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United States: The Brave New World Of Employment Verification Under The "Grand Compromise"

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At the core of the "Grand Compromise" bi-partisan comprehensive immigration reform bill in the U.S. Senate is a paradigm shift in assigning responsibility for assuring that all U.S. employees are authorized workers. Under current law, responsibility rests primarily with the government to make immigration determinations and provide work authorization documents. The employer needs only to complete a Form I-9 and attest that the employee presented facially valid documents. Otherwise, unless the employer learns that a given employee is an unauthorized worker, the employer is generally free from immigration compliance liability.

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Under the Senate bill, the employer becomes the front-line defense against undocumented workers, through re-engineered I-9 processes, mandatory electronic verification of ALL employees, enhanced penalties and sub-contractor compliance management.

We emphasize that it is still early in the legislative process and far too soon to predict passage of this or a similar bill. However, we understand that there is broad and deep support for the workplace enforcement activity. There is a meaningful chance, then, that the principal features of the bill, summarized below, will become law, perhaps as early as October 1, 2008, or earlier for some or all of the features, depending upon the shape of the final legislation.

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Updated I-9 Responsibilities

The bill continues current requirements that all new employees complete a document, likely an I-9 or updated successor form. Completion can be either by paper or electronically, but the mandatory personal inspection of the employee and his/her original documents continue. The employer will be required to maintain copies of the identity and work authorization documents, and both employer and employee will be required to sign across the face of the copies. In addition, the bill would allow employers to accept drivers' licenses as List B identity documents only if the license is REAL ID Act compliant (meaning encoded with biometric information) OR if the employee presents a certified birth certificate or other proof of U.S. citizenship as a List C document. In other words, a social security card would not suffice as work authorization except in circumstances where the drivers' license met REAL ID requirements. After 2013, only REAL ID Act drivers' licenses will be accepted.

Mandatory Electronic Verification of all new Employee Work Authorization Documents

Effective 18 months after enactment, and sooner for certain companies or industries at the discretion of the Secretary of the DHS, all employers will be required to run the Social Security numbers and/or Alien numbers of new employees through the DHS database that has been established under the Basic Pilot program. The bill contemplates that all employees will need a Social Security number by the first day of work. In the face of this, the bill says that the Electronic Employment Verification

social security number by the first day of work. In the fine print, the bill says that the Electronic Employment Verification System (EEVS) is an "immigration benefit" that will allow the DHS to set charges to be assessed to employers who use the system.

Mandatory Electronic Verification of all Existing U.S. Workers

This is one of the most controversial aspects of the bill, and an attempt to set a cure for the lax enforcement and plethora of counterfeit documents that have allowed millions of unauthorized workers to gain employment under the current work authorization program. Within three years of passage, all U.S. employers would need to run social security and alien numbers of all their employees (except those hired under the new scheme discussed above) and, in the event of unsolved mismatches, terminate affected employees. The bill offers no guidance on how the verification of existing employees would be accomplished. Rather, it directs the DHS to develop the standards by regulation.

Optional Requirements of Contractor Enforcement

The bill makes two significant changes in the responsibilities of contractors of labor. First, it establishes that if a contractor knowingly uses unauthorized labor on its premises or in its operations, whether by direct contract or through a sub-contractor, the contractor will be liable as though it directly employed the labor. In addition, the bill gives discretion for the DHS to impose mandatory contract terms dealing with immigration compliance in all contracts for labor.

New Fines for Hiring Unauthorized Workers and Increased Fines for I-9 Paperwork Violations

The bill changes the definition of "knowing employment" of unauthorized labor to a standard of "reckless disregard", making it easier for the government to prove violations. Fines are increased to \$5000-\$75,000 for hiring unauthorized workers and are set at \$1000-\$15,000 per violation for paperwork violations of the I-9 or verification processes. In addition, repeat offenders who are government contractors would face disqualification or debarment. There are criminal penalties of up to six months' imprisonment for employers who engage in a pattern and practice of violations.

Preemption

The bill would preempt state and local laws that impose civil or criminal sanctions (except through licensing and "similar laws"). Note, however, that the preemption language is virtually identical to that in current federal law, which has not deterred state and local government across the country from adopting their own immigration enforcement measures.

Miscellaneous

The bill requires that the Social Security Administration share its mismatch data with the DHS and contemplates adoption of new regulations that outline an employer's responsibility in response to mismatch notices. Depending upon the effective date of this provision, this change would dramatically change the worksite enforcement outlook for employers who receive a high percentage of mismatch notices, as that information currently cannot be shared across government agencies, except where there is existing probable cause of criminal activity.

The bill also imposes new fines on employers who report earnings on mismatched numbers.

We at Littler Global will follow legislative development closely and will provide updates of material developments as the bill works its way through Congress.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Specific Questions relating to this article should be addressed directly to the author.



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