

ANALYSIS OF SENATE IMMIGRATION REFORM BILL

Title III: Interior Enforcement

Includes employment eligibility verification and worker protection provisions

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On April 16, 2013, Senators Menendez (D-NJ), Durbin (D-IL), Schumer (D-NY), Bennett (D-CO), Rubio (R-FL), Graham (R-SC), McCain (R-AZ), and Flake (R-AZ) introduced the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (S.744) into the U.S. Senate. The bill is a comprehensive overhaul of much of our nation's immigration system and includes a road to citizenship for millions of currently unauthorized noncitizens. A general summary of the bill, as well as analyses of Title I (the "Border Security" title) and Title II (the "Immigrant Visas" title), are available at www.nilc.org/irsenate2013.html.

Title III calls for a significant increase in worksite immigration enforcement, including a requirement that all employers in the U.S. use an electronic employment eligibility verification system (EEVS). Our concerns with a mandatory EEVS program are well documented and grounded in a recognition that such a mandate will cause job losses for U.S. citizens and employment-authorized immigrants, impose new costs on employers, drive workers into the underground economy, make all workers more vulnerable, and deprive the government of revenue.¹ However, Title III also would incorporate new due process and worker protections into the mandatory EEVS it would create, as well as fixes to gaps in our labor law system, gaps that abusive employers currently exploit to undercut their above-board competitors.

The Senate Judiciary Committee considered, debated, and amended S. 744 during a markup process that culminated in the bill being voted out of the committee on a 13-5 vote on May 21. During that process, the committee adopted amendments that expand the bill's worker protections and that provide additional assistance to workers who receive an erroneous determination from the EEVS. The committee also passed a troubling amendment that requires that final EEVS nonconfirmations be reported to U.S. Immigration and Customs Enforcement (ICE). The analysis below incorporates information about the Title III amendments that were adopted by the Senate Judiciary Committee as well as the changes to Title III that are proposed in the amendment subsequently offered on the Senate floor by Senators Bob Corker (R-TN) and John Hoeven (R-ND), which will be considered by the Senate on June 24, 2013.

¹ NILC's and others' concerns about requiring employers to use E-Verify, the federal government's Internet-based employment eligibility verification system, are detailed in resources available from www.nilc.org/concerns.html.

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LEGALIZATION & TRIGGERS

- **Road to citizenship.** The bill allows some currently unauthorized immigrants to adjust to a new “registered provisional immigrant” (RPI) status. After 10 years, these individuals can adjust to lawful permanent resident (LPR or “green card”) status if they meet certain qualifications, and then they can apply for U.S. citizenship. In addition, currently unauthorized people who qualify under the bill’s DREAM Act provisions or farm worker program are eligible for an expedited route to green cards and citizenship. (For more information about this, see the summary and analysis of Title II).
- **EEVS “trigger.”** The bill also contains several “triggers” (conditions that must be met before people may benefit from certain provisions of the legalization program), including one based on implementation of the bill’s EEVS mandate. Under the EEVS trigger provision, people who have been granted RPI status may not adjust to LPR status until the federal government implements the mandatory EEVS program. NILC’s analyses of Titles I and II contain more information about all of the bill’s triggers.

COMPONENTS OF THE ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM (EEVS) MANDATE

The bill requires all employers to use the EEVS to verify the employment eligibility of newly hired employees; this mandate would be phased in, based upon employer size, over a four-year period. The EEVS provided for in the bill contains significant due process and worker protections, i.e., ways by which citizen and noncitizen employment-authorized workers may contest erroneous results produced by the EEVS.

Phase-in

- **Federal government employers and contractors.** Federal government employers and contractors must begin using the EEVS either immediately, within 90 days after enactment, or in adherence to previously existing requirements of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (federal government employers) or the applicable federal acquisition rule (73 Fed. Reg. 67651 (Nov. 14, 2008)) (federal contractors).
- **Critical infrastructure employers.** The secretary of the Department of Homeland Security (DHS) may require critical infrastructure employers, such as airports, seaports, nuclear plants, chemical plants and defense facilities, to begin using the EEVS starting 1 year after implementing regulations are published.
- **More than 5,000 employees.** Within 2 years after implementing regulations are published, employers with more than 5,000 employees must begin using the EEVS for newly hired employees and immigrant employees with expiring work-authorization documents.
- **More than 500 employees.** Within 3 years after implementing regulations are published, employers with more than 500 employees must begin using the EEVS for newly hired employees and immigrant employees with expiring work-authorization documents.

- **Agricultural and all other employers.** Within 4 years after implementing regulations are published, agricultural and all other employers (except for tribal employers) must begin using the EEVS for newly hired employees and immigrant employees with expiring work-authorization documents.
- **Tribal employers.** Within 5 years after implementing regulations are published, tribal employers must begin using the EEVS for newly hired employees and immigrant employees with expiring work-authorization documents.

Worker Protections in the EEVS

- **Notification of “further action” notice.** Employers must notify a worker if the EEVS issues a “further-action” notice (indicating that the worker must take additional steps to verify his or her identity or employment eligibility) and inform the worker of the procedures for addressing that notice.
- **Protection from termination.** Employers may not terminate or take any other adverse action against a worker solely because the EEVS issues a further-action notice.
- **Ten business days to contact and appear.** The worker shall have ten business days to contact and, if necessary, appear before the appropriate federal agency in response to a further-action notice.
- **Ten business days for EEVS to confirm or not confirm.** Within ten business days of the date the worker contests the further-action notice, the EEVS shall provide a confirmation or nonconfirmation of the worker’s employment eligibility.
- **The Office of the Small Business and Employee Advocate.** The secretary of DHS shall establish within U.S. Citizenship and Immigration Services (USCIS) the Office of the Small Business and Employee Advocate, whose purpose is to help workers and small businesses comply with employment eligibility verification requirements, including resolution of conflicts arising out of the EEVS.

Review Process for Authorized Workers Who Experience an Erroneous Nonconfirmation

- **Administrative review.** The bill provides for an administrative appeal/review process for workers who receive an erroneous nonconfirmation from the EEVS.
 - The administrative review process precludes awards for monetary damages, attorney’s fees, or costs for aggrieved workers.
 - It includes an automatic stay of the EEVS’s nonconfirmation for workers who file a timely administrative appeal unless the DHS secretary or the commissioner of the Social Security Administration (SSA) determines the appeal to be frivolous.
- **Appeal to an administrative law judge.** The bill provides for an appeal process, including review by an administrative law judge (ALJ).

- The ALJ may award a worker damages, including lost wages, attorney's fees, and costs, in cases in which the ALJ reverses the final administrative determination of the DHS secretary or the SSA commissioner, if the ALJ finds that the erroneous final determination was due to their negligence.
 - The bill provides for an automatic stay of the EEVS's nonconfirmation for workers who file a timely administrative appeal, unless the ALJ determines that the appeal is frivolous.
 - Anyone adversely impacted by the ALJ's decision may appeal to the U.S. court of appeals.
- **Changes to the I-9 employment eligibility verification process:**
- The bill amends current law to limit the list of documents, such as passports and security-enhanced driver's licenses, that employees may show to prove identity and employment eligibility during the employment eligibility verification process.
 - The bill includes a significant expansion of the photo-matching tool, requiring an employer to match the photo from the worker's document to a photo in the USCIS database.²

Employers: Safe Harbor and Certification

- **Safe harbor.** The bill protects employers from liability for violations of federal, state, and local criminal or civil law for any employment-related action taken based on good-faith reliance on the information provided by the EEVS.
- **Employer certification.** The bill requires that employers certify their compliance with the EEVS.

ANALYSIS

We continue to be concerned about forcing all employers to use an EEVS. Based on the nearly two decades of experience we have helping low-income immigrant workers and U.S. citizens deal with errors in the SSA and DHS databases on which the current EEVS, E-Verify, relies, we believe that requiring all employers to use the EEVS could have particularly significant consequences. As the federal government requires more and more employers to use the existing EEVS, errors will disproportionately impact women and immigrants about whom the databases have incorrect information due, for example, to marriage-related name changes, hyphenated last names, or names whose origins are geographic regions other than Great Britain or Western Europe and are thus more likely to be misspelled or have variant spellings.

We are also greatly troubled by a change to the bill that the Senate Judiciary Committee adopted requiring that USCIS report to ICE, on a weekly basis, all of the final nonconfirmations of employment eligibility issued by the EEVS. This change could significantly increase the harm to workers resulting from the database errors endemic to the current EEVS — E-Verify — in the past, and it also poses a threat to the privacy of all workers.

² More information about the USCIS's E-Verify photo-matching tool is available at <http://tinyurl.com/4lfusz5>.

The protections included in this provision represent the minimum level of due process for U.S. citizens and work-authorized people who face possible job losses due to this mandate. If the mandate is enacted, it must be accompanied by a generous legalization program, otherwise workers will go further underground and face exploitation by unscrupulous employers.

INCREASED PENALTIES FOR EMPLOYERS & WORKERS

The bill increases employment-related penalties for both employers and workers. On the employer side, the bill enhances civil penalties for employing unauthorized workers and for using the EEVS in a discriminatory manner. The bill also stiffens criminal penalties for workers who misuse Social Security cards and passports, including in the employment eligibility verification context.

Hiring and Continuing to Employ Unauthorized Workers

- **Hiring of formerly unauthorized workers.** The bill explicitly states that nothing prohibits the employment of formerly unauthorized individuals.
- **Enhanced penalties.** The bill enhances civil penalties for employers who violate immigration law and creates a lien structure for collection of employer-owed monetary penalties.

Social Security Cards & Enhanced Penalties for Misuse

- **Tamper-resistant cards.** Within 5 years, the commissioner of Social Security must issue only fraud-proof, tamper-resistant, wear-resistant, and identity theft-resistant Social Security cards.
- **Criminal penalty.** The bill amends 18 U.S.C. chapter 47 by creating a criminal penalty for some forms of Social Security account number misuse, punishable by fines and up to 5 years in prison.

Antidiscrimination Provisions

- **Antidiscrimination protections expanded.** The bill significantly expands the scope of antidiscrimination protections under the Immigration and Nationality Act (INA) with respect to hiring, firing, and employment eligibility verification based on national origin or citizenship status. This includes adding provisions to the INA to:
 - Protect against employer misuse of the EEVS.
 - Extend the coverage of the INA's antidiscrimination protections to all work-authorized people.
 - Prohibit the denial of a professional, commercial or business license to anyone who is authorized to work in the U.S.
 - Require employers who are required under federal, state, or local law to maintain employment records to provide them to employees upon request.

- **Increased employer fines.** The bill significantly increases employer fines for violations of the INA's antidiscrimination protections.

Unlawful and Abusive Employment

- **New civil & criminal penalties.** The bill creates new civil and criminal penalties for employers who knowingly hire unauthorized workers and violate labor law.

Misuse of a Passport

- **New civil & criminal penalties.** The bill creates new, stringent civil and criminal penalties for misuse of a passport, likely including instances in which a worker uses a fraudulent passport or a passport that belongs to another person for employment eligibility verification purposes.

INCREASED PROTECTIONS FOR WORKERS

The bill increases legal protections for immigrant workers who are wrongfully terminated or who experience significant workplace abuse. The bill would bolster legal remedies for immigrant workers who are terminated in violation of labor laws, while providing for U-visa relief for whistleblowers who experience serious workplace abuse, exploitation, or retaliation. In short, the bill extends legal protections for immigrant workers, while leveling the playing field for honest employers.

Fix for *Hoffman*

- **Legislative fix.** The bill provides a legislative fix of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), by specifying that neither back pay nor any other remedy (except any reinstatement remedy) shall be denied to an individual based on his or her immigration status.

POWER Act

The Senate bill includes key components of the Protect Our Workers from Exploitation and Retaliation (POWER) Act:³

- **U visas.** The bill makes U visas available to victims of significant workplace abuse, exploitation, or retaliation and increases the total annual number of U visas available from 10,000 to 18,000.
- **Protections for victims of labor violations.** The bill provides that DHS and the U.S. Department of Labor (DOL) shall jointly issue regulations that establish a process by which a person who has filed a nonfrivolous workplace claim or is a material witness in such a claim or has filed for U visa relief may, at the DHS secretary's discretion, be entitled to:

³ More information about the original POWER Act is available at www.nilc.org/powerir.html.

- A stay of removal for up to 3 years or until the resolution of the workplace claim, whichever is sooner (the DHS secretary may extend this stay for an additional three years); and
- Work authorization.

ANALYSIS

A mandatory EEVS program will undoubtedly make it very difficult for any future undocumented worker — or any current worker excluded from the bill’s legalization program — to get a job. We are concerned about the hefty penalties that could be imposed on undocumented workers seeking jobs in the future, as well as the criminalization of job-seeking-related conduct that currently is not considered criminal. Abusive employers who want to game the system will still be able to do so by recruiting and exploiting undocumented workers made even more vulnerable by these new provisions.

While the mandatory EEVS will surely make it easier for employers intent on complying with the law to verify their workers’ employment eligibility, the POWER Act provisions included in the bill are necessary to ensure that employers who are willing to disregard their immigration- and labor-law-related responsibilities will be held accountable. In the absence of these provisions, abusive employers would be even more tempted to grossly exploit workers who lack work authorization. For immigration reform to be successful, it must include the types of protections provided for by the POWER Act, which in turn will reduce abusive employers’ economic incentive to mistreat vulnerable workers.

OTHER IMMIGRATION ENFORCEMENT ISSUES

The bill includes additional immigration enforcement provisions, many of which expand protections for vulnerable immigrant populations and bolster safeguards within immigration courts and the detention process. However, the bill would significantly increase the adverse immigration consequences of some kinds of past criminal conduct, putting more individuals at risk for deportation and barring them from accessing RPI status.

Racial Profiling

- **Codifies existing racial profiling law.** The bill codifies existing rules that no federal law enforcement officer may rely on race or ethnicity in making law enforcement decisions or in conducting investigations, except insofar as the officer is relying on a specific suspect’s description (in the case of spontaneous law enforcement decisions) or when trustworthy and relevant information links a person of a particular race or ethnicity to an identified criminal incident (in the case of a specific investigation). This provision, however, should be strengthened by adding a prohibition on profiling by national origin and religion and by closing the exemption for profiling when national security reasons are alleged.

Asylum

- **Asylum processing.** The bill significantly streamlines processing for asylees and refugees by eliminating the arbitrary one-year asylum filing deadline and eliminating family

reunification barriers for asylees and refugees. It also authorizes a streamlined processing for certain high-risk refugee groups, allows asylum officers to grant asylum to eligible applicants following successful credible-fear interviews, and permits qualified stateless individuals to apply for lawful permanent resident status. On the negative side, the bill contains a new provision that would allow for the termination of asylum or refugee status if a person returns to his or her country of origin or last habitual residence without good cause (as determined by DHS) following the grant of such status.

Immigration Court Reforms

- **More judges and staff.** The bill addresses the backlog in immigration courts by providing for an increase in the number of immigration judges and more immigration court personnel.
- **Appointed counsel for vulnerable respondents.** The bill requires the attorney general to appoint counsel for specific vulnerable populations, including unaccompanied minors, those deemed incompetent due to a serious mental disability, and other people considered to be particularly vulnerable, and it authorizes appointment of counsel in other cases the attorney general finds appropriate.⁴
- **Office of Legal Access Programs.** The bill would create an Office of Legal Access Programs, which would be charged with providing legal orientation programs that would give people facing deportation information about the process and about eligibility for relief. The office would be required to identify people who may qualify, because of their vulnerability, to have counsel appointed for them.

ANALYSIS

Essential to any effective overhaul of our broken immigration system is increasing the immigration court system's capacity, because the immigration courts currently are overwhelmed and under-resourced, and the number of cases with which they have to deal will only grow under a new legalization program. We fully support efforts to increase access to legal representation. In particular, vulnerable populations such as unaccompanied children and those with mental disabilities continue to be detained under the current system without adequate legal representation, a practice that flies in the face of due process and fundamental fairness. We also support the bill's long-overdue revision to the arbitrary deadline for asylum claims.

Trafficking & Recruitment

- **New protections for workers recruited from abroad.** The bill would protect workers from abuse in the foreign-labor contracting context by:
 - Requiring foreign-labor contractors to disclose to workers, in their primary language, the terms and conditions of their contract employment;
 - Creating new antidiscrimination provisions; and

⁴ This paragraph was revised on June 25, 2013.

- Prohibiting foreign-labor contractors from charging workers any contracting-related fees (including visa fees and travel costs).
- **Other requirements for foreign-labor contractors:**
 - Requires foreign-labor contractors to register with DOL;
 - Provides for a worker complaint and enforcement process through DOL; and
 - Authorizes DOL to seek remedial action and damages for workers.
- **Exchange visitor protections.** The Corker-Hoeven amendment contains significant new protections relating to the recruitment and employment of exchange visitors. These include disclosure requirements as well as antidiscrimination and antiretaliation provisions.

Crimes

The bill provides for several changes to immigration law that increase the immigration consequences of certain criminal conduct — i.e., under these provisions, more people are likely to be deported, denied admission to the U.S., or denied access to RPI or LPR status.

- **Creates new grounds of inadmissibility and deportability relating to:**
 - *Gang membership.* People convicted of an offense that has gang membership as an element or who, under some circumstances, DHS determines to be willing participants in a criminal street gang are both inadmissible and deportable.
 - *DUI.* People who have committed 3 or more offenses, on separate dates, related to driving under the influence or driving while intoxicated are both inadmissible and deportable. For purposes of deportability, one offense must have occurred after enactment of the immigration reform act.
 - *Crimes of domestic violence.* People who commit certain crimes of “domestic violence” or who violate certain orders of protection are inadmissible (such conduct already makes one deportable).
- **Illegal entry and reentry.** The bill increases the criminal penalties for illegal entry and reentry after removal.
- **Penalties for defrauding people seeking immigration-related legal help.** The bill creates new penalties for *notario* fraud and other actions that defraud immigrants, and it creates fines and provides for incarceration of up to 10 years for people who provide fraudulent immigration services, as well as fines and incarceration of up to 15 years for people who misrepresent themselves as an attorney or accredited representative.

ANALYSIS

Most of these changes will result in the continued separation of families and destabilization of our communities at a time when deportations have reached a record high of over 400,000 per year. Rather than expanding the groups of people who will be permanently exiled from the U.S., we should find solutions that will facilitate family unity and community cohesiveness.

Detention and Removal

- **Positive detention- and enforcement-related changes.** The bill makes a number of beneficial changes to the immigration detention system, including provisions to ensure timely custody and bond determinations and to allow for greater use of alternatives to detention, as well as increased oversight of conditions at detention facilities and compliance with detention standards by immigration detention facilities. The bill also requires important data collection and dissemination regarding people detained by federal immigration authorities, and regarding the grounds and length for that detention. It also contains an important limitation on when immigration enforcement actions may be conducted at sensitive locations, including hospitals, schools, places of worship, and organizations assisting children, pregnant women, people with disabilities, and victims of domestic violence.
- **Bond and custody determinations.** Under the bill's provisions, detained immigrants would be able to get bond more quickly. Within 72 hours of a person being detained, DHS would be required to file the charging document and serve it on the person, determine whether the person will remain in custody, and specify the reasons for continued custody and the amount of any bond.
- **Stipulated orders of removal.** The bill amends current law to require that a person who signs a stipulated order of removal must appear in person before an immigration judge so that the IJ can determine if the person signed the order knowingly, voluntarily, and intelligently.

ANALYSIS

The bill would make some important changes to the nation's massive immigration detention system. Among the helpful changes are those listed above, as well as making compliance with the government's own minimum standards for detention a contract requirement for detention facilities. However, by increasing the use of Operation Streamline,⁵ expanding the categories of people subject to mandatory detention, and increasing the penalties on illegal entry, the bill will unnecessarily increase the number of people funneled into the immigration detention system. Mandatory detention is an inhumane and expensive practice, and we should not be expanding it.

⁵ See our analysis of Title I, the "Border Security" title.