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The Legal Workforce Act (H.R. 3711) – Pro-Immigration Advocates, Be Sure to Look This Gift Horse in the Mouth

Immigration advocates around the country should be heartened by the broad support for legislation to provide DACA beneficiaries with legal status in the U.S. If there was ever a case for a clean immigration bill in Congress, relief for DACA beneficiaries should merit such consideration. However, it may be a bit School House Rock-ish to envision this happening. DACA advocates in Congress will have to engage in "horse trading" with old hands, like Representative Lamar Smith, to ultimately pass a DACA bill before March 6, 2018.

The Merriam-Webster dictionary defines horse trading as the making by powerful people of a clever and often secret agreement usually for the purpose of getting an advantage over others. Representative Smith and his colleagues, Representatives Goodlatte and Calvert, have a "gift horse" bill, H.R. 3711, the Legal Workforce Act (LWA), that could be latched onto pro-immigration legislation. The LWA purports to preserve jobs for U.S. citizens and legal workers by requiring U.S. employers to check the work eligibility of all future hires through the E-Verify system, but this bill does so much more.

The most relevant provisions of this 63-page bill are summarized as follows:

E-Verify Mandates

- Following enactment of the LWA, mandates use of E-Verify for newly-hired employees over a 30-month period, as follows:
    - Employers with 10,000 or more employees in the U.S., within 6 months;
    - Employers with 500 to 9,999 employees in the U.S., within 12 months;
    - Employers with 20 to 499 employees in the U.S., within 18 months;
    - Employers with less than 20 employees in the U.S., within 24 months;
    - Agricultural labor or services employers within 30 months, regardless of size; and
    - Recruiters and referrers for remuneration and union halls, within 12 months.

- In accord with the foregoing timeframes, employers must re-verify all employees with temporary work authorization using E-Verify within 3 days of work authorization expiration.

- Federal, state and local government employers must process existing employees through E-Verify, if not previously processed, within 6 months of enactment.

- Employers with employees working at federal, state or local sites that either require a federal security clearance or are critical infrastructure sites (ex. Airports) must process existing employees through E-Verify, if not previously processed, within 6 months of enactment.

- Employers will be permitted to voluntarily re-verify existing employees through E-Verify on a non-discriminatory, well-defined basis.

Social Security Administration (SSA) Policing

- The SSA must annually notify employers who submit Social Security Numbers (SSNs) to which more than one employer reports wages and there is a pattern of "unusual" multiple use. The notice must provide information for employees to contact the SSA's Fraud Hotline if identity theft is suspected.

- If the SSA confirms that the SSN was used without the employee's knowledge, the SSA must lock the SSN for E-Verify purposes. Additionally, the SSA must contact the employers of the unauthorized users and inform them that their employees may not be authorized to work. The employer receiving this information must process the employee through E-Verify within 10 days of receipt of the notice.

- The SSA will proactively block SSNs for E-Verify use if either suspected or determined to be misused, thereby requiring individuals to establish the accuracy of the SSN to unblock the number.

State Policing of Federal Employment Eligibility Verification Laws

- Although the LWA expressly pre-empts state and local employment eligibility verification laws, it essentially deputizes state governments and offers them a bounty to enforce federal law. State governments are authorized to enforce federal employment verification laws and collect fines in the same manner as the federal government. Employers may only be subject to enforcement by one level of government for the same violations.

- State and local governments will be provided with a "hotline" to report violations. The Department of Homeland Security (DHS) will have 5-business days to respond to the reporting party as to its intent to investigate. The DHS must investigate every complaint that, on its face, has a substantial probability of validity. The DHS must also notify the reporting party of the outcome of the investigation.

- State governments may also sanction employers through revocation of business licenses and similar laws for failure to use E-Verify as required by the LWA.

Substantial Increases for Violations

- Under the LWA, employers may be penalized for: a) paperwork violations; b) knowingly hiring, recruiting or referring an individual knowing that he or she is not authorized to work in the U.S.; c) continuing to employ an individual knowing he or she is or has become unauthorized to work; and d) failing to utilize E-Verify as specified by the LWA (to include failing to verify or verifying in an untimely manner).

- Proposed penalty increases from paperwork violations would be increased from $100 to $1,000, to $1,000 to $25,000.

- Proposed penalty increases for knowingly hiring or continuing to employ violations from existing amounts are as follows:

    - First-time violators - $2,500 to $5,000 (*currently $375 to $3,200*),
    - Second-time violators - $5,000 to $10,000 (*currently $3,200 to $6,500*), and
    - Third-time violators - $10,000 to $25,000 (*currently $4,300 to $16,000*).

- Employers found to engaged in a pattern or practice of violations may be fined up to $5,000 per violation, 18 months in prison, or both (*currently $3,000 per violation, 6 months in prison, or both*).

- The LWA also provides for debarment of employers from obtaining federal contracts, grants and cooperative agreements, to include prospective debarment.

An Incomplete Proposal

The breadth and depth of proposed wholesale changes to current I-9/E-Verify laws are by themselves staggering. However, the principal shortcoming of the Legal Workforce Act is that it does nothing to provide a means to legally employ the 5% of the U.S. workforce that lacks work authorization. The proponents of the LWA may erroneously believe that there are U.S. workers lined up to replace the workers who would be impacted by this bill. Our country needs people to perform a wide variety of jobs across all industries. The U.S. presently has nearly 6.2 million job openings. It is unlikely that there are enough U.S. workers to fill these positions. How will we fill another 8 million or so positions without providing a pathway to legal status for many in the unauthorized workforce?

The only issues the LWA should be logically linked to are the broader legalization of unauthorized workers and future flows of labor. To do otherwise would permit powerful people to force a clever agreement on our country to advantage a minority of politicians at the expense of everyone else.

About the author: Anthony ("Tony") Weigel is the principal of Weigel Law Office, LLC (www.weigellawllc.com) in the Kansas City-area and concentrates his practice in the areas of business-immigration law and employer compliance with immigration laws.