

Lamar Smith's employment eligibility verification system *Harmful to the economy and dangerous for U.S. workers*

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The Legal Workforce Act (H.R. 1772) was introduced by Rep. Lamar Smith (R-TX) in the U.S. House of Representatives on April 26, 2013.¹ The act, which mandates the use of an electronic employment eligibility verification system (EEVS) by every employer in the U.S., is an immigration enforcement-only bill that would put American workers at risk of losing their jobs, push immigrant workers into the underground economy, and increase the nation's budget deficit.² Smith's bill reflects an outdated enforcement-only approach that is completely out of step with the views of the vast majority of Americans, who favor a balanced, commonsense approach to immigration reform that includes a road to citizenship for the 11 million aspiring citizens who live and labor in our communities.

Smith's bill contrasts starkly with the approach taken by a bipartisan group of U.S. senators in their Border Security, Economic Opportunity and Immigration Modernization Act of 2013 (S. 744),³ an approach supported by a solid majority of Americans from across the political spectrum.⁴ In fact, recent polling confirms that 68 percent of Americans and 72 percent of Republicans favor *broad* immigration reform.⁵ Instead, Smith's bill takes a piecemeal approach.

In addition, Smith's bill fails to address the current EEVS's (E-Verify's) problems,⁶ the difficulties that would inevitably accompany a massive increase in use of the system, and the adverse impacts on U.S. citizen and work-authorized immigrant workers that would result. The bill would require that every single employer in the U.S. use an EEVS "patterned on"

¹ H.R. 1772 as introduced is available at www.gpo.gov/fdsys/pkg/BILLS-113hr1772ih/pdf/BILLS-113hr1772ih.pdf. For a summary of the Legal Workforce Act, see *Legal Workforce Act: Summary of its Main Provisions* (NILC, May 2013), www.nilc.org/document.html?id=552.

² The EEVS in the Legal Workforce Act is explicitly "patterned on" E-Verify (see p. 34 of the bill as introduced). For more information about E-Verify, see *Facts About E-Verify* (National Immigration Law Center, Feb. 2011), www.nilc.org/everifyinfo.html.

³ S. 744 as introduced is available at www.gpo.gov/fdsys/pkg/BILLS-113s744is/pdf/BILLS-113s744is.pdf. The text of the bill's sponsors' amendment in the nature of a substitute is available from www.judiciary.senate.gov/legislation/MDM13313.pdf.

⁴ A recent poll conducted by conservative organizations, including Americans for Tax Reform, the National Immigration Forum Action Fund and the Partnership for a New American Economy, found that 74 percent of all voters and 67 percent of Republicans support the Senate bill. See <http://immigrationforum.org/images/uploads/2013/Clips/Immigration%20Reform%20Research%20Deck%204252013FP.pdf>.

⁵ *Id.* For further analysis of S.744, see the resources available at www.nilc.org/irsenate2013.html.

⁶ See note 2.

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E-Verify to verify the employment eligibility of every newly hired worker. Currently, only 7 percent of U.S. employers use E-Verify,⁷ yet Smith’s bill provides for an unrealistic and rushed timeline that would require the remaining 93 percent of employers to use the system within 2 years. Over 5.5 million employers would thus have to be using the EEVS within 2 years of the bill’s enactment,⁸ yet the bill contains no process for workers to contest erroneous findings by the EEVS that they are ineligible to work. This would likely result in thousands of citizens and authorized immigrant workers losing their jobs.

OUR CONCERNS WITH THE LEGAL WORKFORCE ACT

- The bill’s enforcement-only approach is out of sync with public opinion and the bipartisan efforts underway in the U.S. Senate and the House of Representatives to reform our broken immigration system in ways that meet our societal and economic needs and live up to our values.

While the bipartisan immigration reform bill works its way through the U.S. Senate, a group of eight Republican and Democratic members of the House of Representatives has been meeting regularly in a “good faith, bipartisan effort” to fix “the nation’s broken immigration system.”⁹ Unlike the piecemeal, enforcement-only approach reflected in the Smith bill, the House “Gang of 8” is working together to enact *comprehensive* legislation. This approach accords with the preferences of the vast majority of Americans, 83 percent of whom, according to a recent poll, support a road to citizenship for immigrants who meet certain requirements.¹⁰

- The bill’s approach will cause millions of American workers to lose their jobs or prevent them from being hired.

If the Legal Workforce Act becomes law, it will result in hundreds of thousands of Americans either being denied jobs for which they are qualified or having to wait to begin a new job while errors in records are sorted out and corrected.¹¹ The bill would allow employers to condition a job offer on the job applicant’s being verified by the EEVS as employment-

⁷ See *E-Verify Receives High Ratings in Customer Survey* (U.S. Citizenship and Immigration Services, Feb. 21, 2013), <http://tinyurl.com/lw7ztvm>.

⁸ Currently, there are approximately 6 million employers in the U.S. See *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, www.census.gov/econ/smallbus.html. Since only 7 percent of U.S. employers currently use E-Verify, 93 percent, or approximately 5.5 million employers, do not use it.

⁹ On April 17, 2013, these representatives issued a joint press statement that applauded the Senate’s efforts on immigration reform and that suggested that they also anticipated coming to agreement on a comprehensive immigration reform bill. See <http://gutierrez.house.gov/press-release/bipartisan-group-house-members-release-statement-immigration-reform>

¹⁰ See “New York Times/CBS News Poll on Gun Control, Immigration and the Federal Budget,” *New York Times*, May 1, 2013, www.nytimes.com/interactive/2013/05/01/us/politics/02poll-nytimes-cbs.html.

¹¹ For examples of employment-eligible U.S. citizens and immigrants affected by E-Verify, see *How Errors in E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (NILC, Feb. 2011), www.nilc.org/workerseverify.html.

eligible. This would be a radical change from current law, which prohibits employers from using E-Verify to verify a person's employment eligibility until after the person is hired. Given E-Verify's current error rates, of the 52 million new hires in the U.S. per year, between 416,000 and 1.2 million of them would be erroneously flagged by the EEVS as tentatively not eligible to be employed and would have to fix their records before starting their jobs.¹²

The Social Security Administration (SSA) has estimated that requiring all employers to use the EEVS would force 3.6 million workers to either go to SSA to correct their records or lose their jobs. Currently, more than half of U.S. citizen and authorized immigrant workers who are the subject of an E-Verify system database error are unable to correct their records and would therefore lose their jobs under the proposed EEVS.¹³ And at a time of 7.5 percent unemployment,¹⁴ putting millions of workers' jobs on the line is grossly irresponsible.

■ **The implementation timeline is impractical and unworkable.**

Under Smith's bill, every employer in the country — all 6 million of them¹⁵ — would have to participate in the EEVS within two years of the bill's enactment. Increasing current enrollment in E-Verify to 6 million employers would require U.S. Citizenship and Immigration Services (USCIS) to sign up approximately *250,000 employers per month* during the two-year period.

Despite this massive increase in the program's scale, the Smith bill provides for *no performance evaluations* to ensure that the system is working as intended. Requiring such an accelerated and large-scale implementation of the EEVS — without addressing the existing data, technology, and infrastructure problems evident in E-Verify — would be a recipe for chaos and disaster. According to the Association for Computing Machinery, turning E-Verify into a mandatory program is a serious architectural issue, because it would have to handle at least a *thousand-fold increase* in users, queries, transactions, and

¹² A DHS-commissioned independent study found that, of the tentative employment eligibility nonconfirmations issued by E-Verify, 0.8 percent of them were issued in error. See *Findings of the Web-Based E-Verify Program Evaluation* (Westat, Dec. 2009), www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf, p.117. A separate study found a 2.3 percent error rate for tentative nonconfirmations. See description of L.A. County audit at Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), www.migrationpolicy.org/pubs/E-Verify-Insight.pdf, footnote 13. Over the 12 months ending in March 2013, total U.S. hires were 51.8 million. See "Job Openings and Labor Turnover – March 2013," a news release from the Bureau of Labor Statistics, U.S. Dept. of Labor (May 7, 2013), www.bls.gov/news.release/pdf/jolts.pdf, p. 3. The 416,000 figure was reached by multiplying the number of new hires per year (52 million) by the 0.8 percent Westat error rate. The 1.2 million figure was reached by multiplying the number of new hires per year by the 2.3 percent L.A. County error rate.

¹³ Of the 0.8 percent of workers who received a tentative nonconfirmation in error, 0.3 percent were able to correct the error and keep their job — meaning that 0.5 percent of all workers receive a final nonconfirmation in error. See *Statistics and Reports* (U.S. Citizenship and Immigration Services, Feb. 4, 2011), <http://tinyurl.com/35y8thl>.

¹⁴ "Latest Numbers > Unemployment Rate" section of the Bureau of Labor Statistics website's homepage, www.bls.gov. The 7.5 percent rate is for April 2013. (Last visited June 6, 2013.)

¹⁵ *Statistics about Business Size*, *supra* note 8.

communications volumes.¹⁶ Each time a system grows *even just ten times* larger, serious new technical issues arise that were not previously significant.¹⁷

■ **The bill will deprive the government of billions of dollars in tax revenue.**

The Smith bill overlooks the fact that unauthorized workers are not going to leave the U.S. because Congress makes it harder for them to work here. Rather, they and their employers will simply find a way around the EEVS. A sizeable percentage of employers will simply ignore program rules or will move workers “underground,” into the *cash economy*. In Arizona, the first state to make E-Verify mandatory, 83 percent of undocumented workers *remained in the state* after the E-Verify law passed and simply moved to off-the-books jobs, so they would be hidden from government regulators and, in the process, their employers dodged employment-related taxes.¹⁸

■ **The Legal Workforce Act protects big business, but not the American worker.**

The proportion of employers currently participating in E-Verify who violate the program’s rules is already *extremely high*. For example, over *66 percent* of workers reported that participating employers, in violation of the program’s rules, took adverse actions against them when E-Verify couldn’t automatically confirm their employment authorization.¹⁹ And most of these noncompliant employers are participating in E-Verify voluntarily. When employers are mandated to use an EEVS, they will be even *less likely* to obey the rules, particularly in industries known to have significant numbers of undocumented workers. Yet the Smith bill includes *no protections for workers* who suffer adverse action. Employers, meanwhile, are generally relieved of *all liability*, as long as they used the EEVS to verify their workers’ employment eligibility and relied upon information from the EEVS in “good faith.”

■ **The bill opens the door to employer retaliation against workers who are attempting to assert their rights in the workplace or to organize for better working conditions.**

The bill would permit employers to reverify the employment eligibility of their employees whenever it suited their own purposes, as long the employer reverified its entire workforce. Giving employers a free hand to reverify the employment eligibility of each worker in their workforce at any time would allow reverification to be used as a tool of intimidation and retaliation against immigrant employees, whose assertions of workplace rights would be chilled as a result.

¹⁶ See “Mandatory Electronic Employment Verification Systems: Technological Implications” (Association for Computing Machinery, undated), http://usacm.acm.org/images/documents/eevs_issue_brief.pdf.

¹⁷ *Id.*

¹⁸ Magnus Lofstrom, Sarah Bohn, and Steven Raphael, *Lessons from the 2007 Legal Arizona Workers Act* (Public Policy Institute of California, Mar. 2011), www.ppic.org/content/pubs/report/R_311MLR.pdf.

¹⁹ *Findings of the Web-Based E-Verify Program Evaluation* (Westat, Dec. 2009), www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf, p.157.

- The Legal Workforce Act will increase discrimination against Latino, Asian, and other foreign-born workers.

As a Department of Homeland Security–funded study has concluded, the current E-Verify system already contributes to discrimination among foreign-born workers, since they are more likely to be the subject of database errors. E-Verify error rates are *20 times higher* for foreign-born employment-authorized workers than for native-born U.S. citizens.²⁰ This means that under the Smith bill Latinos, Asians, and other foreign-born workers would likely be locked out of jobs and would be more likely to face adverse employment actions. The Smith bill would *increase* this discrimination, since it allows employers to *condition job offers on verification through the EEVS*. Current law allows use of E-Verify for a worker only after the worker is hired precisely because allowing employers to screen workers before they are actually hired creates a tempting opportunity for them to discriminate against lawfully present foreign-born workers.

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²⁰ *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, But Significant Challenges Remain* (U.S. Government Accountability Office, GAO-11-146, Dec. 2010), www.gao.gov/new.items/d11146.pdf, p. 40.