



Statement
On behalf of the
National Restaurant Association

ON: THE LEGAL WORKFORCE ACT

TO: U.S. HOUSE OF REPRESENTATIVES, JUDICIARY SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

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DATE: JUNE 15, 2011

Statement on: “The Legal Workforce Act”
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On Behalf of the National Restaurant Association
House Judiciary Subcommittee on Immigration Policy and Enforcement
2141 Rayburn House Office Building
June 15, 2011

Good Morning Chairman Gallegly, Ranking Member Lofgren, and distinguished members of the Subcommittee. Thank you for allowing me to testify today on behalf of the National Restaurant Association on the Legal Workforce Act, which would create a national E-Verify mandate.

My name is Craig Miller and I served as Chairman of the Board of Directors of the National Restaurant Association from 2005 until 2006. I am currently a member of the Board’s Jobs and Careers Committee, which has policy oversight at the Association over employment verification issues.

The restaurant and food service industry is comprised of 960,000 restaurant and foodservice outlets employing 12.8 million people, which makes it the nation’s second-largest private-sector employer. It is important to note that, despite its size, the industry is composed of predominately small businesses.

For years, the National Restaurant Association has provided input on the best ways to improve the E-Verify program. After reviewing a draft of the “Legal Workforce Act,” we were pleased to see that our concerns are being taken seriously under consideration, 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. When I was President and Chief Executive Officer of Ruth’s Chris Steak House, I also implemented it in my company operations in 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.

We realize that E-Verify is not infallible, as unauthorized workers using stolen or borrowed identifications might still pass an E-Verify check, but we support Congress’ efforts to establish a more effective federal system for all employers.

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.

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 would expect similar arguments to be 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 decide to 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 restaurants are composed of a collection of small franchisees that may or may not even

have a copier at the restaurant location. Thus, we were 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. Furthermore, the Association was glad to see that the Legal Workforce Act provided relief from penalties for a first time offense, if the employer acted in good faith.

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 and ending three years after enactment with agricultural employers.

One concern we do have with the roll-out in the draft we reviewed is that it dismisses the requirements of the Administrative Procedure Act (APA). It is vital that the government give employers an opportunity to comment on significant new regulatory requirements, before imposing those requirements upon businesses. The APA is extremely helpful in making sure that specific issues with proposed regulations are considered by the Administration, regardless of whether it is a Democrat or a Republican holding the executive office.

The Executive Branch sometimes tries to implement programs in conflict with the intent of Congress. The APA is a helpful check to overreaching by any Administration. If speed and the implementation timeline is the concern, the Legal Workforce Act could mandate deadlines for the publication of the regulations, instead of dismissing the APA's requirements altogether.

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. Given that job applicants can now self-check, 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.

While the language in the draft we reviewed could be further clarified, particularly with regard to recordkeeping of job applicants ran through the system, but not chosen for employment, the Association supports the option to check the employment authorization status of job applicants before official hiring.

Two 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. Encouraging job applicants to self-check and allowing them to fix any errors before they begin employment is certainly the best approach.

VOLUNTARY REVERIFICATION SHOULD BE ALLOWED

The Association supports the inclusion of the 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.

PRESERVE THE CONTRACTOR-SUBCONTRACTOR RELATIONSHIP

All employers should be held liable for the work authorization status of their own employees. Thus, as mentioned above, we oppose exemptions. However, the government should not create cross-liability by requiring employers to run the employees of other employers (those with whom they have a contract, subcontract or exchange) through E-Verify. As with current law, all employers who knowingly use subcontract labor to violate immigration laws should be prosecuted.

Similarly, the House voted overwhelmingly for an amendment to H.R. 4437 in 2005, H. Amdt. 664. This amendment is commonly known in the business community as the "Westmoreland Amendment." The language of the amendment would have ensured that contractors would not be held liable for the actions of a subcontractor, when the contractor is not aware that the subcontractor was hiring undocumented workers. H. Amdt. 664 passed by a vote of 270-174—a larger margin of support than was received by the underlying bill on passage. If a similar amendment came up during consideration of the Legal Workforce Act, the Association would encourage you to continue supporting this safe harbor language for contractors.

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).

The draft we reviewed followed the latter approach with a voluntary biometric program available to employers. With fewer acceptable work authorization documents, the issue of identity theft can be more readily addressed.

INTER-AGENCY INFORMATION SHARING WITH EMPLOYERS

When an employer sends a telephonic or internet based inquiry, the system must not only be able to respond as to whether an employee's name and social security number matches, but also whether they are being used in multiple places of employment by persons who may have assumed the identity of other legitimate workers. However, an annual letter requesting that those with more than one job be run through E-Verify again would catch a high percentage of our workforce.

The Association's members have a high proportion of both students and part-time workers that have several jobs in any given year. The Association understands that this provision is trying to get at id theft and social security number misuse. However, the language we reviewed is too broad.

The Association suggests deleting that requirement, but having employers be notified when someone is first ran through the system if their social security number is being used in multiple places of employment. In the alternative, the language should be amended to request reverification only of those individuals with very unusual multiple uses of their social security numbers. The framework should create a threshold for reverification that reliably identifies a true pattern of id theft of a person's social security number. The legislation should not, unintentionally, target the millions of workers with more than one job.

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 authorize 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, thirteen days after the initial inquiry there will be a final response for those that do not come back as work authorize 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 “catch22” 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 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.

LEGAL IMMIGRATION WILL STILL BE NEEDED

While this hearing is on employment verification, we must 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.

During downturns in our economy, as is currently the case, fewer immigrants are needed. But, as the economy improves, operators expect to face a dwindling pool of potential native employees. The nation's long-term demographic shifts suggest that the challenge to recruit and retain employees in our industry will continue well into the future.

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.

I hope that in the near future we can turn our collective attention to undoing the damage being done to the H-2b seasonal and temporary workers program by regulations coming out of the U.S. Department of Labor. 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 and construction, 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 clarifications and minor changes 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.