



Statement
On behalf of the
National Restaurant Association

ON: H.R. 1772, THE LEGAL WORKFORCE ACT

TO: U.S. HOUSE OF REPRESENTATIVES, JUDICIARY SUBCOMMITTEE ON
IMMIGRATION AND BORDER SECURITY

BY: ANGELO I. AMADOR, ESQ.
VICE PRESIDENT, LABOR & WORKFORCE POLICY

DATE: MAY 16, 2013

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By: Angelo I. Amador
On Behalf of the National Restaurant Association
House Judiciary Subcommittee on Immigration and Border Security
2141 Rayburn House Office Building
May 16, 2013

Good Morning Chairman Gowdy, Ranking Member Lofgren, and distinguished members of the Subcommittee. My name is Angelo Amador and I am the Vice President for Labor and Workforce Policy at the National Restaurant Association.

Thank you for allowing me the opportunity to testify today on behalf of the National Restaurant Association on the Legal Workforce Act, which would create a national E-Verify mandate.

Our Association is the leading business representative for the restaurant and food service industry. The industry is comprised of 998,000 restaurant and foodservice outlets employing 13.1 million people—about ten percent of the U.S. workforce. Restaurants are job creators and the nation’s second-largest private-sector employer. Despite its size, small businesses dominate the industry; even larger chains are often collections of smaller franchised businesses.

For years, the National Restaurant Association has provided input on the best ways to improve the E-Verify program. After reviewing H.R. 1772, the “Legal Workforce Act,” we were pleased to see that our concerns are being taken seriously, while so many other attempts to move forward without careful consideration of the impact of such a mandate on employers could have devastating effects.

As you may know, many of our members and their suppliers have been early adopters of the voluntary E-Verify program—some owners have been requiring the use of E-Verify by their operations as early as 2006. The National Restaurant Association is also a user of E-Verify. Our members that use the program, and the head of Human Resources at the National Restaurant Association, have found E-Verify to be both cost effective and fast in helping guarantee a legally authorized workforce.

For businesses across the country, particularly small businesses, it is imperative that any mandated E-Verify program be successful, efficient, and cost-effective within their own administrative structure. A federal E-Verify mandate would have an impact on the day-to-day activities, obligations, responsibilities, and exposure to liability of all restaurants, regardless of size.

To be clear, the Association believes that designing an employment authorization verification system is indeed, unequivocally, a federal role. Actions by 50 different states and numerous local governments in passing employment verification laws create an untenable system for employers and their prospective employees.

I would like to outline some improvements that the federal E-Verify program should have to gain broad support within our industry and compare those potential improvements to the version of the Legal Workforce Act we were able to review. Before addressing the specifics, I would like to highlight a recently released National Restaurant Association/ImmigrationWorks USA survey on E-Verify with first-hand accounts on why employers use or do not use the program. Respondents included restaurant owners and operators, non-restaurant foodservice operators and supply chain professionals.

E-VERIFY SURVEY RESULTS

The survey yielded over 789 responses from a wide range of members in our industry. It is attached to my testimony, so it can become part of the record. Among all restaurant owners and operators, 23 percent told surveyors they currently use E-Verify to check the immigration status of new hires. Among corporate-owned restaurants, a full 49 percent are enrolled in the system.

Of those using the program, it is significant that eighty percent of restaurant operators who use E-Verify would recommend it to a colleague. Two-thirds of the responding restaurant operators who use E-Verify enrolled voluntarily. Twenty-seven percent enrolled because it is mandated in states where they do business and 2 percent use E-Verify because they do business with the federal government.

Of those not using the program, sixty-two percent of the restaurant operators who are not using E-Verify said they did not enroll because they are small companies with no Human Resources professionals. This is why we are calling on changes as part of a broad national mandate that simplifies the current two-step E-Verify process and the need for internet access and a computer.

Finally, the vast majority of restaurant operators that use E-Verify said the system is accurate. Seventy-nine percent of restaurant operators said the E-Verify system has been 100 percent accurate, as far as they know. Across each of the demographic categories, a solid majority of restaurant operators said the E-Verify system has been 100 percent accurate, to the best of their knowledge, but we understand there will be errors and we need ways to deal with them.

A WORD OF CAUTION

Back in 1986, businesses supported the first employer-run employment authorization verification system, which is what we have now. Some argue that the current “I-9” mandatory employment verification program was supported by business because employers wanted to have a tool to find out who was an unauthorized worker and use that information to force those workers to work longer hours and in poorer conditions. This is nonsensical given that most undocumented workers were legalized in the same legislation that created the current mandatory employment verification system.

I have seen similar arguments raised against our continued support for an improved federally-mandated E-Verify system. The truth is that employers are willing to do their part to address this controversial issue, as long as the system is fair and workable.

THERE SHOULD BE ONE LAW OF THE LAND

The current federal employment verification system is clearly in need of an overhaul. Out of frustration, states and localities have responded to the lack of action at the federal level with a patchwork of employment verification laws.

This new patchwork of immigration enforcement laws expose employers, who must deal with a broken legal structure, to unfair liability and the burden of numerous state and local laws. A new federal E-Verify mandate must address this issue specifically, so employers will know with certainty what their responsibilities are under employment verification laws regardless of where they are located.

Under the Legal Workforce Act, as we understand it, states and localities are preempted from legislating different requirements or imposing additional penalties, but they may enforce the federal law and revoke a business license for failure to participate in the program, as required under federal law. While we might prefer blanket preemption, we understand the need to reach a balance.

SPECIAL CONSIDERATIONS FOR SMALL BUSINESSES MUST BE MADE

Smaller employers do not have universal access to high speed internet connections, are less likely to have Human Resources or Legal staff, and, in our industry, management does not work at a desk or behind a computer all day. In fact, even some well-known restaurant brands are composed of a collection of small franchisees that may or may not even have a copier at the restaurant location.

Thus, we are glad to see that the Legal Workforce Act calls for the creation of a toll-free telephonic option for doing E-Verify inquiries and allows, but does not mandate, the copying of additional documents. Unlike the current E-Verify, the mandate found in the Legal Workforce Act would permit a small restaurant to start using the program without the need to buy any new equipment or signing up for high-speed internet access.

ENFORCEMENT PROVISIONS MUST BE FAIR

Full and fair enforcement of an improved E-Verify system should protect employers acting in good faith. Businesses are overregulated and piling on fines and other penalties for even small paperwork errors is not the answer. The Legal Workforce Act states that an employer cannot be held liable for good-faith reliance on information provided through the E-Verify system.

Under the Legal Workforce Act, as we understand it, employers would also be given at least 30 days to rectify errors. While the language in the legislation in this area may need

some further clarification, it is certainly a step in the right direction. Any opportunity to rectify errors would protect employers that are doing their very best to comply in good faith with the myriad of federal regulations from unnecessary litigation.

NO EXEMPTIONS, BUT A REASONABLE ROLL-OUT OF E-VERIFY IS ENCOURAGED

To maintain an equal playing field, the Association believes an E-Verify mandate should be applicable to all employers in our industry. However, we understand that small businesses may need more time to adapt. Thus, we are encouraged by the Legal Workforce Act tiered approach for rolling out E-Verify, starting with employers having more than 10,000 employees.

We continue to welcome the provision that allows the Secretary of Homeland Security the ability to extend each deadline by six months. However, even more important, the program needs adequate resources, both with regard to funding and staffing, if it is to increase from less than 300,000 enrolled employers to over six million in two years. The Association's current users have integrated E-Verify into their hiring practices and disruption because the system is overwhelmed would interrupt their operations in a critical manner.

VERIFICATION OF POTENTIAL HIRES

There is a good tool that employers should be allowed to use that is unavailable under the current E-Verify framework. Currently, employers are not allowed to pre-verify, prior to hire. In other words, while an employer can check references, conduct drug tests, and background checks, before an individual is officially hired, the work authorization does not take place until the employee is officially on the books.

Employers should be given authority to check work authorization status as early as possible and allow the employee to start working with the government to fix any discrepancies before they show up for their first day of work. Thus, we support the provision that allows verification when an offer of employment is extended and making that offer conditioned on final verification of the identity and employment eligibility of the employee.

A few years ago, a restaurant owner from Arizona testified that in over fourteen percent (14%) of their queries, the initial response was something other than "employment authorized." When the initial response from E-Verify is something other than "employment authorized," and the employee has already been hired as mandated in current law, there are additional costs to the employer. Federal law requires that the employer continue to treat the employee as fully authorized to work during the time that the tentative nonconfirmation is being contested.

This means the employer cannot suspend the employee or even limit the hours or the training for the employee. Someone must monitor any unresolved E-Verify queries on a daily basis to make sure that employee responses are being made in a timely manner.

Under current regulations, if an employee contests the tentative nonconfirmation, but does not return with a referral letter, the employer must re-check that employee's work authorization after the tenth federal work day from the date that the referral letter was issued.

Some restaurants are fortunate to have the staff to deal with these issues and allow for redundancy and backup. For smaller operations that do not have that luxury, the burdens are greater.

VOLUNTARY REVERIFICATION SHOULD BE ALLOWED

The Association supports the inclusion of a strictly voluntary reverification provision, but objects to mandatory reverification provisions of the entire workforce. While some small size restaurants may not mind reverifying their workforce, all large-size operations—even those currently using E-Verify—that have contacted the Association list a mandatory reverification requirement as their number one concern.

For the industry's workforce, a restaurant is an employer of choice because they can take advantage of the flexible scheduling we offer, work only during school breaks or move between employers often. The nature of the restaurant business is such that it produces a great amount of movement of the workforce below management level, meaning that a mandatory requirement, in addition to being expensive, would also be redundant.

One of the Association's foremost concerns is to ensure that any new E-Verify mandate does not become too costly or burdensome for our members. Existing employees have already been verified under the applicable legal procedures in place when they were hired.

For those same reasons, the Association continues to oppose not allowing verification of only some workers for good cause. Triggering a reverification requirement for the entire workforce because one employee is reverified, as it currently appears in H.R. 1772, would discourage any reverification because of the cost and time required to conduct such an undertaking. Furthermore, it creates potential liability for a well-meaning employer trying to make sure that his workforce is legally authorized to work, if he reverifies workers with good reason, but still fails to reverify "all individuals so employed."

ROLE OF BIOMETRIC DOCUMENTS IN E-VERIFY

One of the main flaws in the current E-Verify system is the uncomplicated manner through which an undocumented alien can fool the system through the use of someone else's documents. The issues of document fraud and identity theft are exacerbated

because of the lack of reliable and secure documents acceptable under the current E-Verify system.

Documents should be re-tooled and limited so as to provide employers with a clear and functional way to verify that they are accurate and relate to the prospective employee. There are two ways by which this can be done, either by issuing a new tamper and counterfeit resistant work authorization card or by limiting the number of acceptable work authorization documents to, for example, social security cards, driver's licenses, passports, and alien registration cards (green cards).

H.R. 1772 follows the latter approach with a voluntary biometric program available to employers. Also, with fewer acceptable work authorization documents, as is the case with H.R. 1772, the issue of identity theft is also readily addressed.

AN E-VERIFY CHECK NEEDS TO HAVE AN END DATE

The employer needs to be able to affirmatively rely on the responses to inquiries into the E-Verify system. Either a response informs the employer that the employee is authorized and can be hired or retained, or that the employee cannot be hired or must be discharged. Employers would like to have the tools to determine in real time, or near real time, the legal status of a prospective employee or applicant to work.

The Association appreciates that, as we understand it, ten days, or twenty under special circumstances, after the initial inquiry there will be a final response for those that do not come back as work authorized during the initial inquiry. This will help avoid the costs and disruption that stems from employers having to employ, train, and pay an applicant prior to receiving final confirmation regarding the applicant's legal status. Employers cannot wait months for a final determination of whether they need to terminate an employee.

LIABILITY STANDARDS AND PENALTIES SHOULD BE PROPORTIONATE

The Association agrees that employers who knowingly employ unauthorized aliens ought to be prosecuted under the law. The current "knowing" legal standard, also found in the Legal Workforce Act, for liability is fair and objective and gives employers some degree of certainty regarding their responsibilities under the law and should, therefore, be maintained. Lowering this test to a subjective standard would open the process to different judicial interpretations as to what an employer is expected to do. Presumptions of guilt without proof of intent are unwarranted.

Penalties should not be inflexible, and we would urge you to incorporate statutory language that allows enforcement agencies to mitigate penalties based on size of employer and good faith efforts to comply, rather than tying them to a specific, non-negotiable, dollar amount.

THE GOVERNMENT SHOULD ALSO BE HELD ACCOUNTABLE FOR E-VERIFY

The Association objects to the expansion of antidiscrimination provisions beyond what is found in current law. Employers should not be put in a “catch 22” position in which attempting to abide by one law would lead to liability under another one. However, we understand that those wrongfully harmed by the system should have some mechanism to seek relief.

Thus, we support the Legal Workforce Act provision to allow those wrongfully harmed to seek relief under the Federal Torts Claims Act (FTCA). The government must be held accountable for the proper administration of E-Verify. FTCA provides a fair judicial review process that would allow workers to seek relief.

AN E-VERIFY MANDATE SHOULD NOT MEAN ADDITIONAL COSTS FOR EMPLOYERS

The federal government will need adequate funding to maintain and implement an expansion of E-Verify. The cost should not be passed on to the employer with fees for inquiries or through other mechanisms. Additionally, there should not be a mandatory document retention requirement, other than the form where employers record the authorization code for the employees they hire. Keeping copies of official documents in someone’s desk drawer increases the likelihood of identity theft.

The Association supports the Legal Workforce Act provision that keeps the requirements as in current law, where an employer does not need to keep copies of driver licenses, social security cards, birth certificates, or any other document shown to prove work authorization. The fact that the information in these documents will now be run through the E-Verify program makes the need for making copies of these documents unnecessary.

AN EXPANSION OF E-VERIFY SHOULD NOT SERVE AS A BACK DOOR TO EXPAND EMPLOYMENT LAWS

The new system needs to be implemented with full acknowledgment that employers already have to comply with a variety of employment laws. Thus, verifying employment authorization, not expansion of employment protections, should be the sole emphasis of an E-Verify mandate.

In this regard, it should be emphasized that there are already existing laws that govern wage requirements, pensions, health benefits, the interactions between employers and unions, safety and health requirements, hiring and firing practices, and discrimination statutes.

The Code of Federal Regulations relating to employment laws alone covers over 5,000 pages of fine print. And, of course, formal regulations, often unintelligible to the small business employer, are just the tip of the iceberg. Thousands of court cases provide an

interpretive overlay to the statutory and regulatory law, and complex treatises provide their own nuances.

The Association is encouraged by the Legal Workforce Act's emphasis on keeping it simple—a workable, national E-Verify system, nothing more, nothing less.

PARTICIPATION LOOPHOLES IN THE SYSTEM SHOULD BE CLOSED

Part of a government effort to roll out E-Verify to all employers should be closing loopholes for unauthorized workers to get into the employment system. The Association is glad that the Legal Workforce Act, as we understand it, requires state workforce agencies and labor union hiring halls to clear through E-Verify all workers whom they refer to employers.

For employers who receive workers through any of these venues, finding out that the worker is unauthorized after they are on the jobsite creates additional problems in addition to having to go find another worker. For example, with regard to hiring halls, it may also create problems with the labor union, depending on contract requirements. If any of these venues are going to refer workers to employers, they should ensure that those workers are work authorized before they do so.

LEGALIZATION AND LEGAL IMMIGRATION WILL STILL BE NEEDED

Finally, while this hearing is on employment verification, we must not forget that other pieces of our immigration system are also broken. We are committed to working with you on the difficult task of fixing our nation's broken immigration laws over the long haul, which needs to include legalization of a significant portion of the undocumented workforce.

We must also not forget that foreign born workers are an essential part of the restaurant industry's strength—complementing, not substituting, our American workforce. In general, historical immigration policies have brought vigor to the U.S. economy, as immigration creates growth and prosperity for the country as a whole.

Historically, teenagers and young adults made up the bulk of the restaurant industry workforce, as nearly half of all restaurant industry employees were under the age of 25. Over the last several decades, this key labor pool steadily declined as a proportion of the total labor force. According to data from the Bureau of Labor Statistics, the 16- to 24-year-old age group represented 24 percent of the total U.S. labor force in 1978, its highest level on record. However, by 2008, 16-to-24-year-olds represented only 14 percent of the labor force, and is projected to shrink to only 13 percent by 2018.

The predictions in demographic shifts tell us that we will also need to create a legal channel for employers in the service sectors, such as restaurants, to bring other than seasonal workers in a legal and orderly fashion. History tells us that when our economy picks up again, we will need those workers.

IN SUMMARY, THE LEGAL WORKFORCE ACT SHOWS THAT THERE IS LEADERSHIP IN WASHINGTON

It would have been easy to ignore the real concerns of the business community with a national E-Verify mandate and simply pass a law requiring its use. It is harder to pass a responsible E-Verify mandate that accommodates the different needs of the close to eight million employers in the U.S., which are extremely different in both size and levels of sophistication.

In the National Restaurant Association's opinion, notwithstanding the few changes and clarifications needed, the Legal Workforce Act reaches the right balance—a broad federal E-Verify mandate that is both fast and workable for businesses of every size under practical real world working conditions. Without the assurances and improvements to the E-Verify system found in the Legal Workforce Act, it should not be imposed on businesses.

I want to thank you for seeking our input and urge you to continue to engage the business community to create a workable E-Verify program for all employers, regardless of location, that accommodates their different needs. The National Restaurant Association stands ready to continue assisting in the process of tweaking and, then, moving the Legal Workforce Act forward.

Thank you again for this opportunity to share the views of the Association, and I look forward to your questions.