Statement of the U.S. Chamber of Commerce

ON: **"THE LEGAL WORKFORCE ACT"**

TO: **HOUSE SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY OF THE COMMITTEE ON THE JUDICIARY**

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Testimony before
House Subcommittee on Immigration and Border Security
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Hearing on
The Legal Workforce Act

Statement of
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U.S. Chamber of Commerce

Good afternoon, Chairman Gowdy, Ranking Member Lofgren, and distinguished members of the Subcommittee. Thank you for inviting the U.S. Chamber of Commerce to testify on the subject of E-Verify and the nation's employment verification system, a key component of immigration reform. My name is Randy Johnson, and I am the Chamber's Senior Vice President for Labor, Immigration, and Employee Benefits policy.

The Chamber has been asked to testify before House Subcommittees concerning the expansion of E-Verify on at least six prior occasions. During the period 2006 to 2009 we testified five times and on each occasion, the Chamber, while supporting broad reforms to our legal immigration system, expressed opposition to the mandatory expansion of E-Verify without extensive improvements to the workability and reliability of what we saw as a burdensome system. Today, however, as with our testimony in the last Congress, after extensive input from our members, the U.S. Chamber supports mandatory E-Verify and the Legal Workforce Act. The primary purpose of my testimony today is to further explain why and under what conditions.

A mandatory employment verification system must be feasible for employers of all sizes, in all industries, and across business models and geographies. The Legal Workforce Act creates a legal and administrative framework that meets these goals, recognizing the realities of the workplace.

WHY DOES THE CHAMBER SUPPORT E-VERIFY?

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region in the United States. There are currently about 5.7 million active business firms across the country.[1] Of these, about 1% employ more than 10,000 employees, and these employers account for more than 27% of the American workforce.[2] On the other hand, about 60% of all businesses in America employ less than five workers, accounting for just 5% of employed persons in our economy.[3] In total, about 98% of all

[1] U.S. Economic Census.
[2] Id.
[3] Id.

U.S. businesses employ less than 100 staff, comprising nearly 50% of the workforce.[4] The Chamber takes seriously its responsibility to represent the interests of both large and small employers. The Chamber can only support an E-Verify mandate that addresses the concerns of both large and small employers.

The U.S. Chamber created an E-Verify Task Force in January 2011 to assess the Chamber's position on whether or how E-Verify should be expanded. What we learned from our members was that the E-Verify system is greatly improved and, while not perfect, could be workable with continued technical improvements accompanied by specific, important legislative changes.

A. In particular, we learned the following in our assessment of E-Verify with our members:

Preemption
The patchwork of state laws and policies that relate to employment verification and E-Verify is a hindrance to the business community, which always places a premium on the certainty of governing rules. This concern was not only from large multistate employers but also expressed by small employers in part because many small employers do business in more than one jurisdiction. In fact, the number one concern expressed by Chamber members regarding expansion of E-Verify was to ensure there was a uniform national policy. As part of the Task Force conversations in 2011, the Chamber reviewed state laws relating to employment verification and E-Verify and found at that time: 14 states mandated the use of E-Verify for private employers, 2 states made E-Verify optional, 21 states required E-Verify be used by state government contractors, 4 states imposed separate obligations on independent contractors, 13 states imposed sanctions relating to the employment verification obligation, and 11 states had business licensing sanctions.[5]

Reverification
Chamber members were adamant that any expansion of E-Verify could not require running E-Verify queries on each employer's current workforce – since each E-Verify query requires updated I-9 data from the employee. In addition to being burdensome, such "reverification" seems unnecessary since employers have already gone through a process required under law (Form I-9) to verify employment authorization, and such reverification presents particular burdens for federal contractors, who have already completed a process under the Federal Acquisition Regulation relating to some but not all current workers. Reverification of the 147 million Americans currently working would be a stumbling block to every employer in America, with the possible exception of those that rely on short term staffing arrangements.

Reverification of the current workforce will largely be unnecessary in any event because over time most workers will be verified in E-Verify at some point as new hires. There are approximately 60 million new hires annually in the U.S. economy and while that does not capture all workers, and many of the new hires annually are the same workers turning over to new jobs, there is a relatively small percentage of workers that ultimately won't be verified

[4] Id.
[5] For current and updated information about state action regarding E-Verify, the National Conference of State Legislators http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx follows the issue closely.

through E-Verify after several years. In other words, the work authorization of a large majority of the workforce would be checked through E-Verify over a matter of time.

Safe Harbors

Much of the conversation of our members in assessing E-Verify related to the need for safe harbors. It was and remains very important to our members that businesses using subcontractors are not liable for their subcontractors, as under current law, unless the employer knew about the subcontractors' actions. Employers were also concerned about the creation of any new private rights of action, which our members strongly oppose. Some of our members reported that they have avoided E-Verify because they did not see any added protections against enforcement, even when the employer has policies and practices in place to avoid knowingly hiring an unauthorized alien. Many believed that it would also be ideal for there to be recognition of business disruption avoidance during the transition period to a new mandatory E-Verify system.All agreed that for employers using E-Verify, there should be a good faith standard to establish employment verification compliance, with the burden of proof shifting to the government. It was a top priority of our members to exempt any employer using E-Verify in good faith from liability, civil or criminal.

Integrating I-9 With E-Verify

Importantly, almost all Task Force members spoke about the value in eliminating the I-9 employment verification form as a separate requirement, and suggested that there be one, single employer obligation regarding employment eligibility verification.[6] The key component of the I-9 process is the employer attestation that an employer representative has reviewed original identity and work authorization document(s); this is the attestation that should be integrated into E-Verify. Presently, employers who use E-Verify have to separately complete the I-9 form and then transfer data from the I-9 into E-Verify. Congress would have to amend the governing statute in order to integrate the I-9 into E-Verify. Significantly, in order to accommodate all sizes and types of employers, E-Verify would need to be provided in a fully electronic version, integrating the I-9, and also be available by phone for small employers who don't have separate human resources functions and for those employers making hires remotely. Ensuring the ability to run E-Verify queries after an offer and acceptance of employment but before the first day of work was also mentioned by Task Force members. Many Task Force members sought amplification on the timing of E-Verify queries, to ensure clarity that the entire employment verification process could be completed prior to the first day of work.

Phase-in

Our Task Force discussed various options for rolling out an expansion of E-Verify across the country, and the key area of agreement is that there should be a phased process over several years so that not all employers begin using the program at the same time. Critical infrastructure, carefully defined, should go first, and small businesses last.

Agriculture

Because of the exceptional combination of impact to and importance of food security concerns and our nation's food distribution system, it is of central importance that agriculture employers

[6] Interestingly, this position mirrored a finding from the December 2010 Westat study on why employers do not use E-Verify, "The Practices and Opinions of Employers who do Not Participate in E-Verify," where 77% of respondents not using E-Verify said using E-Verify would be beneficial if the I-9 was eliminated.

including the dairy industry have meaningful access to a workable program to sponsor lawful workers before being subject to E-Verify.

B. The Chamber's ongoing assessment of E-Verify suggests that USCIS is continuing to make significant improvements to E-Verify:

E-Verify Errors

There have been many technological and process improvements to E-Verify in the last few years. The often-repeated 12 percent rate of E-Verify errors[7] – relating to tentative non-confirmations issued to authorized workers – is a thing of the past. The current E-Verify error rate is .3 percent (.003 of E-Verify queries).[8] Moreover, it can be expected that erroneous non-confirmations will continually be reduced if E-Verify were implemented in the coming years for new hires across the economy, as U.S. workers correct discrepancies in various queried databases and employers use a new system that integrates an electronic I-9 into E-Verify.[9]

It is cumbersome for both employers and employees when authorized workers have to take time to correct their records with government agencies. Continuing to improve accuracy with regard to authorized workers is thus a high priority for all. U.S. Citizenship and Immigration Services (hereafter USCIS) has been, and is, using technology to do just that – continue to improve accuracy. Most significantly, USCIS is taking steps to reduce name mismatches, including those for the most impacted demographic: naturalized Americans.[10] Such name mismatches have been reduced by about 30 percent.[11]

[7] Intel famously experienced tentative non confirmation rates in excess of 12 percent, even though all these non confirmations were eventually cleared. See Intel's April 2008 comments as part of the FAR rulemaking to impose E-Verify on federal government contractors http://www.weareoneamerica.org/sites/weareoneamerica.org/files/intel-ltr-re-e-verify.pdf. This high rate of error is consistent with the December 2009 Westat study, which reported on data that was 18 months old, also highlighted the Intel example. It turned out that Intel had such a high rate of tentative non confirmations because E-Verify did not link to SEVIS (the Student and Exchange Visitor Information System) which is the easiest and fastest way to verify data for foreign students and exchange visitors, and Intel has an extensive training and internship program which includes foreign students and exchange visitors. Once E-Verify was linked with SEVIS, this problem virtually disappeared. "Findings of the E-Verify Program Evaluation," was based on a review of April to June 2008 data. http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf .

[8] July 2013 Westat report (dated July 2012 but publicly released 2013), "Evaluation of the Accuracy of E-Verify Findings" http://1.usa.gov/1Di66h3. The .3 percent error rate is sometimes criticized and cited for cause for alarm but is considered by others an acceptable accuracy rate. In this regard, it should be emphasized that in the Senate Judiciary Committee mark up of S. 744 in May 2013, Democrats put forward several amendments identifying the need to add further protection for workers only where E-Verify reported tentative non confirmations for authorized workers in excess of 0.3 percent.

[9] Use of an electronic I-9 would reduce errors (such as that integrated into E-Verify under the Legal Workforce Act). See, Westat report released July 2013 at p. 74.

[10] While most tentative non confirmations are issued to unauthorized workers, the name mismatch issue has a distinct impact on naturalized U.S. citizens (who are obviously authorized workers), since they are particularly likely to have non-Anglicized names that can lead to inconsistent records in government databases. To begin to address this concern, USCIS linked the E-Verify query system to the Department of State's Passport Agency so that any American citizen with a passport can be verified even if there are name mismatches in other government records.

[11] Testimony of U.S. Citizenship and Immigration Services before the House Immigration Subcommittee, February 27, 2013 http://judiciary.house.gov/_files/hearings/113th/02272013/Correa%2002272013.pdf at p.2.

Costs

Some have claimed that expanding E-Verify nationwide would cost in excess of $2.7 billion, most of which would be costs borne by small businesses,[12] but at the U.S. Chamber our in-house regulatory impact economist has advised that economic commonsense suggests otherwise. The extrapolation of costs to all employers appears to be based solely on the cost information in the 2008 Westat data.[13] This information is dated, however, and average costs would be expected to decline as the system improved and provided employers certainty, as a result of technical improvements to E-Verify coupled with other statutory improvements such as those provided in the Legal Workforce Act – like providing a safe harbor and a streamlined process (integrating I-9 with E-Verify). Significantly, the 2008 Westat study reveals that 76% of responding employers stated that the cost of using E-Verify was zero ($0).[14] Extrapolating to the full economy the costs that 24% of respondents identified has limited value, when the information from 76% of the respondents is not accounted for. Lastly, the $2.7 billion estimate incorrectly applies data from the Bureau of Labor Statistics' Job Opening and Labor Turnover Survey (JOLTS) to calculate the expected annual number of new hires, leading to overstatement of costs. It has been variously estimated by economists that JOLTS amplifies hire numbers by at least 25% because it includes internal promotions and transfers between establishments that are part of the same employing business.

Notably, to the extent we have heard cost concerns from our members it has largely been related to opposition to a reverification obligation.

E-Verify Worker Protections

Some insist that a new bureaucracy needs to be established to provide workers with sufficient protection from losing their jobs "due to a government error."[15] However, such protections are already being established at the agency level. In September 2013, USCIS revised the notification process so that each employer must provide a new, clearer Further Action Notice (FAN) to employees providing an improved explanation so that employees understand that they must take action to correct their records if there is a tentative non confirmation. In July 2013, USCIS started providing FANs directly to workers who provide their email when completing the Form I-9. Moreover, USCIS now has a Monitoring and Compliance division within E-Verify that reviews if employers print out the FAN, and employers identified as not providing such notice are reported by USCIS to the Justice Department's Office of Special Counsel for investigation for possible unfair immigration-related employment practices. Thus, there are effective checks on employers to ensure they satisfy their obligations.

While USCIS continues to work to establish a formal review process regarding final non confirmations, it nevertheless continues to utilize an informal agency review process now. Any employee or employer may challenge a final non confirmation. No legal filing is required, and

[12] Bloomberg Government, Jason Arvelo, "Assessing E-Verify Costs for Employers and Taxpayers," (January 2011 Brief) and "Free E-Verify Hits Small Business Hardest" (January 27, 2011 article).
[13] The December 2009 Westat study evaluating E-Verify, "Findings of the E-Verify Program Evaluation," was based on a review of April to June 2008 data. http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf
[14] Id. at p. 184.
[15] Incorrect tentative non confirmations issued to authorized workers are usually a result of a discrepancy in that individual's records in government databases that is not the fault or error of the government.

no deadline is imposed.[16] USCIS will consider a request at any time, and there is no legal proceeding or formal filing required of the employee or requesting employer. The agency generally resolves these reviews and overturns the final non confirmation of authorized workers within 48 hours.

CONCLUSION

In the past, the U.S. Chamber has opposed the expansion of E-Verify. However, in light of improvements in E-Verify, its use by federal contractors, and the focus on a more reliable employment verification system as a necessity, as well as a logical prerequisite to further immigration reform, the U.S. Chamber reassessed its position. Consulting with our members as to whether or how E-Verify should be expanded, we have concluded that the time has come to establish a uniform policy regarding employment verification and the use of E-Verify.

In order for the use of an electronic verification system like E-Verify to be a national mandate as the way that employers comply with the employment authorization mandate initially established in 1986,[17] the electronic verification system must be realistically usable by, and address the concerns of, both large and small employers. Operational issues that must be tackled include (i) developing identity verification and authentication methodologies and (ii) allowing remote hires that either occur in remote geographies or occur outside of an office setting, both of which are challenges that face employers of all sizes. Moreover, if we accept that there will be stiff penalties for an employer's failure to complete the electronic employment verification process, we insist that process (i) reflect one, single national policy – and uniform enforcement standards, (ii) establish strong safe harbors for compliant employers, (iii) provide an integrated, single employment verification system, and (iv) include no mandatory reverification requirement for current staff.

Thus, if Congress wants to mandate E-Verify in order to help turn off the jobs magnet for unauthorized workers, it is vital Congress make E-Verify work for employers. The Chamber conditions support of E-Verify expansion and the Legal Workforce Act upon making the system workable for the businesses obligated to verify employment authorization of hires. If the electronic employment verification system is mandated for universal use but is not eminently practicable, it will not serve our national interest and no reasonably anticipated amount of enforcement could ensure otherwise.

In sum, the U.S. Chamber supports the Legal Workforce Act because it creates a workable employment verification framework. We welcome the opportunity to continue to work with you on these issues, and consider targeted adjustments which might be necessary as well as other important aspects of immigration reform, as this legislation moves forward.

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

[16] S. 744 imposed a 10 day deadline and required a filing before a judge, in a legal proceeding.

[17] The Immigration Reform and Control Act (IRCA) signed into law November 6, 1986 required for the first time that all employers be required to complete an employment verification process (currently represented in completion of Form I-9) and be barred, as a separate obligation, from hiring or continuing to employ any worker knowing that the individual is not authorized to work. See 274A of the INA.