



June 10, 2013

The Honorable Harry Reid
U.S. Senate
The Capitol S-221
Washington, D.C. 20510

The Honorable Mitch McConnell
U.S. Senate
The Capitol 230
Washington, D.C. 20510

Dear Senators:

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy group, I am writing to express our concerns and recommendations regarding S. 744, the "Border Security, Economic Opportunity, and Immigration Modernization Act."

NFIB members are supportive of a mandatory, federal electronic employment eligibility verification system (also known as E-Verify) patterned on the current voluntary E-Verify program. However, S. 744 does not take small businesses into account because the bill fails to balance increased enforcement objectives and limit regulatory, paperwork, and financial burdens with the establishment of a mandatory, nationwide E-Verify program.

Instead of leveling the playing field for small businesses, S. 744 includes anti-small employer provisions and places significant new costs, bureaucracy, and regulations on small employers. NFIB's concerns are listed below in order of importance followed by our recommendations for improvement to the E-Verify (Title III) section of the bill.

New Bureau Should Not Be Established Especially Without Congressional Oversight

NFIB is deeply concerned with the creation of a new, independent agency: The Bureau of Immigration and Labor Market Research. The Bureau is established with initial federal appropriations for set-up and then self-funded through fees collected from employers participating in the W nonimmigrant visa program. This self-funding mechanism shields the new Bureau from Congressional oversight since it will not be subject to future appropriations. This structure creates a strong incentive to increase the fees and impose additional and new fees on employers.

Discriminatory Limit Placed on the Construction Industry for W Visas

Under Section 4703, the bill includes specific caps – not to exceed 15,000 per year – for the W visas for the construction industry. The bill directly and discriminately targets and limits these members from fully-participating in the W visa program. As the construction industry continues in its economic recovery, small construction employers need flexibility and support, and the bill fails to provide either.

Department of Homeland Security (DHS) Should Not Be Given New Authority

DHS should not be given new authority to establish *enhanced* penalties for violations of wages, hours, and workplace health and safety. The Department of Labor (DOL) has already been given statutory authority as the agency within the federal government tasked with overseeing and enforcing workplace health and safety, as well as wage and hour requirements. Additionally, it is unclear the monetary range of these *enhanced* penalties that DHS will develop and whether the size of the employer will be taken into account. Consequently, it is impossible to foresee how small businesses will be affected by this significant new authority – an authority that is both duplicative and unnecessary since DOL is already responsible for enforcing wage, hour, and workplace health and safety requirements and regulations. Small businesses do not need another layer of federal bureaucracy or punitive penalties.

Small Business Improvements Needed Under E-Verify Section of S. 744

NFIB strongly supports an E-Verify system that takes into account the size of an employer in its fee structure, includes a reasonable limit on small-business penalties and reduces such penalties on first-time offenders, prohibits penalties for good-faith violations, protects employers from liability if incorrect information on a worker is given by the E-Verify system, reduces paperwork burdens, and contains an appropriate phase-in time of the new E-Verify system. Previously, NFIB has supported a phase-in for E-Verify of four years after enactment – any timeframe shorter than that is burdensome for small businesses to adapt to a nationwide E-Verify system.

Most important, understanding that each small business is unique in location, structure, and operation is key and that adopting a “one size fits all approach” will not work for small business. NFIB Research Foundation’s *National Small Business Poll – Business Structure* found that 87.5 percent of all small employers do not have at least one employee (excluding the owner) whose only job is personnel or human resources.

A large percentage of small businesses are also rural and may not have access to reliable, consistent Internet connections. Therefore, small businesses must have the option to phone-in toll-free for E-Verify. Additionally, the tools and technology mandated for E-Verify under S. 744 must be affordable, reasonable, and usable for all small businesses.

As a result, below are the provisions that need to be addressed and improved under Title III of the bill:

- Tiered civil penalty structure for small business;
- Reinstate good faith defense language;
- Clarify how mandatory training will be financed;
- Language needed to clarify independent contractors and whether general or subcontractors are responsible for E-Verify.

Tiered Civil Penalty Structure for Small Business

The civil penalty section of the bill does not take into account the size of a small business (employer) in the fee structure and fails to offer tiered penalties for small businesses. This “one size fits all approach” will not work for small business and, in fact, even the minimum fine for a

first-time offense could put very small employers out of business. Under previous immigration reform efforts, NFIB has advocated for a tiered penalty structure, similar to the penalty reduction adopted by the Occupational Safety and Health Administration. The current levels included in S. 44 are increasingly high with the first offense ranging from \$3500 to \$7500 for each violation, the second offense from \$5000 to \$15,000 for each violation, and subsequent offense at \$10,000 to \$25,000 each. This differs significantly from current law, which provides that the first offense is between \$250 to \$2000, with the second offense at \$2000 to \$5000, and the third offense from \$3000 to \$10,000 per unauthorized worker.

Additionally, the bill does not reduce penalties for first-time offenders. A small business owner who fails to query a worker should not be subject to fines or other penalties if the employer can establish that the worker is authorized to work in the United States. NFIB has previously endorsed language for a first-time waiver if the employer demonstrates good faith compliance. NFIB continues to support such a waiver.

Reinstate Good Faith Defense Language from Original Bill Text

As introduced, S. 744 included a good faith defense provision; however, the Sponsor's Amendment removed this critical language. Specifically, the language that was deleted granted an employer the ability to retain the good faith defense if: 1) an employer made an E-Verify inquiry but has not received an appropriate verification, and 2) if the employer recorded in the system this reason as to why the employer continues to employ the individual. As a result, clear safe harbor language must be included within the bill to protect employers from liability if E-Verify provides incorrect information on a worker. The nationwide E-Verify system will not be fool-proof, so small businesses must receive protection in a system that contains errors.

Unclear How Mandatory Training for E-Verify Will Be Financed

S. 744 requires that all employers undergo mandatory E-Verify training, yet the bill fails to specify who will be responsible for the cost of training and how this mandatory training will be financed. The burden of financing the mandatory training for the E-Verify system must not be placed on small businesses. NFIB's monthly *Small Business Economic Trends* (SBET) reported in May that the single most important small business problem is taxes at 23 percent, followed by government regulations and red tape at 21 percent, and weak sales at 16 percent. Small businesses do not have the resources to finance yet another mandate or requirement by the federal government.

Clarifications Needed for Independent Contractors and General and Subcontractors

The bill is silent as to whether small employers will need to use the E-Verify system for independent contractors. Under previous immigration reform efforts, NFIB has strongly supported the inclusion of language to ensure that contractors are not liable for hiring or the continuation of employment of an unauthorized alien by a subcontractor. This bill should address this issue to provide clarity for small businesses.

As the Senate begins consideration of the "Border Security, Economic Opportunity, and Immigration Modernization Act," we are eager to work with you to ensure that America's small businesses are not unduly burdened, unfairly scrutinized, or otherwise negatively affected by any unintended consequences resulting from the implementation of a federal mandate patterned on

the current voluntary E-Verify system. NFIB believes that in order for an immigration reform effort to be successful, the requirements and enforcement provisions must be workable, efficient, and fair for small businesses.

Sincerely,

A handwritten signature in black ink that reads "Susan Eckerly". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Susan Eckerly
Senior Vice President
Public Policy

cc: Senators Michael Bennett, Richard Durbin, Jeff Flake, Lindsey Graham, John McCain, Robert Menendez, Marco Rubio, and Charles Schumer