bill requires the reverification of employees with a limited period of work authorization during the 3 business days preceding the expiration of work authorization.

- **Reverification.** The process for reverification is the same as for verification of new hires, recruits or referrals, except that employers shall use a specific form designated by DHS regulations and retain electronic or paper copies for 3 years after reverification or 1 year after termination (whichever is later).
- **Notice.** DHS shall notify employers of the date on which limited work authorization expires. The bill does not provide a grace period or reduced penalty for a failure by DHS to issue this notice.

Mandatory reverification for certain workers.

- Within 6 months of enactment of the bill, reverification is required for the following workers if they have not already been reverified under the existing E-Verify system:
 - all employees of federal, state and local governments
 - all employees at critical infrastructure sites who require security clearance in any government building, military base, nuclear energy or weapons site, airport or other site that requires Transportation Worker Identification Credential
 - employees assigned to perform work in the U.S. under certain federal contracts over \$100,000 who do not hold federal security clearances, are not administrative or overhead personnel, and are not working solely on contracts that provide Commercial Off The Shelf goods or services as defined in the FAR.
- **Multiple uses of the same SSA number.** SSA would be required to notify annually all employees who submit Social Security numbers to more than one employer each of whom reports income to such number if there is a pattern of unusual multiple use. Upon confirmation by the individual to whom the social security number was issued that the number was used without his or her knowledge, SSA would be required to lock the account for employment eligibility purposes. The bill also requires SSA to notify the employer that the employee may not be work eligible. Employers receiving such notices would be required to verify the employee within 10 business days of receipt of the notice.
- **Mismatched wage and tax statements.** SSA would be required to issue a notice to an employer submitting mismatched or corrected wage and tax statements. Employers receiving this notice would be required to reverify the employee using EEVS within 30 calendar days of receipt of the notice.
- The bill imposes new responsibilities on employers and a more limited time frame to respond to the receipt of no-match letters than the now rescinded DHS regulations provided, which was ninety days.

Voluntary verification. 30 days after enactment, the bill permits an employer to voluntarily verify an employee so long as it is done on a nondiscriminatory basis. If an employer voluntarily verifies an employee, the employer would be required to verify all employees so employed. An employer's decision whether to voluntarily verify shall not be considered by a government agency in any proceedings, investigation or review.

Reverification. The process for reverifications and voluntary verification is the same as for verifications of new hires except that employers shall use a specific form designated by DHS by regulations and retain electronic or paper copies for 3 years after reverification or 1 year after termination (whichever is later).

Early compliance. Notwithstanding the effective dates set forth in the staged roll-out of EEVS, on the date of enactment of this bill, DHS is authorized to require certain employers to comply with EEVS while complying with any additional requirements of the Federal Acquisition laws and regulations. During this time these employers would no longer be required to comply with the current E-Verify system. The specified employers are those that are required to participate in

E-Verify as described in IIRIRA § 403(a) and employers who are required to participate in E-Verify under the Federal acquisition laws and regulations.

Copying of documentation permitted. Employers may copy and retain documents presented by employees or prospective employees for the purpose of complying with EEVS.

Limitation on use of forms. The forms DHS designates for use with EEVS may only be used for the purpose of enforcing INA § 274A and related provisions under title 18 U.S.C.

Good faith compliance. Employers are considered to have complied with the act notwithstanding technical or procedural failures if there was a good faith effort to comply. A failure to correct the deficiency constitutes an exception to the good faith protection unless the deficiency was a de minimus error. The employer loses the good faith defense if: 1) the error is not de minimus; 2) DHS has explained the bases for the I-9 failure and how it is not a de minimus error; and 3) the employer has not corrected the failure voluntarily within 30 days. Lastly, the good faith protection will not apply to employers engaging in a pattern or practice of violating INA §§ 274A(a)(1) or (a)(2).

Single extension of deadlines. If the DHS Secretary certifies to Congress that the verification system will not be fully operational 6 months after enactment of the bill, each deadline for an employer to make an inquiry under the system shall be extended 6 months.

“Date of hire” means the date of actual commencement of employment for wages or other remuneration.

Section 3 – Employment Eligibility Verification System (EEVS)

The bill amends INA § 274A(d) to create the Employment Eligibility Verification System (EEVS) which will be “patterned” on the current E-Verify system. EEVS will respond to inquiries at any time by telephone line and other electronic media concerning an individual’s identity and work authorization. EEVS would also maintain records of inquiries made and provide evidence of an inquirer’s compliance.

Within the first three working days of an initial inquiry, EEVS will provide confirmation or tentative nonconfirmation (TN). Where there is a TN, the Secretary and Commissioner of SSA shall specify a secondary verification process that will provide final confirmation or nonconfirmation within 10 working days of the TN.

The Secretary in consultation with the Commissioner may extend the 10 deadline on a case-by-case basis. If time is extended, it must be documented in the verification system.

EEVS is to be used for: 1) individuals hired, referred or recruited; 2) employees designated under INA § 274(A)(b); and 3) individuals who are voluntarily seeking to confirm their own eligibility.

Penalties. This section reiterates the penalties and sentencing guidelines described in Section 2 (see above) for knowing misuse of a Social Security number by an employer.

Updating EEVS data. The SSA Commissioner and DHS Secretary must update their data to maximize accuracy and provide a process to correct erroneous information. Information contained in EEVS must only be used in accordance with this section. Nothing in this section shall be construed as creating a national ID card.

The Secretary has the authority to direct any person or entity involved with critical infrastructure to use the verification system to the extent needed to protect the critical infrastructure.

Limits on remedies for workers. Individual claims for loss of job due to EEVS error must be sought through the Federal Tort Claims Act or injunctive relief to correct the error. Class actions are not permitted.

Section 4 – Recruitment and Referral

“Refer” is defined as sending or directing a person or transmitting documents to another for the purpose of obtaining employment for that person. Generally, only persons or entities referring for remuneration are included in the definition (the bill strikes “for a fee” from INA § 274A(a)(1)(A)). However, union hiring halls that refer union or nonunion individuals who pay union dues are included in the definition, whether or not they receive remuneration, as are various non-profit and other labor service entities. “Recruit” means the act of soliciting a person, directly or indirectly, and referring that person with the intent of obtaining employment for that person.

This section takes effect one year after enactment.

Section 5 – Good Faith Defense

Section 274A(a)(3) is amended to provide employers (or a person or entity that hires, employs, recruits or refers for a fee) a good faith defense when information from EEVS was relied upon for any employment-related action taken.

Absent a showing of clear and convincing evidence by the Secretary that the employer had knowledge that the employee is an unauthorized alien, the employer would not be liable to a job applicant or a government under civil or criminal law.

An employer (or person that hires, recruits or refers) who fails to seek verification and continues to employ an individual may not use the good faith defense. If EEVS registers that not all inquiries were responded to within the required timeframe, the employer can submit another inquiry the next working day to preserve the good faith defense.

Section 6 – Preemption

This section preempts any state or local law, ordinance, policy or rule, including any criminal or civil fine, as they relate to the hiring, continued employment, or status verification for employment eligibility of unauthorized aliens. A state or local political subdivision may exercise

its authority over business licensing and similar laws in order to impose a penalty for failure to use EEVS.

Section 7 – Repeal

This section repeals Subtitle A of title IV of the Illegal Immigration Reform and Immigrant Responsibility Act. Any reference to the E-Verify program is deemed to refer to EEVS established under this Act. This section takes effect 3 years after the date of enactment.

Section 8 – Penalties

This section makes not using EEVS or entering information that a person reasonably believes is false a “knowing” violation INA § 274A(a)(1)(A). Authorizes DHS to waive or reduce the penalty under subsection (a)(1)(A) or (a)(2) if the violator acted in good faith.

Fines outlined in INA § 274A(e)(4) would be substantially increased for both knowing hires and paperwork violations.

The Secretary is given authority to debar repeat offenders of section 274A(a)(1)(A) or (2) or those convicted of a crime under this section from the receipt of Federal contracts, grants, or cooperative agreements under the Federal Acquisition Regulation (FAR). If an entity does not have a federal contract, the DHS Secretary or AG can refer the matter to GSA to determine whether the entity should be placed on the list of those excluded from federal procurement.

This section creates a new office within DHS for receiving state and local government complaints. The office must indicate within 5 business days of the complaint whether or not further action will be taken.

Any person or entity that engages in a pattern or practice of hiring unauthorized workers would be fined not more than \$15,000 for each unauthorized alien, imprisoned for not less than one year and not more than 10 years, or both.

Section 9 – Protections of Social Security Administration Programs

This section requires the DHS Secretary and the SSA Commissioner to come to agreement on making sure SSA receives the funds it needs to establish, carry out, and maintain its duties and responsibilities under the Act.

Section 10 – Fraud Prevention

This section requires the DHS Secretary and the SSA Commissioner to create a program that allows SSNs that have been identified as subject to unusual multiple use or suspected or determined to have been compromised by identity fraud, to be blocked from use in EEVS, unless the user of the SSN is able to show that the SSN is his or hers.

The Secretary and the Commissioner are also required to create a program that will provide a method by which victims of identity fraud may suspend the use of their SSN in the verification system. The Secretary may make this a pilot program before making it available to all individuals.

Section 11 – Biometric Employment Eligibility Verification Pilot Program

This section creates a biometric pilot program within 48 months of enactment that uses private sector entities for the identification process. These private entities would be maintaining their own databases as well as interacting with federal databases. Participation in the pilot program is voluntary for employers, and employers can get out of the program 1 year after opting in. The pilot would apply to newly enrolled employees. Employees are to be provided access to the pilot program to verify information related to their employment authorization and to correct and update their enrollment information. Penalties (felony) for knowing disclosure of fraudulent information are also provided.