

Employment Verification Debate Presents New Challenges



By Eben Wyman

Immigration has been a super-hot topic in Washington over the past few years. In terms of media coverage and national attention, the debate over whether and how to allow the some 12 million undocumented individuals who currently reside in this country to work here legally often trumps the issue of employer verification responsibilities. However, it is a very real fact that Congress is looking to crack down on employers that hire illegal immigrants. That means that NUCA and other construction organizations have to be on the front lines of the debate...and we are.

Current Law

Opponents of “comprehensive” immigration policy continually point to the 1986 “amnesty” bill to make their case against allowing illegal immigrants to stay in this country under any circumstances. What is not commonly mentioned is the fact that the 1986 law requires employers to verify the identity and employment eligibility of all new employees. In short, it is illegal to hire, recruit or continue to employ an individual whom the employer knows is an illegal immigrant. The key word is “knows.” Under current law, an employer found to have “knowledge” of the ineligible work status of his employee(s) is subject to civil and criminal penalties, including jail time.

At the same time, the law also requires that employers not discriminate against prospective employees because of race, national origin or citizenship. Employers are also prohibited from asking for more or different proof of identification than the government-prescribed list of acceptable documents. The employer is responsible for examining those documents and determining if they provide reasonable proof that the individual is here legally.

A New Ball Game

In the post-Sept. 11 world, securing the borders has moved up on the national priority list, to say the least. One constant theme heard in the immigration reform

debate is the need to go after employers that hire undocumented individuals. By and large, utility contractors and other construction businesses work in good faith to ensure that their foreign workers are here legally. But, as NUCA tells anyone on Capitol Hill who will listen, in an industry that faces a real shortage of labor, there is no shortage of elaborate false identification methods.

NUCA recognizes that employers have an important role to play in the enhancement of security through employment verification; what we oppose are efforts to place the responsibilities of federal immigration enforcement officials on the backs of our members. Although there is agreement that the verification system needs to be improved, there is wide disagreement about the appropriate verification steps to be taken by employers and the penalties to be handed out to those who violate verification law. NUCA is currently advocating the following positions for Congress to consider when developing new verification requirements.

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Looking out for Small Employers

In a perfect world, all employers would have an electronic “swipe” device whereby a contractor could easily confirm that a new hire is on the up and up in terms of employment status. In fact, this is one of the

proposals on the table. NUCA supports the concept of an easy-to-use electronic verification system, but such a system has to be user-friendly enough for small companies with one-person human resources departments. NUCA opposes “Internet only” and other, even more elaborate systems that are based on the assumption that all American employers are equipped with modern technology. What works for a Fortune 500 company must also work for a mom-and-pop shop. A federally-required employment verification system must not turn into an unfunded mandate on America’s small businesses.

Preserve the “Knowing” Standard

NUCA and other construction organizations are taking a hard line to ensure that the “knowing” standard that exists in current law continues in any new legislation. The “knowing” standard is clear: If an employer knows that one of his people (or his subcontractor’s people) is illegal and does nothing about it, that employer is in violation of the law. Other standards currently on the table, such as “reckless disregard” or “reason to know,” are too broadly defined and, therefore, too open to interpretation. The “knowing” standard requires proof that the employer actually knew that a person was ineligible for employment.

Verification of Subcontractors

NUCA continues to oppose efforts that would require general contractors to verify the legal status of their subcontractors’ employees. NUCA agrees that general contractors who knowingly use subcontractor labor to violate immigration law should be held accountable. It is, however, unreasonable to saddle general contractors with the liability when they lack authorization to hire or fire a subcontractor’s employees. NUCA continues to support the language originally offered by Rep. Lynn Westmoreland (R-Ga.), a former builder, which ensured that subcontractors were responsible for verifying the legal status of their own employees.

“Safe Harbor” Language

If and when a new verification system is agreed on, the information that comes out of it must be reliable. Under no circumstances should an employer who evaluates an individual’s status based on such information be held liable when the system fails. Additionally, employers should be protected from employee lawsuits when they rely on the information provided by the new verification system. Employers who work in good faith to verify the legality of their workers should not be punished for the shortcomings of the system.

Debarment Provisions

In what is fast becoming a frightening development, there are several efforts under way that would make it easier to debar federal contractors from public work for even minor immigration violations. A provision recently thrown into a minimum wage bill underscores the point. The provision would have required an automatic 10-year debarment for any contractor who was in violation of immigration law. This would have meant debarment — without the “knowing” standard and right of due process — for even a paperwork violation. That was legislating at its worst, and NUCA was pleased to be able to get the provision stripped out of the bill. However, this example demonstrates that unfair proposals are indeed being considered.

Employers must take their employee verification responsibilities very seriously, and for the most part they do. NUCA will continue to ensure that if passage of comprehensive immigration reform legislation is possible this year, it will not include provisions that unfairly punish employers that make every reasonable effort to comply with the new verification system.

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