

Title III of the STRIVE Act of 2007 (H.R. 1645) EMPLOYMENT ELIGIBILITY VERIFICATION

March 29, 2007 (updated May 23, 2007)

Title III of the STRIVE (Security Through Regularized Immigration and a Vibrant Economy) Act of 2007 creates a new electronic employment verification system (EEVS) that every employer in the U.S. would be required to use to verify the employment eligibility of their workers.

As with the EEVS proposed in the 2006 Senate bill (S. 2611),¹ the EEVS in the STRIVE Act builds upon the Basic Pilot program, which has been in existence since 1997 and has been plagued by problems, including inaccurate databases, flawed design, and employer misuse of the program.² Only about 16,000 employers nationwide currently participate in the Basic Pilot, and its expansion to mandatory use by all employers would be a complicated and logistical challenge in the best of circumstances. Any expansion of the Basic Pilot to the entire workforce must grapple with these problems or risk implementation delays and possible melt-down as frustrated businesses and workers struggle to find ways around the resulting flawed and burdensome system.

The future of the STRIVE Act is uncertain. But it is helpful to analyze its EEVS provisions through the lens of accuracy, workability, and minimizing the harm to *all* workers because some or all of them could become law this year as part of a comprehensive immigration reform bill. The STRIVE Act makes a number of important improvements to the Basic Pilot, including provisions to strengthen the privacy, antidiscrimination, and due process protections in the program. A critical feature of the STRIVE Act is that EEVS implementation would be phased in over a 4-year period, with objective benchmarks in place to ensure that it meets minimum accuracy standards and that employers are complying with the privacy and antidiscrimination provisions. As a result, we expect more up-front planning on these issues than would otherwise be the case, and the transition to the new EEVS should be far easier.

Note that no amount of up-front planning and design would be of any use if an EEVS were to be implemented outside of the context of comprehensive immigration reform. In that case, the new system would start out with the insurmountable handicap of 8 million unauthorized workers and their employers seeking to uncover and exploit the weaknesses inherent in any system. For a full summary of the EEVS provisions in the STRIVE Act, see www.nilc.org/immsemplymnt/cir/strive_eevs_2007-04-02.pdf.

* * *

The following summary is not a full analysis of Title III. Rather, we hope to highlight the provisions in the STRIVE Act that should be included in any EEVS proposal, and the provisions that should be opposed.

¹ For an analysis of the EEVS proposed in S. 2611, *see* SUMMARY AND ANALYSIS: THE ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM PROPOSED BY THE SENATE'S COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006 (S 2611) (NILC, Aug. 2006), www.nilc.org/immsemplymnt/ircaempverif/eev001.htm.

² NILC continues to have concerns about the adverse impact of making EEVS mandatory for all workers and employers, but it is all but inevitable that such a system will be incorporated into any comprehensive immigration reform bill. If so, it is imperative that the system be designed well to avoid unnecessary problems both for immigrants and all other workers. For a summary of our concerns, *see* THE BASIC PILOT PROGRAM: NOT A MAGIC BULLET (NILC, Jan. 2007), www.nilc.org/immsemplymnt/ircaempverif/basicpilot_nomagicbullet_2007-01-11.pdf.



LOS ANGELES (Headquarters)

3435 Wilshire Boulevard
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

WASHINGTON, DC

1101 14th Street, NW
Suite 410
Washington, DC 20005
202 216-0261
202 216-0266 fax

OAKLAND, CA

405 14th Street
Suite 1400
Oakland, CA 94612
510 663-8282
510 663-2028 fax

STRIVE Act provisions that should be included in any EEVS proposal:

- ❖ **Requires a four-year phase-in and certification process.** The EEVS is phased in over four years (unlike the 18-month rollout in S. 2611) by size of employer (“critical” employers must participate within one year of enactment). Before the EEVS is implemented (and before any subsequent phase-in), the comptroller general must study and certify that certain standards have been met, including database accuracy, measurable employer compliance with the EEVS requirements, protection of workers’ privacy, and adequate agency staffing and funding. In conducting the studies, the comptroller general must consult with representatives from immigrant communities, among others. The comptroller general is also required to submit reports to the Department of Homeland Security (DHS) and Congress on the impact of the EEVS on employers and employees.
- ❖ **Extends the time that workers have to challenge a finding by the EEVS.** Workers are given 15 days to challenge an initial finding by the EEVS regarding employment eligibility — known as a “tentative nonconfirmation” (versus 8 days under current law and 10 days under S. 2611). As with S. 2611, STRIVE also requires that if DHS cannot issue a determination of a worker’s employment authorization within the time prescribed, the worker is automatically confirmed as employment-eligible (DHS can revoke this determination if it later determines that the worker is not authorized for employment).
- ❖ **Limits the circumstances under which an employer can reverify a workers’ employment eligibility.** The bill makes it an unfair immigration-related employment practice for an employer to reverify a worker’s identity and employment eligibility unless (1) the individual’s work authorization expires (DHS must notify an employer 30 days before the expiration date), (2) the employer has actual or constructive knowledge that the individual is not authorized to work, or (3) the reverification is otherwise required by law. The STRIVE Act also prohibits employers from verifying a worker’s employment eligibility if he or she is “continuing in his or her employment” as defined in regulation.
- ❖ **Creates exceptions to documentation requirements.** Like S. 2611, the STRIVE Act significantly limits the documents that all workers can present to prove their identity and employment eligibility, which may prevent work-authorized individuals from being able to obtain employment (see description on page 3). However, STRIVE does provide exceptions for individuals under age 18 and people with disabilities. STRIVE also allows workers to present a receipt for the application of a document in certain circumstances.
- ❖ **Requires existing antidiscrimination protections in the Immigration and Nationality Act (INA) to apply to the EEVS.** Similar to S. 2611, the STRIVE Act prohibits employers from misusing the EEVS by (1) terminating an individual’s employment based on a tentative nonconfirmation notice; (2) using the EEVS for screening of an applicant prior to an offer of employment; (3) reverifying the employment eligibility of current employees beyond the time period required under law; and (4) using the EEVS selectively to exclude certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants.
- ❖ **Expands existing antidiscrimination protections in the INA.** The STRIVE Act includes a number of important protections that bring the INA closer into line with other civil rights laws. Provisions include: (1) prohibiting national origin discrimination during the employment relationship (the current prohibition is limited to discrimination in hiring, recruitment or discharging); (2) expanding the categories of immigrants who can file a charge of immigration-related unfair employment practice under the INA (language same as S. 2611); (3) extending the time that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), U.S. Department of Justice, has in which to file an investigation of an alleged discriminatory act; (4) giving administrative law judges the discretion to award other appropriate remedies that are available under other civil rights laws; (5) eliminating the provision requiring workers to prove that the employer “intended” to discriminate against them; (6) increasing the fines for employers who are found to have violated the law (language same as S. 2611); and (7) providing \$40 million in funding for OSC to educate employers and employees about antidiscrimination policies (language same as S. 2611).

- ❖ **Strengthens privacy protections.** Like S. 2611, the STRIVE Act requires that information in the EEVS be safeguarded and that only minimum data elements be stored. It creates penalties for unlawfully accessing the EEVS and for using information in the EEVS to commit identity theft for financial gain. Unfortunately, STRIVE implicitly authorizes the creation of a new Social Security card for issuance to every worker, a provision with profound privacy and due process implications.
- ❖ **Strengthens existing preemption language in the INA.** As current law does, the STRIVE Act preempts states and localities from imposing penalties on those who hire undocumented immigrants. STRIVE also preempts states and localities from requiring the EEVS to be used for any other purpose other than employment authorization and from mandating that employers use the EEVS.
- ❖ **Includes due process provisions.** Like S. 2611, STRIVE creates an administrative and judicial review process to challenge a finding that a worker is not authorized for employment (a “final nonconfirmation”). If, after the review process, the worker is found actually to be authorized for employment, and it is found that the original “final nonconfirmation” was the result of a DHS error, the worker is entitled to back wages (although not during any period that the worker was not authorized for employment). STRIVE also requires that workers can view their own records and correct or update information in the EEVS. DHS also must establish a 24-hour hotline to receive inquiries from workers and employers concerning determinations made by the EEVS.

STRIVE Act provisions that should be opposed:

- ❖ **Documentation requirements too restrictive.** Like S. 2611, the STRIVE Act significantly limits the documents that an individual can present to prove identity when seeking employment. Most worrisome is the fact that U.S. citizens can only present a U.S. passport or driver’s license or identification card that complies with the REAL ID Act — even though no state is currently in compliance with REAL ID and eleven states have decided not to implement the law. A more reasonable approach to reforming the current documentation requirements is to require the documents listed in a 1998 INS proposed rule, which limits the current list of documents, but still recognizes the fact that not all work-authorized individuals have the same documents.³
- ❖ **Changes the standard for “knowing” that an immigrant is not authorized for employment.** As in S. 2611, the STRIVE Act changes the standard from “knowing” to “knowing or with reckless disregard.” It is possible that this new standard will lead some employers to err on the side of caution and give more scrutiny to those who look or sound foreign.
- ❖ **Requires sharing of taxpayer information with DHS.** Like S. 2611, the STRIVE Act requires the Social Security Administration to disclose taxpayer identity information of employers and employees to DHS when DHS requests this information. Use of confidential tax information to enforce immigration law can have a negative effect on tax compliance and has the potential to increase discrimination against foreign-looking or sounding workers.
- ❖ **No attorney’s fees or private right of action in administrative and judicial review process.** Like S. 2611, attorney’s fees and costs are not included — even though employers can recover up to \$50,000 in attorney’s fees when they challenge a finding that they violated immigrant law. Low-income workers are far less equipped than are employers to represent themselves or hire counsel, and the availability of fees is critical to their ability to pursue their rights. STRIVE also prohibits a private right of action, which also would drastically limit workers’ ability to correct abuses and errors of the system.

FOR MORE INFORMATION, CONTACT

Tyler Moran, Employment Policy Director | moran@nilc.org | 208.333.1424

³ See 63 Fed Reg. 5,287, (Feb. 2, 1998).