Summary of The Comprehensive Immigration Reform Act of 2010 Relating to Employers

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On September 30, 2010, Senator Robert Menendez of New Jersey and Senator Patrick Leahy of Vermont introduced the Comprehensive Immigration Reform Act of 2010 (CIRA). It differs somewhat from the Bill introduced by Representative Gutierrez early in 2010. While significant portions of CIRA address border enforcement and the allocation of additional assets to this effort, naming appropriations for the same, only salient areas affecting employers are reviewed for the purpose of this article.

Reevaluation of Visa Waiver Programs

Senator Feinstein's bill "The Strengthening the Visa Waiver Program to Secure American Act" is incorporated into CIRA. This bill requires the reevaluation of all programs entitling citizens of certain countries, often business visitors, to travel temporarily to the United States without a visa. The reevaluation would include a study of the number of overstays in the US from each visa waiver country. Any country with more than 2% overstays calculated against the number of admissions in the prior fiscal year, will be temporarily suspended until the overstay rate is again below 2%. The Department of Homeland Security (DHS) is also required to evaluate exit data and compare it to available immigration and law enforcement databases before any new countries can be admitted as visa waiver program participants.

E-Verify

Section 301 of CIRA makes E-Verify mandatory. Specifically, all employers must register with E-Verify within 5 years of enactment of CIRA. All employers within the executive, legislative or judicial branches must participate within 60 days of CIRA's enactment. Employers in industries determined to be part of critical infrastructure or directly related to national security or homeland security must enroll within one year. Employers with more than 1,000 employees must participate within 2 years; employers with more than 500 employees within 3 years, and employers with more than 100 employees, within 4 years. Any employer found to have violated immigration laws must enroll immediately. Failure to register creates a rebuttable presumption that the employer has hired unauthorized aliens. By the same token, compliance in good faith provides employers with an affirmative defense that they have not unlawfully employed an unauthorized worker.

Section 301 requires employers train personnel accessing E-Verify to use it properly and protect civil rights, civil liberties and privacy of employees being "run" through E-Verify. Deadlines are set by which employers must receive

notification from E-Verify and also pro-actively advise an employee of those results. Individuals who receive improper confirmations will be compensated for lost wages up to $7,000 and reasonable costs and attorneys' fees (up to $50,000). Administrative appeal is available to the employee, as well as subsequent judicial review requiring the employee to bear the burden of showing that the administrative order was erroneous. If the system made an erroneous determination, the court may award the plaintiff up to $75,000 in lost wages and reasonable costs and attorneys' fees up to $50,000. The employee also has a remedy against the employer if the erroneous E-Verify notification was caused by its negligence or misconduct. In such case, the employee can seek damages, back pay and reinstatement.

Under Section 307, the misuse of E-Verify is added to the list of unfair immigration-related employment practices. Such unfair practices include:

- Terminating an employee while conformation is pending or the employee's decision to challenge or appeal is pending;
- Using the system for anyone who is not an employee or for unauthorized purposes;
- Using the system to exclude people from employment who appear to require additional verification;
- Failing to provide timely notice of E-Verify results to employees;
- Using the system to deny benefits or interfere with labor rights; and
- Using the system for discriminatory or retaliatory purposes.

CIRA contains a provision outlining the burden of proof to demonstrate discrimination in disparate impact cases. Disparate impact occurs when a facially neutral employment practice has an unjustified adverse impact on members of a protected group or class. Judges may grant declaratory or injunctive relief unless the employer successfully demonstrates it would have taken the same action in the absence of the prohibited motivating factor of citizenship or national origin. Judges may not award damages, but fines for violations are increased under this provision.

E-Verify is to be managed by DHS with proper safeguards, including establishing a program to indentify multiple use of Social Security numbers, since the Social Security Administration may disclose to DHS certain taxpayer identity information. The DHS will have its data security system reviewed every three years to determine its confidentiality compliance for confidential information disclosed in tax returns. CIRA increases the civil penalties under Section 6721 of the IRC against an employer where an employee's last name on a Form W-2 does not match the last name on file with the Social Security Administration.

Under CIRA, the Office of Special Counsel is being awarded $40 million per year from 2001 through 2013 to advise employees and employers of their rights. The Office of Special Counsel (OSC) will be able to obtain E-verify data upon request as part of an investigation. Also, the OSC will be allowed to cooperate with state and local agencies with respect to research and processing charges under state fair employment practice laws.

Self Verification Provision

CIRA allows individuals to verify their own employment eligibility on a voluntary basis, to update their information in the system, submit biometric information and block the use of Social Security numbers in the E-Verify system. The Department of Homeland Security Secretary must also submit a regular report to Congress assessing the system.

I-9 Compliance

I-9 compliance will also carry stricter requirements: the I-9s must be available to the DHS and Department of Justice Office of Special Counsel for seven years after the individual's hiring date or two years after the individual's employment ends, whichever is later. The employer must retain copies of the documentation and protect the confidentiality of the employees' identities and employment eligibility.

Within one year of CIRA's enactment, DHS must issue only machine-readable, tamper-resistant employment authorization cards that use biometric identifiers. (The Social Security administration must also issue fraud-resistant, tamper-resistant, wear-resistant Social Security cards within 2 years of CIRA's enactment.)

H-2C Nonimmigrant Worker Program

H-2C is a nonimmigrant, temporary visa that is not agriculture-based. It must be for employment in an area where the unemployment rate is under 10% for workers who have not completed education beyond a high school diploma. Its main distinction from the H-2B visa discussed below is that it is for longer–term, from three to six years, and permits transition to lawful permanent residence.

A new 14-member independent federal agency is to be set up under CIRA to establish employment-based immigration policies and facilitate research on immigration, including the number of H-2C visas to be issued annually. The Commission is to be made up of the Secretary of the DHS, Secretary of State, Attorney General, Secretary of Labor, Secretary of Health and Human Services, Secretary of Agriculture, Social Security Commissioner, and additional nongovernmental members appointed by the President.

There are stringent requirements to ensure that no US worker is adversely impacted by hiring the intended H-2C visa holder. To obtain an H-2C for a prospective employee, the employer must first demonstrate unsuccessful efforts to recruit US workers unless the Secretary of Labor determines there is a shortage of US workers in the occupation and area of employment. The H-2C employer must post the job opportunity at the prevailing wage level on a public webpage that will transmit it to each state's workforce agency's statewide electronic job registry. Failure to comply with the terms of an attestation as to the job and lack of qualified and available US workers will result in debarment for 3 years in the program.

The employer must also pay the cost of transporting the H-2C visa holder between his or her residence and place of employment. If an employer uses a foreign labor contractor, it must notify the Secretary of Labor. Any individual engaged in foreign labor recruitment must be registered with the Secretary of Labor in accordance with specific requirements for both certification and renewal.

An H-2C worker cannot waive their rights under CIRA. There is a section prohibiting retaliation against an H-2C worker for disclosing information demonstrating violations of CIRA or for cooperating in investigations concerning compliance. H-2C workers have a year within which to file a complaint with the Secretary of Labor. The Department of Labor will conduct its investigation and may authorize a hearing. Violations are subject to administrative remedies and penalties which can include back wages, benefits and civil penalties.

Although the H-2C visa carries nonimmigrant intent, the H-2C visa holder's employer can petition for adjustment of status to lawful permanent residence, or the H-2C visa holder can self-petition if he or she has held H-2C status for at least four years. The requirements for the H-2C workers to transition to qualify for lawful permanent residence include proof of lawful employment, knowledge of English, US history and government.

H-2B Worker Program

The H-2B program is intended for temporary short-term or seasonal workers in non-agricultural positions for industries such as cleaning, construction, and hospitality. The H-2B visa permits a stay of up to 10 months for seasonal workers, and longer if the need is a one-time occurrence. CIRA requires that the employer must first recruit US workers by submitting a job description to the relevant state employment agency for publication on its database and for distribution to unemployment agencies and appropriate recruiters, advertise locally, and notify labor organizations and applicable labor unions of the position, following which, if unsuccessful, the employer can recruit abroad.

Employers must provide complete information in both English and the language of the worker being recruited to the worker concerning terms of employment, benefits, travel and transportation expenses, workmen's compensation, training or education, and a statement describing protections under CIRA. Employers must pay for the cost of travel by the H-2B worker between his or her home residence and place of employment. Employers must also file a report at the conclusion of the H-2B worker's term of employment with the Secretary of Labor. An H-2B visa holder may accept new employment if the new employer files a petition for a temporary labor certification.

There will be an administrative procedure for complaints against an employer failing to meet its requirements or misrepresentation to the H-2B worker, with up to $10,000 in civil penalties, criminal sanctions or a ban on approved H-2B petitions for up to 5 years. H-2B workers can also bring civil actions against their employers for violation of applicable law.

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H-1B and L-1 Visa Reform

The requirements to seek US workers before applying for an H-1B will increase. For example, an H-1B petition by an employer must be preceded by 30 days of advertising online, including job description, wages, terms of employment, minimum requirements and the application process. If an employer has 50 or more employees, no more than 50% can be H-1B workers. Complaints concerning H-1B employers can be investigated up to 24 months after the complaint. The DHS can also conduct annual compliance audits of H-1B employers after any such investigations. There is a prohibition to requiring an H-1B or L worker to pay a penalty for quitting his or her employment or for not offering an H-1B worker the same benefits or eligibility for benefits as a US worker. The fines for violations of the H-1B employment terms will also include lost wages and benefits to the employee.

Finally, the H-1B numeric limitation will no longer apply to medical specialty certification based on post-doctoral training and experience in the US.

H-2A Worker Program

CIRA reforms the existing H-2A program for agricultural workers. The Secretary of Labor may approve of the H-2A hire with an attestation that the collective bargaining representative has been notified of the application if the job opportunities for which the application is filed are covered by a collective bargaining agreement, and further assurances that the job is not due to a strike or lockout; that the position is not for temporary or seasonal job (maximum duration of 10 months); that the employer has offered or will offer the job to be eligible and qualified US workers who applied; and that the employer will provide insurance covering work-related injury and disease if the job opportunity is not covered by the state workers' compensation law. If the job opportunity is not covered by a collective bargaining agreement, the application must also assure minimum wages, benefits and working conditions, the non-displacement of US workers and the recruitment of US workers.

Housing must be provided at no cost to the H-2B worker if the worker lives outside a normal commuting distance. Alternatively, the employer can provide a housing allowance if the local state governor has certified that there is sufficient housing in the area for seasonal agricultural workers. Wages must be either the highest of either the federal, state, or local statutory minimum wage, the prevailing wage for the occupation in the area of intended employment, or the applicable Adverse Effect Wage Rate (AEWR). The latter may not be greater than the applicable AEWR on January 1, 2009.

The Secretary of Labor will have a process to investigate and dispose of complaints which can include the employer paying back pay and civil monetary penalties. Moreover, H-2A aliens are provided with private rights of action regarding housing, transportation, wages, employment guarantee, motor vehicle safety provisions and discrimination provisions.

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Blue Card

The new blue card is a actually long-term agricultural visa. 1,350,000 blue cards will be issued over a 5 year period upon CIRA's enactment. A worker can adjust to blue card status by proving the he or she performed agricultural employment in the US for at least 863 hours or 150 workdays during the 24 month period ending on December 31, 2008 and has a clean criminal record. In possession of a blue card, an alien can travel outside the US and reenter. The employer of a blue card holder must provide written records of employment to the worker and the DHS. 1,350,000 blue cards will be issued over a 5 year period upon enactment of the Act.

A blue card holder is not eligible for any form of assistance under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which has limited legal immigrants from federally funded assistance programs, until five years from the date of the adjustment to lawful permanent resident visa status. As a result, blue card holders may not be discharged from employment except for just cause. If the termination was improper, a worker can obtain credit for the days worked if he or she can show that he or she was fired without just cause and has made a reasonable effort to find another job.

A blue card holder is eligible to adjust to lawful permanent resident status based upon a mathematical formula of the number of work days per year over a multi-year period that the blue card holder performed agricultural employment as demonstrated by employer records filed with the DHS. Fraud, willful misrepresentation, commission of a felony or three misdemeanors, failure to pay taxes or maintain blue card status, etc. are all bars to a blue card holder being granted lawful permanent residence.

R Visa Holders, Nurses and Visa Quota Relief for Physicians

If applied retroactively, CIRA provides that neither the NonMinister Religious Worker program nor the Conrad State 30 programs providing visa waivers for medical doctors working in medically underserved areas have expired on September 30, 2010. There will be a permanent authorization for nonimmigrant nurses to work in areas of professional shortage. Medical physicians who practice in medically underserved areas will not be subject to temporary visa limitations if a state agency submits a request for an exemption and the Secretary of State recommends that the alien be exempted. Physicians who serve in underserved areas will not be subject to temporary visa limitations if a state agency submits a request for exemption and the Secretary of State recommends the same.

Lawful Prospective Immigration Status

Lawful Prospective Immigration Status requires aliens not otherwise inadmissible to register themselves and pay a $500 fine if physically present in the US from September 30, 2010, to the date they are granted status if not otherwise inadmissible. Most of those grounds are conviction of certain offenses or illegal entrance after September 30, 2010.

The applicant has the burden of proving eligibility, has a one year window to apply, and must pass a background security check. There is only one level of administrative appellate review.

To progress from lawful prospective immigrant status to lawful permanent resident or green card status, the prospective immigrant must demonstrate basic citizenship and English skills, pay taxes, maintain a continuous physical presence in the US, and, if eligible, register for military selective service. Applicants over 21 will be required to pay a fine of $1,000 and wait 6 years to acquire lawful permanent resident status. There is only one level of administrative appeal. If the administrative appellate review is denied, judicial review in the local Federal district court is possible.

POWER Act

An acronym for “Protect Our Workers from Exploitation and Realization Act”, this act expands the U visa available to aliens who are victims of crimes to certain workplace labor and employment violations. In fact, aliens who are helpful to the DHS, Equal Opportunity Commission, Department of Labor, or National Labor Relations Boards will be protected and ultimately granted U visa status.

DREAM Act

The Development, Relief and Education for Alien Minors Act of 2009, known as the DREAM Act, is to be left to the states to determine their own residency requirements for higher education benefits for illegal immigrants who were brought to the US by their parents while still very young. Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act effectively discouraged states from providing in-state tuition or other higher education benefits without regard to immigration status. Section 523 of CIRA permits the DHS to cancel removal and grant lawful permanent resident status to individuals who came to the US at 15 years of age or younger and at least 5 years before the date of the bill’s enactment and are still under 35 years of age. First, eligible individuals must obtain conditional permanent resident status, which is available for 6 years or less. Qualifying individuals must be of good moral character, not be a security risk or have committed crimes, and if they have been accepted to college, received a high school diploma, or received a GED. Conditional permanent residence is awarded for six years during which the individual must meet one of the following criteria: (1) graduates from a two year college or certain designated vocational colleges or studied for at least 2 years towards a B.A. or higher, or served in US armed forces for at least 2 years. These benefits apply retroactively if individuals have already met the requirements before the date of enactment.