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PROPOSALS FOR IMPROVING THE ELECTRONIC EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

APRIL 26, 2007

Serial No. 110–18

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

34–927 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PROPOSALS FOR IMPROVING THE ELECTRONIC EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT SYSTEM

THURSDAY, APRIL 26, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:42 a.m., in Room 2141, Rayburn House Office Building, the Honorable Zoe Lofgren (Chairwoman of the Subcommittee) presiding.

Present: Representatives Lofgren, Berman, Waters, Sánchez, Ellison, King, Gallegly, and Goodlatte.

Staff present: Ur Mendoza Jaddou, Chief Counsel; J. Traci Hong, Majority Counsel; George Fishman, Minority Counsel; and Benjamin Staub, Professional Staff Member.

Ms. LOFGREN. I would like to open the hearing of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and welcome the Subcommittee Members, the witnesses, and the public.

This is the Subcommittee's fifth hearing on comprehensive immigration reform. This week, we have been focusing on the inability of existing paper and electronic systems to accurately verify the immigration status and employment eligibility of workers in the United States.

Since one of the main reasons for undocumented immigration is the lure of jobs in the United States, it is imperative that comprehensive immigration reform include an employment verification system that prevents the employment of unauthorized immigrants. At our hearing on Tuesday, we learned that the employment verification systems created in 1986 and 1996 have failed to meet the critical need of verifying employment eligibility.

We heard expert witnesses identify several problems with current Form I-9 paper employment eligibility verification systems created in 1986 and required to be completed by all employers and all workers in the United States each time a person gets a new job, as well as the Basic Pilot program created in 1996 and used voluntarily by 16,000 employers across the Nation.

The problems included: the use of fraudulent documents, including the use of documents by a person other than to whom they belong to gain employment; an unacceptably high number of errors in the Social Security Administration and U.S. Citizenship and Im-

migration Services databases leading to false negatives for U.S. citizens, legal permanent residents, and other work-authorized individuals erroneously denied work authorization; employer discrimination against work-authorized individuals who look or sound foreign; problems in processes and protections for workers and employers who suffer from erroneous denials of employment verification; and concerns about the protection of SSA and USCIS data from theft exposure, and other privacy issues.

These are serious and legitimate concerns that must be addressed so that we may move from today's voluntary participation of 16,000 employers in the Basic Pilot program to mandatory participation by all 7 million employers in the United States.

I look forward to the testimony of our witnesses today, all of whom provide proposals on employment verification. I am particularly interested in how each of the proposals presented here today will address the concerns raised during our Tuesday hearing. It is time for accurate and workable solutions on employment verification.

Today's hearing should be the first step in developing an appropriate system that accurately verifies the employment eligibility of workers in the United States to prevent the employment of unauthorized immigrants.

I would now like to recognize our distinguished Ranking minority Member, Mr. Steve King, for his opening statement.

[The prepared statement of Ms. Lofgren follows:]

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

I would like to welcome the Immigration Subcommittee Members, our witnesses, and members of the public to the Subcommittee's fifth hearing on comprehensive immigration reform.

This week, we have been focusing on the inability of existing paper and electronic systems to accurately verify the immigration status and employment eligibility of workers in the U.S. Since one of the main reasons for undocumented immigration is the lure of jobs in the U.S., it is imperative that comprehensive immigration reform include an employment verification system that prevents the employment of unauthorized immigrants.

At our hearing on Tuesday, we learned that the employment verification systems created in 1986 and 1996 have failed to meet the critical need of verifying employment eligibility.

We heard expert witnesses identify several problems with the current Form I-9 paper employment eligibility verification system, created in 1986 and required to be completed by all employers and all workers in the U.S. each time a person gets a new job, as well as the Basic Pilot program, created in 1996 and used voluntarily by 16,000 employers across the nation. The problems included:

- The use of fraudulent documents, including the use of documents by a person other than to whom they belong, to gain employment;
- An unacceptable high number of errors in the Social Security Administration (SSA) and U.S. Citizenship and Immigration Services (USCIS) databases leading to "false negatives" where U.S. citizens, legal permanent residents, and other work authorized individuals are erroneously denied work authorization;
- Employer discrimination against work authorized individuals who look or sound foreign;
- Problems in processes and protections for workers and employers who suffer from erroneous denials of employment verification;
- Concerns about the protection of SSA and USCIS data from theft, exposure, and other privacy issues;

These are serious and legitimate concerns that must be addressed so that we may move from today's voluntary participation of 16,000 employers in the Basic Pilot program to mandatory participation by all seven million employers in the U.S.

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It is time for accurate and workable solutions on employment verification. Today's hearing should be the first step in developing an appropriate system that accurately verifies the employment eligibility of workers in the U.S. to prevent employment of unauthorized immigrants.

Mr. KING. Thank you, Madam Chair. I appreciate you holding this hearing today.

Today's hearing is a continuation of last Tuesday's hearing on the Basic Pilot Employment Eligibility Verification System. We will examine what we can do to make that system work better, especially to combat identity fraud.

I appreciate these two hearings on the topic since accurate employment eligibility is essential in order to have successful U.S. immigration policy.

Illegal employment is the biggest incentive for illegal immigration and if we don't do everything we can to end the job magnet, we will never have national security or economic security.

I am pleased that our first panel of witnesses consists of several of our House colleagues who have taken leadership roles on this issue. Mr. Calvert has reintroduced his bill to make the use of the Employment Eligibility Verification System, the Basic Pilot program, as we know it, make them use that for all U.S. employers and phase it in over a 7-year span.

That phase-in system was laid out by Mr. Calvert's legislation. It is an inspiration for the Employment Eligibility Verification provisions in last year's Border Protection, Antiterrorism and Illegal Immigration Control Act. It passed the House by a vote of 239 to 182.

Aside from the use of the Basic Pilot Employment Eligibility Verification program, the other way to ensure employment eligibility is the use of machine-readable, tamperproof biometric Social Security card by all jobseekers. Mr. Dreier has proposed that in H.R. 98, the Illegal Immigration Enforcement and Social Security Protection Act of 2007. He developed it along with Border Patrol Union Chief T.J. Bonner, who has been before this Committee a number of times. Such a card would directly combat the theft or misuse of a Social Security number.

Mr. Gallegly, a longtime Member of this Subcommittee and the deputy Ranking Member, has introduced several pieces of legislation aimed at improving the Employment Eligibility Verification process. For instance, H.R. 136 would require the Social Security Administration to notify DHS, the Treasury Department, and the individual rightfully possessing a Social Security number that has been submitted by one employer eight or more times at at least four different addresses. And H.R. 850 would require the IRS to withhold and tax refunds of earned income tax credit from any alien whose work authorization had expired but did not stop working in the United States. Commonsense proposals.

At Tuesday's hearing, the U.S. Citizenship and Immigration Services witness discussed the Basic Pilot program, or the EEVS,

in general and some of the improvements that have been brought forward to the system. I was particularly interested in the fact that the system works so quickly. Over 92 percent of the inquiries get a response within 3 seconds, and I have run that system myself and the longest delay I could find was 6 seconds. But 99.8 percent of U.S.-born citizens receive confirmation in that period of time.

We also heard the exception here, which I think we need to pay attention to. Foreign-born employees have been more likely to receive a tentative non-confirmation, though. A total of 1.4 percent of work-authorized employees received a tentative non-confirmation. So it worked pretty good.

In the past, there was often a 6 to 9 month delay between an immigration's arrival in the United States and the availability of information in the DHS databases for verification purposes. That delay is now down to around 10 days.

USCIS is taking steps to improve EEVS, the Basic Pilot. They are conducting a pilot program that allows employers to make sure the worker standing in front of them matches the picture on file with the DHS employment authorization documents. USCIS is adding more data source to the database and monitoring for patterns of fraud, employment discrimination, and employer misuse. These are steps in the right direction, and it is open to making even more improvements.

For the most part, the witnesses at Tuesday's hearing agreed that the biggest problem facing the EEVS system is it vulnerability to identity theft. To combat this, DHS must have access to Social Security Administration data so it can investigate situations in which a single Social Security number was submitted more than once by a single employer or where a number was submitted by multiple employers in a manner that suggests fraud.

Of course, Mr. Dreier's proposal deals with identity fraud directly. One question, though, is whether there is consensus for a biometric Social Security card. I am interested in the witnesses' testimony today. I recognize there are also proposals brought forth by Mr. Reyes this morning, and by the Flake-Gutierrez proposal that we will hear this morning and I am interested in that testimony as well.

It is really pleasing to me to see this kind of activity on the part of Members, the leadership role that has been taken. I look forward to your testimony.

I thank you again, Madam Chair, and I yield back.

Ms. LOFGREN. Thank you, Mr. King.

We are pleased to be joined by the Chairman of the full Judiciary Committee today, and I would now invite Chairman Conyers for any opening remarks that he may have.

Mr. CONYERS. Thank you so much. I would like permission to put my statement in the record.

Ms. LOFGREN. Without objection.

Mr. CONYERS. And I just want to congratulate this new Lofgren-King alliance that is leading us through a subject-matter by subject-matter inquiry into this huge, complex subject. I am very proud of the way that you are moving on this.

The only point I wanted to make in my whole statement is this problem of worker exploitation or retaliation. You see, when a com-

pany like Swift wants to help find out who is a legal worker and who isn't, and it turns out that this is like putting cheese out for a mouse, then you spring on the people that have provided you the information and, guess what, you are the bad guy. And that is not going to attract a lot of support as we go along.

We have got to have safeguards, and the privacy concerns must be taken into consideration. And I am so happy to see this thoughtful group of Members putting their bills and ideas right on the line. Let's put everything—whatever you have got, put it on the table, ladies and gentlemen, because this train is moving out and we are going to come out with a bill. It is resolved.

And the challenge for us is how do we do it and accommodate so darned many competing interests, and it is in that spirit that I issue and extend a warm welcome to you, and I congratulate our Subcommittee Chairwoman.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Earlier this week, the Subcommittee held a hearing examining problems in the current employment verification and worksite enforcement systems. Today, we have an opportunity to study possible solutions to these problems.

One possible solution concerns the electronic employment verification system, also known as "EEVS." This system is now recognized as playing an increasingly critical role in comprehensive immigration reform. To ensure that the system will—in fact—actually be a solution, it must be *efficient, enforceable,* and *evenhanded.* And, there must be *safeguards* to prevent abuse.

Let me explain each of these requirements.

First, EEVS must be *efficient.* Without doubt, the verification requirements of the 1986 immigration law reforms became substantially undermined by the increasing availability of fraudulent identification documents. While pilot programs established under the 1996 immigration law reforms sought to verify the identity of prospective employees through government databases, these programs have been plagued with bureaucratic red tape and extensive false negatives.

Clearly, if an employment verification system is not reliable and easy to use, employers simply will not utilize it and we will simply be left—again—with a broken immigration system. For example, we learned earlier this week about the odyssey of a staffer on this very Subcommittee who encountered the problem of "false negatives" when she began her employment with us. One can only imagine how different her experience would have been if she was a low-wage worker in a rural area without the support of a Congressional subcommittee behind her. Clearly, an EEVS system must be fair to everyone, not just the educated or informed users.

Second, this system must be *enforceable and evenhanded.* By this, I mean that the system should have appropriate incentives and sanctions. As we heard the other day from one company that tried to comply with a pilot verification program in good faith, it paid substantial consequences. We should not punish employers that voluntarily seek to comply with Federally-sanctioned employment verification programs.

Third, the system must have safeguards so that it does not become a tool of *worker exploitation* or retaliation whether in response to formal organizing activities or as a way to punish individual employees who demand their rights as workers. Unscrupulous employers should not be allowed to profit from worksite enforcement. Also, as part of these safeguards, privacy concerns must be taken into account both from the perspective of the employee and the employer.

I am pleased that some of our colleagues who introduced bills in this Congress concerning employment verification systems are here to discuss their respective proposals and to share their insights on reform. I extend a warm welcome to each of you for your hard work on this important issue.

I, of course, express equal appreciation to our other witnesses from the business community and the public policy sectors. I am particularly pleased that the representative from the Service Employees International Union is joining us today. All too often, anti-immigrant forces have tried to insert wedges in the labor community

by alleging that immigrants will steal American jobs and undercut unionization efforts.

Today's debate on the employment verification system today will certainly contribute to our efforts to enact immigration law reforms that will result in a system that is *controlled, orderly,* and *fair.*

Ms. LOFGREN. Thank you, Mr. Conyers.

In the interest of proceeding to our witnesses and mindful of our schedules, I would ask that other Members submit their statements for the record within 5 legislative days. And, without objection, all opening statements will be placed in the record.

Without objection, the Chair is authorized to declare a recess of the hearing at any time.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

Today marks the fourth hearing in a series of hearings dealing with comprehensive immigration reform. This subcommittee previously dealt with the shortfalls of the 1986 and 1996 immigration reforms, and most recently the difficulty that employers encountered when they attempted to verify that potential foreign employees have work authorization. We heard testimony from Marc Rosenblum that false negatives occur during the I-9 process therefore employers err on the side of caution, making it more difficult for legitimate documented workers to find employment. Certainly making a mistake can be costly to an employer.

We heard testimony from the VP of Swift Meat Packing Company, John Shandley. Mr. Shandley mentioned that they were sued by the Department of Justice (DOJ) for going too far in trying to determine the employment eligibility of a potential employee. Eventually they would settle the case for less than $200,000. Likewise, the recent raid on Swift plants cost the company over $31 million in lost revenue. More than 1,200 employees were detained, while Immigration & Custom Enforcement (ICE) officers searched for undocumented workers. Despite their difficulties with employment verification, Mr. Shandley expressed an eagerness to assist us in coming up with practical solutions to this problem, as Swift held no ill will towards Members of Congress.

As we move towards a practical solution, and consider various proposals to improve employment verification I want to reemphasize the three "E's" articulated by Stephen Yale-Loehr, enforcement, evaluation, and entry. There has been a consistent lack of enforcement on the part of the federal government. Violations of the employment verification provisions may result in civil penalties ranging from $100–$1,000 per employee. However, only 417 Notices of Intent to Fine were issued in FY1999, 178 in FY2000, 100 in FY2001, 53 in FY 2002, 162 in FY 2003, and only three (3) in FY 2004. How can we address the problem if the agency deemed responsible for enforcing our laws has not maintained their responsibilities?

Along those same lines we must address the enormous use of fraudulent documents that occurred as a result of the 1986 and 1996 immigration reform. When Mr. Yale-Loehr spoke about evaluation he stressed the difficulty that employers encounter when they evaluate the documents that a potential employee presents for verification. Likewise the Basic Pilot Program can only verify that a social security number exist. The Basic Pilot Program can not tell a prospective employer that the person presenting the social security number is actually the individual to whom the social security number belongs. Finally let us speak about entry. Keeping in mind that practicality is the key to comprehensive immigration reform, Mr. Yale-Loehr mentioned the need for a temporary guest worker program. While I am a staunch supporter of protecting our borders, and enforcing our immigration laws, we must find a way to effectively deal with the 12 million undocumented workers already here. A guest worker program may be a possible solution.

In conclusion let me say that every single employer in the United States will be impacted by the new employee verification mandates Congress enacts as part of comprehensive immigration reform. Therefore the system must be workable, simple, and reliable. We must also recognize that employers in the United States are vastly different in both size and levels of sophistication, and any verification system that we employ must accommodate those differences. It is time to end the confusion

within the employer verification system because the consequences for individual workers and the economy are significant.

Ms. LOFGREN. We have two distinguished panels of witnesses here today to help us consider the important issues before us. In our first panel, we are very grateful to each Member for being here. We know how busy your schedules are. We have brought together Members of the House of Representatives who have introduced bills with provisions on employment eligibility verification systems in this Congress to discuss their proposals with us.

I would note that Mr. Gallegly, a Member of our Subcommittee, has a written statement that will be included in its entirety in the record but has asked that he not be a witness because he has another commitment that he is going to run off to do, and we respect that request on his part.

[The prepared statement of Mr. Gallegly follows:]

PREPARED STATEMENT OF THE HONORABLE ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Madam Chairwoman, thank you for holding this important hearing on one of the most critical issues that must be addressed if our country is serious about reducing illegal immigration—the development and implementation of an efficient and secure worksite enforcement system.

Illegal immigration is one of the most serious problems facing our nation. The high number of immigrants crossing the border illegally has overwhelmed our schools, hospitals and communities. It is also a direct threat to our national security and counter-terrorism efforts. Illegal workers also hurt American workers by taking jobs and keeping wages and benefits down.

Under current law, a person must provide a social security number in order to get a job. In many cases, an illegal immigrant simply provides a false name and social security number. In other cases, an illegal immigrant adopts the identity of an American who is unaware that his identity has been stolen until he is refused a loan or contacted by an irate creditor.

The federal government could stop misuse of Social Security numbers, but has failed to do so. My legislation would change that.

Every year, employers are required to file W-2 forms with their workers' names, social security numbers and addresses. Currently, when the Social Security Administration receives multiple W-2 forms with the same social security number and different names, it simply ignores it—even when it is obvious that more than one person is using a Social Security number.

In other cases, when an employer files a W-2 with a name and Social Security number that does not match, the government simply mails the worker a letter. That's it. There is little or no follow-up.

This has led to a serious accounting problem in the Social Security program. A GAO report found that as of November 2004, the Social Security Administration has been unable to resolve discrepancies involving 246 million W-2's—involving $463 billion—that were filed with names and Social Security numbers that do not match.

A bill I introduced, H.R. 138, the Employment Eligibility Verification and Anti-Identity Theft Act, would solve this problem by requiring workers to resolve discrepancies involving their name and Social Security number.

A companion bill, H.R. 136, the Identity Theft Notification Act would require the Social Security Administration to investigate if it receives information that more than one person is using one Social Security number.

If there is evidence of fraud and identity theft, the Social Security Administration would be required to contact the Department of Homeland Security (DHS) for prosecution. It would also be required to notify the innocent owner of the Social Security number, so that he can take steps to protect his good credit and good name.

I have also introduced H.R. 849, the Stop the Misuse of ITINs, which would require the Internal Revenue Service (IRS) to notify the Department of Homeland Security (DHS) when it receives a W-2 indicating that a foreign national is working illegally. IRS would also be required to notify the employer that the worker does not have proper work authorization.

Finally, H.R. 850, the IRS Illegal Immigrant Information Act, would require that each December the DHS provide IRS with a list of the people whose work authorization or employment-based visa expired before the calendar year.

If a return is filed by someone working illegally, IRS would be required to notify DHS. The IRS would also notify the employer that the worker does not have proper work authorization and withhold any refund due or Earned Income Tax Credit claimed.

For example, in December 2007, DHS would provide IRS with the names and Social Security numbers of foreign nationals whose work authorization or employment-based visa expired before December 31, 2006. If the IRS receives a W-2 in January of 2008 indicating that the person continued to work in 2007, the IRS would notify both IRS And the worker's employer.

All four of these bills would give the worker an opportunity to resolve the discrepancy or provide proof of current employment authorization.

Enacting these proposals, in addition to requiring that all employers use an improved Basic Pilot Program, will substantially reduce the number of people illegally crossing the border. This will allow the border patrol to concentrate on securing our borders against terrorists, drug smugglers and other criminals.

Madam Chairwoman, thank you again giving me this opportunity to explain my proposals. I look forward to working with you and the distinguished Ranking Member to identify additional ways to reduce the number of people who come to this country illegally.

Ms. LOFGREN. Let me go to the other Members who are able to testify before us today.

First on the panel, and who arrived first in the room, Congressman Ken Calvert represents the 44th Congressional District of California. Throughout his 15 years of congressional service, Mr. Calvert has been instrumental in advancing legislation to protect against identity theft. Prior to his tenure in Congress, Representative Calvert directed Ken Calvert Real Properties.

Representative Dave Dreier has been a Member of the United States House of Representatives since 1981, representing California's 26th Congressional District. He has served in many leadership capacities over the years, from Chair of the House Rules Committee as well as his current position as Chair of the Republican Congressional Delegation from California, where he and I very often collaborate. He graduated with a bachelor's from Claremont McKenna College in 1975 and received his master's from Claremont Graduate School in 1976.

Congressman Silvestre Reyes has served in the House for 11 years as a Representative from the 16th District in Texas, but began his career with the U.S. Immigration and Naturalization Service and the U.S. Border Patrol. He started as a Border Patrol Agent, rising through the ranks to immigration inspector, instructor at the Border Patrol Academy and assistant regional commissioner in Dallas, Texas. During his time with the Border Patrol, Congressman Reyes was known as an effective and innovative manager of the border and, of course, we know him as somebody we can rely on with expertise here in the House.

Representative Luis Gutierrez has represented the 4th Congressional District of Illinois since 1993. Throughout his service in the House, he has worked as a stalwart leader on comprehensive immigration reform. Mr. Gutierrez chairs both the Congressional Hispanic Caucus, and the Democratic Caucus, respective Immigration Task Forces. He also sits before us as a senior Member of this Subcommittee. Before his arrival in Washington, Congressman Gutierrez worked as a teacher, social worker, community activist and city official. He graduated from Northeastern Illinois University.

And, finally, we are expecting Congressman Flake, who is on his way to testify. Mr. Flake is serving his fourth term representing the 6th Congressional District of Arizona. Before serving in the House, Mr. Flake was Executive Director of the Foundation for Democracy, a foundation monitoring the southern African nation of Namibia's independence process and, following his work at the Foundation, he was named the Executive Director of the Goldwater Institute. Mr. Flake graduated from Brigham Young University, where he received a BA in international relations and a master's in political science.

So we will begin with—you all know the drill. Your entire written statement is part of the record, but we would invite you to make an oral statement.

And we will start with you, Ken Calvert.

TESTIMONY OF THE HONORABLE KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CALVERT. Thank you. I thank my colleague from California and friend, Chairwoman Lofgren, Ranking Member Steve King, and the entire Subcommittee for inviting me to testify on my bill, The Employment Eligibility Verification System.

As you know, there are approximately 16,000 employers using the Basic Pilot program, and the program continues to evolve to meet new demands. As you heard this past Tuesday, it is incorporating a photo tool to enable employers to better verify the identity of non-citizen new hires. The Basic Pilot program is also exploring other ways to deter and detect fraudulent documents, fraudulent or other improper use of the system in instances where employers fail to properly follow program procedures.

The program is developing a system to flag multiple uses of Social Security numbers in different locations. The Basic Pilot program has been steadily preparing to go mandatory and is currently capable of handling 25 to 40 million queries a year.

My legislation, HR 19, would make the Basic Pilot program mandatory over a period of 7 years. Companies with 10,000 employees or more would be required to be compliant a year after enactment. Companies with 5,000 employees or more would be required to be compliant until after 2 years and so on down to businesses with fewer than 100 employees, which would be required to be compliant after 7 years. My bill does not require employers to retroactively check employees already hired, only newly hired employees.

The current Basic Pilot program was created from legislation I drafted in the 104th Congress. The legislation was included in the omnibus consolidated appropriations act of 1997 and several Members of both the Subcommittee and full Judiciary Committee voted in favor of the bill. In the 107th Congress and the 108th Congress, the Basic Pilot program was extended and expanded. Both bills were agreed to by voice vote in the House.

I recognize there are concerns about the current Basic Pilot program. The program was not originally designed to catch identity theft, and I understand this is a desirable capability to add. However, the United States Citizenship and Immigration Service is be-

ginning to address this problem through the development of a photo tool and a new monitoring and compliance office that will analyze system usage by employers to detect compliance issues leading to follow-up or referral to Immigration and Custom Enforcement and the Department of Justice.

The question before this Subcommittee and Congress is how best to build upon an effective, working program for which Congress has voted for three times. To create a new program from scratch would be a step backwards that would be hard to explain to budget-conscious taxpayers.

The Basic Pilot program has the ability and authority to address the concerns regarding identity theft and with the support of Congress through the passage of H.R. 19, our country will continue to have a working employment verification system with a decade of experience behind it.

Thank you again for inviting me to testify, and I welcome any questions you may have.

[The prepared statement of Mr. Calvert follows:]

PREPARED STATEMENT OF THE HONORABLE KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Congressman Calvert Statement on H.R. 19, The Employment Eligibility Verification System

I would like to thank my colleague from California, Chairwoman Lofgren, Ranking Member Steve King, and the entire subcommittee for inviting me to testify on my bill, The Employment Eligibility Verification System.

There are approximately 16,000 employers using the Basic Pilot Program and the program continues to evolve to meet new demands. As you heard this past Tuesday, it is incorporating a Photo Tool to enable employers to better verify the identity of non-citizen new hires. The Basic Pilot Program is also exploring a relationship with the Federal Trade Commission to check Social Security numbers against the FTC database of stolen Social Security numbers. The program is developing a system to flag multiple uses of Social Security numbers in different locations. The Basic Pilot program has been steadily preparing to go mandatory and is currently capable of handling 25 million queries a year.

My legislation, HR 19, would make the Basic Pilot Program mandatory over a period of seven years – companies with 10,000 employees or more would be required to be compliant a year after enactment. Companies with 5,000 employees or more would be required to be compliant after two years and so on down to businesses with fewer than 100 employees which would be required to be compliant after seven years. My bill does **not** require employers to retroactively check employees already hired, only newly hired employees.

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I recognize there are concerns about the current Basic Pilot Program. The program was not originally designed to catch identity theft and I understand this is a desirable capability to add. However, the United States Customs and Immigration Service **are** addressing the problem through the development of Photo Tool and cooperation with the FTC.

The question before this subcommittee and Congress is how best to build upon an effective, **working** program for which Congress has voted for three times. To create a new program from scratch would be a step backwards that would be hard to explain to budget-conscious American taxpayers.

The Basic Pilot Program has the ability and authority to address the concerns regarding identity theft and with the support of Congress through the passage of HR 19, our country will continue to have a working employment verification system with a decade of experience behind it.

Thank you again for inviting me to testify and I welcome any questions you may have.

Ms. LOFGREN. Thank you, Mr. Calvert, and for your leadership on this issue.

Congressman Dreier?

TESTIMONY OF THE HONORABLE DAVID DREIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. DREIER. Thank you very much, Madam Chairwoman and Mr. King and Chairman Conyers, Mr. Gallegly, Mr. Goodlatte.

I must say, as I listen to Chairman Conyers talk about this great Lofgren-King combo that is here, I can't help but tell you that I am here to offer what I think really builds on that and is the closest thing to a panacea for this.

Not only do I have as lead cosponsor of my bill, H.R. 98 Silvestre Reyes, but this is a bill that has, as cosponsors, Elton Gallegly, Bob Goodlatte, Mr. King; you, Madam Chair—I don't know if you are a cosponsor, you have certainly indicated an interest in support of it. But I will tell you that I know that Maxine Waters has been a cosponsor along with Tom Tancredo and Grace Napolitano.

It really is to me the one measure that we have on this issue of dealing with immigration reform that does really go all the way across the spectrum philosophically.

In the last Congress, as we all know, we had 10 votes on what Mr. King really appropriately in his opening remarks described as focusing on the supply side, increasing the size of the Border Patrol, Silvestre's former colleagues, the building of the fence, utilizing unmanned aerial vehicles and motion detectors. All of this stuff focused on the supply side and virtually nothing focused again on what Mr. King talked about, the demand side, the magnet that draws people into this country illegally.

Now, this legislation that Silvestre and I have introduced, we call it H.R. 98. Why? Because 98 percent of the people who come into this country illegally come here for one reason. They are looking for economic opportunity. They are looking to feed their families. They are looking for a job. And if we can end that magnet that draws people into the country illegally and at the same time, we hope, see the economy of Mexico and other countries enhanced to the point where people aren't fleeing those countries, I believe that we can turn the corner and, frankly, bring what would be tantamount to an end to this problem.

Now, what we call for is a smart, counterfeit-proof Social Security card. My brilliant staffer Matthew Daniel Tully has just given me his original Social Security card. He is a young guy. I don't know where in the hell mine is. I lost it years ago. But it is nothing but a flimsy piece of paper, which is what anybody had going back to 1935.

Not one attempt whatsoever has been made to update since 1935 the Social Security card. Now, I am not a proponent of a national ID card, but I do know this: if we were to establish a smart, counterfeit-proof Social Security card—that is not biometric by the way, Mr. King, all is it is it has an algorithm strip on the back that the employer would swipe, and that card would go with information that the Government already has, no new information, as to whether this person is an American citizen, if they are here on an H-1B

visa, H-2A, whatever, and I know you are looking at new descriptions of those visas. But they would have—whether or not that person is in fact a qualified worker.

And then that information would come back and the employer would get this, yeah or nay, and they could then hire that person.

One of the big problems we have had, of course, is lack of enforcement. And I opposed the 1986 Immigration Reform and Control Act not only because of amnesty but because of employer sanctions. But we have employer sanctions today. As we all know, they are not enforced. I didn't want to see small businessmen and women turned into Border Patrol agents. I left that to Silvestre Reyes and his colleagues.

The fact of the matter is we have it today. There is a lack of enforcement. And what we have seen, and Chairman Conyers raised this by talking about one particular company, we have seen many people out there knowingly hiring people who were here illegally.

Well, what we do with this card is people in this country looking for a new job, anyone looking for a new job, whether you are a citizen or not, you would have to have one of these cards. Now, no retiree would have to have one of these cards. We are reelected, we don't need to have one of these cards. We only see people who are in the job force, looking for a new job, required to have one of these cars.

And I believe that going through a 2-year phase-in, we could utilize this as a means to take place of the combination of 94 different documents, as we well know, that people utilize to get their jobs, I mean, to qualify. I mean school ID cards, library cards, you know, obviously Social Security cards, and one of the real problems has been a real abuse of the Social Security system.

Now, our problem has been, frankly, the Ways and Means Committee and the Finance Committee in the Senate and some in the White House who have opposed this. I have been talking about this until I was blue in the face for the last 3 years. And I hope very much that we can—I have testified before the Ways and Means Committee on this, their Social Security Subcommittee, and I am hoping very much that we can get them to move on it. There are a number of people who are concerned about getting the Social Security Administration involved in this.

I hope very much, Madam Chair, that we can in fact move forward and incorporate this as a very important part of our process. And I thank you all very much for listening to me.

[The prepared statement of Mr. Dreier follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID DREIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

DAVID DREIER
CHAIRMAN

COMMITTEE ON RULES

Congress of the United States
House of Representatives
Washington, DC 20515

Testimony of Hon. David Dreier
Before the Subcommittee on Immigration, Border Security and Claims
Committee on the Judiciary
April 26, 2007

Madam Chair, thank you very much for inviting me to testify today as the subcommittee considers ways to improve the electronic employment verification and worksite enforcement system. I also want to thank the ranking member, the gentleman from Iowa Mr. King, for allowing me the opportunity to appear before the subcommittee.

As many of the members are aware, this is the second opportunity that I have had to appear before this subcommittee. The last time I testified was in May of 2005 and I appreciate the attention that the distinguished Chair, my colleague from the great state of California, Ms. Lofgren, has given to the importance of employment verification and worksite enforcement proposals.

As many of you know, I have reintroduced my bi-partisan legislation, H.R. 98, the Illegal Immigration Enforcement and Social Security Protection Act of 2007 to help address the issue of workplace enforcement of illegal immigration. I am particularly pleased to have the support of the gentleman from Texas, Mr. Reyes, on this legislation. Mr. Reyes brings a unique perspective to this issue due

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to his experience as chief of the Border Patrol in McAllen and El Paso, Texas. I am grateful for his foresight, determination and willingness to work in a bipartisan way to address the challenge of illegal immigration.

In addition to the gentleman from Texas, I am here today on behalf of a diverse group of co-sponsors who believe that employment verification and worksite enforcement play a crucial role in the immigration debate. I appreciate their support.

Madam Chair, I have long been concerned by the Social Security card's vulnerability to counterfeiting. As some of the veteran Members here may recall, we had a lengthy debate on improving the security of Social Security cards during the debate on the Illegal Immigration Reform and Immigrant Responsibility Act on March 20, 1996. I voted that day to make Social Security cards as secure against counterfeiting as the 100 dollar reserve note and the U.S. passport. Unfortunately, I was among a minority of my party in favor of the amendment offered by our former colleague from Florida, Mr. McCollum, and we ended up losing that vote.

But the world has changed significantly since 1996. As we all tragically learned on September 11th, 2001, we are no longer impervious to attacks on our homeland. As the 9/11 Commission noted, our border security system must be evaluated to ensure that it cannot be taken advantage of by terrorists and criminals. As Silvestre can attest, our Border Patrol is hopelessly overmatched because of the thousands of illegal immigrants flooding across our border every day in search of

economic opportunity. We cannot expect the Border Patrol to have a reasonable chance of identifying and apprehending those who really do mean us harm when the numbers are so clearly not in our favor.

To date, most of our efforts to stop illegal immigration have targeted the supply side of the equation. We try to keep people from crossing the border by building fences, deploying unmanned aerial vehicles and having the Border Patrol make arrests. With roughly 12 million people in the country illegally and more coming across our borders every day, it is clear that the current approach is not working. While enacting the REAL ID Act was a strong step forward, we know that more must be done.

What Silvestre and I propose is that the United States government target demand for illegal labor instead. The only way to begin to control the illegal immigration influx is to take away the incentive to enter the country illegally in the first place. I think most Americans agree that the vast majority of illegal immigrants come here because they are hoping to feed their families. Despite laws to the contrary, work is plentiful for illegal immigrants and current safeguards are insufficient to prevent their employment.

One of the largest vulnerabilities in our current immigration system is the ease with which illegal immigrants can obtain fraudulent identity documents which they then use to demonstrate to employers that they are here legally. We have passed the REAL ID Act to reduce fraudulent driver's licenses, and now we

must turn our attention to the most ubiquitous federal document, the Social Security card.

There have been numerous news reports on Social Security card use by illegal immigrants and the evidence is not encouraging. One broadcast detailed how an illegal immigrant can purchase a fake Social Security card for $1,300 and then easily get a job using the fake card as proof of their eligibility to work. Another report detailed the struggle against identity fraud that one Chicago-area resident faced because no fewer than 37 different illegal immigrants were using her Social Security number for employment purposes. Perhaps most disturbingly, in 2005, illegal immigrants using false Social Security numbers were apparently able to get work at a nuclear power plant in Florida. Far from being just an immigration issue, Social Security card fraud is a national security issue.

H.R. 98 addresses this vulnerability, simplifies current law for employers, toughens sanctions against those who choose to break the law, and provides the Border Patrol the resources it needs for interior enforcement. Our legislation requires the Social Security Administration to issue Social Security cards which contain a digitized photo of the cardholder, in addition to other fraud countermeasures developed in conjunction with the Department of Homeland Security. While the bill does not explicitly call for biometric identifiers, there is nothing in the legislation to preclude their consideration by the Department of Homeland Security. The bill also requires the placement of an encrypted electronic signature strip on the back of the improved card. This strip would be

utilized by employers to verify, via an Employment Eligibility Database housed in the Department of Homeland Security, an individual's eligibility to work in the United States either by swiping the card through an electronic card-reader or calling a toll-free telephone number. The employer would instantaneously receive a response back that would tell them whether or not they are permitted to hire the individual in question.

Only people who intend to seek a new job would have to be issued the new Social Security card. Retirees, for example, would not have to obtain the new, improved Social Security card. I want to make clear that our proposal takes us no further down the road of establishing a national identification card. The improved Social Security card would only be required when an individual applies for a new job. H.R. 98 further stipulates that the Social Security card shall not become a national identification card, requires that the improved Social Security card contain the words "not to be used for the purpose of identification," and provides that an individual shall not be required to carry the card on their person.

In addition, I want to underscore that under H.R. 98 the government would collect no more information about an individual that it does today. The Social Security Administration already collects information on citizenship and employment eligibility and shares that information with the Department of Homeland Security under the aegis of the Basic Pilot Program. What we propose does not threaten individual privacy or impinge upon civil liberties. I would also like to point out that H.R. 98 addresses data security concerns with provisions that

limit access to information contained in the Employment Eligibility Database while imposing strict penalties in the form of a mandatory minimum of five years in prison and a fine for misuse of any information contained in the database.

As one of the strongest supporters of reducing the level of federal bureaucratic red tape for small businesses and private enterprise, I am pleased to say that our legislation reduces the burden on business. Since the passage of the Immigration Reform and Control Act of 1986, employers have been required to verify that an individual is permitted to work in the United States before they make a hire. The current I-9 Employment Eligibility Verification form requires employers to accept 94 different document combinations. Everything from school ID cards to U.S. Coast Guard Merchant Mariner cards must be accepted by employers to establish a prospective employee's identity and eligibility to work.

Compounding matters, employers are potentially liable under the law if they hire an individual who has presented a fraudulent form of identification – any one of the aforementioned 94 combinations. While there are no doubt employers out there who knowingly hire illegal immigrants, I believe that a majority wants to comply with the law and tries to. But we are forcing them to be experts in detecting dozens of different types of fake documents. Each of our offices is required to comply with the law and file an I-9 verification form for each employee we hire. I ask my colleagues, do you feel confident that you or anyone on your staff can identify a fake military dependent's ID card, Native American

tribal document, or any of the other permitted documents? If not, then you could be potentially criminally liable if your office hires an illegal immigrant.

Compare the current system to what H.R. 98 would put into place. Rather than 94 different document combinations, there would only be one that employers would be allowed to accept. Employers would not be responsible for detecting fake cards because they would have access to the card-readers and the toll-free number to verify that the card belongs to the cardholder and that the individual is eligible to work in the U.S. Our legislation will make it simpler, faster, and more reliable for employers to know exactly who it is they are hiring.

No matter how simple we make the process there will always be those who are unwilling to comply with the law because they enjoy the benefits of a cheap source of illegal labor. While these employers know it is unlawful to hire an illegal immigrant, current penalties deter little and enforcement of the law is too lax. To provide extra incentive for employers to comply, we have increased civil penalties by 400 percent, from $10,000 to $50,000 per illegal immigrant hired. We also increase criminal penalties to a maximum of 5 years in federal prison for each illegal immigrant hired. And because it is inherently unfair for the government to pick up the tab for deporting an illegal immigrant to his home country when someone was unlawfully employing them, H.R. 98 requires the employer to reimburse the federal government and cooperating State and local governments for the cost of deportation.

But penalties are only effective insofar as violations of the law are investigated and prosecuted. This has been the most tragic failure of the 1986 legislation. The government outlawed the employment of illegal immigrants and required employers to verify eligibility, yet it has done very little to enforce the law or ensure compliance. We need dedicated Border Patrol agents to focus exclusively on employer enforcement, and H.R. 98 authorizes 10,000 new agents to do just that. That is the number that I believe would create an effective enforcement regime, and while I know it is a large number I think we must realize that we cannot have effective border security on the cheap.

Madam Chair, full implementation of the Illegal Immigration Enforcement and Social Security Protection Act will decrease illegal immigration. In fact, I estimate that it can eliminate 98 percent of illegal border crossings, thus the bill's title, H.R. 98. Why? Because illegal immigrants will not come here if they know they will be unable to find a job. There simply will be no incentive for them to make the perilous journey across the desert. If we can decrease illegal immigration by even half that much it will be a strong start and allow the Border Patrol to focus its efforts on apprehending criminals and interdicting terrorists.

Past approaches to solving this problem have clearly not worked as well as we would have liked. It is time for a new solution. We must enforce the laws already on the books, we must make it feasible for employers to comply with those laws, and we must increase the penalties for violating those laws. H.R. 98 will help to address these issues in a streamlined fashion. I would like to once

again thank Chairwoman Lofgren and Ranking Member King for holding this hearing today, and I welcome any questions that my colleagues may have.

Ms. LOFGREN. Thank you very much, Congressman Dreier.

Congressman Reyes?

TESTIMONY OF THE HONORABLE SILVESTRE REYES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. REYES. Thank you, Madam Chair and Members of the Committee and Chairman Conyers. Thank you so much for holding this hearing and agreeing to take on what is an important part of what I think is our national security landscape.

I mention that because whatever the figure is, and we don't know what that figure is exactly, between 9 million and 12 million people are living in a shadow world in our country today. So it is incumbent upon us as Members of Congress to work and find a way to greatly reduce or eliminate this shadow world because we are concerned that there may be those in that shadow world, in our country, that are here to harm us and have that potential as long as that shadow world exists.

I am very proud to be here with my colleagues because I know all of us want to find a solution to this perplexing issue and I am particularly proud of my two colleagues here to my left, Congressman Flake and Congressman Gutierrez, for the legislation that I have endorsed that is comprehensive in nature.

I think that if we are going to be successful, if we are going to be able to address the issue that is facing us today, you have to have three very critical components. You have to have legalization, you have to have border security and you have to have a guest worker program. So I am proud to endorse their legislation, and I hope all Members of Congress take a close look at that.

We were at the White House yesterday. I will let Congressman Gutierrez talk more about that meeting, at least I hope he does, because we had a meeting with President Bush, who is very much interested for the same reasons of national security that we address this.

I am also proud to have had a role in H.R. 98 with my colleague David Dreier, and actually we have introduced this the last three Congresses, and we have testified a number of times before this Committee and other Committees about this proposal. I was thinking as David was speaking. In 1977 I headed up the first computer program to create a system that would identify potential legal visitors to this country. It was called the Alien Documentation Identification and Telecommunications System. That was in 1977.

I find it incredible, and I find it appalling, that with all of the advances in telecommunications, all of the advances in computers and our ability to be able to monitor, that we haven't come up with a system like H.R. 98 or perhaps one like my colleague Mr. Calvert was talking about, that we haven't utilized technology to give us a system that does three very important things: increases our security by knowing who is coming into our country; secondly, gives employers the ability to verify conclusively and therefore takes them out of the loop in terms of responsibility as to who they are hiring and who is on their payroll; and, third, puts the onus on the Department of Homeland Security, where it should be, to enforce our Nation's immigration laws.

So I am proud to be part of this effort. I hope that we in this Congress are serious about comprehensive immigration reform. We can't afford to postpone it a day more. And when people talk about the cost that it is going to entail, I would remind all of us, the cost of another hit like the one we took on 9/11. This is an investment in ourselves. This is an investment in the future for our children, and our grandchildren, and the security of our country. It is a national security issue.

And that is why I believe that comprehensive immigration reform with those three components—legalization, a guest worker program and border security, which includes what H.R. 98 does—is so critical and so important. That was our message to President Bush yesterday. It is I think an understandable and cohesive message that everybody needs to understand on both the House and the Senate side.

So thank you very much for taking on this issue. I do have a written statement.

Ms. LOFGREN. The written statement will be included in the record.

Mr. REYES. And I will be glad to answer any questions.

[The prepared statement of Mr. Reyes follows:]

PREPARED STATEMENT OF THE HONORABLE SYLVESTRE REYES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I would like to begin by thanking Chairwoman Zoe Lofgren and Ranking Member Steve King for holding this very important hearing today. As the lead Democratic cosponsor of H.R. 98, the Illegal Immigration Enforcement and Social Security Protection Act, I have been pleased to work with my friend and colleague from California, Mr. Dreier, on the bill, and I appreciate his leadership on this issue.

Before coming to Congress, I served for 26½ years in the U.S. Border Patrol. Half of the time I was a Border Patrol Sector Chief, first in McAllen, then in El Paso. As the only Member of Congress with a background in border enforcement, I have first-hand knowledge of what we need to do in order to reduce illegal immigration while keeping our borders and the nation safe.

I have always said that we need a comprehensive immigration reform plan with three main components: strengthened border security; earned legalization for those who qualify; and a guest worker program with tough employer sanctions. Comprehensive reform is like a three-legged stool. Without one leg, the stool topples.

I applaud the Committee for today's hearing and for gaining insight about one of the three components: the need for stricter employer sanctions. I have witnessed firsthand the difference that tough employer sanctions can make in discouraging attempted illegal entries into the United States.

In 1986, the Immigration Reform and Control Act passed Congress and contained provisions which would penalize employers who hire illegal immigrants. After enactment, in parts of the country such as the border region where those of us in law enforcement had the resources to enforce those sanctions, there was a dramatic decrease in illegal entries into the United States. Clearly, once word got out that illegal immigrants were not being hired, the incentive to enter the United States was gone and attempted entries dropped off considerably.

H.R. 98 would expand and improve on the Immigration Reform and Control Act by enhancing the protection of Social Security cards and allowing employers to instantaneously verify a prospective employee's eligibility to work in the United States. The bill would also increase civil and criminal penalties for employers who hire illegal immigrants or fail to verify their employment eligibility.

If properly funded and with appropriate oversight and privacy protections, H.R. 98 would be an important step toward halting the flow of people seeking to enter the United States illegally in order to find employment. Our immigration and border security personnel will then be able to focus more of their time, effort, and resources on those who may be trying to enter the country to do us harm.

If we are really serious about enacting comprehensive immigration reform, we must include tough employer sanctions as one of the proposals within the final bill.

Thank you for allowing me to testify on behalf of H.R. 98, and I look forward to continue to work with the Subcommittee in the future.

Ms. LOFGREN. Thank you so much.

Congressman Gutierrez?

TESTIMONY OF THE HONORABLE LUIS V. GUTIERREZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. GUTIERREZ. Chairwoman Lofgren, Subcommittee Ranking Member Mr. King, full Committee Chairman Mr. Conyers, and I have to say all of my colleagues here, Mr. Dreier, Jeff Flake and Silvestre Reyes, I am really delighted and it is such a pleasure to be here with people with such a wealth of valuable information.

And I always said that Silvestre always brings such a great historical perspective given what he did before he came here to serve in the Congress of the United States, and I thank him for bringing that very valuable bipartisanship here and bipartisanship yesterday, Madam Chairwoman, at the White House, where we brought these issues up.

And I wanted to say that because of Silvestre Reyes' historical knowledge, Congressman Pastor from Arizona and Xavier Becerra from California and I said to the President, we need enforcement, but we don't need roundups of innocent individuals throughout our community, and we were able to speak with not only the knowledge of our conviction but with the historical knowledge that Silvestre Reyes brought us about what Ronald Reagan was able to do when he approached the issue of comprehensive immigration reform back in 1986 and halted the severe worker raids that were hurting people and say we wish to help and our broken immigration system.

Let me begin by saying that an employment verification system must be part of a comprehensive immigration reform. We will be setting ourselves up for continued failure if such a system is not implemented with strong border security, a new visa program for future workers and a tough but fair earned legalization program for the estimated 12 million unauthorized individuals currently living and working.

With that important point in mind, I would like to focus my testimony today on the employment verification system in STRIVE, which would allow the shortfalls of our current system to be corrected.

The Electronic Employment Verification System in STRIVE would require the creation of a biometric, machine-readable, tamper-resistant Social Security card. In addition to this card, the bill limits the number of other documents an employer could accept as proof of identity and work eligibility and require that they be biometric in some instances.

Going back to what Mr. Dreier said about the multiple uses, we need to limit what an employer can accept. It can't be just everything. That wouldn't help us.

Limiting the number of documents to those that are secure and tamperproof would help to eliminate the lucrative market of false documents, but we need to do more. The STRIVE Act also requires DHS to set up a system to prevent identity theft and individuals from misrepresenting themselves. Establishing an employment verification system that will apply to all workers in the U.S. is a

massive undertaking and must be approached prudently with a roll out plan that is contingent upon the system's accuracy.

Going back to Mr. Calvert, who has a 7-year roll out period, it is going to take years, Madam Chairwoman. I don't know how we do it well and be fair to American workers unless we do it that way.

STRIVE phases in the use of our system, starting with critical infrastructure employers, followed by large, then small, employers.

H.R. 1645 also requires the Comptroller General to certify on an annual basis that the verification system is responding accurately and effectively to employer queries before it can be expanded.

Performance benchmarks are essential to employer confidence in the system and to prevent U.S. citizens and others who are work-authorized from being denied eligibility to work.

Individuals will also be allowed to check their own records for accuracy. In addition, workers can contest inaccurate determinations of the system; if wrongfully denied work eligibility they will have the right to administrative review, lost wages and, if necessary, judicial review.

The mandatory expansion of such a system also raises legitimate privacy concerns. Technology, such as encryption, regular testing of the system and implementing regular security updates, would have to be used. Information to be stored in the system would also have to be limited and could only be used for employment verification purposes.

The bill also provides and levies stiff penalties for unlawful access or modification of employment system information. In its annual review, the Comptroller General must also certify that our system is protecting the privacy of records in the system.

Witnesses before this Subcommittee have testified that employment discrimination has been an inherent problem under the current system. The STRIVE Act forbids employers from using the system to discriminate against job applicants or employees on the basis of nationality; terminating employment due to an initial tentative non-confirmation; using the system to screen potential employees; reverifying outside of the law the employment status of an individual; or, using the system selectively.

Last point: we cannot have a robust employment verification system without equally robust enforcement. Increased penalties for individuals who falsely attest to being authorized to work and employers who do not comply with the new system's requirements or knowingly hire unauthorized. Our bill also debars employers from using the system for Government contracts, grants, and agreements who violate the system.

With regard to enforcement resources, the STRIVE Act requires Immigration and Customs, ICE, to spend at lease 25 percent of their time.

I would submit the rest of the testimony, but I would like to say that we must make sure as we roll out the system, Madam Chair, that there be safe harbors for employers. If an employer is using our system, our Federal system, and they are doing it in good faith and they are checking it and they hire those that are undocumented, we must also provide a safe harbor for them as we protect employees, we protect employers until we perfect our system.

Thank you so much, Madam Chair.

[The prepared statement of Mr. Gutierrez follows:]

PREPARED STATEMENT OF THE HONORABLE LUIS V. GUTIERREZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Chairwoman Lofgren, Ranking Member King and my colleagues on the Subcommittee, thank you for this opportunity to testify on my and Congressman Jeff Flake's proposal in the STRIVE Act, H.R. 1645, to improve the electronic employment verification and worksite enforcement system.

Like a number of witnesses who have recently come before this Subcommittee, I want to begin my comments with what I think is the most essential element in crafting an employment verification system that works. That is, the system must be part of comprehensive immigration reform. If such a system is not implemented with strengthened, coordinated border security, a new visa program that provides the future workers our economy needs, and a tough, but fair, earned legalization program for the estimated 12 million unauthorized individuals currently living and working underground, we will be setting ourselves up for continued failure on this front.

I would like to focus my testimony today on addressing how the employment verification system proposed in STRIVE would address or fix the shortfalls of the current system, as identified by recent witnesses' testimonies before this Subcommittee.

ANY EMPLOYMENT VERIFICATION SYSTEM MUST PREVENT DOCUMENT FRAUD

The Electronic Employment Verification System (EEVS) in the STRIVE Act, first and foremost, would require the creation of a biometric, machine readable, tamper-resistant social security card. In addition to this fraud-proof card, the only other documents an employer could accept to prove identity and work eligibility under the new system are a U.S. passport; a state driver's license or identity card that meets the requirements of PL 109–13 (REAL ID); a permanent residence or green card; or a tamper-proof employment authorization card issued by the Department of Homeland Security.

Requiring a limited number of secure documents would be a great step forward in eliminating the lucrative market of false documents, but we need to do more. To prevent individuals from using valid documents that are not, in fact, their own, the STRIVE Act also requires the Secretary of the Department of Homeland Security to establish reliable and secure ways under the new verification regime to determine if the information in the system's databases match the hired employee whose eligibility is being verified.

EEVS MUST MAINTAIN AND PROVIDE ACCURATE DATA AND OTHERWISE BE RELIABLE ENOUGH TO INSTILL CONFIDENCE IN THE SYSTEM

Establishing an employment verification system that will apply to all workers in the U.S. is a massive undertaking and must be approached prudently, under a realistic timeline and with a roll out plan to the entire workforce that is contingent upon the system's accuracy. STRIVE phases in the use of the EEVS, starting with critical infrastructure employers, followed by large, then small, employers.

H.R. 1645 also requires the Comptroller General to certify on an annual basis that the verification system is responding accurately and effectively to employer queries before it can be expanded. It is essential to build in performance benchmarks so that employers have confidence in the system, and are not tempted to circumvent it. We also want to prevent U.S. citizens, legal residents and others work-authorized from being denied eligibility to work.

Individuals will also be allowed to check their own EEVS record for accuracy.

If the verification process results in a tentative nonconfirmation or a final nonconfirmation of a worker who is, in fact, work authorized, STRIVE ensures recourse for the worker.

In the case of a tentative nonconfirmation, a worker is granted 15 business days to contest it. If a worker is wrongfully denied work eligibility ("final nonconfirmation") by EEVS they will have a right to administrative review, lost wages in the case of an error caused by the system itself, and, if necessary, judicial review.

EEVS AND THE PROTECTION OF PRIVACY AND SECURITY OF INFORMATION

The mandatory expansion of such a system also raises legitimate privacy concerns. DHS, in consultation with the Social Security Administration (SSA), would have to design and operate the system so that privacy is safeguarded by the tech-

nology used (use of encryption, regular testing of the system and implementing regular security updates). Information to be stored in the databases would also be limited to the individual's name, date of birth, social security number, employment authorization status, the employer's name and address and record of previous inquiries and outcomes.

Such information could be used for employment verification purposes only, and the bill prohibits and levies stiff penalties for the unlawful access or modification of EEVS information.

In its annual report reviewing benchmarks for the system's roll out, the Comptroller General must also certify that the EEVS is protecting the privacy of records in the system.

PROTECTION OF INDIVIDUALS FROM DISCRIMINATION

Recent witnesses before this Subcommittee have discussed how employment discrimination has been an inherent problem under the current employer sanctions regime and the Basic Pilot program. The STRIVE Act forbids employers from using the new system to discriminate against job applicants or employees on the basis of nationality; terminating employment due to a tentative nonconfirmation; using the system to screen employees prior to offering employment; reverifying the employment status of an individual in violation of the law; or, using the system selectively. Civil fines for unfair immigration-related employment practices are also increased and additional funding is authorized for the dissemination of information to employers, employees and the general public about the rights and remedies of these protections.

THE NEED FOR ROBUST ENFORCEMENT

Of course, we cannot have a robust employment verification system without equally robust enforcement. H.R. 1645 creates significant criminal penalties for individuals who falsely attest to being authorized to work, civil penalties for employers who do not comply with the new system's requirements and criminal penalties for knowingly hiring unauthorized workers. Our bill would also debar employers who repeatedly violate these provisions from government contracts, grants, and agreements.

In addition, the bill requires DHS to establish a complaint and investigation process regarding potential violations related to hiring or continuing to employ unauthorized workers.

With regard to enforcement resources, the STRIVE Act requires Immigration and Customs Enforcement (ICE) to spend at lease 25 percent of their time on worksite enforcement.

In sum, the Employment Eligibility Verification System in the STRIVE Act would address a number of the shortfalls of the current system as created by the immigration laws passed in 1986 and 1996. As we all know, the current system does not work, and perhaps most troubling, it does nothing to prevent illegal immigration or the employment or exploitation of unauthorized workers. As part of a comprehensive solution to our broken immigration system, I believe that the EEVS in STRIVE will provide us with a system that is tough, fair and works to bring both employers and workers under the rule of law.

Thank you, Madam Chairwoman.

Ms. LOFGREN. Thank you.

And we finally have Congressman Flake.

TESTIMONY OF THE HONORABLE JEFF FLAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. FLAKE. Thank you, Chairwoman Lofgren and Ranking Minority Member King and Chairman Conyers. It is great to be back in the Judiciary Committee for the first time since my involuntary leave. I appreciate being invited, and I appreciate the way that you are conducting these hearings and the seriousness with which you are addressing this issue. This is important today, to talk about the importance of comprehensive reform, in particular employment verification.

I am glad to be here with this panel, with Mr. Calvert, the father of Basic Pilot, basically, who has done so much good work there, and David Dreier, with the secure Social Security card, which we incorporated into our legislation. And I think that we have got a good package here.

Since Luis did such a good job explaining what our legislation does in this regard, let me just kind of talk a little bit about the need for it and why this is so important. We need to always remember that of the illegal population that is here, it is estimated between 12 million and 20 million, there are really no good estimates, but the best ones seem to be about 7.2 million in the workforce. The bulk of those have managed to deceive their employer somehow with unsecure documentation, documentation that is fraudulent. So we have to have a way to combat that.

There are some tools out there right now. Basic Pilot is out there. But we need to go further than that. I should note that Swift, the meatpacking plant, Swift, I believe, had been using Basic Pilot since 1997. Basic Pilot does a great job of telling you whether or not a Social Security number is valid. But there are limitations on whether it can tell you whether that same Social Security number is being used 500 times.

And so we have got to attack the identity theft and fraud issue, and that is why it is so important to use the Dreier language and go further. And Luis is exactly right in talking about the need to do it thoughtfully and to roll it out well and to make sure that employers have those tools and have the confidence to use them as we go forward.

As we have mentioned before, there are four real main elements to comprehensive reform. Obviously, we need more border security. We need a mechanism to deal with those who are here illegally now. We need a guest worker plan moving forward so we won't find ourselves in the same pickle we are in today, not having a legal framework to bring people in that our economy so desperately needs.

But most important here, the lynchpin to everything, is to make sure that employment can be verified. Forty percent of those who are here illegally didn't sneak across the border. They came legally and overstayed. And they simply have found their way into the workforce. So we can do all we want to at the border, but we haven't solved the problem unless we have employer verification, and that is what this is all about.

I am glad to be here with this distinguished panel.

[The prepared statement of Mr. Flake follows:]

PREPARED STATEMENT OF THE HONORABLE JEFF FLAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Thank you, Madam Chairwoman, for holding this important series of hearings on various aspects of immigration policy, and for inviting me to testify. The ability of employers to quickly and accurately verify the authorization of their employees to work in the United States will be a crucial component of getting a handle on our broken immigration system.

EMPLOYMENT VERIFICATION IS CRUCIAL TO COMPREHENSIVE REFORM

We have heard various estimates—and, of course, no one can know the true number for sure—of how many people are illegally present in the United States. The number most consistently used is 12 million. Of those 12 million, the Congressional

Research Service estimates that 7.2 million people are unauthorized workers in the civilian labor force. That figure represents five percent of the U.S. labor force. These workers have either fooled their employers with false documents and identity fraud, or are working for an employer aware of their status. I believe that most workers fall into the former category, rather than the latter.

Simply put: many of those that are here in our country illegally are here for employment. However, they did not all risk an illicit border crossing to get here. According to a Pew Hispanic Center survey published last year, nearly half of those who are here illegally didn't sneak across the border. Rather, they entered the country legally through a port of entry like an airport or a border crossing checkpoint and overstayed their visas. Over the past 15 years, we have tripled the size of the Border Patrol and increased its budget tenfold. Congress has gone so far as to mandate the construction of a wall on our southern border. And still they come.

Border enforcement alone won't solve our illegal immigration problem. Border enforcement is a crucial component of a comprehensive solution to solving the problem of illegal immigration, along with resolving the status of the millions of undocumented aliens, fixing backlogs in legal immigration, and ensuring interior enforcement of our immigration laws. A guest worker program that provides employers with the legal workforce of essential workers they so desperately need is essential to ensuring that our immigration laws are enforced. Clearly, as is the focus of this hearing, fixing our broken immigration program will also require a workable and fraud-proof employment verification system.

As I am sure many of you are aware, measures to ensure that those that are unauthorized to work in the U.S. are prohibited from doing so are not new to the immigration reform debate.

1986 ATTEMPT AT EMPLOYMENT VERIFICATION

The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to knowingly hire, recruit, or refer for a fee, or continue to employ an alien who is not authorized to be so employed. IRCA's employer sanctions also included penalties, both civil and criminal, for those violating the prohibition on unauthorized employment. However, under the 1986 law, employers were deemed to have met their obligation if the document presented to verify work authorization "reasonably appeared on its face to be genuine." This approach was almost universally derided as fruitless, due to the prevalence of fraudulent documents and the ease with which undocumented workers could obtain them. Unauthorized workers could easily find employment, either by presenting counterfeit documents or stealing another's identify.

1996 ATTEMPT AT EMPLOYMENT VERIFICATION

A decade later, Congress again sought to solve the problem of unauthorized employment when it included the Basic Pilot program in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. As many of you are aware, Basic Pilot is a voluntary, online verification system that allows employers to confirm the eligibility of new hires by checking the personal information they provide against federal databases. Originally started in 1997 with limited geographic availability, the system is currently available nationwide, but suffers from severe limitations including the fact that it is still voluntary and prone to fraud.

The raids of the Swift meat packing plants in December illustrated more clearly than anything else the limitation of the Basic Pilot program. The company had been trying for years to comply with our inept and broken immigration system. They were actually sued for overzealously inquiring into the backgrounds of job applicants suspected of presenting fraudulent documents—this became the basis for a discrimination lawsuit by the Department of Justice. Swift has participated in the Basic Pilot Program since its inception in 1997, but was well aware of its shortcomings—namely, the program does not catch identity theft by workers. Employers can check whether an applicant has presented a valid Social Security number, but Basic Pilot will not note the fact if the number has been used 500 times in the past year. In the end, it was this shortcoming of Basic Pilot that permitted the company to utilize the system and still hire hundreds of illegal workers. This is the kind of charade that, unfortunately, characterizes much of our current immigration policy.

THE STRIVE ACT OF 2007 EMPLOYMENT VERIFICATION APPROACH

More than two decades since IRCA, the song remains the same: the true key to enforcing our immigration laws will involve worksite enforcement. As trite as it sounds, those who forget the past are doomed to repeat it. As part of a comprehensive approach to immigration reform, the STRIVE Act of 2007 takes note of the les-

sons learned through past attempts and would provide the crucial employment verification system that is enforceable and prevents against ID fraud.

The legislation introduced by Congressman Gutierrez and I would create a mandatory system for employers to electronically verify workers' employment authorization. It also establishes criminal penalties for employers and workers who operate outside the system and implements strong enforcement mechanisms.

The Employment Eligibility Verification System, or EEVS, mandates the Homeland Security Department and Social Security Administration to develop a mandatory system for employers to verify the employment authorization of all new workers electronically or telephonically and establishes an interim verification regime for employers to use while the system is under development. The system would be gradually phased in over time, starting with critical infrastructure employers, followed by other employers based on size: largest employers would be required to use the system first, with smaller employers following in successive years.

Importantly, the legislation limits the number of documents that an employer can accept in order to verify a worker's eligibility to work. It follows the lead of legislation introduced by Congressman Dreier, in mandating an improved, biometric, tamper-resistant and machine-readable Social Security card. It is important to note that these provisions will not create a new secure National ID, but rather will prevent identify fraud exclusively in an employment verification setting.

In addition to the secure Social Security card, other documents that could be presented to prove work authorization include a United States passport, a REAL ID-compliant driver's license, a permanent resident card, and a secure card that the Secretary of Homeland Security could create to indicate work authorization. This is a vast improvement over the vast alphabet soup of documents that employers must currently accept from workers and try to verify as authentic.

The mandatory EEVS system would establish a secure and responsive system that would provide a safe harbor for employers to ensure that the workers they are hiring are legally present in the U.S. The new System will use a cross-agency, cross-platform system to share immigration and Social Security information necessary to verify an individual's work authorization. The System will not only determine if an individual's name matches a Social Security number on file, but also whether the person standing before the employer does, in fact, bear the name and number that they've presented to the employer.

A key component of the EEVS system is the creation of new and significant penalties for those workers and employers operating outside of the system. Scofflaw employers would be fined on a sliding scale for hiring unauthorized workers. This would entail fines of between $500 and $4,000 for each unauthorized worker for first-time wrongdoers, but quickly escalate to $20,000 for each unauthorized worker for repeat offenders. Concurrently, employers who do not follow the rules for record-keeping or verification practices would face fines of up to $6,000 for repeat offenders. These employers could also face prison sentences of up to three years. Repeat violators would also be barred from federal contracts for five years.

Madam Chairwoman, in conclusion, I would like to emphasize how crucial I believe the issue of employment eligibility verification is to the success of the broader comprehensive immigration reform. Giving employers the tools they need to determine if their workforce is legal will eliminate any excuse they currently have to fall foul of the law. Ensuring that those employers who choose to disobey the law will be held accountable will give the American people confidence that the days of lax enforcement are over and a new temporary worker program can be competently implemented and enforced.

Ms. LOFGREN. Well, thank you very much.

What a distinguished panel this is, and we are so grateful that you took the time to be with us.

We have questions, but we, as much as anyone, understand your schedule. I mean, we have the Chairman of the Intelligence Committee, the Ranking Member of the Rules Committee, just as examples. So if any of you need to leave before we ask questions, we will respect that and understand it. Those of you who can stay, we also very much appreciate that.

So if you need to leave, you may.

Mr. DREIER. We are here for the long haul.

Ms. LOFGREN. On for the long haul. Then we will go to questions, and I am going to begin.

My question reflects the testimony we will receive from the Cato Institute later this morning. I think all of us, and I include myself, have talked about the need for an employment verification system. We feel that we have Basic Pilot, we are looking at ways to improve it, whether we rename it or whatever. And your testimony has been very helpful and very on target.

But when you are in a mode like that, I always think it is important to listen to the voices that are saying, "Wait a minute," and address those issues. And one of the things that our Cato witness has pointed out is that when you have information sent to Social Security and the Department of Homeland Security, that information becomes, I am quoting from his testimony, "Very easy for those entities to access, copy, or use. It is likely combined with metadata information about what information was collected from whom and so on. And can then be correlated with information at the IRS or educational loan department, health records," and on and on.

And the witness goes on to say, "Unless there is a clear, strong, verifiable data destruction policy in place, any electronic employment verification system will be a surveillance system, however benign in its inception, that observes all American workers."

And I think as the testimony concludes, the old saw is true, again, this is a quote from the testimony: "Information is power. Uniform government ID systems have important consequences in terms of the individual's relationship to government. A major concern with national IDs is the power that the identification gives to government," and that the lesson that the witness hopes we will take is to "design a system that uses one key to control access to our intangible lives, our finances, communications, health care and so on, is a risk to our freedom and privacy," to summarize.

These are issues that all of us care about. That is not new.

Any comments on these concerns? And if they are real concerns and we still do have a need to verify, what do we do about that concern? What protections do we build in or should we worry about it? Anyone who wants to answer?

Ken?

Mr. CALVERT. I think we all agree that a verification system is needed in the United States and any verification system, obviously, by its own definition, imposes some problems with privacy.

However, that is a reasonable tradeoff in order to make sure that people that come into this country are coming here legally and working legally.

A system similar to the Basic Pilot program, whether or not we come up with a way to make it counterfeit proof, is, I think, the best program, the most nondiscriminatory program, because it checks the document itself, to ensure that the people who come here have a legitimacy to come into the work force.

I was in the restaurant business also. I had a number of restaurants. And it was—when I was an employer, it was impossible when we filed the I-9 form to check to see whether people were here legally or not. I went through the system, filed the I-9 form, put the several identifications on the back of the form and complied with the law.

However, I knew because I could not ask nor could I look into the background of individuals that I hired, that some probably were here illegally.

So a system such as this is necessary and I think that we are all on the same path, and I think it is necessary to impose this system and allow employers to check the veracity of the documents and the people they employ.

Ms. LOFGREN. Anyone else?

Mr. DREIER. Yes, Madam Chair.

First of all, let me just say that I think Ken Calvert brings tremendous perspective from his experience as a restauranteur, and I am strongly supportive obviously of his Pilot program. And I appreciate the fact that my friends Luis Gutierrez and Jeff Flake have included H.R. 98 as part of STRIVE.

James Madison, in "Federalist 51," talked about the need for us to make sure that Government gets control of itself. And the fact of the matter is that I describe myself as a small "L" libertarian Republican. I echo and regularly talk about every one of those concerns that the Cato witness has brought forward because I believe that the notion of having the Government get too much information is something that I find absolutely abhorrent.

We obviously have had some sacrifices that have had to be made. We all have recognized that since September 11 of 2001. That is one of the reasons I have been very particular and careful in crafting this legislation to ensure that the Government doesn't get any new information that it doesn't already have.

Now, the Cato witness has talked about the potential for the sharing of information and the leaking of that information, which I think is a very, very valid concern. That is why in H.R. 98 I have included very, very harsh penalties for any of the activity that has been described there, and I too am concerned, as I said in my opening remarks, about the prospect of some kind of national ID card. I know there are some people who have opposed it in the past but are now supportive of that notion.

But it is absolutely right and the Cato witness is absolutely right in talking about the need to ensure that we don't have a national ID card, number one, and, number two, that we don't see the Internal Revenue Service gaining access to information that they should not have access to.

Ms. LOFGREN. Thank you very much.

I am almost up, but I don't want to cut you off, Mr. Flake.

Mr. FLAKE. Let me just briefly say, in our legislation we are cognizant of that risk, so we actually have four different, maybe five different pieces that can be used as secure documentation. They just all have to be machine readable, tamperproof, and so you won't have one national ID out there. It can be the secure ID, passport, an identification card that DHS wants to come up with, but there won't be just one piece. So that is a valid concern.

Mr. GUTIERREZ. I am going to punt this right back.

Madam Chairwoman, with you and Mr. Conyers, I can just—Berman, Jackson Lee, Waters, Meehan, Delahunt. I am confident that if the Committee does its work, we are going to put those protections in there.

Ms. LOFGREN. Thank you very much.

And thank you, Mr. Ranking Member, for your indulgence in my going over.

Mr. DREIER. Could I just say one quick thing, if I could, Madam Chair?

Ms. LOFGREN. Certainly.

Mr. DREIER. And that is, to Jeff's point, I think it is important for us to know, one of the concerns that I have had about other documents is that they create the potential for discrimination, and that is why the utilization of the Social Security card really eliminates that. And the reason I say that is, you hear, well, you know, we will have a card for the guest workers who are here, a special card for the guest workers.

Well, how do you ask? You look at someone and you say, well, is this a guest worker or is this an American citizen? I find that appalling, and that is why I think the Social Security card, which would mean that anyone in the labor force looking for a new job would be required to have that one document, and that is why I think that that is the way for us to go.

Thank you very much.

Ms. LOFGREN. Thank you.

Mr. King?

Mr. KING. Thank you, Madam Chair.

At first, I would note that Mr. Dreier quoted from "Federalist 51" and then he said, "Too much information is something that I find absolutely abhorrent."

I find your brain is full of all kinds of information, Mr. Dreier, none of which is abhorrent to me. I wanted to make that remark.

Mr. DREIER. I have some, I bet, that you would.

Mr. KING. I would like to first turn to Mr. Calvert.

Before Basic Pilot was implemented, was there any way that the employer could verify that the name on the I-9 form actually matched the name that matched the Social Security number that was presented?

Mr. CALVERT. No. There was no system available to an employer to check the veracity of the documents that were being used.

Mr. KING. And now can—does an employer know if they run the Basic Pilot that that name matches the Social Security number and the identity to that number?

Mr. CALVERT. Yes. The system works not perfectly but pretty well. And the statistics that you used earlier, way over 90 percent of the time you can check the veracity and effect of the document that is being used or the person that is applying for work.

Mr. KING. But if it is a "no match," on those names, if they give you the wrong name but a good Social Security number, you get a non-confirmation?

Mr. CALVERT. That is correct.

Mr. KING. And then the applicant gets time to cleanup their records.

Mr. CALVERT. To cleanup their records, to check to find out if there is a problem within the Social Security Administration.

Mr. KING. And we are always going to have problems when we go into a huge database, 300 million people in this country. And I want to submit this proposal or just a philosophy and ask you to respond to it, and that is, if we had a database that wasn't 100 per-

cent clean, which obviously every database has some problems in it, I am looking at it from the standpoint of using it cleans up those records, because that is the only way you can really get it cleaned up, is to use it.

Mr. CALVERT. Well, I would point out, when we started down this path back in 1997, we had tremendous amount of problems getting this thing rolling. I started out with a number of States. It started out, if you will remember, the folks that were involved in this, seven States, and then we rolled it all 50 States. And we had problems all the way along the way.

So the Social Security Administration, Homeland Security, others, have now involved themselves in this, and have worked their way through a lot of these problems. Certainly, what happened with Swift is unfortunate, but I would like to point out that 50 employers a day sign MOUs to get onto the Basic Pilot program. This program will double in the next year. We have several large employers, I mean by large mega-employers that are looking on putting this program on voluntarily.

So it is a system that works and it is a system that employers want to use.

Mr. KING. This Basic Pilot goes out to a pair of databases, Social Security Administration, DHS. And in DHS it has the FBI database, NCIC, National Crime Information Center database. Do you know of any instances where that information went to an NCIC database and there were wants and warrants out there on an individual that was perhaps sitting in the HR office of a prospective employer? Has that done anything to pick up any of the people on the streets, even on the Top 10 Wanted List?

Mr. CALVERT. I don't know of that being used in the system. I have primarily been focused on employment verification.

Mr. KING. Would you be for or against utilization of that to help make our system cleaner?

Mr. CALVERT. Well, certainly, looking at it, the problem is that anytime you start expanding the basic system, which what we are trying to accomplish here is whether or not people are eligible for employment, it becomes in fact more complicated, more difficult. But it is, you know, I guess we could take a look at that, but that is what would occur.

Mr. KING. Thank you, Mr. Calvert.

Mr. Dreier, when one presents the magnetic stripe on the Social Security card that you have presented here today, how does an employer verify that that actually matches the biology of the person whom it was submitted to?

Mr. DREIER. Because the way this works is that there is a photo imbedded on the card, and the card that is provided has the number. They swipe that card and it goes into the databank, the DHS databank, which would simply give a yes or no as to whether or not this is in fact a qualified worker.

So there is a photo embedded on that card. And that is the end. The natural question is, well, we are all issued these cards when we are kids. The photograph is taken once one enters the labor force, the workforce, so that you don't have a baby picture on there.

Mr. KING. I have seen some of these congressional pictures, though, and I can't recognize the people on the card.

Mr. DREIER. Yes. That looks like my staff member has got his baby picture on there, and it was taken last week, so——

Mr. KING. Would there be a requirement to update that picture, say——

Mr. DREIER. That would obviously be something that would have to be addressed, because as you said, a lot of people have pictures in which they look a lot younger than they are.

And the whole process would be phased in. Again, this is one of the arguments that has been given against this, talking about the fact that there may be 40 million of these needed because there are 40 million people who are changing jobs on an annual basis, and that is one of the things that has led a number of people to oppose this.

But, you know, obviously there is going to be a cost to anything that we are going to do, and I think that if you look again at these multifarious documents that are provided, to get down to one, because there has been no attempt whatsoever to update since 1935 this card. I think that this is really the single best route for us to take on this.

Mr. KING. Thank you, Mr. Dreier.

If I could, just a quick question of Mr. Flake.

The issue that I raised with regard to using the Basic Pilot program and when that search goes through the database of DHS, FBI, NCIC, down through there, would you be supportive of using that for law enforcement so that if we are going to run all these databases, we can pick some of these people up off the street?

And then in conjunction with that question, we have employers that are deducting billions of dollars in expenses that are being paid to illegal employees, illegal wages. Would you support using that also to ask the IRS to deny the deductibility of wages and benefits paid to illegals?

Mr. FLAKE. I want to be sensitive to any unfunded mandates that we are passing on to people at the local level or businesses that may not have the tools to do it. But to the extent—I mean, our legislation, what we are trying to do in this is to make sure that we have interagency cooperation, that we can—obviously, these databases that we are going to be using, when you have a biometric, can be used by law enforcement agencies and everything else. So that is really the ultimate goal of where we are going.

At the present time, I just don't know what kind of mandates or costs would be borne by the local entities, so I am not sure.

Mr. KING. Thank you, Mr. Flake.

Ma'am, I yield back.

Ms. LOFGREN. Thank you, Mr. King.

I would now recognize our Chairman, Mr. Conyers for his 5 minutes of questions.

Mr. CONYERS. Jeff Flake, I commend you and Luis for the anti-discrimination provision that is in your electronic employer verification system. I think it is very important.

But why was Javier Rodriguez, on Amy Goodman's program, so critical of this bill that you two are proposing when—and he suggested it is corporate sponsored or corporate favored. Is President Bush with us? Or to what extent—I know we talked about him being there, but I need to know what that really means.

And my dear former Chairman, you know, calling a national ID—it is not a national ID card. It is not a national ID card. But you know the problem you are going to have, they are going to say it is an ID card.

Mr. DREIER. No. They have been.

Mr. CONYERS. They may have already started. I really don't know.

And, finally, back to Jeff Flake, how do we get to balanced enforcement for treatment of employer? Safe harbor may be a nice way, a cozy way, of helping them out, but then we don't want to hang them out like Swift was hung out to dry for cooperating.

So I leave this for all of you to help me unravel. And I know we are going to be seeing each other, so the world doesn't end when my 5 minutes ends. We are going to be talking a lot about this.

Mr. FLAKE. Let me just say, to answer the first, I can't speak for the President on this. I know the President has been supportive consistently of comprehensive reform. As far as the details of our legislation, our legislation as a whole, he has not come out and taken a position on it. But I know and appreciate that he has been consistently in favor of comprehensive reform, including employer verification.

With regard to the second point, as far as equal enforcement, I have always felt that we need better enforcement, more severe enforcement, and that is why our legislation increases the penalties on employers if they knowingly violate immigration law. But they have got to have the tools. And that is the balance that I think that you are referring to.

Heretofore, employers haven't had all the tools even though there have been some tools out there. They still—they are imperfect or incomplete tools right now.

Mr. CALVERT. Mr. Chairman, I might point out, bringing it to Swift, that was an extremely unfortunately situation. But I would point out that this program is not perfect, but I would challenge anyone here to find a Government program that is perfect. But it is the only system out there today. And for the whole, the great majority, well over 90 percent, it is working to verify documents that are used for employment.

As far as the issue of discrimination, this program, the Basic Pilot program, was never intended to be a prescreening program to discriminate against potential employees, and the current program is developing and monitoring a compliance office to detect and follow-up on these fraudulent and other misuse of the systems and with instances of employers not following program procedures.

I want to point out that under the 1986 Simpson-Mazzoli Bill, there were significant fines in the bill that could be imposed by the immigration folks if in fact an employer knowingly hired somebody illegally. However, there was no system until the Basic Pilot program came on, for the employer to verify whether or not the documents that were being used were legitimate. So today it is the only system that is available.

Mr. CONYERS. But what about the small business people in your Basic Pilot program? There has got to be some financial incentives. The moms and pops aren't going to be able to afford your plan.

Mr. CALVERT. Well, I would—I was a small businessman, relatively a small businessman. And I wanted to do the right thing. Most small businesspeople I know across America, when I go back home, are absolutely in favor of the Basic Pilot program, and it is proven by the fact that the program is literally doubling every year.

Thousands and thousands of small employers are signing up to get on the Basic Pilot program. Small restaurateurs, small drycleaners, businesses all across America.

Mr. DREIER. Let me just say that our 5 minutes has ended, but I am glad that the Chairman has indicated that life will go on beyond the 5 minutes, and I will just say very quickly that I think that on this notion of a national ID card, my idea is that the Social Security card is thrown into your desk drawer. You only use it when you are applying for a new job, and that is the only use that is going to be out there for it.

Mr. CONYERS. Thank you, all.

Ms. LOFGREN. Thank you.

And as noted, the Chairman of the full Committee has been very engaged in this process, which is a wonderful phenomena.

Before recognizing the gentlelady Ms. Jackson Lee, I would like to note that the former Chairman of the Immigration Subcommittee, former Congressman Bruce Morrison, is here, and he is associated with the Society for Human Resource Management, who has a statement that, by unanimous consent, will be made a part of our record.

I would now recognize the gentlelady from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Thank you very much.

I do appreciate the series of hearings that we are having and look forward to being able to discuss a multitude of legislative initiatives, which could include the Save America Comprehensive Immigration Reform Bill that I have authored for a number of years, and I believe that combined with trying to fix some of the missteps of 1986 and 1996, I think amongst the witnesses today we have a broad range of options and opportunities to take this issue very seriously.

Let me just acknowledge that I have young Claudia Ocampo with me today from Arlington, Texas, and she is with Girls, Inc. We are very proud of her. And I will just simply say that she has an immigrant background, but her family are contributing, and we are excited that she is here with us today.

I think that is the tone in which I want to utilize my time; as a backdrop of how we fix the immigration system. I think we need to start from the premise that we have individuals who want to contribute to society. We have individuals who are contributing to society. And we have got to find a way that balances privacy, due process—those are some issues that I am very concerned about, the nondiscriminatory practices against employees and enforcement.

Yesterday, I think, and I don't know, Madam Chairwoman, the days are running together. I think we were in a hearing either yesterday or the day before, and I asked the representative from Swift, "Did you come to this hearing to complain about your treatment?"

And he was forthright. "Absolutely not. But can you tell us what the law is, because we would like to comply with the law."

My Texas contractors who are looking for roofers and electricians and, of course, all of us say find Americans, and that is what I say to them, but they are looking for all of these skills and they say simply tell us the law.

Mr. Dreier, you are talking about a card which I would just jump ahead and say, you know, on many occasions on the floor we have indicated that it is a national ID card. But if we are going to start afresh, let's try to find out what it is.

And my concerns would be, you can help me understand the safeguard provisions that would protect the privacy of the information that would be on the card. I have heard you previously say put it in the drawer, it is only supposed to be used for employment purposes. You know about theft. You know that people keep cards in their wallet more than they probably need to.

And so what would be your take on how we would ensure the privacy and what non-immigration information do you think would be recorded on the card?

And before you answer, let me just pose to Mr. Flake so he can be thinking about it, let's get it right. And, frankly, I want to make it clear that I am not faulting ICE. They are doing their job. They need to have rules and regulations. But the raids that are going on create a massiveness of intimidation. I don't know if they have been occuring in your district. You might want to comment on that. But I think I would like to hear from you as to what a constructive enforcement system would do to utilize ICE resources where they should be, where people are flagrantly, outwardly saying, "I am not even going to worry about the system." You can think about that.

Mr. Dreier?

Mr. DREIER. Thank you very much, Ms. Jackson Lee.

Before you came into the room, I actually had an exchange on this issue with Mr. King and with the distinguished Chair of the Subcommittee in which we were talking about the fact that there is understandable concern over the notion of any of this information being shared. That is one of the reasons that when the employer gets the information back, they don't get the exact status of a person, whether or not they are a citizen or they are here on some kind of visa. They just get yes or no, in fact is this a qualified worker.

And we do have very harsh penalties that we include in the legislation for anyone who is utilizing this information incorrectly

As I said, I would be very troubled at the notion of the Internal Revenue Service gaining access to this kind of information that may be coming in. And so that is why we have been careful to make it clear that the Government is not going to be able to gain any new information.

Now, I would also argue that if look at the fact that the flimsy little piece of paper that has been the Social Security card, Ms. Jackson Lee, since 1935, and no attempt whatsoever to update that, that having a smart, counterfeit-proof card would in fact play a role in diminishing the threat for duplication and fraudulent use of that card. So that is why I believe that this is indicated.

And, again, to Mr. Conyers' very appropriate point on the issue of discrimination, this card prevents some other card being utilized and asking someone whether or not, you know, you have your guest worker card, and looking at someone and saying, well, that must be a guest worker. And that is why the Social Security card is an——

Ms. JACKSON LEE. But it wouldn't have any extraneous information—extra information that would not be necessary.

Mr. DREIER. Absolutely. You are absolutely right.

Madam Chair—thank you, Mr. Dreier.

May I let Mr. Flake answer on getting a system in——

Ms. LOFGREN. Certainly.

Ms. JACKSON LEE [continuing]. So we can balance this raiding that is going on.

Mr. FLAKE. I wish I had a good answer as to how these raids can be nondiscriminatory and effective and not catching other people in the net that shouldn't be in the net. ICE struggles with that. So do local governments.

In my district, the city of Chandler years ago had a type of roundup where they thought that they could check documents. In the end, they included in the net a lot of people that shouldn't have been in the net.

But I can't see how ICE can simply not try to enforce current law. So we are in a horrible period right now, until we get the kind of identification that we are talking about. That is why it is so important that we move through and get comprehensive reform. It is a very good question.

Ms. JACKSON LEE. We need to fix the system.

Mr. FLAKE. Yes.

Ms. JACKSON LEE. Thank you.

Ms. LOFGREN. Thank you.

The gentlelady from California, Ms. Sánchez, is recognized for 5 minutes.

Ms. SÁNCHEZ. Thank you, Madam Chair.

I would just like the folks on our first panel to know that we appreciate the thoughtfulness with which you have tried to tackle this problem.

Earlier in the week, we had another hearing in this Subcommittee dealing with the same issue. And Jonathan Scharfen, the deputy director of USCIS, was here to answer questions, and I asked him the same question that I am going to ask all of you, which is: my concern with the Basic Pilot program and extending this to all employers is what happens when employers misuse the system? And I am going to give you a few examples.

Employers who may not enter somebody into the verification system until—and still hire them, still hire workers—and then later enter them into the system when, say, a labor complaint has been filed against the company. Or unauthorized employees having access to the employment verification system, not something that I would want to happen with my information.

So I asked him, what kind of penalties exist for employers who misuse the system and how often does that happen and there weren't any clear statistics and they really didn't have an answer

for what are the penalties for an employer who misuses the database.

So I am going to ask each of you, how would you address that problem, of employers misusing the electronic employment verification system?

Mr. DREIER. Let me just say that I am not here, Ms. Sánchez, as an expert on the employer verification system. I am here arguing that the answer is for us to have a smart, counterfeit-proof Social Security card and the employer would get no information whatsoever other than is this person in fact a qualified worker. Meaning are they in this country legally. And that is the only thing that employers would have as information by utilizing the smart, counterfeit-proof Social Security card.

Ms. SÁNCHEZ. Mr. Flake, what is your response?

Mr. FLAKE. That is a very good question and that has been a concern whenever we are dealing with this, as we talked about before, identification that people will construe as a national ID, we want to make sure that it is secure. And so we have specific mandates in terms of who can utilize that information within the company and then specific penalties if it is misused by others. So if you look in our legislation, there are safeguards there. It is an important point and one that we took seriously.

Ms. SÁNCHEZ. Okay. Just out of curiosity, what types of penalties do you envision?

Mr. FLAKE. In terms of—I think they are roughly equivalent with the penalties that we have for basically hiring those who are illegal once you knowingly do it, which I think are $20,000 on the second occurrence, between $4,000 and $10,000 on the first.

Ms. SÁNCHEZ. Okay. I thank you.

Mr. DREIER. Let me just say that on H.R. 98, we have a 400 percent increase in the penalty from $10,000 to $50,000 and a mandatory 5 years in prison for employers who are out there and who are knowingly hiring, and that is how we focus on the whole notion of enforcement so that we don't see businesses out there abusing this.

Ms. SÁNCHEZ. Okay. But we are talking about——

Mr. DREIER [continuing]. Right, I know.

Ms. SÁNCHEZ. Because you are talking hiring. I am talking about misusing of the——

Mr. DREIER. Right. Right. I am talking about the hiring.

Ms. SÁNCHEZ. I understand. Thank you very much, Mr. Dreier. I yield back.

Ms. LOFGREN. Well, thank you very much.

And thanks to the Members who have so generously given of their time. We know how busy you are. And your commitment of time shows us how committed you are to this issue and we appreciate it a great deal.

I am going to ask that our second panel of distinguished witnesses come forward at this time.

First, I am pleased to introduce Randel Johnson, who is Vice President of the Labor, Immigration and Employee Benefits at the United States Chamber of Commerce. Prior to joining the U.S. Chamber, Mr. Johnson worked as the labor counsel and coordinator for the Republican staff of the House Committee on Education and the Workforce and spent 6 years as an attorney with the U.S. De-

partment of Labor. He served as a member of several commissions concerning immigration, including the Department of Homeland Security Data Management Improvement Task Force, the 21st Century Workforce Commission, and the Carnegie U.S. Mexican Migration Study Group. Mr. Johnson holds degrees from Dennison University, the University of Maryland School of Law, and the Georgetown University Law Center.

We are also pleased to have Robert Gibbs with us, a founding partner with the Seattle law firm of Gibbs Houston Pauw. Mr. Gibbs has specialized in immigration and employment law for over 20 years, advising organizations spanning a host of different industries, from agriculture to construction to food processing. He addresses us today on behalf of the Service Employees International Union. Mr. Gibbs holds his law degree from the University of Washington Law School.

We are also pleased to have Jim Harper with us, the Director of Information Policy Studies at the Cato Institute here in Washington. Mr. Harper has written extensively on the intersections between privacy concerns and modern data technology systems, and he serves as a member of the Department of Homeland Security's data privacy and integrity advisory committee. Mr. Harper holds his JD from Hastings College of Law.

Finally, I would like to welcome Jessica Vaughan, the senior policy analyst for the Center of Immigration Studies. Ms. Vaughan has worked for the Center since 1992, having developed her expertise in the Executive Branch's implementation of immigration policy. Before joining the center, Ms. Vaughan worked as a Foreign Service Officer with the State Department. She earned her bachelor's degree at Washington College in Maryland and master's degree from Georgetown University.

As you have heard, each of your written statements, which I have read and appreciate a great deal, will be made a part of the official record. We ask that you summarize your testimony in 5 minutes. When the yellow light goes on there, that means you have a minute to go. And when the red light goes on, it means your time is up and we would ask that you summarize.

So, if we could, we will begin with Mr. Johnson.

TESTIMONY OF RANDEL JOHNSON, VICE PRESIDENT, LABOR, IMMIGRATION & EMPLOYEE BENEFITS, U.S. CHAMBER OF COMMERCE

Mr. JOHNSON. Thank you, Chairwoman Lofgren and Ranking Member King.

I think it was sort of gratifying to see the apparent consensus of the last panel in terms of what I think was comprehensive immigration reform, if I was hearing the Members correctly, and it certainly marks a change in the debate, I think, and is a hopeful indication of what we can get done in the House in the next several months.

I am Randy Johnson, Vice President of Labor, Immigration and Employee Benefits at the U.S. Chamber. I do want to note that the Chamber also co-chairs the Essential Worker Immigration Coalition and separately the Employment Eligibility Verification Working Group. Both of these groups are very broadly based across in-

dustry sectors. They will be submitting separate statements, and I think much of what I will say today will be reflected in their statements, indicating that there is a general concern in many of the areas I will talk about today across industry.

I do confess that when I went down to the Chamber as Vice President, I didn't think I would be testifying in front of a panel here in the House in favor of a broad, sweeping mandate on employers. But here I am, and hopefully I will still have my job when I get back to the office.

But I think the fact that the Chamber and other business groups are willing to step into a broadening mandate indicates how important we think it is to achieve comprehensive immigration reform. With that being said, while a lot of the press has been focused on temporary worker programs and the undocumented, I think there has been a lack of attention to title 3 and the employer verification system, which is why I think we so much appreciate the fact the Committee is holding this hearing today specifically on this issue.

There has been a lot of discussion in prior hearings with regard to the degree of accuracy of the pilot program. We can debate that back and forth. I am not sure if it is 20 percent or 1 percent, frankly, and DHS won't tell us. Hopefully they will tell us in the future and, more importantly, they will tell you.

However, it is important to note that even with a 1 percent error rate, you are talking about disqualifying perhaps over 1 million Americans from their livelihood. Not a credit card transaction. We are talking about people losing their jobs, U.S. citizens and not just immigrants. So the stakes, I think, could not be higher, not just for the employer community but also for employees. And certainly none of us want to see a system rolled out that disqualifies U.S. citizens from jobs that they are properly authorized to work.

And now, as I said, it is important from a business community standpoint that any rollout of a system is part of comprehensive immigration reform, and I know that has been noted by many others, so I won't belabor it. But it is important that it is seen as part of a package.

With regard to key elements, phase-ins, if those—and Congressman Calvert made a compelling case with regard to the pilot program today, with regard to its accuracy and its workability, and that is fine and that is great. Even he proposed a phase-in of 7 years. But if the Department of Homeland Security and others have such a strong belief that this will work, surely they will not oppose a benchmark that tests the accuracy of the system as it rolls out.

The business community has a jaundiced view of the ability of the Government to roll such a massive program out in the way it has been promised, but if it can be done, then surely those proponents won't be afraid of solid benchmarks and so the program will be tested before it is rolled out to the next part.

Secondly, we think it should be limited to new hires. We know that is controversial, but there are 140 million employees in the workforce today. Think of the burden on employers to reverify all of those employees. And given that there are 50 million to 60 million new hires every year just in a general turnover in the workforce, over time people will be reverified anyway. So we think no

reverification of the existing workforce but certainly, obviously, new hires.

Third, we think that the existing law with regard to the subcontractor-contractor relationship should be retained. That is a contractor should not be liable for the violation of a subcontractor absent, of course, knowing that the subcontractor is in fact violating the law. That is indefensible and it should remain so, but imputed knowledge of some sort, we think, is not a proper level of fault or liability.

Obviously, we think—and this is where there is a contrast between realtime verification and testing, whether or not what the Government gives you is true, but employers do need a quick response and an accurate response when they put an employee's name in there, and they need a final decision by the Government fairly quickly with regard to whether or not that person can be hired. We think 30 days is about right. Others think perhaps a longer time.

Lastly, with regard to—two more things. With regard to fees, not surprisingly we don't think the business community ought to have to support this system or pay for it. It is of general importance to this country and we think it should be funded generally by taxpayers and through the Government, normal appropriations, and not through fees imposed on the private sector.

With regard to enforcement, we don't think the debarment process has a role here. The debarment process is a separate issue with regard to enforcement of labor laws. Labor laws and immigration laws ought to be left to those in law enforcement and the debarment process should not be part of that.

Preemption, we think we need sound preemption across the board of State laws in this area. And, lastly, we are concerned about parts of certain bills we see which appear to be sort of quiet ways to expand labor laws and push a labor agenda beyond immigration and for separate reasons we would oppose that, and we would hope this issue is limited to immigration issues and not a quiet way of pushing a labor agenda that has nothing to do with immigration.

Thank you.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF RANDEL K. JOHNSON

Statement of the U.S. Chamber of Commerce

ON: PROPOSALS FOR IMPROVING THE ELECTRONIC EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT SYSTEM

TO: HOUSE SUBCOMMITTEE ON IMMIGRATION, CITZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW OF THE COMMITTEE ON THE JUDICIARY

BY: RANDEL K. JOHNSON

DATE: APRIL 26, 2007

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

Statement on

"Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System"

Before

The House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary

Randel K. Johnson

Vice President, Labor, Immigration, and Employee Benefits

U.S. Chamber of Commerce

April 26, 2007

Good Morning Chairman Lofgren, Ranking Member King, and distinguished members of the Subcommittee. Thank you for inviting me to testify on a new employment eligibility verification system. My name is Randy Johnson, and I am vice president of labor, immigration and employee benefits, and today I am testifying on behalf of the U.S. Chamber of Commerce. I am encouraged that the Subcommittee is examining this critical issue of how our workforce could be better verified, because a new system will have an impact on every single employer and employee.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. I also serve as a co-chair of the Essential Worker Immigration Coalition (EWIC), a coalition of businesses, trade associations, and other organizations from across the industry spectrum that support reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

The Chamber is also co-chair of the Employment Eligibility Verification System Working Group, or EEVS Working Group. This group was formed to serve as the voice of business exclusively on the issue of a new employment verification system and it is now made up of companies and trade associations from across the industry spectrum. The reason is simple: there are over seven million employers and this will affect all of them, whether or not they hire immigrants.[1] The stakes are extremely high, and the concerns of the business community of how this new system will be constructed can not be overstated. While much of the press has been focused on the issues of the undocumented and new worker programs, we certainly view the employer verification system provisions as equally important.

[1] U.S. Census Bureau "Number of Firms, Number of Establishments, Employment, and Annual Payroll" http://www.census.gov/csd/susb/usst04.xls.

I. Overview

The Chamber supports a new employment eligibility verification system within the context of comprehensive immigration reform because employers want the tools to ensure that their workforce is in fact authorized to work. The labor force in the United States is 146.3 million strong.[2] Furthermore, due to turnover, demographics of the workforce, and the growth of our vibrant and changing economy, every year employers hire about 50 to 60 million people in the United States.[3] Each new employee must be verified as eligible to work under the current paper-based I-9 system and we expect that new employees would have to be verified under any future electronic employment verification system.

There are common concerns across the business, labor, and ethnic groups' advocates because of the broad reach of any new program, as it will affect every employer and employee. We are willing to be part of the solution, but a verification system needs to be fast, accurate, and reliable. Any new system cannot be too costly or burdensome for either employees or employers. It should also not open the door to a barrage of new causes of action unrelated to the hiring or firing of employees based on their work authorization status. Also, as I will explain in detail, this issue should not be combined with the enforcement of labor laws. Before concentrating on the specifics of a future system, I will briefly address why this issue should be dealt with only within the context of comprehensive immigration reform.

II. New Electronic Employment Verification System Within the Context of Comprehensive Immigration Reform

Current immigration laws, including the worksite enforcement provisions, are severely flawed and have failed to curb the flow of undocumented workers into the U.S. It has been more more than 20 years since the passage of the Immigration Reform and Control Act of 1986 (IRCA), and we are still experiencing the entry of undocumented workers into the U.S. at a rate of about 500,000 per year.[4] IRCA's goal was to address the undocumented in the country and create a worksite enforcement regime that deterred the employment of the undocumented. This clearly has not happened.

IRCA did not address the future need for workers in the U.S. economy, which has contributed in part to our current dysfunctional system. There was no provision for the flow of lesser skilled or semi-skilled ("essential") workers when there was a shortage of U.S. workers. Additionally, IRCA provided for a paper-based employment eligibility verification system that has failed to deter undocumented workers from entering the U.S. workforce. This combination of flawed policies has resulted in a significant portion of the U.S. workforce, approximately five percent, working in our businesses in an undocumented status.

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[2] Bureau of Labor Statistics, "Employment Situation Summary March 2007" April 8, 2007. http://www.bls.gov/news.release/empsit.nr0.htm.

[3] Bureau of Labor Statistics "Job Openings and Labor Turnover February 2007" http://www.bls.gov/news.release/pdf/jolts.pdf

[4] Passel, Jeffrey, "The Size and Characteristics of the Unauthorized Migrant Population in the U.S." *Pew Hispanic Center Report*, March 2006. http://pewhispanic.org/files/reports/61.pdf

Studies have shown that the principal cause in the reduction of undocumented immigrants in the last decade is due to a decrease in demand for unauthorized workers because of recessions and other economic indicators, while increased enforcement has had only a "small" effect.[5] "The single macroeconomic/demographic variable most highly correlated with the annual flows is the U.S. unemployment rate."[6] Therefore, any new worksite enforcement regime must be promulgated with a new worker program, and a program to address and correct the undocumented status of workers already employed in the U.S. It must also be created in coordination with a new worker program that responds with flexibility to the needs of our vibrant and diverse economy.

There have been attempts to revamp the worksite enforcement regimen at the federal legislative level and through the administrative process. Although the goal of fixing the worksite enforcement program is admirable, such attempts, outside comprehensive reform, could be severely detrimental to the economic security of the country. Noted national security experts have also reinforced that enforcement alone at any level is not the solution.[7]

III. The Current Employment Verification System

IRCA created the current paper-based employment verification system in the United States. An employer must wait for a newly hired employee to start work before attempting to verify work eligibility in the United States. Within the first three days, the employee shows the employer a document or combination of documents to prove identity and eligibility to work from a list of 27 possible options. The employer must fill out the Form I-9 and retain it. The process is susceptible to fraudulent documents, as well as identity fraud. Employers are not document experts. If a document looks valid on its face, an employer may not legally ask questions without the risk of violating anti-discrimination laws.

The current system has made it impossible for employers to really know who is actually authorized to work and who is not. It is important to note that often, when the Department of Homeland Security (DHS) conducts an audit or raid of an employer, the employer is generally not found at fault because it has followed the law, filled out the proper forms and documents, and could not have known that its employees were not authorized to work. While the company might not suffer any legal action or fines, losing valuable members of the workforce and possibly closing down for even a short amount of time can often add up to significant financial losses, not including the less quantifiable harm such as negative publicity.

In 1998, DHS rolled out an electronic employment eligibility system, the Basic Pilot Program. The Basic Pilot Program is a strictly voluntary, internet based, automated system where an employer checks a new hire's name and social security number against a government-run database to make sure the name and number matches those on record. As numerous studies and

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[5] Passel, Jeffrey, "U.S. Immigration: Numbers, Trends, and Outlook." *Pew Hispanic Center Report*, March 26, 2007, pages 12-13.
[6] Id. at 13.
[7] Coalition for Immigration Security, composed of numerous former DHS officials, stated in their April 2006 letter that there is a relationship between adequate legal channels of immigration and enhanced border security. See also Stuart Anderson "Making the Transition from Illegal to Legal Migration" *National Foundation for American Policy*, November 2003.

reports have shown, the databases maintained at DHS and the Social Security Administration are not always up-to-date, there is a high error rate in determining work authorization, and the program is incapable of capturing identity fraud.[8] Although this Subcommittee has previously examined the Basic Pilot Program, it is worth noting that in its current form, it would be problematic to expand it to all existing employers and employees. A future employment eligibility verification system will need to take into account the failures and successes of the Basic Pilot Program to ensure that it is workable.

IV. Principles for a New Employment Eligibility Verification System

Businesses want a reliable, streamlined, and easy to use method to verify the employment eligibility of their workforce. To start, it is imperative that adequate funds and resources be allocated to develop and implement the program to accommodate the over seven million employers in the United States.[9] This will be a significant expansion of the less than one percent of the employer community that currently uses the Basic Pilot Program on a voluntary basis.[10] The Chamber has testified many times during the immigration reform debate and has consistently called for the development of an employment eligibility verification system that carefully addresses: who is to be verified; what documents will be accepted; how the system will be phased in; how the system will function and who will certify functionality; how the system will be enforced; and, how DHS will protect good faith actors.

The Chamber's foremost concern is to ensure that any new system does not become too costly or burdensome for employers. Businesses already spend approximately 12 million hours each year documenting the legal status of the nation's 50 to 60 million new hires.[11] This new system will not only be used by companies with large Human Resources departments and in-house legal counsel, but also by employers operating in the field out of the back of a pickup truck. These small employers create millions of jobs in the U.S. economy, and the burdens placed upon these entrepreneurs must be considered.

A. Employee Population to be Covered

Pursuant to IRCA, each new employee hired after November 6, 1986 must be verified as eligible to work under the current paper-based I-9 system. IRCA grandfathered employees hired prior to November 6, 1986 so as not to cause undue disruption of businesses. It is critical that any new process only mandate that new hires need to be

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[8] Government Accountability Office, "Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts," June 19, 2006, http://www.gao.gov/new.items/d06895t.pdf. Even an error rate of one percent of applicants would put at risk over a million workers in losing their job or perspective employment. The stakes could not be higher. For more detail on error rates see testimony from Angelo I. Amador, U.S. Chamber of Commerce before the House Subcommittee on Workforce, Empowerment, and Government Programs of the Committee on Small Business, June 27, 2006, http://www.uschamber.com/issues/testimony/2006/060627_testimony_immigrant_employment.htm.

[9] Census Bureau. See footnote 1.

[10] As of December 2006, over 12,000 employers were registered with the Basic Pilot Program, approximately 0.2 percent of all employers, http://www.uscis.gov/files/nativedocuments/EEV_FS.pdf.

[11] Jacoby, Tamar. "An Idea Whose Time Has Finally Come? The Case for Employment Verification." *Migration Policy Institute*, 2005, www.migrationpolicy.org.

verified under any future electronic employment verification system. Employers should only be required to verify new employees, as existing employees have already been verified under the applicable legal procedures in place when they were hired. Re-verifying an entire workforce is an unduly burdensome, costly proposition, and unnecessary given how often workers change jobs in the United States.

B. Acceptable Documents for Proof of Identity and Employment Authorization

The issues of document fraud and identity theft have been exacerbated under the current paper-based I-9 system because of the lack of reliable and secure documents. Documents should be re-tooled and limited so as to provide employers with a clear and functional way to verify that they are accurate and relate to the prospective employee. There are two ways by which this can be done, either by issuing a new tamper and counterfeit resistant work authorization card or by limiting the number of acceptable work authorization documents to, for example, social security cards, driver's licenses, passports, and alien registration cards (green cards). All of these documents could be made more tamper and counterfeit resistant. In fact, in 1998, the federal government began issuing green cards with a hologram, a digital photograph and fingerprint images and by 2010 all green cards currently in existence should have these features.

With fewer acceptable work authorization documents, the issue of identity theft can more readily be addressed. The new verification process will need to require a certain degree of inter-agency information sharing. When an employer sends a telephonic or internet based inquiry, the government must not only be able to respond as to whether an employee's name and social security number matches, but also whether they are being used in multiple places of employment by persons who may have assumed the identity of other legitimate workers. In the long run, as the verification system is developed and perfected, it should move closer towards the use of biometric technology that can detect whether the person presenting the document relates to the actual person to whom the card relates.[12]

C. Fair and Reasonable Roll Out of New System

The Government Accountability Office (GAO) reported last year that there are still some unresolved issues with the Basic Pilot Program, including delays in updating immigration records, false-negatives, and program software that is not user friendly.[13] Specifically, GAO has reported additional problems and emphasizes, "the capacity constraints of the system [and] its inability to detect identity fraud."[14] Given these and other concerns, the new system should be phased in and tested at each stage, and expanded to the next phase only when identified problems have been resolved. The best approach would be for the

[12] Obviously, as biometric technology is rolled out, it is important to address who would actually pay for the readers and the implementation of the technology. Further, there will be legitimate issues of practicality in implementing biometrics in many workplaces.
[13] Bovbjerg, Barbara D., Director, Education, Workforce, and Income Security Issues at GAO, Testimony before the Subcommittee on Oversight of the House Committee on Ways and Means, February 16, 2006.
[14] Id.

program to move from one phase to the next only when the system has been improved to take care of inaccuracies and other inefficiencies ascertained through the earlier phase. This would also allow DHS to properly prepare for the new influx of participants. In addition, if industry sectors are carved out, these need to be delineated and defined. For example, there needs to be clear guidelines of what exactly falls within the broad term of "critical infrastructure" if that is used as one benchmark.

D. Response Times

The employer needs to be able to affirmatively rely on the responses to inquiries into the system. Either a response informs the employer that the employee is authorized and can be retained, or that the employee is not and must be discharged. Employers would like to have the tools to determine in real time, or near real time, the legal status of a prospective employee or applicant to work. DHS and the Social Security Administration must be given the resources to ensure that work authorization status changes are current to avoid the costs and disruption that stems from employers having to employ, train, and pay an applicant prior to receiving final confirmation regarding the applicant's legal status.

The Chamber understands that due process concerns must allow the employee to know of an inquiry and to then have the ability to challenge a government determination. Thus, at the very least, employers should be able to submit an initial inquiry into the system after an offer of employment has been made and accepted. Presumably this could be done two weeks before the first day of employment so the clock starts running earlier. The start date should not be affected by an initial tentative nonconfirmation. Of course, for employers that need someone immediately, the option of submitting the initial inquiry shortly after the new employee shows up for his or her first day at work should continue to be available. In the case of staffing agencies, current law allowing for submission of the inquiry when the original contract with the agency is signed should be kept in future laws. A maximum of 30 days, regardless of when or how the inquiry is made, and taking into consideration time to submit additional information and manual review, should be the outer limit that the system should take from the date of initial inquiry until a final determination is issued by the government.

E. Government Accountability

The government must also be held accountable for the proper administration of the new system. There must be an administrative and judicial review process that would allow employers and workers to contest findings. Through the review process, workers could seek compensation for lost wages due to a DHS agency error. Meanwhile, if an employer is fined by the government due to unfounded allegations, the employer should be able to recover some attorneys' fees and costs—capped at perhaps $50,000—if they substantially prevailed in an appeal of the determination. Additionally, workers should have access to review and request changes to their own records to avoid issues when changing jobs.

F. Enforcement and Liability/Penalties

The Chamber believes that full and fair enforcement of a new, functional verification system coupled with comprehensive immigration reform will be more feasible and more likely to focus on the true egregious violators than is currently the case. We believe that enforcement should take into account transition times for the new system and should protect the employers acting in good faith. Furthermore, we believe that DHS should have primary authority over the enforcement provisions of any new system. There should be language prohibiting private rights of action against employers for matters that should be enforced by DHS. Furthermore, the power to investigate any labor or employment violations should be kept out of a system created exclusively for the purpose of verifying employment eligibility. The Chamber continues to call for a simple and reliable system, which includes reasonable penalties for bad actor violators.

With respect to employer liability, the current "knowing" standard should be maintained. The government should punish intentional violators, however, those employers whose only error was a simple oversight or mistake should be given an opportunity to rectify such error. Presumptions of guilt without proof of intent are unwarranted. It is also critical to the employer community that it does not bear direct liability for subcontractor actions unless the contractor knew of the actions of the subcontractor. In other words, the contractor should not be held liable for undocumented workers hired by a subcontractor without evidence of direct knowledge of the general contractor. Without such protection, an employer could be open to liability even for the violations of its peripheral contractors – e.g. a water delivery company or landscaping contractor.

A number of additional penalties and causes of action have been suggested as proper penalties in a new verification system. These range from debarring employers from federal government contracts to expansion of the current antidiscrimination protections. Penalties must be tailored to the offense and the system must be fair. Automatic debarment from federal contracts is not an authority that should be given to DHS. Indeed a working process already exists in current law under the Federal Acquisition Regulations (FAR).

Additionally, the Chamber objects to expansion of antidiscrimination provisions found in current law. As stated above, a new, functional system coupled with comprehensive immigration reform should provide adequate assurances that it will not be used to discriminate against workers. Employers should not be put in a "catch-22" position in which attempting to abide by one law would lead to liability under another one.

G. Preemption of State Laws and Local Ordinances

It is also important to note that several states and local governments are attempting to either force employers/retailers to bear the cost of helping shield undocumented workers or are attempting to impose additional worksite enforcement provisions. These attempts run the risk of undermining the ability of the federal government to oversee and enforce national immigration laws and also put undue burden on businesses attempting to deal

with the current broken system. A new worksite enforcement regime needs to address specifically these attempts to preempt jurisdiction of federal immigration law.[15]

H. Limited Bureaucracy, Cost, and Expansion of Employment Law

It is imperative that the new system be workable, simple, easy to use, and not be costly or burdensome to employers. DHS will need adequate funding to create, maintain and implement the new system. This cost should not be passed on to the employer with fees for inquiries or through other mechanisms. Additionally, DHS should not promulgate overly burdensome document retention requirements. The transition from the paper-based system to a new electronic system must be handled in a smooth and methodical way that verifies the functionality of the systems and also takes into account the vast differences in the employer community. Small employers should not bear the burden disproportionate to medium-sized and larger employers.

The new system needs to be implemented with full acknowledgment that employers already have to comply with a variety of employment laws. Thus, verifying employment authorization, not expansion of employment protections, should be the sole emphasis of a new employment verification system.

In this regard, it should be emphasized that there are already existing laws that govern wage requirements, pensions, health benefits, the interactions between employers and unions, safety and health requirements, hiring and firing practices, and discrimination statutes. The Code of Federal Regulations relating to employment laws alone covers over 5,000 pages of fine print. And of course, formal regulations, often unintelligible to the small business employer, are just the tip of the iceberg. Thousands of court cases provide an interpretive overlay to the statutory and regulatory law, and complex treatises provide their own nuances.[16] A GAO report titled "Workplace Regulations: Information on Selected Employer and Union Experiences" identified concerns regarding workplace regulations that employers continue to have to this very day.[17] The report noted that enforcement of such regulations is inconsistent, and that paperwork requirements could be quite onerous. Most importantly, the report concluded that employers are overburdened by regulatory requirements imposed upon their businesses and many are fearful of being sued for inadequate compliance.

The cost of compliance continues to grow at an alarming pace. A 2005 study by Joseph Johnson of the Mercatus Center[18] estimated the total compliance cost of workplace

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[15] A record number of immigration-related bills are under consideration, or have been enacted, in all 50 states. Nationwide, 1,169 immigration bills are in the works, and at least 57 bills in 18 states have been enacted, according to the National Conference of State Legislatures, http://www.ncsl.org/.

[16] For example, one treatise on employment discrimination law alone stretches over 2,000 pages. Barbara Lindemann and Paul Grossman, "Employment Discrimination Law," *ABA Section of Labor and Employment Law*, 3rd Edition, 1996.

[17] U.S. Government Accountability Office Report, "Workplace Regulation: Information on Selected Employer and Union Experiences," GAO-HEHS-94-138, Washington DC, pages, June 30, 1994, pages 25-53.

[18] Johnson, Joseph. "The Cost of Workplace Regulations", *Mercatus Center*, George Mason University, Arlington, Virginia, August 2001.

regulations at $91 billion (in 2000 dollars) and a follow up study by W. Mark Crain for The Office of Advocacy, U.S. Small Business Administration,[19] estimated the total compliance cost of workplace regulations at $106 billion (in 2004 dollars). Within a four year span, the cost grew at a rate of 15 billion, or 3.75 billion per year.

V. Conclusion

The Chamber urges you to continue to engage the business community to create a workable electronic employment verification system within the context of comprehensive immigration reform. This requires an overall system that is fast, accurate and reliable under practical real world working conditions, and includes:

- A new verification system that only applies to new hires;
- A reasonable number of reliable documents to reduce fraud;
- A telephone based alternative to accommodate all employers;
- A phase-in with independent certification as to accuracy and workability;
- Congressional oversight authority with independent studies;
- Verification to begin when firm offer of employment is made and accepted, followed by reasonable system response times—at the most 30 days;
- Accountability structures for all involved—including our government;
- An investigative and enforcement system that is fair, with penalties commensurate to the offense;
- Provisions to protect first-time good faith "offenders" caught in the web of ever-changing federal regulations;
- No expansion of liability beyond the knowing standard for contractor/subcontractor relationships;
- No expansion of antidiscrimination laws or debarment outside the FAR system;
- Clarification that federal jurisdiction preempts state and local laws;
- No artificially created incentives favoring automatic fines or frivolous litigation; and,
- No expansion of labor laws within the electronic employment verification system.

Employers will be required to utilize and comply with the new electronic employment eligibility verification system, and therefore, we should continue to be consulted in shaping such a system. We at the Chamber, EWIC, and the EEVS Working Group, stand by to continue to assist in this process. Thank you again for this opportunity to share the views of the Chamber, and I look forward to your questions.

[19] Crain, Mark W. "The Impact of Regulatory Costs on Small Firms," Report RFP No. SBHQ-03-M-0522, Lafayette College, for the Office of Advocacy, *U.S. Small Business Administration*, September 2005.

Ms. LOFGREN. Thank you, Mr. Johnson.

Mr. Gibbs?

TESTIMONY OF ROBERT GIBBS, PARTNER, GIBBS HOUSTON PAUW, ON BEHALF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION

Mr. GIBBS. Thank you, Madam Chairwoman and Ranking Member King and other Members of the Committee.

I am most pleased to be here and hear this discussion this morning, particularly, as Mr. Johnson mentioned, the emphasis on comprehensive reform, which is of strong interest to the Service Employees International Union.

The Service Employees Union has extensive experience assisting its members in dealing with the kinds of problems that employers face in verifying the authorization of employees for work. Because of that and because of the problems that we see with discrimination in existing systems and with inaccuracies in Social Security and Immigration Service records, we are particularly concerned that this Committee makes sure that anything that is done in this regards gives a system that is right, particularly as we talk about expanding the program from a system that only involves less than 1 percent of the employers in this country to one that would involve 8 million employers and 160 million workers. You are talking about a massive problem if we make even small errors and small missteps in the process of construction an electronic verification system.

For a verification system to work, it must accurately identify those who are qualified for employment while providing a workable means for needed workers to timely obtain documentation of their authorization to work.

For the first tie, this kind of program would provide to the Government the power to order employers to terminate workers. And if we are expanding that to every employer/every employee, it is a massive expansion of a Government program.

What does this mean to each of us, to the Members of the Committee? The testimony here this week from Citizenship and Immigration Services was that under the Basic Pilot program, 8 percent are erroneously non-confirmed, at least at a preliminary basis, of all workers. Not just immigrant workers but citizen workers, everybody who is verified, it is an 8 percent error rate.

One may think 8 percent, that is not too bad. Eight percent of the workers in your district is 24,000 workers; 24,000 workers coming into your district offices, asking your staff for help is a lot of work and a lot of problem for your staff to deal with. That is why it is so critical that we get this right. Unless these errors are cured, there are going to be major problems in your offices and for the families in our districts who are losing their jobs and trying to figure out how to support their families.

Proposals to require employers to electronically utilize a Government verification program will only succeed if it is part of a program of comprehensive reform. Why is that the case? It is not just because we want comprehensive reform. But unless you shrink the size of the problem down to something that is manageable, this program will collapse of its own weight.

There has to be both a program to remedy the 7 million to 12 million unauthorized worker situations here in a broad way and not a narrow program that only fixes half of those people, plus a program for future immigration worker flows so that we are not back here 10 years from now dealing with a problem that we haven't cured in 2007.

It is only if those workers—only if there is not both the supply of undocumented workers there who are attractive to employers who would like to use their work without having to pay competitive wages and decent working conditions, does an electronic verification system have a chance to work. If there is a major supply of workers and a labor market that demands the use of those workers, some employers will find ways to get around whatever system this Committee devises.

What we saw with the creation of the Immigration Reform and Control Act's employer sanctions in 1986, which created the I-9 form and required employers to verify every employee by the employee's presenting documents was that the employer filled out the I-9 form and the employee presented the document. Unfortunately, some number of those employees presented made up documents. They made up a name, they made up a Social Security number and they presented it.

Now what we are getting, as we try to tighten the system, is that we get rather than completely made up documents which don't injure some real person, we are starting to see the kind of situation that happened at Swift, where employees then have to find a legitimate name and a legitimate Social Security number and birth date to use to generate documents which will clear the Basic Pilot program.

So as we tighten the system you get a response, and the response is identity fraud problems. If we want to roll that out on a national basis, we would better figure out how we are going to keep that from happening at the same time, but there are other consequences, then, that flow from trying to tighten up the identity fraud problem.

There are several things that we think need some fixing in the various bills for employment verification. We think that the efforts to limit the number of documents have gone too far. There are too few documents in the most recent proposal. In other words, the pendulum has swung way too far the other direction.

Why is this a problem? Well, there are several reasons. One is, the passport, which only 25 percent of U.S. workers have, is a very expensive and increasingly time-consuming process to get. The Real ID, five States have bowed out of that. Homeland Security only accepts a very few number of documents, charges a lot of money and takes a lot of time to generate them.

Ms. LOFGREN. Mr. Gibbs, your time is——

Mr. GIBBS. I will wind up and respond to questions.

[The prepared statement of Mr. Gibbs follows:]

PREPARED STATEMENT OF ROBERT H. GIBBS

TESTIMONY OF

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ON BEHALF OF
SERVICE EMPLOYEES INTERNATIONAL UNION

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

APRIL 26, 2007

Madam Chairwoman and members of the subcommittee:

I am Robert H. Gibbs, representing the Service Employees International Union. Prior to the passage of the Immigration Reform and Control Act in 1986, I worked with individuals, unions and employers concerning issues on the interface between employment and immigration. Significantly, for this hearing, my work has covered issues relating to employment authorization documentation, employer sanctions, and inaccuracy in government record keeping systems.

The Service Employees International Union (SEIU) has over 1.6 million members in the United States (and 200,000 additional members in Canada). SEIU members work in the property services, health care and in the public sector. Many are immigrant workers who work in low wage occupations such as janitors, security guards, home care aids and nursing home workers. SEIU has been a leading advocate for improving the lives of low-wage workers and for comprehensive immigration reform.

SEIU has extensive experience assisting its members in responding to employer actions following non-confirmations from U.S. Customs and Immigration Service (USCIS), or Social Security Administration (SSA) under the Basic Pilot Program. Because of our experience with these problems over the past several years, we have substantial concerns about how an Electronic Employment Verfication System (EEVS) regimen would be structured to avoid injurious inaccuracies, as well as employer discrimination and harassment of immigrant workers.

I. INTRODUCTION

It is critical that Congress "get it right" if an EEVS program is enacted. A poorly thought-out, poorly funded program will create more problems for workers and American employers than it will solve. For a verification program to work, it must accurately identify those qualified for employment, while providing a workable means for needed workers to timely obtain legal authorization.

Such a program will dramatically change the nature of the government's role in the employment relationship. For the first time, the ***government would have the power to order employers to terminate employees,*** if the employee data provided in the system does not match government databases. Such new power can only be accepted if there are adequate systems in place to remedy inaccurate records, and remedies for unfair terminations.

The impact of the EEVS proposals will not merely impact undocumented workers, but will have serious consequences for millions of citizens, lawfully employed immigrants and their families if database inaccuracies are not fixed. The most recent research on the

Basic Pilot Program shows 8% of all queries were the subject of a tentative non-confirmation (TNC) by the system.[1] That is an unacceptably high figure.

Unless database errors are cured, 24,000 of the estimated 300,000 workers in each congressional district would be required to spend several hours attempting to straighten out SSA or USCIS records in order to continue their employment. Many of these constituents will contact your offices for assistance.

Proposals to require employers to electronically utilize a government employment verification program will only succeed if they are part of a broader package of reform to expeditiously legalize the status of the estimated twelve million workers who are here without authorization, as well as to provide a fair mechanism for future immigrant workers

Without these necessary components, there will be little incentive for employers and employees to comply. There must be effective and fair ways to fulfill the future needs of employers and immigrant workers in a timely, cost-effective manner. As we saw with the 1986 employer sanctions program efforts to ensure that employers only hire documented workers are bound to fail. When there is a large pool of unauthorized workers, and when the immigration laws provide inadequate mechanisms for legal, working visas for thousands of low wage workers in service, construction, agriculture, garment and light manufacturing industries.

IRCA demonstrated that when the law required all employees to present certain documents, the employees did so. The demand for documents merely generated a new industry in counterfeit documents. Likewise, the creation of an EEVS will merely generate more fees for document purveyors, who will have an incentive to obtain documents that relate to a real person, thereby expanding the growth of the use of purchased, borrowed or stolen identities. Once hundreds of such document purveyors develop the capacity to obtain thousands of such documents, there is nothing to insure that they will not broaden their market to include users who seek to use them to defraud banks and merchants.

For an EEVS program to work it is essential that it be part of comprehensive reform.

II. ANY EEVS PROGRAM MUST PROVIDE FLEXIBILITY IN THE TYPES OF ACCEPTABLE DOCUMENTATION.

Some EEVS proposals, such as S. 2611 and the STRIVE Act, drastically reduce the list of acceptable documents that the employee may present to a U.S. passport, a REAL ID compliant drivers license, or a DHS-issued resident alien card or work authorization card. While the employer sanctions program was often criticized for having too many documentation options, these proposals suffer by going to the other extreme. Moreover,

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[1] Testimony of Marc Rosenbaum Fellow, Migration Policy Institute, for the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, REfugeess, Border Security, and International Law, April 24, 2007, relying on recent USCIS data.

for immigrants the only documents that are acceptable are those issued by DHS. There should be appropriate, flexible, and cost-effective options available to workers to establish that they are authorized for employment. These excessively-limited lists of documents need flexibility to allow states to phase in upgraded ID's gradually, and to insure that immigrants are not limited to expensive DHS documents, where others would suffice.

There are several problems with the limited options of these proposals:

1) **U.S. Passport:** at present only about 20% of American citizens have a U.S. passport. The cost is excessive for many American workers--$98. There are months-long delays in obtaining a passport (or replacing a lost or stolen one) due to increased requirements for travel to Canada or Mexico.

2) **REAL ID-compliant drivers license/identification card:** Five states to date have already determined that they will not implement REAL ID, given the excessive cost imposed on the state by the unfunded mandates. More are expected to join this list. Employees in these states will have to obtain an expensive U.S. passport. Reports have been made of states refusing to issue licenses where the applicant data does not match erroneous data at SSA, e.g. maiden/married name problems. See e.g., the *Anchorage Daily News* story at (see attached) http://www.adn.com/life/lende/story/8709601p-8611871c.html . Under this regimen, even native-born U.S. citizens will have to spend time traveling to SSA offices to try to get their records to match up. Many will seek the assistance of congressional staff, especially to the extent the problem lies in SSA records systems.

3) **DHS-issued documents for permanent residents, asylees and others lawfully authorized to work:** Immigrants are limited to DHS-issued identity documents. Under the current law, immigrants can present a valid, unrestricted SSA card, as can asylees, rather than a DHS-issued document. SSA will only issue unrestricted SSA cards after clearing the eligibility of the applicant with CIS. (Asylees are persons whose asylum status has been approved by USCIS). With proposals to increase the security measures on SSA cards, there is little reason to limit legal permanent residents and asylees solely to DHS-issued cards. These limitations have several problems: 1) Cost: DHS is proposing to increase the cost of a replacement permanent resident card to $290, for a replacement work card to $340; 2) Delays: a replacement permanent resident card is currently taking a ***minimum*** of 9-10 months (assuming no problems), and a renewal work card is taking at least four months. Over 100,000 adjustment and citizenship applications have been delayed beyond six months (some for years) because of FBI delays in CIS required background checks. CIS is planning to impose name check requirements on all work card applications, inevitably causing further delay for persons who are legally entitled to the documentation.

At present, your congressional district staff are well aware of the high number of problems with the processing of immigration documentation by USCIS. Given the geographic dispersal of immigrants, these problems surface in every district. Agency delays and mistakes are all too common, and agency responsiveness, even to Congressional staff is often poor. Imposing a poorly thought-out, and inadequately funded and tested electronic system, will substantially increase the demand on your staffs. Since the EEVS proposals would require employers to terminate non-confirmed employees, the stakes will be dramatically higher for your constituents, and significantly add to your district office caseload.

III. EFFECTIVE ANTI-DISCRIMINATION FEATURES MUST BE AN INTEGRAL PART OF ANY EEVS.

One of the significant problems identified by major studies with both the 1986 employer sanctions program, as well as by the Basic Pilot Program, is employer discrimination against immigrant workers who are lawfully seeking employment. Despite several GAO studies, no serious reforms have been implemented to reduce the incidence of anti-immigrant discrimination. Instead, Congress is now considering a substantial expansion of a program that has failed to operate properly, without discrimination. Failure to remedy these problems will doom the EEVS program to failure in limiting undocumented employment, just as the prior programs failed. Constructing programs that allow, indeed encourage discrimination, only provides incentives to those employers who seek competitive advantage against employers who are making good-faith efforts to comply with workplace laws and standards.

Discrimination in employer sanctions programs occurs in several ways:

1. **Illegal prescreening of employees:** the EEVS proposals, like the Basic Pilot Program, all proscribe use of the system to prescreen employees. But it is not surprising that employers seek to limit their hiring and training costs by screening applicants, rather than hiring and then terminating employees. Since legal immigrant workers are disproportionately impacted by database inaccuracies, they are particularly harmed. GAO and Westat studies have all found this abuse to be rampant. EEVS programs must provide sufficient remedies and enforcement funding to dissuade this conduct.

2. **Discrimination in terms of employment to employees with a Tentative Non-confirmation:** studies have shown a high level of discrimination against those employees who are subject to a Tentative Non-confirmation. This includes termination, reduced pay, training, benefits, poor scheduling, etc. Because database errors are more common in the USCIS databases as to immigrant workers, than for the SSA databases, the effect of the TNC-related discrimination is more pronounced for immigrant workers.

3. **Defensive hiring:** employers may respond to the potential costs of the EEVS by avoiding hiring applicants that "look" or "sound" foreign in appearance or language. GAO studies found this a consistent problem as a result of the 1986 employer sanctions regimen. A slightly different version of this practice is requiring more or different documentation from Latinos which violates the law.

4. **Discrimination against citizen workers:** some employers will prefer hiring undocumented workers knowing that they will be afraid of complaining about poor working conditions or rates of pay.

Effective remedies must be provided to insure against these different types of discrimination. Protections against discrimination must include governmental oversight of employer use of the program, worker education, timely/cost effective procedures, and sufficient remedies for deterrent and remedial impact.

IV. EEVS PROGRAMS MUST PROVIDE PROMPT, SIMPLE METHODS FOR WORKERS TO CORRECT DATABASE ERRORS AND AGENCY DELAYS.

EEVS proposals shift the burden to the employee to demonstrate his/her authorization for employment despite the high error incidence in SSA and DHS databases. Notably, although the agencies merely state that they cannot confirm the employee's work authorization, rather than that the employee is not authorized to work, the employer ***must terminate*** a non-confirmed employee.

GAO and Westat studies of the prototype Basic Pilot show that employees must take many hours off from work, usually at their own expense, in an effort to straighten out erroneous agency databases. Employers have reported that the agencies often fail to respond, or respond late to their inquiries. GAO studies have reported that CIS often is unable to locate the paper files that must be reviewed in order to remedy CIS data problems, caused by tardy data entry, or poor communication between different DHS or DOJ components as to actions taken on a casefile.

Additionally, applications for CIS approval, extensions or replacement of documents are frequently long-delayed, or erroneously denied. When the application is pending, or if it is wrongly denied, CIS will not confirm work authorization, even if the applicant should have been approved. In the interim, a TNC or final nonconfirmation will issue, through no fault of the individual, and thereby cause employment termination.

EEVS must provide for an effective, timely means for individuals to obtain correction of their records before they lose employment. Such mechanisms must include fully staffed customer service lines to enable remedy without extensive travel and endless waits at agency offices with hundreds of others. USCIS may have only one office in any given state, unlike the SSA. Termination should only be required where the

system has conclusively determined that the employee is not authorized for employment. Employees must be provided a timely, workable mechanism to challenge such agency determinations. Remedies should also provide full backpay and attorney's fees for employees that are wrongly terminated by government error or delay. GAO and Westat studies have found a high degree of employer failure to provide employees guidance about their rights to contest improper terminations. EEVS must correct this failure by insuring that employees are fully advised of their rights to contest improper terminations.
Congress should also ensure that CIS has sufficient funding to provide prompt, accurate adjudication of applications to help prevent improper employment termination.

V. ENACTMENT OF AN EEVS SYSTEM WITHOUT IMMIGRATION REFORM WILL FURTHER EXPAND THE UNDERGROUND ECONOMY, AND DEPRESS WORKING CONDITIONS FOR ALL WORKERS.

Enforcement of an EEVS without comprehensive immigration reform to provide legal status to the existing 12 million undocumented workforce, and providing workable mechanisms for future needs is doomed to failure. Labor market growth in the coming decades is predicted to be in the lower wage positions in the service sector, including health care, hotel/restaurant, and in construction. These needs cannot not be sufficiently met solely with American born workers.

Failing to legalize existing workers and create legal channels for new workers to meet future workforce needs will provide a strong incentive to employers to continue to hire undocumented workers. There will be the demand for workers, as well as the supply of undocumented workers. Employers will have greater incentives to employ workers off the books, pay cash, or misclassify workers as "independent contractors" and therefore not subject to EEVS.

Such employers will likewise not pay Social Security or unemployment taxes, provide medical insurance or workers compensation, nor will they withhold income tax. Knowing that their workers will fear to complain, and lack protections from labor protection agencies, the unscrupulous employers will have little to fear from not paying the minimum wage or overtime, or failing to provide safe and healthy working conditions.

EEVS without comprehensive reform will fuel the underground economy, while putting law-abiding employers in the sights of DHS. This system will ensure that unscrupulous employers gain a competitive advantage at the expense of workers, and their communities and disadvantage good employers. Local, state and federal government will lose tax revenue to pay for essential services. We need to encourage all employers to play by the rules, and not create incentives to pay off the books.

The creation of an underground economy has been fostered by the limitations of the 1986 IRCA employer sanctions regime, which though it provided a legalization program, failed to accommodate future flows needed by the labor market. The commensurate failure to increase visa quotas to allow the legal entry of spouses and children of legalized aliens, exacerbated the numbers of undocumented as legalized immigrants brought their families here in advance of visa availability.

To the extent an EEVS program creates an unnecessary burden for legitimate, taxpaying employers it will encourage further growth of the underground economy. Such an expansion hurts all American workers, both immigrant and native born as well as the majority of responsible employers who will be forced to compete with employers who pay cash under the table fail to pay the minimum wage ignore fundatmental labor protections.

V. CONCLUSION

Any enforcement-only approach is doomed to fail, as it will merely provide further justification for employers to discriminate against immigrant workers in hiring, or compensation. To the extent broad measures are not taken to provide effective, timely processes for workers to immigrate legally to fill workplace needs, enforcement alone will fail in its goal of limiting undocumented immigration. Without such measures, enforcement alone in 2007 will be no more effective than it has been in the past twenty years of more border fences and tougher immigration laws.

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Anchorage Daily News

What is in a name? Social insecurity

HEATHER LENDE
AROUND ALASKA

(Published: March 15, 2007)

HAINES -- I'm not sure what my name is. I didn't get hit on the head and lose my memory. I tried to renew my driver's license and was informed that the name I have been using for 25 years is not legal.

Apparently, I didn't change it from the name I was born with, Heather Vuillet, after I married Chip Lende. I thought I had, since Heather Lende is printed on my passport, license, income tax forms, property deeds, insurance policies and the nameplate in front of my chair at Haines Borough School Board meetings.

Not so, said the Social Security computer, which cross-checked my license renewal application at the office of the Alaska Department of Motor Vehicles here and blocked it.

Alarmed, I called the Social Security Administration and spoke with a woman, who, I believe, was in Oklahoma. She said I needed to bring my passport and marriage certificate to the nearest Social Security office, which is in Juneau, 90 miles by ferry or plane.

At the Federal Building door in Juneau, I took off my boots, walked through a metal detector and was wanded by a guard in a police-style uniform. He also asked to see my ID.

The driver's license still worked.

At the door of the Social Security office, there was another armed guard, in a brown, military-style uniform. It was just us in the windowless waiting room. After 15 minutes, a Social Security officer called me to the counter.

I cheerfully explained the situation and showed him my passport and marriage license. I also had my driver's license, voter registration card, birth certificate, baptismal record and all five of our children's birth certificates, just in case. He looked at them and at his computer screen and said he was sorry but I wasn't legally Heather Lende.

He said that my license would not be renewed and the same thing would happen when my passport expired if I didn't match my name to my Social Security number.

I wished I had the presence of mind to ask why my income tax was still being collected.

Instead, I started to say that without ID I couldn't leave Haines by plane, ferry or road through Canada. (This is also true of all Alaskans.) But we don't have a hospital. What if I was sick or injured? What if my dad in New York got sick and I couldn't go? I must have looked like I was going to cry, because the officer said he would help me.

All I had to do was to fill out a name-change form and provide two pieces of ID, a passport or driver's license in my maiden name, and a marriage certificate -- the original or a certified copy -- from the agency that issued it.

But my passport and license already had the name that would be my new name, Heather Lende, on them.

I did have my birth certificate and my marriage license. I asked if they could be the two IDs. He said birth certificates aren't allowed.

I heard the "Twilight Zone" music and then saw Laurel trying to explain this one to Hardy in their screwball comedy way:

"Let me get this straight" Laurel would say " I need an ID with a name on it that I don't have and can't get in order to change it to the name that I already have that is on all of my IDs?"

The Social Security officer agreed it was nutty, but it was the law. He could, however, use the marriage license as one of the two required documents, and a certified copy of a medical record in my maiden name could substitute for the license or passport as the other.

I am 47 years old. I was married in New York when I was 22 and have been in Alaska ever since. I was a healthy child. I got stitches once, when I was 10, visiting the Pennsylvania grandparents.

My parents left the town I grew up in 15 years ago to move to a farm upstate. My mother didn't save much in the transition except my Middlebury College diploma.

That is not a legal ID. But the record of a minor knee surgery I had in a Vermont hospital when I was in school there would be if I could find it.

It was easy. I did it by phone and fax with a credit card -- same with the agency-certified copy of my marriage license.

Once I had the documents in hand, the Social Security officer in Juneau -- who has been very kind -- called to say I might not need the medical record after all. Since I had it, I mailed it to him anyway, and in a few weeks I should have my old name back.

In the meantime, I think the lesson in all of this is best summed up by a faded bumper sticker on 80-something-year-old Haines pioneer John Schnabel's truck: "I Love My Country But Fear My Government."

Ms. LOFGREN. Thank you very much.
Mr. Harper?

TESTIMONY OF JIM HARPER, DIRECTOR OF INFORMATION POLICY STUDIES, THE CATO INSTITUTE

Mr. HARPER. Thank you very much, Madam Chair.

I feel like I have to confess, I should maybe be docked a couple of minutes because your question came out of my testimony. I won't volunteer to be docked those minutes, but thank you for asking that question. I appreciate you focusing on those issues because I do think they are very important.

Congratulations and thank you very much for conducting extensive hearings on the immigration reform issue, and particularly this issue. It is a pleasure to me to see broad agreement on comprehensive immigration reform, and I want to make a blanket statement that if I don't repeat enough may hold: that I understand and accept entirely the good faith, the good intentions, and sincerity of everybody who testified before you on this panel and everybody on this Committee to try to solve difficult problems and come up with some solutions.

I sometimes relish being the skunk at the garden party. I don't in this case. But I do want to highlight some very serious concerns about the expansion of Basic Pilot and electronic employment verification generally.

There really are formidable problems with creating a workable and acceptable employment verification system for Federal immigration law enforcement. A nationwide system for checking identity and eligibility is much more easily said than done.

It is not surprising, of course, that there is a push to improve the current system. There are a lot of problems with it. I think we should have a marker that it is more important that American citizens and eligible people should be able to work than it is to exclude illegal aliens from working, the discrimination issue we have heard about so much already.

The theory of using employment eligibility to reduce the power of the U.S. economic magnet makes logical sense. But it is very difficult to prove work eligibility under IRCA on a mass scale. The credential that we are talking about, eligibility, is a personal one; that is, it attaches to an individual and is nontransferable.

So the process requires two steps: identification and determination of that eligibility. Frankly, I don't know how you get away from identification, a mass identification system, which could probably be characterized accurately as a national identification system.

As to ID, as to the system now, we use identification in our personal transactions all the time. We are built to do that with our eyes and ears to recognize other people. And so we very often rely on identification as a bulletproof way of getting things done.

But remote identification, identification of strangers, identification using cards, is a different process. It is a process that is much more open to fraud in various dimensions of it, and that is why the current I-9 system doesn't work very well.

At the outset of an employment relationship, particularly in the low-skill areas, employers really don't know their employees from

Adam, so they have to accept documents that are often fraudulent. They are not in a good position to verify the accuracy or the tamper-resistance of the documents they are looking at.

I think that moving to an electronic verification system would reduce illegal working somewhat by creating a simple sort of background check, checking to see if this name and Social Security pair exists, is paired also in the Social Security system databases. You could do rough logic checks, as was discussed. See if a Social Security name pair had been used before several times in succession. That would give you some suggestion that fraudulent documents were being used.

But what exactly you do with that information is very difficult, because you would be just as likely to take the honest, law-abiding worker and make them a tentative non-confirmation as you would the fraudulent worker.

The system would create a great demand, because of its toughness, would create a great demand for additional identity fraud, that is to get new, unused name and Social Security pairs. So there would be a lot more demand for that information. It would come from the law-abiding citizens and the data would be stolen lots of different places. We know about the data breaches that have happened in the public and private sectors.

The response is a secure card. I don't know how you do it without making it a biometric card, and I do think that in fairness it would have to be some kind of national ID system.

There are very, very advanced technical ways that you could create a biometric credential that doesn't share any other information, but that is a couple generations down the road. It is possible, but I don't see it happening in the very near future.

You brought up some of the privacy concerns, and I very much appreciate that. An electronic system is different in kind, not degree, from a paper-based system. When an employer puts an I-9 form in a file, that is one thing. When the information is submitted to the Government electronically, that is a very, very different thing. And the information can be collected, stored, and used. I appreciate the good faith of law writers saying we do not want it used, we do not want it converted to other uses. But you know the Social Security number was supposed to be for operating the Social Security system, and we know well that we are well beyond that date.

Ms. LOFGREN. Mr. Harper, I am not docking you your time, but I am going to keep you to 5 minutes——

Mr. HARPER. Very well.

Ms. LOFGREN [continuing]. As we have a vote coming up on the floor soon.

Mr. HARPER. I do appreciate the consensus on broad reform. And thank you for hearing me.

[The prepared statement of Mr. Harper follows:]

PREPARED STATEMENT OF JIM HARPER

Testimony of Jim Harper
Director of Information Policy Studies
The Cato Institute
to the House Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

Hearing on Proposals to Improve the Electronic Employment Verification and Worksite Enforcement System

April 26, 2007

Chairman Lofgren, Ranking Member King, and Members of the Committee:

It is a pleasure to speak with you today. I am director of information policy studies at the Cato Institute, a non-profit research foundation dedicated to preserving the traditional American principles of limited government, individual liberty, free markets, and peace. In that role, I study the unique problems in adapting law and policy to the information age. I also serve as a member of the Department of Homeland Security's Data Privacy and Integrity Advisory Committee, which advises the DHS Privacy Office and the Secretary of Homeland Security on privacy issues.

My most recent book is entitled *Identity Crisis: How Identification Is Overused and Misunderstood*. I am also editor of Privacilla.org, a Web-based think tank devoted exclusively to privacy, and I maintain an online resource about federal legislation and spending called WashingtonWatch.com, which recently introduced a legislative wiki that will increase government transparency — especially once you in Congress realize that you can use it to communicate directly with the interested public. I speak only for myself today and not for any organization with which I am affiliated or for any colleague.

Congratulations and thank you for conducting extensive hearings on so many dimensions of the immigration reform issue. When bills pass Congress without hearings, the results can be expensive and threatening to liberty. The REAL ID Act is one example. While that law has done much for me in terms of frequent flyer miles and book sales, I prefer Congress to legislate with care.

There are formidable problems with creating a workable and acceptable electronic employment verification system for federal immigration law enforcement. By stating the

problem in terms of identification and credentialing, perhaps I can help surface some of those problems and help you determine what the best approach is to immigration reform, whether there should be an electronic employment verification system, and what the concerns are with such a system.

My analysis leads me to conclude that there are fundamental problems with the policy of "internal enforcement" which electronic employment verification supports. The flaws in internal enforcement should be fatal to that concept. The solution that will foster legality is aligning immigration law with the economic interests of the American people.

Immigration Policy, Briefly

One cannot talk about a technology-focused government program without examining policy considerations. The human forces that a policy would channel or counteract are the most important influence on how the supporting system must be designed, where the challenges to it will come from, and the human and monetary costs of making the system work for its intended purpose.

Our nation's immigration policy is at a crossroads. According to my colleague Dan Griswold and Labor Department projections, our economy will continue to create 400,000 or more low-skilled jobs annually in the service sector — tasks like food preparation, cleaning, construction, landscaping, and retail. Yet during the period from 1996 to 2004, the number of adult Americans without a high school education — the demographic that typically fills these jobs — fell by 4.6 million.[1]

These demographic facts create very powerful economic forces. There is demand in the United States for both low- and high-skilled workers. Workers in many nearby countries desire and, in many cases, very badly need work of the kind offered in the United States. The economic gradient is steep.

Like water following the laws of gravity, there has been continuing movement of workers to the United States. Unlike water, which can be stopped with simple barriers, people on both sides of the border dedicate their ingenuity to getting what they want and need. The self-interest of employers and workers is a powerful (and almost always beneficial) force that is hard to quell or conquer.

The last major effort to address immigration did not admit the power of these economic forces, however. In the Immigration Reform and Control Act, Congress chose not to expand legal immigration, but instead interposed a legal eligibility requirement on the employment relationship. IRCA made it unlawful for employers to knowingly hire

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[1] Daniel T. Griswold, *Immigration Reform Must Include a Temporary Worker Program*, Orange County Register (Mar. 7, 2007) <http://www.freetrade.org/node/600>.

workers who are not eligible to work in the United States. All employers are required to verify employees' work eligibility via the I-9 form, and employers who knowingly hire ineligible workers are subject to penalties.

There is logic to this idea: In theory, making it illegal to hire those not legally in the United States could reduce the strength of this country's economic "magnet." The I-9 process and employer sanctions undoubtedly have had some effect on curtailing illegal immigration and working, but not very much. The policy cannot be called a success — obviously — Congress is revisiting it.

Employment eligibility verification has not changed or defeated the underlying economics. It would not be a good idea to do so — Americans benefit from the influx of labor, and the workers who come here benefit from working here.

Because the I-9 process and employer sanctions seek to defeat their economic interests, the system has two principle opponents: employers and workers. It relies on them for implementation, though, which is why success has been so elusive and will continue to be. It is important to examine whether a "strengthened," electronic system such as an expanded Basic Pilot can improve on the status quo, and whether the costs of implementing such a system are justified by the benefits.

Eligibility Checks as a Credentialing System

It is useful to look at employer sanctions under the Immigration Reform and Control Act system through the lens of identity and credentialing. This helps reveal all the steps in the process, their weaknesses, what it would take to fix them, and what that would cost. If nothing else, it shows that a nationwide system for checking identity and eligibility is *much* more easily said than done.

Simply put, IRCA made working legally in the United States contingent on presenting a certain credential: proof of legal eligibility. There is a difference, of course, between being eligible to work and proving that eligibility. The gap between actual eligibility and proof of it is routinely exploited by the system's opponents — again, employers and workers — as they pursue their interests.

<u>False Positives and False Negatives in Screening for Ineligibility</u>
It is difficult to prove work eligibility under IRCA on a mass scale. Because the credential is a personal one (i.e., attaching to the individual, non-transferable), there are two steps to this process: 1) identification of the individual and 2) determination of that individual's eligibility.

Flaws in the processes for proving identity and eligibility (actually, testing for ineligibility) mean that some people who are entitled to work may be denied work ("false

positives"), and some who are not legally entitled to work will be able to work ("false negatives").

False positives and false negatives are almost always in tension with each other. Seeking lower false positives usually requires the acceptance of higher false negatives, and vice versa. For example, a system that excluded every single ineligible worker without exception (*zero* false negatives) would exclude from working many eligible workers (high false positives).

Because of our system of values and rights, the IRCA regime must have very low false positives — and no false positives attributable to government action. It is wrong to deprive those who are legally eligible to work of a livelihood, and a wrongful deprivation of work based on government action would be a denial of Due Process. This requires the acceptance of some false negatives (i.e., the employment of some ineligible people).

Though the current system appears deeply flawed, it may be relatively well tuned to the requirement that there be the barest minimum of false positives. A system with high false negatives — essentially, a sloppy internal enforcement system — may be the most appropriate accommodation of the difficult-to-implement policy of internal enforcement.

Changing to an electronic system like an expanded Basic Pilot must happen without raising false positives, which, again, would be incompatible with our system of individual rights and dignity, as well as with Due Process in many cases. Let us briefly examine the current processes before turning to how an expanded Basic Pilot would change them and whether the those changes are justified given the costs.

Employment Eligibility Verification: the I-9

Currently, employers must collect and examine identity and eligibility information from all employees at the time of hire. This can be done through a single document, such as a passport or certificate of U.S. citizenship, or through two separate documents, one each for identity and eligibility, such as a driver's license and a social security card. The employer must attest, under penalty of perjury, that it has examined the documents, found that they appear to be genuine, and that the employee appears eligible to work in the United States.

This conversion of every small business person and human resources director in the country to an immigration agent assuredly hides the cost of the enforcement regime, but it does not necessarily work very well at combating illegal working, for a combination of reasons.

First, like many broad identity and credentialing systems, the I-9 process is highly subject to avoidance. As noted above, employers and workers have strong economic incentives to get together on mutually agreeable terms. The IRCA policy is an interposition on that

process. Employers and workers can and do collude to avoid the system entirely. They conduct business "under the table," avoiding IRCA and various taxes and regulatory restrictions, as well.

Assuming they operate within the system, however, employers and workers still create many false positives and negatives, wrongly excluding some people from work, and allowing some to work contrary to IRCA.

Checking Identity and Eligibility

In our personal interactions, people use identification constantly. We are very adept at recognizing others with our eyes, ears, and other senses. This enables us to pick up right where we left off when we see people a second, third, and fourth time. Our success and familiarity with in-person, familiar identification seems to give us excessive confidence in identification's power in other contexts.

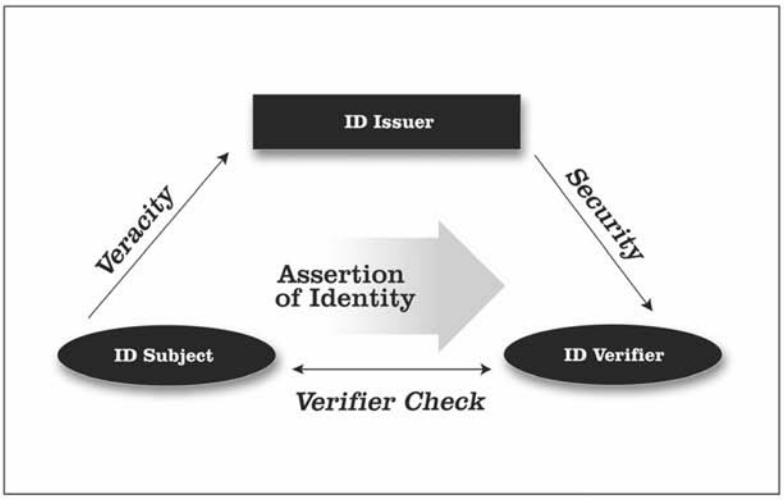
The employment relationship is not like our relationships with friends and neighbors. It typically commences among strangers. Particularly in low-skill jobs, the new employee proffers his or her identity for the first time at the beginning of the relationship. The employer takes little time to examine the applicant's identity *bona fides*.

At this early point in the relationship, though, the government requires the employer to examine and report on the new employee's identity information. It is not a natural, personal interaction of the kind that gives us so much confidence in identification. It is identification by card.

In my book, *Identity Crisis: How Identification is Overused and Misunderstood*, I describe the process of identifying someone by card. This is an important and valuable process, which allows people to be treated as "known," at least to a degree, from the first encounter. But the identification-by-card process is also fraught with weaknesses. The figure on the next page describes the three steps in the process by which a card transfers identity information from the subject (cardholder) to the verifier (relying party).

First, the subject applies to a card issuer for a card, typically supplying all the information on the card. Next, the card issuer creates a card, supplying information to any later verifier. Finally, the verifier compares the card to the subject and, having verified that the card is about the subject, accepts the information on the card.

Each of these three steps is a point of weakness, an opportunity for false negatives to creep in. In the first step, the subject may apply to the card issuer with false information (including false documents), or the subject may corrupt employees within the card issuer, causing them to issue an inaccurate but genuine card. This will almost certainly deceive the employer, who, except under extraordinary circumstances, cannot be expected to second-guess information printed on a genuine, un-tampered-with card.



At issue in the second step is the security of the card against forgery or tampering. Though many government-issued ID documents are quite resistant to forgery and tampering, the broadened use of these documents (including for immigration control) has increased the value of forging such documents and devising ways to tamper with them. Employers, who would be acting against their own interests to discover such things, cannot be expected to discover forgery or tampering of any decent quality.

The third step, comparing the identifiers on a card to the subject, is an area where employers are not specially disabled — everyone has the same ability to compare a picture to the face in front of them — but here, again, employers will not be terribly eager to discover deception, such as someone showing the card of a different person similar in appearance.

If the worker has opted to present separate identity and eligibility documents, the process for employer verification of eligibility follows much the same path — and it carries the same risks to the system.

The worker may have acquired the eligibility document by fraud or corruption, such as by wrongly acquiring a certified copy of a birth certificate matching the name on the identity document. The security of this kind of document tends to be low, which

compromises the second step in the process. Social security cards, for example, are relatively commonly forged. Because these documents do not typically have any biometric identifiers, there is no way for the employer to check it against the worker. A mere name-match to the identity document is taken as proof that the eligibility document is tied to the identity document which was previously tied to the worker.

Considering the many tenuous steps involved in the process, it is little wonder that deputizing employers as immigration agents has not been an end to the U.S. economic "magnet." There are high false negatives in the system today.

This process is also a source of false positives, though. It prevents people who are legally entitled to do so from working.

The requirement to present documents itself is a barrier to employment, for example, particularly for homeless, indigent, and mentally ill people. Due to personal failing or not, they may lack education and basic coping skills, they may have experienced violence, theft of their belongings, and drug and alcohol addiction. But when the time comes to clean up, pull themselves up by their bootstraps, and take that entry-level janitorial job, federal law requires them to present documents they often do not have.

If the documents are unavailable, they must be applied for within three business days, and produced within 90 days, or the new employee will be fired. People on the margins are undoubtedly discouraged and dissuaded from working by these barriers — low as they may seem to the elites that populate the committee rooms and witness tables in Congress.

Discrimination is another source of false positives. The I-9 Form itself has prominent anti-discrimination information, undoubtedly because of employers' IRCA-inspired hesitance to employ potentially ineligible workers. Employers who want to hire workers without hassles, and who want to steer clear of liability under IRCA, will naturally gravitate away from job candidates whose eligibility to work appears marginal. Workers with Hispanic surnames, or who lack proficiency in English, are probably turned away by risk-averse employers long before the question of documentation arises.

"Improving" Eligibility Screening with Electronic Checks

Given the flaws in the current system, it is unsurprising that there should be a push to improve it. However, improvements that would raise false positives should not be adopted. It is more important that American citizens should be able to work than it is to exclude illegal aliens from working. There is probably no improvement that lowers false negatives without raising false positives. This suggests that the policy of internal enforcement itself is the source of the problem. At least two attempts to improve it have already failed.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 required INS to commence three pilot programs to test electronic verification of employees' eligibility to work: the Citizen Attestation Verification Pilot Program, the Machine-Readable Document Pilot Program, and the Basic Pilot Program. According to the Government Accountability Office, the three pilot programs were to test whether pilot verification procedures could improve the existing Form I-9 process by reducing (1) document fraud and false claims of U.S. citizenship (i.e., false negatives), (2) discrimination against employees (false positives), (3) violations of civil liberties and privacy, and (4) the burden on employers to verify employees' work eligibility.[2]

The Citizen Attestation Verification Pilot Program allowed workers to attest to their citizenship status. The status of newly hired employees attesting to being work-authorized noncitizens was electronically checked against information in INS databases. Unsurprisingly, ineligible workers attested to being citizens. Employers, who lacked an interest in ferreting out this kind of fraud, did not ferret out this kind of fraud. But they did discriminate against work-authorized noncitizens, likely because of the paperwork and liability risks such workers presented. The Department of Homeland Security terminated the Citizen Attestation Verification Pilot Program in 2003.

The Machine-Readable Document Pilot Program was initiated in Iowa because that state issued driver's licenses and identification cards carrying the information required for the I-9 in machine-readable form. The program had technical difficulties in reading the driver's licenses and IDs, and it was undermined by the state's transition away from using Social Security numbers on driver's licenses in the interest of Iowans privacy and data security. DHS terminated the Machine-Readable Document Pilot Program in 2003 as well.

Basic Pilot is the remaining effort to verify work eligibility electronically. After completing the I-9 Forms, employers enter the information supplied by the worker into a government Web site. The data is then compared with information held by the Social Security Administration and with DHS databases to determine whether the employee is eligible to work.

Basic Pilot electronically notifies employers whether their employees' work authorization is confirmed. Submissions that the automated check cannot determine are referred to U.S. Citizenship and Immigration Service staff, who take further steps to verify eligibility, or who determine the ineligibility of the worker.

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[2] *See generally*, Government Accounting Office, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813 (Aug. 2005) <http://www.gao.gov/new.items/d05813.pdf>.

When Basic Pilot cannot confirm a worker's eligibility, it issues the employer a "tentative nonconfirmation." The employer must notify the affected worker of the finding, and the worker has the right to contest his or her tentative nonconfirmation within 8 working days by contacting SSA or USCIS. When a worker does not contest his or her tentative nonconfirmation within the allotted time, the Basic Pilot program issues a final nonconfirmation for the worker and the employer is required to either immediately terminate the worker or notify DHS of the continued employment of the worker.

False Negatives Lowered, But at a Cost

Basic Pilot undoubtedly does have some controlling influence on the rate of false negatives --- ineligible workers being able to work. The submission of the worker's proffered name and Social Security number to the Social Security Administration allows for a simple background check: comparing whether the name/SSN combination submitted matches a combination in the SSA's files.

By databasing submissions, SSA can position itself to detect multiple uses of the same name/SSN combination, such as when the same "identity" is hired in multiple states during the same week. These types of checks increase the challenge for ineligible workers and probably reduce illegal working to some degree.

Given the economic incentives in favor of work, however, workers (and employers) will take a variety of counter-measures. More employment will occur under the table, for example. Ineligible workers, or criminal organizations working on their behalf, may corrupt employees in Social Security offices and the Department of Homeland Security to obtain confirmations of eligible status. This kind of corruption routinely occurs in Departments of Motor Vehicles across the country because of the value in having a real (though inaccurate) driver's license or state-issued ID card.

The primary counter-measure ineligible workers will take is to seek documents with genuine, but rarely used, name/SSN combinations. The source of those identifier combinations, of course, will be work-eligible Americans. Expanding Basic Pilot will increase illicit trade in Americans' Social Security numbers and other identifiers. Expanding Basic Pilot will increase identity fraud.

False Positives Raised

While lowering false negatives and illegal working some, expanding Basic Pilot will also raise false positives. More work-eligible Americans will be denied employment.

The sources of false positives are many, and they will compound to frustrate American workers and employers alike. For example, simple errors in data entry by employers will create a baseline mistaken "tentative nonconfirmation" rate, sending workers into the unwelcome embrace of federal bureaucratic offices and processes.

Last December, the Social Security Administration's Office of Inspector General estimated that the SSA's "Numident" file — the data against which Basic Pilot checks worker information — has an error rate of 4.1% . All of the cases it analyzed resulted in Basic Pilot providing incorrect results.[3] At this rate, one in every 25 new hires would receive a "tentative nonconfirmation" and have to engage with the bureaucracy — most likely during hours they are supposed to be at those new jobs. False positives would be high and costly under an expanded Basic Pilot.

The "logic checks" that SSA might run are not as simple to deal with as one might assume. Looking for the same "identity" hired multiple times in short succession, for example, would suggest that some workers are submitting fraudulent information, but it would not reveal which ones. A work-eligible person would be just as suspect as the non-work-eligible people using his or her information.

The work-eligible person would probably be "tentatively nonconfirmed" like the rest, and have to prove that, among all the people using this identity, he or she is the true person. This will not be easy for people with low levels of education, limited proficiency in English, and other detriments. They may be pushed out of the legitimate working world, their identity fraud victimization made worse by what they perceive only as confounding bureaucratic procedures.

Let there be no illusion that people seeking redress for a "tentative nonconfirmation" from the Social Security Administration or the Department of Homeland Security will enjoy a pleasant, speedy process. Offices where people seek redress for data errors would be as friendly, courteous, responsive, and efficient as the Departments of Motor Vehicles offices that Americans so dread. People will wait in line for hours to access bureaucrats that are not terribly interested in getting them approved for employment.

The consequences of scaling up a program like this should not be underestimated. Basic Pilot has many flaws at its current size, but growing the program will create new and different problems. Going from less than 20,000 employers to the entire nation is a change in kind, not degree. The employers in the program now are relatively well-equipped and motivated compared to the variety of employers an expanded Basic Pilot would encounter.

Most small businesses have no personnel dedicated to compliance. Many businesspeople are rarely connected or not connected to the Internet, either because of remoteness, cost, or lack of business necessity. The compliance, accuracy, and non-discrimination rates experienced in an expanded Basic Pilot would likely be lower than what is currently seen.

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[3] Office of the Inspector General, Social Security Administration, *Accuracy of the Social Security Administration's Numident File*, A-08-06-26100 (Dec. 2006) <http://www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm>.

The Costs of Expanded Electronic Verification

Beyond its influence on working, expanding electronic verification would impose many costs on the country and society. The dollar costs of a nationwide electronic verification system would be high. Electronic verification would have far greater privacy consequences than the current system — and these consequences would fall on American citizens, not on illegal immigrants. Expanded electronic verification would invert our federal system and explode limited government. Final employment decisions would no longer be made by employers and workers, but by a federal government bureaucracy — or maybe two of them.

Taxpayer Dollars

In December 2005, the Congressional Budget Office estimated the costs of the electronic employment verification system in H.R. 4437, an immigration reform bill in the 109th Congress.[4] Those costs were substantial.

Under the Basic Pilot expansion in that bill, CBO found that 50 to 55 million new hires would have to be verified each year. A total of 145 million currently employed workers would have to have been screened using the expanded system by 2012. CBO's estimate was conservative; it excluded agricultural workers.

Given the massiveness of the undertaking, CBO estimated $100 million in short-run costs for upgrading software, hardware, databases, and other technology. To handle queries about "tentative nonconfirmations," the Department of Homeland Security and Social Security Administration would have had to spend about $100 million per year on new personnel. The federal government, states, localities, and private businesses would all have had to spend more for screening their workers. Accordingly, CBO found that the mandates in the bill would exceed the thresholds set by the Unfunded Mandates Reform Act of 1995.

Ironically (returning to substantive policy briefly again), all of this government spending and expanded bureaucracy would go toward preventing productive exchanges between employers and workers. Taxes and spending would rise to help stifle U.S. economic growth. Astounding.

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[4] Congressional Budget Office, Cost Estimate: H.R. 4437, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (Dec. 13, 2005) <http://www.cbo.gov/ftpdocs/69xx/doc6954/hr4437.pdf>.

American Citizens' Privacy

The American citizen taxpayer would not only incur pocketbook costs and increased bureaucracy, but lost privacy as well. An electronic system is not just a faster paper system. It has dramatically different effects on privacy.

When an employer fills out a form like the I-9 and puts it in a file, the information on the I-9 remains practically obscure. It is not very easy to access, copy, or use. This protects privacy, and it protects against the data breaches we have heard so much about recently. It is relatively inefficient — but secure in terms of the worker's privacy.

When an organization enters I-9 information into a Web form and sends it to the Social Security Administration and Department of Homeland Security, that information becomes very easy for those entities to access, copy, or use. It is likely combined with "meta-data" — information about when the information was collected, from whom, and so on. The process gives these agencies access to a wealth of data about every American's working situation. And because it is tied to the Social Security number it can easily be correlated with tax records at the IRS, education loan records in the Department of Education, health records at the Department of Health and Human Services, and so on.

Unless a clear, strong, and verifiable data destruction policy is in place, any electronic employment verification system will be a surveillance system, however benign in its inception, that observes all American workers. The system will add to the data stores throughout the federal government that continually amass information about the lives, livelihoods, activities, and interests of everyone — especially law-abiding citizens.

Many people believe that they have nothing to hide, and feel willing to have their employment tracked if it will stop illegal immigration. Unfortunately, it will not. And most people who make the "nothing to hide" claim balk when they are actually confronted with stark choices about privacy. No one has ever mailed me their tax forms so I can publish them on the Web.

People have things to hide. That is normal and natural. Indeed, many people object to information about themselves being compiled on principle, no matter who is doing it or what their purpose. That is an acceptable way of thinking in this country, where we allow law-abiding citizens to protect privacy for any reason or no reason.

Employment Eligibility Data and Identity Fraud

Disclosure to the government is not the only privacy-related concern with an electronic employment verification system. Data security is an issue as well. We have seen massive data breaches from government agencies in the recent past, and from private entities too. Many occur by mistake. In some cases, a particular set of data is the target of a hacker or criminal.

Earlier in my testimony, I noted that a counter-measure ineligible workers will use in the face of an electronic employment verification system is to acquire new name and Social Security number pairs. The very best source of this information will be the system itself — the Social Security Administration and DHS databases, the offices where "tentative nonconfirmations" are processed, the people that process them, and the communications links that connect all these elements.

Any electronic employment verification system will be a target for hackers, a data breach waiting to happen, and a threat to the identity system we rely on today. The best security against data breach is not collecting information in the first place. Electronic employment verification would put Americans' sensitive personal information at risk.

Add-ons to Electronic Employment Verification: A National ID System

As I discussed above, an expanded electronic employment verification system would not just stop ineligible workers from working and employers from hiring them. It would change behavior, causing work to be done under the table and increasing identity fraud aimed at defeating the 'strengthened' system.

The establishment of such a system would also change the behavior of governments. An electronic employment system would expand over time and join with other programs. These behaviors are just as important to consider.

Were an electronic employment verification system in place, it could easily be extended to other uses. Failing to reduce the "magnet" of work, electronic employment verification could be converted to housing control. Why not require landlords and home-sellers to seek federal approval of leases and sales so as not to give shelter to illegal aliens? Electronic employment verification could create better federal control of financial services, and health care, to name two more.

It need not be limited to immigration control, of course. Electronic verification could be used to find wanted murderers, and it would move quickly down the chain to enforcement of unpaid parking tickets and "use taxes." Electronic employment verification charts a course for expanded federal surveillance and control of all Americans' lives.

It is well recognized that Basic Pilot does little to detect or suppress orthodox identity fraud, in which criminals or illegal aliens present false credentials. Employers — deputized as immigration officials and acting against their interests — can be expected to remain quite unhelpful at ferreting out this fraud.

Seeking to close this 'loophole,' many immigration reform proposals already include the creation of some form of national identification scheme. With the REAL ID Act near collapse — states are refusing to implement this unfunded surveillance mandate — the

dominant proposal seems to be the idea of having a secure, biometric Social Security card. This has the same characteristics and flaws as any other national ID system. These problems deserve review.

Costs to Taxpayers

The REAL ID Act has forced some analysis of having a national ID in the U.S., and there is now cost information to work with. The Department of Homeland Security recently estimated in its Notice of Proposed Rulemaking on the Act that implementing this national ID system would cost $17 billion dollars.[5] This is a huge expenditure, which actually fails cost/benefit analysis.[6]

REAL ID, of course, contemplates implementation by state Departments of Motor Vehicles, which are somewhat equipped for the logistical problems involved in personal information collection (including biometrics) and card issuance. The Social Security Administration has essentially no similar capacity — issuing a card is the easy part. SSA would have to construct many more satellite offices, gain the capability to collect and store biometrics and other information, and build many other capabilities from scratch, at enormous further cost.

Surveillance

There are serious additional privacy concerns with the creation of a nationally uniform identity system. Economists know well that standards create efficiencies and economies of scale. When all the railroad tracks in the United States were converted to the same gauge, for example, rail became a more efficient method of transportation. The same train car could travel on tracks anywhere in the country, so more goods and people traveled by rail. A nationally uniform "secure, biometric" Social Security card would have the same influence on the uses of ID cards.

If all Americans had the same identification card, there would be economies of scale in producing card readers, software, and databases to capture and use the information from the cards. Americans would inevitably be asked more and more often to produce identification cards, and share the data from them, when they engaged in various governmental and commercial transactions.

Various institutions would capitalize on the information collected in the federal database behind the card and harvested using these Social Security cards. Speaking to the

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[5] Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Proposed Rule 72 Fed. Reg. at 10,845 (Mar. 9, 2007).

[6] Testimony of Jim Harper, Director of Information Policy Studies, The Cato Institute, to the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia at a hearing entitled "Understanding the Realities of REAL ID: A Review of Efforts to Secure Drivers' Licenses and Identification Cards" at 6-9 (Mar. 26, 2007) <http://hsgac.senate.gov/_files/TestimonyHarper.pdf>

Department of Homeland Security's Data Privacy and Integrity Advisory Committee recently, Anne Collins, the Registrar of Motor Vehicles for the Commonwealth of Massachusetts said, "If you build it they will come." Speaking of REAL ID, she was pointing out that massed personal information would be an irresistible attraction to the Department of Homeland Security and many other governmental entities, who would dip into data about us for an endless variety of purposes.

The DHS NPRM on REAL ID cites some other uses that governments would make of REAL ID, including controlling unlawful employment, gun ownership, drinking, and smoking. Uniform ID systems are a powerful tool. Just like REAL ID, a secure, biometric Social Security card would be used for many purposes beyond what are contemplated today, including tracking of law-abiding citizens.

Transfer of Power

The old saw is true: Information is power. Uniform government ID systems have important consequences in terms of the individual's relationship to government. A major concern with national IDs is the power that identification systems give to governments.

We are all well aware of the beneficent motives of most government employees, but good feelings are not good security. Governments and government officials do stray from the path of lawfulness, peace, and liberty. If the government knows where you are, if it knows where your assets are, if it knows how you communicate and with whom, it is in a much better position to affect your life in ways you may not like.

Governments of the future, making use of national ID systems — and particularly electronic tracking — would not have to go through the difficulties they traditionally have when they want to affect the rights and liberties of an individual. Large databases about people change the incentive structure that law enforcement and national security agencies face.

To be simplistic, traditionally, law enforcement agencies have investigated crimes. They have learned of something bad happening or something bad about to happen, and they have gone after that. More and more, with data available about everybody, they will be in a position to investigate people, instead of crimes.

It is easy to overstate but impossible to deny that uniform national ID systems are a threat to our freedoms. Places like Nazi Germany, the Soviet Union, and apartheid South Africa all had very robust identification systems. Identification systems did not cause the tyranny or rank discrimination that overtook those countries, but identification systems were very good administrative systems that these oppressive regimes used.

Avoiding a national identification system is a bulwark against tyranny. If our identity systems are difficult to navigate, that provides us security against broken democracy. I

am very proud of our government and our system, but we should take care to protect ourselves by avoiding a national identification system.

Insecurity

As discussed above, identity fraud would be exacerbated by expanding Basic Pilot. A uniform national ID system would contribute further to this problem.

One reason why identity fraud is so easily engaged in today is that a Social Security number is pretty much the only key that one needs to access people's financial lives. Because the system is so simple and economically efficient, it is also efficient for criminals. They navigate our identity system easily and use the SSN, plus one or two other identifiers, to break into people's financial lives.

All of us are used to securing our physical assets with six, eight, or ten different keys that we keep on our key chains. It is a terrible security idea, ignoring the lesson we carry around in our pockets, to design a system that uses one key to control access to our intangible lives: our finances, communications, health care, and so on.

Many technologists, and of course governments, think that a single key is a great idea. It is true that a single-key system such as a "secure, biometric" Social Security card would work very well for institutions, but it would not secure the lives and privacy of individuals. Our identification systems should be diversified, not unified. Bringing all Americans within a national ID system is a massive undertaking that the rightfully independent and unruly American people will rightly resist.

The expansion of Basic Pilot would reduce illegal working some, at costs to American citizens in terms of suppressed legal working, higher taxes and more bureaucracy, and threats to privacy and data security. It would leave open a rather significant 'loophole,' though, doing almost nothing to connect truly verifiable identity information to the eligibility decision. The solution to this — and the ineluctable direction of an electronic employment verification policy — is to create a national ID system. This is anathema to American values.

Ultimately, the problem is with the policy of internal enforcement itself. For relatively small immigration control benefits, the costs of verifying eligibility are very high. The parties to the employment eligibility system are required to act against their interests, meaning they will always slow-walk compliance. The policy invites attacks on our already too fragile identity system. And the privacy and dollar costs fall on law-abiding citizens, not wrongdoers.

Instead of moving to electronic eligibility verification, the policy of internal enforcement should be eliminated, root and branch. The need for it can be dissipated, and legality

fostered, by aligning immigration policy with the economic interests of the American people. Legal immigration levels should be increased.

Ending Limited Government to Save It

Economics isn't everything. There are principles at stake here that should not be forgotten. Proponents of internal enforcement, electronic employment verification, and national ID systems believe strongly that people who come here in violation of the law should not enjoy this country's benefits. Were that the one founding principle of our nation, they would be right in all that they support.

But many other principles are at stake: the individual liberty and personal freedom of American citizens; the constitutionally mandated limits on federal power; low taxes, minimal regulation, and competition; privacy.

I will close by observing a small, but very symbolic change that electronic employment verification would make: Up to this point in our nation's history, decisions about who should work for whom have been made by employers and workers. Even under the IRCA regime as it stands now, employers make the selection of who they will hire, perhaps accepting some potential liability if they hire someone that is "ineligible." Letting workers and employers get together on their own terms makes eminent sense, just like people deciding for themselves what food they should eat and how their kids should be schooled.

But with nationwide electronic employment verification, we would move to a regime where the last word on employment decisions would not be with the worker and employer, but with the federal government. This is an extension of federal government power into an area where it has no business being. The founders of our nation and the Framers of our Constitution would spin in their graves to see what Congress is considering.

Proponents of internal enforcement and electronic employment verification surely have a sound principle that they stand on. But they have grown willing to sacrifice more important, founding principles for the less important goal of controlling illegal immigration — and ineffectively at that.

Ms. LOFGREN. Thank you.

Ms. Vaughan, your 5 minutes.

TESTIMONY OF JESSICA VAUGHAN, SENIOR POLICY ANALYST, CENTER FOR IMMIGRATION STUDIES

Ms. VAUGHAN. Thank you, Ms. Lofgren and Mr. King, for the opportunity to testify this morning.

My view is that the electronic employment verification system works very well and we are accomplishing the two goals of helping employers avoid hiring illegal workers and making it harder for illegal workers to deceive their employers.

Congress does not need to make changes to the way the system operates or how it processes queries as has been proposed in the STRIVE Act. After 10 years of tests, evaluations and improvements, we know that it works. It is an efficient system. It has safeguards to prevent wrongful termination and discrimination and employers report that it is easier to use than the existing I-9 paperwork system and brings no disruption to the company or to legal workers.

The system is working well, but it is not perfect. The biggest problem with EEV is that it is still voluntary. Those employers who wish to excuse themselves from the law can choose not to participate. Not only is this unfair, it means the program is not nearly as effective as it could be in preventing illegal employment.

Companies who must compete with scofflaws are at a disadvantage. Congress has a responsibility to ensure that conscientious employers who perform their due diligence in hiring are not put at a disadvantage for doing so. The most obvious way to do this is to phase in mandatory participation in EEV, ideally starting with industries that have historically attracted large numbers of illegal workers.

If the program were to be made mandatory tomorrow, most businesses would be able to comply. Even most small businesses already use the Internet and can access the system. Companies who don't want to do it themselves can pay their own accountants or lawyers or hire one of the more than 300 private sector designated agents to verify workers for them.

If the EEV program is made mandatory, it is important that certain processes that have been honed over the 10-year pilot phase be preserved. For example, the current practice is to do the manual confirmations that are more costly and time consuming only when an employee contests a tentative non-confirmation result.

Those who do not contest are assumed to be ineligible and the agencies don't have to spend anymore time on them. This self-weeding feature will be even more important as the volume of queries increases.

The STRIVE Act, on the other hand, requires that manual verification be done even before determining if an employee is going to contest a tentative non-confirmation. That is going to be wasteful. And the verification office would quickly be bogged down trying to verify however many thousands of unverifiable cases are turned up.

The other major issue that has to be addressed, of course, to improve the system is identity fraud. While this is a vulnerability, it

is not a fatal flaw, and a number of options exist to overcome the system's limitation.

First, Congress should support the USCIS plan to develop a monitoring and compliance unit in the verification office by providing resources for staff and technology. And in addition to electronic monitoring, the unit should institute a through on-site audit process to check both paperwork and employees. It should be done on both a random basis and also to follow-up on leads generated by monitoring the queries that go through. And the Social Security Administration should be directed to routinely share information with DHS on possible immigration violations.

There are other ways for companies to pick up on this kind of fraud on their own. For almost 2 years, the Social Security Administration has offered an electronic verification service called SSNVS. So employers can monitor their payrolls, and we are talking about current employees, not just new hires, and they can detect discrepancies between the company records and the Social Security record.

Nearly 20,000 employers used it last year to verify more than 25 million employees, making this program even bigger than Basic Pilot. Arizona has been doing SSNVS audits for more than a year and the State of North Carolina considers it a best practice and insists that their State employers do it on a quarterly basis. If Swift & Company had made use of this tool, it might have been spared the big disruption that was caused when ICE raided its worksites at the end of last year.

Congress should consider requiring all employers of a certain size to perform regular SSNVS audits as an alternative to retroactive EEV screening.

Some have proposed that the identity fraud issue be addressed through the creation of a biometric work identification card. While this might be a desirable goal for the future and definitely deserves further study, I don't see how it will help improve the existing verification system.

Besides the cost of developing the program, even if every legal worker had a biometric card to prove it, very few if any employers have the capability to authenticate the identity of job applicants. While plenty of barber shops, snowball stands, and gas stations use the Internet on a regular basis, it is not realistic to expect them to acquire fingerprint readers or retina scanners or that type of equipment at this point in time, and it is not fair to expect communities around the Nation that are shouldering the burden of illegal immigration to wait until that kind of technology becomes affordable and available before they see serious immigration law enforcement.

Finally, there must be a more vigorous worksite enforcement effort from ICE to address off-the-books employment.

Thank you very much.

[The prepared statement of Ms. Vaughan follows:]

PREPARED STATEMENT OF JESSICA M. VAUGHAN

Proposals to Improve the Electronic Employment Verification and Worksite Enforcement System

Statement of Jessica M. Vaughan
Senior Policy Analyst
Center for Immigration Studies

Before the
House Judiciary Committee
Subcommittee on Immigration, Citizenship, Refugees,
Border Security, and International Law
Washington, DC

April 26, 2007

Thank you, Chairwoman Lofgren and Ranking Member King, for the opportunity to appear before the subcommittee to discuss the federal electronic employment verification (EEV) program, formerly known as Basic Pilot. This program helps prevent the employment of illegal aliens by enabling employers to electronically verify the work eligibility of new hires directly with the appropriate federal agencies, and is widely considered to be one of the most effective tools available to foster increased compliance with immigration laws. After ten years of experience, evaluations and improvements, we know that the EEV system works. It is efficient and accurate, it has safeguards to prevent wrongful termination and discrimination, and employers enrolled in the web-based program report that it is easier to use than the existing I-9 paperwork system and brings no disruption to the company or to legal workers.

The main problem with the EEV program is that it is now voluntary—those employers who wish to excuse themselves from the law can choose not to participate. Requiring all employers to use this system will disrupt illegal hiring practices that disadvantage law-abiding employers and make it harder for illegal aliens to deceive employers with false documents and claims.

In addition, steps must be taken at the federal agency level to detect, deter and punish identity theft – specifically, the use of stolen valid Social Security numbers and immigration documents by illegal aliens to thwart the verification process. Finally, because some illegal employment occurs "off the books" and outside the reach of the EEV system, the verification program must be accompanied by a vigorous ICE worksite enforcement and removal effort.

Background. I am a Senior Policy Analyst with the Center for Immigration Studies (CIS)[1], based in Washington, DC. The Center is a non-partisan, independent research institute devoted to the study of immigration policy and the impact of immigration on American society.

Our research shows that the fiscal costs of a large illegal alien population are substantial. We estimate that the annual cost to the federal government is roughly $10 billion per year, even after accounting for any taxes paid by illegal aliens. These costs are primarily for Medicaid, health care for the uninsured, food assistance programs, the federal prison and court systems, and education funding. State taxpayers incur millions of dollars of additional annual costs from illegal immigration, primarily for Medicaid, education, health care, incarceration, and public assistance in various forms, including public housing.

Illegal workers take jobs that could be filled by the large number of native or legal immigrant workers who are currently un- or under-employed. Illegal immigration contributes significantly to the size of the population living in poverty and needing social services. Our research shows that they do not "take jobs Americans won't do," but mainly take low-skill jobs at lower wages than employers would have to offer to legal workers, causing labor market distortions and depressing wages in low-skill sectors.[2] No economic evidence exists to support the notion that America suffers from a shortage of low-skilled workers.

The problem of illegal immigration cannot be solved with border control measures alone. Despite stepped up efforts along parts of the border, many illegal migrants still are able to elude the Border Patrol. In addition, it is believed that as many as 40% of illegal aliens arrive here on planes or ships, and overstayed their visa. For this reason, interior enforcement, including workplace compliance, is a critical tool.

The Department of Homeland Security (DHS) has stepped up workplace enforcement activities. Firm actions against rogue employers will always be needed to protect workers from exploitation and to deter others, but are costly on many levels. The New Bedford raid resulted in 361 illegal alien arrests, but required 11 months of investigation and preparation by ICE and utilized 300 federal agents. To make a dent in the level of illegal employment, workplace enforcement needs to be balanced with compliance programs such as EEV.

Research indicates that this approach would bring a noticeable decline in the size of the illegal alien population without placing an unreasonable burden on employers.[3] The EEV program takes the guesswork out of determining a new employee's status, so that employers do not have to become quasi-immigration agents, making judgments regarding an applicant's immigration status that they are not qualified to make. Further, the EEV program helps ensure that businesses have a stable workforce that is less

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[1] www.cis.org.

[2] *Dropping Out: Immigrant Entry and Native Exit From the Labor Market, 2000-2005*, by Steven A. Camarota, March, 2006, http://www.cis.org/articles/2006/back206.html.

[3] *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, Jessica M. Vaughan, Center for Immigration Studies, April 2006, http://www.cis.org/articles/2006/back406.html.

susceptible to identity fraud and less likely to be disrupted by the increasing level of federal workplace enforcement activity.

History of Basic Pilot. It is widely recognized that employment is the most common incentive for illegal immigration to the United States. In 1986, with the passage of the Immigration Reform and Control Act, it became illegal for employers to knowingly hire illegal aliens. The law required employees to produce documents establishing eligibility for work, but provided no way for employers to ascertain if the documents are legitimate. This spawned a huge counterfeit document industry and enabled employers who deliberately ignore immigration laws to get away with accepting fraudulent documents, while holding out the specter of discrimination charges against those conscientious employers who might inspect documents too closely.

In 1997, the bipartisan blue-ribbon Commission on Immigration Reform, headed by former Democratic Texas Congresswoman and civil rights icon Barbara Jordan, concluded: "Reducing the employment magnet is the linchpin of a comprehensive strategy to deter unlawful migration**. . . .** Strategies to deter unlawful entries and visa overstays require both a reliable process for verifying authorization to work and an enforcement capacity to ensure that employers adhere to all immigration-related labor standards. The Commission supports implementation of pilot programs to test what we believe is the most promising option for verifying work authorization: a computerized registry based on the social security number."[4]

Three pilot programs were introduced in 1997 and the most successful, known as Basic Pilot, was reauthorized and expanded by Congress in 2004. An independent evaluation carried out by Temple University's Institute for Survey Research and the private research firm Westat found that Basic Pilot did reduce unauthorized employment among participating employers (the program is currently voluntary).[5] The study said that the program did this in two ways. It identified illegal aliens who had submitted false Social Security numbers or immigration documents and it deterred illegal aliens from seeking jobs at employers who participated in the program. A majority of the participating employers surveyed (64%) said that the number of illegal workers applying for work had been reduced under Basic Pilot and nearly all (95%) felt that the program had reduced the likelihood that they would hire illegal aliens.

EEV is Efficient, Accurate and Easy to Use. Participating employers must electronically verify the status of *all* newly-hired workers within three days of hire, using information that an employee is already required to provide on the Form I-9. Employers key information (name, date of birth, and Social Security number or immigration documentation) into a simple form accessible on the DHS web site and transmit it to DHS. DHS then transmits the information to SSA, which checks the validity of the Social Security number, name, date of birth, and citizenship provided by the worker. The data on non-citizens is confirmed by SSA, and then referred back to DHS to verify work

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[4] U.S. Commission on Immigration Reform, *1997 Report to Congress Executive Summary*, p. xxxiv. Available at www.utexas.edu/lbj/uscir/bacoming/ex-summary.pdf.

[5] *Findings of the Basic Pilot Evaluation,* Institute for Survey Research (Temple University) and Westat, June 2002 and *Report to Congress on the Basic Pilot Program,* Department of Homeland Security/U.S. Citizenship and Immigration Services, June 2004, p. 3. Available at www.uscis.gov/graphics/aboutus/repsstudies.

authorization according to that agency's immigration records. According to USCIS, nearly all queries (92%) receive a positive response within seconds.[6] If the system cannot immediately verify status, the query is referred to other DHS offices in the field that process immigration applications, in case the non-citizen has very recently been approved to work. Some of these cases are resolved very quickly, even within one day. Others may take up to ten days.

If neither agency can confirm work authorization on the individual, the employer receives a tentative non-confirmation response. The employer is supposed to check the accuracy of the information it submitted (e.g. for misspellings or transposed numbers) and either resubmit to DHS or ask the employee to resolve the problem with SSA or DHS. If workers do not contest or resolve the non-confirmation finding within eight working days, the EEV system issues a final non-confirmation notice, and employers are required to either immediately terminate the employee or notify DHS that they are continuing to employ the person (possibly inviting an investigation and penalties).

The EEV program relies on the databases maintained by the Social Security Administration and Department of Homeland Security. These agencies recognize the need to return accurate results to employers, so that authorized workers are not denied employment. Some organizations, including the Chamber of Commerce, National Immigration Law Center and ethnic advocacy groups, have objected to mandatory verification on the grounds that some authorized individuals could be denied employment due to errors in the database. While "false negatives" are theoretically a possibility, the system has safeguards built in to ensure that a tentative non-confirmation does not result in termination. Upon receipt of a tentative non-confirmation, employers have the chance to correct any data entry errors that may have been made, and the employee has a chance to correct any erroneous or out-dated information in the federal record. One common reason for a discrepancy is that the worker recently was married or divorced, but neglected to notify the SSA. Some workers may be known by their middle name, and use that on a job application, but find that the Social Security record has the full legal name. Mandatory use of EEV will actually increase the accuracy of these federal databases by providing further impetus for workers to update or correct the Social Security database well before it is time for them to begin collecting Social Security benefits.

As for the immigration records, DHS has taken steps to make the EEV system more interoperable with all the various sub-systems that could confirm an alien's work authorization, including recent immigrants, temporary workers, refugees and asylees, those who change status, and other special cases. Most of the criticisms raising this objection are based on the early evaluations of Basic Pilot, and the issues have since been addressed. For instance, the first evaluation of Basic Pilot in 2002 noted that sometimes a new immigrant's data would not be entered into the system for 6-9 months, meaning he could wrongfully be denied authorization. By 2005 it only took 10-12 days for this information to make it into the system. Following the appropriation of more than $100 million in federal funding earmarked for Basic Pilot last year, DHS is now in the process of doing four new upgrades to make all but a tiny percentage of cases instantaneously

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[6] Statement of Jock Scharfen, USCIS, before the House Judiciary Subcommittee on Immigration, April 24, 2007.

approvable. According to testimony from USCIS earlier this week, 92 percent of cases are approved instantaneously in 2006.

The real-life experience of the state of Arizona is instructive. Arizona has been verifying the Social Security numbers using a system similar to EEV for all 42,000 state employees about every five weeks since the fall of 2005. These regular audits reportedly turned up only 409 no-matches over the year, most of which were caused by the kind of name changes described above, meaning more than 99.9 percent of the state employees were verified without a problem.

Employers Positive About EEV. Evaluations of EEV/Basic Pilot have found virtually unanimous satisfaction with the program. The most recent, an audit by the Social Security Administration, found 100% of Basic Pilot/EEV users to be satisfied.[7] An independent evaluation of Basic Pilot commissioned by DHS also found that participating employers overwhelmingly report positive experiences with the program – 96 percent think that it is an effective tool for status verification.[8] Among other findings:

* 92% of employers thought the verification did not overburden their staff.
* 93% of employers thought Basic Pilot was easier than the existing I-9 process.

DHS provides a variety of options for administering the program that are designed to accommodate all types of employers (a complete description is available at www.uscis.gov/graphics/services).

Sue Kraft, Vice President of Corporate Administration and Human Resources at Purvis Systems, an information technology services corporation based in Middletown, Rhode Island, who has used Basic Pilot for over two years, says, "It is very, very simple to use. You get a quick response – no more than 15 seconds." Similarly, Lisa Rosa-Smith, the human resources administrative assistant at the Comfort Inn in Warwick, Rhode Island, reports that she has had "no problems" with the system, and believes that it helps them avoid hiring illegal aliens. The attitudes of human resources professionals nationwide is similarly enthusiastic – a recent survey by the Society of Human Resource Management found that 92% of its members support electronic immigration status verification.[9]

One indicator of the success of EEV has been the rapid growth in the number of employers enrolled. More than 16,000 employers have signed up to date, and the number is growing at the rate of 1,000 a month. This growth is certain to continue, as awareness of the benefits of participation grows, and as several states have passed legislation mandating use of the program either for all employers or for state agencies and their contractors.[10]

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[7] *Congressional Response Report: Employer Feedback on the SSA's Verification Programs,* Office of the Inspector General, Social Security Administration, A-03-06-26106, December, 2006.
[8] Temple/Westat study, p. 102.
[9] *2006 Access to Human Capital and Employment Verification: Survey Report* by Jessica Collison, Society for Human Resource Management, March, 2006.
[10] Colorado requires state agencies and their contractors to use it, and a similar law in Georgia goes into effect on July 1, 2007. The Oklahoma legislature has passed a law to require all employers to use it, and similar bills are being considered in Missouri, Rhode Island, Oregon, and other states.

Options to Improve the EEV Program.

1. Mandatory Participation. EEV is clearly working well for those employers using it, but as long as the majority of employers are not participating, it will never be able to make a noticeable dent in the problem of illegal employment. Despite the benefits, unless required to, most employers will just never get around to it, can't be bothered or believe they already have a legal workforce. Other companies see an advantage to hiring illegal workers and will go through the motions of completing the required I-9 paperwork, but prefer to look the other way or, in some cases, actively encourage the submission of fraudulent documents. Because federal enforcement of illegal hiring practices has been a low priority for DHS for many years, there is little risk of prosecution or sanctions for non-compliance.[11]

Companies who must compete with scofflaws are at a disadvantage. This is not hypothetical – for example, a landscaper in Orange County, California tells of his decision to enroll in Basic Pilot. He had no trouble finding labor, though he had to offer a dollar an hour more than his competitors – and that was the problem. His competitors, still hiring illegal aliens, were underbidding him on commercial landscaping contracts and he was forced to drop out.[12]

Congress has a responsibility to level the playing field and ensure that conscientious employers who perform their due diligence in hiring are not put at a disadvantage for doing so. The most obvious way to do this is to make participation in EEV mandatory. Participation can be phased in according to a variety of factors. Larger companies could be enrolled first, or those in sectors of the economy with more pronounced problems of illegal employment.

If the program were to be made mandatory, most businesses would be able to comply. Already, 78 percent of small businesses (<100 employees) use the Internet[13], and the number is expected to continue to climb over time. Companies not wishing to establish Internet connectivity can hire one of more than 300 private-sector "designated agents" to conduct the EEV check for them, much as many companies use private payroll, background checking or tax services.

The implementation of a mandatory version of the EEV program has the potential to affect a large share of the illegal alien population within just a few years. Many of these workers are employed in sectors such as construction, food service, hospitality, and farming, where the turnover rates are high. This suggests that a mandate to verify all new hires could potentially deny employment to as many as half of the illegal alien job-seekers over a period of several years. A large share of the illegal population, when denied easy access to employment, will return home voluntarily. One recent study found

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[11] "Immigration Enforcement Within the United States," Alison Siskin, et al, Congressional Research Service Report for Congress, April 6, 2006, pp. 36-42. http://www.fas.org/sgp/crs/misc/RL33351.pdf.
[12] "Immigrant Employment Verification and Small Business," testimony of Mark Krikorian, Center for Immigration Studies, before the U.S. House of Representative Small Business Committee, Subcommittee on Workforce, Empowerment and Government Programs, June 27,2006. www.cis.org/articles/2006/msktestimony062706.html.
[13] Jupiter Research, quoted in a 12/15/06 e-Week.com story.

that robust worksite enforcement had the potential to reduce the illegal Mexican population by as much as 40 percent over five years.[14]

If the program is made mandatory, it is important that certain processes that have been honed over the 10-year pilot phase of EEV be preserved in order to maintain the efficiency and effectiveness of the program. Current practice is to undertake manual confirmation only when an employee contests a tentative non-confirmation result. Those who do not contest a tentative non-confirmation are assumed to be ineligible, and the agencies need not spend more time investigating. This "self-weeding" feature will be even more necessary as the volume of queries increases. If the more costly and time-consuming manual verification process must be launched before determining if an employee will contest, as has been proposed in the STRIVE Act, for example, the Verification Office will quickly become bogged down trying to verify many thousands of unverifiable cases.

It is not necessary to institute a new "default confirmation" process to protect employees whose status is unclear. Currently, if an employee is not immediately verifiable, the system issues a tentative non-confirmation, which is the equivalent of a default confirmation. Those with a tentative non-confirmation may stay on the job until the discrepancy is resolved, any errors are corrected and the manual confirmation process plays out. The latest Social Security Administration audit found that the vast majority of employers (86%) are dealing with tentative non-confirmations in an appropriate way, and there has been no widespread discrimination or mistreatment of those whose eligibility is harder to determine. A default confirmation process would eliminate any incentive for the federal agencies to rapidly return a final decision. As for ineligible workers, it is better for them to be terminated sooner rather than later.

Lawmakers should resist the temptation to include cumbersome administrative and judicial review rights for employees who are not confirmed. Only a small handful of individuals out of millions of queries over the years have ever experienced a problem, and these very few cases are resolved through the Department of Justice's Office of Special Counsel for Unfair Employment Practices.

2) Address Identity Fraud. The EEV system can detect bogus immigration documents and Social Security numbers, but it often cannot detect when an imposter is using a stolen identity. Use of stolen Social Security numbers by illegal aliens and their employers has grown rapidly in recent years as word gots around that the verification system can be fooled in this way and as worksite enforcement was neglected. While this limitation represents a vulnerability, it is not a fatal flaw, and a number of options exist to drastically reduce the weakness.

A. Compliance Unit. Congress should support the fledgling efforts of the USCIS Verification Office to develop a fraud detection capability in the EEV program, as outlined in testimony earlier this week, by providing them with resources to acquire the staff and technology to greatly expand the new monitoring and compliance unit. This unit will help guard against discrimination by ensuring that employers are using the program appropriately. Equally important, it will work with ICE to detect and investigate

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[14] "Migrants' Networks: An Estimable Model of Illegal Mexican Immigration," by Aldo Colussi, University of Pennsylvania, November, 2003.

identity fraud and other problems that may indicate violations of the law. The compliance unit should institute a thorough in-person worksite audit process using teams of experienced agents/compliance officers to double check employer and employee claims, both on a random basis and to follow up on leads generated by electronically monitoring queries. In addition, the Social Security Administration should be directly to routinely share information on possible immigration violations with DHS.

B. Social Security Number Verification System. The Social Security Administration offers a free electronic verification service (Social Security Number Verification System, or SSNVS) so that employers can audit their payroll records.[15] It was introduced in June, 2005 and more than 19,600 employers used it last year, verifying 25.7 million employees, making it larger than the EEV program. The SSA will identify any discrepancies between what employees have reported and the information on file with the agency. Most of the discrepancies involve name changes (due to marriage, for example), but the audits can also turn up indicators of fraud that may point to an illegal worker. Companies wishing to weed out illegal workers who are already on the payroll can use this tool. Arizona has been performing SSNVS audits for more than a year, and has found the practice to very effective in ensuring a legal work force.[16] The North Carolina state auditor has performed SSNVS audits on its largest employers and established it as a mandatory "best practice" for all public employers. Congress could require all employers to perform SSNVS audits as an alternative to retroactive EEV screening, as has been proposed in previous years.

C. Enhanced Employee Screening. Employers who wish to do more than the bare minimum to limit their vulnerability to identity fraud, either because they have a compelling business need, such as defense contractors or others working in sensitive areas, or because their industry attracts a large number of illegal workers, such as meatpacking or construction, can also work with immigration law services companies in the private sector to receive training in the detection of fraudulent documents and other best practices for additional protection beyond what electronic verification provides. The cost of these enhanced verification services would be minimal compared to the potential cost of becoming the subject of a workplace raid by ICE.

D. Biometrics for the Future. It has been proposed that the identity fraud issue be addressed through the creation of a "tamper-proof" biometric work identification card, perhaps by adding biometric features to the Social Security card. While this might be a desirable goal for the future and deserves further study, it will not help improve the existing electronic verification process. It would take several years and billions of dollars to issue biometric cards to the more than 150 million eligible workers in this country.

Even if every legal worker had a biometric card to prove it, very few, if any, employers have the capability to biometrically authenticate the identity and eligibility of a job applicant. Some have already complained that EEV, which relies on paperwork and numeric identification, represents a disproportionate hardship for small businesses, although I believe this has been greatly exaggerated, particularly with the availability of

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[15] See http://www.ssa.gov/employer/ssnv.htm.

[16] "State effort proves that Social Security info can be verified," by Richard Ruelas, *Arizona Republic*, October 16, 2006. http://www.azcentral.com/news/columns/articles/1016ruelas1016.html.

third-party designated agents. While many barbershops, snowball stands, and gas stations do use computers and the Internet on a regular basis, it is hard to imagine them acquiring fingerprint readers or retina scanners at this point, much less learn to operate them correctly and with integrity. It is not fair to expect the communities around the nation that are shouldering the burden of illegal immigration to wait for such technology to become available and affordable before they see serious immigration law enforcement.

The EEV system is both fair and effective because it places responsibility for verification on federal agencies, where it belongs. It does not expect employers to make judgments about the authenticity of documents or identity that they are not qualified to make. Employers must only transmit information and then take action based on the response of DHS and SSA.

3) Boost Worksite Enforcement. Mandatory electronic verification is an effective way to help employers comply with immigration laws, but there must also be a corresponding enforcement effort directed at those employers who seek to evade the law. ICE has improved its record in the last two years, but the number of illegal aliens removed as a result of worksite enforcement is still a drop in the bucket. Research suggests that many employed illegal aliens are working "off the books,"[17] and thus beyond the reach of the EEV system. In addition to providing ICE with additional resources, staff, and legal tools to address this problem, Congress should consider other approaches to shrink the underground work force. For example, at least one state has passed a law that would prevent companies from claiming as business expenses any workers who are not legal employees or independent contractors. Such an approach will presumably increase income and payroll tax revenues as well.

Conclusion. Mandatory verification of immigration status for new employment is not a silver bullet. Rather, it should be considered as one key part of a larger strategy to gradually shrink the illegal population through firm enforcement and establishing a climate of compliance. This strategy acknowledges that the population of more than 12 million illegal immigrants realistically cannot be apprehended and deported one by one. Nor should the federal government enact a mass amnesty to legalize this population. Instead, lawmakers should rely on an array of policies to increase the day-to-day enforcement of immigration laws, prevent employment, and encourage voluntary observance of immigration laws. Other proven tools include electronic status verification for public benefits, immigration law training for state and local law enforcement and public agency employees, strict standards for drivers' licensing, and rigorous identification standards for financial institutions, and encouragement of state and local laws and ordinances to reinforce federal goals. Adoption of these policies will convince a large number of illegal aliens that they would be better off returning home on their own, thereby easing the burden on local communities and enabling federal authorities to concentrate their resources on the most problematic cases.

Respectfully submitted by:

Jessica M. Vaughan

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[17] See Camarota, *The High Cost of Cheap Labor*, by Steven Camarota, p. 17.

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Ms. LOFGREN. Thank you, Ms. Vaughan. Thank you for summarizing.

I am going to be quick because we are expecting a vote within the next 10 minutes on the floor that will consume 40 minutes or so.

I will just say that in terms of assuming that those that do not adequately contest are not eligible, I think would be a mistake, and I am going to give an example, because she has given me her permission, which is the Counsel for this Subcommittee.

Ms. Hong has been a United States citizen for over 15 years, and the Congress participates in the Basic Pilot. Even though she had her United States passport, it came back not eligible. And Ms. Hong, it took her 7 days, three trips to the Social Security office, three trips to the House employment office, three trips to the Judiciary Committee. She is an immigration lawyer, her boss is the Chair of the Immigration Subcommittee. She was successful in getting this straightened out.

But I am mindful that there are people who are not immigration lawyers, whose boss is not the Immigration Subcommittee Chair, who might actually give up, and they would still be United States citizens. So I think we need a better system than just to assume that if you fail it is okay.

I just would like to say and ask this question I guess of whoever can answer it, maybe to Mr. Harper. First, we need an accurate database. Right now it is inaccurate. But the point you are raising is that having an accurate database actually poses a threat to the privacy and freedom of the United States.

Can you see any provisions or steps that we might take, other than fines, because it is the Government that you have expressed a concern about, Big Brother for lack of a better word, by involving the private sector or some other steps we might take to ease the concerns that you have raised in your testimony?

Mr. HARPER. It is a good question. You are definitely between a rock and a hard place in terms of a system that works really well. Well, it has to have really good data and a really strong biometric connection to the individual. The hard place is that that puts a lot of power in the hands of the Government to monitor people, to control them, and we should write policy with an eye down the horizon to a time when none of us are in power and someone might be in power that we don't want to have in power.

I think our Government is a great one. Our system is a great one. But it is not perfect and there is an uncertain future, so we have to design these systems, which are very powerful, with that in mind.

The Federal Trade Commission had a meeting earlier this week, Monday and Tuesday. I didn't attend all of it, but what I heard of it was very exciting, because I think people there recognize that distributed systems can provide all the security in some cases without the surveillance. And there are systems beginning to be created that put the person in control. It might be a card or token that the person carries and controls. And they have the power over what happens with the information.

Centralizing is dangerous. Dispersing is better. There is a lot to come before we know how to do it.

Ms. LOFGREN. Thank you very much. And I think I will ask the staff to follow-up with the FTC on that distributed system idea. That is a new one to me.

I am going to yield to Mr. King now, since we are expecting votes, for his 5 minutes.

Mr. KING. Thank you, Madam Chair.

Mr. Johnson, as I read through your testimony and read through your testimony, it was very efficiently delivered here, I want to comment, too. You got to a lot of material in in a short period of time.

The question occurs to me, and it seems to me that when we step back and take a look at a situation that we have and ask how do we really want to fix this problem, how would you set your priorities first. And so I want to say this: if this Congress could devise a way to pass legislation that successfully brought compliance with the current law, with regard to illegal labor and illegal immigration and unlawful presence in the United States, and those that were unlawfully present in the United States transitioned back to their home countries, would you support that kind of legislation?

I am not talking about a roundup. I am talking about legislation that simply puts incentives in place and if human nature fit our design, if they flowed back, do you want them to go home?

Mr. JOHNSON. Well, Congressman, I think if it would allow them to go back to their home countries and then therefore—and not disqualify them from returning legally—in other words, they would not be subject ot the five or 10 year bar, we would certainly support that. But we wouldn't support a requirement that would, well, require them to go back to their so-called home countries because I think as the Pew study has shown, frankly 5 percent of our workforce is compromised of undocumented workers, and many Members of the Chamber and other people representing part of our coalition believe these workers are necessary parts of their workforce.

Mr. KING. Mr. Johnson, I am asking you, are they more necessary than the rule of law in the United States of America? Isn't the rule of law a pillar of this Nation's success?

Mr. JOHNSON. Absolutely. But there are obviously various ways by which people can be punished for violating the law and being required to leave the country is one option. A civil fine is another option. There are many ways in which all of us as U.S. citizens "violate the law," whether we are speeding or otherwise. But you have to have a measure of proportionality and practicality and certainly civil fines——

Mr. KING. I understand your answer. And I thank you for that.

I turn to Mr. Gibbs. You brought some curiosity, as I listened to your testimony, when you testified that 8 percent of the initial applicants that are run through Basic Pilot are rejected.

Could it be possible that even that full 8 percent or perhaps more than that would be not lawful for them to work in the United States? It could be illegal applicants?

Mr. GIBBS. No. That number is——

Mr. KING. How would you know?

Mr. GIBBS. Well, that number is from CIS themselves. Their testimony this week, and Mr. Rosenbaum's testimony was, that is 8 percent incorrect non-confirmation.

Mr. KING. I understand the basis for that response, but I would point out to you that it is not incorrect, because we have 98.6 percent of those applicants are ultimately approved between the initial check and the follow-up, where they have got the opportunity to present their records.

And so I will submit that that is an indication that the Basic Pilot program is working. And many of those people that won't apply for the secondary within that 72 hours probably have figured out that they have been caught in this process and that is why they don't appeal.

The gentlelady here has got such an interesting case. It is interesting also that she is here legally and she made the appeal and even then it was difficult, but she had the conviction because she had the confidence that she is lawfully present here. Many of those people do not. Do you concede that point?

Mr. GIBBS. Well, no, I don't concede the point. It seems to me that the numbers are 8 percent of people are erroneously non-confirmed and they——

Mr. KING. I won't agree to that. Because 98.6 percent of them are ultimately approved. So if they are erroneously identified, that means there is something flawed in our system. We have got 99.8 percent of all natural born American citizens that are approved. We have got 98.6 percent of all applicants that are approved. Eight percent rejected in the first test, and then the balance of those up to that 98.6 percent are approved. So I don't know how you can make that statement, Mr. Gibbs.

Mr. GIBBS. Eight percent in your district is 24,000 people who would have to do what Ms. Hong had to do.

Mr. KING. That doesn't mean, though, that they have been rejected. That just means that our system is working and we are cleaning the system up.

Mr. GIBBS. I appreciate that.

Mr. KING. Let me ask you another question, then, and that is how would you go about cleaning up a system if you weren't to use it? I will submit that is the way we clean it up. We are cleaning it up now. Ms. Hong is—that is clean. I am glad that is clean. It is going to be a little hard work, but how else would you clean up the system?

Mr. GIBBS. I really don't understand how the agency—what they need to do. That is something the agency can best work on.

Let me just make one other point, though. The 24,000, there is an important problem here, because many employers, according to WestStat studies, almost half of employers use the program to prescreen workers. So they were barred from even—they weren't even told they were non-confirmed, but that is why they didn't get offered the job.

Ms. LOFGREN. The gentleman's time has expired.

Mr. KING. I yield back.

Ms. LOFGREN. We will go to Mr. Conyers, and if we can go very quickly so we don't come back after this set of about 40 minutes of voting.

Mr. CONYERS. Absolutely.

Just as I was recovering from the Chamber of Commerce representative's very fair and equal—a very excellent statement, and

just as I was pulling out of it and making adjustments from my previous assumptions, here comes a Cato representative who sounds perfectly reasonable and normal about this approach to the subject matter and raises very clearly the concern that is where does the American worker fit into the immigration picture.

I congratulate you, sir. Both of you are going to have to explain to your organizations why Conyers is aligning with you at this point. But that is your problem.

But where do we fit in here, Gibbs and Harper? What is the deal? And this is a very important part of it. I come from where? Detroit, where we are being ripped to shreds by economic automobile relocation. Talk to me.

Ms. LOFGREN. Quickly talk to him.

Mr. CONYERS. Well, not Johnson. Johnson goes for it, but I want to hear from Gibbs and Harper.

Mr. GIBBS. Well, that is why the union is so concerned about this program. The program will affect every worker. It will affect American workers who were born here, like you and I were. It affects people who immigrated here, like Ms. Hong. It affects workers who came seeking a better life but who haven't been able to work through the Immigration Services system.

That is why this program is so important, because it interfaces the Immigration Service process with our own citizenship process. If we don't get it right, we are going to harm our entire workforce, whether it is citizens or non-citizens. That is why the union is so concerned, because we have Members who are the whole spectrum.

Mr. HARPER. I guess I come to this issue and this broad problem with a disability, which is that I don't know the answer to the total immigration reform problem.

Analyzing this particular subset of the problem, I think that huge costs fall on the law-abiding native-born citizen from this kind of program, but I don't have a solution that gets you out the other side. It is just that you have incredible costs in dollars, privacy, from an expanded or anywhere near perfected electronic verification system.

Mr. CONYERS. I appreciate your candor and thank you all.

Ms. LOFGREN. The gentleman from California, do you have one—we have about 6 minutes before the vote will be called, so we are going to have to——

Mr. BERMAN. Just one question to Mr. Harper.

From what I know about Cato, you are very concerned about intrusions on individual liberty and want to preserve maximum amounts of freedom and you hate regulation. What I ask is whether or not you can contemplate in a situation where we need to deal with an intolerable situation, which is the status quo, you conceive of regulatory measures glommed on to an electronic employment verification system which can minimize the potential for abuse of that system.

Mr. HARPER. Hate is such a strong term. We have many concerns about excessive regulation.

You know, you are going to do what you are going to do, and I am here to call it like I see it. I understand the good faith of everybody working on this problem to try to come to a solution.

Frankly, in my written testimony, going through this, trying to figure out where to go on this, the sloppy system we have right now in the paper I-9, listen, I don't think requiring employers to be immigration agents is a good policy in the first place. But if you are going to do it, the sloppy system you have now might be the best way. If you want to absolutely minimize false positives——

Mr. BERMAN. It is not a system. It is not a system.

Mr. HARPER. It is a system. It is a really messy system.

Mr. BERMAN. That insults the concept of system.

Mr. HARPER. If you strengthen it, you are going to hurt Americans.

Ms. LOFGREN. Ms. Waters, do you have any compelling——

Ms. WATERS. Just quickly. No, it is not a compelling question except to say this. Immigration reform is very complicated and we are going to have to work very, very hard. And in order to get a reasonable policy on a path to legalization, we are going to have to get tough on something. And tough on border enforcement and tough on employers and enforcement of sanctions against them for not really trying to do a good job is going to happen.

And I just want to tell my friends at the Chamber of Commerce and any place else that coming here under the red, white and blue flag, trying to defend those practices and not wanting a tough verification system, it ain't going to happen.

Ms. LOFGREN. Thank you for that statement.

At this point, I am going to thank the witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions to you, which we will forward and ask you to answer as promptly as you can to be made part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of other employment eligibility verification proposals and any other additional materials related to this important issue.

Our hearing today has helped illuminate numerous issues concerning this system. Our next hearing will be on Wednesday, May 2, at 2 p.m. in Room 2237. We will talk about the point system that the White House is discussing.

With that, this hearing is adjourned.

[Whereupon, at 11:35 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF SUSAN R. MEISINGER, PRESIDENT AND CEO, SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND CHAIR, HR INITIATIVE FOR A LEGAL RESOURCE

Madam Chairwoman, Congressman King, Members of the Committee. I am pleased to submit the following statement on behalf of the Society for Human Resource Management and the HR Initiative for a Legal Workforce.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 217,000 individual members, the Society's mission is both to serve human resource management professionals and to advance the profession.

The Human Resource Initiative for a Legal Workforce represents human resource professionals in thousands of small and large U.S. employers representing every sector of the American economy. The HR Initiative and its members are seeking to improve the current process of employment verification by creating a secure, efficient and reliable system that will ensure a legal workforce and help prevent unauthorized employment, a root cause of illegal immigration.

On behalf of both organizations, we thank the Committee for its work thus far in the area of improving America's employment verification process. Our members represent the front lines on workforce verification, and offer a critical viewpoint. In the end, this is not just a debate about immigration reform, it is a debate about workplace management—which impacts all U.S. employers and all American workers, not just the foreign born. We do not believe there is a one-size-fits-all solution to employment verification. Rather we believe that private sector technologies can be effectively incorporated into the verification and hiring process.

The subject of today's hearing, "Improving the Electronic Employment Verification and Worksite Enforcement System" is central to deterring illegal immigration to the United States. It is no secret that the wide availability of jobs in this country has become the magnet for unauthorized migration. The most critical element for true immigration reform, therefore, is establishing a foolproof system for certifying that an applicant is authorized to work in the United States. Unfortunately, the electronic verification system in place today is inadequate to meet the demand, and current proposals before Congress fall far short of what is needed.

Currently, employees are permitted to submit up to 29 different legally-acceptable documents as proof of eligibility to hold a job in the United States. This document-based system is prone to fraud, forgeries and identity theft, making it difficult, if not impossible, for an employer to differentiate between the legal and illegal worker. Adding to the problem, the federal government's voluntary electronic verification program, the "Basic Pilot," is inadequate to meet the needs of all U.S. employers because it cannot stop identity fraud.

U.S. employers, whether large or small, cannot be expected to consistently identify unauthorized workers using the existing system, but they are liable for severe sanctions if these workers find their way onto the payroll. At the same time, they are subject to claims of discrimination if they question the validity documents too much.

The proliferation of false or stolen documents can and does cause reputable employers to mistakenly hire individuals who are not eligible to work. At the same time, the lack of certainty and threat of government-imposed penalties may lead some employers to delay or forego hiring legal workers who are eligible. In either case, the costs are high for both U.S. employers and legal workers.

Employers need the right tools to verify a legal workforce. However, HR cannot—and should not—be America's surrogate border patrol agents. Rather, employers are entitled to an unambiguous answer to the query whether an employee is authorized to accept an offer of employment.

Congress must transform the current paper-based verification process into a state-of-the-art electronic system that is accurate, reliable, cost-efficient, easy-to-use, and shares responsibility among government, employers and employees. Specifically, we advocate a system that would verify identity through additional background checks and the potential use of biometric enrollment conducted by government certified private vendors. By eliminating subjective determinations of work authorization documents, this system will eliminate discrimination and simplify enforcement.

However, before *any* employment verification system is mandated, it must meet the following Principles:

Principle 1: Shared Responsibility Among Government, Employers and Employees—U.S. employers, employees and the federal government share responsibility for a reliable, efficient, accurate system to verify employment eligibility.

Principle 2: Fair Enforcement—U.S. employers should be liable for their own hiring decisions, not those made outside their control.

Principle 3: Accuracy and Reliability—Employers should not be forced to participate until the government provides assurances that the system is accurate and reliable.

Principle 4: Ease of Use—The new verification system should be easy to understand and to implement at all worksites.

Principle 5: Deployment of Latest Technologies—A new verification system must make false documents and identity theft ineffective. One way to achieve effective and efficient worksite enforcement is to include biometric identifiers or other state-of-the-art technology in the identity and work authorization process that is capable of automatically recognizing an individual's identity.

If adequately funded and fairly administered, SHRM and the HR Initiative believe this new system could eradicate virtually all unauthorized employment—thereby eliminating a huge incentive for illegal immigration. It will also eliminate discrimination by taking the subjectivity out of the verification process.

True employment verification is the only way to ensure fair and equitable treatment for those individuals who should have access to legitimate jobs. It is essential for a legal workforce and for America's national and economic security.

I would again like to thank the Committee. We look forward to working with you to implement the solutions advocated by SHRM and the HR Initiative for a Legal Workforce.

Attached are the following HR Initiative for a Legal Workforce documents:

1. Principles
2. Concepts for Secure Electronic Employment Verification System
3. Frequently Asked Questions

ATTACHMENTS

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The Human Resource Initiative for a Legal Workforce (www.legal-workforce.org) represents human resource professionals in thousands of small and large U.S. employers across every sector of the American economy. The HR Initiative and its members are seeking to improve the current process of employment verification by creating a secure, efficient and reliable system that will ensure a legal workforce and help prevent unauthorized employment, a root cause of illegal immigration.

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HUMAN RESOURCES INITIATIVE FOR A LEGAL WORKFORCE
2007 PRINCIPLES

The members of the Human Resources Initiative for a Legal Workforce recognize that the illegal immigration crisis facing the United States is largely due to the ready availability of good paying jobs in this country. Central to the immigration discussion, therefore, is the need to establish a reliable, efficient and accurate employment eligibility verification process that would serve our national interest.

The current employment eligibility verification system, which requires employers to exercise discretion in examining multiple documents, does not deter unauthorized employment, as employers cannot know whether documents are real or fake. Meanwhile the current electronic verification program, known as the "Basic Pilot," can be an effective safeguard against document fraud, but it does little to prevent the growing problem of identity theft.

House and Senate immigration reform proposals have included the eventual mandatory participation by all U.S. employers in the Basic Pilot (including re-verification of current employees).

The HR Initiative supports Congress and the Department of Homeland Security (DHS) in the effort to restore integrity to our immigration system. Indeed, the vast majority of U.S. employers would endorse a process to bring certainty to employment verification. However, we believe required participation in Basic Pilot, in its present form will fail to provide the security needed.

To address these concerns, the HR Initiative for a Legal Workforce assembled an expert working group of human resource professionals to develop a set of principles to guide the creation of a new worksite enforcement system. We believe that for a mandated electronic employment verification system to become effective, it must meet the following Principles:

1. *Shared responsibility among government, employers and employees*
2. *Fair enforcement*
3. *Accuracy and reliability*
4. *Ease of use*
5. *Deployment of latest technologies*

Principle 1: Shared Responsibility – U.S. employers, employees and the government share responsibility for a reliable, efficient, accurate system to verify employment eligibility. This system should:

- Establish clear federal statutory language preempting states from imposing employment eligibility verification provisions. The current profusion of state mandates is confusing and costly for employers and undermines the goal of an effective national system.

- Require the Secretary of Homeland Security to enforce the federal preemption of state and local employment verification laws.

- Create a federal advisory board consisting of employers, employees and technology experts to provide guidance in the creation and implementation of any new employment eligibility verification system.

- Direct the federal government to provide funding to implement, administer, and maintain the electronic employment eligibility verification system to meet the standards set by the National Institute of Standards and Technology (NIST).

- Require employers to verify through the system their new employees' authorization to work in the United States. Employers who intentionally fail to conduct employment eligibility verification should be penalized.

- Require employees and applicants to maintain accurate and up-to-date documents verifying their eligibility to work. Employees and applicants who intentionally present false or fraudulent documents should be penalized. Individuals should also have the option of verifying their own eligibility before seeking employment.

- Require the federal government to ensure a high level of accuracy in its databases and to include mechanisms that guarantee timely responses to queries.

Principle 2: Fair Enforcement and Protection – U.S. employers should be liable for their own hiring decisions, not those made outside their control. Enforcement needs to be vigorous and fair, and should focus on employers that blatantly ignore the law as opposed to employers who commit paperwork or technical violations in their attempt to comply. A fair and correct enforcement effort must:

- Require verification only of individuals hired after the enactment of a new electronic verification system. Enforcement of existing statutes should be used to identify ineligible individuals who are currently employed by organizations.

- Reconcile any new federal laws with existing employment, labor, health and civil rights laws. Employers should not be subject to conflicting statutes and enforcement procedures in complying with federal immigration law.

- Protect against discrimination for employers, employees and applicants.

- Create mechanisms within the system to ensure that personal information is kept private and only used for purposes of employment verification.

- Require employers to be responsible for their own hiring practices, not for third-party employers, including contractors or subcontractors, absent actual knowledge.

- Ensure that enforcement and sanctions are consistent with the violation. Punishment should be severe for intentional violations, but not for administrative errors that easily could be corrected. A substantial grace period should be provided to allow employers to correct technical errors.

- Create a comprehensive "Good Faith" reliance standard for employment decisions made on the basis of using the electronic employment eligibility verification system.

Principle 3: Accuracy, Reliability and Efficiency – Employers want an accurate, fair and timely electronic employment eligibility verification system, but should not be forced to participate until the federal government provides assurances that the system works. This means that the system must respond instantaneously, and the information contained in the response must be correct. Before requiring all employers to use an electronic system, Congress must:

- Require a qualified entity, such as the National Institute of Standards and Technology (NIST), to certify the capacity of computer hardware, the accuracy of various databases which feed into the electronic verification program, and the ability of the system to receive real-time links with all Social Security Administration (SSA), DHS, and Internal Revenue Service databases to meet the needs of employers, employees and applicants.

- Require DHS and SSA to perform real-time data entry of employment eligibility that is immediately available for verification purposes. All information integrating with these databases needs to be accurate and current.

- Require the electronic employment verification system to respond to an initial query immediately, but in no more than three days, and provide secondary and final confirmation or non-confirmation as soon as possible, but in no more than ten days.

- Allow employers the option of using the electronic employment eligibility verification system electronic screening after a contingent offer of employment is accepted, but before the employee commences work as long as the system is administered on a consistent, non-discriminatory basis.

Principle 4: Ease of Use – The new verification system should be easy to understand and to implement at all worksites. It should:

- Streamline the employment eligibility verification process by allowing the entire attestation and verification system to be conducted electronically to eliminate duplication and paperwork. The verification system also should be interoperable with most human resource management and database systems.

- Allow the electronic verification system to be accessible through the Internet and telephone with round-the-clock help-desk support to answer questions about technology or help resolve questions about employment status. The system must be user-friendly for employers of all sizes, taking into account the limited resources of some employers.

- Provide access to the employment eligibility verification system without charge.

- Allow a period of 12 months between enactment of any new law or publication of any new regulation or policy and actual implementation of the new law or policy. This provides time for public service announcements and other outreach to employers and employees about their new obligations.

Principle 5: Deployment of Latest Technologies – The current verification system is paper-based and requires individuals to produce documents to establish identity and work authorization. A new verification system must make false documents and identity theft

ineffective so that employers can be assured of a legal workforce. One way to achieve effective and efficient worksite enforcement is to include biometric identifiers or other state-of-the-art technology in the identity and work authorization process that is capable of automatically recognizing an individual's identity. A biometric system would automatically recognize an individual based on measurable biological (anatomical and physiological) and behavioral characteristics. The new employment eligibility verification system should:

- Create an employment verification system that transitions to biometric identifiers, consisting of private databases that contain biometrics and is integrated into federal status and identity systems.

- Allow willing individuals to enroll and provide personal data, including biometric data, so that employers would receive instantaneous and accurate response.

- Permit employers to use the biometric approach as soon as feasible and create incentives including "good faith" defenses to enforcement actions for those who use the system.

- Eliminate the current work authorization and identification documents for those participating in the biometric identifiers system.

- Allow employers to voluntarily participate in either an enhanced electronic employment eligibility verification system or to use biometric or other state-of-the-art technology. Provide incentives for employers to participate in the more secure biometric system. This system would operate as follows:

    I. **Documents-Based Verification Process** – Enhanced electronic verification system. Employers participating in this system would be subject to the full range of enforcement efforts and penalties.

    II. **Biometric or Other State-of-the-Art Verification Process** – Fully operational electronic verification system, based entirely on biometric identifiers or other state-of-the-art technology. The enrollment of the employee in the biometric system will include verification of that person's identity through additional background check databases. Employers participating in this system would be deemed to be in compliance and relieved of technical penalties and fees for participating in the system.

Employers want certainty in their workforce. For this reason, they support transforming the current paper-based method into a biometrically-based or other state-of-the-art electronic verification system. If adequately funded, fairly administered, vigorously enforced and supported by state-of-the-art technology, this new system would eliminate virtually all unauthorized employment and at the same time eradicate most forms of immigration-related unfair employment practices.

OVERVIEW

SECURE ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM (SEEVS)

The HR Initiative for a Legal Workforce proposes allowing employers to choose to participate in one of two electronic employment verification systems as described below.

I. EEVS— A completely electronic employment verification system (EEVS) which improves upon the current Basic Pilot system. Employers would verify identity by visually examining a limited number of documents presented by the employee. Employers would verify work authorization by submitting employee data to the SAVE system. The verification process can be initiated either post offer and acceptance of a job by an employee but prior to the commencement of work or within the first 3 days after work commences. The databases feeding into the SAVE system must be upgraded to ensure all information is accurate and updated and that secondary verifications are completed within 10 days. Employers would continue to make subjective determinations that the person presenting the documents is who he claims to be and that the documents are valid on their face. The current I-9 form would be eliminated. Employers in this system would be subject to the current range of enforcement efforts and penalties.

II. SEEVS— A more secure electronic employment verification system (SEEVS) that guards against identity theft would be available to employers on a voluntary basis. This state-of-the-art system would verify identity through additional background checks and potentially biometric enrollment conducted by private vendors. The employee's work authorization would continue to be verified through the SAVE databases. By eliminating subjective determinations of work authorization documents, this system will eliminate discrimination and simplify enforcement. There will be only two enforcement questions for the government: 1) Did you check every employee through the system in a fair and equal manner? 2) Did the employer make his/her hiring decisions consistent with information they received through the system. Employers participating in this system would be deemed to be in compliance absent a showing of bad faith.

If SEEVS were operational, it would work as follows:

1) After a job is offered and accepted but prior to the commencement of work, the prospective employee (PE) would participate in the verification process.

2). The verification process would start with the PE presenting a "government-issued picture ID" (e.g., driver's license, state ID, passport, green card) as representation of identity.

3). The PE would provide a social security or alien identification number and be asked whether he/she is "enrolled in a secure identity program." If so, the employer would run the secure identity verification process either directly or through government approved vendor.

4). If the PE is not "enrolled in a secure identity program," the employer would refer him/her to one of the certified enrollment centers for enrollment. The employer can assume the cost of enrollment or impose it on the PE, but its policy must be uniform for all PEs of all levels and at all locations.

5). The secure identity verification process consists of submitting the PEs "proof of identity" to the enrollment, which will be linked to the data bases of all such vendors – to be continuously updated by the SSA and DHS databases.

6). The enrollment center will return "yes", "no" or "maybe" answers to the question of whether the PE is who he/she claims and if so, whether and for how long the PE is authorized to work. A prompt resolution system would be available through the certified vendor to resolve the "maybes" and to allow employees to appeal a "no".

Secure Identity and Employment Authorization System - Any electronic employment verification system meeting standards set by the National Institute of Standards and Technology (NIST) that automatically recognizes an individual based on measurable biological, anatomical, physiological or behavioral characteristics.

New Employee Participation – The electronic verification system will only apply to new hires after the date of implementation.

Current Employees –The electronic employment verification system will only apply to new employees and will not require verification of current employees.

Enrollment Process- Individuals seeking employment with an employer participating in SEEVS would be required to enroll in the system through one of the competing, private enrollment providers. The Enrollment Process would be similar to the Registered Traveler program.

Identity Verification – The enrollment providers would verify identity through forensic document examination and tailored data mining in publicly available databases. This system would build upon background checks currently conducted by many employers An individual's identity would be verified and could be "locked" to biometric or other secure identifiers through this process.

Employment Authorization – The employer (or its verification agent) queries the interoperable system of private enrollment providers with the employees' biometirics (or other identifier). That system is updated regularly with work authorization data through the SAVE system (or a similar arrangement) which links to SSA and DHS databases. The system responds that the identity does or does not check out, and, if so, if employment is authorized

Private Database - By assigning the identity process to private vendors, personal data would be collected by multiple DHS-certified vendors using NIST standards, thereby avoiding the creation of a government maintained national database.

Employment Process – New employees will make an assertion of identity using such documents as a "government-issued picture ID" (consistent with current identity documents for I-9s), which is not being accepted as proof of identity but as an alleged identity, subject to

verification. This identity will be checked through the interoperable private vendor verification system using biometrics, along with work authorization.

Verification Process – The process would occur after a job is offered and accepted but prior to the commencement of work, or within three days of commencement of work. The employee would provide a social security number and be asked whether he/she is "enrolled in a secure identity program." If so, the employer would run the secure identity verification process either directly or through government approved vendor.

Penalties - Employers who use SEEVS would be provided a safe harbor and would not be subject to technical, intent to hire, or national origin discrimination charges if the employer used the system and made his/her hiring decisions based on the information received from the system.

Visit www.legal-workforce.org for an expanded description of the HR Initiative principles and to learn more about the importance of employment verification issues.

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Legislative Proposal

Fair Enforcement with Protection for Privacy and Civil Rights

Background: Employers should be held liable for one's own actions, and not for events outside of their control. Enforcement against must be vigorous and fair, and must focus on willful violations and not paperwork errors.

To achieve the above-described objectives, Congress must enact the following provisions as part of any worksite enforcement legislation:

- There should be an opportunity to correct paperwork errors. The following language should be included in any proposal to amend the current penalty scheme:

"Special Rule Governing Paperwork Violation- In case where an employer commits a violation of this act that is deemed to be purely paperwork violation where the Secretary fails to establish any intent to hire persons who are unauthorized for employment, the Secretary shall permit the employer to correct such paperwork error within 30 days of receiving notice from the Secretary of such violation."

- Congress should continue to protect all workers against discrimination by enacting the following antidiscrimination provisions:

"It is an unfair immigration-related employment practice for an employer to
-Use the verification system for screening of an applicant prior to an offer of employment; or
- Selectively verify employees or job applicant based upon race or national origin.

Notwithstanding any other provision of law, it shall be unlawful to utilize the electronic employment eligibility system to investigate any current employee whose eligibility for employment has been verified through any means previously."

- Any electronic employment eligibility verification system must contain sufficient protection for individual privacy. Congress should enact the following provisions taken from the "Security through Regularized Immigration and a Vibrant Economy Act of 2007," or the "STRIVE Act" of 2007, H.R. 1645.

PROHIBITION OF UNLAWFUL ACCESSING AND OBTAINING OF INFORMATION-
"(A) IN GENERAL- It shall be unlawful for any individual other than an employee of the Social Security Administration or the Department of Homeland Security specifically charged with maintaining the System to intentionally and knowingly--
"(i) access the System or the databases utilized to verify identity or employment eligibility for the System for any purpose other than verifying identity or employment eligibility or modifying the System pursuant to law or regulation; or
"(ii) obtain the information concerning an individual stored in the System or the databases utilized to verify identity or employment eligibility for the System for any purpose other than verifying identity or employment authorization or modifying the System pursuant to law or regulation.
"(B) PENALTIES-
"(i) UNLAWFUL ACCESS- Any individual who unlawfully accesses the System or the databases as described in subparagraph (A)(i) shall be fined no more than

$1,000 per individual or sentenced to no more than 6 months imprisonment or both per individual whose file was compromised.
"(ii) UNLAWFUL USE- Any individual who unlawfully obtains information stored in the System in the database utilized to verify identity or employment eligibility for the System and uses the information to commit identity theft for financial gain or to evade security or to assist another in gaining financially or evading security, shall be fined no more than $10,000 per individual or sentenced to no more than 1 year of imprisonment or both per individual whose information was obtained and misappropriated.

"PROTECTION FROM LIABILITY- No employer that participates in the System and complies in good faith with the attestation in subsection (b)(1) shall be liable under any law for any employment-related action taken with respect to an individual in good faith reliance on information provided by the System regarding that individual.
"LIMITATION ON USE OF THE SYSTEM- Notwithstanding any other provision of law, nothing in this subsection shall be construed to permit or allow any department, bureau, or other agency of the United States to utilize any information, database, or other records used in the System for any purpose other than as provided for under this subsection.
"ACCESS TO DATABASE- No officer or employee of any agency or department of the United States, other than such an officer or employee who is responsible for the verification of employment eligibility or for the evaluation of an employment eligibility verification program at the Social Security Administration, the Department of Homeland Security, and the Department of Labor, may have access to any information, database, or other records utilized by the System."

- Employers should be held accountable for willful violations of the law, and not for actions of other which are beyond the employers' control. Any statutory language should be clear on that point:

"An employer who uses a contract, subcontract, or exchange entered into, renegotiated, or extended to obtain the labor of an alien in the United States ***knowing*** *that the alien is an unauthorized alien with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of law."*

- To avoid confusion or conflicting requirements on employees and employers alike, any new legislation must be clear that the federal law preempts any state or local laws dealing with the same issue. Moreover, it must be clear that state and local governments should not promulgate laws dealing with federal immigration issues at all:

(modifying the STRIVE Act)
''(2) PREEMPTION.—In order to assure the effective and uniform enforcement of federal immigration laws, no State or local government shall by law or contract—
''(A) impose civil or criminal sanctions upon employers who employ or otherwise do business with unauthorized aliens;
"(B) require, authorize or permit a system of verification of the authorization of employees or employment applicants to accept employment except as explicitly authorized by Federal law;
''(C) require, authorize, or permit the use of a federally mandated employment verification system for any other purpose other than the required by Federal law, including verifying status of renters, determining eligibility for receipt of benefits, enrollment in school, obtaining or retaining a business or other license provided by the unit of government, or conducting a background check; and
''(D) require employers to use an employment verification system for any purpose, except as required by Federal law, including without limitation such purposes as—
''(i) as a condition of receiving a government contract;
''(ii) as a condition of receiving a business license; or
''(iii) as the basis of assessing a penalty.

- The enactment of new laws governing worksite enforcement should not affect existing rights and obligations under other laws, such as labor or health.

"Nothing in this subsection shall affect any existing rights and obligations of employers or employees under federal, state or local laws."

- There should be a safe harbor for employers who follow the new requirements imposed by the legislation, and who rely on information provided through the electronic system. With the elimination of any personal judgment under the new scheme, the concept of "good faith" should be modified and there should be an absolute defense if the employer follows the new requirements.

"If an employer establishes that the employer has complied with the requirements of this section with respect to the hiring of an individual, and has relied on information provided through the electronic employment eligibility verification system, that employer shall have established an affirmative defense that the employer has not violated the provisions of this section."

A User Friendly System

Background: Employee and employers alike need a new employment eligibility verification system that provides greater certainty and that is reliable and responsive. Any new scheme, especially if it mandates electronic verification, must be user friendly, and the government should provide training as well as technical support for the employers who must use the system.

- The system should allow the employer to verify eligibility and attest to having followed the verification procedure at the same time. An electronic verification system therefore

should include the attestation component and the paper Form I-9 should become either obsolete (or at least optional only for those who still must verify over the telephone).

"The Secretary of Homeland Security shall design and operate an electronic employment eligibility verification system that permits an employer to utilize any technology that is consistent with this section and with any regulation or guidance from the Secretary to streamline the procedures to comply with both the attestation and employment eligibility verification requirements."

- Employers and employees must have access to government representatives to troubleshoot difficulties with the system around the clock.

"The Secretary shall establish a fully staffed 24-hour hotline that shall receive inquiries from individuals or employers concerning determinations made by the electronic employment eligibility verification system, and shall identify for an individual, at the time of inquiry, the particular data that resulted in a determination that the System was unable to verify the individual's identity or eligibility for employment."

- Participation in the electronic verification system should be without cost to the employer or the employee. Borrowing language from the STRIVE Act, the section discussion participation should read:

"PARTICIPATION-

"(A) REQUIREMENTS FOR PARTICIPATION- the Secretary shall require employers to participate, without any cost of employers or employees, in the System as follows: . . ."

- The Department Homeland Security should educate the public about the new electronic system and the newly imposed requirements on employers for a period of 12 months before employers are required to participate in the electronic system, and before new statutory requirements become effective.

"The Secretary shall develop a public education campaign regarding the obligations imposed on employees and employers by this Act, as well as tutorials without cost to the public regarding how to use the newly developed verification system. The public education campaign shall be implemented at least 12 months before the effective date of the earliest of the effective dates contained in this Section."

A New and Secure Verification System

- The current system is paper-based and is susceptible to identity and document fraud. The voluntary "Basic Pilot" program can be helpful in reducing document fraud but cannot stop identity fraud. To achieve a truly effective and efficient worksite enforcement scheme, the verification program eventually must include biometric identifiers, and must give employers the options of using such as system.

"(e) ADVANCED TECHNOLOGY EMPLOYMENT VERIFICATION SYSTEM—
The Secretary shall within one year of enactment of this subsection establish a program to certify private-sector providers of an advanced technology employment verification system that can be adopted by employers on a voluntary basis to comply with their obligations under this section, which program shall comply with the following requirements—
"(1) The system shall provide for private sector providers subject to initial and periodic certification by the Secretary, which shall operate the system on behalf of enrolled individuals and employers which contract with such providers;
"(2) The system shall be based on one or more technologies that have been screened and approved by the National Institute of Standards and Technology (NIST), after consultation with employers and prospective providers of the system technology, to meet or exceed the following standards—
"(i) All approved technologies must be interoperable such that any employer that adopts participation in the system can verify any prospective employee enrolled with any certified provider;
"(ii) All approved technologies must be based on a verification of identity, identifying data, and personal traits (including biometric identifiers) determined by NIST to provide a high level accuracy;
"(iii) Biometric data shall be segregated and encoded such that it is separate from identifying information and can be linked to such identifying information only through activation by the subject individual voluntarily activating the linkage through the verification process or approved correction mechanisms.
"(iv) Databases controlled by the Secretary and by the Commissioner of Social Security shall be maintained in a manner to capture new entries and new status information in a timely manner and to interact with the private enrollment databases to keep employment authorization status current on a daily basis.
"(3) The system shall be limited in application to hiring decisions made after implementation of the system and specific defined circumstances of expiration of prior authorized employment or affirmative, credible evidence of lack of authorization.
"(4) No provision of state or local law or of federal, state or local contract shall be valid to the extent it purports to require participation in the system.
"(5) The system shall provide for the enrollment of prospective employees in a manner that provides a high level of certainty as to their true identities using comparison to Social Security and immigration identifying information, forensic review of identity documents, and background screening verification techniques using publicly available information.
"(6) The enrollment process shall result in the association of an accurate name, date of birth, social security number, and immigration identification number (if any) with the established identity of each enrollee.
"(7) The system shall provide for databases of identifying information to be retained by certified providers subject to privacy standards established and enforced by the Secretary, including a requirement that biometric and other identifying traits of enrollees be stored through an

encoding process that keeps their accurate names, dates of birth, social security numbers, and immigration identification numbers (if any) separate except during electronic verification.
"(8) The system shall provide for regular updating at least once per business day of all records contained in all provider databases with the employment authorization status of each enrolled individual.
"(9) The system shall require that verification be accomplished by employers after a job offer has been made and accepted, but can be prior to the commencement of work;
"(10) The system shall require that verification be performed by enrolled employers of designated agents using technologies approved pursuant to paragraph (2) such that a secure identity and identifying information are screened against the databases of all enrolled individuals.
"(11) Employers that adopt participation in the system shall arrange and pay for the enrollment of any employee requiring verification who has not previously enrolled with a certified provider.
"(12) Employers shall not be permitted to selectively use the system for any class, level or category of employee, but can implement the system at selected locations without implementing it at all locations.
"(13) Enrolled individuals shall be permitted to access the system to verify their own employment authorization and shall be provided with readily available processes to correct and update their enrollment and employment authorization information.
"(14) Review, challenge and discrimination protections regarding the verification responses and their uses from the system shall provide the same level of rights and protections to employees as those afforded under subsection (d) [EEVS].
"(15) Employers shall be permitted to make employment decisions in reliance on the employment authorization information provided by the system in the same manner as provided under subsection (d)[EEVS].
"(16) Employers shall be immune from liability under this section for all locations in which the system is operated for all employment decisions in accordance with the procedures established for use of the system, provided that the system is used in accordance with its requirements and employment decisions are not made contrary to the authorization responses received.
"(15) No data stored pursuant to the system shall be accessible to any person other than those operating the system to verify employment without the written consent of each enrolled individual given specifically for each instance of disclosure or in response to a warrant issued on the basis of probable cause issued by a judicial authority in a criminal proceeding.

A Taskforce to Oversee the Administration of the Verification Program

- The statute should create a federal advisory board consisting of employers, employees and technology experts to provide guidance in the creation and implementation of any new employment eligibility verification system.

(a) ESTABLISHMENT- Not later than1 month after the date of the enactment of this Act, the Secretary of Homeland Security, in consultation with the Secretary of Labor, the Secretary of Commerce, and the Social Security Administration, shall establish a task force to carry out the duties described in subsection (c) (in this section referred to as the `Task Force').
(b) MEMBERSHIP-

(1) CHAIRPERSON; APPOINTMENT OF MEMBERS- The Task Force shall be composed of the Secretary of Homeland Security and 16 other members appointed in accordance with paragraph (2). The Secretary of Homeland Security shall be the chairperson and shall appoint the other members.

(2) APPOINTMENT REQUIREMENTS- In appointing the other members of the Task Force, the Secretary of Homeland Security shall include—

(A) representatives of Federal, State, and local agencies with an interest in the duties of the Task Force,

(B) private sector representatives of affected industries and groups.

(C) non-profit national human resource and employer associations

(3) TERMS- Each member shall be appointed for the life of the Task Force. Any vacancy shall be filled by the Secretary of Homeland Security.

(4) COMPENSATION-

(A) IN GENERAL- Each member of the Task Force shall serve without compensation, and members who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(B) TRAVEL EXPENSES- The members of the Task Force shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of service for the Task Force.

(c) DUTIES- The Task Force shall evaluate the following:

(1) How the Secretary of Homeland Security can efficiently and effectively carry out Title III of this Act, to include implementation and deployment of the EEV in a manner that:

(A) results in responses to employers within the timeframes mandated under this Act;

(B) eliminates erroneous responses on identity or employment eligibility;

(C) provides sufficient outreach and help-desk resources to employers using the EEV; and

(D) provides a voluntary option for employers to implement a biometric capability in the EEV.

(2) How the United States can improved the employment verification process and procedures to include--

(A) enhancing the EEV system through data collection, data entry, and data sharing of employee verification information by better use of technology, resources, and personnel;

(B) increasing cooperation between the public and private sectors;

(C) increasing cooperation among Federal enforcement and benefit agencies and the private sector; and

(D) modifying information technology systems while taking into account the different data systems, infrastructure, and processing procedures of small, medium, and large employers.

(E) deploying a biometric capability in the EEV

(3) The cost of implementing each of its recommendations.

(d) STAFF AND SUPPORT SERVICES-

(1) IN GENERAL- The Secretary of Homeland Security may, without regard to the civil service laws and regulations, appoint and terminate an executive director

and such other additional personnel as may be necessary to enable the Task Force to perform its duties. The employment and termination of an executive director shall be subject to confirmation by a majority of the members of the Task Force.

(2) COMPENSATION- The executive director shall be compensated at a rate not to exceed the rate payable for level V of the Executive Schedule under section 5316 of title 5, United States Code. The Secretary of Homeland Security may fix the compensation of other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for such personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

(3) DETAIL OF GOVERNMENT EMPLOYEES- Any Federal Government employee, with the approval of the head of the appropriate Federal agency, may be detailed to the Task Force without reimbursement, and such detail shall be without interruption or loss of civil service status, benefits, or privilege.

(4) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES- The Secretary of Homeland Security may procure temporary and intermittent services for the Task Force under section 3109(b) of title 5, United States Code, at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(5) ADMINISTRATIVE SUPPORT SERVICES- Upon the request of the Secretary of Homeland Security, the Administrator of General Services shall provide to the Task Force, on a reimbursable basis, the administrative support services necessary for the Task Force to carry out its responsibilities under this section.

(e) HEARINGS AND SESSIONS- The Task Force may, for the purpose of carrying out this section, hold hearings, sit and act at times and places, take testimony, and receive evidence as the Task Force considers appropriate.

(f) OBTAINING OFFICIAL DATA- The Task Force may secure directly from any department or agency of the United States information necessary to enable it to carry out this section. Upon request of the Secretary of Homeland Security, the head of that department or agency shall furnish that information to the Task Force.

(g) REPORTS-

*(1) DEADLINE- Not later than **DATE**, and not later than December 31 of each year thereafter in which the Task Force is in existence, the Secretary of Homeland Security shall submit a report to the Committees on the Judiciary of the House of Representatives and of the Senate containing the findings, conclusions, and recommendations of the Task Force. Each report shall also measure and evaluate how much progress the Task Force has made, how much work remains, how long the remaining work will take to complete, and the cost of completing the remaining work.*

(h) LEGISLATIVE RECOMMENDATIONS-

(1) IN GENERAL- The Secretary of Homeland Security shall make such legislative recommendations as the Secretary of Homeland Security deems appropriate--

(A) to implement the recommendations of the Task Force; and

(B) to obtain authorization for the appropriation of funds, the expenditure of receipts, or the reprogramming of existing funds to implement such recommendations.

(i) TERMINATION- The Task Force shall terminate on a date designated by the Secretary of Homeland Security as the date on which the work of the Task Force has been completed.
(j) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated to carry out this section such sums as may be necessary for fiscal ***years _____through _____.***

Frequently Asked Questions:

SEEVS – Secure Electronic Employment Verification System

How would SEEVS improve the employment verification process?

The system would prevent identity fraud by automatically recognizing an individual based on measurable biological (anatomical and physiological) and behavioral characteristics. The new system would be able to answer two vital questions:

1. Is the person identified by name, date of birth, and social security number **authorized** to accept the employment being offered?
2. Is the person actually who he or she claims to be?

By preventing new unauthorized employment, the incentive for illegal immigration will end.

Explain the basic framework of how would SEEVS work.

The system has three distinct stages:

1. Enrollment of prospective employee to verify identity;
2. "Tagging" of the identity with employment authorization data from the Social Security Administration and Department of Homeland Security; and,
3. Verification of the identity and work authorization of the employee.

How does the enrollment process work?

If the employee is not "enrolled in a secure identity program," the employer would refer him/her to one of the competing, private enrollment providers. The Enrollment Process would be similar to the Registered Traveler program. The employer can assume the cost of enrollment or impose it on the employee, but its policy must be uniform for all employees of all levels and at all locations.

New employees will assert identity using such documents as a "government-issued picture ID" (consistent with current identity documents for I-9s), which is subject to verification. The enrollment providers would verify identity through forensic document examination and tailored data mining in publicly available databases. This system would build upon background checks currently conducted by many employers an individual's identity would be verified and could be "locked" to biometric or other secure identifiers through this process.

Won't this system compromise personal privacy? Who would set the standards?

Any such secure electronic employment verification system needs to meet standards set by the National Institute of Standards and Technology (NIST). The SEEVS model for prevention of identity theft lies in authorizing competing private entities, certified by the government with the

involvement of NIST, to develop and conduct the process necessary to verify the identity. The privately held databases would be protected from disclosure by law and held in a segregated fashion that would prevent linking of identity to biometrics without the enrolled person presenting his or her biometrics as the key.

Would every working American be required to participate?

No. The system will apply to new employees and will not require the verification of current employees. However, existing employees who have not gone through the authorization process will have an incentive to enter the secure identity program so they can gain job mobility.

What is required of potential employees to participate in the system?

Employees and applicants would be required to maintain accurate and up-to-date documents verifying their eligibility to work and enroll in SEEVS through a private vendor. Employees and applicants who intentionally present false or fraudulent documents would be penalized.

When does a potential employee enroll?

The enrollment process could occur at the individual's initiative at any time before or after a job offer had been extended and accepted.

How is an identity proven?

The enrollment process would involve proof of identity through forensic document examination and tailored data mining in publicly available databases. Utilizing state-of-the-art technology and processes currently in use by employers today, including background checks, an individual's identity would be verified and could be "locked" to biometric or other secure identifiers.

When a prospective employee presents his/her identity, the vendor database will determine if the identity matches by a biometric comparison and will report either that it is not the enrolled person, or if it is, whether and for how long employment with that employer is authorized.

What happens after enrollment?

The confirmed identity and employment status would be initially tagged and then continuously updated by a link between the private vendor and SSA and DHS databases.

What are the specific steps?

After a job is offered and accepted, but prior to the commencement of work, the prospective employee would participate in the verification process.

1. The employee would provide a social security number and be asked whether he/she is "enrolled in a secure identity program."
2. If so, the employer would run the secure identity verification process either directly or through government approved vendor.
3. The vendor will return "yes," "no" or "maybe" answers to the question of whether the employee is who he/she claims and if so, whether and for how long the employee is authorized to work.

What if the potential employee wants to challenge the decision?

A prompt resolution system would be available through the certified vendor to resolve the "maybes" and to allow employees to appeal a "no." Those that cannot prove legal work authorization will not be able to secure new employment.

What if false documents are presented by the potential employee?

Presentation of false identity documents in the enrollment process will result in refusal of enrollment and should have enforcement consequences. At the point of employment, the employee cannot present a new identity if rejected the first time by the system, because the presented biometrics and false identity will be encoded into the system. Only the government agencies can correct errors at this point. This is to prevent employers from supplying new identities.

Why does SEEVS rely on private vendors to maintain records?

By assigning the identity process to private vendors, personal data would be collected by multiple DHS-certified vendors using NIST standards, thereby avoiding the creation of a national database maintained by the federal government containing identifying characteristics or biometrics. The system would in many ways be similar to the credit bureau model.

Competition of certified vendors would enhance service. In addition, the private firms are much more likely to produce a workable technology in a timely manner than a bureaucratic government contracting process.

How are the records protected?

Protection can be provided by separating the biometric and identity databases and having them connect only when the individual accesses the system for verification by presenting the biometric "key." Protection from unauthorized government and private use of the data bases could be imposed by statute. None of the DHS or SSA data would be provided to the private vendors, who only receive an authorization "tag" or not. Vendors and employers would not know why authorization failed and only the individual could go to SSA or DHS to fix the underlying problem.

What is the Federal Government role in the process?

In addition to law enforcement, the focus of the government would be on cleaning up its existing SSA and DHS databases and assuring that new immigrant and nonimmigrant entries and changes in status are promptly incorporated. The private vendors would "ping" these government databases on a continuous basis to assure that current employment authorization status is always tagged to a secure identity.

What are the liabilities for employers that follow the proper procedure?

Employers who use SEEVS would be provided a safe harbor and would not be subject to technical, intent to hire or national origin discrimination charges if the employer used the system and made his/her hiring decisions consistent with information they received through the system. Employers participating in this system would be deemed to be in compliance absent a showing of bad faith.

Employers wishing to remain in the simple EEVS based on the Basic Pilot would be subject to the current fine and penalty structure. In addition, enforcement would be re-focused on employers who make no attempt to comply at all. It is likely that such employers are violating many other employment and tax laws, making them prime targets for enforcement.

Does the SEEVS system require a new biometric Social Security card?

No. A new biometric Social Security card would cost billions of dollars to create, foster visions of a national database and ID card, and would tax the current capabilities of the Social Security system. Individuals have all of the information they need to make the SEEVS system work, their biometric traits. Finally, as has been demonstrated before, government-issued identity and work authorization cards eventually can be counterfeited by those who want to circumvent the system.

For more information, visit www.legal-workforce.org

JOINT STATEMENT OF THE AIR CONDITIONING CONTRACTORS OF AMERICA, THE ASSOCIATED BUILDERS AND CONTRACTORS, THE ASSOCIATED GENERAL CONTRACTORS, THE MASON CONTRACTORS ASSOCIATION OF AMERICA, THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ROOFING CONTRACTORS ASSOCIATION, THE NATIONAL UTILITY CONTRACTORS ASSOCIATION, AND THE PLUMBING-HEATING-COOLING CONTRACTORS—NATIONAL ASSOCIATION

Joint Statement for the Record

U.S. House of Representatives
House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law

"Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System"

April 26, 2007

Submitted on behalf of

Air Conditioning Contractors of America
Associated Builders and Contractors
Associated General Contractors
Mason Contractors Association of America
National Association of Home Builders
National Roofing Contractors Association
National Utility Contractors Association
Plumbing-Heating-Cooling Contractors – National Association

On behalf of the aforementioned associations, we appreciate the opportunity to submit the following statement for the official record. We would like to thank Chairwoman Lofgren , Ranking Member King and members of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law for holding today's hearing on "Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System."

For the past decade, comprehensive reform of U.S. immigration laws has been a top priority for the construction industry. As Congress has struggled with the proper way to move forward on this very controversial issue, construction employers have been at the forefront calling for reforms to not only the employer verification and enforcement system, but also border security measures, interior enforcement, a future flow immigrant system, and addressing the issue of how to respond to the 11-12 million undocumented immigrants who are currently in the United States. While we are firmly committed to a fully comprehensive approach to immigration reform, we fundamentally understand that getting the employer verification and enforcement system right is a primary component of successful reform, because it will impact every U.S. employer, not just those who use immigrant labor. We are encouraged by the subcommittee's dedication to exploring this issue as a part of the larger debate on comprehensive immigration reform and appreciate this opportunity to provide input.

The impact and contributions of the immigrant workforce is nothing new to the construction industry. Throughout the history of the United States, new immigrants have found our industry to be a welcoming place for them to build good careers and gain a foothold in American society. From the Irish, to the Italian, German, Chinese, and now, Hispanic, immigrant populations, the construction industry has been a place where new immigrants to our shores could embark upon the road to the American Dream. In fact, careers in the construction industry traditionally have been one of the quickest paths to entrepreneurship. As such, our industry has been a magnet for those immigrants willing to work hard and pursue the American Dream of owning one's own business.

Inasmuch as the presence of immigrant workers is not a new phenomenon for our industry, it is also not a dwindling one. According to a study released by the Pew Hispanic Center on March 7, 2007, Latinos accounted for 36.7 percent of the 2006 U.S. employment growth. The same study noted that employment in the construction industry grew by 559,000 workers in 2006, and that Hispanic workers, mostly foreign born, were responsible for nearly two-thirds of the increase in industry employment. In total, the construction industry employed 2.9 million Hispanic workers in 2006. As the native U.S. population continues to move away from jobs involving manual labor, to more service-oriented jobs, and as our population continues to age and move out of the workforce, we have found it increasingly difficult to find the workers we need to continue meeting the construction demands of our growing economy. For this reason, we continue to see the percentages of immigrant workers in our industry increase, and our organizations continue to appreciate and welcome the contributions of immigrant workers. It should also be noted that the average hourly earnings in construction is over $21.00. This is a gain of 5.2% over 12 months and continues the tread of higher wages in the industry.

Undertaking a massive reform of U.S. immigration law is not an easy task, and perhaps one of the most daunting components of it is the creation of a new employer verification and enforcement system. A new system will impact every employer and every worker in the United States. Getting the system right—creating a workable, fair and efficient process—is a complicated task, fraught with the potential for confusing regulations, bloated and languishing bureaucracies, and aggressive, devastating enforcement actions against employers who are legitimately trying to do the right thing. Through our comments here, we hope to share with the Subcommittee some of the most pressing concerns we have regarding the creation of a new system.

Keeping Perspective: Large vs. Small Employers and Key Issues of Concern

Important in any review of employer verification system proposals is the question of large versus small employers. As representatives of an industry that is predominantly comprised of small employers, we are acutely concerned with whether a new verification system will be workable for a small business, and whether the enforcement of the new system will be fair to them. Small employers, especially in our industry, typically do not have human resources (HR) departments, and they do not have HR staff. Often in our industry, companies do not have dedicated offices; instead, business owners do their books at their kitchen tables and operate their day-to-day business over a cell phone, or even out of their pickup trucks or vans. We regularly find that our smaller members do not have frequent or common access to a computer—nevermind high speed internet access—and frankly, in many instances we still have problems contacting some of our members through the use of fax machines. A new employer verification system must be workable not only for the Fortune 100 companies in the U.S., but also for the small employer who might have only three employees, and who thinks they might have an email address but could not tell you what it is, because they have never tried to use it.

Common conversations surrounding the creation of a new verification system often involve the debate over the creation of tamper-proof identification and work authorization cards, and internet-only based access to the system. These conversations are of concern to small employers in our industry, not because we don't support the creation of tamper-proof identification or internet based systems, but because the creation of these things necessarily brings with it problems when trying to address the reality that every U.S. employer will need to be in compliance.

Creating tamper-proof identification is one issue, but the problem of how employers are required to use those IDs is another. Many small employers are unable to afford the cost of expensive card readers, software and high speed internet access. And additionally, in our industry, the ability of employers to use these readers actively is hindered by the fact that, again, many of our employers are not operating on a day-to-day basis at a desk, behind a computer, and in a dedicated office. A new verification system must address these types of issues by ensuring, if nothing else, that a new burdensome, unfunded mandate is not levied on employers requiring them to buy a lot of expensive equipment, and that any new verification system is both internet and phone-based.

"Knowing" Standard

Our organizations strongly believe that any verification system put in place as part of comprehensive immigration reform must maintain the current "knowing" standard. For employers to comply fully with a new system, they must be able to understand easily and clearly their role and obligations. The "knowing" standard, put simply, provides clarity for employers: "knowing" that someone is illegal, or that the employee of one of your subcontractors is illegal, and choosing to do nothing about it, is a violation. Our industries oppose watering down the "knowing" standard to a more subjective standard, such as "reckless disregard," or "reason to know." These concepts are far too broad, far too open to interpretation, and lack clear definition for employers. It is unfair to saddle employers with broadly defined standards that make it impossible for them to know whether they are fully in compliance or will still carry liability—because the determination of their compliance will be made by someone else's definition or interpretation of the situation, rather than a clear rule.

Contractor-Subcontractor Relationships

Our associations strongly oppose creating a pattern of vicarious liability that would make general contractors responsible for the legal status of their subcontractors' employees. The construction industry has a unique perspective on the issue of contractor-subcontractor relationships because almost all business activity is traditionally conducted through contract. However, the issue of contractor and subcontractor liability in the verification system is broad-based, and impacts far more industries than just construction. Any business or industry that contracts with others for services—from cleaning crews, to landscapers, to caterers and equipment maintenance—is impacted by the way in which Congress treats the contractor-subcontractor relationship.

While all of our groups agree that general contractors who knowingly use subcontracting relationships and subcontract labor to violate immigration law should be punished and brought to account for their actions, we also strongly believe that it is fundamentally unfair to create a blanket, direct chain of liability for all contractor-subcontractor relationships. Put simply, it is outrageous and unfair for the federal government to mandate that employer "A" should be held accountable for the behaviors and practices of employer "B"—especially concerning employees that employer "A" does not have the power to hire or fire. Further, such a system would be superfluous and redundant. If all employers are subject to the same verification requirements, why would there be a need to subject employers to potential liability for employees that presumably would have been verified by their direct employer? A mandate from Congress that employers could all be held responsible for the behaviors of other employers could essentially cripple the construction industry, as companies big and small struggle with how to assume massive levels of liability, while still having no power to mitigate that liability. Our associations understand that all U.S. employers will be required to participate in a new verification system, and believe that under such a system, all employers should be held directly accountable for the legal status of their own, direct employees. A system which keeps all employers liable for their own actions and behaviors is not only fair, but will create far less confusion and problems for all employers who are trying to navigate and comply with a new verification system.

Liability for Failures of the System

Our associations fully support the inclusion of safe harbor language for employers who rely on information provided to them by the verification system. Under no circumstances should an employer, who in good faith correctly complied with the new verification system and was provided incorrect information by the system when determining final action on an employee's status, be sued by the former employee, or involved in an enforcement action by the federal government, for relying on that information.

Debarment Provisions

A major concern for our associations is language that seeks to completely change the way the procurement process is administered. There currently exists a well-tested and thorough system in place to handle alleged violations of federal law, including immigration worksite violations. The existing federal debarment process protects the government's proprietary interests; it is not used to punish first time offenders with what is comparable to a corporate death sentence. What is rarely mentioned in the current immigration reform debate is that current Federal Acquisition Regulations (FAR) already grant the government the authority to debar businesses for a wide range of improper conduct, including commissions of a criminal offense, fraud, and immigration violations. Because of the severity of the punishment, the current debarment process includes a ten part test that differentiates habitual bad actors from those who have made a simple mistake.

Both the House and the Senate have made efforts to debar federal contractors and those seeking to become federal contractors for even simple violations of immigration law. These efforts would bypass the structure set up in the current system and totally ignore the current process as well as the ten part test. Should efforts to move forward with this idea succeed, it will have ramifications well beyond immigration law, and would open the floodgates to using the procurement system as an enforcement mechanism for even first time paperwork violations of any federal law. Attempts to bypass the FAR process confuses the purposes of the federal procurement system and distort its mission, which federal procurement officers have long and correctly understood to be limited to protecting the government's proprietary interests.

Eligible Documents and Document Retention

Under the current I-9 system, employers are required to accept up to 27 different forms of identification as proof of identification and work eligibility in the U.S. Technically, an employer who requests documents from an applicant would have to accept a college ID and a social security card as proof of identity and work authorization—even though both documents are easily forged.

One of the main issues faced by employers today is that the rampant counterfeiting of documents puts employers at a disadvantage for being able to ensure that job applicants are truly work authorized. An employer who wonders whether the documents they have been presented are legal is still precluded from asking for more documentation for fear of discrimination lawsuits. As a result of all of the uncertainty and widespread counterfeiting of identity documents—as well as increasing instances of pure identity theft—the construction industry supports limiting the number of eligible documents for proof of work authorization, and the creation of tamper-

resistant documents that will give employers the confidence of knowing that their job applicant is eligible to work in the United States.

Additionally, our industries support retention of the current "may" requirement in regard to the photocopying and retention of identity documents presented as part of the verification process. Under current law, U.S. employers may choose to retain copies of identity documents for their files, but they are not required to do so. We believe that while it is important to allow employers who choose to copy documents the right to do so, it is overly burdensome to require all employers to copy identity documents. For reasons previously explained, large employers have a greater ability and opportunity to copy, retain, and protect copies of identity documents than do small employers. Most small employers have a lean, if any, administrative staff, and no dedicated human resources department, photocopiers or permanently secure locations to keep these photocopies. We fully support retaining "may," or providing small employers with an exemption from the requirement to photocopy all identity documents.

Verification System Implementation and Timelines

The construction industry believes that any new mandatory employer verification system needs to be phased in over a period of several years, based on size of employer. Clearly, larger employers will have more resources and time to devote to understanding how to navigate a new system, while smaller employers will need time to be trained and to understand this new regulatory requirement. Given that there are over 8 million employers currently in the United States, rapidly pushing all employers into the new system is certain to lead to problems and delays. Our associations believe that phasing in the new system provides benefits that are two-fold: giving smaller employers time to understand their obligations, while also giving the government time to adjust to the influx of employers into the system. Many in Congress as well as around the country want to see critical infrastructure use this system quickly. Our associations support this as well, as long as "critical infrastructure" is clearly defined and sensibly limited to those segments of the economy that are truly "critical". We urge lawmakers to support a gradual multi-year, phase-in period based on size of employer, with larger employers enrolling in the system first, and smaller employers joining in last, once the system has proven that it can work efficiently. Further, the system should incorporate an independent certification process to ensure accuracy and reliability.

Additionally, employers participating in a new verification system should be able to begin the verification process as soon as possible. Because of the complexity and time delay associated with getting final confirmations or non-confirmations, employers should be able to begin the verification process once an applicant has officially accepted an offer of employment, and a start date has been established. In the first few weeks of employment, employers—especially in the construction industry—expend a lot of up-front costs in job and safety training. An employer who begins the verification process at the date of acceptance of the job offer can better manage their training resources, and will know whether they need to hold off on expending those limited resources until a final confirmation comes through.

Additionally, the overall scope of the verification system, and the timeline between initiating a verification and receiving a final answer is of great concern to our industries. While we applaud

proposals that require the Department of Homeland Security to respond to an employer within 24 hours on the first confirmation/non-confirmation, we are concerned with any proposal that seeks to drag out the review process for tentative non-confirmations over the span of several weeks. Employers need to know as quickly and efficiently as possible whether or not their new employees are work authorized and—unless employers are able to pre-verify job applicants prior to offering them the position. A system which requires employers to keep an employee on the payroll for months before finding out that the person was not work authorized is simply over burdensome and a waste of the employer's limited resources. The timeline for the review of tentative non-confirmations must provide for a rapid turnaround so that employers can be confident that their employees are legally allowed to work.

Preemption

Of great concern to our industry, and to all industries, is the proliferation of a patchwork quilt of state and local immigration laws. We strongly believe that any comprehensive immigration reform legislation passed by Congress must clearly and decisively pre-empt all state and local immigration laws, so that employers who operate across state or local jurisdictions, be it in construction or any other industry, can clearly know what their roles and responsibilities are under the law. We support the federal government's authority to enforce federal immigration law and the requirements that flow from that law, and we urge lawmakers to support strong and comprehensive preemption language.

Enforcement

Our associations strongly believe that the enforcement of immigration law should remain under the authority of the Department of Homeland Security, and that the power to investigate labor and employment violations should be kept to areas outside of the employer verification system. The system is being created to establish an efficient and workable method for determining the work authorization of U.S. workers, and its function should be strictly to accomplish that goal. Under current law, employers already have to comply with scores of requirements regarding wages, pensions, health benefits, safety and health requirements, hiring and firing practices and discrimination statutes. The costs and resources involved in complying with all of the current federal laws and regulations are significant enough without adding an additional layer on top of a new verification system that is supposed to serve a basic, functional purpose. We oppose using the verification system to broaden and expand employment protections which are already covered under existing law.

Conclusion

Again, thank you for the opportunity to submit these comments, and we thank you in advance for giving careful consideration to the views of the U.S. construction industry on this important subject. Our associations continue to support a fair, efficient and workable employer verification system that holds every U.S. employer accountable for all of their direct employees, and that vigorously punishes willful and egregious violators of the system. The employer verification and enforcement portion of any comprehensive immigration reform bill is vitally important due to the scope of its impact on all U.S. employers and every U.S. worker, and we are eager to work

with Congress as it crafts a meaningful and permanent solution to the immigration concerns that impact our country today.

PREPARED STATEMENT OF THE ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM WORKING GROUP BY ANGELO I. AMADOR, CO-CHAIR UNITED STATES CHAMBER OF COMMERCE; KELLY KNOTT, CO-CHAIR, ASSOCIATED GENERAL CONTRACTORS OF AMERICA; AND SCOTT VINSON, CO-CHAIR, NATIONAL RETAIL FEDERATION/NATIONAL COUNCIL OF CHINA RESTAURANTS

Statement for the Record

For the

Hearing on Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System

House Judiciary Committee
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

April 26, 2007

Submitted on behalf of

The Electronic Employment Verification System Working Group

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EEVS WORKING GROUP
ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM

THE VOICE OF BUSINESS

Executive Committee

Agriculture Coalition for Immigration Reform	Building Service Contractors Association International	National Chicken Council
Americans for Tax Reform	College and University Professional Association for Human Resources	National Club Association
American Meat Institute	Essential Worker Immigration Coalition	National Multi Housing Council
American Nursery & Landscape Association	Golf Course Superintendents Association of America	National Restaurant Association
American Road & Transportation Builders Association	International Franchise Association	National Roofing Contractors Association
American Seniors Housing Association	International Public Management Association for Human Resources	Printing Industries of America/Graphic Arts Technical Foundation
American Staffing Association	Mason Contractors Association of America	Retail Industry Leaders Association
American Subcontractors Association	National Association of Home Builders	Society of American Florists
Associated Builders and Contractors, Inc.	National Association of Plumbing-Heating-Cooling Contractors	Tree Care Industry Association

The Electronic Employment Verification System (EEVS) Working Group commends the members and leadership of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law for holding today's hearing, and we appreciate the opportunity to submit this written statement for the record.

The EEVS Working Group is a coalition of employer trade associations with a stakeholder interest in the complex issue of employer enforcement of federal laws on employee work eligibility. Some members of EEVS have an interest in the broader issues of comprehensive immigration reform and have for several years advocated for a rational approach to fixing our broken immigration laws that takes into account our economy's need for a ready supply of available workers in order to continue to grow. However, we all agree that proposals under consideration by Congress to require employers to bear a greater share of the burden of enforcing the nation's employment eligibility policies are of paramount importance in the context of broader immigration reform. After all, *every single employer in the United States* will be impacted by the new employee verification mandates Congress enacts as part of comprehensive immigration reform.

We believe it is critical that any new employer mandates on employee work eligibility verification lead to the creation of a system that is workable, simple, reliable, and free to employers, the ultimate end-users of the system. Additionally, such a system must recognize that the existing 6-7 million (even this number is debatable, with estimates ranging from a low of 5.4 million to 8 million) employers in the United States are vastly different in both size and levels of sophistication, and accordingly must accommodate these differences. If not done right, there is great risk of mass confusion among employers and employees alike, which could have significant consequences for every individual worker, as well as the broader economy.

As Congress considers proposals in this area, we would like to outline some of the things we think are vital to the development of a new program.

Safe Harbor

Common sense dictates that any new mandatory employee verification requirement provide employers with a safe harbor from liability for civil or criminal penalties should an employee that the system confirms as work authorized later turn out not to be. Moreover, an employee who is deemed by the system as non-confirmed should not have a cause of action against the employer if it is later determined that the system's determination was erroneous.

Costs to Employers

Regulation is not free. There are costs to both the regulated and the regulator. Policymakers should remember that mandating employer use of an employee verification system will cost employers and employees – both groups constituents – something in terms of time and energy devoted to compliance with the new regulations. EEVS Working Group members are willing to bear the costs of a new system in order to achieve the goals associated with broader immigration reform – assuring a secure border, establishing access to a legal temporary workforce when market forces dictate, and certainty that the existing workforce is legal and authorized – so long as the system is fast, reliable, efficient and easy for employers of all sizes to use. However, every effort should be made to ensure that unnecessary costs, such as needless document retention requirements (not every employer has access to a photocopy machine), are not made part of the system. Moreover, we feel strongly that any outright costs to employers, such as user fees, should be avoided altogether. Enforcement of federal

immigration law is ultimately a government responsibility, and we believe that legislative language should make explicit that no type of fee should be imposed on employers for use of the mandatory system, whatsoever.

Forward Application

EEVS strongly believes that any new employee verification mandates apply only to new employees, and not have retroactive application to an employer's existing workforce. Reverification of the entire workforce, a universe of over a hundred million individuals in the U.S. workforce, would be enormously burdensome for employers, employees, and the federal government itself. In fact, it is unlikely that such a proposition would even be feasible, given the current state of technology and staff levels at the Department of Homeland Security and the Social Security Administration. The existing voluntary Basic Pilot Program, upon which any new mandatory employee verification system will presumably be based, is not currently capable of handling the massive number of system queries that would be generated if reverification of the entire U.S. workforce were required. In fact, Jock Scharfen, deputy director at USCIS testified before this Subcommittee on Tuesday that the current Employment Eligibility Verification Program (formerly Basic Pilot) has a current capacity of only 25 million queries per year. Doubling the system capacity, according to Mr. Scharfen, could be achieved by adding on to the system's computer servers, but even that would not expand its capacity to levels sufficient to accommodate an entire workforce reverification.

Intent Standard

We feel very strongly that the intent required for an employer's liability for hiring or continuing to employ a worker who is not authorized to work must be a *knowing* standard. Current law provides for this standard of intent, which grants employers some degree of certainty with regard to their obligations under the law. An employer, under current law, must be shown to know or have known that the employee in question is not work authorized in order for liability to inhere. There are proposals that have been introduced that would lower this standard to one of *reckless disregard* or some other less clear, more subjective standard of intent required to prove a violation of the law. Such a lower standard of intent is unfair to employers because it lacks the clarity of the current law standard, but also because it would require a degree of vigilance that borders on veering imprudently close to violating an employee's civil rights. For smaller employers lacking sophisticated human resources and/or legal staff, who are not experts in the complexities of employment law, such a subjective *reckless disregard* standard could lead to inadvertent discrimination, and an accompanying explosion in federal civil rights cases.

System Phase-In

The EEVS Working Group feels strongly that any new mandatory verification system should be phased-in over a period of several years. This timeframe would serve two purposes. First, it would allow for the federal bureaucracy in charge of implementing the system to ramp up their current capabilities and to work through any system bugs that will inevitably occur. It would also allow for the federal government to certify, at various stages of the system's rollout, that each phase is in fact working as it should before employers are required to use it. Second, a years-long rollout will allow the employer community adequate time to become aware of their new obligations under the law, and to become educated on how the system works. It is important to bear in mind that this process will be an enormous undertaking, for both the agencies in charge

of implementation and execution, as well as employers. Lawmakers should carefully consider all ramifications, with an eye toward possible unintended consequences.

Size of employer should also be a factor in phasing in the new system. Obviously, smaller employers have fewer resources than larger employers in terms of staff and time, and will need a longer period of time to understand their obligations under the new law. We are pleased that some of the legislative proposals we have seen thus far do take this consideration into account.

Verification Timelines

It is important that policymakers contemplate how such a system will function in practice and the impact that it will have on an employer's day-to-day operations. In some industries, it is not uncommon for hiring decisions to take place in a very short timeframe – in some cases, on the spot, especially in tight labor markets when the economy is expanding and demand for scarce labor is high. EEVS feels strongly that once an employer decides to hire an applicant and the applicant has accepted, that the employer should immediately be allowed to utilize the mandatory verification system so that the employee can begin work as soon as possible. Additionally, the system should provide an immediate response to the employer as to the new employee's work authorization. There will be some employees for whom work eligibility cannot be immediately confirmed, and the system should be given a reasonable period of time to review the query, but this timeframe should not be unduly drawn out. It is important to employers, especially those in the service sector, that employees be identified by the system as either confirmed to work, or not confirmed to work, as quickly as possible, so that disruptions to business operations – after all, that is the practical effect of any new mandatory verification requirement – are minimized. Employers cannot fairly be asked to wait for weeks, all the while bearing the cost of training and carrying a new employee, only to later find out that the employee is not work authorized by the system.

Misplaced Debarment Efforts

Both the House and the Senate have made efforts to debar federal contractors and those seeking to become federal contractors for even simple violations of immigration law without taking note of existing regulations that govern this type of penalty. Current federal acquisition law is thorough and well-tested and is already in place to handle alleged violations of federal law, including immigration violations. The current federal debarment process is designed to protect the government's proprietary interests; it is not used to punish first time offenders with what is comparable to a corporate death sentence. Because of the severity of the punishment, the current debarment process includes a ten part test that differentiates habitual bad actors from those who have made a simple mistake. Proposals in the House and Senate bypass the structure set up in the current procurement system and totally ignore the existing process as well as the ten part test. Should this idea move forward, it will have ramifications well beyond immigration law by totally changing the purpose of the federal procurement system and open the floodgates to its use as an enforcement mechanism for even first time paperwork violations of any federal law.

Contractual Relationships

Every employer should be responsible and required by law to verify their own employees. Congress should not create vicarious liability risk between two or more employers involved in a contractual agreement. Such relationships are between two or more employers who each have

separate employees. This separation must continue to exist. One employer should not be held accountable for another employer's employees when they have no control over the hiring or firing process, unless there is actual knowledge of illegal hiring practices. The House and the Senate have staked out different positions on this matter based on the legislation passed out of each body during the 109th Congress. The final House bill included language that provides a safe harbor for general contractors whose subcontractors hire undocumented employees if they do not have knowledge of such hiring practices.

Enforcement

Enforcement is a critical component to making sure any new verification system works. Those who knowingly circumvent the system undercut the efforts of those businesses who want to do the right thing and follow the law. The EEVS Working Group feels strongly that the new verification system enforcement provisions should be under the authority of the Department of Homeland Security. Our membership feels strongly that this system should not be used as an opportunity to increase the investigative authority of the Department of Labor (DOL). The employment verification system should not be complicated with the addition of more requirements that are not part of the mission of the verification process. In the context of comprehensive immigration reform, the EEVS Working Group believes that all those working in the United States should have the protections established by current law. By mixing the purpose of verification with attempts to bring the DOL into the equation is a recipe for disaster. The verification system is to serve a basic and functional purpose, to verify the work eligibility of individuals. It should not be used to bring in a myriad of other federal laws that have no direct link to this basic purpose. We strongly oppose using the verification system to expand employment and labor protections that already exist in current law.

Preemption

Inaction on immigration reform at the federal level has led to the proliferation of new immigration enforcement laws at the state and local levels. For multi-state employers this phenomenon is creating new complexities as they struggle to comply with an ever-larger array of disparate requirements. EEVS strongly believes immigration policy is a federal responsibility and prerogative and, as such, we urge Congress to preempt all state and local immigration laws as quickly as possible. Employers must know what their responsibilities are under immigration law, and having one federal law will help alleviate any confusion about employers' role under the law.

Expansion of Antidiscrimination Protections

We are aware that some drafts of immigration reform legislation include efforts to expand antidiscrimination protections to classes of workers that may be created under a new temporary worker visa program. Current law already provides protections against civil rights violations, and we believe it is unnecessary to expand these. Again, the law of unintended consequences applies here. Expansion language included in some drafts could lead to the awkward and difficult-to-explain result that a non-citizen, temporary worker could be granted preferential hiring status over either a legal permanent resident or a citizen applicant. In effect, an employer could be sued by a non-citizen temporary worker if he or she is not hired in favor of an applicant who is a citizen. Such an absurd result surely would not be intended by federal lawmakers, but could very well result if this antidiscrimination language is enacted into law.

Conclusion

The EEVS Working Group looks forward to working with you in crafting a rational federal employment verification policy that leads to the creation of a workable, reliable, efficient, and easy-to-use employment verification system that meets regulators' needs without unduly burdening commerce and hampering economic growth. We thank you for this opportunity to submit written testimony for today's hearing and we applaud your diligent efforts.

PREPARED STATEMENT OF THE ESSENTIAL WORKER IMMIGRANT COALITION

EWIC Essential Worker Immigration Coalition

April 26, 2007

The Honorable Zoe Lofgren, Chairwoman
The Honorable Steve King, Ranking Member
House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary

Re: Hearing - April 26, 2007 - "Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System"

Dear Chairwoman Lofgren and Ranking Member King:

We submit this letter today to provide input from the Essential Worker Immigration Coalition ("EWIC") on the important topic of a new Electronic Employment Verification System ("EEVS"). EWIC is a coalition of businesses, trade associations, and other organizations from across the industry spectrum that support reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

EWIC's co-chair, Randel Johnson, is presenting oral and written testimony on behalf of the U.S. Chamber of Commerce. We want to underscore and recognize his comments and reiterate our deep concern for establishing a workable, reliable and efficient EEVS system within the context of comprehensive immigration reform. Attempts to increase and augment the worksite enforcement system outside of comprehensive reform, either through federal legislation, state legislation or administrative rule-making would be harmful to the nation as a whole and put at risk our economic security. A new EEVS system will impact <u>every</u> business in the United States as well as <u>every</u> employee. It is imperative that this new system function properly and be administered in the proper environment.

EWIC believes that a new system must be adequately funded with resources available to implement the program with more than seven million employers. It can not be burdensome to employers from either a cost or an administrative perspective. We believe that the development of an employment eligibility verification system must focus on: who is to be verified; what documents will be accepted; how the system will be phased in; how the system will function and who will certify functionality; how the system will be enforced, and how the Department of Homeland Security will protect good faith actors. Specifically, we must ensure that the new system includes:

- A new verification system that only applies to new hires - no retroactive re-verification;
- A reasonable number of reliable documents to reduce fraud;

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- A reasoned phase-in with independent certification as to accuracy and workability;
- A reasonable definition of "critical infrastructure" employers;
- A "knowing" intent standard for liability for both employers and contractors that have subcontractor relationships;
- A reasonable system response times—at the most 30 days;
- An option for employers to begin the verification process once an offer has been officially accepted;
- A telephonic option, as well as an internet option, should be made available for inquiries;
- Accountability for errors when employers and/or employees are given inaccurate information;
- An investigative and enforcement system that takes into consideration concerns of small business and is fair, with penalties commensurate to the offense including provisions to protect first-time good faith offenders caught in the web of ever-changing federal regulations;
- Recognition that automatic debarment of employers from federal government contracts is not an authority that should be given to DHS and must be handled through current law under the Federal Acquisition Regulations ("FAR"); and
- Clarification that federal jurisdiction preempts state and local laws.

EWIC and its members have studied this issue for many years and have valuable input to provide to legislators on workability. We are prepared to continue to work with all involved to establish a functional, reliable and efficient system.

Respectfully,

Essential Worker Immigration Coalition (EWIC)

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PREPARED STATEMENT OF THE NATIONAL COUNCIL OF LA RAZA

Overview

Madame Chairwoman and members of the Committee, thank you for holding two hearings on the critical issue of employment verification.

The National Council of La Raza (NCLR) – the largest national Hispanic civil rights and advocacy organization in the United States – is a private, nonprofit, nonpartisan, tax-exempt organization established in 1968 to reduce poverty and discrimination and improve opportunities for Hispanic Americans. NCLR is also a convener of the Low-Wage Immigrant Worker Coalition, a nationwide coalition of labor unions, civil rights organizations, immigrant rights organizations, and others concerned with the rights of low-wage immigrant workers in the U.S.

We believe that employment verification is a critical issue that deserves more attention. While most people think of employment verification as merely an immigration enforcement tool, the fact is that provisions of comprehensive immigration reform will have an impact on every single American worker and every American employer. Because of the enormous reach of these provisions, it is critical that they be well designed and perfectly implemented. If not, millions of U.S. workers could be affected and the implications could be dire. For example, eligible workers could be denied employment, and subjected to severe discrimination on the basis of national origin and citizenship status.

As we enter this discussion, it is important to point out that the notion of worker verification is not new to the immigration debate. There is a long history here, a history that we must learn from if we are to design and implement immigration reform that accomplishes its principal goal of dramatically reducing undocumented migration, while accomplishing the equally important goal of fair treatment for immigrants and native-born Americans. It should be abundantly clear that NCLR supports this goal; we have been working for many years on developing a policy agenda around comprehensive immigration reform because we believe firmly that the U.S. can and should have an orderly and fair immigration system in which illegal entry is rare, and our laws are enforceable.

It should also be abundantly clear that NCLR has long been concerned about our nation's ability to implement and administer employer sanctions in a way that would be effective without engendering employment discrimination. The results of the 1986 law, from our perspective, represent the worst possible outcome. Employer sanctions have clearly been ineffective; nevertheless, there is abundant documentation that the policy has caused discrimination on the basis of nationality and citizenship status. When Congress considered the Immigration Reform and Control Act (IRCA) of 1996, it included a sunset provision designed to allow it to reconsider employer sanctions if a widespread pattern of employment discrimination were to result; in 1991 the General Accounting Office found exactly that result, and Congress failed to act in any way on this evidence. In short, the goal of immigration control has not been advanced, and the Latino community among many others has faced employment discrimination which is unique in our nation's civil rights history, as it was caused entirely by a federal law. By any standard, this has been a disastrous outcome.

Given this history, you can imagine the reluctance with which NCLR and our many coalition partners entertained a new debate on immigration reform in which the implementation of employer sanctions was likely to be a factor. Not only must we contend with a history of employment discrimination, but we also have deep reservations about the government's ability to expand the implementation of employer sanctions by implementing an employment verification system. We have consistently pointed out that the data on which such a system would rely is notoriously inaccurate, and the agencies which administer it are notoriously lax in dealing with database problems. There is ample evidence that our concerns are well founded. There is much reason to be concerned that advancing an employer verification system will jeopardize a substantial portion of the U.S. workforce because data inaccuracies will cast doubt on certain workers' ability to do their jobs lawfully, while others will likely be the victims of "defensive hiring." This involves employment practices that weed out people perceived as immigrants, or whose ethnicity suggests that they might be in the category of workers for whom verification is time-consuming and costly because the databases are fraught with errors.

Despite these serious concerns, we have engaged the policy debate on worker verification issues, and have demonstrated our willingness to devise a system which can allow employers to swiftly verify workers' authorization for employment while simultaneously protecting workers against dismissal or discrimination because of bias, ignorance, or faulty data. We do this because we believe there is wide support for creating an enforceable standard for legal employment in the workplace, and that a reliable, fair system could in fact play an important role among a combination of policies aimed at deterring unauthorized immigration, especially if we expand legal and safe avenues for entry. We have deep concerns about the potential for harm to Hispanic and other Americans, but we are prepared to engage this debate because it is essential for our immigration reforms to be effective. It is equally important for them to be fair and to adequately protect all authorized workers; we cannot support a policy unless it meets both of these standards.

Concerns with Current Employment Verification Systems

Employment verification is not an easy solution or a magic bullet to our broken immigration system, though a well-designed and effective system could play an important role in a multipart strategy to control unauthorized migration. However, our experience thus far demonstrates that the nation is very far from being able to implement such a system in the short term. As Congress moves forward with comprehensive immigration reform, inclusive of an expanded Electronic Employment Verification System (EEVS), it must design and implement a program that ensures accuracy of data, privacy of information, protection from misuse, minimal opportunities for discrimination, and maximum opportunities to address system errors.

A. Employment Discrimination Under Employer Sanctions

It is well documented that one result of employer sanctions and worker verification has increased discrimination against persons who look or sound "foreign" or have a "foreign" surname. Some employers demand that certain workers show additional or "better" documents beyond what is required by law – often asking for immigration documents from U.S. citizens whom they perceive to be immigrants. Other employers implement unlawful "citizen only" policies. A

congressionally-mandated Government Accountability Office (GAO) report found a widespread pattern of discrimination resulting solely from employer sanctions, reporting substantial discrimination on the basis of foreign accent or appearance, or preference of certain authorized workers over others. These results were confirmed by nearly a dozen studies conducted locally during the 1990s by local human rights commissions and other organizations which also found significant discrimination resulting from the implementation of employer sanctions.

In addition, there is evidence that some employers have knowingly hired unauthorized workers and used verification or re-verification of employment eligibility as a means to retaliate against workers who complain about labor conditions thereby severely restricting workers' ability to organize or improve labor conditions. Other employers incorrectly re-verify only those workers whom they perceive to be "foreign," further discriminating against and intimidating workers who look ethnic.

While Congress added antidiscrimination provisions to the 1986 law and created an office in the Justice Department to address discrimination claims, these efforts appear to have had modest impact on curbing discrimination resulting from IRCA. Even if such efforts were abundantly effective, it is not acceptable to allow discrimination to result from a federal law while creating mechanisms to address it after the fact. Any new laws or policies dealing with employer sanctions and worksite verification must anticipate potential discriminatory results and include vigorous measures to prevent them.

B. Data and Discrimination Problems with the Basic Pilot

In 1996, through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created electronic employment eligibility pilot programs to allow employers direct access to government databases to verify workers' employment authorization. Currently, approximately 15,000 employers use the Basic Pilot. Participation in the Basic Pilot Program is voluntary, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate in the pilot program. Employers who choose to participate must enter into a memorandum of understanding (MOU) with the Department of Homeland Security (DHS) and, where applicable, the Social Security Association (SSA). Violation of the terms of the MOU is grounds for immediate termination of participation in the pilot, as well as appropriate legal action.

Employers who participate in the Basic Pilot Program must first complete I-9 forms for all employees. The employer then verifies employment eligibility with SSA and DHS. If employment is verified, no further action is needed. If the employer's information does not match the SSA or DHS records, the employer must give the employee a "tentative nonconfirmation notice," and the employee has eight working days to resolve the discrepancy with the SSA and/or DHS.

After nearly a decade of experience with the Basic Pilot Program, it is clear that it has significant flaws which must be addressed if Congress is to pursue the creation of a universal mandatory electronic verification system. The creation of such a system without addressing the

fundamental flaws in the current program is unadvisable and will result in severe negative consequences for immigrant and U.S. workers on a much larger scale than they currently experience.

In 2002, a Basic Pilot evaluation was conducted for the Department of Justice by the Institute for Survey Research at Temple University and Westat. The evaluation report identified several critical problems with the pilot program and concluded that it "is not ready for larger-scale implementation at this time." This conclusion is based on many problems with the current Basic Pilot Program, most notably that the program was seriously hindered by inaccuracies and outdated information in DHS immigration databases. For example, a sizeable number of workers who were found not to have work authorization *were in fact work authorized*, but for a variety of reasons either the Immigration and Naturalization Service (INS) or SSA did not have up-to-date information. The rates of tentative nonconfirmations remain significantly higher for noncitizen workers than for citizen workers because the immigration databases are less reliable than the SSA database. Furthermore, the evaluators found that when employers contacted the INS/DHS and SSA in an attempt to clarify data, these agencies were often not accessible; 39% of employers reported that SSA never or sometimes returned their calls promptly, and 43% reported a similar experience with the INS. The evaluators also discovered that employers engaged in prohibited practices. For example, 45% of employees surveyed who contested a tentative nonconfirmation were subject to pay cuts, delayed job training, and other restrictions on working, and 73% of employees who should have been informed of work authorization problems were not.

Any U.S. worker can fall victim to inaccurate or outdated SSA data. Individuals who fail to report a change of name or change of address, or whose change of address information is not properly or swiftly entered into the database can be denied employment as a result of a nonconfirmation. Furthermore, databases at the INS and its DHS successor are notoriously inaccurate; numerous Government Accountability Office (GAO) studies have highlighted vast problems with the quality of this data and the timeliness with which it is updated.

The evaluators also found that additional problems were the result of employers not complying with the federally-mandated memorandum of understanding they were required to sign as a condition of participating in the Basic Pilot. These participating employers engaged in prohibited employment practices, including pre-employment screening, and would deny workers not only a job but also the opportunity to contest database inaccuracies. They would thus take adverse employment action based on tentative determinations, which penalizes workers while they and the INS work to resolve database errors. In addition, they would fail to inform workers of their rights under the program. No program can function unless those utilizing the program comply with the required procedures.

As a result of these ongoing problems, the report concluded that:

> The evaluation uncovered sufficient problems in the design and implementation of the current program, precluding recommendation of its significant expansion. Some of these problems could become insurmountable if the program were to be expanded dramatically in scope. The question remains whether the program can be modified in a way that will permit it to maintain or enhance its current benefits while overcoming its weaknesses.

We understand that there is an updated version of this evaluation and eagerly await the new information.

Key Areas that Must be Addressed

In the 109th Congress, as part of larger immigration reform bills, both the House and the Senate passed bills creating universal mandatory electronic employment verification systems modeled after the Basic Pilot Program and utilizing the same databases. Given the flaws in the current program and the fact that the government-sanctioned evaluators found unequivocally that the program should not be expanded, we firmly believe that any expansion of the current program without addressing its fundamental flaws would be extremely ill advised and would result in continued negative consequences for immigrant and U.S. workers alike.

The most significant weaknesses of the current Basic Pilot Program include its lack of resources, database inaccuracies, and employer misuse of the system to discriminate against workers. In order to improve the existing Basic Pilot Program, any expansion must include the following:

Comprehensive immigration reform: Perhaps most importantly, serious employment verification can only happen within the context of comprehensive immigration reform. With approximately 12 million undocumented immigrants in the U.S., and approximately nine million of them in the workforce, entire sectors of our economy are dependent on undocumented labor. Millions of employers and workers would be devastated by a sudden increase in employment verification if it is not done within the context of legalizing the existing workforce and creating legal channels for future workers to enter the U.S. Enforcement alone is not an answer.

Phase-in: Any mandatory universal verification system must be implemented incrementally, with vigorous performance evaluations taking place prior to any expansion. Moving forward rapidly without addressing ongoing problems within the system will not help to achieve stated goals and will result in harm to U.S. workers.

Antidiscrimination protections: Necessary antidiscrimination protections include amending the section of the Immigration and Nationality Act (INA) addressing unfair immigration-related employment practices explicitly applied to employment decisions based on the new electronic employment verification system; expanding the categories of immigrants who can file an immigration-related unfair employment practices complaint under the INA; increasing fines for violations of the INA's antidiscrimination provisions; prohibiting employers from using the electronic employment verification system to discriminate against workers; and providing funding for the Office of the Special Counsel for Immigration-Related Unfair Employment Practices to educate employers and employees about antidiscrimination policies.

Data accuracy: Every effort must be made to ensure that the data accessed by employers are accurate and continuously updated. Errors in the data will result in the denial of employment for potentially millions of U.S. citizens and foreign-born workers in the U.S. Innocent mistakes, such as the misspelling of "unusual" names, transposing given names and surnames, and the like, inevitably have a disproportionate impact on ethnic minorities.

Documentation: It is critical that the list of acceptable documents for the system allows every work-authorized worker to provide adequate documentation. If not, countless work-authorized U.S. citizens and legal immigrants will be denied employment because they are unable to provide the required documents. For example, a requirement that U.S. citizens provide either a U.S. passport or a driver's license or state-issued ID that complies with the REAL ID Act is extremely problematic because many U.S. citizens do not hold passports, and the REAL ID Act has not been implemented and no state is currently in compliance with REAL ID. In fact, several states have recently opted out of REAL ID implementation. Even if REAL ID is implemented in some states, many individuals – including U.S. citizens – will have trouble meeting the requirements to obtain a driver's license. It is important that the number of documents that may be used to prove identity and work authorization be adequate to ensure that every work-authorized individual has the ability to comply.

National ID: It is also critical that an EEVS not result in a single work authorization document for all workers, such as a new, tamper- and forgery-resistant Social Security Card. The existence of such a card would be a de facto national ID card. It would result in discrimination and would increase the probability of identity theft and other breaches of privacy. In the current law enforcement context, failure to carry an ID card would likely provide a pretext to disproportionately search, detain, or arrest Latinos and other ethnic minorities who would also be subject to new levels of government discrimination and harassment. In the private sector, minorities would likely be the targets of identity checks by banks, landlords, health care workers, and others. For these reasons, NCLR strongly opposed the mandatory use of a single document for EEVS purposes.

Administrative and judicial review. Human error or an error in the database could have devastating consequences for workers who are denied employment and therefore their financial means of support. NCLR believes that due process protections must be included which require employers to provide employees with information in writing (in a language other than English, if necessary) about their right to contest a response from the EEVS and the procedures for doing so. Furthermore, individuals should be allowed to view their own records and contact the appropriate agency to correct any errors through an expeditious process. NCLR also believes it is critical for workers to have the ability to seek compensation from the government in the case that an error occurs due to faulty data in a government database. This should be done by creating an administrative and judicial review process where individuals can contest findings by DHS and seek compensation for the wages lost where there is an agency error. Attorneys' fees and costs should also be included any EEVS legislation.

Privacy protections: The collection and retention of large amounts of personal information must be accompanied by strong privacy protections. Necessary privacy protections include minimizing the data to be both collected and stored; creating penalties for collecting or maintaining data not authorized in the statute; placing limits on the use of data and making it a felony to use the EEVS data to commit identity fraud, unlawfully obtain employment, or for any other purpose not authorized in the statute; and requiring independent assessments of the privacy and security of the EEVS and its effects on identity fraud or the misuse of personal data.

Enforcement of labor laws: The notion that a mandatory EEVS program is the panacea that will deter employers from hiring undocumented workers is at best deeply flawed when there is no political will for meaningful enforcement of stronger labor and employment laws. The lessons learned over the last 20 years with the current employer sanctions system that have resulted in widespread labor law abuses demonstrate that focusing on labor law enforcement is a critical and indispensable component of any true comprehensive immigration reform legislation.

Resources: Sufficient resources will be necessary to implement and maintain the new EEVS. The current Basic Pilot system includes approximately 15,000 employers. A mandatory expansion to all employers would increase that to seven million employers. An expansion of this magnitude would require upgrades to hardware, software, databases, and other technology, and additional personnel would be needed to handle tentative nonconfirmations and other tasks that must be done by humans. Federal, state, and local governments, as well as private businesses, would all take on the additional costs of screening workers. A Congressional Budget Office (CBO) report estimated that the EEVS system included in S. 2611 as passed by the Senate in May 2006 would cost the federal government approximately $1.6 billion for the 2007-2011 time period. It is critical that any new EEVS program be implemented well, and that the means to provide the resources for implementation must be a key element of any EEVS proposal.

Preemption: It must be clearly stated that any new system created must be used exclusively for the purpose of employment verification by authorized agents. The EEVS and its databases must not be used by entities other than employers to check immigration status for any reason. State and local governments must not require employers to use the system prior to any federal requirement.

Conclusion

NCLR recognizes that worksite verification has become an essential element of the immigration debate, and is prepared to play a constructive role in the policy debate around creating such a system if it can be effective in curtailing unauthorized migration and if it is unlikely to harm immigrant or native-born workers. But we also believe that it would be morally and substantively disastrous to put a worksite verification system in place without addressing serious flaws which have been identified after years of experience. It is clear that large numbers of individuals – including U.S. citizens and legal permanent residents – could face denied or delayed employment due to errors in the data or misuse of the system. It would be unacceptable for the outcome of such a policy to cost any authorized workers their livelihoods and incomes. Congress cannot claim to be unaware of the dangers of advancing such a system, and it must not act without addressing them thoroughly. NCLR looks forward to working with Congress to ensure that as comprehensive immigration moves forward, the EEVS provisions are handled with utmost care and are designed and implemented in a way that protects all U.S. workers.

PREPARED STATEMENT OF TYLER MORAN, EMPLOYMENT POLICY DIRECTOR, NATIONAL IMMIGRATION LAW CENTER

The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment laws is an important resource for immigrant rights coalitions and community groups, as well as national advocacy groups, policymakers, attorneys and legal aid groups, workers' rights advocates, labor unions, government agencies, and the media.

Overview

A nationwide electronic employment verification system (EEVS), coupled with increased enforcement of immigration law, is viewed by many as the key to curtailing the employment of unauthorized workers in the United States. However, an immigration enforcement-only approach, including the employer sanctions created under the Immigration Reform and Control Act (IRCA) of 1986 and the existing EEVS,[1] not only has failed to deter unauthorized employment, but has also had the unintended consequence of allowing employers to use employer sanctions to drive down the wages and working conditions of *all* workers.[2] Unscrupulous employers have the power and ability to threaten workers with deportation for exercising their labor rights and are infrequently held liable for labor law violations. They therefore have a powerful economic incentive to recruit, hire and exploit undocumented workers in order to lower the cost of doing business. This exploitation not only harms the undocumented workers, it harms U.S.-born workers who find their job opportunities, wages and working conditions undermined. It also undercuts any worksite enforcement system because the economic incentive to exploit immigrant workers far exceeds the cost of complying with immigration, labor, or employment laws.[3]

This problem is not solved solely by a legalization program, because even the most generous legalization policy will exclude some workers. For example, the *Comprehensive Immigration Reform Act of 2006* (S. 2611) that passed the Senate would have excluded a large number of workers who did

[1] The current EEVS is the Basic Pilot program which was created under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. It is currently used by approximately 16,000 employers. For more information, see BASIC INFORMATION BRIEF: DHS BASIC PILOT PROGRAM (National Immigration Law Center, March 2007), available at www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf.

[2] *See, for example,* Douglas S. Massey, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES: WHEN LESS IS MORE: BORDER ENFORCEMENT AND UNDOCUMENTED MIGRATION, April 20, 2007, available at http://judiciary.house.gov/media/pdfs/Massey070420.pdf, and Muzaffar Chishti, "Employer Sanctions Against Immigrant Workers," WORKINGUSA: THE JOURNAL OF LABOR AND SOCIETY, March-April 2000, available at https://www.ilw.com/articles/2001,0615-Chishti.shtm.

[3] *See, for example,* Jenny Schulz, "Grappling with a Meaty Issue: IIRIRA's Effect on Immigrants in the Meatpacking Industry," 2 J. GENDER RACE & JUST. 137, 145-46, 1998 (noting employer sanctions are ineffectively enforced because of the "cooperative" approach immigration has adopted toward employers resulting in employers escaping sanctions despite large-scale immigration raids) and Stephanie E. Tanger, "Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking," HARVARD LATINO LAW REVIEW, Vol. 9, 2006, available at http://www.law.harvard.edu/students/orgs/llr/vol9/tanger.pdf.

not meet the bill's requirements.[4] And, depending on how our legal immigration system is reformed, including if backlogs are reduced, it is likely that the powerful U.S. economy will continue to draw undocumented workers to this country. Additionally, it is not just undocumented workers who suffer abuses, but also documented workers.

NILC believes the solution lies in (1) reforming our immigration laws in a comprehensive and realistic way, one that also includes strengthening our labor, employment, and civil rights laws, and (2) vigorously enforcing these laws. We do not support an expansion of the employer sanctions scheme, including an EEVS, because of the way in which it has been used to circumvent and weaken workers' rights. However, because the concept of an EEVS enjoys almost universal support in Congress and therefore will almost certainly be incorporated into any comprehensive immigration reform bill, it is crucial that any proposed EEVS be designed so as to avoid negative consequences for workers — both immigrant and U.S.-born — and so that it includes basic worker protections that are necessary to deter employers from knowingly hiring undocumented workers.

It is in this context that we ask Congress to consider an approach to immigration worksite enforcement that doesn't rely *only* on enforcement of hiring sanctions, but also addresses the way in which immigration law often "trumps" labor law. Without addressing this problem, an enforcement-only policy will be counter-productive because it will not address the economic incentive that employers have to hire undocumented workers by any means possible, including moving into the underground economy, misclassifying workers as independent contractors, and using sham subcontracting arrangements.[5]

Reforms that should be included in any new or expanded worksite enforcement system are summarized below. Specific legislative recommendations relating to these reforms are included in the latter part of this testimony.

(1) **Fix the weaknesses of the Basic Pilot program before it is further expanded**. Numerous entities, including an independent report commissioned by the former Immigration and Naturalization Service, the Government Accountability Office, and the Social Security Administration's Office of the Inspector General, have found that the Basic Pilot program has significant weaknesses, including its reliance on government databases that have unacceptably high error rates and employer misuse of the program to discriminate against workers.[6] These

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[4] *See* "Senate Approves Sweeping but Flawed Immigration Reform Bill: The Comprehensive Immigration Reform Act of 2006 Program," National Immigration Law Center, May 30 2006, www.nilc.org/immlawpolicy/CIR/cir017.htm.

[5] *See* Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," THE WALL STREET JOURNAL CLASSROOM EDITION, April 2005, http://wsjclassroom.com/archive/05apr/econ_underground.htm; Lora Jo Foo, "The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation," YALE LAW JOURNAL, 103 Yale L.J. 2179, May 1994, available at www.wiego.org/papers/FooImmigrantWorkers.pdf.

[6] FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June, 2002), available at www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD; IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYER VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, Aug. 2005) (hereafter "GAO"), available at www.gao.gov/new.items/d05813.pdf; and CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of

weaknesses must be addressed before the system is expanded from its current 16,000 employers to over 7 million employers;

(2) **Ensure that immigration law complements labor law, rather than undermines it.** Under current law, employers seek out and hire undocumented workers to exploit them for their labor, and then threaten them with deportation when they exercise their labor rights. The employer generally pays no penalty for the labor violations. Holding employers liable for these labor law violations, and preventing them from using immigration law to "deport their problem" will reduce the economic incentive to seek out these vulnerable workers; and

(3) **Ensure that all workers have equal rights and remedies under labor and civil rights laws.** Studies conducted after the passage of IRCA found widespread discrimination as a result of employer sanctions.[7] Current antidiscrimination protections under the Immigration and Nationality Act (INA) do not provide all workers equal protection from discriminatory conduct, and not all workers have equal remedies for violations of labor and civil rights laws. Denying all workers the same rights and remedies creates an incentive for employers to seek out those who are most vulnerable.

Problem with current law

The failure of employer sanctions

Immigration enforcement at the worksite as a means to combat unlawful migration began in 1986 with the passage of IRCA, which for the first time made it unlawful for employers to "knowingly" hire unauthorized workers and created civil penalties (known as "employer sanctions") for those who do so. One of the goals of IRCA was to stem the flow of undocumented immigrants to the United States by removing the job magnet. This enforcement-only policy of the last 20 years, however, has been a resounding and obvious failure. Undocumented migration appears to have hit a plateau, but it has done so at an all time high, with 7.2 million unauthorized workers now employed in the U.S., representing almost 5 percent of the civilian labor force.[8]

Critics argue that the number of undocumented immigrants is high because employer sanctions have not been vigorously enforced. The theory is that if there were no employment market, unauthorized workers would not come, and those who are here would leave. However, there is no evidence that these types of measures would dry up the employment market. Rather, to the extent these measures are effective in initially reducing employment opportunities, their main effect has been to make the undocumented workers even more desperate for employment and willing to accept even more marginal, dangerous and exploitative jobs.[9]

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the Inspector General, Social Security Administration, Dec. 2006), (hereafter "SSA"), available at www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm.

[7] The most notable report was issued in 1990 by the General Accounting Office. *See* IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (General Accounting Office, March, 1990), available at http://archive.gao.gov/d24t8/140974.pdf.

[8] Jeffrey S. Passel, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (Pew Hispanic Center, March 2006), available at http://pewhispanic.org/files/reports/61.pdf.

[9] *See, for example,* K. M. Donato, J. Durand and D. S. Massey, "Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act," DEMOGRAPHY 29: 139-158. 1992.

A more desperate workforce has brought the opportunity for abusive employers to exploit their labor.[10] Exploitation of immigrant labor is certainly not a new phenomenon, but IRCA gave employers a powerful new tool to threaten workers with deportation under the guise of complying with the law. Under the employer sanctions system, employers often knowingly hire undocumented immigrants with the intent of exploiting their labor by, for example, placing them in unsafe working conditions, paying them a lower than market wage, or not paying them at all. If workers do file a labor complaint or join with their fellow workers to form a union, the employer will conveniently remember the requirements under IRCA and either threaten workers with deportation or actually call the U.S. Department of Homeland Security (DHS) to have the workers deported.[11] Oftentimes the workers are whisked into detention or out of the country before they have a chance to seek remedies for the labor violations, and employers pay no monetary penalty for their actions.

In addition to deterring undocumented immigration, IRCA also had the goal of protecting the jobs and wages of U.S. workers, and protecting noncitizens from discrimination.[12] These goals have also not been realized, as IRCA has resulted in the depression of wages and working conditions of all workers, and discrimination against those who look and sound "foreign."[13] Undocumented immigrants who are under the constant threat of deportation are forced to accept diminished working conditions. This, in turn, undermines the broader labor market. When some workers are easy to exploit, the conditions of all workers suffer because of "race to the bottom" competition and because opportunities for collective action by workers are undermined.[14] For example, all of the workers at the Smithfield Packing Company in North Carolina suffered when the employer responded to a union campaign by threatening immigrant workers with being arrested by immigration authorities, in addition to committing many other egregious labor violations intended to interfere with the workers' organizing efforts.[15]

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[10] *See, for example,* Tanger, *supra* note 3.

[11] *See, for example,* Kate Bronfenbrenner, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING (Cornell University, submitted to the U.S. Trade Deficit Review Commission, Sept. 6, 2000), available at www.citizenstrade.org/pdf/nafta_uneasy_terrain.pdf; the report on a study that found that employers threatened to refer undocumented workers to the former Immigration and Naturalization Service (INS) in 52 percent of cases where undocumented workers were present in the unit; Judith Browne-Dianis, Jennifer Lai, Marielena Hincapie, and Saket Soni, AND INJUSTICE FOR ALL: WORKERS' LIVES IN THE RECONSTRUCTION OF NEW ORLEANS (Advancement Project, et al, July 2006), available at www.nilc.org/disaster_assistance/workersreport_2006-7-17.pdf; Muzaffar Chishti, *supra* note 2.

[12] The legislative history on protecting U.S. wages states: "It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law." *See* H.R. Rep. No. 99-682. However, this is exactly what has happened. The legislative history on antidiscrimination states the intent that IRCA ameliorate the "inadequacy of current law to protect individuals from the potential act of discrimination that may uniquely arise from the imposition of [employer] sanctions." *See* H.R. Rep. No. 99-682.

[13] *See* Massey, *supra* note 2, and GAO *supra* note 7.

[14] *See, for example.,* Amy M. Traub, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN & EXPAND THE AMERICAN MIDDLE CLASS: 2007 EDITION (Drum Major Institute for Public Policy, 2007), available at http://drummajorinstitute.org/immigration/; Jennifer Gordon, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (Fordham University School of Law, June 21, 2005), available at http://judiciary.house.gov/OversightTestimony.aspx?ID=431.

[15] BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), www.hrw.org/reports/2005/usa0105/.

Despite IRCA's attempt to prevent discrimination, discriminatory hiring practices against those who look or sound "foreign" greatly increased after IRCA. A 1990 Government Accounting Office (now known as the Government Accountability Office) report found that the enactment of employer sanctions created "a serious pattern of discrimination." Overall, the GAO estimated that 19 percent of all employers began one or more discriminatory practices as a result of IRCA's enactment.[16]

Weaknesses of the Basic Pilot Program

The Basic Pilot program[17] was one of three pilot programs implemented by the 1996 immigration law and originally was available only to employers in the six states with the highest immigration populations at the time. The other two pilot programs were eventually discontinued. However, in December 2004 Congress extended the Basic Pilot to all 50 states, and it is now available to employers who voluntarily choose to participate in the program, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate. According to DHS, 16,000 employers are currently enrolled in the program.[18]

The intent of the Basic Pilot program was to toughen worksite enforcement by creating a system that was efficient, secure, and nondiscriminatory.[19] However, after 10 years, the program still has significant weaknesses that undermine its effectiveness. In creating the pilot programs in 1996, Congress required the former Immigration and Naturalization Service (INS) to have an independent evaluation conducted before the pilot programs could be extended. The INS selected two firms, the Institute for Survey Research at Temple University and Westat, to conduct the evaluation. The evaluation report issued in January 2002 identified several critical problems with the Basic Pilot program, including the facts that (1) the government databases on which it relies have unacceptably high error rates and (2) employers misuse the program to discriminate against workers.[20] It is our understanding that Westat has recently concluded an updated evaluation of the program, though the results of that study have yet to be released to the public. It will be important for Congress to review this study to assess if there have been any improvements since 2002, and what problems remain.

DHS and the Government Accountability Office (GAO) also issued reports in 2004 and 2005, respectively, that note the Basic Pilot's problems with data accuracy.[21] Most recently, the Social Security Administration's (SSA's) Office of Inspector General released a report in December 2006.[22]

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[16] GAO, *supra* note 7.

[17] For more information, NILC, *supra* note 1.

[18] Jock Scharfen, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES: PROBLEMS IN THE CURRENT EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT SYSTEM (USCIS, U.S. Dept. of Homeland Security, April 24, 2007), available at http://judiciary.house.gov/media/pdfs/Scharfen070424.pdf.

[19] Conference Report on H.R. 2202, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sept. 24, 1996.

[20] Temple University Institute for Survey Research and Westat, *supra* note 6. For a summary of NILC's concerns, *see* THE BASIC PILOT PROGRAM: NOT A MAGIC BULLET (NILC, Jan. 2007), available at www.nilc.org/immsemplymnt/ircaempverif/basicpilot_nomagicbullet_2007-01-11.pdf.

[21] *See* GAO, *supra* note 6, and REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM (U.S. Citizenship and Immigration Services, June 2004), available at www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C18523%7C11260.

[22] SSA, *supra* note 6.

The SSA report found many of the same problems as were identified in the 2002 report, including database inaccuracies and employer abuse of the program resulting in employment discrimination.

- Database inaccuracies.
  One of the most significant problems identified by the 2002 independent evaluation of the Basic Pilot program was that it was seriously hindered by inaccuracies and outdated information in SSA and INS databases. For example, a sizeable number of workers who were identified as not having work authorization were in fact authorized, but for a variety of reasons the databases did not have up-to-date information on them. While the database accuracy has somewhat improved since 2002 to 92 percent accuracy,[23] that still means that *8 percent* of authorized workers are being wrongly identified the first time around (referred to as a "tentative nonconfirmation"). If the program were to be expanded nationally to accommodate the over 50 million new hires per year,[24] that means that at least *4 million* workers per year may have to follow up with federal agencies to correct their records. We do not know how the new accuracy statistics break down by citizenship status; in 2003, when the accuracy rate for SSA was 88.4 percent, databases were able to automatically verify the status of 99.8 percent of native-born citizens, but *less than 50 percent* of work-authorized noncitizens.[25]

  While most tentative nonconfirmations eventually are favorably resolved, the process often requires costly and time-consuming manual reviews and, for the worker issued the tentative nonconfirmation, unpaid time off from work to follow-up with the appropriate federal agency. Additionally, an unknown number of work-authorized job applicants are not notified of tentative nonconfirmations or are wrongfully terminated by their employer before they even have the opportunity to prove that they are indeed authorized to work in the U.S. (For more information on this problem, see the section below regarding employer misuse of the program).

  Database errors affect all workers. In SSA's December 2006 report, it estimated that 17.8 million of its records contain discrepancies related to name, date of birth, or citizenship status.[26] Inaccuracies exist for a number of reasons, including name changes due to marriage or divorce, data input errors, and delays in data entry. Additionally, SSA does not have in its records the citizenship status of many naturalized citizens, so when they claim U.S. citizenship on their I-9 employment eligibility verification form, these workers receive a tentative nonconfirmation because their information does not match the SSA database.

- Employer misuse of the program
  The 2002 independent evaluation and the 2006 SSA report have also revealed that employers use the Basic Pilot program to engage in prohibited employment practices. For example, the law requires that employers first extend a job offer to a worker and then complete the employment eligibility verification process, including the Basic Pilot procedure. In violation of this requirement, many employers put workers through Basic Pilot *before* extending the job

[23] USCIS, *supra* note 18.

[24] JOB OPENINGS AND LABOR TURNOVER: FEBRUARY 2007 (United States Department of Labor, Bureau of Labor Statistics, February 2007), available at http://www.bls.gov/news.release/pdf/jolts.pdf.

[25] USCIS, *supra* note 21.

[26] SSA, *supra* note 6.

offer, to avoid the potential costs of hiring and training employees who are not eligible to work (a practice known as "pre-screening"). This practice is a problem because most workers who receive a tentative nonconfirmation are, in fact, authorized to work. If workers are not hired because of a tentative nonconfirmation and are never informed that there is a problem with their records, they not only are denied a job but also the opportunity to contest database inaccuracies.

- In 2002, among employees who received a tentative nonconfirmation from the Basic Pilot, 23 percent said that they were *not* offered a job.[27]
- Four years later in 2006, 42 percent of employees surveyed reported that employers used the Basic Pilot to verify their employment authorization *before* hire.[28]
- The 2002 evaluation found that 73 percent of employees who should have been informed of work authorization problems were not notified.[29]
- Additionally, 17 percent of employers admitted that they do not encourage employees to contest nonconfirmations — either because they believe that such action by an employee rarely results in a finding that the worker is in fact work-eligible, or because contesting a tentative nonconfirmation requires too much time.

Employers also take adverse employment action based on tentative nonconfirmations, which penalizes workers while they and the appropriate agency (DHS or SSA) work to resolve database errors. For example, the 2002 independent evaluation found that 45 percent of employees surveyed who contested a tentative nonconfirmation were subject to pay cuts, delayed job training, and other restrictions on working.[30] Some employers also compromised the privacy of workers in various ways, such as by failing to safeguard access to the computer used to maintain the pilot system, e.g., leaving passwords and instructions in plain view for other personnel to potentially access the system and employees' private information.

Although employers are prohibited from engaging in these practices under a memorandum of understanding that they sign with DHS, U.S. Citizenship and Immigration Services officials have told the GAO that their efforts to review and oversee employers' use of the Basic Pilot program have been limited by lack of staff.[31]

Limitations of labor and civil rights law

While all workers, regardless of immigration status, continue to be covered under labor and employment laws, a 2002 Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*,[32] has

[27] Temple University Institute for Survey Research and Westat, *supra* note 6.

[28] CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), available at www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf.

[29] Temple University Institute for Survey Research and Westat, *supra* note 6.

[30] *Id.*

[31] Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP, COMMITTEE ON THE JUDICIARY, U.S. SENATE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, June 2006), available at www.gao.gov/new.items/d06895t.pdf.

[32] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 122 S.Ct. 1275 (2002).

had a dampening effect on immigrant workers' ability to exercise their rights. The *Hoffman* decision found that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to receive back pay wages, the only monetary remedy available under the National Labor Relations Act (NLRA). The *Hoffman* decision was limited to undocumented workers' right to back pay under the NLRA, but employers have attempted to extend the scope of the decision to workers who have filed complaints of discrimination, minimum wage and overtime violations, health and safety violations, and even personal injury cases.[33] A 2004 Human Rights Watch report noted that "[e]mployment law in the wake of *Hoffman Plastic* remains in flux, and immigrant workers' rights remain highly at risk."[34]

The *Hoffman* decision has actually undermined the employer sanctions system by creating a new economic incentive to hire undocumented workers: companies *benefit* if they hire undocumented workers because they perceive such workers as carrying reduced liability for labor law violations.[35] The decision also weakens the position of *authorized* workers confronting abuse or exploitation because their undocumented coworkers have fewer legal avenues for redress of labor violations, including unlawful retaliation, and therefore they have far less incentive to participate in efforts to improve conditions, such as by serving as a witness in a sexual harassment or discrimination claim. Businesses that take advantage of this situation can cut legal corners and thereby gain a competitive advantage over law-abiding employers.

Strong labor law protections for all workers can be meaningfully realized only if the law prohibits employers from using a worker's immigration status to interfere with these rights. The fear and division resulting from the *Hoffman* decision has had an adverse impact on all workers' rights, including the right to organize and bargain collectively.[36] *Hoffman* also has resulted in limiting workers' access to the legal system, particularly since many of the cases being litigated arise from defendants seeking discovery into the plaintiffs' immigration status, which serves to chill and intimidate immigrants from pursuing legal claims.[37]

Just as the Supreme Court's narrow decision in *Hoffman* has had a broader effect on all workers, IRCA's employer sanctions provisions resulted in discrimination against documented workers who

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[33] *See, e.g.*, cases where Hoffman has been expanded to deny immigrant workers basic employment and labor rights: Crespo v. Evergo Corp., N.J. Super. Ct. App. Div. No. A-3687-02T5 (Feb. 9, 2004) (denying victim of pregnancy discrimination back pay, economic damages for emotional distress); Renteria v. Italia Foods Inc., N.D. Ill., No. 092-C-495 (Aug. 21, 2003) (workers fired for filing an overtime pay), *see* www.nilc.org/immsemployment/emprights/emprights067.htm; Majlinger v. Casino Contracting, et al., 2003 N.Y. Misc. LEXIS 1248 (Oct. 1, 2003) (workers' compensation denied to injured worker), *see* www.nilc.org/immsemployment/emprights/emprights072.htm.

[34] *See* Human Rights Watch, *supra* note 15.

[35] *See, for example,* Christopher Ho and Jennifer C. Chang, "Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies For Protecting Undocumented Workers in the Title VII Context and Beyond," HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL, Vol. 22:473, 2005, available at http://www.hofstra.edu/pdf/law_labor_Ho_Chang_vol22no2.pdf.

[36] *id.*

[37] *See* Rivera et al., v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004) (upholding a protective order prohibiting the disclosure of plaintiffs' immigration status noting that "while documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution").

appeared or sounded "foreign." The antidiscrimination protections in section 274B of the INA, which were added by IRCA, were enacted to address that discrimination. The intent of section 274B was to complement Title VII of the Civil Rights Act of 1964 by prohibiting discrimination that was uniquely created by the employer sanctions scheme and to cover employers exempt from Title VII.[38] For example, Title VII only covers national origin discrimination for employers with fifteen or more employees, and it does not prohibit citizenship status discrimination (such as "citizens only" hiring policies).[39] In response to a report by the Task Force on IRCA-Related Discrimination, section 274B was amended in 1990 to also protect against "document abuse."[40] The new provision prohibits an employer from requesting more or different documents from a worker than are required to complete the Form I-9 or from rejecting documents provided by the employee that reasonably appear to be genuine. Document abuse is the most common type of immigration-related unfair employment practice.

While the INA's antidiscrimination protections have been critical in protecting thousands of workers from discrimination, tens of thousands more workers are excluded from its protections and remedies because of the law's limitations. For example, in order to file a national origin or citizenship discrimination charge under 274B, a worker must be a "protected individual," which under current law is defined as including U.S. citizens and nationals, asylees, and refugees. It also includes lawful permanent residents (LPRs), but only those who are not yet eligible for naturalization and those who file for naturalization within six months of eligibility. All other employment-authorized workers are excluded. Additionally, while employers are prohibited from discriminating at the time of hiring, the law allows these same employers to discriminate against workers in the terms and conditions of employment, including workplace harassment, based upon citizenship/immigration status.

Unlike Title VII, which prohibits discrimination based on race or national origin in the hiring and firing stages, as well as in the terms and conditions of employment, section 274B does not prohibit discrimination based on citizenship with respect to an employee's terms and conditions of employment. The result of section 274B's limitations is that bad-apple employers can issue harder work assignments or pay lower wages to workers based on their citizenship/immigration status. Under existing law, employers may discriminate against documented workers by providing benefits to U.S. citizens and LPRs and denying those same benefits to refugees based upon their immigration status. And because the remedies are more restrictive than those afforded under other civil rights laws, they do not deter employers from engaging in such practices in the future.

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[38] In fact, IRCA's prohibition of national origin discrimination overlaps with the national origin jurisdiction of the Equal Employment Opportunity Commission (EEOC) established by Title VII. *See* 8 U.S.C. §1324b(a)(2)(B).

[39] "Since World War II and especially after the civil rights reforms of the 1960s and 70s the guarantee of equal protection under law had been expanded beyond racial and religious bigotry to prohibit discrimination implicating gender, national origin and age. As understood by the Supreme Court, however, in Espinoza v. Farah Mfg., 414 U.S. 86 (1973), discrimination based on citizenship (sometimes also referred to as alienage) was not legislatively prohibited. It was this omission in large part that Section 102 of IRCA was enacted to correct." United States v. Marcel Watch, 1 OCAHO No. 143 (Mar. 22, 1990). The Office of the Chief Administrative Hearing Officer (OCAHO) is part of the Executive Office for Immigration Review and is the agency that adjudicates administrative cases pursuant to sections 274A and 274B of the INA.

[40] REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON IRCA-RELATED DISCRIMINATION (U.S. Department of Justice, September 1990).

Recommendations for improving the electronic employment eligibility verification and worksite enforcement system

1. **The weaknesses of the Basic Pilot program must be addressed before it is made mandatory.** If the current flaws in the Basic Pilot are not addressed *before* it is expanded, it will prevent authorized workers from obtaining employment, cause certain businesses and industries to move into the unregulated underground cash economy, and create an incentive for employers and workers to circumvent the EEVS by misusing valid or counterfeit documents. Congress should learn from weaknesses of the Basic Pilot program in order to address them in any new EEVS. Without doing so, problems that currently affect only 16,000 employers will be greatly exacerbated when the system is expanded to the over 7 million employers in the country. Specific recommendations include:

   - **Phase-in with objective benchmarks.** Phase-in the EEVS at a reasonable rate, by size of employer, and provide for certification by the comptroller general that it meets requirements regarding database accuracy, low error rates, privacy, and measurable employer compliance with system requirements before implementation and each phase of expansion. Such a phase-in will hold the government accountable for these reasonable and essential outcomes, providing an incentive to invest in proper planning and design features. This provision was included in section 301(c)(11) of the STRIVE Act.[41]

   - **Application only to new hires.** Apply EEVS only to *new* hires, since the circularity in the workplace, with a turnover/separation rate of 40 percent (50-60 million employees) per year, means that eventually most people will be verified by the new system in a relatively timely manner without forcing employers to go through old records and reverify all existing employees. This limitation was included in the STRIVE Act and the Comprehensive Immigration Reform Act of 2006 (S. 2611).[42]

   - **Antidiscrimination protections.** Require EEVS to comply with existing antidiscrimination protections in the INA, and prohibit employers from misusing the system by (1) conducting employment eligibility verification before offering employment; (2) unlawfully reverifying workers' employment eligibility; (3) using it to deny workers employment benefits or otherwise interfere with their labor rights, or to engage in any other unlawful employment practice; (4) taking adverse action against workers whose status

[41] For a summary of the EEVS provisions in the STRIVE Act, *see* EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM IN THE STRIVE ACT OF 2007 (National Immigration Law Center, April 2007), available at www.nilc.org/immsemplymnt/cir/strive_eevs_2007-04-02.pdf.

[42] For a summary of the EEVS provisions in S. 2611, *see* COMPARISON OF EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM PROPOSALS IN THE BORDER PROTECTION, ANTITERRORISM, AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005 (HR 4437) AND THE COMPREHENSIVE IMMIGRATION AND REFORM ACT OF 2006 (S 2611) (National Immigration Law Center, May 2006), available at www.nilc.org/immlawpolicy/CIR/eevs_side-by-side_2006-6-12.pdf. For an analysis of the EEVS provisions in S. 2611, *see* National Immigration Law Center, "Summary and Analysis: The Electronic Employment Eligibility Verification System Proposed by the Senate's Comprehensive Immigration Reform Act of 2006 (S 2611)." IMMIGRANTS' RIGHTS UPDATE, Aug. 17, 2006), available at www.nilc.org/immsemplymnt/ircaempverif/eev001.htm.

cannot initially be confirmed by the EEVS; or (5) selectively excluding certain people from consideration for employment due to the perceived likelihood that additional employment eligibility verification might be required, beyond what is required for other job applicants. Similar provisions were included in section 301(c)(3)(L) of the STRIVE Act and section 305 of S. 2611.

- **Due process protections against erroneous determinations.** Create due process protections that (1) allow workers to review and challenge the accuracy of the data in the EEVS; (2) require employers that participate in the EEVS to notify individuals that any information entered into the EEVS may be used for immigration enforcement; (3) require employers to provide detailed information about an individual's right to contest an EEVS finding, and the procedures for doing so; (4) clarify that an individual's failure to contest an EEVS finding does not constitute "knowledge" that an immigrant is undocumented under the current regulatory definition; and (5) create an administrative and judicial review process to challenge EEVS findings and that provides for remedies such as back pay and attorney's fees if it is determined that a worker was terminated due to DHS error. Similar language was included in sections 301(c)(3)(K), 301(c)(10), 301(c)(12)(A)(i), 301(c)(12)(C)(ii), 301(c)(19) of the STRIVE Act and sections 301(d)(8)(D), 301(d)(8)(E) and 301(d)(10) and (11) of S. 2611.

- **Privacy and identity theft protections.** Create privacy and identity theft protections that protect information stored in the system from misuse and sale or other commercial use; and create civil and criminal penalties for unlawful use of information in the EEVS. This language was included in sections 301(c)(5), 301(c)(8), 301(c)(12)(A)(iv), 301(c)(13), 301(c)(15) of the STRIVE Act and section 301(d)(12) of S. 2611.

- **Studies of and reports on EEVS performance.** Require independent studies and reports to assess the accuracy of the DHS and SSA databases on which the EEVS must rely, the privacy and confidentiality of information in the databases, and whether the EEVS program is being implemented in a nondiscriminatory manner. Required reports should also assess if the EEVS is meeting the needs of both workers and businesses. Similar language was included in section 301(c)(18) of the STRIVE Act and section 301(d)(14) of S. 2611.

- **Workable documentation requirements.** Proposals to further limit which documents are acceptable to establish employees' identity must be flexible enough to recognize the fact that not all work-authorized individuals have the same documents. Under no circumstances should a REAL ID–compliant driver's license or ID card be required. No state is currently in compliance with REAL ID, and indeed seven states thus far (Maine, Idaho, Montana, Washington, Arkansas, Hawaii, and North Dakota) have decided not to implement the law, or placed significant conditions on their participation.[43]

[43] For more information on states that have rejected REAL ID or that have proposals pending, *see* National Immigration Law Center, "Anti-REAL ID Measures Rejected in Five States So Far," IMMIGRANTS' RIGHTS UPDATE, April 25, 2007, available at www.nilc.org/immspbs/DLs/DL036.htm.

- **Only in the context of immigration reform.** Without legalizing the current undocumented population and providing an opportunity for immigrants to lawfully come to the U.S., the new system would start out with the insurmountable handicap of 8 million unauthorized workers and their employers seeking to uncover and exploit the weaknesses inherent in any system.

2. **Ensure that immigration law complements labor law, rather than undermines it.** Under current law, employers seek out and hire undocumented workers to exploit them for their labor, and then threaten them with deportation when they exercise their labor rights. The employer pays no penalty for the labor violations. Workers' rights to make labor claims must be protected, and the government should not take measures that discourage workers from making complaints about health and safety.

   - **Keep workers in U.S. to pursue claims against employers.** Preserve labor law enforcement opportunities by preventing workers from being removed from the country before labor agencies have an opportunity to interview them when labor law violations are discovered during an immigration enforcement action. This will prevent employers from using DHS to whisk them out of the country before the employers are held accountable. DHS internal guidance states that agents must "ensure to the extent possible that any arrested or detained aliens necessary for the prosecution of any violations are not removed from the country without notifying the appropriate law enforcement agency which has jurisdiction over these violations."[44] However, this guidance does not prohibit an immigration enforcement operation in the midst of a labor dispute, nor do all U.S. Immigration and Customs Enforcement (ICE) agents abide by it.
   - **Prevent retaliation for exercising labor rights.** When immigrants have been detained because their employer retaliated against them in the course of a labor dispute, grant them an opportunity to petition for visas and work authorization while they pursue the retaliation claim against that employer. DHS internal guidance states that "[w]hen information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees…."[45] While some regional DHS offices follow this guidance, others do not. When the guidance is not followed, immigrants are removed from the country and the employer suffers no penalty for violating labor law, allowing the employer to then hire a new group of undocumented workers it can exploit.
   - **No masquerading as health or safety personnel.** Stop ICE agents from masquerading as personnel from an agency or organization that protects health or public safety or provides domestic violence services. Doing so undermines the ability of health and public safety agencies to carry out their mission.[46] This provision was included in

[44] *See* section 33.14(h) of the Special Agent Field Manual as of Apr. 28, 2000; formerly cited as Operations Instruction 287.3a.

[45] *Id.*

[46] In 2005, in North Carolina, ICE officers lured immigrant workers to a mandatory health and safety training by posing as Occupational Safety and Health Administration (OSHA) personnel. The enforcement action in North Carolina resulted in

section 412 of the STRIVE Act.

3. **Ensure that all workers have equal rights and remedies under labor and civil rights laws.** Reports conducted after the passage of IRCA in 1986 found widespread discrimination as a result of employer sanctions.[47] Current labor and civil rights law does not provide all workers equal protection from discriminatory conduct. Not providing *all* workers the same rights and remedies creates an incentive to seek out those who are most vulnerable. Specific recommendations include:

   - **Employers liable regardless of immigration status of worker.** Clarify that an employer that violates labor or employment laws remains liable for back pay or other monetary damages regardless of the worker's immigration status. When certain workers are not eligible for monetary damages, it creates an economic incentive to hire undocumented workers because such workers carry reduced liability for labor law violations.

   - **Nondiscrimination in employment.** Prohibit citizenship and national origin discrimination under section 274B of the INA in all aspects of the employment relationship. The current prohibition is limited to discrimination in hiring, recruitment or firing. This results in employers being able to discriminate against workers who are legal immigrants because of their citizenship status. This provision was included in section 304 of the STRIVE Act.

   - **Protect employment-authorized workers.** Allow *all* employment-authorized workers to file a citizenship or national origin discrimination claim. Current law only protects U.S. citizens and nationals, asylees, refugees, and lawful permanent residents (LPRs) who are not yet eligible for naturalization and those who file for naturalization within six months of eligibility. Section 303 of STRIVE and section 305 of S. 2611 would slightly expand the definition of "protected individual" to also include all LPRs, immigrants granted temporary protected status, immigrants granted parole, and nonimmigrants admitted under the new H-2C program.

   - **More reasonable rules for combating immigration-related unfair labor practices.** Reform the rules governing unfair immigration-related labor practices by: (1) extending the time that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has in which to file a complaint from 180 days to 2 years; (2) permitting back pay as a remedy; (3) giving administrative law judges the discretion to award other appropriate remedies that are available under other civil rights laws; (4) eliminating the provision requiring workers to prove that the employer "intended" to discriminate against them; and (5) increasing the fines for employers who are found to violate the law. These provisions were included in section 304 of the STRIVE Act.

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the detention of undocumented, documented and U.S. citizen workers, seriously compromising the ability of OSHA to protect all workers.

[47] GAO, *supra* note 7.

Conclusion

An enforcement-only approach (as embodied by a mandatory EEVS and misplaced reliance on increased immigration worksite enforcement) will never solve the problem of unauthorized employment. If anything, the lessons of IRCA have taught us that an enforcement-only approach actually creates incentives for employers to hire unauthorized workers. If Congress is serious about addressing this issue, it must be willing to consider an approach to worksite enforcement that does not rely *only* on enforcement of hiring sanctions, but also addresses (1) the weaknesses of the current Basic Pilot program; (2) the way in which immigration law often "trumps" labor law; and (3) the fact that currently all workers are not subject to the same labor and civil rights protections. If Congress does not address these issues, unscrupulous employers will continue to have a financial incentive to hire and exploit undocumented workers, legitimate employers will be placed at a competitive disadvantage, and both documented and undocumented workers will be increasingly subject to workplace abuses.