

CIR ASAP

FLASHPOINTS FOR EMPLOYERS

Virtually no one in Washington expects Congress to act on CIR ASAP, the comprehensive immigration reform bill introduced in December by the Congressional Hispanic Caucus. Its goal from the start was to jumpstart a conversation – the bill likely to move is the bipartisan measure being crafted by Sens. Charles Schumer and Lindsey Graham.

Still, CIR ASAP will hang over the 2010 immigration debate, and its provisions – both good and bad – are sure to reappear again and again.

A politicized commission to set visa limits, increased employer liability for subcontractors, new fees and fines, new burdens for businesses that depend on the H2B visa program – yet no new program to provide the U.S. economy with the workers it needs for economic recovery. These are just some of the flashpoints of concern to employers – provisions we will need to fight to keep out of any bill that does move.

Hungry as employers are for immigration reform, it has to be reform that works for U.S. businesses and the U.S. economy. Unfortunately, CIR ASAP is not that bill – and, if it moved, could do more harm than good for employers.

CIR ASAP VISAS FOR FUTURE WORKERS

HOW IT WORKS

- CIR ASAP would provide virtually no relief for non-agricultural employers seeking a stable, legal supply of lesser-skilled foreign workers. It does not create a new temporary worker program or expand any existing lesser-skilled visa category.
- Instead of providing additional worker visas, the legislation calls for an annual lottery that would allow 100,000 immigrants with no family or prospective employment in the U.S. to enter the country on “transitional visas.” Winners of the lottery would not be required to work. Employers could not use the program to sponsor employees. And the program would sunset after three years – the lottery would be held only three times. Preference would be given to individuals from countries that have traditionally been the source of illegal immigration. After three years in the U.S., transitional visa holders would obtain green cards.
- The bill imposes significant new restrictions on the existing H2B seasonal worker program and does nothing to expand the chronically short supply of H2B visas (a mere 66,000 are issued annually). The legislation requires H2B employers to make additional efforts to recruit U.S. workers and to pay foreign workers substantially higher wages than they pay today. Employers would also face more stringent enforcement, increased litigation and new criminal penalties.
- CIR ASAP does provide some relief for high-skilled immigrants and their employers: additional employment-based green cards and a reduction of the green-card backlog. But the legislation also makes it harder for companies to use the temporary high-skilled L1 and H1B programs, imposing new wage requirements on personnel who move within a company and prohibiting the placement of foreign workers at a client’s worksite without approval from the Department of Labor or the Department of Homeland Security.
- The bill also provides some relief for agricultural employers. The Agricultural Job Opportunities, Benefits and Security (AgJOBS) Act is incorporated wholesale in the legislation, although without the incentives sought by many agricultural employers to encourage farm workers to continue working in agriculture while they adjust their immigration status.
- Though the bill increases the overall number of green cards available for immigrants who come to the U.S. to work, none of those new permanent visas would go to unskilled non-farm workers. Under CIR ASAP as today, there would be only 5,000 green cards issued annually to unskilled workers, a tiny fraction of the number who are attracted each year by jobs in the U.S. and who could benefit the economy by settling permanently.

FLASHPOINTS FOR H2B EMPLOYERS

- 🔗 ***Raises wages.*** The bill requires employers to pay substantially higher wages to H2B workers, perhaps even higher than to U.S. citizens working alongside them. Currently, employers must pay H2B workers a government-determined “prevailing wage” or the

rate paid to similarly-situated U.S. workers, whichever is higher. The bill would change the formula so that H2B wages must exceed 150 percent of the minimum wage, the top third of the Bureau of Labor Statistics wage range for the occupation in question or the elevated wages mandated by the Davis-Bacon and Service Contract Acts for government contract work.

- ① **Invites lawsuits.** The legislation increases employers' exposure to litigation, allowing any U.S. worker who claims that his or her wages or working conditions have been adversely affected by the employment of H2B workers to sue their employer in federal court.
- ① **Inhibits business restructuring.** A company that has recently laid off 500 workers or one-third of its workforce would be barred from hiring any H2B workers for 12 months after the layoffs and would have to terminate any existing H2B workers within 60 days. This could prevent companies from restructuring and growing – barring an employer who closed a failing facility in one location from hiring workers at another, for example.
- ① **Higher fees and costs.** On top of the \$320 H2B employers already pay to DHS for every worker, CIR ASAP would impose an additional \$800 fee payable to the Department of Labor. Employers would also be required to reimburse H2B workers for the cost of transportation from their home countries to the place of employment, and then back to their home countries or next place of employment.

CIR ASAP COMMISSION ON IMMIGRATION & LABOR MARKETS

HOW IT WORKS

- The bill creates a permanent, independent federal agency, the Commission on Immigration and Labor Markets.
- The commission is made up of seven voting members appointed by the president and confirmed by the Senate, along with eight ex-officio members from the president's cabinet. The purpose of the commission is to establish employment-based immigration policy and conduct research on the economic impact of immigration.
- The commission would make annual recommendations to Congress regarding the number of permanent and temporary employment-based visas to be issued the following year, among other matters.
- The commission's recommendations would become law unless Congress passed a "resolution of disapproval."

FLASHPOINTS FOR EMPLOYERS

- 🔑 **Quotas for high-skilled and lesser-skilled workers.** The commission would have authority over all employment-based visa categories and would set annual immigration levels for every type of worker: temporary, permanent, high-skilled, lesser-skilled, agricultural, seasonal, even professional athletes.
- 🔑 **Default power.** The commission's recommendations automatically become law unless both the House and Senate intervene, passing resolutions of disapproval within 90 days. This default approval mechanism makes it very likely that the numerical limits proposed by the commission would become law.
- 🔑 **No guidelines from Congress.** The legislation does not stipulate baseline figures for the number of workers to be admitted annually in any visa category. Nor does it stipulate a floor or ceiling to guide the commission's deliberations. This gives the commission a totally free hand, and it could conceivably decide that no workers are necessary.
- 🔑 **Sets its own rules.** The bill sets no parameters for the methodologies the commission may use to determine immigration quotas. It makes no suggestions about specific objective criteria that should guide the group's deliberations or about the standards by which Congress should judge its work. As a result, Congress would have no input into the commission's methods unless it passed a resolution of disapproval.
- 🔑 **Highly partisan.** The president picks all seven voting members of the commission, and all eight ex-officio members come from the president's cabinet. Outside of the Senate confirmation process, the minority political party has no say in the make-up of the commission.

- ① ***Not just quotas but policy.*** Along with setting annual numerical limits, the commission has authority to make a wide range of recommendations about immigration policy – including any legislative or administrative actions it deems “in the national interest.” This gives the commission extraordinary scope to influence the operations of the Department of Homeland Security and the Department of Labor.
- ① ***Bad timing for employers.*** The commission is not required to set numerical limits for the fiscal year ahead until April 1 of the preceding year. This means that employers will not know how many visas are available in the visa category they use until six months before the year begins.

CIR ASAP EMPLOYMENT VERIFICATION

HOW IT WORKS

- The bill makes E-Verify mandatory for all U.S. employers within three years.
- It does little to change the way E-Verify works. Employers will still be required to submit employees' Social Security numbers and other information electronically to the Department of Homeland Security, and DHS will check that information against government databases to verify that each employee is authorized to work in the United States.
- The bill shortens the time in which DHS must respond to an E-Verify inquiry from an employer – in one day rather than three days. But it significantly increases the time an employee is given to resolve or contest a government determination that he or she is not work-authorized.
- The bill prohibits employers from verifying existing employees (unless an individual renews an expired work authorization).
- It makes it possible for individuals to access E-Verify databases to confirm their own eligibility for employment – the “self-check” option.
- It increases penalties for noncompliance and for using E-Verify to discriminate against employees.
- It preempts all state employment verification laws.

FLASHPOINTS FOR EMPLOYERS

- 📍 **Phased-in timeframes.** The program becomes mandatory for some employers sooner than for others.
 - Critical infrastructure employers - 6 months
 - Large employers (more than 5000 employees) - 1 year
 - Mid-size employers (1000 to 5000 employees) - 2 years
 - Smaller employers (less than 1000 employees) - 3 years
- 📍 **Increased liability for subcontractors' actions.** Currently, the government can hold an employer liable for a subcontractor's hiring of unlawful workers if the government proves the employer knew or had reason to know that the workers were not legal. CIR ASAP would lower the standard of proof, making an employer liable if the government can show that the employer acted with “reckless disregard” of the status of the employees. This means an employer could be held liable for a subcontractor's actions even if the employer did not know that the workers in question were unlawful.

- ④ **Limited protections for good-faith employers.** Even employers who comply thoroughly with verification mandates are not protected from government investigation or prosecution. (They are protected from liability for employment-related actions - e.g. being sued for firing an employee.)
- ④ **Timeframes create uncertainty for employers.** Because of the way the bill expands the time workers are given to resolve problems identified by E-Verify, employers will not be able to terminate questionable employees for up to two months. If the employee challenges the government's determination that he or she is not work authorized, the time in limbo would be even longer.
- ④ **Private right of action against employers.** Employees mistakenly found to be unauthorized to work can take legal action against their former employers, suing them for reinstatement, back pay and other remedies. If it turns out the employer was not responsible for the mistake or omission, DHS must compensate the employee for up to \$75,000 in lost wages and attorney's fees.
- ④ **Punitive damages for discriminatory practices.** The bill requires employers to pay punitive damages to any worker who can establish that the company or one of its employees engaged in discriminatory practices with "malice or reckless indifference." This means an employer could face punitive damages even if he or she did not intend to discriminate.
- ④ **Increased penalties.** CIR ASAP doubles the civil fines for hiring unlawful workers (from \$250 to \$500 per violation) and for paperwork violations (from \$100 to \$200 per violation). An employer who engages in a pattern or practice of abuse would face up to three years in prison (up from six months) and a \$20,000 fine (up from \$3000).
- ④ **Reversal of Hoffman Plastics Supreme Court decision.** In disputes between employers and employees – over union organizing, workplace injuries, discrimination and other matters - the employer cannot refuse to give back pay or other monetary remedies to an employee on the grounds that he or she was unauthorized to work at the time of the dispute.