

February 5, 2013

Workplace Policy Institute: Immigration Reform in 2013 — What U.S. Employers Can Expect

By Jorge Lopez

For the past decade, lawmakers have discussed immigration reform, but changes to U.S. immigration laws have been minimal. During the 2012 election campaign President Obama pledged to place immigration reform at the top of his agenda. His re-election indicates that key voting blocs support immigration reform, and analysts on both sides of the political debate predict changes to current immigration law in 2013. Most recently, President Obama announced in Las Vegas his support for various proposed reforms, with the top contenders including: relief to undocumented workers; increased immigration enforcement; and an increase in the number of visas allotted to foreign nationals with STEM (Science, Technology, Engineering, and Math) degrees. This article provides a brief background on immigration reform, discusses the potential immigration reform measures, and concludes with the potential effects of immigration reform on U.S. employers.

What Is Immigration Reform?

There is little debate that the U.S. immigration system needs improvement. Individuals enter the country without going through the proper legal process either because it is too complex, difficult and/or expensive, or because there is no legal means at all for entry. The current mechanisms to admit skilled and unskilled workers are not effective, and make it difficult for U.S. employers to have access to top international talent. Comprehensive immigration reform would: (1) overhaul the U.S. immigration system, while simultaneously securing the nation's borders and punishing those who assist others in coming to the U.S. unlawfully; (2) address the issue of what to do with the millions of individuals currently in the country without a legal status; and (3) improve the ability of employers to obtain visas for foreign national employees in important market sectors.

The Comprehensive Immigration Reform Act of 2010 ("Reform Act of 2010") was introduced in 2010 but failed to pass. Today, many on Capitol Hill – Democrats and Republicans – believe now is the time to introduce a new comprehensive immigration reform proposal. President Obama has said the biggest failure of his first administration was the lack of comprehensive immigration reform. Republicans, partially citing the loss of the presidential election on lack of support from Latino voters, are courting their vote by targeting comprehensive immigration reform. Unions are calling for it in order to help their membership. Industries hard hit by immigration compliance enforcement are also advocating for change.

While there currently is no comprehensive legislation circulating in Congress, both Republicans and Democrats have indicated that immigration reform is a priority. Recently, a group of eight

Republicans and Democrats released their Bipartisan Framework for Comprehensive Immigration Reform in January 2013.¹ The plan, which is detailed further in this article, is expected to be introduced as legislation in March or April 2013. While members of each party have expressed a willingness to work across party lines, some Republicans are advocating for reform to regulations affecting immigrants — such as those with STEM degrees — while Democrats are seeking comprehensive immigration reform measures.

STEM Immigration Reform

Previously Proposed STEM Legislation

Current immigration laws provide incentives to foreign nationals graduating from a U.S. university with a STEM degree.² The most recent statistics from 2009 indicate that 32.7% of graduates with STEM degrees have temporary visas, and this number has been rising every year.³ For example, while most foreign students can receive employment authorization for up to 12 months after they graduate from a U.S. university through a program known as Optional Practical Training (OPT),⁴ graduates with STEM degrees can apply for an additional 17-month extension of their OPT if their employer is registered with E-Verify, for a total of 29 months.⁵

The current regulations offer incentives to foreign students who obtain STEM degrees from U.S. schools (as outlined above) to remain in the U.S. temporarily, but do not provide extended nonimmigrant visa options or a pathway to permanent residency. The failure to address these needs often affects operational business needs, with the end result being interruption of vital needs of the U.S. employer. In an effort to address this problem, STEM legislation has been proposed that would create a separate immigrant visa (“green card”) category for foreign graduates of U.S. universities with STEM degrees.

In order to understand the current trends in STEM reform legislation, it is important to look at the history of the proposed legislation. Below is a list of some recently proposed legislation on this topic:⁶

- **S. 169 – The Immigration Innovation Act of 2013 (I-Squared Act):** Introduced by Senator Orrin Hatch (R–UT) and numerous cosponsors on January 29, 2013, the Act has four main objectives: 1) to change the H-1B visa limits based on the annual market; 2) authorize dual intent for student visas; 3) elimination of per-country numerical limitations on employment based visas; and 4) increasing funding for STEM education and training.
- **H.R. 3012 – Fairness for High – Skilled Immigrants Act:** Introduced by Representative Jason Chaffetz (R–UT) on September 22, 2011, this bill would eliminate the employment-based per-country cap by fiscal year 2015 and raise the family-sponsored per-country cap from 7% to 15%. By raising the employment-based per-country cap, this legislation would increase the number of skilled workers that can immigrate to the United States.
- **S. 3185 – STAR Act:** Introduced by Senator John Cornyn (R–TX) on May 15, 2012, this bill would eliminate the diversity visa program and allocate the 55,000 immigrant visas from the diversity visa program toward eligible STEM graduates of qualifying U.S. research institutions who have job offers in related fields.
- **H.R. 6412 – Attracting the Best and Brightest Act of 2012:** Introduced by Representative Zoe Lofgren (D–CA) on September 14, 2012, this legislation would have amended the Immigration and Nationality Act to make up to 50,000 visas available for STEM graduates. This legislation also proposed to eliminate the diversity visa program.

1 For a copy of the Bipartisan Framework, see Michelle Valerio, [Bipartisan Immigration Plan Releases Today](#), Littler’s Global Mobility & Immigration Counsel (Jan. 28, 2013).

2 See 8 C.F.R. Parts 214 and 274a.

3 U.S. Congressional Research Service, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees* (R42530; Nov. 26, 2012), by Ruth Ellen Wasem, available at <http://www.fas.org/sgp/crs/misc/R42530.pdf>.

4 *Id.*

5 *Id.*

6 To see the text of any legislation referenced in this article, please visit the Library of Congress’s THOMAS website at <http://thomas.loc.gov/home/thomas.php>.

- **S. 3553 – BRAINS Act:** Introduced by Senator Charles Schumer (D–NY) on September 19, 2012, this bill provided for immigrant visas for certain advanced STEM graduates, student visa reform, age-out protections for children, retention of priority dates, and family reunifications for high-skilled workers. This legislation did not propose to eliminate the diversity visa program.

As evidenced by this lengthy legislative history of proposed immigration reform to increase the number of STEM workers in the United States, there is support for reform in some context. The most recent legislation, described below, has passed the House of Representatives and is currently pending in the Senate (at the time of this article).

The STEM Jobs Act (H.R. 6429)

The STEM Jobs Act (H.R. 6429) would eliminate the diversity lottery green card program and reallocate up to 55,000 green cards to foreign nationals who graduate from a U.S. university with an advanced STEM degree. Preference would be given to graduates with a doctorate and the remaining green cards to graduates with a master's degrees. In order to qualify for a green card under this category, foreign graduates would have to meet the following requirements:

- Receive a doctorate degree from an eligible U.S. university in a STEM field;
- Agree to work for five years in a STEM field;
- Complete all coursework while physically present in the United States; and
- The employer petitioning for the foreign national must go through the labor certification process in order to demonstrate that there is no American worker who is able, willing, qualified or available for the job.

If any of the green cards are not used by foreign nationals with a doctorate, then they would be made available to foreign graduates from U.S. universities with a master's degree. The requirements would be similar to the doctorate requirements listed above, except that the individual must have also majored in a STEM degree in college. In addition, only individuals graduating from universities that meet the definition of a research institution under H.R. 6429 would qualify for a green card under this proposed category.

Summary of Political and Public Interest Group Opinions on STEM Reform

Generally, support for the STEM Jobs Act is split between conservatives that see the legislation as a compromise to comprehensive immigration reform, and more liberal groups that are seeking comprehensive immigration reform measures.

The STEM Jobs Act is primarily backed by Republicans, conservative groups, and technology lobbyist groups. Republicans, who have long sought to eliminate the Diversity Visa Program support the STEM Jobs Act as a solution to immigration reform. Supporters of the bill include The Information Technology Industry Council, U.S. Chamber of Commerce, Microsoft, EEE-USA, American Council on International Personnel, Society for Human Resource Management, Semiconductor Industry Association, Compete America, and the American Conservative Union.⁷ These groups view STEM reform as a solution that will both improve the U.S. economy by retaining STEM graduates in the U.S. to work in areas where there is currently a shortage of workers and improve the U.S. immigration system.

In contrast, Democrats oppose the bill because it will eliminate the Diversity Visa Program. Although Democrats support STEM reform, their support lies in a more comprehensive immigration reform that will encourage STEM graduates to remain in the U.S. and contribute to the U.S. economy without eliminating the Diversity Visa program. The White House also opposes the STEM Jobs Act since it only offers a small change to U.S. immigration laws.

Moreover, union groups such as the AFL-CIO and SEIU are supportive of comprehensive immigration reform and do not view the STEM Jobs Act as a solution to the broken U.S. immigration system. In addition, groups that oppose STEM reform are concerned with a measure of the bill that prohibits family members from working in the U.S. while they wait for their visas in the U.S. Opposition groups are more likely to support

7 For letters and statements in support of the STEM Jobs Act, see U.S. House of Representatives, Committee on the Judiciary, [The STEM Jobs Act](#).

a bill that grants family members' work authorization while they wait for permanent residency, since the wait time for permanent residency is usually several years.

The Effect of the STEM Jobs Act on U.S. Employers

Although The STEM Jobs Act is currently stuck in the Senate, now that the elections are over it is expected that immigration reform legislation will be implemented in some form. As such, it is important for U.S. employers to understand the implications of this issue.

The Benefits of STEM Reform

The goal of the STEM Jobs Act is to encourage foreign graduates with STEM degrees from U.S. universities to remain in the U.S. after graduation. U.S. companies with difficulty filling job openings in STEM fields may find a more diverse pool of applicants available post-STEM reform. If an employer wishes to sponsor a STEM employee for a green card, it will now have an additional available option. This will hopefully encourage more individuals to pursue a STEM degree and expand the talent pool in these fields. The U.S. is lagging in the production of native-born STEM degree graduates.

Potential Drawbacks to the Proposed STEM Reform

Although on its face the STEM Job Acts seems to be an easy answer to a shortage of workers in STEM fields, the bill provides neither a straightforward approach to obtaining a green card nor does it create a nonimmigrant visa solution. Both criteria must be met to have a successful outcome.

While an employer can sponsor an employee for a green card before the commencement of employment, this is not normally done. The most common approach is Permanent Labor Certification, a costly and uncertain process of a year or more to obtain a green card. Few employers are willing to make this investment in time and money for an individual who has never worked for them, and the overwhelming majority choose to start the green card process after the employee has been working with them for a period of time.

For an employer to employ a foreign national, the individual needs a visa conferring employment authorization. As explained above, recent graduates can work with Optional Practical Training (commonly known as OPT) for one year, and STEM graduates whose employers are enrolled in the federal E-Verify program are eligible for an additional 17 months of employment authorization. However, once OPT ends the foreign student generally requires a nonimmigrant visa to continue to work for a U.S. employer. The most popular nonimmigrant visa is the H-1B visa, but availability is limited each fiscal year to 85,000 new visas, including advanced degree individuals.⁸ If an employer is unable to obtain an H-1B visa, then it may not be able to hire the foreign national. As a result of this limitation, even if an employer could sponsor a STEM graduate for a green card (allowing for employment on a long-term basis), it might not be possible to employ that same individual on a temporary basis. Absent the ability to employ the individual temporarily while the green card application is in process, many employers will understandably be reluctant to agree to green card sponsorship, making, for many individuals, the availability of STEM green cards more myth than reality.

In addition to the nonimmigrant visa issues outlined above, under the proposed legislation employers must still undergo the Labor Certification process. In this process, an employer must perform expensive and time-consuming recruitment steps, including multiple newspaper advertisements and postings with a state job bank, to determine if minimally-qualified U.S. workers are immediately available to fill the proffered position. The recruitment process takes months to complete, and if no qualified U.S. workers are identified the subsequent application to the U.S. Department of Labor takes six to 12 more months to process.⁹ After the Labor Certification process is complete, only then can the employer apply for the immigrant visa on behalf of the foreign national, a process involving another four to six months of processing by the U.S. government. Given that the purpose of the STEM Jobs Act is to attract foreign graduates in the STEM field to study and remain in the United States, and given that there is a shortage of workers available in the STEM fields, it seems counterintuitive to require individuals seeking work in a STEM job to navigate such a convoluted process.

⁸ Public Law 101-649 (Act of November 29, 1990).

⁹ For processing times, see the [iCert Visa Portal webpage](#) of the U.S. Department of Labor's Employment & Training Administration.

Moreover, the five-year commitment to employment in a STEM field may not provide an incentive to foreign graduates, especially if it is difficult for them to change employers during this time period.

Finally, many individuals with a doctorate in a STEM field have completed extensive research in their field to obtain a doctorate and thus might already qualify for a green card under another category, such as the Outstanding Researcher or Extraordinary Ability green card categories — neither of which requires the labor certification process or a commitment to work for the sponsoring employer or in a STEM field for five years.¹⁰

Concluding Thoughts on STEM Reform

The STEM Jobs Act is a step towards immigration reform, but it is not a complete solution to the need for more STEM workers in the United States. Immigration reform that provides both a path to permanent residency for foreign graduates and also allows employers to hire candidates who can commence work shortly thereafter, rather than waiting months, would be a better solution to the lack of availability of temporary worker visas in the United States. In general, a more comprehensive solution for immigration reform should focus more on the needs of employers rather than the specific degree obtained.

The most recent Comprehensive Immigration Reform Framework proposed by a bipartisan group of senators also includes an initiative to award green cards to immigrants who have received a Ph.D or master's degree in a STEM degree from a U.S. university. The details are expected to be unveiled when legislation is introduced later this year.

Comprehensive Immigration Reform

Most interested parties agree that a comprehensive plan will need to address: (1) a path to citizenship for undocumented individuals; (2) action taken against employers who knowingly hire undocumented workers; and (3) an expansion of current immigration categories and broader visa options for both skilled and unskilled workers.

Path to Citizenship for Undocumented Individuals

It is likely that future comprehensive immigration reform will adopt many of the features of the Reform Act of 2010,¹¹ which proposed a path to citizenship for undocumented individuals currently in the United States.

Lawful Prospective Immigrant Status (LPI)

The Reform Act proposed creating a provisional legal status known as Lawful Prospective Immigrant status (LPI), under which eligible individuals would be those physically present in the country before September 30, 2010, lacking a criminal record, and who met certain admissibility criteria. The status would be valid for an initial period of four years and could be extended. Dependents would be eligible for LPI Dependent status. The LPI status would also allow for work authorization. After six years in LPI or LPI Dependent status, individuals would be eligible to apply for lawful permanent residency. In addition, individuals in LPI status would be eligible for Social Security numbers and would have the ability to update or amend their Social Security number records with no penalties. The number of individuals granted permanent residence under this provision would not count against the already established numerical limits for permanent residence status issuance.

The Bipartisan Framework for Comprehensive Immigration Reform proposes a similar status for undocumented immigrants, requiring them to register with the government, pass a background check, pay a fine, and in exchange earn probationary legal status that would allow them to live and work legally in the United States. Eventually these individuals will have an opportunity to apply for lawful permanent residence, after meeting certain requirements, but they will be required to go to “the back of the line” of prospective immigrants.

The DREAM Act

The Reform Act of 2010 also proposed the DREAM Act (Development, Relief, and Education for Alien Minors Act), which was initially introduced in 2001 as a way to help children brought to the U.S. as minors by their parents who are, as a result, undocumented. Since 2001, the DREAM

¹⁰ See generally 8 U.S.C. § 203(b)(1)(B).

¹¹ S. 3932, 111th Congress (2010).

Act has undergone several revisions, but in most iterations involves a regularization of status for those who entered the U.S. as children, who had been physically present in the U.S. for at least five years, earned a high school diploma or GED or were admitted to a post-secondary school, and had good moral character.¹² The DREAM Act has not passed as part of the Reform Act of 2010 or as stand-alone legislation.

DACA

In the absence of movement to help children by Congress, the Secretary of the Department of Homeland Security (DHS) Janet Napolitano announced the use of prosecutorial discretion when dealing with a clearly defined set of individuals who were brought to the U.S. at an age when they could not form the intent to break the law given their age.¹³ Secretary Napolitano directed U.S. Citizenship and Immigration Services (USCIS) to implement this mandate within 60 days of the June 15, 2012 memorandum date. USCIS created the Deferred Action for Childhood Arrivals (DACA) program.¹⁴ Individuals may request deferred action to delay removal proceedings from the U.S. for two years. Work authorization is available under DACA, and extensions are also possible. DACA does not provide lawful status or a path to citizenship to covered individuals.

The criteria to benefit from DACA are set forth as follows:

- Under the age of 31 as of June 15, 2012;
- Arrival in the United States before reaching age 16;
- Continuous residence in the United States since June 15, 2007, up to the present time;
- Physical presence in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with USCIS;
- Entry without inspection before June 15, 2012, or lawful immigration status expired as of June 15, 2012;
- Currently in school, graduated or obtained a certificate of completion from high school, obtained a general education development (GED) certificate, or an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- No convictions of a felony, significant misdemeanor, three or more other misdemeanors, and otherwise no threat to national security or public safety.

While DACA addressed some of the issues facing undocumented minors, it is not a long-term solution as legally it is merely a potentially reversible decision by the government not to take action against these individuals. It is not an act of law providing guaranteed benefits or a path to legal status in the U.S.

The ACHIEVE Act

In November 2012, the ACHIEVE Act¹⁵ was proposed by former Senators Kay Bailey Hutchison (R–TX) and Jon Kyl (R–AZ). At a press conference Kyl stated, “We have to get this ball rolling” on a sensible approach to immigration . . . This particular part of immigration reform seemed a logical place to begin.”¹⁶ Both Hutchinson and Kyl retired this year, so it is unclear if the ACHIEVE Act will gain a following. They indicated they had been working on this Act for about a year before the election. As this is the first attempt at an immigration fix for many undocumented workers under the new congressional session and President Obama’s second term, it is anticipated that the Act will likely be modified.

The ACHIEVE Act also targets individuals brought to the U.S. by their parents as minors and it has 3 stages. The first requires individuals to apply for a six year W-1 visa, allowing them to attend college, enter the military, and obtain legal employment. Upon completion of a college

12 See S. 729, 111th Congress (2009).

13 See Memorandum from Secretary of Homeland Security Janet Napolitano to David V. Aguilar, Acting Commission of U.S. Customs and Border Protection, Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services, and John Morton, Director of U.S. Immigration and Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

14 See U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals Process*.

15 S. 3639, 112th Congress (2012).

16 See Jordan Fabian, *Jon Kyl, Kay Bailey Hutchinson Unveil Alternative to DREAM Act*, ABC News-Unionvision (Nov. 27, 2012).

degree, an associate's degree and two-and-a-half years of employment, or four years of military service, an individual can apply for the second stage. Stage two requires the individual by application to obtain a W-2 visa, granting a four-year conditional non-immigrant visa that allows for continued lawful employment. The third stage allows an individual to apply for a five – year W-3 visa and to apply for citizenship. The W-3 allows a four-year extension option. To date, the ACHIEVE Act has not been signed into law.

Support for the DREAM Act and ACHIEVE Act

The Bipartisan Framework for Comprehensive Immigration Reform also proposes to give preferential treatment to individuals who entered the United States as minor children and thus did not knowingly choose to violate any immigration laws. The Framework does not elaborate on what type of preferential treatment these individuals would receive.

As both Democrats and Republicans sponsor work on versions of comprehensive immigration reform, the labor unions – AFL-CIO and SEIU – are proponents of the DREAM Act. These groups support the creation of a path for undocumented children to earn an education and become a member of the workforce and ultimately earn a path to citizenship. The Congressional Hispanic Caucus rejects the ACHIEVE Act. Senator Bob Menendez (D–NJ) says “The problem with the ACHIEVE ACT is it does not achieve the dream,” while Representative Luis Gutierrez (D–IL) said it was “too little too late.”¹⁷

Implications of the DREAM Act and ACHEIVE Act on Employers

If passed, the DREAM Act and ACHIEVE Act would widen the availability of highly skilled candidates for employers because they both require the completion of higher education. Currently, many undocumented children do not attend college, vocational schools, or serve in the military for fear of being discovered as undocumented individuals. Passage of either act would help decrease the numbers of undocumented individuals and create lawful employment opportunities. It should also decrease the number of unauthorized workers and thus employers will be less likely to hire individuals who are not eligible to work in the U.S. Presently, DACA is another avenue for employers to access talented lawful workers and reduce their reliance, in some case, on undocumented workers.

Opponents to the DREAM Act and ACHIEVE Act argue that this legislation rewards individuals who are in violation of U.S. immigration law. Although immigration to the U.S. may not have been by choice, *i.e.*, many DREAM Act/ACHIEVE Act beneficiaries were brought to the U.S. as children, there remains a consensus that other areas of immigration reform should take precedence. In addition, the individuals who would benefit from this legislation do not necessarily have the type of education and/or experience that is needed to benefit the U.S. economy. In fact, many have never gone to college because of their immigration status. Legalizing these individuals may not directly affect U.S. employers in the same way that STEM reform would.

Legislation to Prevent Employers from Hiring Undocumented Workers

Mandatory National Employment Verification System

The Reform Act of 2010 called for a mandatory national employment verification system which would have been required for all federal government agencies, and provided for a phase-in compliance period for all employers, depending on the size of the employer, so that compliance would not become automatic upon enactment of the Act. The Reform Act of 2010 proposed training for employers so as not to violate employees' civil rights and privacy. In addition, the verification system was not to be used for discriminatory purposes. There were also proposed guidelines for employers for uniform handling of the confirmation or non-confirmation of employment authorization. In addition, the Reform Act of 2010 proposed a method for individuals to check their own work authorization status in the national system. As a way to combat fraud in the verification system, the Reform Act of 2010 also called for the creation of fraud-resistant Social Security cards.

The recently released Bipartisan Framework for Comprehensive Immigration Reform also discusses a mandatory employment verification system that would prevent identity theft and end the hiring in the future of unauthorized workers. It appears that it will resemble the verification system proposed in the Reform Act of 2010 but more information will be available once the legislation has been drafted.

¹⁷ See Emily Deruy, [Congressional Hispanic Caucus Rejects ACHIEVE ACT](#), ABC News-Unionvision (Nov. 28, 2012).

E-Verify

The verification system in the Reform Act of 2010 was similar to the basic pilot program, the precursor to E-Verify that was mandated under the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).¹⁸ The basic pilot program was launched in 1997 and over the years has grown from a pilot program available in only a few states to a web-based employment verification tool available in all states to all employers. In 2007, the name E-Verify was adopted. As of March 31, 2012, 353,822 employers were enrolled in E-Verify.¹⁹

Enrolling in and using E-Verify is mandatory for certain government agencies and government contractors. In addition, many states have passed legislation mandating employers enroll in and use E-Verify as a way to ensure undocumented workers are not being hired. President Obama recently signed legislation extending the E-Verify program until September 30, 2015.

Support for a Mandatory National Employment Verification System

Both Democrats and Republicans have indicated that stopping the employment of undocumented workers is an important part of any immigration reform. The SEIU is a proponent of E-Verify as part of comprehensive immigration reform but not as a singular bill. SEIU's position is that E-Verify should be a part of reform that helps to end illegal immigration. SEIU argues that a mandatory E-Verify bill is a "jobs killer" that would drive more undocumented workers underground, increasing an illegal secondary labor market. SEIU also views the error rate with E-Verify as high enough that documented workers — both U.S. citizens and non-citizens — would be laid off, thus increasing the economic hardship in the country were E-Verify to become mandatory.²⁰ The concerns regarding a mandatory E-Verify program will likely be debated in any new comprehensive reform proposal given the new state laws being passed requiring the use of E-Verify.

The U.S. Chamber of Commerce has expressed that the business community would support a mandatory electronic verification system as long as it addressed the concerns of both large and small businesses.²¹ The Chamber of Commerce is primarily advocating for an electronic system that would preempt all state and local laws, be implemented over a fair and reasonable period and mandatory only for new hires, include fair and reasonable enforcement provisions that are proportionate to the offense and allow employers to rectify minor paperwork violations, and hold the government accountable for E-Verify mistakes. As outlined above, although the U.S. Chamber of Commerce does support an electronic verification system, there are some reservations about the implementation and enforcement of such a system.

The Effect of a Mandatory National Employment Verification System on Employers

The DHS, in cooperation with the Department of Justice, has historically focused on worksite raids and gone after undocumented employees. These raids have involved a great deal of cooperation with local law enforcement. However, under the Obama administration, the DHS has focused its efforts on the employers who knowingly hire undocumented workers. Employers have been fined and imprisoned. Currently, employers that knowingly hire undocumented workers can pay a very high price. Moreover, even those employers that did not knowingly hire undocumented workers but failed to properly complete Form I-9 can face harsh financial penalties.

All employers are affected by this legislation, regardless of whether they are hiring undocumented workers, because all employers are subject to higher scrutiny. In addition, state rules regarding E-Verify have forced employers operating in multiple states to comply with different state E-Verify programs that in some cases may seem more onerous than the federal program. In some cases, employers are mandated to comply with state E-Verify programs when the federal program is voluntary. Multi-state compliance increases the administrative work of any employer and the implementation of a national program would likely add to this burden. In the end, it will become a part of the compliance balancing act.

Expanding Current Immigration Categories as a Solution to Immigration Reform

The Reform Act of 2010 included several provisions to change nonimmigrant visa categories to provide mandates for employers to look for U.S. workers, expand the visa categories, and at the same time protect alien employees from being exploited by unscrupulous employers. The

18 See Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

19 See U.S. Citizenship and Immigration Services, [E-Verify History and Milestones](#).

20 See Press Release, Service Employees International Union, CTW, CLC, [Mandatory E-Verify is a Jobs Killer](#) (Feb. 10, 2011).

21 *Hearing on E-Verify: Challenges and Opportunities Before the Subcommittee on Government Management, Organization, and Procurement of the House Committee on Oversight and Government Reform* (written statement of the U.S. Chamber of Commerce), 111th Congress (July 23, 2009), available at http://www.uschamber.com/sites/default/files/testimony/090723_everify.pdf.

Reform Act of 2010 also called for the creation of a visa category to aid shortage industries. When the Reform Act failed to pass, so did all the initiatives. Both Democrats and Republicans appear to be working behind closed doors with both sides saying little about concrete provisions and programs for comprehensive reform. It is anticipated that both parties will present bills during the first few months of the new Congress.

Similar to the Reform Act of 2010, the Bipartisan Framework for Comprehensive Immigration Reform will aim to expand current immigration categories and provide businesses with the ability to hire lower-skilled workers in a more timely manner, depending on the needs of the market.

Concluding Thoughts on Comprehensive Immigration Reform

As of the printing of this paper, a comprehensive immigration bill has not been introduced on Capitol Hill, yet both Republicans and Democrats have indicated a strong interest in trying to change a system that most perceive as broken. As such, it is anticipated that when a bill is introduced all interested advocacy groups and politicians will have concrete ideas to debate and interests involved in order to move everyone one step closer to a reformed immigration system.

In addition, President Obama considers immigration reform a priority for the current administration and is a proponent of comprehensive immigration reform, rather than a piecemeal approach. In his most recent press conference in Las Vegas on January 29, 2013, President Obama laid out his goals for comprehensive immigration reform, which included four points: (1) an increase in immigration enforcement; (2) a national verification system; (3) a pathway to citizenship for undocumented immigrants; and (4) improvements to the legal immigration system to decrease wait times, assist U.S. employers, and improve family reunification.²² To avoid the implication that this type of reform would constitute an “amnesty,” reform would also include the payment of fines and any back taxes. This plan is similar to the comprehensive immigration reform that has been proposed by Democrats. In addition, in his speech President Obama emphasized that if a bill was not introduced in Congress early this year he would introduce a bill himself and force a vote on Congress.

Mostly likely, immigration reform will positively impact employers because it will expand the available workforce and decrease the possibility of hiring unauthorized workers. In particular, healthcare organizations may want to consider active participation in immigration reform due to the shortage of doctors and other medical professionals. According to a recent study, by 2015 there will be a deficit of 63,000 doctors, particularly in rural areas and inner cities where few doctors practice; this number is expected to double by 2025.²³ Currently, neither STEM reform nor the comprehensive immigration reform proposals address this shortage. In fact, current immigration laws, in particular the J-1 visa, actually serve to limit the number of foreign doctors in the United States.²⁴ Many doctors that come to the United States for medical residency or fellowship training come on a J-1 visa and are subject to the J-1 two-year home residency requirement, meaning that in most cases they must return to their home country for two years before returning to the United States. Although there is a waiver available, designed to bring doctors to underserved areas in the United States, it is not a comprehensive solution to the healthcare shortage in the U.S.

One area of immigration reform that has the potential to negatively impact employers would be a national employment verification system. This type of program could be costly to implement for both large and small employers, especially employers that have a high turnover rate in their workforce.

Whether reform is comprehensive or only covers a small area of immigration law, employers should anticipate that there will be some form of immigration reform in 2013. Littler’s Workplace Policy Institute and its Global Mobility and Immigration Practice Group will be part of this critical dialogue.

[Jorge Lopez](#), Co-Chair of Littler Mendelson’s Global Mobility and Immigration Practice Group, is a Shareholder in the Miami office; [Michelle Valerio](#) is Counsel in the Miami office; [Carol Williams](#) and [Scott Decker](#) are Counsel in the Atlanta office. Littler Mendelson’s Workplace Policy Institute (WPI) is devoted to developing and influencing workplace legislative and regulatory developments at the federal and state levels. WPI provides the employer community with advocacy services, including litigation support. In addition, WPI closely monitors important labor, employment, and benefits policy initiatives and provides clients, trade associations, and policymakers with timely and thoughtful analysis of the practical implications of such proposals. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Lopez at jlopez@littler.com, Ms. Valerio at mvalerio@littler.com, Ms. Williams at cwilliams@littler.com, or Mr. Decker at sdecker@littler.com.

22 The White House, [Remarks by the President on Comprehensive Immigration Reform](#) (Jan. 29, 2013).

23 See Annie Lowrey and Robert Pear, [Doctor Shortage Likely to Worsen With Health Law](#), New York Times (July 28, 2012).

24 See 8 U.S.C. § 212(e).