



Statement
On behalf of the
National Restaurant Association

ON: THE LEGAL WORKFORCE ACT

TO: U.S. HOUSE OF REPRESENTATIVES, JUDICIARY COMMITTEE,
SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY

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Statement on: “The Legal Workforce Act”
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On Behalf of the National Restaurant Association
House Judiciary Committee
Subcommittee on Immigration and Border Security
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Good Morning Chairman Gowdy, Ranking Member Lofgren, and distinguished members of the Subcommittee. My name is Angelo Amador and I am the Senior Vice President & Regulatory Counsel at the National Restaurant Association.

Thank you for allowing me the opportunity to testify today on behalf of the National Restaurant Association on the Legal Workforce Act, which would create a national E-Verify mandate. My comments are based on the version of the Legal Workforce Act amended and reported out of the House Judiciary Committee in the 113th Congress (H.R. 1772).

Our Association is the leading business representative for the restaurant and food service industry. The industry is comprised of one million restaurant and foodservice outlets employing 14 million people—about ten percent of the U.S. workforce. Restaurants are job creators and the nation’s second-largest private-sector employer. Despite its size, small businesses dominate the industry; even larger chains are often collections of smaller franchised businesses.

For several years, the National Restaurant Association has provided input on the best ways to improve the E-Verify program. We believe that the Legal Workforce Act is a thoughtful, balanced approach to implementing a major change related to workplace hiring for employers of all sizes. To be sure, we do not take this attempt at change lightly. Employers in our industry, as in others, do not usually respond with eager excitement about the prospect of a new federal mandate in the workplace. So, we are especially appreciative of the bill sponsors’, and this subcommittee’s, efforts to think through the real-world implementation of a universal E-verify mandate.

As you already know, many of our members and their suppliers have been early adopters of the voluntary E-Verify program—in fact, some franchisors have been requiring the use of E-Verify by their operations since as early as 2006. The National Restaurant Association is also a user of E-Verify. Our members that use the program, and my own Department of Human Resources at the National Restaurant Association, have found E-Verify to be both cost effective and fast in helping guarantee a legally authorized workforce.

In April 2013, the National Restaurant Association released the results of a survey of about 800 members on the use and implementation of the current E-Verify system. What we found was broad support for the program, with members generally experiencing few problems signing up in the system and appreciating the ability to quickly ensure that their employees are authorized to work. Still, there is room for improvements to the system that we believe are important for the successful implementation of a nationwide E-Verify mandate that encompasses all U.S. employers. I will discuss more details of this survey in a moment.

For businesses across the country, particularly small businesses who make up so much of our industry, it is imperative that any mandated E-Verify program be fair, efficient, workable, and cost-effective within their own administrative structure. A federal E-Verify mandate would have an impact on the day-to-day activities, obligations, responsibilities, and exposure to liability of all restaurants, regardless of size.

In context, the mandate—once implemented—will be the final hurdle that every employer must clear for each and every hiring decision made in the United States. For our members, in an industry with naturally high turnover rates, whose businesses are so reliant on their workforce—and their workforce’s ability to provide guests with a pleasing experience—this system’s day-to-day success is vital. This makes the structure and details of the system extremely important to our members.

To be clear, the Association believes that designing an employment authorization verification system is unequivocally a federal role. Actions by 50 different states and numerous local governments in passing a patchwork quilt of employment verification laws create an untenable system for employers and their prospective employees. Our members, be they large restaurant chains, or regional chains, or even small restaurants with a couple of locations on different sides of a state line, should not be asked to try to keep up with any number of differing—potentially conflicting—regulations, all covering the same workplace transaction.

E-VERIFY SURVEY RESULTS

Before I move into a discussion of some of the key considerations in a nationwide E-Verify mandate, I want to take a moment to provide some more detail on the survey we conducted, which includes first-hand accounts on why employers use or do not use the program. Respondents of our survey included restaurant owners and operators, non-restaurant foodservice operators and supply chain professionals.

Among all restaurant owners and operators, 23 percent told surveyors they currently use E-Verify to check the immigration status of new hires. Among corporate-owned restaurants, a full 49 percent are enrolled in the system. We believe those numbers are higher now.

Of those using the program, it is significant that eighty percent of restaurant operators who use E-Verify would recommend it to a colleague. Two-thirds of the responding restaurant operators who use E-Verify enrolled voluntarily. Twenty-seven percent enrolled because it is mandated in states where they do business and 2 percent use E-Verify because they do business with the federal government.

Of those not using the program, sixty-two percent of the restaurant operators who are not using E-Verify said they did not enroll because they are small companies with no Human Resources professionals. This is why we are calling on changes as part of a broad national mandate that simplifies the current two-step E-Verify process and the need for internet access and a computer.

Finally, the vast majority of restaurant operators that use E-Verify said the system is accurate. Seventy-nine percent of restaurant operators said the E-Verify system has been 100 percent accurate, as far as they know. Across each of the demographic categories, a solid majority of

restaurant operators said the E-Verify system has been 100 percent accurate, to the best of their knowledge, but we understand there will be errors and we need ways to deal with them.

FUTURE IMPLEMENTATION OF E-VERIFY

Below, I would like to outline some improvements that we believe the federal E-Verify program should include in order to gain broad support within our industry, and compare those potential improvements to the version of the Legal Workforce Act reported out of the Judiciary Committee during the last Congress.

There Should Be One Law of the Land

The current federal employment verification system is clearly in need of an overhaul. Most employers in our industry recognize that the I-9 system put in the place in 1986 is not adequate to meet the demands of employment verification in our more modernized time. In the current system, employers are boxed in by federal regulations that, on one side, require them to conduct the I-9 process on every person they hire and, on the other side, limit their ability to question the validity of authorization and identity documents used during that process.

The I-9 system's inability to truly recognize work authorization has led to frustration not only for employers, but also for American workers and state and local governments. Out of this frustration, and the frustration caused by the federal government's inability to move forward on the issue, many states and localities have responded with a patchwork of employment verification laws.

This new patchwork of immigration enforcement laws expose employers, who must deal with a broken legal structure, to unfair liability and the burden of numerous state and local laws. A new federal E-Verify mandate must address this issue specifically, so employers will know with certainty what their responsibilities are under employment verification laws—regardless of where they are located. We strongly believe that it is unfair, and a recipe for confusion and conflict, to ask employers in any industry to attempt to comply with a number of differing regulations covering the same workplace transaction.

Under the Legal Workforce Act, as proposed, states and localities are preempted from legislating different requirements or imposing additional penalties, but they may enforce the federal law and revoke a business license for failure to participate in the program, as required under federal law. While we might prefer blanket preemption, we understand the need to reach a balance and we believe this balance would be workable on the ground in our members' restaurants.

Special Considerations for Small Businesses Must Be Made

In our industry, we frequently find that smaller employers do not have consistent, universal access to high speed internet connections, that many restaurant owners from previous generations have little familiarity with online reporting systems, and are less likely to have in-house Human Resources or Legal staff. In fact, in our industry, management does not typically work at a desk or behind a computer all day. Looking beyond the smaller restaurant owners,

even some well-known restaurant brands are composed of a collection of small franchisees that may or may not even have a copier at the restaurant location.

I think for those inside the Beltway, where we see eight year olds in the Air and Space Museum with i-Phones, it is often hard to believe that a technology gap exists in our country. Or that all business owners are not automatically up to speed on HR and hiring regulations, but I can attest as someone who spends a great deal of time meeting with our members in many states, that not all U.S. employers are equally as savvy about high speed internet and online reporting systems, and detailed regulatory requirements.

Thus, we are glad to see that the Legal Workforce Act calls for the creation of a toll-free telephonic option for doing E-Verify inquiries and allows, but does not mandate, the copying of additional documents. Unlike the current E-Verify, the mandate found in the Legal Workforce Act would permit a small restaurant to start using the program without the need to buy any new equipment or signing up for high-speed internet access.

Enforcement Provisions Must Be Fair

Full and fair enforcement of an improved E-Verify system should protect employers acting in good faith. Businesses are already overregulated and piling on fines and other penalties for even small paperwork errors, punishing the people who are trying to do the right thing, is not the answer. The Legal Workforce Act states that an employer cannot be held liable for good-faith reliance on information provided through the E-Verify system.

We strongly support this provision and believe that no employer who is using the system in good faith should be held liable by the government, if they relied on information or approval provided by the government's database that turned out to be incorrect. Likewise, we also strongly believe that employers should not be held liable by an employee, or a worker they chose not to hire as a result of information provided by the government database that later was shown to be incorrect.

Under the Legal Workforce Act, as we understand it, employers would be given at least 30 days to rectify errors. Any opportunity to rectify errors would protect employers that are doing their very best to comply in good faith with the myriad of federal regulations from unnecessary litigation.

No Exemptions, But a Reasonable Roll-Out of E-Verify is Encouraged

To maintain an equal playing field, the Association believes an E-Verify mandate should be applicable to all employers in our industry. As you can imagine, employers believe that in the interest of fundamental fairness and fair competition, the government should treat employers equally in these regulatory areas. However, we also clearly recognize that small businesses may need more time to adapt. Thus, we are encouraged by the Legal Workforce Act's tiered approach for rolling out E-Verify, starting with employers who have more than 10,000 employees.

We continue to welcome the provision that allows the Secretary of Homeland Security the ability to extend each deadline by six months. However, even more important, the program needs

adequate resources, both with regard to funding and staffing, if it is to increase from less than a million enrolled employers to over six million in just a few years. As I stated earlier, because this system is a last hurdle in finalizing every hiring decision in the United States, and due to our industry's naturally high turnover rate, having an E-Verify system that is overwhelmed trying to clear temporary nonconfirmations, or finalize decisions, could have a significant impact on our members' abilities to run their operations.

Verification of Potential Hires

We also believe that there is a good tool that employers should be allowed to use, which is currently unavailable under the E-Verify framework. Today, employers are not allowed to pre-verify a worker, prior to finalizing the hire. In other words, while an employer can check references, conduct drug tests, and background checks, before an individual is officially hired, the work authorization does not take place until the employee is officially on the books.

This can create significant problems for our members as they go through the process of putting a new employee into training, and getting them integrated into the system, only to find out that they did not clear E-Verify. Employers should be allowed to check E-Verify at the same time they are doing background checks, checking references, and going through other pre-hire processes.

Employers should be given authority to check work authorization status as early as possible. In cases where a temporary nonconfirmation is issued, it will allow the employee to start working with the government as soon as possible to fix any discrepancies before they show up for their first day of work. Thus, we support the provision that allows verification when an offer of employment is extended and making that offer conditioned on final verification of the identity and employment eligibility of the employee.

A few years ago, a restaurant owner from Arizona testified that in over fourteen percent (14%) of their queries, the initial response was something other than "employment authorized." When the initial response from E-Verify is something other than "employment authorized," and the employee has already been hired as mandated in current law, there are additional costs to the employer. Federal law requires that the employer continue to treat the employee as fully authorized to work during the time that the tentative nonconfirmation is being contested.

This means that the employer cannot suspend the employee or even limit the hours or the training for the employee. Someone must also monitor any unresolved E-Verify queries on a daily basis to make sure that employee responses are being made in a timely manner.

Under current regulations, if an employee contests the tentative nonconfirmation, but does not return with a referral letter, the employer must re-check that employee's work authorization after the tenth federal work day from the date that the referral letter was issued.

Some restaurants are fortunate to have the staff to deal with these issues and allow for redundancy and backup. For smaller operations that do not have that luxury, the burdens are greater.

Voluntary Reverification Should be Allowed

The Association supports the inclusion of a strictly voluntary reverification provision, but objects to mandatory reverification provisions of the entire workforce. While some small size restaurants may not mind reverifying their workforce, all large-size operations—even those currently using E-Verify—that have contacted the Association list a mandatory reverification requirement as their number one concern.

For the industry’s workforce, a restaurant is an employer of choice because they can take advantage of the flexible scheduling we offer, work only during school breaks or move between employers often. The nature of the restaurant business is such that it produces a great amount of movement of the workforce below management level, meaning that a mandatory requirement, in addition to being expensive, would also be redundant. In an industry such as ours, the workforce is ultimately “reverified” in short order because the workers have moved around to different positions with different restaurants.

One of the Association’s foremost concerns is ensuring that any new E-Verify mandate does not become too costly or burdensome for our members. Existing employees have already been verified under the applicable legal procedures in place when they were hired.

For those same reasons, the Association continues to oppose not allowing verification of only some workers for good cause. During the 113th Congress, we opposed the original language in H.R. 1772 that required reverification of the entire workforce, if even one individual was reverified for good cause. Instead, we support the language reported out of the Judiciary Committee that allows employers to reverify all individuals employed at the same geographic location or all individuals employed within the same job category, at the employer’s discretion, for good cause. This new law should not create additional potential liability for a well-meaning employer trying to make sure that his workforce is legally authorized to work.

Role of Biometric Documents in E-Verify

One of the main flaws in the current E-Verify system is the uncomplicated and elementary manner through which an undocumented alien can fool the system through the use of someone else’s documents. The issues of document fraud and identity theft are exacerbated due to the lack of reliable and secure documents acceptable under the current E-Verify system.

Documents should be re-tooled and limited so as to provide employers with a clear and functional way to verify that they are accurate and relate to the prospective employee. There are two ways by which this can be done, either by issuing a new tamper and counterfeit resistant work authorization card or by limiting the number of acceptable work authorization documents to, for example, social security cards, driver’s licenses, passports, and alien registration cards (green cards).

H.R. 1772 follows the latter approach allowing for work towards the development of a voluntary biometric program available to employers. In addition, with fewer acceptable work authorization documents, as is the case with H.R. 1772, the issue of identity theft is addressed, helping

employers be more confident that the documents being presented as part of the verification process are legitimate.

An E-Verify Check Needs to Have an End Date

The employer needs to be able to rely on the responses to inquiries made of the E-Verify system. Either a response informs the employer that the employee is authorized and can be hired or retained, or that the employee cannot be hired or must be discharged. Employers would like to have the tools to determine in real time, or near real time, the legal status of a prospective employee or applicant to work.

Unfortunately, all too often mandatory E-Verify proposals create verification timelines that seemingly go on forever, forcing employers to wait—by some proposed timelines—potentially up to 6 months for the system to give them a final answer. And, during this time, employers cannot treat an employee in any way differently than a worker who is fully confirmed and on the payroll. This means that training, bonuses, work hours, and all other workplace considerations for a worker in “tentative status” must be the same as for other workers—even though you do not know if the worker is really, finally, approved.

Obviously, if a new worker is having a bureaucracy and paperwork issue that needs to get cleared up in the E-Verify system, they should have time to do so. However, for many employers, it would be extremely challenging to put a lot of resources and training into a worker for months, only to find out that their status was a final nonconfirmation.

Because of this timeline concern, the Association appreciates that, as we understand it, ten days, or twenty under special circumstances, after the initial inquiry, there will be a final response for those that do not come back as work authorized during the initial inquiry. This will help avoid the costs and disruption that stems from employers having to employ, train, and pay an applicant prior to receiving final confirmation regarding the applicant’s legal status. Employers cannot wait months for a final determination of whether they need to terminate an employee.

Liability Standards and Penalties Should be Proportionate

The Association agrees that employers who knowingly employ unauthorized aliens ought to be prosecuted under the law. In no way do we defend knowing violators of the system. The current “knowing” legal liability standard, also found in the Legal Workforce Act, is fair and objective and gives employers some degree of certainty regarding their responsibilities under the law and should, therefore, be maintained.

Lowering this test to a subjective standard would open the process to different judicial interpretations as to what an employer is expected to do. Presumptions of guilt without proof of intent are unwarranted and create a “gotcha” atmosphere that is likely to spend resources on going after employers who are trying to do the right thing, versus those who are intentionally evading and gaming the system

We also strongly believe that penalties should not be inflexible, and we would urge you to incorporate statutory language that allows enforcement agencies to mitigate penalties based on

size of employer and good faith efforts to comply, rather than tying them to a specific, non-negotiable, dollar amount.

In order for the E-Verify system to work nationwide, we believe that it needs to operate at least in part as a partner and tool for employers who are clearing their new employees through the system. Inflexible penalty structures that do not acknowledge good faith efforts by employers to utilize the system, and structures that make no effort to recognize the substantive difference between a high penalties levied on a small versus a large business would be counterproductive to this goal.

The Government Should Also be Held Accountable for E-Verify

The Association objects to the expansion of antidiscrimination provisions beyond what is found in current law. Employers should not be put in a “catch 22” position in which attempting to abide by one law would lead to liability under another one. However, we understand that those wrongfully harmed by the system should have some mechanism to seek relief.

Thus, we support the Legal Workforce Act provision to allow those wrongfully harmed to seek relief under the Federal Torts Claims Act (FTCA). The government must be held accountable for the proper administration of E-Verify. The FTCA provides a fair judicial review process that would allow workers to seek relief.

An E-Verify Mandate Should Not Mean Additional Costs for Employers

The federal government will need adequate funding to maintain and implement an expansion of E-Verify. We strongly object to these costs being passed to the employers via fees on inquiries, or through other mechanisms.

In order for a nationwide and mandatory E-Verify system to truly work, it has to be efficient and accessible to all U.S. employers who are hiring. Charging fees for every inquiry in the system, and certainly the subsequent and inevitable increases in those fees, could be a contributing factor that encourages some employers to find ways around the system.

Additionally, there should not be a mandatory document retention requirement, other than the form where employers record the authorization code for the employees they hire. Keeping copies of the official identity and authorization documents that were presented by each employee at hire in someone’s desk drawer increases the likelihood of identity theft. In this day and age, where identity theft is such a primary and important concern, we believe that requiring employers to keep copies of these documents has the potential to create more problems than solutions.

The Association supports the Legal Workforce Act provision that keeps the requirements as in current law, where an employer does not need to keep copies of driver licenses, social security cards, birth certificates, or any other document shown to prove work authorization. The fact that the information in these documents will now be run through the E-Verify system makes the need for making copies of these documents unnecessary.

An Expansion of E-Verify Should Not Serve as a Back Door to Expand Employment Laws

The new nationwide, mandatory system needs to be implemented with full acknowledgment that employers already have to comply with a variety of employment laws. Thus, verifying employment authorization, not expansion of a Christmas tree wish list of employment protections, should be the sole emphasis of an E-Verify mandate.

In this regard, it should be emphasized that there are already existing laws governing wage requirements, pensions, health benefits, the interactions between employers and unions, safety and health requirements, hiring and firing practices, and discrimination statutes.

The Code of Federal Regulations relating to employment laws alone covers over 5,000 pages of fine print. And, of course, the labyrinth of formal regulations, often unintelligible to the small business employer, are just the tip of the iceberg. Thousands of court cases provide an interpretive overlay to the statutory and regulatory law, and complex treatises provide their own nuances.

The Association is encouraged by the Legal Workforce Act's emphasis on keeping it simple—a workable, national E-Verify system, nothing more, nothing less.

Participation Loopholes in the System Should be Closed

Part of a government effort to roll out E-Verify to all employers should be closing loopholes for unauthorized workers to get into the employment system. The Association is glad that the Legal Workforce Act, as we understand it, requires state workforce agencies and labor union hiring halls to clear through E-Verify all workers whom they refer to employers.

For employers who receive workers through any of these venues, finding out that the worker is unauthorized after they are on the jobsite creates additional problems, in addition to having to go find another worker. For example, with regard to hiring halls, it may also create problems with the labor union, depending on contract requirements, which often require an employer to accept onto the jobsite immediately any worker sent from the hiring hall. If any of these venues are going to refer workers to employers, they should ensure that those workers are work authorized before they do so. Without this requirement, these venues become giant loopholes in the system that can perpetuate an illegal workforce.

LEGALIZATION AND LEGAL IMMIGRATION WILL STILL BE NEEDED

Finally, while this hearing is on employment verification, we must not forget that other pieces of our immigration system are also broken. We are committed to working with you on the difficult task of permanently fixing our nation's broken immigration laws over the long haul, which needs to include legalization of a portion of the undocumented workforce and the development of a workable visa program for legal workers to enter the United States to work in the low-skilled sectors. Simply changing the E-Verify system will not be enough to fix an immigration system that has been collapsing for almost thirty years.

At the National Restaurant Association, we cannot forget that foreign born workers are an essential part of the restaurant industry's strength—complementing, not substituting, our

American workforce. In general, historical immigration policies have brought vigor to the U.S. economy, as immigration creates growth and prosperity for the country as a whole.

Historically, teenagers and young adults made up the bulk of the restaurant industry workforce, as nearly half of all restaurant industry employees were under the age of 25. Over the last several decades, this key labor pool steadily declined as a proportion of the total labor force. According to data from the Bureau of Labor Statistics, the 16- to 24-year-old age group represented 24 percent of the total U.S. labor force in 1978, its highest level on record. However, by 2008, 16-to-24-year-olds represented only 14 percent of the labor force, and is projected to shrink to only 13 percent by 2018.

Predictions about workforce and demographic shifts tell us that the United States will also need to create a legal channel for employers in the service sectors, such as restaurants, to bring other than seasonal workers in a legal and orderly fashion. History tells us that when our economy picks up again, we will need those workers. History also tells us that when no visa system exists to allow workers to enter legally, workers will come into the U.S. illegally. One of the key ways we can begin to address that issue is to develop a workable and reasonable visa system to accommodate those who want to enter the United States legally to work, and who have chosen to wait their turn outside of the U.S. to do so.

SUMMARY

It would have been easy to ignore the real concerns of the business community with a national E-Verify mandate and simply pass a law requiring its use. It is harder to pass a responsible E-Verify mandate that accommodates the different needs of the close to eight million employers in the U.S., which are extremely different in both size and levels of sophistication.

In the National Restaurant Association's opinion, notwithstanding the few changes and clarifications needed, the Legal Workforce Act reaches the right balance—a broad federal E-Verify mandate that is both fast and workable for businesses of every size under practical real world working conditions. Without the assurances and improvements to the E-Verify system found in the Legal Workforce Act, it should not be imposed on businesses.

I want to thank you for seeking our input and urge you to continue to engage the business community to create a workable E-Verify program for all employers, regardless of location, that accommodates their different needs. The National Restaurant Association stands ready to continue assisting in the process of tweaking and, then, moving the Legal Workforce Act forward.

Thank you again for this opportunity to share the views of the Association, and I look forward to your questions.