EXHIBIT J

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2017-2018 Regular Session

AB 450 (Chiu)
Version: June 21, 2017
Hearing Date: July 11, 2017
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Employment regulation: immigration worksite enforcement actions

DESCRIPTION

This bill would enact a set of restrictions on California employers to ensure that the assistance they give to federal immigration enforcement activity in the workplace goes no further than what is required by law and that workers have sufficient notice and opportunity to correct any inaccuracies in their employment eligibility records before employers take adverse action against them in connection with immigration enforcement audits.

BACKGROUND

It is estimated that more than 2.6 million undocumented immigrants reside in California. They make up a large fraction of California's workforce and represent a significant factor in California's economy. For example, undocumented workers are believed to comprise 45 percent of California's agricultural workforce and to hold 21 percent of construction jobs. Across the board, almost 1 in every 10 workers in California is undocumented.

An increase in workplace raids and audits of employee work authorization records will have a dramatic impact on California workers and businesses. Yet such an increase in workplace immigration enforcement activity is likely and may already have begun under new immigration enforcement priorities ushered in on the heels of President Trump's inauguration. Whereas, previously, federal immigration officers had focused on detaining serious criminals, the new policies cast a much broader, less discerning net.[1] All immigrants, including the many who toil daily in California's low-wage labor force, now have a target on their backs.

[1] *Compare* Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) U.S. Department of Homeland Security <https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf> (as of June 18, 2017), *with* Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) U.S. Department of

As we do in the case of other law enforcement authorities, all Californians – including undocumented immigrants – enjoy important constitutional and legal protections that prohibit immigration enforcement officers from trampling on our privacy or inhibiting our liberty. Fourth Amendment restrictions, for example, prevent immigration officers from conducting unreasonable searches and seizures, just as they do the police. Outside of points of entry into the country, everyone generally has the right to refuse to respond to questions directed at them by immigration officers, with the possible exception of a request for a name.

These same rights apply in the workplace, though during workplace immigration enforcement actions in the past, federal immigration officials have shown limited regard for them.[2] Moreover, as a practical matter, since the employer controls the workspace, the employer can consent to waive some of these rights. Such consent eviscerates many protections that workers would otherwise have and gives immigration officers access to people and documents that they would otherwise be required to leave alone.

Immigration enforcement activity frequently has a secondary effect on workers as well. Confronted by the prospect of immigration officers interviewing worker or rifling through personnel records, employers sometimes feel compelled to take unusual steps to scrutinize those records, subject employees to additional documentation requirements, or even fire certain employees. For the reasons explained in Comment 6 of this analysis, such steps are generally unnecessary and frequently illegal. The reality is, however, that employers often undertake such steps nonetheless.

This bill would enact a series of measures designed to combat the problems associated with immigration enforcement activity in the workplace comprehensively. First, the bill would prevent California employers from inadvertently undermining the constitutional and legal rights of their employees by consenting to warrantless searches of non-public areas or providing access to personnel records without a subpoena.

Second, the bill would create four notification requirements related to immigration enforcement activity in the workplace. Two of these notices would go from employer to employee before and after immigration enforcement activity, letting workers know what is going on and if they need to do anything in response. The remaining two notices would go to the California Labor Commission, enabling it to track and respond to workplace immigration enforcement activity in the state and its effect on California workers.

Homeland Security p.2 < https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf> (as of June 18, 2017).

[2] The author notes, for example, incidents in 2008 when ICE raided the Van Nuys Micro Solutions Enterprises (MSE) facility. ICE had eight criminal arrest warrants when it raided the plant and detained 800 workers at the facility. In 2007, ICE raided a Michael Bianco, Inc. (MBI) facility in Massachusetts. ICE had arrest warrants for five individuals when it blocked exits and detained 500 workers.

Third, the bill would require the Labor Commission provide complainants and witnesses with certification of their participation in the resolution of a matter pending before the Labor Commission. This provision is intended to help immigration officials know when they might be detaining or deporting someone who is critical to the resolution of a California labor dispute.

Finally, the bill would subject California employers to state fines if they abuse the work eligibility verification process by re-verifying the eligibility of employees at a time or in a manner not required by federal law.

This bill passed out of the Senate Committee on Labor and Industrial Relations on a 3 to 1 vote.

CHANGES TO EXISTING LAW

Existing law provides, under federal law, that an immigration officer may not enter into the non-public areas of a business or a farm or other outdoor agricultural operation for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States, unless the officer has either a warrant or the consent of the owner. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained. Existing law further specifies that nothing in this provision prohibits an immigration officer from entering into any area of a business to which the general public has access or onto open fields that are not farms or other outdoor agricultural operations without a warrant or consent. (8 U.S.C. Sec. 1357; 8 C.F.R. Secs. 287.8(f)(2) and (4).)

Existing law requires an employer to verify, through examination of specified documents, whether or not an individual is authorized to work in the United States. It specifies that if the document is presented and reasonably appears on its face to be genuine, then the employer has complied with this requirement and is not required to solicit or demand any other document. (8 U.S.C. Sec. 1324a(b).)

Existing law makes it an unfair immigration-related employment practice for any person or entity to do any of the following: (a) discriminate against any individual, except as provided, with respect to the hiring, recruitment, or referral of the individual for employment or the discharging of the individual from employment; or (b) request, with the intent of discriminating against an individual, more or different documents than are required under law or refuse to honor documents tendered which, on their face, reasonably appear to be genuine. (8 U.S.C. Sec. 1342a(a)(1)-(6).)

Existing law prohibits an employer or any other person or entity from engaging in, or directing another person or entity to engage in, an unfair immigration-related practice against any person for the purpose of retaliating against that person for exercising his or her rights under state or local labor law. These protected rights include the following: a) filing a complaint or informing any person of an employer's or other party's alleged

violation of a state or local labor law, so long as the complaint or disclosure is made in good faith; b) seeking information regarding whether an employer or other party is in compliance with state or local labor law; and c) informing a person of his or her potential rights and remedies under state or local labor law, or assisting him or her in asserting those rights. (Lab. Code Sec. 1019(a).)

Existing law defines "unfair immigration-related practice," for purposes of state law, to mean any of the following practices when undertaken for retaliatory purposes, and not at the direction or request of the federal government: (a) requesting more or different documents than are required by federal law or refusing to honor required documents that on their face appear to be genuine; (b) using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required or authorized by federal law; (c) threatening to file or filing of a false police report, threatening to file or filing a false report or complaint with any state or federal agency, or threatening to contact or contacting immigration authorities. (Lab. Code Sec. 1019(b).)

Existing law specifies that engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of a protected right shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights. (Lab. Code Sec. 1019(c).)

Existing law permits an employee or any other person who is subject to an unfair immigration-related practice, where the unfair practice is retaliatory in nature, to bring a civil action for equitable relief and any applicable damages or penalties, and specifies that an employee or other person who prevails shall recover his or her reasonable attorney's fees. (Lab. Code Sec. 1019(d)(1).)

Existing law prohibits an employer, in the course of satisfying federal immigration law, from requesting more or different documents than are required under federal immigration law; refusing to honor valid documents, as specified; or attempting to reinvestigate or re-verify an incumbent employee's authorization to work using an unfair immigration-related practice. (Lab. Code Sec. 1019.1.)

This bill would prohibit an employer, or a person acting on behalf of an employer, from providing a federal immigration enforcement agent access to any non-public areas of a place of labor without a properly executed warrant, except as otherwise required by federal law.

This bill would prohibit an employer, or a person acting on behalf of the employer, from providing a federal immigration enforcement agent with access to employee records without a subpoena.

This bill would require an employer to provide an employee, and the employee's representative, a written notice of a federal immigration worksite enforcement action at

the employer's worksite, unless prohibited by federal law. That notice must be in the language the employer normally uses to communicate employment information and contain the following: a) the name of the federal immigration agency conducting the enforcement action; b) the date that the employer received notice of the enforcement action; c) the nature of the enforcement action to the extent known; d) a copy of the notice of an immigration enforcement audit or inspection of I-9 Employment Eligibility Verification forms or other employment records, worksite investigations, worksite interviews of employees, worksite raids, or any other immigration worksite enforcement action to be conducted; and e) any other information that the Labor Commissioner deems material and necessary.

This bill would require an employer to provide to an affected employee, and to the employee's representative, a copy of the written federal immigration agency notice describing the results of an immigration enforcement audit or inspection and written notice of the obligations of the employer and the affected employee arising from the action, as specified. The notice shall contain the following information: a) a description of all deficiencies or other items identified in the written federal immigration audit or immigration enforcement action results notice; b) the time period for correcting any potential deficiencies identified by the federal immigration worksite enforcement action; c) the time and date of any meeting with the employer to correct deficiencies; d) notice that the employee has the right to representation, as specified; e) any other information that the Labor Commissioner deems material and necessary.

This bill would require an employer to notify the Labor Commissioner of a federal government immigration agency immigration enforcement action within 24 hours of receiving notice of the action and, if the employer does not receive advance notice, to immediately notify the Labor Commission upon learning of the action, unless prohibited by federal law.

This bill would require an employer to notify the Labor Commissioner before conducting a self-audit or inspection of employment eligibility verification forms, and before checking the employee work authorization documents of a current employee, unless prohibited by federal law.

This bill would prohibit an employer from checking the employment eligibility of a current employee, including conducting a self-audit or inspection of specified employment eligibility verification forms at a time or in a manner not required by specified federal law.

This bill would require the Labor Commissioner, upon a determination that an employee complainant or employee witness is necessary to conduct an investigation or prosecution, to issue a certification to the employee stating that he or she has submitted a valid complaint and is cooperating in the investigation and prosecution.

This bill would prescribe penalties against employers for failure to satisfy requirements and prohibitions of between $2,000 and $5,000 for initial violations and between $5,000 and $10,000 for each subsequent violation, though the Labor Commissioner would have discretion to lower or waive the fines if the violation is based on immigration enforcement officials gaining access to non-public parts of the workplace without a warrant and consent was not given by the owner or anyone else with control over the workspace.

COMMENT

1. Stated need for the bill

According to the author:

> It is a frightening time to be an immigrant in the United States. With the President's proposal of hiring 10,000 new ICE agents, we anticipate worksite raids are next. Unfortunately, California has not had a good history with worksite raids. In the past, ICE routinely violated constitutional rights such as the 4th amendment's protections against illegal searches and seizures. For example, ICE would use individualized arrest warrants to question and detain other workers without individualized suspicion.
>
> AB 450, the Immigrant Worker Protection Act, addresses these concerns and establishes a clear standard to ensure disruptive raids are conducted legally. To ensure that a workplace raid is as minimally disruptive as possible and employee privacy is protected, an employer needs to ask ICE for a judicial warrant before allowing worksite access and ask for a subpoena before sharing confidential employee information. AB 450 also requires employers who receive notice of a worksite enforcement action to notify the Labor Commissioner and employee's representative; and provides workers who are critical to the investigation of a labor claim the right to receive certification from the Labor Commissioner that the worker is central to this investigation.
>
> In an environment of division and fear, California must continue to defend our workers and to ensure that our laws protect all Californians.

In support, the California Labor Federation and SEIU California write:

> In recent executive actions, this Administration has signaled that all immigrants here without permission are now enforcement priorities. California has already seen a jump in immigration

> enforcement raids and it is widely anticipated that worksite raids are next.
>
> Both workers and employers need clear rules for worksite enforcement. Immigrants are the backbone of so many California industries and widespread worksite raids will be disruptive and cause chaos. Employers need straightforward guidelines to know when to permit access to the worksite and to confidential employee information.

In further support, Bet Tzedek Legal Services writes:

> In the past, ICE agents have routinely conducted mass work-site sweeps without warrants and based on racial profiling, violating basic constitutional rights. These raids impact all employees, and could cause all workers, citizen and undocumented, to be detained in harsh conditions at a worksite or could lead to the exposure of confidential personal information held by the employer. By requiring employers to allow access to the workplace to immigration authorities only when they have a judicial warrant, or to share confidential information only when presented with a subpoena, AB 450 will establish worker safeguards to ensure that employees' due process and privacy rights are protected at the workplace.

In further support, Jim Cochran, Founder and General Manager of Swanton Berry Farms, Inc., writes:

> I have been reading about "raids" by ICE that appear to be quite disruptive and unsettling to all workers, citizens and non-citizens alike. As you know, this has made it more difficult to hire and retain workers. While I know that ICE has a difficult job to do, I am hoping that they can proceed with their work in a measured way, using appropriate warrants and subpoenas. I believe that AB 450 will provide us with a good framework to work with immigration officers. The last thing we need is to create panic in the ag worker community.

2. Expressed concerns with the bill

In opposition to the bill, the Society for Human Resource Management writes:

> From the Human Resource professional's perspective, AB 450, while well intentioned, will add a host of unnecessary and burdensome requirements, create many logistical challenges, and

> could possibly force human resource professionals to decide between abiding by federal law or state law.
>
> Compliance with AB 450 requires multiple employees at the employers' place of work to understand fully federal law regarding ICE agents' access and puts employers in a bind. For example, an administrative assistant who is approached by an ICE agent is likely to comply with what the uniformed officer asks. If the ICE officer is asking for access beyond what is provided for in federal law, it is highly unlikely that the administrative assistant will be aware. […]
>
> Additionally, self-audits of I-9 files performed by our members are reasonable and should be encouraged, not discouraged. There is a distinction to be made between an audit of forms to ensure they are filled out correctly in compliance with federal law, and situations where employers actually go back and look at documents again or ask employees for new documentation – practices that are already prohibited by law.

In further opposition to the bill, the California Chamber of Commerce, about 50 of its local affiliates, and a variety of trade associations write:

> [AB 450] penalizes an employer for choosing to cooperate with federal immigration enforcement authorities, thereby denying the employer the right to determine the best course of action for its business under these difficult circumstances [when an immigration enforcement action occurs at its place of employment]. Believing its employment eligibility verification and recordkeeping practices are in full compliance with federal law, an employer may determine that cooperation with federal enforcement officials is its best course of action. Unfortunately, AB 450 forbids an employer from cooperating with federal enforcement officials and instead requires the employer to demand "a judicial warrant." […]
>
> [AB 450] imposes complex written notice requirements on the employer to be provided to each employee and the employee's representative regarding I-9 audits by federal authorities. […] Who is the employee's representative – is an employer thus required to obtain the name and contact information from each employee of who their representative would be in the event of a notice issued under this legislation? […] How does an employer determine who is an affected employee?

3. What ICE can and cannot do at workplaces now

Absent a judicial warrant, a subpoena, exigent circumstances, or consent, there are constitutional and legal limits on where Immigration and Customs Enforcement (ICE) officers may go and what documents they can demand to see.

a. Workplace immigration raids

Pursuant to federal regulations and consistent with Fourth Amendment prohibitions on unreasonable search and seizure, there are significant restraints on ICE agents' access to worksites. Although there are some exceptions (under exigent circumstances, for example), the dominant rule is as follows:

> An immigration officer may not enter into the non-public areas of a business, a residence including the curtilage of such residence, or a farm or other outdoor agricultural operation, except as provided in section 287(a)(3) of the Act, for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected. When consent to enter is given, the immigration officer must note on the officer's report that consent was given and, if possible, by whom consent was given. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained. (8 C.F.R. Sec. 287.8(f)(2).)

In order to obtain such a warrant, ICE agents must comply with Fourth Amendment requirements. In other words, to conduct the search, the ICE agents must convince a magistrate judge that they have "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., Amend. IV). In the case of immigration enforcement, federal courts generally apply a relaxed standard. *Blackie's House of Beef, Inc. v. Castillo* (D.C. Cir. 1981.) 659 F.2d 1211. Still, the application for the warrant must have "sufficient specificity to enable the judge to make an independent determination of whether probable cause exists and to prevent the agents from having uncontrolled discretion to rummage everywhere in search of seizable items once lawfully within the premises." *International Molders' and Allied Workers' Local No. 164 v. Nelson* (9th Cir. 1986) 643 F.2d 547, 553 (9th Cir. 1986), citing *United States v. Condo* (9th Cir. 1986) 782 F.2d 1502, 1505. And, the warrant must still be signed by a magistrate judge.

Without such a warrant, ICE agents are limited to public areas of a business. There, as in any public location, ICE agents can question any individual "believed to be an alien" about his or her right to be in the United States. (8 U.S.C. Sec. 1357(a)(1).) If that questioning leads to sufficient probable cause, the ICE agents may proceed with an arrest. On the other hand, unless the ICE agents have such probable cause, the

individual must be permitted to walk away and has the right not to answer questions, apart from a request for a name. (U.S. Const., Amend. 5; *Matter of Guevara* (BIA 1991) 20 I&N Dec. 238; *but see Hiibel v. Sixth Judicial District Court of* Nevada (2004) 542 U.S. 177 (holding that people may be required to identify themselves to state law enforcement when so required by state law; California has no such state law).)

b. Inspection of employment records

Immigration officers have the power to inspect employee records. However this authority is not unlimited. First, by law ICE must give employers three days' notice before inspecting employee records and I-9 forms. Second, an employer is not legally obligated to provide access for the inspection unless the demand for inspection is accompanied by a subpoena. Immigration officers have the power to issue subpoenas. (8 U.S.C. Sec. 1225(d)(4); 8 C.F.R. Sec. 287.4.) Thus, when ICE gives an employer notice that it intends to inspect the employer's work eligibility records, it can do so with a subpoena, and the employer is then legally obliged to comply. Absent the subpoena, ICE can only access the records if the employer consents to it.

Section 2 of AB 450 would add a Labor Code provision requiring employers not provide access to employee records to ICE in the absence of a subpoena.

4. Supremacy clause and preemption considerations

Whenever federal and state laws conflict, the federal law governs. (U.S. Const., art. VI.) "Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (*Gade v. National Solid Waste Management Association* (1992) 505 U.S. 88, 108.)

U.S. Supreme Court precedent identifies three types of pre-emption: express, field, and conflict. Express pre-emption applies where Congress explicitly states that a federal statute is intended to pre-empt state legislation. Field pre-emption occurs when federal legislation is so pervasive in an area of law that Congress has left no room for the states to supplement it. Conflict pre-emption takes place when a state and federal statute are so at odds that it is impossible to comply with both at once. (Chemerinsky, Constitutional Law Principles and Policy, Fifth Edition, p. 414.)

In *Arizona v. United States* (2012) 567 U.S. 387, the U.S. Supreme Court indicated that this analysis applies to state laws that bear some relationship to immigration matters. In that case, the Court upheld some provisions of an Arizona statute that only related indirectly to immigration enforcement, while striking other provisions that more directly interfered.

Applying a similar analysis to AB 450 arguably suggests that the bill is not preempted. There is nothing express in federal law telling states they cannot place limitations on the ability of employers to consent to workplace immigration raids.

As to field preemption, immigration law is the province of the federal government. Nonetheless, as the Arizona case made clear, the federal government's sweeping power to govern the field of immigration law itself does not prohibit states from enacting laws that have some connection to immigration, so long as they do not attempt to regulate immigration itself. AB 450 does not purport to regulate who may or may not be in the country lawfully and it does not attempt to change the rules regarding who is legally authorized to work. As a result, it does not appear that AB 450 would encroach upon the field of immigration regulation such as to trigger preemption.

Finally, AB 450 would not conflict with federal law because it would be perfectly possible to comply with AB 450's provisions and federal law at the same time. Simply put, AB 450 would not prevent the federal government from doing anything it is not already prevented from doing. What AB 450 eliminates is an employer's discretion to consent to allow the federal government to go *beyond* what it would otherwise be legally prohibited from doing. As the Assembly Committee on the Judiciary's analysis of this bill concluded:

> Existing federal law already requires immigration agents to obtain a warrant to search a worksite and a subpoena to access employee records, unless the employer grants consent. This bill effectively takes away the employer's option to grant consent. Taking away this option to consent may or may not be fair to the employer, or it may or may not be good policy, but it does not "conflict" with federal law as that term is used in federal preemption analysis. That is, it is still possible for the employer to comply with both state and federal law. If the employer complies with the state law by asking to see a warrant, he or she is not violating any federal law. The employer, by asking to see a warrant, is simply doing something that he or she clearly has a right to do under federal law. (Analysis of AB 450, March 23, 2017 Version (April 25, 2017, Hearing Date) Assembly Committee on the Judiciary, p. 7)

5. <u>The employee-in-the-headlights problem</u>

Earlier versions of this bill sustained criticism on the ground that employers could be subjected to fines in circumstances in which immigration enforcement officers obtained consent from employees who either lacked sufficient training to demand to see a warrant, or knew better, but felt too intimidated in the moment to request a warrant. A newly hired greeter at a restaurant, for example, might panic at the sudden appearance of federal agents at reception and, not wanting to cause a scene with diners, might

quickly acquiesce to a request to be escorted back to the kitchen, instead of referring the matter to the manager or asking to see legal authority in the form of a judicial warrant.

To address this concern without eliminating the strong incentive for employers to train all staff on how to respond appropriately to the presence of immigration enforcement officers, the bill has been amended to allow the Labor Commissioner to reduce or waive the fines under certain circumstances. Specifically, the fines can be lowered or waived if immigration officers gain access to non-public parts of the workplace without the consent of the business owner or someone with control over the workspace. This compromise still incentivizes employers to ensure that all employees are well trained on proper procedure in response to the presence of immigration authorities, but puts the primary responsibility on owners and managers. It also acknowledges the reality of how quickly a workplace immigration raid can unfold and the level of pressure and intimidation that workers may feel when confronted by federal agents.

6. Employment eligibility verification and reverification: the I-9 process and its abuses

To grasp the purpose and function of AB 450's notification requirements, it is helpful to put them in the context of the basic law behind establishing eligibility to work. In broad strokes, that law works as follows.[3]

All employers are required to verify that new hires are authorized to work in the United States. To do so, they must have the employee fill out Section 1 of an I-9 form, providing basic information about their identity and attested to their citizenship or immigration status in the United States. This step is supposed to happen after a job offer has been accepted, but before the employee completes the employee's first day of work.

Within three business days of starting work, the new hire must present evidence, in the form of one or a combination of specified documents, that the new hire is eligible to work in the United States. As the employer is not expected to be a forensic expert or to act as an immigration authority, the employer must simply confirm that the documents presented appear, on their face, reasonably genuine and relate to the person who is presenting them. The employer makes notes about the documents reviewed in Section 2 of the I-9 form, may take copies of the documents if the employer chooses to do so, and then the process is done. Employers must keep I-9 forms on file for three years after the person is hired or one year after the person is terminated, whichever is later.

As a default matter, once an employer has verified an employee's eligibility to work at the time of hire, there is no need to re-verify that eligibility ever. Re-verification is only necessary in certain specific circumstances, such as when the employee initially establishes eligibility using a document that only confers temporary eligibility to work,

[3] The information contained in this Comment is based on the U.S. Customs and Immigration Services' *Handbook for Employers – Guidance on Completing Form I-9* (Jan. 22, 2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/E-Verify%20Manuals%20and%20Guides/M-274-Handbook-for-Employers.pdf> (as of July 1, 2017).

such as an H1-B visa, for example. In that case, the employer should re-verify the employee's eligibility to work prior to the expiration of the temporary document by going through the I-9 process again.

Federal and state law prohibit the improper use of the I-9 work eligibility process. Among the abuses forbidden are discriminatory application of the process (demanding more, or particular, documentation of people from certain countries, for instance) and retaliatory use of the I-9 process (suddenly re-verifying the eligibility of an employee who has expressed concern about safety at the worksite, for example.)

When ICE officers inspect an employer's I-9 records, they may be looking for information about a particular person, for evidence that fraudulent documents have been used, or for examples of temporary eligibility that has expired. What the ICE officers discover may indeed indicate that a worker used false documents or is no longer eligible to work. Not infrequently, however, there is a more innocent explanation. Employers and employees sometimes forget to re-verify when new eligibility documents come in or the basis for their eligibility changes (when they naturalize, for example.)

The purpose of the notice from employers to employees about ICE audits of I-9 information is to provide notice and an opportunity to employees to address the situation. Of course, if the employee is not or never was eligible to work, there may be nothing that the employee can do and the employer may have to fire that employee. In other cases, however, the notifications may enable employees to update the basis for their work eligibility.

The employer notice to the Labor Commission serves a related purpose. State law prohibits employers from using the eligibility verification process in a discriminatory or retaliatory fashion. By requiring employers to notify the Labor Commissioner whenever they intend to check an employee's eligibility status outside of the time and manner prescribed by law, the Labor Commissioner will have the opportunity to ensure that the employer is not engaging the practice for abusive purposes.

7. Amendments

The notification requirements that this bill creates impose a burden on employers at what may already be a pressure-filled time. Nearly all parties agree that comprehensive immigration reform would be a vastly superior solution. In the absence of federal action on that front, however, and confronted by a new set of immigration enforcement priorities that target a large part of the workforce that California counts on to make its economy go each day, these notification requirements serve a compelling purpose. Still it may be possible to streamline them somewhat to make them as simple as possible to follow, while still achieving their purpose. With that in mind, the author may wish to consider the following amendments, which may be summarized as follows:

- The employer can take the ICE agent to a non-public part of the business for purposes of verifying the warrant only.
- The notification requirements have been modified to make it less burdensome on employers to comply. They will have more time; do not have to give individualized notice to all employees; only have to hand deliver notices to employees who ICE has marked as having problematic documents; and will be have a standardized form available to them from the Labor Commissioner to make the notification easier.

Amendment 1

On page 3, after line 16, insert:
(c) This section shall not preclude an employer or person acting on behalf of an employer from taking the federal government immigration enforcement agent to a nonpublic area, where employees are not present, for the purpose of verifying whether the federal government immigration enforcement agent has a judicial warrant, provided no consent to search non-public areas is given in the process.

Amendment 2

On page 3, in line 17, strike "(c)" and insert:
(d)

Amendment 3

On page 4, in line 7, after "(a)" insert
(1)

Amendment 4

On page 4, in line 8, after "provide" insert:
written notice

Amendment 5

On page 4, in line 8, after "each" insert:
current

Amendment 6

On page 4, in lines 8 and 9, strike "employee, and the employee's representative, a written notice," and insert:
employee, by the method and

Amendment 7

One page 4, in line 13, strike out "24" and insert:
72

Amendment 8

On page 4, in lines 13 through 16, strike out "inspection. The notice shall be delivered by hand at the workplace if possible and, if hand delivery is not possible, by mail and email, if the email address of the employee is known, and" insert:
Written notice shall also be given within 72 hours

Amendment 9

On page 4, in line 16, after "employee's" insert:
authorized

Amendment 10

On page 4, in line 17, strike out "representative" and insert:
representative, if any

Amendment 11

On page 4, in line 18, strike out "(1)" and insert:
(A)

Amendment 12

On page 4, in line 21, strike out "(2)" and insert:
(B)

Amendment 13

On page 4, in line 22, strike out "(3)" and insert:
(C)

Amendment 14

On page 4, in line 23, strike out "(4)" and insert:
(D)

Amendment 15

On page 4, in line 26, strike out "(5)" and insert:
(E)

Amendment 16

On page 4, after line 27 insert:
(2) On or before July 1, 2018, the Labor Commissioner shall develop a form that employers may use to comply with the requirements of subdivision (a) to inform employees of a notice of inspection to be conducted of I-9 Employment Eligibility Verification forms or other employment records conducted by a federal immigration agency. The form shall be available on the Labor Commissioner's website so that it is accessible to any employer.

Amendment 17
On page 4, on line 28, after "(b)" insert:
(1)

Amendment 18
On page 4, in line 29, after "each" insert:
current

Amendment 19
On page 4, in line 29 after "employee's" insert:
authorized

Amendment 20
On page 4, in line 30, after "representative," insert:
if any,

Amendment 21
On page 4, in line 33, strike out "24" and insert:
72

Amendment 22
On page 4, in line 34, strike out "24" and insert:
72

Amendment 23
On page 4, in line 36, after "employee's" insert:
authorized

Amendment 24
On page 4, in line 36, after "representative," insert:
if any,

Amendment 25
On page 5, in line 3, after "employee's" insert:
authorized

Amendment 26
On page 5, in line 5, strike out "(1)" and insert:
(A)

Amendment 27
On page 5, in line 8, strike out "(2)" and insert:
(B)

Amendment 28
On page 5, in line 10, strike out "(3)" and insert:
(C)

Amendment 29
On page 5, in line 12, strike out "(4)" and insert:
(D)

Amendment 30
On page 5, in line 14, strike out "(5)" and insert:
(E)

Amendment 31
On page 5, after 15 insert:
(2) For purposes of this subdivision, an "affected employee" is an employee identified by the federal government immigration agency inspection results to be an employee who may lack work authorization, or an employee whose work authorization documents have been identified by the federal government immigration agency inspection to have deficiencies.

Amendment 32
On page 5, in lines 16 and 17, strike out "notice to all affected employees or their representatives" and insert:
the notices required by this section

Amendment 33
On page 5, in line 23, strike out "affected"

Amendment 34
On page 5, after line 25, insert:
(d) For purposes of this section, an "employee's authorized representative" means a collective bargaining representative.

Amendment 35
On page 5, in line 26, strike out "(d)" and insert:
(e)

Amendment 36
On page 6, in line 3 after "employee's" insert:
authorized

Amendment 37:
On page 6, in line 3, strike out "representative" and insert:
representative, if any,

Amendment 38

On page 6, after line 15 insert:
(e) For purposes of this section, an "employee's authorized representative" means a collective bargaining representative.

Amendment 39

On page 6, in lines 19-21, strike out "before conducting a self audit of, inspection of, or review of, I-9 Employment Eligibility Verification forms and" and insert:
and the employee's authorized representative, if any,

Amendment 40

On page 6, after line 35 insert:
(d) For purposes of this section, an "employee's authorized representative" means a collective bargaining representative.

Support: Alliance of Boys and Men of Color; Asian Americans Advancing Justice - California; Bet Tzedek Legal Services; Brightline Defense Project; California Association of Local Conservation Corps; California Domestic Workers Coalition; California Federation of Teachers; California Immigrant Policy Center; California Labor Federation; California Professional Firefighters; California Rural Legal Assistance Foundation; Ceja Vineyards; the City and County of San Francisco; Coalition for Humane Immigrant Rights; Robledo Family Winery; San Francisco Labor Council; San Mateo County Central Labor Council; the Santa Clara County Wage Theft Coalition; SEIU California; State Building and Construction Trades Council; United Auto Workers – Local 5810; Swanton Berry Farm; United Domestic Workers of America – AFSCME Local 3930; United Domestic Workers of America – AFSCME Local 3930/AFL-CIO; United Farm Workers; United Food and Commercial Workers Union – Western States Council; Western Center on Law & Poverty; Worksafe; 7 individuals

Opposition: Agricultural Council of California; Associated General Contractors of California; Association of California Egg Farmers; Bay Area HR Executives Council; California Association of Wheat Growers; California Association of Winegrape Growers; California Bankers Association; California Bean Shippers Association; California Building Industry Association; California Business Properties Association; California Chamber of Commerce; California Citrus Mutual; California Cotton Ginners and Growers Association, Inc.; California Employment Law Council; California Farm Bureau Federation; California Framing Contractors Association; California Fresh Fruit Association; California Grain and Feed Association; California League of Food Processors; California Manufacturers and Technology Association; California Pear Growers Association; California Pool & Spa Association; California Professional Association of Specialty Contractors; California Restaurant Association; California Retailers Association; California Seed Association; California Trucking Association; California Warehouse Association; Camarillo Chamber of Commerce; Central Coast HR Association; Central Valley HR Management Association; Chambers of Commerce

Alliance of Ventura and Santa Barbara Counties; The Chamber of Commerce of the Santa Barbara Region; Construction Employers' Association; El Centro Chamber of Commerce and Tourist Bureau; Family Business Association of California; Family Winemakers of California; Greater San Fernando Valley Chamber of Commerce; Greater Riverside Chamber of Commerce; Grower-Shipper Association of Central California; HR Association of Central California; Inland Empire Society for HR Association Management; Long Beach Area Chamber of Commerce; Murrieta Chamber of Commerce; National Federation of Independent Businesses; North Orange County Chamber of Commerce; Oceanside Chamber of Commerce; Official Police Garages of Los Angeles; Oxnard Chamber of Commerce; Professionals in Human Resources Association; Redondo Beach Chamber of Commerce and Tourist Bureau; Sacramento Area HR Association; San Joaquin Human Resource Association; Santa Barbara HR Association; Santa Maria Chamber of Commerce; Sierra Human Resources Association; Society for Human Resource Management; Society for Human Resource Management - California State Council; Society for Human Resource Management – Central California; Society for Human Resource Management – Kern County; Society for Human Resource Management – Northstate; Society for Human Resource Management – San Diego; Society for Human Resource Management – Tulare/Kings County; Society for Human Resource Management – Wine Country; South Bay Association of Chambers of Commerce; Southwest California Legislative Council; Tulare Chamber of Commerce; Vacaville Chamber of Commerce; Ventura County Agricultural Association; Western Agricultural Processors Association; Western Carwash Association; Western Growers Association; Wine Institute; Yuba-Sutter Chamber of Commerce

HISTORY

Source: California Labor Federation; SEIU California

Related Pending Legislation:

AB 291 (Chiu, 2017) would establish stronger legal protections for tenants against landlords who may disclose, or threaten to disclose, a tenant's immigration status to federal authorities as part of a pattern of harassment and retaliation. AB 291 is currently pending consideration on the Assembly Floor.

SB 54 (De León, 2017) would create the California Values Act that would bar state or local resources from being used for immigration enforcement and prohibit state or local law enforcement agencies from detaining or transferring anyone for deportation without a judicial warrant. SB 54 is currently pending consideration in the Assembly Committee on the Judiciary.

Prior Legislation:

SB 1001 (Mitchell, Chapter 782, Statutes of 2016) prohibited, among other things, any attempt to reinvestigate or re-verify an incumbent employee's authorization to work using an unfair immigration-related practice.

SB 666 (Steinberg, Chapter 577, Statutes of 2013) prohibited employers from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and extended those prohibitions to preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry.

AB 622 (Hernández, Chapter 696, Statutes of 2015) prohibited an employer or any other person or entity from using the E-Verify system at a time or in a manner not required by a specified federal law or not authorized by a federal agency memorandum of understanding to check the employment authorization status of an existing employee or an applicant who has not received an offer of employment, except as required by federal law or as a condition of receiving federal funds.

AB 1236 (Fong, Chapter 691, Statutes of 2011) set forth a series limitations on the use of electronic employment eligibility verification systems.

Prior Vote:

Senate Labor and Industrial Relations Committee (Ayes 3, Noes 1)
Assembly Floor (Ayes 50, Noes 24)
Assembly Appropriations Committee (Ayes 10, Noes 6)
Assembly Judiciary Committee (Ayes 8, Noes 3)
Assembly Labor and Employment Committee (Ayes 5, Noes 2)

****