Summary of Legal Workforce Act

H.R.2164, as introduced June 14, 2011

SHORT SUMMARY

H.R. 2164 amends the current employment eligibility verification process all employers must use to ensure their workers are legal. (INA 274A; 8 U.S.C. 1324a) The bill maintains the existing framework for the employment eligibility verification process (including the I-9), but also makes important changes, such as mandating E-Verify and increasing penalties for employers who knowingly hire illegal aliens or fail to use E-Verify. H.R.2164 also preempts states from imposing civil or criminal penalties on employers who knowingly hire illegal aliens or fail to use E-Verify. The bill does permit states to exercise their licensing authority to penalize employers for failure to use E-Verify.

SECTION 1. SHORT TITLE (P.1)

This act may be cited as the "Legal Workforce Act".

SECTION 2. EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS (P.2-35)

Employer Attestation and Document Inspection (p.2-7)

H.R. 2164 expands the universe of employers, recruiters and referrers who must participate in the employment eligibility verification process by including, via new definitions set forth in Section 4, union hiring halls and labor service entities or agencies. As set forth in H.R.2164, the employment eligibility verification process includes:

- Inspecting documents (current law)
- Providing an attestation that the individual hired, recruited or referred is not an unauthorized alien (current law), and
- Using E-Verify (new requirement, see below).

The attestation and documentation requirements go into effect 6 months after the date of the enactment.

Regarding document inspection, H.R. 2164 reduces the number of documents that may be used to establish identity and work authorization from the 26 currently allowed to ten. However, the bill gives DHS discretion to designate additional acceptable documents that establish both work authorization and identity. (For a list of documents currently acceptable, see the Form I-9.)

Thus, with these changes, H.R. 2164 provides that a person or entity who hires, recruits or refers an individual, on or before the date of hiring, must attest under penalty of perjury that it has verified an individual is not an unauthorized alien by:

- Obtaining the employee's SSN or alien identification number and
- Examining an identification document (currently 12)
    - Unexpired state issued driver's license or ID card if it contains a photo and relevant information
    - Unexpired U.S. military ID card

    - Native American Tribal identification document
    - For individuals under 18, an attestation of identity and age made by a parent/legal guardian (currently minors may use school records, report cards, medical records, or day care records)
- Examining a work authorization document (currently 8)
    - Social Security card
- BUT, also acceptable are documents that evidence BOTH work authorization and identity (currently 6).
  These include:
    - Unexpired U.S. passport or passport card
    - Unexpired green card that contains a photograph
    - Unexpired employment authorization card that contains a photograph
    - In the case of a non-immigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing as endorsement of the alien's non-immigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions identified on the form
    - Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating non-immigrant admission
    - Other documents designated by DHS if they are biometric, contain a photograph and certain personal information, provide evidence of work authorization, and contain security features
- DHS may prohibit certain documents from being used if they do not reliably establish work authorization or identity, or are fraudulently used to an unacceptable degree (same as current law)

Individual Attestation (p. 7-11)
As under current law, the individual being hired, recruited or referred for employment shall attest under penalty of perjury that the individual is a citizen, a legal permanent resident (green card holder), or an alien authorized to work. The individual must also provide his SSN or alien identification number to the employer (currently this is only required if the employer is participating in E-Verify).

H.R. 2164 also creates a new penalty for employees who provide false social security numbers (SSNs) during the verification process. Specifically, the bill provides that any individual who provides an SSN or alien ID number that belongs to another person, knowing that the number does not belong to the individual providing the number, shall be fined under the criminal code and/or imprisoned not less than 1 year and not more than 15 years. Any individual who does the same in furtherance of certain fraud and identity theft-related felonies set forth in 18 U.S.C. 1028A shall be subject to – in addition to the penalty for the felony – a fine and/or prison term of 2 years.

Verification and Document Retention (p.11-17)
H.R. 2164 mandates that ALL employers use E-Verify. Recruiters and referrers must do so by the date recruiting or referring commences. Employers must do so between the date of the job offer and 3 business days after the date of hire. Current law only permits employers to use E-Verify by the end of three working days after the date of hire. (*See* IIRAIRA Sec. 403(a)(3)(A)) In addition, under H.R. 2164, an employer may condition employment upon legal status.

As under current law, H.R. 2164 provides that if a person or entity receives a final non-verification under E-Verify, the employer may terminate the employee. If the employer continues to employ the employee, he must notify Homeland Security (DHS). Failure to notify will be considered a violation of

the prohibition on hiring illegal aliens under INA 274A(a)(1)(A). Employers must retain the documentation for 3 years after the hiring, recruiting or referral (current law).

Continuation of Seasonal Agricultural Employment (p.18)
This paragraph modifies and codifies a loophole in current regulations by providing that an individual shall not be considered a new hire (and thus subject to verification through E-Verify) if the individual is engaged in "seasonal agricultural employment" and is returning to work for an employer that previously employed the individual. (*See* 8 CFR 274A.2(b)(1)(viii)(A)(8))

Effective Dates of New Verification Process (p.18-21)
Under H.R.2164, the implementation deadlines for employers to adopt the new employment eligibility verification process – including the E-Verify mandate – are as follows:

- Employers with 10,000 or more employees: 6 months
- Employers with 500 or more employees: 12 months
- Employers with 20 or more employees: 18 months
- Employers with 1 or more employees: 24 months
- Employers of H-2A agricultural guest workers: 36 months
- Persons or entities that recruit or refer individuals for employment: 12 months

H.R. 2164 provides that federal law relating to E-Verify remains in effect until the effective date of this bill, as does any other provision of law mandating use of E-Verify that is in force before the effective date of this bill.

Re-Verification of Individuals with Limited Work Authorization (p.22-25)

- H.R. 2164 provides that employers shall re-verify the identity and employment eligibility of all employees with temporary work authorization during the 30-days preceding the expiration of such work authorization (similar to current law). However, under H.R.2164, DHS must notify an employer of the date on which their employees work authorization expires.
- Implementation schedule for re-verification requirements:
    - Employers with 10,000 or more employees: 6 months
    - Employers with 500 or more employees: 12 months
    - Employers with 20 or more employees: 18 months
    - Employers with 1 or more employees: 24 months
    - Employers of H-2A agricultural guest workers: 36 months

Verification of Current Employees (p.25-34)

- Currently, E-Verify may only be used to verify the work authorization of new hires. H.R. 2164 expands the use of E-Verify by requiring employers to verify the work authorization of *current employees* who fall into certain categories. These include:
    - Federal, state or local government employees, within 6 months of enactment
    - Employees who require a Federal security clearance working in a Federal, State or local government buildings and other sensitive sites, within 6 months of enactment
    - Employees working on federal or state contracts over the simple acquisition threshold, within 6 months of enactment. However, this does not apply to individuals who have obtained secure, standardized federal ID; are administrative or overhead personnel; or are working solely on contracts for commercial off the shelf goods or services.
    - Employees who are the subject of notice from SSA to the employer indicating that the SSN used by an employee is in fact assigned to another person. Such verification must be done within 10 business days of receiving the notice.

        - H.R. 2164 requires that SSA shall annually notify employees who submit a SSN to which more than one employer reports income, and shall include the number of employers reporting income on that SSN and in which states
        - If the confirmed holder of the SSN indicates that the SSN was used without his knowledge, the SSA shall lock the SSN for verification purposes and notify the employers of the individuals who wrongfully submitted the same SSN that such individuals may not be work authorized.
- 30 days after enactment, H.R. 2164 permits voluntary use of E-Verify with respect to any employee, as long as it is not done on a discriminatory basis. If an employer re-verifies an employee, the employer shall seek verification of "all individuals so employed."
- 30 days after enactment, DHS may begin requiring employers already required to use E-Verify, including federal contractors, to comply with these provisions
- 30 days after enactment, DHS shall enable voluntary compliance with these requirements by employers voluntarily using E-Verify

Good Faith Compliance (p.34-35)
H.R. 2164 expands the existing good faith compliance provision through several changes (INA §274A(b)(6)):

- As under current law, a person or entity is considered to have complied with the employment eligibility verification process notwithstanding a technical or procedural failure if there was a good faith attempt to comply.
- However, H.R. 2164 provides that the good faith exemption shall not apply if:
    - The failure is not de minimis (new language);
    - DHS has explained why it is not de minimis (new language);
    - The person or entity has been provided at least 30 days to correct the error (current law is 10 days); and
    - The person or entity has not voluntarily corrected within such time period (current law.)
- As under current law, the good faith exemption shall not apply to a person or entity that has or is engaging in a pattern or practice of employing illegal aliens.
- This change to the good faith compliance provision gives employers the upper hand in that it requires an affirmative action on the part of Homeland Security before any prosecutorial authority can overcome an employer's claim of good faith compliance.

SECTION 3. EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM (P.35-44)
This section transfers existing law regarding the operation of E-Verify, as found in § 404 of IIRAIRA, into INA §274A(d). However, H.R. 2164 makes several small changes and adds several provisions as follows:

- H.R. 2164 limits verification to:
    - Individuals hired, referred, or recruited;
    - Employees and prospective employees; and
    - Individuals seeking to confirm their own employment eligibility.
- H.R. 2164 creates a new penalty for employers who commit fraud. It provides that a person or entity that makes an inquiry under E-Verify and knowingly provides a SSN or alien ID number that does not belong to the individual who is the subject of the inquiry shall be fined and/or imprisoned for not less than 1 year and not more than 15 years. If the fraud is committed pursuant to another fraud or identity-theft related felony under 8 U.S.C. § 1028A(c) then in addition to the punishment provide for such felony, there shall be a penalty of a prison term up to 2 years.

- H.R. 2164 also sets forth specific remedies for employees. It provides that if an individual alleges he would not have been terminated from a job but for an error of the verification system, the individual may seek compensation only through the Federal Tort Claims Act and injunctive relief to correct such error. It provides that no class actions may be brought under this paragraph.
- H.R. 2164 also protects employers from civil or criminal liability for "any action taken in good faith reliance" on information provided by E-Verify.

SECTION 4. RECRUITMENT, REFERRAL, AND CONTINUATION OF EMPLOYMENT (P.44-47)

H.R. 2164 expands the universe of those who are subject to sanctions under the INA by expanding the definition of those who "recruit" and "refer" individuals for employment.

- Currently, INA 274A provides that it is unlawful for any person or entity
    - To hire, or to recruit/refer **for a fee**, an unauthorized alien (i.e. an illegal alien)
    - To hire for employment an individual without complying with the employment eligibility verification process (currently the I-9 process)
    - For agricultural employers/associations/contractors, to hire or to recruit/refer **for a fee** an individual without complying with the employment eligibility verification process
- H.R. 2164 deletes the words "for a fee" from current law, meaning that the prohibition applies to a broader groups of organizations that recruit or refer individuals for employment.
- However, H.R. 2164 also creates a limited definition of "refer," which is as follows:
    - The act of sending or directing a person, or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the U.S. for such person.
    - The definition includes only those who refer for a fee, except for union hiring halls, labor service entities, or labor service agencies.
- H.R. 2164 defines "recruit" as follows:
    - The act of soliciting a person, directly or indirectly, and referring the person to another with the intent of obtaining employment for that person.
    - The definition includes only those who recruit for a fee, except for union hiring halls, labor service entities or labor service agencies.
- These definitions apply 1 year after enactment, except that provisions relating to continuation of employment shall take effect 6 months after the date of enactment.

SECTION 5. GOOD FAITH DEFENSE (P.47-50)

Under current law, a person or entity that establishes it has complied in good faith with the verification process has established an affirmative defense that the person or entity has not violated the prohibition on hiring illegal aliens. (INA §274A(a)(3)) H.R. 2164 expands this good faith defense in several ways.

- H.R. 2164 changes current law by providing that an employer who establishes good faith compliance with the verification process has also established compliance with:
    (1) the prohibition on employing illegal aliens
    (2) the prohibition on hiring without following the verification process, and
    (3) the employment eligibility verification process

  This good faith defense will stand *unless Homeland Security (DHS) shows by clear and convincing evidence* that the employer had knowledge that an employee is an unauthorized alien. This poses significant problems for enforcement. If the Department of Justice undertakes an enforcement action, DHS will be required to make a showing by clear and convincing evidence to overcome the good faith defense. If a state undertakes an enforcement

action (assuming the preemption clause allows it), DHS will also be required to make a showing by clear and convincing evidence to overcome the good faith defense. Considering virtually every employer will attempt to assert a good faith defense, a successful prosecution for hiring illegal aliens will generally require: (1) an affirmative showing by DHS that the employer knew the employee was an illegal alien that (2) meets the clear and convincing standard instead of preponderance of the evidence standard. This will significantly hamper what immigration enforcement there is.

- In addition to this change, H.R. 2164 adds language providing that a person or entity that hires, employs, recruits or refers for a fee who establishes that it has complied in good faith with the employment eligibility verification process shall not be liable to a job applicant, employee, federal or state government for any employment-related action made in good-faith reliance on information provided through E-Verify.
- H.R.2164 provides that the Good Faith Defense shall not apply to persons or entities who do not use E-Verify as required, or to persons or entities that have made an inquiry but have not received an appropriate verification within three working days after the inquiry was received.
- H.R.2164 also provides that if a person or entity attempts to make an inquiry and the program registers that not all inquiries were responded to during the relevant time, the person or entity can make an inquiry the first day the system records no non-responses and still qualify for the defense.

SECTION 6. PREEMPTION (P.50)

In May, the U.S. Supreme Court upheld state laws that use licensing laws to punish employers who: (1) knowingly hire illegal aliens, or (2) fail to use E-Verify as required by state law. Section 6 attempts to override the *Whiting* decision by preempting virtually all state and local laws regarding the employment of illegal aliens. While Section 6 appears to reserve states' licensing authority to penalize employers who do not use E-Verify, it eliminates any possibility of states using licensing laws to punish employers who knowingly hire illegal aliens.

Section 6 provides:

> This section preempts "any state or local law, ordinance, policy, or rule, including any criminal or civil fine or criminal penalty structure" that relates to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens.

It also provides:

> "A state, locality, municipality, or political subdivision may exercise its authority over business licensing and similar laws as a penalty for failure to use the verification system" when and as required.

Even regarding the use of licensing provisions to penalize employers for failure to use E-Verify, the language is unclear. The first sentence clearly preempts all state and local laws regarding to the hiring of unauthorized aliens and the employment eligibility of illegal workers. However, the second sentence seemingly contradicts the first sentence by providing that states and locals may "exercise [their] authority over business licensing and similar **laws**" as a penalty for failure to use E-Verify. It is not certain whether the second sentence allows a state to pass a law that requires E-Verify and use the loss of a business license as the penalty, or whether it only permits states to administratively condition a business license upon the use of E-Verify. If the latter is the case, then Arizona's 2007 law would likely be lost in its entirety.

SECTION 7. REPEAL (P.51)

- Subtitle A of title IV of IIRAIRA is repealed.
- References made to the employment eligibility system established in section 404 of IIRAIRA are deemed to refer to the system as amended herein.

SECTION 8. PENALTIES (P. 51-56)

- H.R. 2164 increases civil penalties for hiring unauthorized aliens as follows:
    - First offense, from $250 - $2,000 to $2,500 - $5,000
    - Second offense, from $2,000 - $5,000 to $5,000 - $10,000
    - Third offense and subsequent offenses, from $3,000 - $10,000 to $10,000 - $25,000
- Increases civil penalties for failure to comply with the employment eligibility verification process from $100 - $1,000 to $1,000 - $25,000;
- Provides that failure to use the employment eligibility verification process as required by law or providing false information to the system shall be treated as if the employer violated the prohibition on hiring illegal aliens.
- Waives these penalties for a first-time offender who establishes that he/she acted in good faith
- Provides that DHS may debar employers who are repeat violators of the prohibition on hiring unauthorized aliens.
- Increases criminal penalty for a pattern or practice of violations of (a)(1)(A) or (a)(2) from $3,000 per alien to $15,000 per alien; prison time is increased from not more than six months (misdemeanor) to not less than one year and not more than 10 years(felony).

SECTION 9. PROTECTION OF SOCIAL SECURITY ADMINISTRATION PROGRAMS (P.56-59)

- Beginning in Fiscal Year 2013, SSA and DHS shall enter into and maintain an agreement which shall
    - Provide full funding to SSA for its responsibilities for the employment eligibility verification system
    - Provide such funds quarterly in advance
    - Require an annual accounting and reconciliation to be reviewed by the OIS in SSA
- Provides that the existing agreement(s) will remain in place if the established deadline isn't met, adjusting for inflation and increased volume.

SECTION 10. FRAUD PREVENTION (P.59-61)

- DHS and SSA shall establish a program in which SSNs that have been identified to be subject to unusual, multiple use in E-Verify, or that are otherwise believed to be compromised by identity fraud or other misuse, are blocked from use unless the individual using such number is able to establish that the individual is the legitimate holder.
- DHS, in consultation with SSA, shall establish a program under which victims of identity fraud and other individuals may suspend or limit use of their SSNs for purposes of the verification system.
- DHS shall establish a program in which the SSN of certain aliens shall be blocked from use for purposes of the verification system unless the alien is permitted back into the U.S. legally and with valid authorization status. Such aliens include
    - those with final orders of removal,
    - those who voluntarily depart, and
    - nonimmigrants whose work authorization has expired.

SECTION 11. BIOMETRIC EMPLOYMENT ELIGIBILITY VERIFICATION PILOT PROGRAM (P.61-71)

- DHS, in consultation with SSA and National Institute of Science and Technology, shall establish by regulation a biometric employment eligibility verification system
- The program would be for voluntary use and would apply to new hires
- Establishes minimum requirements for the program