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# Analysis of the Legal Workforce Act

By Dan Cadman

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Now that the midterm elections are over, a court has issued a temporary restraining order enjoining key portions of the president's "executive actions" on immigration, and the dust has settled on the DHS funding fight, various congressional committees are examining what kinds of legislative actions might help bolster the fast-sinking national immigration system. On March 3, the House Judiciary Committee approved a bill called the Legal Workforce Act (LWA), introduced by Lamar Smith (R-Texas) on behalf of himself and a number of other representatives.<sup>1</sup>

## Background

This bill is a serious and significant effort to improve and revise the procedures laid out in the Immigration and Nationality Act (INA) relating to the regimen used to verify the work eligibility of job applicants. Those procedures can be found in Section 274A (codified at 8 U.S.C. § 1324a),<sup>2</sup> which was inserted into the INA by the Immigration Reform and Control Act of 1986 (IRCA), the same omnibus legislation that established a broad-based amnesty.

The work authorization portions added by IRCA were designed to balance the amnesty by ensuring that future waves of illegal aliens would be deterred by eliminating the magnet of jobs. That it failed at doing so is evident by the volume of illegal aliens who have accumulated since then. Some observers have suggested it failed because the mechanisms established were flawed. Others, this writer among them, believe the empirical evidence suggests that the employer verification and sanctions regimen was undermined by a lack of resources and the will to use them consistently, uniformly, and completely.

However, over time even the best of regimens needs a second look. Technologically, the world is vastly different than it was 30 years ago. Means exist that could never have been contemplated then by which verifications can be undertaken and compliance enforced, if only the agencies of government are willing and able to apportion the time and priority that national application of such a regimen requires. One way of looking at it is via the "broken windows" theory of policing.<sup>3</sup> The case can be made that if there is any single broken window in the arena of immigration policy that could be "fixed" to make a substantive difference in reversing both present and future massive flows of illegal border crossers and visa overstayers, it is through denying them the facility to obtain jobs as readily as they can now. That is what this bill is all about.

The most significant revision is that the bill provides for electronic methods of employment eligibility verification, primarily the well established and popular E-Verify program,<sup>4</sup> rather than the existing paper-based system that relies on Form I-9. Several other portions of existing law are also revised and updated.

The violation and penalty provisions contained in INA Section 274A are also amended and, as the reader will see, there have been some interesting traps built into the bill for those who would ignore the verification requirements or who would use them to achieve superficial compliance, but then hire aliens without the right to work anyway.

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## Section-by-Section Analysis

**Section 1.** Simply establishes the “short title” of the Legal Workforce Act (LWA) bill.

**Section 2.** This portion of the bill overhauls Subsection 274A(b). It requires the Department of Homeland Security (DHS) secretary to promulgate regulations within six months designating the new telephone and electronic verification system to be used for work eligibility verifications by employers, recruiters, and referrers-for-a-fee such as job headhunting firms. (From here forward, I will refer only to employers although, unless otherwise spelled out, it also means recruiters and referrers).

Though not identified by name, the already-existing (but at present mostly voluntary) E-Verify system stands as a front-runner for secretary designation, although almost certainly after revisions to ensure its capacity to fulfill all of the new requirements embedded in this bill. The electronic verification requirement is a tremendous leap forward. Use of computer-based E-Verify (or its successor) to confirm through DHS and Social Security Administration (SSA) databases the information now being collected by paper and relying on forged documents (often accepted by employers with a wink and a nod) may not stop all fraud, but it will weed out a substantial portion.

Section 2 also identifies very specifically which documents may be used for purposes of proving both identity and work authority, vs. those that prove only identity and those that prove work authority (which must be presented in combination to be legally employed). A few observations come to mind as one reviews this portion of the bill.

- First, Section 2 requires many of the DHS-issued documents to contain both a photograph and other biometric information, usually a fingerprint (see p. 5 of the bill). Oddly, it contains no such requirement for employment authorization documents (EADs). It should. While the clear trend at DHS is toward capture of biometrics for documents, why leave this to chance?
- Second, Section 2 continues to permit presentation of state driver’s licenses as proof of identity, which is half of the equation needed to obtain work, when combined with a designated work permit of various kinds (see p. 6 of the bill). Yet we know that several states have begun overtly issuing driver’s licenses to illegal aliens. This poses a conundrum — one that was recently remarked upon by a leading immigration and employment law practitioner in California (one of the states that issues such licenses).<sup>5</sup> Why encourage use of a driver’s license issued to illegal aliens? The section does permit the DHS secretary to prohibit unreliable documents that are laid out in the lists of this bill, but it is improbable that an administration that’s been absolutely profligate in its issuance of EADs<sup>6</sup> and grossly negligent in its enforcement responsibilities will exhibit the desire to prohibit use of such driver’s licenses. For this reason, the language needs to be modified to specifically state that *no* driver’s license, driving privilege card, or state-issued identity card provided to illegal aliens may be presented or accepted as proof of identity for purposes of work authorization under the INA.
- The language contained in the attestation portion of Section 2 (p. 8) might also benefit from tightening up in light of the controversy over the administration’s constitutionally dubious executive actions. It permits an individual to attest that he is a citizen or national, a resident alien, or “an alien who is authorized under this Act or by the Secretary of Homeland Security to be hired, recruited, or referred for such employment.” (Emphasis added.) This gives credence to the idea that the secretary may authorize employment to aliens outside of the statutory scheme laid out in the Act — something that should under no circumstances be countenanced, given all of the actions taken by the administration that are well beyond the boundaries of the Constitution and laws.

In reinforcing the new telephonic and computerized verification procedures outlined at the beginning of Section 2, the process for verification of attestations and documents presented also specifically provides that employers performing the verification process *must* use the electronic verification system to confirm the documents, information, and biographic data presented by the individual (p.10).

Follow-on provisions lay out the methods for receiving and recording confirmation codes from the electronic verification system that confirms employment eligibility or, alternatively, tentative or final non-confirmations of the right to work. Also covered are secondary verification procedures to be used by both employee and employer in order to proceed from “tentative

non-confirmation” to a final confirmation or non-confirmation — including time frames in which these secondary procedures must be invoked, so that the process doesn’t linger beyond the time needed to reach finality. Importantly, employers may not terminate employees for tentative non-confirmations, as long as the secondary processes are in play (pp. 10-13).

The bill provides that individuals who are the subject of a final non-confirmation may be terminated for failure to present required documents. Uniquely, it also provides that if an employer does not terminate an employee after final non-confirmation, he must notify the DHS secretary of the failure to terminate (which would, of course, constitute a violation of the substantive provisions of the INA, which prohibit hiring or continued employment of unauthorized workers). However, if he fails to notify the secretary of his continued employment of the non-confirmed individual, that, too, becomes a violation (pp. 14, 15). Note that although this catch-22 is embedded in regulatory procedures, it’s new to the employment verification procedures law, and parallels are not unknown in other segments of federal law. For instance, the INA requires individuals to report that they have imported prostitutes or others for immoral purposes (which importation of course constitutes a criminal violation of law). However, if they fail to file such a report, it, too, is a violation. There are similar catch-22 provisions in tax law requiring the reporting of proceeds earned from illicit gambling or narcotics.

Section 2 establishes a graduated time frame in which the new procedures are to be implemented, depending on the size of the employing entity: employers of 10,000 or more must comply within six months; employers of 500 to 9,999 must comply within a year; smaller employers are given additional compliance time. While to some this may seem counter-intuitive, it is likely that larger employers have better human resource capabilities to comply sooner than small employers. Furthermore, from the immigration compliance perspective, it is much more important to enroll employers of large numbers of individuals than the smaller or one-off employers (pp. 15, 16).

Agricultural employers are given a full 36 months to comply, in acknowledgement of some unique factors in agricultural hiring. These include the recognition that much agricultural hiring takes place “in the field” (literally) and the fact that some agricultural employers may need time to acquire technology or adjust their processes to get into compliance, as many have done successfully in the states that already have universal mandatory E-Verify laws. It is undoubtedly also a political concession, since growers are among the employers most accustomed to hiring illegal workers, and also enjoy great influence in certain congressional districts.

Another new proviso to be found in Section 2 permits employers to condition job offers upon successful verification of an individual’s right to work. Such a conditional offer is not permitted under existing rules, although it would seem to be a common-sense measure (p. 18), and a reasonable concession to certain types of employers who have balked at the prospect of hiring and investing in training new employees only to find out days later that the new hire was not authorized to work.

Section 2 also amends existing law to require a regime of re-verification of individuals with limited work authorizations. The time frames in which this is to take place are consistent with those for new hires, and the phase-in for this requirement follows the same protocol described above, in which employer size defines when (within six months, a year, etc.). Once again, agricultural employers are given a three-year phase-in period, which one has to conclude in many instances will allow them to continue hiring illegal workers. (pp. 21-23).

In addition, Section 2 specifically requires re-verification of certain employees who may have fulfilled the prior paper I-9 based system if the verification was not also accompanied by the electronic systems check now being required. This provision generally applies to federal, state, or local government employees; individuals holding federal security clearances, or requiring access to sensitive sites and locales; and employees of federal contractors (pp. 24-26).

The bill also contains an excellent proviso requiring the Social Security Administration to begin sending notices to individuals whose Social Security accounts contain multiple contributions or other unusual activity that might signify ongoing identity theft — including use for work verification purposes — so that the affected individuals can take steps to combat the fraud through use of federal fraud hotlines, etc. Furthermore, if on inquiry it appears that the Social Security account information is being inappropriately used, both SSA and DHS may “lock” the account from being used to verify work eligibility and must notify the employer whose verification submission reflects the fraudulent use (pp. 26-28).

Section 2's amendments to the INA also permit employers to voluntarily initiate re-verification of an employee, provided that all similarly situated employees (e.g. by job site or job category) are also re-verified in a like manner. This provision states clearly that a decision to do so shall not subject the employer to adverse consequences (pp. 28-30).

Recognizing that the verification system being instituted might or might not in fact be E-Verify, the bill permits employers who either by mandate (such as federal contractors) or by volition have been using E-Verify to sign onto whatever new verification is adopted earlier than the time frames laid out elsewhere in the bill, should they wish to do so (pp. 30, 31).

The bill provides for a one-time six-month extension of all deadlines for complying with the new verification process, but only if the DHS secretary submits to Congress a certification that he or she is unable to get the verification system up and running within the time frame permitted under the bill (pp. 33, 34).

**Section 3.** Amends Subsection (d) of INA 274A, by laying out the parameters that will be required in whatever verification system the DHS secretary ultimately designates (which may be maintained by a nongovernmental entity on behalf of the secretary).

The verification system must permit toll-free telephone and electronic access; must provide responses within three days of information inputs; must maintain records of information submitted, as well as confirmation/non-confirmation responses provided; and must be able to provide response codes to verifiers that they maintain with their copies of records as proof of the inquiry. The system additionally must be able to reconcile secondary verifications (based on "tentative" non-confirmations) within 10 days of submission, using both DHS and SSA database records, although case-by-case extensions of the 10 days are permitted when necessary for government reconciliation and resolution processes (pp. 34-36).

Section 3 requires the system to be designed with reliability, user-friendliness, and adequate security and firewall protections against abuse by hacking or identity theft, with a clear audit trail of transactions. It must also be able to flag inquiries that may suggest patterns of abuse, such as selectivity, which in turn might suggest unlawful discrimination by an employer in his verification practices. It is also important to note that, under the bill, individuals are permitted to use the system on a voluntary basis to self-confirm their eligibility for employment (pp. 36-38). This is a feature known as "Self-Check", which has already been implemented in E-Verify.

There is a separate subsection in Section 3 outlining the responsibilities of the SSA commissioner that comport with the standards laid out above for the verification system in regard to time lines, ease of use, system security, etc., when verifying Social Security account information tendered as part of the employment eligibility verification process. There is a parallel provision addressed to the DHS secretary that specifies compliance with the standards when verifying alien file and control numbers contained in documents tendered (pp. 38, 39).

Significantly, both the commissioner and secretary are required to establish mechanisms for using inadequacies discovered during secondary verification processes as a means to improve their respective databases and verification responses, and minimize the need to resort to secondary verifications generated as the result of inadequate, erroneous, or untimely data (p. 40). Such a feedback loop is critical to continual system improvement, and continued public trust in the verification process (and, thus, compliance with the employer verification and sanctions regime of the statute).

Section 3 prohibits establishment of a national identity card, and permits operators of critical infrastructure facilities to use the system for confirming the identity of those who work or are allowed access to the facilities, upon approval by the DHS secretary (pp. 40, 41).

**Section 4.** Modifies the verification rules relating to recruiters, referrers, and continued employment. One important change is that the law will now cover not only those who refer for a fee, but certain other entities that do so without fee, such as labor union hiring halls and state unemployment agencies engaged in referring individuals for employment in the United States (p. 41) — see the paragraph below regarding "definitions".

It also amends the technical language. Existing language refers to verification compliance "after hiring"; the amendment would simply refer to "compliance" in recognition of the newly authorized practice of conditionally offering employment *only* upon confirmation that the applicant is eligible to work (pp. 41, 42).

The section defines “recruit” and “refer” for purposes of INA Section 274A, meaning only those who do so for a fee *unless* they are unions or public or private labor service agencies and entities (pp. 42, 43).

**Section 5.** Lays out the legal parameters of a “good faith” defense to charges that an employer has violated any of the substantive or technical portions of the INA’s employer verification and sanctions provisions. Significantly, it provides those defenses to employers not only against government charges, but also against suits by job applicants, as long as the employer is able to show he exercised compliance with the verification procedures and relied in good faith on the outputs provided to him by the verification system (pp. 43-45). However, Section 5 makes clear that failure to use in a timely fashion the required verification system voids any claim to a good faith defense, except where such failures are attributable to the system itself for various reasons (pp. 45-47).

**Section 6.** Preempts state and local governments from establishing their own verification systems or penalty structures, but reaffirms (as have the courts previously) their right to establish business licensing and penalty processes for entities that fail to use the federal verification system (p. 47).

The bill also, however, permits states and localities to enforce the federal provisions as long as they do so precisely in accordance with the law and any supplementary regulations promulgated pursuant to the statute. In order to ensure familiarity with those laws and regulations, the DHS secretary is required to provide state and local governments all training materials and guidance that it would provide to its own agents. In circumstances where state or local governments conduct investigations and initiate violation proceedings, they are entitled to retain any fines assessed as the result of a finding of noncompliance (pp. 47, 48).

Section 6 also contains a “no double jeopardy” proviso stating that whichever level of government first initiates investigation into an entity for non-compliance has the right to proceed against the entity or, in the alternative, to defer to another governmental entity to proceed, if it so chooses.

**Section 7.** A technical amendment that assures that the substitute language of this bill becomes the “official” language of the revised INA Section 274A (p. 49).

**Section 8.** Modifies the penalties language contained in Subsection 274A(a). Some of it is technical, for instance by revising references to the attorney general to say, instead, the DHS secretary, etc. However, the amount of fines for both substantive and technical (“paperwork”) civil violations are also adjusted significantly upward in recognition of the inflationary effect that has taken place over the last 30 years. (pp. 49-51).

The language also specifies that orders arising from findings of noncompliance may include not just fines, but also “such other remedial action as is appropriate”, and states clearly that failure to use the required system to verify documents and data submitted by job applicants/employee constitutes a substantive violation.

Section 8 reiterates the “good faith defense” established earlier (in Section 5 of the bill). The difference, though, is that this “good faith” defense is to be applied only in reduction or waiver penalties *after* a finding of non-compliance (pp. 51, 52). (One wonders how an employer who operated in good faith would be found in non-compliance given the prior “good faith” defense against charges being filed in the first place.) Similarly, the size of the employer is to be considered when levying fines and penalties, presumably because small employers are unlikely to be able to bear the burden of heavy fines.

The section establishes debarment procedures ensuring that repeat violators of the verification and employment procedures may be precluded from federal grants, contracts, and cooperative agreements, present or future, and outlines the mechanisms by which debarment may occur—including scope and duration (pp. 52-54). The language used in this section is not particularly straightforward, but that is because it reflects the equally obtuse means by which entities may be disbarred. In many instances, the final word on the matter is exercised neither by the DHS secretary nor the attorney general (whose administrative law judges oversee civil fine cases) — but instead by a host of other federal agencies and officials. To the writer, this seems self-defeating and does not send the all-important message that the federal government will police itself as vigorously as it does private employers.

Section 8 establishes an office in DHS responsible for receiving and handling complaints from state and local governments about possible noncompliance by employers — and also for notifying the complainant within five days about what it is doing or intends to do about the complaint and, subsequent to inquiries instituted as the result of complaints, advising the complainant of the outcome of the investigation. The new office is also required to submit yearly reports to Congress on the number and outcome of such complaints (pp. 54, 55).

Finally, the section amends the criminal penalties for violations of INA Section 274A relating to a pattern or practice of hiring unauthorized workers, by increasing both the applicable fines and maximum jail sentence (p. 56).

**Section 9.** Amends a provision of the federal criminal code relating to fraud and misuse of immigration-related documents, by overtly and specifically including “documents meant to establish work authorization” as among the documents covered by the provision (p. 56). (See 18 U.S.C. § 1546 for the affected provision, pre-amendment.<sup>7</sup>)

**Section 10.** Contains a provision requiring DHS to pay SSA for the costs of its participation in the verification procedures and system — the funds of which are to be given to SSA *in advance* of each fiscal quarter for its part in running the system (pp. 56, 57).

The reasons for this are difficult to comprehend, since it is just as easy for Congress to directly appropriate funds to SSA as to DHS, which under this provision must then negotiate a complex reimbursement mechanism and agreement with SSA, replete with DHS and SSA inspector general audits to ensure proper provision and expenditure of these funds.

It is clear, though, that the sponsors understand exactly how complex (and potentially friction-laden) these negotiations will be, because the bill also contains a “savings” clause that ensures continuity of verification system operations in the event that there is disagreement and a negotiation has not been concluded for any period of time (pp. 58, 59).

**Section 11.** Creates fraud prevention measures such as blocking the use of a previously abused Social Security number for purposes of employment eligibility verification, unless the individual tendering the number can establish by “secure and fair” procedures that he is the rightful holder of the number (p. 59).

Similarly, the section requires the DHS secretary and SSA commissioner to create a method for permitting legitimate holders of compromised numbers to “suspend or limit” use of the numbers. The follow-on section provides the same relief for minors, whose parents may invoke the suspension-or-limitation procedures (pp. 60, 61). The bill permits each of these “suspend or limit” procedures to be undertaken initially on a pilot basis before nationwide implementation.

**Section 12.** Permits continued use of an E-Verify photo-matching tool as a part of employer verification procedures, but clarifies that it must be used for both identity and work eligibility documents when comparing to the face of the employee/applicant, not one or the other (p. 61).

**Section 13.** Requires creation of two distinct identity authentication pilot programs, each using different technology, which employers may voluntarily choose to participate in, that will be used to aid in the suppression of identity fraud. In creating the pilots the DHS secretary is obliged to consult both the SSA commissioner and the director of the National Institute of Standards and Technology (pp. 61, 62).

**Section 14.** Requires the SSA Inspector General’s Office to initiate a series of audits within one year of enactment of the LWA in several different categories, all of which are designed to uncover evidence of individuals misusing Social Security numbers to illegally gain employment. The results of these audits are thereafter to be reported to the relevant congressional committees, whose chairmen will determine whether the information contained in those audits should be shared with DHS in order to initiate enforcement activities to combat unauthorized employment (pp. 62, 63).

## Conclusion

There is a great deal in this bill that is excellent, even though there are some things this writer would prefer be refined for the reasons outlined.

This bill establishes a way forward from the status quo, which is unacceptable to anyone who claims to have any interest at all in ensuring that the unabated wave of illegal immigration to this country is finally placed under control. It is undeniable that the promise of work is a prime motivator for aliens who come to our shores illegally or stay without authority.

Even those parties who advocate a second amnesty such as the one undertaken in 1986 *claim* that they subscribe to the notion that jobs must be eliminated as a primary magnet — rather than admitting that what they really want is a running series of amnesties in perpetuity, which fundamentally undercuts our national sovereignty. If they are serious, now is the time to show it.

## End Notes

<sup>1</sup> [H. R. 1147](#).

<sup>2</sup> [8 U.S. Code § 1324a](#) - Unlawful employment of aliens.

<sup>3</sup> Mark Krikorian, "[Needed: Broken-Windows Immigration Policing](#)", National Review Online, October 27, 2014.

<sup>4</sup> USCIS E-Verify [website](#).

<sup>5</sup> Mary E. Pivec, "[Can Federal Immigration Law And AB 60 Be Reconciled?](#)" fordharrison.com, February 25, 2015.

<sup>6</sup> Jessica M. Vaughan, "[Government Data Reveal Millions of New Work Permits Issued Since 2009](#)", Center for Immigration Studies, February 2015.

<sup>7</sup> [18 U.S. Code § 1546](#) - Fraud and misuse of visas, permits, and other documents.