

## Provisions of the Comprehensive Immigration Reform Act of 2006 That Affect Immigrant Workers

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### Introduction

On March 27, 2006, the Senate Judiciary Committee completed markup of and voted to approve immigration reform legislation proposed by committee chair Arlen Specter (R-PA) (a bill also referred to as the “chairman’s mark”), titled the Comprehensive Immigration Reform Act of 2006. Subsequently, a “compromise” bill hammered together by Senators Mel Martinez (R-FL) and Chuck Hagel (R-NE) that was similar to but less generous than the committee-passed bill was introduced in the Senate.

The Judiciary Committee–approved bill and the compromise bill both were “comprehensive” — they contained a mixture of wonderful and awful provisions. They combined a path to legalization for many undocumented persons living in the U.S., a reduction in immigration backlogs, a new guest worker program, and a host of punitive “enforcement” measures. Significantly, the Judiciary Committee bill eliminated a provision in the chairman’s mark (as originally proposed by Specter) that would make being in unlawful status a crime, and it provided a humanitarian exception to provisions that would penalize some assistance to undocumented immigrants.

On Friday, April 7, Specter introduced a slightly revised version of the compromise bill, also called the Comprehensive Immigration Reform Act of 2006 (S 2611 and 2612), and vowed to take it up in committee when Congress returned from recess on April 24.

Unfortunately, the revised compromise proposal still includes many of the punitive enforce-

ment measures that were part of the original chairman’s mark and the Judiciary Committee–approved bill. It would create a temporary guest worker program that could still result in exploitation of workers by unscrupulous employers, and it still lacks important labor protections. In addition, it would maintain the requirement that employers electronically verify the immigration status of each new employee via an electronic employment eligibility verification system. Implementing such a system would result not only in a massive new bureaucracy, but also in an expansion of the underground economy (as more employers hire workers “off the books” and pay them in cash), as well as an increase in identity theft, fraud, bribery, and corruption.

This issue brief highlights the provisions of the compromise bill that may adversely affect immigrant workers. The text of the bill is available on the Comprehensive Immigration Reform page of NILC’s website, at:

[www.nilc.org/immlawpolicy/CIR/index.htm#cira](http://www.nilc.org/immlawpolicy/CIR/index.htm#cira).

### The Compromise Bill Includes Punitive Provisions that Will Prevent Many Undocumented Workers from Obtaining Legal Status

Title II of the bill includes new and harsher enforcement provisions that would subject immigrant workers to additional criminal penalties and to more extreme removal and detention–related policies — and would almost certainly make many undocumented immigrants permanently ineligible to obtain legal status. These provisions raise seri-



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ous concerns because their effect would be to basically contravene the bill's positive legalization provisions.

Specific concerns with provisions included in Title II of the bill include the following:

■ **New document-related offenses that would subject immigrants to criminal penalties and make them ineligible for immigration relief.**

The compromise bill would create new passport, visa, and document "fraud" offenses. It would make those who admit committing these offenses inadmissible and deportable, even if they had not actually been charged with or convicted of the offenses. Section 208 also would expand the types of offenses that constitute fraud to include omissions on any document, and it would broadly expand the definition of "immigration documents" to include evidentiary and supporting documents. These provisions would carry serious consequences for immigrant workers who might make a minor omission on an immigration application or inadvertently include false information on an immigration form, such as an incorrect birth date.

Section 222 of the bill also would make these new document fraud offenses "aggravated felonies." If this provision were to become law, any immigrant who is convicted of a document-related offense would be subject to mandatory detention, would be barred from applying for any immigration relief, including legalization, and would be permanently banned from returning to the U.S.

Of particular concern to immigrant workers is the fact that submitting any false information to an employer on an I-9 employment eligibility verification form would be an offense subject to these provisions. The bill states that these document fraud provisions would apply to "prospective conduct," i.e., acts committed after the bill is enacted. But the government could interpret some of these acts to be a "continuing offense," such as when an immigrant worker uses a false Social Security number or identity document to complete an I-9 form prior to the date the bill is enacted and is paid based on that SSN and false identity after that date. This section

could potentially affect millions of undocumented immigrant workers.

■ **Expansion of what constitutes an "aggravated felony."** Under this bill, the definition of "aggravated felony" would be expanded to include the document-related offenses discussed above, as well as three convictions for "driving under the influence" (DUI). This section would retroactively make the third DUI an aggravated felony, even if it occurred before the bill's enactment. The harsh consequences for people deemed to be aggravated felons would permanently bar them from the U.S., subject them to mandatory detention, and make them ineligible for any immigration relief.

■ **Increase in the kinds of acts that constitute "smuggling."** The bill would broadly expand the kinds of offenses that would be considered "smuggling" crimes, and it would make such offenses aggravated felonies. Under the bill, smuggling offenses would include inducing or encouraging an undocumented immigrant to reside in the U.S.; moving or transporting an undocumented person in the U.S.; and shielding or concealing an undocumented person in the U.S. from detection. A limited humanitarian exception could protect medical or service organizations from criminal charges, but not an individual who helped a relative.

■ **Penalties for failure to file a change-of-address form with the U.S. Department of Homeland Security.** The compromise bill also would change the penalties for failure to submit a change of address by increasing fines and providing for imprisonment of up to 6 months. The provision also would deem immigrants who fail to submit a change of address on more than one occasion a "flight risk." This change-of-address provision could impact all immigrant workers, even those who apply for legalization after the bill is enacted, who fail to promptly submit a change-of-address form.

■ **New penalties for involvement with street gangs.** The bill provides for increased penalties

related to being or having been associated with a street gang. Under the bill, any person whom the DHS determines is or has been a member of a street gang or has “participated in activities” of a gang would be inadmissible to the U.S. and deportable. Past membership in a gang would be sufficient to trigger these penalties even if it was long ago and did not involve commission of criminal acts. The determination of which individual is or has been a gang member or has been involved in gang activities would be at the sole discretion of the consular officer or the DHS. This provision would seriously impact immigrant workers. In recent raids of day laborer sites, local law enforcement officers and agents from U.S. Immigration and Customs Enforcement have made workers strip so the agents could search their bodies for gang insignias, apparently because some have claimed that the laborers work by day and engage in gang activities by night.

- **Additional penalties for failure to comply with an order of voluntary departure.** The compromise bill would compel immigrants to waive their right to appeal if they accept a grant of voluntary departure. The bill also would make any person who overstays a grant of voluntary departure ineligible for immigration-related relief. Immigrant workers granted voluntary departure who failed to leave the U.S. would be ineligible for any immigration relief, including legalization.

### **The Compromise Bill Provides for Increased “Worksite Enforcement” but Not for Increased Enforcement of Labor and Employment Law**

Title III of the bill addresses enforcement of immigration law in the workplace. As the Judiciary Committee bill would, the compromise bill would increase the number of worksite enforcement investigators by at least 2,000 per year for a 5-year period beginning the date of enactment of the proposal, while completely ignoring the need to increase enforcement of labor and employment laws.

As long as unscrupulous employers continue exploiting immigrant workers while facing almost no chance of being prosecuted for providing unsafe working conditions and for violations of labor law, the rights of all workers will be seriously undermined.

The language of Title III is still being negotiated, and it is expected that changes will be made to the compromise bill before the bill is debated on the Senate floor.

Specific concerns with Title III include the following:

- **Despite its documented flaws, the Basic Pilot employment eligibility verification program would be made mandatory for all employers.** Under the compromise bill, participation in the Basic Pilot program, an automated employment eligibility verification program in which currently employers participate on a voluntary basis (unless they are required to participate in it under the terms of a court-approved settlement agreement) and that is relatively small, would be mandatory for every employer in the country. The Basic Pilot has been plagued by significant problems, including inaccurate information entered in the DHS and Social Security Administration databases on which it relies, lack of adequate privacy protections, and misuse of the program by employers (e.g., using the information they are provided access to in a manner that violates the program’s rules). If all employers in the U.S. were to be required to use the Basic Pilot, with its inadequate technology and safeguards and its reliance on inaccurate databases, the costs would be enormously high and the results exasperating for all workers, not just immigrant workers.
- **To verify their identity and employment eligibility, workers would have fewer choices than they do now regarding which documents they may present.** The current Form I-9 employment eligibility verification system allows new employees to choose, from a fairly extensive list of acceptable documents, a combination of documents to present to their new

employer to establish their employment eligibility. This flexibility was built into the system because its designers recognized (a) that not all work-authorized individuals have the same documents and (b) that otherwise employers might demand to be presented certain specific documents and thus discriminate against employment-eligible workers who do not have those documents. In addition to decreasing the number of documents that are acceptable as proof of employment eligibility, the compromise bill would require that, as proof of identity, workers present a driver's license or ID card that complies with requirements laid down by the REAL ID Act. However, the REAL ID Act's requirements will not take effect until May 2008 (at the earliest), and when they do take effect many employment-eligible noncitizens will not be eligible for a REAL ID-compliant license or ID.

- **SSA “no-match” letters may be used to enforce immigration law.** The compromise bill would require employers to maintain records of all actions taken to resolve any issue that raises “reasonable doubt” as to the validity of an employee's identity or eligibility for employment, which could include actions they take when they receive letters from the Social Security Administration informing them that, based on information they provided on wage earners' W-2 forms, the wage earners' names do not match the Social Security numbers under which their wages were reported. While the compromise bill does not specifically mention SSA no-match letters, employers fearful of penalties will likely be overly cautious when they receive such “no-match” letters and will precipitously fire the workers named in the letters. To date, thousands of workers have been fired due to employers assuming, often incorrectly, that if a worker is named in an SSA no-match letter, the worker must be ineligible for employment.

## The Compromise Bill Would Vastly Expand the Guest Worker System

Title IV would create a new temporary worker program. The new H-2C guest worker visas would be available to individuals who want to come to the U.S. from abroad to work for 2 terms of up to 3 years each (for a total of 6 years) in job categories not covered by other guest worker visas. This new program would radically change the way the current guest worker system functions, since the current system is designed to address employers' need for seasonal and short-term labor. Employers in some industries would likely see such a program as a way to cut labor and benefits costs by hiring guest workers to replace employees who are permanently eligible for employment and thus less vulnerable to exploitation. The compromise bill made three important changes to the temporary worker program provisions of the Judiciary Committee-approved bill. Specifically, the compromise bill (a) would cap the number of temporary guest workers at 325,000 workers a year; (b) would require that jobs be advertised at the prevailing wage; and (c) would add 2,000 new U.S. Dept. of Labor inspectors to monitor employers under this program.

Specific concerns with Title IV include the following:

- **H-2C workers would have no meaningful mobility in the labor market.** If they became unemployed for more than 60 days, they would have to leave the country. As a result, they would feel pressure to accept reduced wages and substandard working conditions from any employer that would be willing to sponsor and hire them before the 60-day period expired. The bill does not provide for lapses in employment due to work-related injuries or other serious health concerns. The bill does allow DHS to waive a worker's departure from the U.S. but provides no basis on which such a waiver would be granted.

- **No meaningful mechanism would be provided for enforcing “labor protections” — for example, for ensuring that workers are paid the prevailing wage or that whistleblowers do not suffer retaliation.** The compromise bill would establish an administrative enforcement scheme, under which the secretary of the U.S. Dept. of Labor would have to determine that there was “probable cause” that a violation had occurred before the DOL would conduct an investigation. If the secretary did not determine that there was probable cause, the party charging the violation would have no other avenue for seeking a remedy.
- **H-2C workers would have no meaningful protection against discrimination.** The anti-discrimination provisions of the Immigration Reform and Control Act of 1986, which, for example, forbid citizenship status–based discrimination in hiring or firing workers, or in referring them to jobs for a fee, do not cover guest workers; and the compromise bill would do nothing to plug this hole in the law.
- **The bill does not provide for a meaningful audit process.** The only sanction that employers who recruit and hire H-2C guest workers would face if an audit found them to be in violation of the guest worker program rules would be that they would be disallowed from participating in the program for a short period of time.
- **H-2C workers would not be allowed to switch to a different nonimmigrant visa category.** While H-2C workers would be allowed to switch jobs (i.e., their status would be “portable”), they would not be allowed to work for employers that for whatever reasons were not eligible to hire H-2C workers, and they would not be eligible to adjust their status to another nonimmigrant visa category.
- **Prospective employers would have to verify H-2C workers’ employment eligibility via the Basic Pilot employment eligibility verification program, which relies on Dept. of Homeland Security and Social Security Administration databases.** Because both the DHS and the SSA are perpetually behind on entering data into their database systems, the systems’ records are notoriously unreliable. Employment-eligible H-2C workers whose prospective employers must verify their employment eligibility via the Basic Pilot thus are likely to face delays in actually starting work, when the employers are unable to confirm through the system that the workers are employment-eligible.

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