

AMENDMENT TO THE AMENDMENT
IN THE NATURE OF A SUBSTITUTE OFFERED
BY MR. SMITH OF TEXAS
OFFERED BY M. *Johnson*

[H.R. 3711]

In section 2, in the proposed subsection (b)(1)(C)(ii)(V), add at the end the following:

1 “(cc) NOTICE OF NONCON-
2 FIRMATION.—Not later than 3
3 business days after an employer’s
4 receipt of a final nonconfirma-
5 tion, the employer shall notify the
6 individual who is the subject of
7 the nonconfirmation, and provide
8 information about filing an ad-
9 ministrative appeal pursuant to
10 subparagraph (G). The noncon-
11 firmation notice shall be given to
12 the individual in writing. The in-
13 dividual shall affirmatively ac-
14 knowledge in writing, or in such
15 other manner as the Secretary
16 may specify, the receipt of the

1 nonconfirmation notice from the
2 employer. If the individual re-
3 fuses or fails to acknowledge the
4 receipt of the nonconfirmation
5 notice, the employer shall notify
6 the Secretary in such manner as
7 the Secretary may specify.”.

In section 2, in the proposed subsection (b)(1), add
at the end the following:

8 “(F) ADMINISTRATIVE REVIEW.—
9 “(i) IN GENERAL.—An individual who
10 is notified pursuant to subparagraph
11 (C)(ii)(V)(cc) of a nonconfirmation by the
12 employer may, not later than 15 business
13 days after the date that such notice is re-
14 ceived, file an administrative appeal of
15 such nonconfirmation. An individual sub-
16 ject to a nonconfirmation may file an ap-
17 peal thereof after the 15-day period if the
18 appeal is accompanied by evidence that the
19 individual did not receive timely notice of
20 a nonconfirmation, or that there was good
21 cause for the failure to file an appeal with-
22 in the 15-day period. All administrative ap-
23 peals shall be filed as follows:

1 “(I) CITIZENS OR NATIONALS OF
2 THE UNITED STATES.—An individual
3 who claims to be a citizen or national
4 of the United States shall file the ad-
5 ministrative appeal with the Commis-
6 sioner.

7 “(II) ALIENS.—An individual
8 who claims to be an alien authorized
9 to work in the United States shall file
10 the administrative appeal with the
11 Secretary.

12 “(ii) ADMINISTRATIVE STAY OF NON-
13 CONFIRMATION.—The nonconfirmation
14 shall be automatically stayed upon the
15 timely filing of an administrative appeal,
16 and the stay shall remain in effect until
17 the resolution of the appeal, unless the
18 Secretary or the Commissioner terminates
19 the stay based on a determination that the
20 administrative appeal is frivolous or filed
21 for purposes of delay.

22 “(iii) REVIEW FOR ERROR.—The Sec-
23 retary and the Commissioner shall develop
24 procedures for resolving administrative ap-
25 peals regarding nonconfirmations based

1 upon the information that the individual
2 has provided, including any additional evi-
3 dence or argument that was not previously
4 considered. Any such additional evidence
5 or argument shall be filed within 15 days
6 of the date the appeal was originally filed.
7 Appeals shall be resolved within 30 days
8 after the individual has submitted all evi-
9 dence and arguments he or she wishes to
10 submit, or has stated in writing that there
11 is no additional evidence that he or she
12 wishes to submit. The Secretary and the
13 Commissioner may, on a case by case basis
14 for good cause, extend the filing and sub-
15 mission period in order to ensure accurate
16 resolution of an appeal before him or her.
17 Review of any nonconfirmation under this
18 paragraph shall be limited to whether the
19 nonconfirmation notice is supported by the
20 weight of the evidence.

21 “(iv) COMPENSATION FOR ERROR.—If
22 the individual was denied a stay under
23 clause (ii) and the Secretary makes a de-
24 termination that the nonconfirmation
25 issued for an individual was not caused by

1 an act or omission of the individual or the
2 employer, the Secretary shall compensate
3 the individual for lost wages in an amount
4 not exceeding \$75,000 and reasonable
5 costs and attorneys' fees incurred during
6 administrative and judicial review, not to
7 exceed \$50,000. Amounts under this clause
8 may be adjusted to account for inflation
9 pursuant to the US Consumer Price
10 Index—All Urban Consumers (CPI-U)
11 compiled by the Bureau of Labor Statis-
12 tics.

13 “(v) CALCULATION OF COMPENSA-
14 TION.—Lost wages shall be calculated
15 based on the wage rate and work schedule
16 that prevailed prior to termination. The in-
17 dividual shall be compensated for wages
18 lost beginning on the first scheduled work
19 day after employment was terminated and
20 ending 180 days after completion of the
21 administrative review process described in
22 this paragraph, or judicial review if any, or
23 the day after the individual is reinstated or
24 obtains employment elsewhere, whichever
25 occurs first. If the individual obtains em-

1 employment elsewhere at a lower wage rate,
2 the individual shall be compensated for the
3 difference in wages for the period ending
4 180 days after completion of the adminis-
5 trative review process or judicial review, if
6 any. For purposes of determining an indi-
7 vidual's compensation for the loss of em-
8 ployment, such compensation shall not in-
9 clude any period in which the individual
10 was ineligible for employment in the
11 United States. Compensation or reimburse-
12 ment provided under this subparagraph
13 shall not be provided from funds appro-
14 priated in annual appropriations Acts to
15 the Secretary for the Department of
16 Homeland Security.

17 “(vi) TEMPORARY STAY OF FINAL AD-
18 MINISTRATIVE DECISION DENYING AP-
19 PEAL.—If the appeal is denied, the Sec-
20 retary shall stay the decision for a period
21 of 30 days to permit the individual to seek
22 judicial review of the decision under sub-
23 paragraph (H). If a judicial action is
24 brought within this period, the stay shall
25 remain in effect until the resolution of the

1 case, unless the Court terminates the stay
2 based on a determination that the action
3 for judicial review is frivolous or filed for
4 purposes of delay.

5 “(G) JUDICIAL REVIEW.—

6 “(i) IN GENERAL.—After the Sec-
7 retary or the Commissioner makes a final
8 determination on an appeal filed by an in-
9 dividual under subparagraph (F), the indi-
10 vidual may obtain judicial review of such
11 determination in a civil action commenced
12 not later than 30 days after notice of such
13 decision.

14 “(ii) JURISDICTION.—A civil action
15 for such judicial review shall be brought in
16 the district court of the United States for
17 the judicial district in which the plaintiff
18 resides or, if the plaintiff does not reside
19 within any such judicial district, in the
20 District Court of the United States for the
21 District of Columbia.

22 “(iii) SERVICE.—The defendant is ei-
23 ther the Secretary or the Commissioner,
24 but not both, depending upon who issued
25 the administrative order under subpara-

1 graph (G). In addition to serving the de-
2 fendant, the plaintiff shall also serve the
3 Attorney General.

4 “(iv) ANSWER.—The defendant in any
5 action under this subparagraph shall in-
6 clude, in any answer to a claim in such ac-
7 tion a certified copy of the administrative
8 record compiled during the administrative
9 review under subparagraph (F), including
10 the evidence upon which the findings and
11 decision are based. The court shall have
12 power to enter, based upon the pleadings
13 and the administrative record, a judgment
14 affirming or reversing the result of that
15 administrative review, with or without re-
16 manding the action.

17 “(v) STANDARD OF REVIEW.—

18 “(I) The burden shall be on the
19 plaintiff to show that the administra-
20 tive order was erroneous. Administra-
21 tive findings of fact are conclusive un-
22 less any reasonable adjudicator would
23 be compelled to conclude to the con-
24 trary. The court, upon good cause
25 shown, may in its discretion remand

1 to the Secretary or the Commissioner
2 for additional fact-finding or other
3 proceedings.

4 “(II) If the plaintiff meets his or
5 her burden to show that the adminis-
6 trative order was erroneous, the court
7 shall, upon request of the plaintiff, de-
8 termine whether the plaintiff can es-
9 tablish by the preponderance of the
10 evidence that the error was caused by
11 the decision rules, processes, or proce-
12 dures utilized by the System or erro-
13 neous system information that was
14 not the result of acts or omissions of
15 the individual.

16 “(vi) COMPENSATION FOR ERROR.—

17 “(I) IN GENERAL.—In cases in
18 which the judicial review reverses the
19 final determination of the Secretary
20 or the Commissioner made under sub-
21 paragraph (G), the individual was de-
22 nied a stay under subparagraph
23 (G)(ii), and the court finds that the
24 final determination was erroneous by
25 reason of the decision rules, processes,

1 or procedures utilized by the System
2 or erroneous system information that
3 was not the result of acts or omissions
4 of the individual, the court may award
5 to the individual lost wages not ex-
6 ceeding \$75,000, reasonable costs and
7 attorneys' fees incurred during admin-
8 istrative and judicial review which
9 shall not exceed \$50,000, and com-
10 pensatory damages in an amount
11 deemed necessary by the court.
12 Amounts under this clause may be ad-
13 justed to account for inflation pursu-
14 ant to the US Consumer Price
15 Index—All Urban Consumers (CPI-
16 U) compiled by the Bureau of Labor
17 Statistics.

18 “(II) CALCULATION OF LOST
19 WAGES.—Lost wages shall be cal-
20 culated based on the wage rate and
21 work schedule that prevailed prior to
22 termination. The individual shall be
23 compensated for wages lost beginning
24 on the first scheduled work day after
25 employment was terminated and end-

1 ing 180 days after completion of the
2 judicial review described in this para-
3 graph or the day after the individual
4 is reinstated or obtains employment
5 elsewhere, whichever occurs first. If
6 the individual obtains employment
7 elsewhere at a lower wage rate, the in-
8 dividual shall be compensated for the
9 difference in wages for the period end-
10 ing 180 days after completion of the
11 judicial review process. No lost wages
12 shall be awarded for any period of
13 time during which the individual was
14 not authorized to be employed in the
15 United States.

16 “(III) PAYMENT OF COMPENSA-
17 TION.—Notwithstanding any other
18 law, payment of compensation for lost
19 wages, costs and attorneys’ fees under
20 this paragraph, or compromise settle-
21 ments of the same, shall be made as
22 provided by section 1304 of title 31,
23 United States Code. Appropriations
24 made available to the Secretary or the
25 Commissioner, accounts provided for

1 under section 286 of the Immigration
2 and Nationality Act (8 U.S.C. 1356),
3 and funds from the Federal Old-Age
4 and Survivors Insurance Trust Fund
5 or the Federal Disability Insurance
6 Trust Fund shall not be available to
7 pay such compensation.

8 “(IV) EXCLUSIVE REMEDY.—
9 Awards of compensation for lost
10 wages, costs, and attorneys’ fees
11 under this paragraph shall be the ex-
12 clusive remedy for a finding under
13 subclause (I) that a final determina-
14 tion of the Secretary or the Commis-
15 sioner made under subparagraph (G)
16 was erroneous by reason of the neg-
17 ligence or recklessness of the Sec-
18 retary or the Commissioner.

In section 3, in the proposed subsection (d), strike
the quotation marks and second period at the end of
paragraph (9) and insert the following:

19 “(10) BACKPAY REMEDIES.—Neither backpay
20 nor any other monetary remedy for unlawful employ-
21 ment practices, workplace injuries, or other causes

1 of action giving rise to liability shall be denied to a
2 present or former employee on account of—

3 “(A) the employer’s or the employee’s fail-
4 ure to comply with the requirements of this sec-
5 tion in establishing or maintaining the employ-
6 ment relationship; the employee’s violation of
7 the provisions of federal law related to the em-
8 ployment verification system set forth in sub-
9 section (a); or

10 “(B) the employee’s continuing status as
11 an unauthorized alien both during and after
12 termination of employment.”.

