

**TESTIMONY OF DEBORAH SMITH
ON BEHALF OF THE WASHINGTON CHAPTER
OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

**HB 274 - AN ACT MAKING UNAUTHORIZED EMPLOYMENT OF ALIENS UNLAWFUL
HEARING, HOUSE JUDICIARY COMMITTEE
JANUARY 26, 2011**

HB 274 mandates that all Montana employers use the voluntary, federal E-Verify system. It also establishes a new state enforcement scheme that could result in a loss of all business licenses if an employment violation is established under state law. Because E-Verify is an error-riddled mechanism that is not yet ready for mandatory use by states, and because the proposed enforcement bureaucracy is preempted by federal law, and moreover conflicts with it, the Washington Chapter of the American Immigration Lawyers Association opposes this bill.

AILA is a national association with approximately 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. Its Washington Chapter is comprised of more than 330 members throughout the Northwest states, who practice in various areas of immigration law. One of the areas in which we possess particular expertise is in representing employers in immigration compliance matters, including in I-9 and anti-discrimination compliance, and in workplace enforcement actions. Our members practice regularly before the Department of Homeland Security and the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

It is worth noting at the outset that HB 274 is similar in key respects to the Legal Arizona Workers Act (the Arizona law), which is currently under review at the United States Supreme Court. See *Chamber of Commerce of the United States v. Whiting*; documents available here: http://www.scotusblog.com/case-files/cases/chamber-of-commerce-of-the-united-states-v-candelaria/?wpmp_switcher=desktop. Like HB 274, the Arizona law requires all employers to use E-Verify, and establishes a state enforcement regime that could result in the loss of all licenses to do business in the state if the state determines that an unauthorized alien has been employed by an employer. The following organizations are some of those who have sued to enjoin the Arizona law, and are parties in the US Supreme Court case: Chamber of Commerce of the United States of America, Arizona Chamber of Commerce, Arizona Contractors Association, Arizona Farm Bureau Federation, Arizona Landscape Contractors Association, Arizona Restaurant and Hospitality Association, Arizona Roofing Contractors Association, Associated Minority Contractors of America, and the National Roofing Contractors Association. Joining these prominent business associations are a number of not-for-profit organizations, including the ACLU, Mexican-American Legal Defense and Education Fund, and the National Immigration Law Center. The United States has appeared as an amicus curiae (friend of the court) in support of those seeking to strike down the Arizona law, as has AILA, the Service Employees International Union, and more than a dozen other organizations and individuals.

There is good reason that such a broad coalition of diverse interests has joined together to oppose the Arizona law -- the law is bad for business, it is bad for workers, and it is preempted by federal law. The regulation of immigration and the employment of people in the United States who are not US citizens are exclusively and uniquely federal matters. Even though HB 274 purports to track the language of the federal immigration statute, as does the Arizona law, it places in state hands decisions about whether an employee possesses authorized employment status, which could lead to entire companies being shut down in Montana, as well as to the loss of all the jobs in those companies.

The bill would create a new state bureaucracy to make such determinations. And, there can be no guarantee that a decision about authorized employment would be the same in Montana as it would be, for example, in Arizona. Such inconsistency could harm a company doing business in more than one state. At a minimum, Montana should wait to see what happens with the Arizona case before enacting a law that could be ruled unconstitutional before its effective date.

Moreover, while the accuracy of the E-Verify program has been improved, a new report from the General Accounting Office - Congress's investigative research office - has determined that 76% of all name mismatches in E-Verify belong to US citizens (Report at 19); that problems with document fraud and privacy protections persist (Report at 21); and that significant compliance and capacity concerns remain if the system becomes mandatory on a national scale (Report at 29). Report available at <http://www.gao.gov/new.items/d11146.pdf>. There is no practical or legal reason for Montana to be ahead of curve in E-Verify use, in light of these circumstances and our state's relatively small immigrant population.

HB 274 would be a complicated mess for Montana businesses and state government to implement. It would place a burden on business owners to defend themselves against potential claims of employment of unauthorized aliens based on nothing more than a complainant's "constructive knowledge" - which could be little more than a wild guess - that particular workers were not authorized for employment. Section 3(2)(a), page 2 lines 18 - 19. While knowingly filing a false or frivolous claim of unauthorized employment is a misdemeanor under the bill, Section 3(2)(a), page 2 lines 22 - 23, claims involving conjecture are not criminal offenses. Consequently, the bill does little to prevent unfounded claims being filed for the state to investigate and the employer to address in a hearing.

Confidential employment documents may be subpoenaed for examination by this new state bureaucracy; it is not clear such documents would be exempt from public disclosure. Section 3(4), page 3 lines 2 - 4. And orders issued by the state, which could include the names of workers who the state finds to be unauthorized - but who in fact may ultimately be determined to be authorized under federal law - are to be published on a public database. Section 6, page 4 lines 26 - 27. Peculiarly, the bill requires local law enforcement to be notified of an unauthorized worker's presence, even though the local authorities are charged with being peacekeepers, not immigration enforcers. Section 3(5), page 3 line 9. It is quite possible that such provisions not only would violate federal law, they also may violate state privacy laws.

The Immigration and Nationality Act establishes detailed and uniform procedures for all employers in the United States to follow when hiring all employees. In addition to establishing documentation requirements to verify authorization to work in the United States, 8 USC § 1324a, federal law also provides anti-discrimination provisions to protect workers against profiling and other abusive practices, 8 USC § 1324b. AILA notes with concern the provisions of HB 274 that would compel an employer to re-verify certain employees' documents, or to provide additional documentation of their status, in possible contravention of federal law that prohibits re-verification or new screening of selected employees. See Section 4(1)(b)(ii), page 5 lines 18 - 19.

The federal immigration system is not perfect. It suffers from many dysfunctional aspects, including lack of uniform enforcement by the federal authorities against businesses who employ unauthorized aliens. But the problem belongs to the federal government to resolve. Montana's businesses are not immigration experts, and federal law does not require them to be so. HB 274 attempts to shift the burden verify authorized employment status from where it correctly lies, with the federal government, to Main Street Montana business people. The bill suffers from the same infirmities facing the Arizona law. Accordingly, AILA would urge the committee to table this bill.