

Worker Concerns About The McCain-Kennedy Immigration Reform Bill, S. 1033

Senators McCain and Kennedy have produced an immigration reform bill (S. 1033) of ambitious scope and bold ideas. However, significant improvements are needed in its labor protections if the bill is to achieve its goal of bringing fairness and order to the process that domestic employers must follow to hire foreign workers.

Employment is the main reason why hundreds of thousands of people enter the U.S. illegally each year, and sectors of our economy have grown to depend upon foreign workers. The bill wisely accepts this reality and responds by creating “H-5 visas,” which open a path for these workers to obtain legal status in the U.S. This legal status itself, particularly coupled with the bill’s provisions for family unification and citizenship, offers immigrant workers the prospect of winning fair treatment in the workplace.

However, the bill’s good immigration provisions are undermined by some of its employment provisions, which present an unacceptable danger that foreign workers will be exploited—through insufficient wages, through the sale of visas by unscrupulous foreign labor recruiters on what amounts to a worldwide black market, through job injuries that are not fairly treated, and through inability to enforce their rights. So, before the bill deserves broad support, its employment provisions should be improved as follows:

1. Protect Existing Wages and Conditions

There is ample room in the U.S. economy for more legalized foreign workers without eroding existing U.S. wages and working conditions. All workers should object to laws that would allow U.S. employers to sponsor more foreign workers when employers’ primary objective is not to fill unmet needs, but to weaken U.S. wage and work-condition standards. Employers have an enormous economic incentive to erode current standards. If this erosion is allowed, workers everywhere suffer. The bill is objectionable because it essentially leaves employers in charge of how many visas will be available each year, and because it does not prevent employers from replacing existing employees with new foreign workers whenever employers wish to affect wages or conditions. Experience proves that employers will seek more foreign workers through a quasi-criminal army of labor recruiters who have access to a limitless, worldwide supply of desperate workers. As a result, the bill would admit millions of new legal immigrants over the next few years regardless of how many new jobs become available. Moreover, the history of efforts to stop illegal immigration shows that *Latin American* immigration will not stop simply because temporary work visas become much more available *worldwide*. If illegal immigration continues, labor oversupply and downward pressure on wages and conditions would only increase. Ultimately under the bill, all unskilled employment in the U.S. would become at-will, paid at \$5.15 per hour, and difficult to find.

The bill should be amended as follows to prevent recruitment of workers simply as a means of depressing wages and conditions:

- require employers hiring new H-5 workers or unauthorized workers to pay a prevailing wage rate;
- guarantee workers’ compensation and other basic U.S. employment conditions, particularly as to safety;
- require employers to pay all worker recruitment and transportation costs under the H-5A program;
- extend the strike/lockout provision to cover replacement of workers discharged during a labor dispute;
- require employers seeking H-5A workers to report why any person legally working in the U.S. referred to the job was not hired; and
- as a condition of making H-5A visas available to its nationals, require collaboration of each sending country in controlling illegal immigration and to ensuring compliance with the laws of the sending country.

2. Expand Workers' Ability to Change Jobs

The primary asset that workers have in negotiating fair terms with employers is their ability to seek alternative employment if terms are inadequate. The bill wisely makes H-5 visas “portable,” allowing workers to seek new employment while keeping their visas. However, this portability is on such narrow terms that it will be of little practical use. The bill allows employers and their agents to lend H-5 workers the money they need to pay high fees for recruitment, travel, penalties, and visas. This often leads to exploitation, when foreign labor recruiters charge workers for a chance to work and secure high-interest debts with attachment to a single employer, family assets, and, in some cases, personal safety of family members in the home country. The bill also allows employers to petition for permanent status for favored employees earlier than the workers may petition for themselves, thus forcing workers to stay with employers purely to gain immigration benefits that employers may manipulate. And the bill’s 45-day unemployment bar will prevent job mobility in cases where it is fairly necessary, including in cases of workplace injury, workplace disputes, and seasonal employment.

The following amendments would promote the true portability that workers need:

- place the decision of who gets a visa in response to an employer’s job offer in neutral hands;
- make all fees, costs, and penalties payable by workers over time on fair terms that are fully disclosed;
- prohibit any deduction from wages that results in payment below the applicable minimum wage;
- allow workers, employers, and representative organizations to apply for permanent status at the same time and on the same terms;
- extend the 45-day unemployment rule to 90 days, particularly for farm, construction, landscaping, and other workers whose employment is seasonal in nature; and
- ensure that time lost due to industrial injury, or due to a worker’s retaliation, wage, or whistleblower claim, does not count toward the 45-day unemployment rule while the injury or claim is pending.

3. Ensure Respect for the Law

While the bill contains important prohibitions against disparate pay, discrimination, and retaliation, it limits enforcement of these worker protections to investigations by the U.S. Department of Labor using existing staff and resources, and only when DOL has been shown reasonable cause to investigate. Abundant experience with past guest worker programs shows that under this enforcement scheme, employers will routinely ignore the law and never be held accountable.

The only way that the law will be respected is if the following common enforcement tools are available:

- provide DOL a separate enforcement appropriation to investigate any claim filed, guarantee an administrative hearing in any *bona fide* claim, and conduct audits based on random selection and on tips;
- create an express private right of action including liquidated damages payable to successful complainants;
- use attorney fees and access to Legal Services programs to ensure access to courts for affected workers;
- allow workers to enter the U.S. as necessary to pursue their legal claims;
- require that all labor recruiters be licensed and bonded, with sanctions for using an unlicensed recruiter; and
- deem every business using H-5 workers as an integral part of their operations to be a joint employer of those workers.

Conclusion: The McCain-Kennedy bill strikes a balance so much in favor of employers that any benefits resulting from a more legalized workforce would likely be negated by the detriments resulting from a limitless and unregulated labor supply. A better balance must be found before workers should support this bill. A more detailed description of the bill and its consequences is available at http://friendsfw.org/Advocates/Immig/Analysis_Labor_Provisions_McCain-Kennedy.pdf