



PRESIDENT AND SENATORS COMPROMISE ON COMPREHENSIVE IMMIGRATION REFORM



Kelly Campbell
"Employers who attempt to evade the verification requirements will face stiff penalties."

On May 17, 2007, Administration officials and a bipartisan group of Senators reached an agreement on comprehensive immigration reform legislation. As one political

commentator noted, "It is in the nature of a legislative compromise that if you are a true believer -- on either side -- you will not see it as a compromise. You will see it as a sell-out. If

you truly believe that illegal immigrants should be evicted then you will oppose this. On the other hand, if you truly believe that undocumented aliens should be fully accepted into American society, then you will oppose this." Although an official version of the proposed legislation has not been fully disclosed, the proposal addresses eight key areas:

1. Putting border security and enforcement first. Border security and worksite enforcement benchmarks must be met before other elements of the proposal are implemented. These benchmarks include the construction of several hundred miles of fence, the hiring of additional border patrol agents, the implementation of the "catch and return" policy at the border, and the availability of the employment eligibility verification system to all employers across the country. The proposal also establishes penalties for border crimes and gives the border patrol additional tools to stop illegal border crossings. Those additional tools

include the hiring of more border agents with supporting equipment, the construction of additional fencing and vehicle barriers in targeted areas, and the development of a proper mix of sensors, radar and cameras.

2. Providing tools for employers to verify the eligibility of the workers they hire. The proposal contemplates that within a few years all employers will be required to copy and retain identity and work authorization documents and to verify the work eligibility of all employees using an employment eligibility verification system (EEVS). Required use of the EEVS will be implemented in phases: Employers in critical industries will be required to use the EEVS first, then all employers will be required to use EEVS for new hires, and then all employers will be required to use EEVS for all employees. **PRACTICAL EFFECT: Greater administrative and document retention burdens:** Within a few years all employers will be required to copy identity and work authorization documents. Employers will be required to participate in the Internet-based EEVS and to verify the employment eligibility of all employees, not just new hires, within a few years. Employers will be expected to deal with Social Security mismatch letters quickly because the Social Security Administration will provide the mismatch information to the Department of Homeland Security.

3. Creating a temporary worker program. The proposal creates a temporary worker program to fill jobs that Americans are not doing and to provide a lawful way to meet the needs of the American economy. To ensure that

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Suzanne K. Roten



SUZANNE K. ROTEN is a Senior Associate in the Knoxville, Tennessee office of the firm, which she joined in 2001. Her law practice

includes an emphasis in employment discrimination and wrongful discharge litigation, as well as FLSA, ADA and FMLA compliance. Suzanne is licensed to practice law in the State of California, and she regularly advises clients on California employment law compliance. She received her Bachelor of Arts degree in English Literature from the University of California, San Diego, a Master of Library Science from the University of California, Berkeley, and her law degree from the University of California, Los Angeles. While in law school, Suzanne was a member of the UCLA Law Review and served as its Chief Managing Editor. Suzanne was appointed by the Mayor of Knoxville to serve as a member of the Knoxville Civil Service Merit Board from 2004 - 2009. Suzanne is a member of the Labor and Employment Law sections of the Tennessee Bar Association and the California Bar Association.

Suzanne is also a member of the Knoxville Bar Association and the Los Angeles County Bar Association.

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the program is truly “temporary,” workers will be limited to three two-year terms, with at least a year spent outside the United States between each term. The temporary worker program will have a cap of 400,000 aliens each year, which can be adjusted up or down in the future depending on demand. The proposal also recognizes the unique needs of agriculture by establishing a separate seasonal agricultural component under the temporary worker program. PRACTICAL EFFECT: ***Labor intensive and seasonal industries will have a source of temporary low-skilled labor:*** *The new Y temporary worker program would provide a temporary source of labor for those industries that cannot find enough workers, as it provides only a two-year nonimmigrant visa and requires that workers leave the U.S. for one year before being eligible to renew their work visa for a subsequent 2-year period. These temporary workers generally would not have a path to permanent resident status. There is some concern that the 400,000 cap is too small to meet the need.*

4. No amnesty for illegal immigrants. Illegal immigrants who entered before January 1, 2007 and who “come out of the shadows” will be given probationary status. Once the border security and enforcement benchmarks are met, they must pass a background check, remain employed, maintain a clean criminal record, pay a \$1,000 fine, and receive a counterfeit-proof biometric card to apply for a work visa or “Z visa.” Some years later, these “Z” visa holders will be eligible to apply for a green card, but only after paying an additional \$4,000 fine; completing accelerated English requirements; getting in line behind the current backlog of immigrant visa applicants; returning to their home country to file their green card application; and demonstrating merit under the merit-based system. PRACTICAL EFFECT: ***Amnesty or not amnesty?:*** *The proposal gives those who have been in the United States since before January 1, 2007 the opportunity to remain in the United States so long as they apply for a Z visa, pass a criminal background check, pay certain fees, and remain employed. Some call this part of the compromise amnesty because the illegal aliens are not thrown in jail or returned to their home countries. Others deny this part of the compromise is amnesty because the Z visa holders have to pay substantial fees, pass criminal background checks, and wait a long time before they can become permanent residents.*

5. Strengthening the assimilation of new immigrants. The proposal declares that English is the language of the United States and calls on the United States government to preserve and enhance it, as well as enacting accelerated English requirements for many immigrants. PRACTICAL EFFECT: ***Aliens will need to become fluent in English.***

6. Establishing a merit system for future immigration. The proposal contemplates a new merit-based system to select future immigrants based on the skills and attributes they will bring to the United States. Under the merit-based system, future immigrants applying for permanent residency in the United States will be assigned points for skills, education, and other attributes that

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ALTERNATIVES AND TIPS ON HANDLING SOCIAL SECURITY MIS-MATCH LETTERS



FRED BISSINGER
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While the handling of social security mis-match letters has never been the sole basis for an ICE investigation or prosecution, ICE always asks during any investigation how employers respond to such Social Security mis-match letters, and the employer's response is always a relevant consideration to ICE. Further, the ICE "best practices" generally recommend that employers develop a protocol for such matters. Unfortunately, ICE has never specifically indicated how employers should respond to such mis-match letters.

Employers currently respond to such mis-match letters in various ways:

1. Some companies simply send a memo to the employee telling them to straighten the matter out with Social Security, and do nothing else.
2. Other companies do No. 1 above, but also terminate the employee on the second or third occasion of the employee's name showing up on separate mis-match letters from Social Security.
3. Some employers go to the other extreme, and send a memo to employees as outlined in No. 1 above, but terminate the employee after 30 or 60 days if the employee does not come back and demonstrate that the problem has been corrected.
4. Still another approach is to follow the proposed ICE regulation, which includes a

How to handle Social Security mis-match letters is one of the most controversial issues one can face. A protocol for handling such mis-match letters is recommended,

and should be developed with advice of counsel. The "advice of counsel" defense may help if ICE contends that procedures are not appropriate.

set of reasonable steps that employers can take to avoid a charge of constructive knowledge arising from the mis-match letter. If the employer has first checked the matter with the employee and asked the employee to correct the matter with SSA, and if the employee is unable to correct the discrepancy within 60 days of the employer's receipt of the mis-match letter, then the employer could re-verify the employee's work eligibility through a modified I-9 procedure within three additional days.

A couple of years ago, a major employer sent a letter sent to the IRS, SSA, Homeland Security, and the Department of Justice seeking advice on these issues. The letter pointed out that a number of organizations contend that an employer should only provide the employee with the no-match letter and then leave it to the individual to correct, without having further duties to report to the employer. These organizations point to a number of opinion letters that state that "no-match letters," standing alone, are not evidence of falsification or lack of an authorization to work in the U.S. Only SSA responded to the inquiry, basically refusing to take a position, other than restating that SSA instructs employers that, "... the no-match letter does not make any statement about an employee's immigration status ... you should not take adverse action against an employee just because his or her SSN appears on the list of unmatched SSN's."

To make matters even more confusing, the issue is the subject of some debate among attorneys representing employers, and no one is completely sure what to do. It is submitted that most employers would be better off following the proposed ICE regulation, which is a reasonable application of the law and also provides a "safe harbor" for employers to avoid prosecution based on following the regulations' procedure. It also expressly requires employees to fill out a new I-9 form within a 3 day period following the expiration of 60 days, during which the employee may present documents with a different Social Security number as part of the process. Any document produced as a part of the modified I-9 process must be verified with DHS or SSA.

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further our national interest, including: ability to speak English; level of schooling, including added points for training in science, math, and technology; job offer in a specialty or high demand field; employer endorsement; and family ties to the U.S. PRACTICAL EFFECT: *Shift from a system that granted permanent resident status based primarily on family relationship to a system that grants permanent resident status based on the alien's skills.*

7. Ending chain migration. The immigration system would be reformed to better balance the importance of family connections with the economic needs of the United States by replacing the current system. Under the current system nearly two-thirds of green cards are awarded to relatives of U.S. citizens. Under the new system, visas for parents of U.S. citizens are capped, and green cards for the siblings and adult children of U.S. citizens and green card holders will be eliminated. The diversity lottery program, which grants 50,000 green cards per year through random chance will be eliminated. With this elimination, currently available visas will be used to clear the family backlog in eight years. After the clearing of the family backlog, the new merit system will use these visas for future immigration purposes. PRACTICAL EFFECT: *Fewer immigrant visas will be issued based on family relationships.*

8. Clearing the family backlog. Millions of family members of U.S. citizens now wait years in line for a green card, with some waits estimated at as long as 30 years. Family members who have applied legally and have lawfully waited their turn in

line will receive their green card within eight years. PRACTICAL EFFECT: *For those who seek to enter the United States lawfully based on family status the long wait will end and a million or more workers could become available within the next decade.*

There is no assurance that compromise reached between the White House and the bipartisan group of Senators will pass the Senate or the House. In addition, a lot of the details still need to be resolved.

For employers, the proposal has significant ramifications. First, within a few years, employers will be expected to verify the identity and work authorization of all workers using the EEVS. Employers who attempt to evade the verification requirements will face stiff penalties. Second, the Department of Homeland Security will have an additional weapon in identifying illegal aliens through the ability to receive mismatch information from the Social Security Administration. Third, it appears that employer audits will be important to ensure employer compliance with the verification system. Fourth, employers who are having difficulty finding workers will likely benefit from the temporary worker program, which will allow as many as 400,000 aliens to enter the country each year to fill jobs that Americans are not doing. Fifth, illegal aliens who were in the United States prior to January 1, 2007 will have the opportunity to continue to live, work and travel freely in the United States. This last feature of the agreement is probably the most significant for employers who need to retain workers for labor-intensive jobs.

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Although the above approach is probably the safest to follow, it may be permissible to follow a slightly different procedure, in which the employer notifies the employee that he or she must correct the problem with the SSA. If the employer receives another no-match list from the SSA with the employee's name showing up a second time, the employer could terminate the employee's employment based on not having corrected the problem with the SSA.

The above suggestions are not to say that other procedures are not workable, they are simply to say that they represent "mainstream" thinking at this point.