CompeteAmerica

The Alliance for a Competitive Workforce

Sept. 18, 2019

SUMMARY OF SEN.GRASSLEY PROVISIONS IN AMENDMENT TO HR 1044 FILED BY SEN.LEE

(Senate Amendment on H-1B High-Skilled Workers to the Senate's Fairness for High-Skilled Immigrants Act of 2019, amending the version passed by the House as HR 1044)

Provision (section number of HR 1044 as added by Grassley Amendment)	Issue	As compared to Durbin-Grassley bill (using section numbers in S. 180 (115th) as reference)
Internet Posting Requirement (IPR) The IPR, in Section 3, will create a publicly available, publicly searchable database of jobs that are underlying Labor Condition Applications (LCA) being filed at DOL for any LCA used in support of an initial approval for H-1B classification. The IPR will not apply with regard to an LCA filed to support an H-1B petition to amend status based on a change in location or job or to change employers or positions through portability, and is not intended to apply to a petition to extend stay with the same employer. An employer seeking to file a LCA for an individual not already approved for H-1B status must first provide 30-day notice of key elements of the underlying job, similar to - but more robust than - the notice to employees already provided, while creating a single portal for U.S. workers and the public to view.	The Internet Posting Requirement can be seen as a means to modernize the concept in IMMACT90 (the law that initially created the Labor Condition Application) to use public access as the principal means of ensuring employer compliance. While the IPR is *not* a pre-recruitment mandate, it does explicitly provide transparency, the opportunity for U.S. workers to know what types of jobs are being offered to H-1B workers, and the means for U.S. workers to contact those employers to apply for a position.	This is from 101(b) and 121 of Durbin-Grassley. In comparison to 101(b), the Grassley Amendment to Amendment makes an important substantive change by limiting the new Internet Posting Requirement as applicable only to Labor Condition Applications for initial H-1B approvals. The text from 101(b) is also lightly edited to ensure consistency with longstanding DOL policy, regulations, and terms, and to suggest that any process information shared by employers about job applications relates to similar jobs (move from "the" position to "a" position). As compared to 121: notice and comment rulemaking to establish and explain the IPR to the public was a "may" but is a shall in the Amendment; the timeline was 90 days for website followed by 30 days for employers to start the mandated compliance with IPR but in Amendment changed to 180 days followed by 90-day advance notice before IPR compliance.
Basis of Prevailing Wage The wage determination methodology on prevailing wages must be provided by employers filing a Labor Condition Application (LCA), under Section 4(a).	Sharing wage methodology information is a matter of transparency and a means to avoid gamesmanship by employers. As this information is currently required on the Labor Condition Application form itself, adding this to the statute codifies this practice as a permanent feature.	This is from 101(c) of Durbin-Grassley, lightly edited to reflect that other parts of 101 are not included in the Amendment.
W-2 Reporting to DOL Section 4(b) creates a new 212(n)(1)(I) in the Immigration and Nationality Act, which allows DOL to ask for W-2 wage and tax statements.	While the IRS cannot share tax reporting records with DOL, under the confidentiality provisions of 26 USC 6103, the employer can provide it if under investigation. Many employers provide W-2 records to DHS when filing for H-1B extensions, and this provision will now allow DOL to ask for such records.	From 102 of Durbin-Grassley. The slightly revised text is an attempt to clarify that no employer is expected to file W-2s with an LCA or automatically, instead only upon request by DOL.

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LCA Fees Fees paid at the time of Labor Condition Application (LCA) filing, would allow DOL to have funds for agency oversight, investigation and enforcement, and are required by Section 4(c).	One reason there is such limited enforcement or ability to assess LCA filings before certification is the absence of funding to ensure proper staffing and resources at DOL.	107 of Durbin-Grassley requires DOL to engage in notice and comment rulemaking to set a "reasonable application processing fee" for LCA processing. Amendment revised the fee description to payment of "an administrative fee to cover the average paperwork processing costs and other administrative costs," while retaining the requirement for public rulemaking.
Eliminating "B-1 In Lieu Of H-1B" (BILOH) Section 4(d) bars the decades long practice of permitting B-1 business visitor admissions to the United States instead of H-1B classification in certain circumstances.	Because IMMACT90 restricted the H-1B classification by both instituting a numerical cap for the first time and requiring a Labor Condition Application as a prerequisite, the idea is that employers should not be able to circumvent these labor market protections (numerical limits and LCA) by using the B-1 category instead.	From 110 of Durbin-Grassley. Text on striking BILOH practice is adopted verbatim.
Whistleblower Protection Whistleblowers on employer violations of the Labor Condition Application process have been protected under 212(n)(2)(C)(iv) of the statute since the 1998 ACWIA legislation, but Section 5(a) replaces that section in its entirety, strengthening the protections.	The new whistleblower protections can be seen as perfecting the attempt 20 years to address whistleblower issues and to newly encourage whistleblowers to come forward.	This text is part of 112 of Durbin-Grassley. The new whistleblower text is adopted verbatim.
Information Sharing USCIS is required under Section 5(b) to share information with DOL it believes "indicates" that an H-1B employer is not complying with H-1B requirements. This same text had been added to the Immigration Innovation Act of 2018 (S.2344 in the 115th).	In the past, USCIS has been hamstrung in developing policies to share information that would help DOL to enforce the Labor Condition Application program. Requires data share in a way that provides employers entitled with notice and a hearing should DOL commence an investigation.	From 115 of Durbin-Grassley. Text on information sharing is adopted verbatim.

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LCA Processing Section 6(a) revises the review and certification standard and process. Currently Labor Condition Applications (LCAs) are just reviewed for completeness and obvious inaccuracies, and if incomplete or obviously inaccurate they are not certified. The Grassley Amendment establishes that DOL is responsible for reviewing LCAs for clear indicators of fraud or misrepresentation of material fact, but retains the requirement that LCA processing shall be completed within 7 days. If such clear indicators are identified, DOL may investigate.	Improved enforcement from the construct initially established in IMMACT90 (the legislation that created the LCA requirement) necessitates a broader review role at DOL.	This was a centerpiece of the Schumer-Grassley Amendment in 2012, agreed upon to try to move the Fairness for High-Skilled Immigrants Act that year. The text is from 103 of Durbin-Grassley. Amendment does not change the LCA processing time to 14 days as in Durbin-Grassley, and instead retains the current 7-day processing requirement. (In addition, Amendment keeps the text at the end of 212(n)(1) as undesignated matter and thus does not make the formatting changes from 103.)
Ensuring Prevailing Wages are for Area of Employment Section 6(b) codifies in statute that prevailing wages are tied to the geographical area within normal commuting distance of the actual address of employment, just as required under DOL regulation.	Even though DOL regulations make clear that the statute requires a prevailing wage determination for the actual place of employment (except in limited circumstances when DOL recognizes *per diem* travel), there is an opportunity for employers to abuse the area of employment requirement. The new provisions codify current DOL regulatory standards to ensure they are retained and enforced.	
Ensuring Actual Wages are for Similarly Employed Section 6(b) codifies in statute that actual wages relate solely to employees working for the sponsoring employer with substantially the same duties and responsibilities as the H-1B nonimmigrant, just as required under DOL regulation.	Even though DOL regulations make clear that the statute requires an actual wages determination for the employer's similarly situated professional workers, there is an opportunity for employers to abuse the similarly employed requirement. The new provisions codify current DOL regulatory standards to ensure they are retained and enforced.	

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Audits and Surveys Section 6(c) permits annual surveys and/or compliance audits of any employer that hires an H-1B employee and *mandates* annual compliance audits of H-1B dependent employers (except that if after a compliance audit an employer is not found to have committed any willful violations then DOL may not conduct another compliance audit until at least 4 more years has passed).	Improved enforcement from the construct initially established in IMMACT90 (the legislation that created the LCA requirement) and ACWIA (the 1998 legislation that created the separate provisions for H-1B dependent employers) ensures broader access by DOL of information from employers using the program.	This critical change to DOL's ability to effectively administer the Labor Condition Application (LCA) obligation was a centerpiece of the Schumer-Grassley Amendment in 2012, agreed upon to try to move the Fairness for High-Skilled Immigrants Act that year. The text introducing surveys and audits comes from 111 of Durbin-Grassley with one change in Amendment allowing that employers will only be audited once every five years if no willful violations identified.
Investigations after Complaint Under Section 6(c), DOL is explicitly granted authority to initiate an investigation of an employer based on a complaint from a former employee or other member of the public.	Ensuring DOL has authority to initiate full investigations based on public complaints.	This text is part of 111 of Durbin-Grassley. Amendment does not adopt the provision in 111 that allows a complaint to made 24 months after possibly offending employer actions (retaining the requirement that a complaint made within 12 months) and does not mandate creation of a hotlines to accept complaints. The Amendment text was featured in the Schumer-Grassley Amendment in 2012, agreed upon to try to move the Fairness for High-Skilled Immigrants Act that year.
Penalties Pursuant to Section 6(d), two penalties for LCA violations increase from $1,000 to $3,000, one from $5,000 to $15,000, with one fine increasing from $35,000 to $100,000.	The current penalty levels for employers violating LCA requirements have been in place for 20 years (since 1998 ACWIA legislation) and should be updated to be effective.	This text is part of 112 of Durbin-Grassley, which proposed increasing the penalties five-fold. Amendment increases the penalties three-fold and in Section 6(e) changes the Durbin-Grassley language of mandatory penalties to discretionary penalties (move from "shall" to "may") on the very last page of the Amendment.

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LCA Investigations Section 6(e) broadens Labor Condition Application (LCA) investigatory authority as a general matter. The new statutory text would • allow DOL investigations about an employer's general compliance with LCA requirements, without regard to willfulness (but retains the presumption that most fines or penalties can only occur if a willful failure), • allow anonymous sources to form the basis of investigation (but still requires a "credible" information standard), and • allow investigations to run their course without statutory time limit (currently limited to a 60-day window).	Improved enforcement from the construct initially established in IMMACT90 (the legislation that created the LCA requirement) suggests a broader investigatory role at DOL. The text of 212(n)(2)(G)(i) of the statute had required the Labor Secretary personally to certify reasonable cause for investigations, and that sentence is struck in addition to fundamental changes to DOL's ability to effectively monitor LCA compliance.	This three-page revision to the statute is 20% of the Amendment and was a centerpiece of the Schumer-Grassley Amendment in 2012, agreed upon to try to move the Fairness for High-Skilled Immigrants Act that year. The origin of the text is 114 of Durbin-Grassley, with one notably change – moving penalties from "shall" to "may" (the Amendment text also slightly edits the 114 language as a matter of legislative drafting).

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