

# ANALYSIS OF DRAFT WHITE HOUSE BILL

## Title III: Employment Eligibility Verification & Worker Protections

FEBRUARY 20, 2013

**T**his title calls for a dramatic increase of worksite immigration enforcement, including implementation of a mandatory electronic employment eligibility verification system (EEVS). Our concerns with a mandatory EEVS program are well documented and grounded in recognition that such a program will cause job losses for U.S. citizens and employment-authorized immigrants, impose new costs on employers, drive jobs into the underground economy, make all workers more vulnerable, and deprive the government of revenue.<sup>1</sup> In light of these concerns, the due process and workers' protections outlined in the White House proposal are the minimum safeguards required if the country is to enact a mandatory EEVS policy.

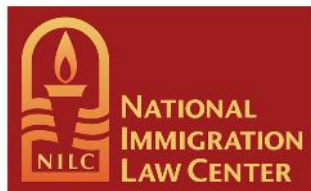
This title also contains long overdue fixes to gaps in our labor law system, which abusive employers currently exploit to undercut their above-the-board competitors. Congress should consider these ways to prevent unscrupulous employers from exploiting immigration enforcement to undermine labor and employment standards and law. If enacted, provisions of this title would protect whistle-blowing employees from detention and deportation.

### EMPLOYMENT ELIGIBILITY VERIFICATION

- **I-9 employment eligibility verification process.** Amends current law regarding documents that employees may show to prove employment eligibility and identity during the employment eligibility verification process.
- **Electronic employment eligibility verification system.** Requires use of an EEVS by all employers with more than 5 employees.
- **Phase-in.**
  - *Federal government employers and contractors* must begin using the EEVS either immediately, within 60 days after enactment, or in adherence with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (federal government employers) or the applicable federal acquisition rule (73 Federal Register 67651 (Nov. 14, 2008) (federal contractors).

<sup>1</sup> See our "Concerns about Requiring Employers to User E-Verify" webpage, [www.nilc.org/concerns.html](http://www.nilc.org/concerns.html).

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- *Tribal employers* must begin using the EEVS, within 5 years after regulations are published, for newly hired employees with expiring temporary work authorization.
- *Critical infrastructure employers* must begin using the EEVS within one year after regulations are published.
- *Employers with more than 1,000 employees* must begin using the EEVS within 2 years, after the regulations are published, for newly hired employees and employees with expiring work authorization documents.
- *Employers with more than 250 employees* must begin using the EEVS within 3 years, after the regulations are published, for newly hired employees and employees with expiring work authorization documents.
- *All employers* must begin using the EEVS within 4 years, after the regulations are published, for newly hired employees and employees with expiring work authorization documents.

➤ **Worker protections.**

- Employers may not terminate a worker or take any other adverse action against a worker solely because the EEVS issues a notice of further action, including during the review process (see below for more about the review process).
- Employers must inform employees that the EEVS may be used for immigration enforcement purposes and that it may not be used to discriminate or otherwise take adverse action against U.S. citizens or employment-authorized aliens

➤ **Review process for authorized workers experiencing a system error.**

- *Administrative review.* Includes an administrative appeal/review process for workers who receive an erroneous nonconfirmation.
  - The administrative review process precludes awards for monetary damages, attorney's fees, or costs for aggrieved workers.
  - Includes an automatic stay of the EEVS's nonconfirmation for workers who file a timely administrative appeal unless the secretary of the U.S. Department of Homeland Security (DHS) or the commissioner of the Social Security Administration (SSA) determines the appeal to be frivolous.<sup>2</sup>
- *Appeal to an administrative law judge (ALJ).* Includes an appeal process including review by an 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 determination of the DHS secretary or the SSA commissioner made as part of the administrative review process and finds that the final determination was erroneous by reason of the negligence of the secretary or the commissioner.

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<sup>2</sup> When the term "Secretary" appears in the draft bill, it is never followed by "of Homeland Security" or "of DHS," but from the context we assume that all references in this title to "Secretary" are to the secretary of Homeland Security.

- Includes an automatic stay of the EEVS's nonconfirmation for workers who file a timely administrative appeal unless the ALJ determines the appeal to be frivolous.
- *Private right of action.* If an error was caused by an employer's negligence or misconduct, a worker may file suit and receive damages, reinstatement, and other appropriate remedies from the employer.
- **Hiring and continuing to employ unauthorized workers.**
  - Explicitly states that nothing prohibits the employment of formerly unauthorized individuals.
  - Enhances civil penalties for employers who violate immigration law and creates a lien structure for collection of employer-owed monetary penalties.
- **Social Security cards.**
  - Within 2 years of the enactment of the bill, the Social Security Administration must issue fraud-resistant, tamper-proof Social Security cards.
  - Enhances criminal penalties for possession of a Social Security card that is not one's own.
- **Antidiscrimination provisions.**
  - Significantly expands the scope of antidiscrimination protections under the Immigration and Nationality Act (INA), including expanding the INA to include employer misuse of the EEVS and making the antidiscrimination protections apply to all work-authorized people.

## INCREASED PROTECTIONS FOR WORKERS

- **Hoffman fix.**
  - Provides for a legislative fix of *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002), by specifying that neither back pay nor any other remedies (except any reinstatement remedy prohibited under federal law) shall be denied to an individual based on his or her immigration status.
- **POWER Act.** Includes a version of the POWER Act,<sup>3</sup> including:
  - **Limits on DHS actions.** If DHS initiates an enforcement action at a workplace where a workplace claim has been filed or as a result of information provided in retaliation for a workplace claim, DHS shall make sure that any individuals necessary for the investigation of the claim are not removed until DHS (a) notifies the appropriate agency with jurisdiction over the violation; and (b) provides the agency the opportunity to interview the individuals.
  - **Protections for victims of labor violations.** DHS and the U.S. Department of Labor shall jointly issue regulations that establish a process by which an individual

<sup>3</sup> More information about the original POWER Act is available at [www.nilc.org/power-act-2011-06-08.html](http://www.nilc.org/power-act-2011-06-08.html).

who has filed a 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:

- 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.
- **Limits removal proceedings.** Expands 8 USC section 1367 to preclude removal proceedings that result solely from information provided to DHS in retaliation for a worker exercising his or her workplace rights by filing a workplace claim.
- **Creates a “Labor Law Enforcement Fund.”**
- Creates an additional employer penalty of up to \$5,000 per unauthorized worker, which would be deposited into a newly created Labor Law Enforcement Fund available to the secretary of the U.S. Department of Labor to ensure compliance with workplace laws.
- **Increases penalties for employer abuses of migrant and seasonal workers.**
- Increases both fines and prison sentences for an employer who violates Title 29 the Migrant and Seasonal Agricultural Protection Chapter and directs the U.S. Sentencing Commission to increase penalties for individuals convicted of offenses under section 274A of the INA (for unlawful employment of aliens); section 1851 of the Migrant and Seasonal Agricultural Worker Protection Act; and section 216 of the Fair Labor Standards Act.