

**Immigration Works
National Conference Call
on Smith E-Verify Bill
(H.R. 2164 - The Legal Workforce Act, 2011)
June 30, 2011**

MS. TAMAR JACOBY: Hello. This is Tamar Jacoby, president of Immigration Works USA. Thank you so much for joining us for this national call.

Anybody who's following this knows that we've gone from a moment of not much happening on immigration in Washington to suddenly immigration is, I won't say topic – quite topic A yet, but Lamar Smith, chairman of the House Judiciary Committee has introduced legislation to make the E-Verify program mandatory for all U.S. employers within two years.

Similar but different legislation has been introduced by Senator Grassley in the House. There's been – there's some complexity, some maneuvering – I'm sorry – Senator Grassley's similar, parallel legislation in the Senate. Senators do introduce legislation in the Senate. There's been some complexity and maneuvering about exactly when the House bill is going to move, but I think many of us expect it to have to move before the August recess, certainly to move forward. It's not actually come to a vote.

And there's been a lot of different reactions in the business community. For – (inaudible) – the mainstream business reaction community has been largely, or uniformly, unanimously positive in its reaction to the bill. Agriculture has taken a different view and been very skeptical. IW, Immigration Works, made the strategic decision to support the bill. Others in our coalition did not. We think of ourselves as a big tent and we do represent and include and try to serve employers from farms to restaurants to construction and beyond. And given that big tent, there's been some difference in the organization on the bill.

What we hope to do on the call today is explain the context, explain what's in the bill, air some of the different views from within the coalitions, including the agricultural dissenting view, so to speak, and talk with all of you about our position and yours.

So we've got – as usual, we've got a terrific panel of presenters to get the conversation going. We'll start with Cathy Enright who's the vice president of federal government affairs to the Western Growers Association, new to these calls. And we're very excited and pleased to have her on.

Second presenter will be someone well known to those of you who join the calls regularly, Greg Siskind, who's a partner at the Siskind Susser law firm in Nashville, Tennessee, but a national presence as a commentator and source and authority on immigration law, the founder and mastermind, reigning genius of the Visalaw blog.

And third, and certainly not least, is Lyndon Melmed who's now a partner at Berry-Appleman & Leiden, previously chief counsel at the U.S. Citizenship and Immigration Service.

So, with no further ado – and what we'll do, as we always do on these calls, each of the presenters will talk for 10, 12, 15 minutes and then we'll open it to questions. If you already have a question and want to get in the queue, press star one or press star one at anytime as a question occurs to you.

So, Cathy, let's start right out with you. And, again, I want to emphasize to folks, Immigration Works is a big tent. We've taken the strategic decision of supporting the legislation. And if you want to see our position in more detail, it's on our website. But we're very respectful and completely understand the agricultural position which is that their sector is different. Their workforce is different. Their needs and concerns are different. And they have taken a different view and we just wanted to have a chance to have a clear presentation of that, which we don't – I don't think it's a pro and con. I think I understand that view as much as I understand the position I did take for strategic reasons. I want to give Cathy a chance to explain that a little bit.

So, Cathy, just a first question: kind of where is agriculture on this bill? And spell that out for us a little bit.

MS. CATHY ENRIGHT: I think agriculture is supportive of E-Verify legislation only if it provides for a workable agriculture guest worker program. One without the other is – E-Verify without the program is not acceptable.

MS. JACOBY: So just to put this in some context, you know, I totally understand that statement and I think from the broader business community, we would even say we take the same position only we have a little more of – we're willing to have a little more of a time lag between the two. But in the long run, for the broader business community, as well as agriculture, if we don't eventually get visas, this is not going to be acceptable. But you all are saying, if they don't come at exactly the same time, it's not acceptable.

So talk a little more, expand on it for a little more for us kind of the various different sectors of agriculture and what the view is in a little more – spelled out a little more and why.

MS. ENRIGHT: Sure. So the bill as written completely ignores the reality of the U.S. agricultural workforce. We have not shied away from the fact that it's estimated that upwards of 80 percent of our workforce is falsely documented. There's a reason for

that. Americans will not work in the field. They will not do the jobs that these folks who are the backbone of our food production system do everyday.

With regard to the proof being in the pudding, I think you only need to look as far as Georgia to see the impact of that on agriculture. As you may know, Georgia has an E-Verify law that has not yet been enacted but it is experiencing 30 to 50 percent labor shortages in the field. Already they estimate current losses at \$250 million. It's early in the season down there, in the harvest season. But what – workers are simply avoiding the state.

MS. JACOBY: Wow, those are incredible numbers. And the story that we've all seen of the – tell us the story of the probationers.

MS. ENRIGHT: Oh, yes. Yes. There's been – me I don't comment on that but I think that that is not exactly the workforce that farmers are looking for. And my understanding is that those – and this is pretty typical of putting legal workers into the field. They don't last very long. The job is extremely difficult.

MS. JACOBY: I mean, just so people who didn't see the clip, there was a national AP story. The governor suggested that if migrant workers or foreign workers are leaving the state (and grows ?), perhaps we should have a program where probationers were brought in to work in the field. And the AP reporter happened to go there the first day and see how it was working out. And sure enough, at 3:00 p.m. in the afternoon, long before the day was done, the probationers were lighting out, running across the fields. They'd had enough of the hard work in the fields.

MS. ENRIGHT: There's 11,000 open farm jobs in Georgia right now.

MS. JACOBY: Wow. So Americans don't want to do the jobs. We recognize that many of the workers are – 80 percent of the workers in labor intensive agriculture are unauthorized. Therefore, E-Verify would destroy – I mean, spell out the case. I don't have to do it.

MS. ENRIGHT: Yes, that's exactly right. I mean, it's certainly going to impact perishable agriculture first, clearly. The farming operations will just move to Mexico. So U.S. production would drop. We'll import more of our food. But, in addition, beyond just the agriculture focus, the bill also ignores the role of our sector in the U.S. economy. For every one agriculture job, two to three American jobs are created or supported. And we're talking about upstream and downstream from the harvest, so farm equipment, seed, food processors, transportation, grossers, marketing – folks who are employed in marketing, packaging – they all rely on agriculture. If those jobs go away, so if the field workers' jobs go away – and of course farm production is moved even more over the Mexico, those other jobs are going to go away too.

MS. JACOBY: So talk about very clear, very helpful, and very scary – talk about what’s in the bill for agriculture and why it doesn’t seem enough to you all.

MS. ENRIGHT: Well, we did get a nod of a three-year phase-in for agriculture before we had to comply with E-Verify.

MS. JACOBY: As opposed to two for everyone else. As opposed to two for everyone else. Yes.

MS. ENRIGHT: And the idea is that we would be able to get legal workers over the course of three years so that we could move – the illegal folks would move off the farm and legal employees would move onto the farm. We know that’s not the case. Legal workers will not do this job.

MS. JACOBY: Yes.

MS. ENRIGHT: So basically the three-year waiver, if you will, or exemption, just forestalls the inevitable. We’re either dead today or we’re dead in three years.

MS. JACOBY: And that strange provision that says that a returning worker could be counted would not necessarily be a new hire. That doesn’t help particularly?

MS. ENRIGHT: It really doesn’t because if you are an employer of returning workers and you get a no-match letter from the Social Security Administration, you have to E-Verify those people. You could get a no-match or you could get a mismatch on your wage and tax statements which you would get every year when you, the employer file your income taxes.

MS. JACOBY: Yes. So let’s just step back and explain this to people for a minute. So just explain the provision on the returning worker and then explain the no-match provision.

MS. ENRIGHT: Essentially, in the law, in the bill, E-Verify is supposed to apply only to new hires. So a part of the thinking was that if you had returning workers, experienced workers, which we need, that they wouldn’t be caught up in this because you wouldn’t have to E-Verify them.

MS. JACOBY: Because the law says that a returning worker in agriculture could be considered not a new hire.

MS. ENRIGHT: It’s not a new hire. However, if Social Security Administration flags that employee’s documents, let’s just say with a no-match letter, then the employer must E-Verify that employee.

MS. JACOBY: Under the bill. Under the bill. And so that would catch the returning worker.

MS. ENRIGHT: That's right. They're going to catch –

MS. JACOBY: They're giving with one hand – you've got your returning workers, but they're taking away with the other because your returning workers are going to get Social Security no-match letters.

MS. ENRIGHT: Exactly right.

MS. JACOBY: Got it. Okay. So what is – and probably there's not a single strategy in agriculture, although maybe there is – here increasingly there might be. What is agriculture's strategy going forward in the next weeks and months in Congress? Are you hoping that E-Verify can be coupled with something else?

MS. ENRIGHT: Exactly. With the workable guest worker program. That's exactly what we're working on.

MS. JACOBY: And what are the chances of that?

MS. ENRIGHT: Well –

MS. JACOBY: I'm sorry.

MS. ENRIGHT: We're going to try to succeed, obviously.

MS. JACOBY: But you are talking to champions. I mean, I don't want to – (audio break) – say more than you want to but if you want to tell us any more about who you're talking to or what you're talking about.

MS. ENRIGHT: We are talking to champions. I think that's the best way to go forward. And Chairman Smith himself has spoken with the agriculture industry at a number of times and has said, bring me your ideas.

MS. JACOBY: Right.

MS. ENRIGHT: So there is an opening. I don't know how large it is but we're certainly going to try to fashion a workable guest worker program.

MS. JACOBY: And that means – I guess what you're talking – have something for the people already here as well as people coming in the future?

MS. ENRIGHT: That's exactly right. We would want something, a program. It could be a single program that is open to both the new hires as well as the experienced workers.

MS. JACOBY: And just to be – I mean, you know, I'm sure that I'm not the only person listening who's having skepticism. I mean, there's some hope that some Republicans in the House can get their heads around a need to do something for the current workforce.

MS. ENRIGHT: They all get it, Tamar. It's just politically a firebrand and it's a very, very difficult issue for folks to come out publicly on. They all get it.

MS. JACOBY: Right. Right. Well, especially they get it about farm I think.

MS. ENRIGHT: Sure. Absolutely.

MS. JACOBY: The question is – yes – what can we get out of them politically.

MS. ENRIGHT: That's exactly right.

MS. JACOBY: Well, great. What am I leaving out about the farm story and the farm point of view?

MS. ENRIGHT: I think the only – I mean, I'll just repeat what I said at the beginning that we're seeking a balance. The enforcement plus the guest worker program it's – I've seen some headlines where it says agriculture is opposing E-Verify. We are not if it's coupled with a workable guest worker program.

MS. JACOBY: Yes. That's an important distinction.

MS. ENRIGHT: It really is.

MS. JACOBY: Yes. Yes. That's a very important distinction that the business in general, including agriculture, is understanding that we want to be on the right side of the law and that enforcement that works is something we welcome but it has to be coupled with worker visas. And, again, you know, the IW statement says E-Verify is a first step. You're saying it needs to take steps at the same time. And I think, you know, there's a distinction to be drawn that we're giving them – because some of their sectors – some other sectors can afford to give them more time to take the second step later but we certainly I think are all united in the idea that E-Verify without worker visas is not workable for the American economy.

MS. ENRIGHT: Exactly. It's been my experience not to hope that the fix will come later. We need it now.

MS. JACOBY: You need to see it now. Totally understood. Well, I hope you will – thank you so much for being here and for giving us a window on the agriculture thing. I think it's really, really helpful, and I hope you'll stay around and listen to the other presentations and be here for the Q&A.

MS. ENRIGHT: I will. Thank you.

MS. JACOBY: Great. So, Greg, let's turn to you. Talk to us about the context of this bill. Let's step all the way back – well, it's not that far back, but we've had a call – a lot of our listeners and people in the IW network know about the Supreme Court decision. But in many ways, the Supreme Court decision and sort of understanding how that fits into the context of this bill is a very important understanding. So talk to us a little bit about the context.

MR. GREG SISKIND: Well, I should say just sort over the last six to nine months have been just not a good period of time for the pro-immigration community. I mean, you had a border bill that just sailed through to provide \$600 million of funding without being coupled with anything on the pro-immigration side. And I know that that upset a lot of people in the pro-immigration advocacy community.

MS. JACOBY: And your point there – and just to go and underscore your point there, what you're talking about is even in the Democratically controlled Senate, right, enforcement and enforcement alone can sometimes sail through and without any relief of any kind.

MR. SISKIND: The concept of comprehensive solutions, where we were – you know, the pro-immigration senators were not going to support enforcement bills without being coupled with solutions, that apparently went out the window with voting on that bill. And then you had, of course, the 2010 election which really changed the dynamics in the House.

And then you had the Whiting case which I'll mention – (inaudible) – also all be state laws that have been, we had been pretty successful in blocking a lot of the bad, the worst measures from getting through state legislatures. But in the last six months, it's basically been one piece of bad news after another.

But the Whiting case I think has really kind of accelerated more than just about anything what we're seeing right now as far as E-Verify mandates. For those who are not that familiar with the case, it's basically – (audio break) – it was a challenge of the first Arizona immigration law. Most people know about S.B. 1070 and all the bad things associated with that from last year –

MS. JACOBY: This is the employers' sanctions law.

MR. SISKIND: This is the 2007 law. And basically it did two things, the law. It mandated E-Verify for all employers in the state of Arizona. It didn't have a phase-in. It was immediately effective. And then also it had created a business license revocation system where employers that were found to have knowingly hired unlawful workers would be subject to the revocation of their business license. And so that case was challenged. It worked its way through the Ninth Circuit. It eventually made it to the Supreme Court. I think a lot of us were pessimistic because Justice Kagan had to recuse herself from the case because of her being previously solicitor general. So that didn't help as far as the vote that probably would have been with us. But at the end it didn't really matter on there as far as the way the case was –

MS. JACOBY: So, I don't mean to – (inaudible) – you, but the bare outlines of the decision and get importantly what it means for the state.

MR. SISKIND: Right. So basically the Arizona law was upheld. The E-Verify mandate was upheld and the business license revocation provision was upheld. Now, it didn't go further than that. It just basically was limited to just the two things but obviously those were two – that was a major loss for –

MS. JACOBY: So it's basically telling states throughout the country that they can now take that Arizona employer sanctions law and with no concern about constitutionality, only outside of your politician in the state where people are clamoring for immigration enforcement, take this off the shelf and put in place in your state.

MR. SISKIND: Yes. So basically, any state that wants to do an E-Verify mandate or a business license revocation law can do it and know that they can do it constitutionally.

MS. JACOBY: And it's almost like driving the car that the Joneses are driving, right? I mean, states are under pressure – if they don't act there's going to be something fishy. It's like your neighbors all have a new car. Why don't you?

MR. SISKIND: And we've really seen that. I mean, we have the entire, for example, southeastern block of the country now it's basically – has moved legislation in the last several months. There are 17 states now that have their own E-Verify laws. Some of those are now or maybe just applied to state agencies but the trend is definitely go broad. And we are seeing now with states that are passing laws that are calling all employers, the phase-ins are varying as far as how quickly they're being phased in. We're not seeing exemptions for industries. I mean, we've been behind the scenes trying to – where we know that these laws are moving to try and promote the idea, for example, of exempting agriculture and other kinds of employers. But for the most part it's a – they're pretty sweeping.

MS. JACOBY: Just this year – it was these last few months it's in three new states that are now mandating for virtually all employers except for –

MR. SISKIND: Yes. I mean, since the beginning of the year there's nine new states that have passed an E-Verify – (audio break) – of some sort of another. In South Carolina, I think the governor just signed it on Monday a bill there. And North Carolina has just passed one in the last couple of days. Tennessee, my state, just passed a bill past month on there. And that was a mandate for all employers. And it's – it just seems like every day there's another state legislature that moved it through on there.

MS. JACOBY: And in the wake of the ruling, I've heard a lot of folks in a lot of states that have taken a pass talking about doing it – Kansas and – (audio break) – are not doing it. There was one other state that – you know, okay. The Supreme Court has given us a green light, let's go.

MR. SISKIND: I think that's the scary part for employers that operate across multiple states on there is now trying to figure out when you operate in 10 states how to fit into 10 different sets of rules.

MS. JACOBY: And give us some sense of how the rules could be different. So what are we talking about, implementation – (audio break)?

MR. SISKIND: In some states, for example, you need to determine whether you may or may not be subject to it, depending whether you fit under maybe a contract or – and so you have to analyze whether the business that you're doing with state and local governments rises to that level that you have to figure out whether you have to use it or not. Some states, it's based on the size of the workforce. So it may be that like in North Carolina, for example, there's 24 – there's an exemption for 24 employees. I think Georgia had a lower number. So you have to figure out in some states – you have some states now depending on the size of the workforce that you have there. You know, there's phase-in times that are different so you also have to figure out – you may be having to implement it at different times in different places. You know, and then it gets somewhat murky when you have employees that roam, that may be working in several offices in terms of calculating your size for purposes in different states.

MS. JACOBY: And even if you're – I don't know – let's take – I'm always pretending I'm a flower – I own a flower shop in Juno, Alaska, just because I don't know anybody in my coalition who does that. Even if I'm running my flower coalition in a state that just introduced a mandate like this and I'm only in one state, there hasn't been much thought given in the states to safe harbors for employers or any concern about what business might need in a mandate to make it workable.

MR. SISKIND: Yes, I mean, some states are better than others. There are some states that basically say that, you know, if you're complying, like the Tennessee business license law wasn't as bad as others where they said, for example, if you can show that you're complying with – if you're complying with the I-9 rule, then even if it – that you would be okay.

MS. JACOBY: I'm contrasting it with the Smith bill where for better or worse, I mean, again, like it or not for some sectors, they worked very closely with business to give consideration to safe harbor issues and make it workable.

MR. SISKIND: Yes. And we'll talk more about that, but that is one of the things in the Smith bill that we don't see in some of these state bills for sure on there. And it's really a mixed bag as far as the way the states are implementing these requirements on it. So I certainly can sympathize with employers that are really unhappy and nervous about having to every day find out that what they have to do is different because another state where they're operating has changed the rules again.

MS. JACOBY: And so still in a sense – and now we're sort of coming to the punch line of the presentation. So how will – so you've described this context of enforcement on these increasingly possible – the Supreme Court has given a green light to activity in the states. States are taking that green light seriously and moving. You know, I predict within a year we'll have 25 states – E-Verify for everyone but done a little bit differently. What does the Smith bill – how does it affect that context?

MR. SISKIND: Well, I mean, I think the chief attraction of the Smith bill for the business community is that it creates a uniform system. All these E-Verify measures in the state are going to be preempted and there will be one law regarding E-Verify and the phase-in will be uniform across the country. So that, for one, it will – it preempts – I think people are worrying about the preemption provisions. I know that Lyndon is going to talk about that. But that's certainly one of the major features of the Smith bill that will affect state laws. And then the –

MS. JACOBY: And it will literally like knock out all the employment related laws in the states like overnight it could pass opt out –

MR. SISKIND: Right. And I think that there are a whole bunch of state laws that are potentially going to be preempted now under the Smith bill if it passes. You know, the one glaring exception is business license laws, which the Whiting case said was constitutional, in fact, the Smith bill – it's only constitutional because the 1896 act created a preemption for that, but the Smith bill actually keeps –

MS. JACOBY: So the Smith bill says that any state – let's just make it totally clear for people – the Smith bill – let me see if I can get it right and then you'll correct me. The Smith bill says we're knocking down all the – not the leasing laws, not that you can't rent an apartment laws, but all the work site employment laws. They're off the books erased. Nevertheless, states can continue to pile on penalties when a business – yes.

MR. SISKIND: Now, there are a whole bunch of penalties –

MS. JACOBY: But spell it out. But spell out the sentence. So they can continue – states can still make their own punishments, only business licenses but they can use business licenses – clearly not everybody’s read the bill, right? They can use businesses licenses and their business licensing ability to revoke and suspend and issue business licenses to punish employers who have been found to be in the wrong and not using the federal E-Verify system. Is that correct?

MR. SISKIND: That is there correct on there. The rest of the panoply of state laws right now for things like, for example, taking away the tax deductions that employers have for wages paid to workers found to be illegal.

MS. JACOBY: They can’t do that. Going forward, if the bill passes, they can’t do that.

MR. SISKIND: They can’t do that. There as several states – as you know, one of the scarier provisions that we see pop up frequently, the private right of action where disgruntled employees can sue an employer saying that they were replaced by somebody that was in the country illegally.

MS. JACOBY: So none of that going forward.

MR. SISKIND: Right. And my read on it is a lot of – there’s probably 20 different types of provisions that I’ve seen that the states have done to punish employers that would go away. Now, obviously, I’m not a big fan of the business license provision staying in there at all. I think the preference would have been for a total preemption of it. But that’s – you know, at least it clarifies that all these other things are not okay.

MS. JACOBY: And the feds – excuse me – the states can’t get into the business of deciding whether you’re compliant or not, right? It’s only – they can only act when the feds have –

MR. SISKIND: That’s the way I understand it. Lyndon, I don’t know if you have a different view on it but that’s the way I read it is that it would only be following a – the federal government would have to act first.

MS. JACOBY: Okay. Let’s have Lyndon. Okay. Lyndon, hold on for a minute – well, go ahead. Answer. That’s fine. Sorry. Go ahead.

MR. LYNDON MELMED: I would agree with Greg that the language is – they can only use business licensing and similar laws as a penalty for failure to use the system. And so I think all eyes will turn to the feds to determine whether there has been a failure to use the system. I think we’ll see some efforts around that but I suspect that will be the outcome.

MS. JACOBY: So, Greg, just before we – I'm going to turn to come to you and then we'll go into what's really in the bill and some of the matters. Greg, anything else to say about the context and how that's important in understanding what the bill does and doesn't do?

MR. SISKIND: Well, yes. I mean, I guess I was much more of an optimist in this arena before this year. You know, if you ask me, every five minutes I'll change my mind on whether it's been a strategically good decision or not as far as the – and I'm sure that you probably have – it was probably tremendously difficult to figure out, sort of judge it. But I am really very pessimistic at the state level. And not just at the state level but also at the local level. I mean, municipalities – and we didn't even get into the fact that if you go – that in Southern California or you go into Florida or a bunch of other states, we're seeing not just states passing E-Verify rules but counties and cities passing their own rules. And that's just got to be a nightmare for employers that they have not just potentially 50 different sets of rules on E-Verify but potentially hundreds of different rules –

MS. JACOBY: Could be thousands. Yes. Yes. Yes. I think you're right. I don't think supporting this bill – I think you put it nicely. I don't think supporting this bill is an easy decision for anyone. And it has to do with the context. It has to do with what we think is plausible to get out of Congress now and going forward. It has to do with some hope that this is a first step that can lead to some other steps that – most importantly worker visas. And that getting – once this is done, it's not going to be possible to say anymore – well, we're not enforcing the law or we can't change the law until we've enforced it. And that this will highlight the labor needs in a very different way and make it easier for some Republicans who haven't been part of the solution up to now to be part of the solution.

MR. SISKIND: Right. Well, I mean, back in – you know, both efforts for comprehensive immigration reform, there was one camp of particularly Republicans but also some Democrats who said that once they saw evidence that there was real enforcement going on, that they would be ready to move on to dealing with guest workers and legalization issues and all that. And I guess that if this happens, that group of folks are going to have fewer places to hide.

MS. JACOBY: Fewer excuses. Yes. But, again, I want to appreciate the way you've highlighted that it's not an easy decision and we're – in a more optimistic day we would have said, we don't need to do this. Let's go for CIR tomorrow. But, you know, nobody lives there anymore. Stay with us. I'm sure people have lots of questions for you.

Lyndon, let's get back to the nitty-gritty. What's in this bill?

MR. MELMED: Well, thanks, Tamar. Well, it's certainly been described as the sort of the E-Verify mandatory bill. But in fact, the legislation makes so many changes to

the underlying verification process, apart from the electronic system that it's worth digging down and looking at those because I think you have to evaluate the bill taking those provisions into account, starting with the simple point that it actually moves the I-9 verification process much further towards a single electronic system and away from a paper-based system. And for larger employers and just frankly from a human resources perspective, moving towards an electronic system is welcome relief and has been the number one ask for many companies for a number of years.

MS. JACOBY: So meaning that you don't have to do your paper in I-9s anymore. You just do online.

MR. MELMED: Right. And there's some provisions – I anticipate there's always going to be some record keeping and some paperwork. But you're not going to be judged entirely by how and when you complete that paper. And then it's moving as far as they can towards a purely electronic process.

But they did build in a key provision which is a telephonic system. And that's a critical issue for small employers who are not always going to have access to the Internet, either at hiring sites or at all. And so that was an interesting concession by Chairman Smith to recognize just the realities of small businesses in certain industries that you can't have an entirely electronic Internet-based system. And that's been a surprisingly difficult ask for a number of years because the government, of course, wants to have just a single system.

MS. JACOBY: Okay. So you're saying so far that it's basically usable by employers, used by different sizes. Okay.

MR. MELMED: Yes. They're certainly taking into account the considerations of how an employer actually uses it on the front end with their employees. And then the second point is closely related is that it moves the process up, the verification process up in the hiring process so that employers can verify employees' authorization of work at the time of offer and they don't have to wait until the hiring date and then they would have to do it within three days of the actual hiring. There's also a provision that allows employers to make an offer conditional on an individual being work authorized. And so, again, moving the process up as early as possible is recognizing the realities of how the hiring process is done in the real world. It can be a controversial provision in certain quarters, but again, certainly not to business practices and business interest.

MS. JACOBY: Usability. Yes. Yes. Okay.

MR. MELMED: The third provision, again, doesn't really have anything to do with the electronic system but they make changes to – call it what you want – good faith defense, safe harbor, outgoing standards but really changes – it will radically change how the federal government enforces the law and the likelihood of being subject to fines and penalties.

MS. JACOBY: So explain this. This is very important.

MR. MELMED: The two key provisions are, first, they codify, they write in the statute a provision that protects an employer as the good faith defense for technical or procedural failures that are de minimis, which is not defined, small technical procedural failures that the employer is able to cure within 30 days. Sorry?

MS. JACOBY: Go ahead.

MR. MELMED: Translating that legal terminology into practice is that employers will be notified of technical violations that they use the systems and they don't use it properly or they don't fill out – if there is a form, they'll be notified. They'll have 30 days to correct it. And if they do all of that, then they will be protected from the penalties by the government.

MS. JACOBY: And just to put this in context, right, I mean, every – you tell me. You're in practice. But isn't it true that currently, the overwhelming majority of offenses in I-9 and what you get pinned for and fined for in I-9s is forgetting to dot your T or cross your Is or sign it in the right place or put in your address and it will basically eliminate that kind of offense, is that not right?

MR. MELMED: Yes. It seems like every other week there's a pronouncement by an ICE director, Assistant Secretary Morton saying that there's another 1,000 notices going out. And once they get that hook into an employer on paperwork violations, one, you could face very substantial penalties on those alone but it's usually the catalyst for further investigation, further review and it's a negotiating tool for the government. And so this administration in particular has been heavily focused on those paperwork violations.

Now, the prior administration, the last administration was focused more on proving that employers had knowledge and then going after the knowing violations and the criminal penalties. And this bill does clarify that the government to prove a knowing violation must prove by clear and convincing evidence. In the legal world, that, of course, is the highest standard that's really the criminal standard, not beyond a reasonable doubt but it's clear and convincing – clear and convincing evidence. And that's going to make more difficult for the government to prove their case and then they're going to be less reluctant to bring cases, especially when you've also taken off those technical violations and been able to take care of those technical violations, then it really is – can't imagine that the ICE enforcement authorities are (pleased ?) with the changes.

MS. JACOBY: Are happy. Yes. Yes. Yes. Interesting. That's important. That's a very helpful explanation. Okay. So I mean, the way I put that in simple language is it punishes bad employers and protect good ones. But maybe – but understanding the details is really helpful. Okay.

MR. MELMED: Employers who are trying to comply with the program in good faith will have a lot less to fear under this bill than they would under current law. Interestingly, they, despite some calls to go in this direction, they did not expand liability for subcontractors.

MS. JACOBY: Which would have been bad, which would have been bad.

MR. MELMED: Right. Just setting no news is good news, there have been calls and certainly proposals out there to make employers liable for the actions of their subcontractors or to require them to insert provisions into their contracts with subcontractors. We've seen that creep in FAR rules. We've seen it at the state level and other legislative proposals. And Chairman Smith did not get there and left the law as it today which is an employer's only liable for its own employees and not for subcontractor liability.

MS. JACOBY: So, so far, you're talking about mostly things that businesses are going to like. Do you have any more of those or should we go to what things businesses might not like so much or concerns –

MR. MELMED: I think given the time, only final point is on the biometric front that's living battleground. I think you could come in on the Senate side where Senator Schumer is very interested in it. But they just went with a straightforward within 18 month to have a pilot program for biometrics that will actually bring in private entities, private companies to do identity management and employment eligibility management. So they did not seek to push in biometrics and impose those costs on employers. They recognize it's coming and they want to bring in the private sector to solve those problems, but they didn't try to enforce anything prematurely on the business community.

MS. JACOBY: So, so far, it sounds like if we could only get the guest workers too or the worker visas, this would be a pretty good system to build, to run and to last. What should be of concern to employers?

MR. MELMED: It is certainly a mixed bag bill. There are some significant provisions. And starting with something that you all have mentioned briefly on this call, it's just the phase-in period. It's certainly the most ambitious – I'm not saying it nicely – ambitious phase-in that you could have for –

MS. JACOBY: What is it exactly? What is it?

MR. MELMED: For employers over 10,000 in six months. And then it's daggered down, employers over 5,000 within one year. But every single employer, every single employer with one employee must be in the system within two years, subject to those agriculture – the agriculture provisions, agricultural provisions that they have 36 months, three years to get into the system.

But to enroll every single employer within two years, and some earlier but really every employer within two years, that's both an aggressive timeframe, but also to a certain extent you talked about the preemption and the benefits of preempting the state laws and how many states are seeking to impose E-Verify on a faster timeline, although, you know, you can't get much faster than two years. And so having an aggressive phase

MS. JACOBY: And we're going from 250,000 employers to six million in that period. That's going to be a big ramp-up for the system. I mean, they claim they can do it, but don't try this at home.

MR. MELMED: Yes. It's certainly more aggressive than any of the bills in the past. So the phase-in – but really the other really key provision that's dangerous for employers – Cathy mentioned it as impacting their decision on the agricultural front and that's re-verification. The bill does not explicitly mandate re-verification but it gets it through sort of a backend way. It would allow employers voluntarily to re-verify their existing workforce if they do it to all employees.

But the way that Chairman Smith went after the re-verification issue, really it's how does Chairman Smith want to go after current employees who may be undocumented, is through the no-match letter. And this codifies the no-match letter, as Cathy mentioned, when an employer pays its taxes, the record is going to come back as not matching with Social Security numbers and then when an employer receives the no-match notice, then the employer will be required to use the electronic verification system for those existing employees. So you might have a little bit of a grace period of a few months but it could be as early as one year.

And that's troubling not just for the business disruption for existing employees but there's also, as we've seen over the past really five to 10 years, a lot of uncertainty about when and how no-match notices are administered and issued. Not only do you not know – not only are you worrying about your existing employees and when it's going to happen, there's no way to predict it. It's entirely within the discretion of the federal government when they send those notices out.

MS. JACOBY: So, Lyndon, I know we're getting – I'm going to urge you to speed up a little bit because I do want to leave a little bit of time for questions on this one. Tell us – can you – have we left anything out in things that concern us?

MR. MELMED: No. I think you already addressed the preemption language and the pros and cons of that. The competing E-Verify bill that's out there was introduced by Senator Grassley on the Senate side. And without going through that whole bill, I can just hit five key provisions to sort of show where a senator who was involved in E-Verify discussions with bills in the past is on some of these key issues for business.

First is there's no preemption of any state laws. In fact, the only preemption language in the bill would bar states from – like Illinois tried to do which tried to ban the use of E-Verify if it prohibits states from going in the opposite direction but certainly doesn't put any breaks on states seeking to mandate E-Verify.

MS. JACOBY: So Smith is quite good preemption, not perfect but quite good, and Grassley is none, okay, comparing the two?

MR. MELMED: It's a green light for state laws. No telephonic provision for employers. The Grassley bill would require subcontractor liability language in contracts.

MS. JACOBY: Oh, oh. So that means that if I'm building your house and somebody's working for me, even though it's not my company, I had nothing to do with their hiring, I hardly know the guy except I know that he's a good plumber, suddenly I'm responsible for his – uh, that's a mess.

MR. MELMED: But the way they go at it is they would require you to include language in any contract with you subcontractor that they will use it and presumably they would then go after the general contractor under that paper trail.

MS. JACOBY: Okay.

MR. MELMED: If you thought one year was bad, they have a one-year phase-in under Grassley.

MS. JACOBY: Oh. Two years – and then one year.

MR. MELMED: Yes. Two years was bad, and it's one year under Grassley. No phase-in at all, just all employers. And the final kicker would be a full re-verification of all employees within two years.

MS. JACOBY: Oh, my God. Oh.

MR. MELMED: And you have to recognize that the no-match capability would still be in the hands of the federal governments in all those regulations. And so there would be statutory, federal statutory re-verification within three years and the possibility of no-match letters coming down the pipe earlier than that.

MS. JACOBY: And so the point being here that – bottom line that Smith is maybe troubling people, may sound burdensome, of great concern to some sectors but at least it was put together with some consideration of how business could use it and it's a lot better than what you could be facing if – compared to a bill that there's been no business input and no effort to balance the concerns of the enforcement community and the business community. Is that a fair summary?

MR. MELMED: Yes, the devil's in the details. If you just did one to two bullet comparison of Smith and Grassley, it's a two-year versus one year and similar re-verification provisions, but when you dig down one level as to how it's going to be implemented and what the federal government would do on the enforcement side, it would have a significant difference for employers.

MS. JACOBY: Great. So we do have a few minutes left for questions. I'm eager to hear people's questions and eager to hear from you all. Let's open it up to questions. Press star one if you have a question. If you want to direct it to someone in particular, go ahead. But, panelists, feel free to jump in in response. Let's open it to the first question.

MR. BETO CARDENAS: Hello?

MS. JACOBY: Hello. You're on.

MR. CARDENAS: Hey, Tamara. It's Beto. How are you doing?

MS. JACOBY: Hey, Beto. How are you? Please identify yourself for everyone else on the call.

MR. CARDENAS: Certainly. Beto Cardenas, attorney at Vinson & Elkins in Houston, Texas, and executive counsel to Americans for Immigration Reform. The question for you and for the panel is that this past week the Senate Judiciary Subcommittee had a hearing on the DREAM Act. To the extent that you all could give us a synopsis of where Immigration Works is and perhaps the concept of the Senate moving at a committee stage that legislation or addressing it, could you all –

MS. JACOBY: Yes. Good question. And that was just what we were going to get to and I didn't do because I wanted to get to questions. So a perfect question. So my – you know, prediction and, you know, take anything like a total grain of salt – you know, I may get up tomorrow and have a different prediction, but I anticipate that the Smith bill will move through the house like a knife through butter. You know, there may be some question about when they bring it up and what the rule is so that they don't have a lot of other debates about other crazy immigration stuff. They would have to have a pretty closed rule, or a very closed rule, but once they figure that stuff out, no question it passes.

And then the question is when does the Senate bring it up, and how do they bring it up. And I think that certainly the Democratic leadership of the Senate will not want to bring it up a standalone bill by itself because I think even in the Democratically controlled Senate it will be very hard for people to vote “no,” Democrats to vote “no” on an enforcement tool that works, that goes after everybody's scapegoat, employers, and that is now – we can say it's 98.3 percent accurate and that it's going to be implemented in 25 states soon. So, you know, hard to see, on a straight up and down vote on E-Verify, hard to see it losing.

So what I would predict that – and, you know, I’m not revealing any inside knowledge here. It’s just how I would see it going if I was just – what I would do if I was Harry Reid is I would try to change the subject. And so I would try not to bring up E-Verify alone. I would try to either bring up E-Verify with something else attached to it, potentially a poisoned pill, potentially a poisoned pill, potentially something I wanted or I would try to change the subject completely and bring up something different like the DREAM Act.

And, you know, I think – I don’t know exactly what combination of those things will – the Democratic leadership will decide to do, but I expect to see an effort to try to use the Senate rules to make it so – either bring up something that we know Republicans can’t pass, right, so you have the DREAM Act if we don’t think enough Republicans are going to pass or comprehensive which we don’t think enough Republicans are going to pass, and then, and E-Verify which will be happening at the same time and it’s confusing, basically a strategy of throwing sand in the gears, changing the subject. You know, will it work? A lot will depend on how people manipulate the rules.

We saw the president saying yesterday that, you know, E-Verify alone was not a good idea and there needs to be a balanced bill. Is that code language attached to the DREAM Act? So it’s very hard to predict exactly what will happen and when? I would anticipate that the Senate will state this offer as long as possible and use it as a kind of an electoral gambit – you know, we, Democrats, trying to help Latinos and those nasty Republicans are trying to punish them. If I could predict the outcome, I would be in a different business. I would be making money for my predictive powers. But I don’t know if others on the panel have a different view? Lyndon, Greg?

MR. SISKIND: I think on the DREAM Act, there’s – I’m not sure that Senator Reid is going to want to have any kind of vote on the DREAM Act to protect I guess a couple of vulnerable Democrats. I’d be surprised even if they have votes or amendment votes on the DREAM Act to try and attach it. I wish that were the case. I’m not too optimistic at this point.

MS. JACOBY: All right. That’s interesting. I mean, I sort of agree that I don’t see them – I think at this stage, if it works, it’s basically a strategy to stop things, to have sort of one –train coming down one track and another train coming in a different direction down the other track and the ideas is a crash, not vote to pass them. I take the point.

Beto, do you have another – you come from the – you were a Senate staffer. Do you have a different view?

MR. CARDENAS: I share your view in terms of kind of the House Judiciary Committee moving something through quite efficiently with little change if any. Maybe

at a mark-up you have a chairman's amendment and maybe another amendment or two to get through. I do –

(END)