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May 16, 2013

Hearing on "H.R. 1772, the 'Legal Workforce Act,'"

Before the House Judiciary Committee,

Subcommittee on Borders and Immigration

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Statement of Julie Myers Wood

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Subcommittee Chairman Gowdy, Ranking Member Lofgren, Members of the Subcommittee, I appreciate the opportunity to testify before you about H.R. 1772, the "Legal Workforce Act."

My name is Julie Myers Wood, and I am President of Guidepost Solutions, an investigative and compliance firm. In that position, I work with companies on their internal compliance programs, create web-based solutions to assist businesses with export and immigration compliance challenges, and consult with companies that work with the government. I also serve as an Advisory Committee member of the American Bar Association's Commission on Immigration and as a Member of the Constitution Project's Committee on Immigration. I am testifying today solely in my personal capacity and not as a representative of any group or organization.

Before joining the private sector, I most recently served as the Assistant Secretary of Immigration and Customs Enforcement (ICE) for nearly three years. I also served in a variety of government positions, including Assistant Secretary for Export Enforcement at the Department of Commerce, Chief of Staff for the Criminal Division at the Department

of Justice and Deputy Assistant Secretary (Enforcement – Money Laundering and Financial Crimes) at the Department of Treasury.

I. H.R. 1772 Must Be Considered In Context of Challenges to Stopping Illegal Employment.

When considering H.R. 1772, it is important to remember the significant challenges we have in stopping unlawful employment. The government has not succeeded in effectively reducing the magnet. When I started at ICE in 2006, there was virtually no workplace enforcement. Although it was common knowledge that jobs drove individuals to enter the United States illegally, the agency had not focused on how to prevent this behavior. Fines, if any, were assessed under an outdated structure, were subject to substantial legal wrangling and ended up being nothing more than a slap on the wrist to companies that considered them the cost of doing business. The focus of the old INS was simply not on criminal violations. For example, in 2002, the INS's last full year of existence, it brought only 25 criminal cases in worksite investigations and only collected $484,585 through the administrative fine process.

At that time, few employers were on the Basic Pilot (BP) (predecessor to the E-Verify program). For employers who were on the program, document fraud remained rampant, and limited BP reporting procedures caused some inefficiencies in compliance efforts.

In an attempt to focus anew on stopping illegal employment, in 2006, ICE developed a focus on egregious employers. The agency focused on criminal investigations, revising the civil fine structure, and also requesting funding for auditors to

begin civil Form I-9 audits. For several years, we conducted criminal investigations where we obtained civil forfeitures in excess of $30 million each year and prison terms for some egregious employers. While these investigations were complex and time intensive, this approach resulted in renewed awareness and cooperation from some high-risk industries. We recognized this approach was also considered controversial by some as it included large-scale apprehensions and removals of the unauthorized workers, who in many cases were using the names and social security numbers of authorized workers and U.S. citizens. The arrest and deportation of unauthorized workers consumed considerable ICE resources in worksite enforcement cases. Despite this ramped up enforcement, many companies in lower-risk industries did not think it necessary to focus on I-9 and immigration compliance with this targeted approach.

During this period, United States Citizenship and Immigration (USCIS) took many steps to improve the E-Verify process, including requiring participation for federal contractors, and introducing photo match tools for a growing number of Department of Homeland Security and U.S. government issued documents. Those improvements encouraged significant numbers of employers to join the program.

The current Administration has focused primarily on civil immigration audits, adopting an IRS-type approach. Under this approach, more companies have been subject to desktop audits, and the general awareness of immigration compliance has increased significantly. This approach is also imperfect, however. In most cases, ICE HSI agents are not involved in a review of compliance and there is no on-site review. Often tell-tale signs of abuse are overlooked as they could not possibly be evident in a paperwork-only review.

Furthermore, less than .01% of employers have been subject to fines in any given year. The average cost of the penalty was still miniscule - under $25,000 per company in fiscal year 2012. Total civil fines for last fiscal year were only $12 million. Employers are well aware of the statistics.

On occasion, the focus on civil audits have even resulted in perverse consequences – some employers with legal, fully authorized workers, were fined, while others that had a high percentage of unauthorized workers didn't receive a monetary fine, let alone a warning notice. The government essentially ignored the unauthorized workers, allowing them to stay and work in the United States. In the context of these Form I-9 civil audits, ICE issues a Notice of Suspect documents notifying the employer of a worker without appropriate paperwork. The employee is terminated and then simply walks down the street to a new unsuspecting employer. Generally speaking, no action is taken where the I-9 Forms are technically complete, even where it is clear that the employer knew or should have known of the employees lack of status in the United States. For this reason, deterrent effects of the civil audits, if any, seem to be wearing off. While some employers take the civil fine system seriously, others have begun to write the cost of immigration compliance off as another rounding error.

I have seen the effects of the civil fine model first-hand since leaving ICE and consulting with a variety of large and small companies in many industries. Many of these companies have struggled with employment verification. And, although these companies want to do the right thing, sometimes they find the current processes are often counter-intuitive and overwhelming.

On the positive side, more and more employers are participating in E-Verify, and the Administration continues to encourage participation as part of a compliance program. Employers that participate in E-Verify often find that it is a helpful addition to their overall process, especially the photo tool, but they are still frustrated by ever-increasing requirements and focus on "technical" aspects of the I-9. In testimony today, I will bring their lessons to bear in terms of reviewing the practicality of this Bill and how it would work.

II. H.R. 1772 Addresses Several Core Problems With Current Processes.

H.R. 1772 addresses several core problems with current processes. First, the Bill levels the playing field by requiring mandatory employment verification. Second, it reduces the burden on employers by combining the duplicative Form I-9 and E-Verify requirements into a single process. With a strong pre-emption provision, the Bill also addresses the complexity of multiple state requirements. The Bill provides a good-faith defense for employers who appropriately follow the process. Finally, the Bill provides employers with the authorization to complete a verification review of current employees in a consistent manner.

A. H.R. 1772 Addresses The Need for a Mandatory Verification System Using Existing Tools.

A key component of H.R. 1772 is the requirement of a mandatory verification system built around the government's current system, E-Verify. This makes sense. E-Verify has made significant progress over the past several years in terms of new participants as well as technological improvements. It has proven to be a critically

important tool for employers to use, free of charge, in an effort to determine an individual's employment eligibility. The metrics on E-Verify use, accuracy, and speed are strong and improving all the time.

Rather than suggesting a whole new system as some suggest or inserting burdensome new processes into existing E-Verify protocols, it makes sense to build on the system already in place. A good starting point is making the system mandatory. Another suggestion would be to build tools to assist employers with the compliance requirements within the current system.

Although now a sizeable number of industry leaders are on E-Verify, in many industries E-Verify participation is still the exception rather than the rule. It is critical that the system be made mandatory to level the playing field and increase compliance. Requiring E-Verify on a mandatory basis will also help address the disconnect some employers currently feel. What I often hear from employers, particularly in high-risk industries, is that they go on E-Verify but their competitors do not, and that their competitors continue to engage in high-risk hiring practices, undermining the market.

B. H.R. 1772 Appropriately Streamlines and Simplifies the Verification Process.

Currently, employers who are utilizing E-Verify must also separately complete the Form I-9. This form requires an employer and employee to complete two pages of biographic information – including much of the information later provided to E-Verify. The Form I-9 is not intuitive. It has an employer reference handbook that is 65 pages long.

After completing the Form I-9, participating employers then go through the E-Verify process where they have to provide much of the same information again for purposes of the electronic employment eligibility process. For employers that are not using an electronic I-9 or a hybrid system, they are required to manually type in all the information that is then sent to E-Verify. This type of duplication makes no sense.

For employers, the duplication also is problematic because employers can be fined or assessed penalties based on errors on their I-9s even though the employees were found to be "Employment Authorized" through the E-Verify system. Examples of such errors include a failure to check a box indicating the employee's status even where appropriate documents are recorded or record the issuing authority of a Social Security card. Even when employers are allowed to correct those paperwork errors, they are still spending time and often significant money to make a piece of paper "neat" and "technically accurate" for the regulators. Such a focus on the technical side of the I-9 defeats the underlying purpose – ensuring that the employees are authorized to work. H.R. 1772 addresses this issue by combining the I-9 data elements with the E-Verify data elements into one single process for employers.

C. H.R. 1772's Pre-Emption Provision Provides Employers With a Federal, Consistent Requirement.

One of the additional challenges faced by employers is navigating the federal and state requirements relating to employment eligibility. In an attempt to step-up a perceived lack of federal enforcement of employment laws, many states and even local governments have developed their own laws mandating E-Verify. Although the purpose

behind these laws makes sense, it has been difficult for some larger employers with national footprints to manage all the requirements – which are at times inconsistent in the documentation required or other issues. Tracking of such requirements is unmanageable. Section 6 of H.R. 1772 addresses this issue by expressly preempting state laws mandating E-Verify participation.

D. H.R. 1772 Permits Employers to Use E-Verify on Existing Employees

One additional challenge employers often have is ensuring that their current workforce is fully authorized. Under current law, employers in most situations are prohibited from utilizing E-Verify on current employees. Although there are methods for employers to make determinations on current employees, these methods are often more burdensome and costly than E-Verify. And, if not managed appropriately, these methods can lead to unintentional discriminatory actions. To address this, Section 2 of H.R. 1772 allows employers to utilize E-Verify on existing employees. It is important to ensure that this is done in a non-discriminatory way, and the Bill requires that voluntary verifications of existing employees be done consistently to avoid problems.

E. H.R. 1772 Gives Employers A Good Faith Defense.

One of the most pressing issues for employers is a concern that they will be a subject of government investigation or, worse, penalized, even when acting in good faith. Section 5 of H.R. 1772 appropriately provides a good faith defense for employers using E-Verify in good faith. Although this would not protect employers who willfully turn a blind eye to identity theft or other patterns relating to unauthorized workers, it ensures

that an inadvertent error with the mandated electronic system will not result in harm to the company.

III. H.R. 1772 Recognizes a Significant Weakness in E-Verify and Requires E-Verify to Improve Identity Theft Capabilities

One of the challenges employers face is that the E-Verify system does not have a foolproof way to recognize identity theft. The system's Achilles heel remains its reliance on the accuracy of, and limitations on, information that is input into the system. If an employer is unable to confirm that the identity documents presented belong to the individual who presents them, what value is there to the "Employment Authorized" message from E-Verify? It is merely confirming the authorization of the data entered.

Even though USCIS has made considerable progress (and despite USCIS's ongoing efforts in this area), photo matching is still not available on the primary documents presented by employees: driver's licenses and state identification cards. And, absent an identity tool tied to E-Verify, employers have been left to serve as document detectives. The need to connect identity is not limited to work authorization concerns. Indeed, the 9/11 Commission came to the same conclusion that employers have known for a long time: Identity documents are only as good as the information they contain. Without an ability to match an individual to the identity on their document, drivers' licenses and state-issued identity cards remain vulnerable to fraudulent use.

RealID was poised to correct this loophole and provide conclusive matches to drivers' licenses and their holders. In fact, despite the retrenchment from RealID in this Administration, many states have pressed ahead and are now meeting established

benchmarks for implementation. However, drivers' licenses in many states are still unsecure.

The good news is that there are ways to improve the current system. H.R. 1772 recognizes the potential for identity verification through the E-Verify system by proposing an authentication pilot in Section 12. Many models currently exist for such a process. The private sector has developed mechanisms to address identity theft, while protecting the rights of employees and ensuring appropriate treatment of asylees and refugees. One such system is a software program I developed with several colleagues is called SecureID (www.icssecureid.com). This system leverages public sector data and other information to provide real-time algorithms and consistent screening for employees, in conjunction with the Form I-9 and E-Verify process. The SecureID system avoids the problem of making rank and file HR managers identity investigators, who in their well-intentioned efforts to promote a legal workforce only ask certain new hires questions based on where their documents were issued or because their English is limited or not spoken.

The SecureID tool has proven to be extremely effective for employers who have faced significant identity fraud challenges with non "photo matched" documents, and has offered managers a consistent process to address individuals that change their status while employed based on adjustments (such as the recent DACA announcement). Employers have also used the system to address Third-Party notifications relating to allegations that information submitted by a certain employee in fact belongs to another person. Rather than starting from scratch, E-Verify can be augmented with SecureID or other identity verification products.

In my view, in attempting to effectively address the magnet of unauthorized employment, employers have been unfairly saddled with a significant burden related to interior enforcement of our immigration laws. H.R. 1772 takes some positive steps to address some of these burdens and provide additional tools to employers. We are appalled to learn when our law enforcement has inadequate resources to properly perform their duties. Similarly, we should be equally appalled that the government has given a tremendous responsibility to America's businesses, large and small, and yet to date, have only armed them with bureaucratic procedures and limited tools to perform their task.

I appreciate the opportunity to testify before you, and would welcome the opportunity to answer any questions you may have.

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