May 6, 2013

Dear Senator Durbin:

We write in support of the comprehensive immigration reform process and thank you for your critical and constructive efforts in support of this legislation. The comments below to S. 744 reflect our joint views on this important legislation.

Labor-Business Coalition.

The United Food and Commercial Workers Union (UFCW) and the Food Manufacturers Immigration Coalition have come together to advance our mutual goals of reforming our immigration laws in favor of families, workers and businesses across the industries that we represent. We attach our joint statement of principles and summarize our immigration-reform goals as follows:

- Smart, effective border enforcement that promotes the safe and legal movement of people and goods;
- A workable, transparent employment verification system that defines, rights, responsibilities and protections for workers and employers on which both can reply;
- A commitment to earned citizenship;
- Protection of family-based immigration so that spouses, parents and children remain together;
- Creation of an occupational visa for non-seasonal, permanent positions that will enhance the productivity of U.S. companies, to the benefit of U.S. workers and U.S. employers alike.

Comments on S. 744.

We believe that the Border Security, Economic Opportunity, and Immigration Modernization Act has performed admirably on addressing border security, legalization, and protection of family-based immigration.

Our comments focus on areas where improvement is needed. To that end, amendments have recently been distributed to you, and we would request your careful consideration of the following proposals:

- Self-Check: While S. 744 makes E-Verify mandatory, it still does not solve the problem of identity theft. The E-Verify system's "Self-Check" feature is a strong tool to avoid identity theft, but the Office of Special Counsel prohibits its use, and the bill unfortunately adopts the OSC interpretation. In light of the enhanced civil and criminal penalties in S. 744, we believe employers should be given reasonable tools to avoid the employment of unauthorized aliens – including those aliens engaging in identity theft. Allowing employers to use Self-Check in a uniform, nondiscriminatory fashion will create greater transparency for new employees, and will enable employers to ensure that their new hires are not circumventing E-Verify
- Employer Reliance. If an employer takes the extra step of deterring identity theft through the uniform use of Self-Check, then the employer should be presumed to have acted in "good faith" with respect to the E-Verify confirmations it receives.
- "Official Rules of the Road." S. 744 creates additional grounds of prohibited conduct, and enhances penalties, for both: (i) immigration compliance failures, and (ii) unfair immigration-related employment

actions. This puts employers "between a rock and a hard place," because immigration enforcement and anti-discrimination rules often conflict. The result is not only bad for employers, but is bad for employees as well – particularly when an employer is confused about which rules should prevail. Our third amendment resolves this conflict by requiring DHS and DOJ to publish regulations describing a course of conduct in the employment verification process that: (i) satisfies employment verification requirements, and concurrently (ii) avoids anti-discrimination liability. If an employer follows these regulations, then the employer is presumed to have complied with both the verification and anti-discrimination rules.

Legislative language, and an explanation, is attached for each amendment.

Finally, we note that S. 744 provides for a special allocation of "W" visas to occupations designated by the Secretary of Labor as Meat, Poultry and Fish Cutters and Trimmers. The Food Manufacturers Immigration Coalition did not request this language and does not believe it is necessary, and the UFCW does not support the special treatment of these occupations. We believe the language can be deleted, but will work with the sponsors to determine whether revised language might be acceptable.

Thank you for your review and consideration of these amendments and our comments, and we look forward to working with you.

Sincerely,

Barry L. Carpenter

On behalf of FMIC

Joseph T. Hansen

On behalf of UFCW

Amendments to S. 744:

1. Self-Check:

Legislative Language:

- on page 515, strikes lines 13-21;
- on page 513, insert after line 20 the following: "(D) A person's or entity's requirement that an employee or prospective employee use a self-verification feature of the System (or of a comparable private service) for the purpose of avoiding liability under Section 274A(a), provided that such requirement is imposed in a uniform, nondiscriminatory manner.".

Explanation:

- S. 744 establishes an electronic worker verification system that will continue to be vulnerable to identity theft, because all State drivers' licenses and identification cards will remain eligible to satisfy the employment eligibility rules -- but most State documents will not be available in the System's photo-matching tool. Employers are also subject to enhanced civil and criminal penalties for the knowing employment of unauthorized aliens. As such, employers require additional tools to ensure that identity theft is not defeating their use of the E-Verify System. The new antidiscrimination provisions of S. 744, however, expressly prohibit employer use of self-verification tools.
- Self-verification tools are not discriminatory as long as the employer applies them uniformly. Furthermore, prohibiting use of self-verification methods will increase the likelihood that identity theft will defeat E-Verify, and will prevent employers from reducing their risk of liability.
- Given the prevalence of identity theft, employers must engage in reasonable measures beyond E-Verify to avoid employment of unauthorized aliens. Until State Drivers' licenses become secure, the Employment Verification System in S. 744 will remain vulnerable to this problem. Employers should therefore be permitted to continue with measures beyond E-Verify to combat identity theft. S. 744 unwisely treats measures beyond E-Verify as discrimination, and this new ground of discrimination should therefore be deleted.
- For the above reasons, this amendment: (i) deletes the new prohibition on employer requirements that new employees undergo a self-verification screening; and (ii) explicitly permits employers to require self-verification checks of new employees as long as the requirement is imposed uniformly on all new employees, in a nondiscriminatory fashion.

2. Safe Harbor:

Legislative Language:

- on page 448, line 24, insert at the end the following new sentence: "If an employer utilizes a self-verification measure in the manner described in Section 274B(a)(2)(D), such employer's reliance on the information provided by the System shall be presumed to be in good faith. Such presumption may only be overcome by clear and convincing evidence in a civil proceeding, or by evidence beyond a reasonable doubt in a criminal proceeding.".

Explanation:

- Employers should be given the tools to comply with the new worker verification requirements. If employers use those tools, they should be able to rely on the System without fear of future liability.
- The worker verification system should incentivize a culture of compliance, and safe harbors are an effective method to accomplish this goal. Conversely, ambiguity with respect to whether liability attaches to certain actions incentivizes risk-mitigation – which is not always consistent with voluntary compliance.
- The current Protection from Liability provision is unclear because it conditions liability protection on an employer's "good faith" reliance on E-Verify confirmations. The key question is "what constitutes good faith reliance?"
- This amendment would set forth a clear, simple, compliance-related action that, if taken by an employer, would satisfy the "good faith" requirement and give the employer certainty. In that manner, employer compliance is given its proper priority.
- The language above accomplishes this objective by: (i) allowing employers to require new employees to undergo a self-verification measure to avoid the risk of identity theft; and (ii) clarifying for employers that this measure constitutes good faith action that will protect them from employer sanctions liability.
- It is important to note that the "knowing" employment requirement does not provide employers with clarity or protection. In the civil context, the government can establish a "knowing" violation through "constructive knowledge," a term imposing liability for failure to infer a person's unlawful status through notice of applicable facts and circumstances. 8 CFR 274a.1(*l*). In the criminal context, prosecutors may establish knowledge through the "willful blindness" theory, which requires substantially less than actual knowledge. See e.g., *United States v. Heredia*, 483 F.2d 913 (9th Cir. 2006) (en banc). Both "constructive knowledge" and "willful blindness" are case-specific, flexible, and ambiguous standards. Rather than provide employers with certainty, they create greater uncertainty. Given this uncertainty, the above amendment is necessary.

3. Guidelines for Employer Compliance:

Legislative Language:

- on page 520, insert after line 15 the following new subsection: "(c) EMPLOYER COMPLIANCE REGULATIONS.—Not later than 6 months after the publication of interim regulations under subsection (a) or final regulations under subsection (b), whichever date is earlier, the Secretary and the Attorney General shall publish regulations setting forth: (1) sample actions that employers may take that satisfy the requirements under Section 274A (relating to employment eligibility confirmation), which same actions (2) do not constitute a violation under Section 274B (relating to unlawful immigration-related employment practices). An employer that complies with such regulations shall be deemed to have acted in good faith reliance pursuant to Section 274A(d)(5), and may not be liable for a charge of discrimination under Section 274B or title VII of the Civil Rights Act of 1964 [42 USC 2000e et seq.] unless the Special Counsel can establish prohibited conduct by clear and convincing evidence. Such presumption and enhanced standard of proof shall also apply until publication in final or interim final form of the regulations required by this subsection.".

Explanation:

- Employers are presently caught between the "rock" of employer sanctions laws and the "hard place" of the antidiscrimination laws.
- There are countless cases of OSC bringing discrimination charges against employers attempting to avoid employer sanctions liability. There are also instances of civil and criminal immigration enforcement cases being brought against employers that declined to implement certain immigration compliance practices for fear of discrimination liability.
- S. 744 does not resolve this tension. In fact, by increasing the penalties for both worker verification failures and discriminatory immigration-related employment practices, the bill has aggravated the problem.
- This amendment requires DHS, DOJ, and any other interested agency, to provide employers with a clear path to avoid both: (i) worker verification liability, and (ii) immigration-related discrimination risk. Such a regulation will facilitate and incentive voluntary employer compliance, and will assist employers to achieve Congress' twin goals of deterring unauthorized employment and eliminating immigration-related discrimination.

STATEMENT OF UNITED FOOD & COMMERCIAL WORKERS UNION AND FOOD MANUFACTURERS IMMIGRATION COALITION ON IMMIGRATION REFORM LEGISLATION

We join Americans across the country and call for congressional action on U.S. immigration policy. We join those committed to work toward a comprehensive approach that serves our country's interest by promoting fairness and the rule of law and contributes effectively to our economic well-being and recovery. We support reform that recognizes the US economy's current and future need for permanent workers to support growth. America has always been a nation of immigrants. Now is the time to create a modern, 21st century legal immigration system that reflects our national interests and values.

We support a comprehensive immigration reform that:

- Ensures smart and effective enforcement that protects our borders, fosters commerce, and promotes the safe and legitimate movement of people and goods at our ports of entry.

- Establishes a workable employment verification system that defines rights, responsibilities and protections for workers and employers on which both can rely. Provides for enhancement of the current verification program to ensure that employment verification can be applied uniformly and effectively, such as the E-Verify Self Check. Compliance with employment and antidiscrimination laws should be transparent, not a guessing game. Employment verification should not be restricted to a biometric process.

- Renews our commitment to earned citizenship that fully integrates undocumented immigrants into our way of life, affirming our shared rights, protections and responsibilities by providing a pathway to citizenship.

- Protects the sanctity of family by reducing the family backlogs and keeping spouses, parents and children together.

- Creates a process for determining and addressing the need and allocation of employment based visas to provide safe and legal avenues for foreign workers to fill future workforce needs. Establishes an independent government office to ensure that migration meets the needs of employers and the American economy. Creates a new occupational visa for non-seasonal, non-agricultural permanent positions not covered by other visa programs. Requires the new office to provide real-time empirical data on labor markets and wages so that employers can recruit effectively and policy makers can legislate based on relevant evidence and avoid ideological arguments.

- The purpose of the new occupational visa is to enhance the productivity of U.S. companies that utilize permanent non-seasonal non-agricultural labor, to the benefit of U.S. workers and U.S. employers alike. Any new independent government office should focus on analyzing the availability of able, willing and qualified U.S. workers, in conjunction with employer recruitment efforts. If such U.S. workers cannot be found by employers in a reasonable period of time, the government office

should facilitate the entry of foreign workers to fill the vacant positions -- consistent with the purpose of the new visa category.

We support comprehensive immigration reform that reflects both our interest and our values as Americans and is consistent with our nation's commitment to opportunity, fairness and equality. It is time to move forward, time for us to join together to enact immigration reform.