



### ***House Bill 4969: Position Report***

House Bill 4969 would require Michigan employers to register and participate in the federal E-Verify program when hiring employees; this is cause for concern. The ACLU of Michigan is sensitive to the very real economic difficulties that the state of Michigan is experiencing, and we support effective local measures to alleviate these hardships. HB 4946, however, is not such a measure. As described in detail below, E-Verify databases are riddled with errors that erroneously will prevent numerous innocent Americans from working and greatly diminish employee privacy by making personal information vulnerable to theft and misuse. During this period of economic hardship, the last thing we need is for our local governments to pass legislation that will make it even more difficult for Americans to work.

The purpose of House Bill 4969 is to increase the economic vitality of Michigan and its documented workforce. Yet, relying on E-Verify will actually increase the costs to our local businesses and prevent Americans the opportunity to earn a decent living.

Mandatory employment eligibility verification systems put undue costs on business of all sizes, as they force business owners to take valuable resources away from vital issues like productivity and revenue. As a recent *Wall Street Journal* editorial opposing the use of the deeply flawed E-Verify correctly emphasized, "the last thing employers need now is more bureaucratic red tape." See <http://online.wsj.com/article/SB123414293730761905.html>.

In June of 2007, the Government Accountability Office explained that E-Verify still "is vulnerable to employer fraud that diminishes its effectiveness and misuse that adversely affects employees . . . such as limiting work assignments or pay while employees are undergoing the verification process." These problems have been highlighted since 2002, yet they remain unresolved. See "GAO Testimony on Employment Eligibility Verification", available at <http://www.gao.gov/new.items/d07924t.pdf> and <http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=564>.

Moreover, experts on both sides of the political spectrum agree that E-Verify is not an effective way to curb the hiring of illegal aliens. Again, the *Wall Street Journal* recently noted, "[t]he program is plagued by serious problems that include misidentifying U.S. citizens as not authorized for employment." Indeed, a 2007 independent study of E-Verify, commissioned by the Department of Homeland Security itself, concluded that "the data based used for verification is still not sufficiently up to date to meet the requirements for accurate verification." The Social Security Administration, on whose files E-Verify relies, recently reported that 17.8 million of its files contain incorrect information, 12.7 million of which concern U.S. citizens.

These numbers make clear that HB4969 will only do harm to our American workforce while failing to achieve its desired goal of enforcing immigration policy and increasing our economy. At a time when our economy is under duress, we should be way of any initiative that would compound the struggles of our American workforce.

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# Facts About Basic Pilot/E-Verify

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## ■ What is the Basic Pilot/E-Verify program?

Basic Pilot/E-Verify is a voluntary, Internet-based program created in 1997 that supplements the I-9 employment eligibility verification process and allows employers to electronically verify U.S. citizen and noncitizen employees' employment eligibility with the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA).<sup>1</sup>

## ■ How does Basic Pilot/E-Verify work?

A participating employer first enters into a memorandum of understanding (MOU) with DHS and SSA regarding their use of the program to verify the employment eligibility of all newly hired employees. Once a worker is hired, the employer completes an I-9 form to verify the worker's employment eligibility, as is required under current law. The employer then enters the worker's personal identification information from the I-9, such as name, date of birth, citizenship or immigration status, and Social Security number, into a form on the Basic Pilot/E-Verify website, whereupon the information is electronically compared to information in DHS and SSA databases. The system then either confirms to the employer that the worker is employment-eligible or it issues a "tentative nonconfirmation" (TNC) notice indicating that the databases cannot immediately confirm that the worker is employment-eligible. If the employer receives a TNC regarding the worker, the worker has only eight federal working days from the issuance of the TNC to contest the finding with SSA or DHS. If a worker does not contest the finding, the TNC becomes final and the employer must terminate the employee or risk being found in violation of immigration laws.

## ■ How does Basic Pilot/E-Verify change the current I-9 employment eligibility verification process?

The program modifies the existing I-9 process in two distinct ways. Although employers must still complete an I-9 form for each newly-hired employee within three business days of the date employment begins (as required under current law), they must also comply with the following:

- Employers can accept a document listed in the I-9 form's "List B" as proof of a worker's *identity*, but only if the document contains a photograph. The worker can still choose whether to present one document from "List A" — establishing *both identity and employment eligibility* — or to present one "List B" document to establish *identity* and one "List C" document to establish *employment eligibility*.

<sup>1</sup> All employers are required to verify employees' work eligibility using a government form called "Form I-9, Employment Eligibility Verification," or the "I-9 form." To enable employers to complete the form, workers are required to present documents proving their identity and employment eligibility. A copy of the I-9 form can be found on the U.S. Citizenship and Immigration Services (USCIS) website, at [www.uscis.gov/files/form/I-9.pdf](http://www.uscis.gov/files/form/I-9.pdf). For more information on Basic Pilot/E-Verify, see *Basic Information Brief: DHS Basic Pilot/E-Verify Program* (NILC, Mar. 2008), [www.nilc.org/immsemplymnt/ircaempverif/e-verify\\_infobrief\\_2008-03-13.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf).



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- If a worker presents an employment authorization document (EAD or I-766) or permanent resident card (“green card” or I-551), as part of complying with Basic Pilot/E-Verify’s photo screening tool requirements the employer must make a photocopy of the document and retain it along with the completed I-9 form. This requirement is specific to using Basic Pilot/E-Verify, since employers administering the traditional I-9 process are not required to make or keep copies of documents presented by employees.

## ■ What is the photo screening tool?

The photo screening tool (PST) is a limited feature that allows an employer to compare a newly hired worker’s EAD or permanent resident card to the image of the card stored in DHS’s database. The PST may be used only *after* Basic Pilot/E-Verify confirms the worker’s employment eligibility (i.e., after any TNC from SSA or U.S. Citizenship and Immigration Services is resolved) and only if the worker attests to being a lawful permanent resident or authorized to work in the U.S. *and*, on his or her own initiative, presents a newer version of the permanent resident card (I-551) or EAD (I-766).<sup>2</sup> The PST does not currently have the capacity to verify the authenticity of older green cards, older EAD cards, or any of the other identification documents that an employee may present when completing the I-9 process. If the employer determines that the PST photo image does not “reasonably” appear to match the card presented by the worker, or if the employer cannot make a determination, DHS will issue either a TNC or review the case for confirmation. Workers have three federal working days from the issuance of the TNC to resolve the issue with DHS. If the worker does not resolve the issue within this timeframe, the TNC becomes final and the employer must dismiss the employee or risk being found in violation of immigration laws.

Basic Pilot/E-Verify’s PST feature raises concerns about the potential for increased discrimination against employment-eligible immigrants, since currently non-U.S. citizen workers are the only workers to whom the tool may be applied. For example, because the I-766 EAD and the I-551 permanent resident card are the only documents that the PST can screen, the program may encourage employers to demand that workers show them one of those two documents, which is a violation of the Immigration and Nationality Act’s antidiscrimination “document abuse” provisions. These provisions prohibit employers from demanding specific documents from workers, or more documents than the law requires, to prove their employment eligibility.<sup>3</sup> The addition of another employment eligibility verification step that applies only to noncitizens also provides employers an added incentive to avoid hiring authorized immigrants, because it increases the amount of burden and expense involved in hiring them.

## ■ What rights do workers have under Basic Pilot/E-Verify?

Workers have the right (1) to be required to complete an I-9 form only after being extended an offer of employment and before being electronically verified, (2) to choose which documents (from the I-9 form’s Lists A, B, and C) they will present to an employer, (3) not to comply with requests to present additional documents beyond what the I-9 process legally requires, (4) to know whether the employer uses Basic Pilot/E-Verify, (5) to know if a TNC has been issued, (6) to be provided eight federal work days after a TNC is issued/received in which to contest it, (7) not to be dismissed from employment or subject to retaliatory or adverse action while

<sup>2</sup> As explained below, an employer may not require an employee to present a specific document, nor to present more documents than are required by law.

<sup>3</sup> See 8 U.S.C. § 1324b(a)(6).

contesting a TNC; and (8) not to be subject to an arbitrary reverification after the initial verification.<sup>4</sup>

## ■ How does Basic Pilot/E-Verify affect workers?

While Basic Pilot/E-Verify is currently voluntary and used by only approximately 80,000 employers nationwide, it potentially affects every single worker in the United States, U.S. citizen and noncitizen alike. Numerous proposals are pending in Congress to require electronic employment eligibility verification of all 153 million workers in our civilian labor force, and a few states already require all or some employers to use Basic Pilot/E-Verify.

The two most significant problems with the program include (1) inaccurate and outdated information in the DHS and SSA databases that incorrectly identifies eligible workers as not eligible for employment and (2) misuse of the program by employers. The high TNC rate for employment-eligible foreign-born workers is of significant concern — particularly because the studies have found that employers take adverse action against workers who receive TNCs. In addition, SSA estimates that a mandatory system would misidentify at least 2.5 million U.S. citizen and employment-eligible noncitizen workers per year as being unauthorized to work. That translates into misidentification of 11,000 U.S. citizens and employment-eligible noncitizens per working day and an average of over 6,000 affected workers per congressional district per year.

## ■ Are businesses required to use Basic Pilot/E-Verify?

Use of the program by private businesses is still voluntary, with the following exceptions:

- Employers that have been previously convicted of hiring unauthorized workers or engaging in unfair immigration-related employment practices.
- Employers that do business in states that require them to use the program.<sup>5</sup>

An executive order and proposed federal regulations also mandate that federal government contractors and vendors use Basic Pilot/E-Verify.<sup>6</sup> Currently, more than 200,000 companies have contracts with or supply services to the federal government. Once the regulations are finalized, federal contractors that do not use Basic Pilot/E-Verify could lose their contracts due to nonperformance — i.e., failure to fulfill their obligations under the contract.

## ■ What are the major concerns with Basic Pilot/E-Verify?

Opposition to mandatory use of the program is grounded in concerns over inaccurate databases that deprive lawful workers of jobs, discrimination against workers by employers, weak technology and infrastructure that do not protect personal data from cyber threats and that threaten privacy rights, and increased administrative burdens for DHS and SSA. For example:

- The most recent independent evaluation of the program commissioned by DHS found that “the database used for verification is still not sufficiently up to date to meet the [Illegal

<sup>4</sup> For more information on this issue, see *Know Your Rights about Basic Pilot/E-Verify* (NILC, April 2008), [www.nilc.org/immsemplymnt/ircaempverif/E-Verify-KYRs\\_2008-05-08.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/E-Verify-KYRs_2008-05-08.pdf).

<sup>5</sup> NILC currently is compiling a comprehensive list of states and localities that require employers to use Basic Pilot/E-Verify.

<sup>6</sup> Executive Order 13465 of June 6, 2008, Amending Executive Order 12989, as Amended, 73 FR 33285–87 (June 11, 2008), and 73 FR 33374–81 (June 12, 2008). For more information about the proposed regulations, see *Not Ready for Prime Time and Not a Magic Bullet: New Executive Order and Proposed Rule Require Federal Contractors to Use Basic Pilot/E-Verify* (NILC, July 2008), [www.nilc.org/immsemplymnt/ircaempverif/e-verify-exec-order-TPs-2008-07-15.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-exec-order-TPs-2008-07-15.pdf).

Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification.”<sup>7</sup>

- Two separate reports from 2006 and 2007 found that employers do not follow program rules and that the rate of employer noncompliance is substantial.<sup>8</sup>
- Some employers that use the program engage in unlawful and prohibited practices, including preemployment screening, adverse employment action based on TNC notices, failure to inform workers of their rights under the program, and reverifying the employment eligibility of existing employees without a legitimate or lawful reason.
- DHS has a consistent history of mishandling the huge volume of data for which it is responsible, a history that includes shredding unprocessed files (90,000 in 2002), throwing away unprocessed files (2005), and losing records (110,000 files in 2006). In addition, because DHS’s record-keeping system remains largely paper-based, databases are not updated in real time to accurately reflect, for example, the granting of work authorization to individual immigrants.
- Anyone posing as an employer can access data used by Basic Pilot/E-Verify. DHS does not screen those who enroll in the program to verify that they are bona fide employers.
- If Basic Pilot/E-Verify or some similar system is made mandatory, it will result in 3.6 million extra visits or calls to SSA field offices per year by workers seeking to resolve TNCs. SSA already faces major backlogs in processing Social Security benefits claims; as of January 2008, 751,676 disability claims were pending, with an average wait time of 499 days for resolving each claim.

## ■ What groups oppose a mandatory Basic Pilot/E-Verify?

Many diverse groups recognize that the existing program is deeply flawed and unworkable for employers and workers. There is also widespread recognition that proposals in Congress which seek to make the program mandatory fail to adequately address concerns about it that have not been substantially addressed in the 10 years since the program was first piloted. Groups that oppose the mandatory use of the program in its current state include:

- National labor groups and unions.
- Business associations.
- Computer technology experts.
- Scholars from conservative think tanks.
- Due process and constitutional rights advocates.
- Faith-based and social justice organizations.

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<sup>7</sup> *Findings of the Web Basic Pilot Evaluation* (report submitted to DHS by Westat, Sept. 2007) (hereinafter “Westat 2007”), [www.nilc.org/immsemplymnt/ircaempverif/WebBasicPilotRprtSept2007.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/WebBasicPilotRprtSept2007.pdf), p. xxi.

<sup>8</sup> Westat 2007, and *Interim Findings of the Web-Based Basic Pilot Evaluation* (report submitted to DHS by Westat, Dec. 2006), [www.nilc.org/immsemplymnt/ircaempverif/westatinterimreport\\_webbasicpilot\\_2006-12.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/westatinterimreport_webbasicpilot_2006-12.pdf).

# Why the Federal Rule Requiring Government Contractors to Use E-Verify Is Bad Public Policy

JULY 15, 2009

On November 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a final rule that amends the Federal Acquisition Regulation (FAR) by requiring certain federal agency contracts and subcontracts to include a provision mandating use of the E-Verify program.<sup>1</sup> E-Verify is a voluntary, Internet-based program that allows employers to electronically verify information a worker presents by accessing data in databases maintained by the Social Security Administration (SSA) and the U.S. Department of Homeland Security (DHS). If the final rule is implemented, it will affect 3.8 million workers in the first year. The final rule initially was scheduled to take effect on January 15, 2009; however, on December 23, 2008, business groups filed a lawsuit in the U.S. District Court for Maryland, asking for injunctive relief. Subsequently, the litigation was put on hold. On July 8, 2009, DHS announced that, “after a careful review, the Administration will push ahead with full implementation of the rule” beginning September 8, 2009.<sup>2</sup> On July 13, 2009, the court announced that it would lift the stay on the litigation, so it will now proceed.

If implemented, the FAR will have a devastating impact on workers and the already struggling economy. Specifically—

## ■ Requiring businesses to enroll in E-Verify as a condition of receiving government contracts would massively expand a program that is still not ready for prime time.

- As of July 2009, more than 134,000 employers were enrolled in E-Verify,<sup>3</sup> and the new rule would require an additional 168,324 contractors and subcontractors to enroll. This would represent a 120 percent increase in utilization of the program.
- Currently, only slightly fewer than 2 percent of the approximately 7.4 million employers in the U.S. use the program, and only half are “active users,” meaning they have used the program once in the last fiscal year.<sup>4</sup>
- The program simply is not prepared to handle this increase in demand, and it won’t be until its databases are purged of incorrect and outdated data that misidentify many lawful immigrants and U.S. citizens as not being authorized to work, resulting in employers losing authorized workers.

## ■ Workers and businesses pay a high price for E-Verify database errors.

- SSA has estimated that if E-Verify were to become mandatory and the databases were not improved, SSA database errors alone could result in 3.6 million workers a year being misidentified as not authorized for employment.<sup>5</sup>
- Queries submitted to E-Verify by Intel Corporation in 2008 resulted in slightly over 12 percent of all workers being initially flagged as unauthorized for employment. All of these workers were cleared by E-Verify as work-authorized, but only after “significant investment of time and money” and “lost productivity.”<sup>6</sup>
- The U.S. Citizenship and Immigration Services Ombudsman interviewed a variety of employers in Arizona, where use of E-Verify is mandatory, and found the “concern most frequently identified” is that the notices employers receive when the federal databases



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cannot confirm a worker's employment eligibility are "issued on work-authorized individuals."<sup>7</sup>

■ **Requiring businesses to enroll in E-Verify would impose exorbitant costs at a time when our economy is most vulnerable.**

- An economic analysis commissioned by the U.S. Chamber of Commerce concluded that the net societal costs of the new FAR requirements would be \$10 billion a year.<sup>8</sup>
- Imposing these costs would be particularly unwise now, when the economy is in a severe recession.
- In particular, such costs will have a disproportionate effect on small businesses and their ability to contribute to the economy. In issuing the final rule, the government acknowledged that the rule would impose costs on "nearly every small entity in the Federal contractor base," and it expressly declined to formally certify, under the Regulatory Flexibility Act, that the rule would not have "a significant impact on a substantial number of small entities."<sup>9</sup>

■ **Mandating E-Verify without providing undocumented workers a path to legalizing their status will only drive them and their employers further into the underground economy.**

- Policymakers have made clear that a mandatory electronic employment verification system (EEVS) is a key component in comprehensive immigration reform.
- Over 7 million undocumented workers are employed in the U.S., and many live here with family who are U.S. citizens or lawful permanent residents. These workers are unlikely to part from their families and leave the country merely because E-Verify is expanded.
- Instead, workers and their employers will simply move into the underground economy. The Congressional Budget Office estimated in 2008 that the mandatory EEVS in the Shuler-Tancredo SAVE Act would decrease Social Security trust fund revenue by more than \$22 billion over ten years because it would increase the number of employers and workers who resort to the black market, outside of the tax system.<sup>10</sup>
- *The Arizona Republic* reported that a 2008 Arizona law requiring businesses to use E-Verify has resulted in workers and businesses moving off the books and into the cash economy.<sup>11</sup> This is depriving Arizona of income-tax revenue at the same time the state is facing a \$1.6 billion budget gap.

■ **Employers continue to fail, at a "substantial" rate, to comply with E-Verify program rules, according to a 2007 DHS study.**

- The study found that the rate of employer noncompliance with program rules is "substantial."<sup>12</sup> That employers consistently fail to comply with certain E-Verify rules is a problem that DHS has failed to address since it was first identified in 2002.
- Contrary to program rules, 47 percent of employers submitted workers' data to E-Verify *before* their first day at work; 9.4 percent of employers did not notify workers of an error in their records (a "tentative nonconfirmation") that resulted in E-Verify not being able to confirm them as work-authorized; 7 percent who notified workers did not encourage them to correct the information because, they said, the process of contesting the notice takes too much time; 22 percent of employers restricted work assignments, 16 percent delayed job training, and 2 percent reduced pay based on tentative nonconfirmation notices.<sup>13</sup>
- According to the 2007 study, employees reported that supervisors assumed that all employees who received tentative nonconfirmation findings were unauthorized workers and therefore required them to work longer hours and in poorer conditions.<sup>14</sup>

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<sup>1</sup> The final rule amends 48 CFR Parts 2, 12, 22 and 52, and was published in the Federal Register at 73 FR 67651–705 (Nov. 14, 2008). For a summary of the rule, see [www.nilc.org/immsemplymnt/ircaempverif/e-verify-FAR-summary-2009-07-9.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-FAR-summary-2009-07-9.pdf).

<sup>2</sup> “Secretary Napolitano Strengthens Employment Verification with Administration’s Commitment to E-Verify,” U.S. Dept. of Homeland Security press release, July 8, 2009, [www.dhs.gov/ynews/releases/pr\\_1247063976814.shtm](http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm).

<sup>3</sup> *Id.*

<sup>4</sup> See Richard M. Stana, *Testimony Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Committee on the Judiciary, House of Representatives: Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System* (Government Accountability Office, June 2008, GAO-08-895T), [www.gao.gov/new.items/d08895t.pdf](http://www.gao.gov/new.items/d08895t.pdf), at 10.

<sup>5</sup> *Transcript from Hearing on Employment Eligibility Verification Systems*, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007.

<sup>6</sup> Intel Corporation, “Comments on Proposed Employment Eligibility Regulations Implementing Executive Order 12989 (as amended),” Aug. 8, 2008.

<sup>7</sup> *Observations on the E-Verify Experience in Arizona and Recommended Customer Service Enhancements* (U.S. Department of Homeland Security Office of the Citizenship and Immigration Services Ombudsman, Dec. 22, 2008), [www.dhs.gov/xlibrary/assets/cisomb\\_everify\\_recommendation\\_2008-12-22.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_everify_recommendation_2008-12-22.pdf), emphasis added.

<sup>8</sup> Richard B. Belzer, “Appendix A: Peer Review of Regulatory Impact Analysis: Federal Acquisition Regulation Case 2007-013(Employment Eligibility Verification),” prepared for the Labor, Immigration and Employee Benefits Division of the U.S. Chamber of Commerce, August 2008, <http://tinyurl.com/l6bhf3>, at 1 and 15.

<sup>9</sup> 73 FR 67699 (Nov. 14, 2008).

<sup>10</sup> Letter from Peter R. Orszag, Director, Congressional Budget Office, to John Conyers Jr., Chair, Committee on the Judiciary, U.S. House of Representatives, April 4, 2008.

<sup>11</sup> Daniel Gonzalez, “Illegal Workers Manage to Skirt Ariz. Employer-Sanctions Law: Borrowed Identities, Cash Pay Fuel an Underground Economy,” *The Arizona Republic*, Nov. 30, 2008.

<sup>12</sup> *Findings of the Web-Based Basic Pilot Evaluation* (Westat, Sept. 2007) at xxii, emphasis added.

<sup>13</sup> *Id.* at 71, 76 and 77.

<sup>14</sup> *Id.* at 77.





**Homeland  
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## **OBSERVATIONS ON THE E-VERIFY EXPERIENCE IN ARIZONA & RECOMMENDED CUSTOMER SERVICE ENHANCEMENTS**

**DECEMBER 22, 2008**

*The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.*

### **I. EXECUTIVE SUMMARY**

E-Verify is an Internet-based program that permits registered employers to verify a new hire's legal ability to work in the United States. This report explores how E-Verify has been received by some public and private sector employers who have been required to use it.

E-Verify is currently offered to employers on a voluntary basis nationwide. However, some states, including Arizona, have enacted legislation mandating the use of E-Verify with varying trigger requirements. In Arizona, all private and public sector employers are required to use E-Verify regardless of the number of workers they employ.<sup>1</sup>

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) interviewed a variety of employers in Arizona to gain insights into how E-Verify is working in a universal, mandatory-use environment, and to determine how E-Verify might perform if nationally mandated by immigration reform legislation.

The Ombudsman determined from this study that mid-sized and large employers appear relatively satisfied with the speed and accuracy of E-Verify. Smaller employers, however, expressed varying levels of concern with user-friendliness. Also, confusion remains about the exact timing, and the specific processes, that must be followed by employers and employees after E-Verify returns a Tentative Nonconfirmation (TNC) determination. Apart from these operational observations, the Ombudsman found that USCIS outreach and education efforts have been well received by system users, but may not be reaching smaller sized employers that represent 50 percent of the existing private U.S. payroll.<sup>2</sup>

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<sup>1</sup> The Citizenship and Immigration Services Ombudsman (Ombudsman) selected Arizona as an appropriate venue for study as it became the first state to mandate E-Verify usage state-wide beginning January 1, 2008. See "Legal Arizona Workers Act" (HB 2779) enacted July 2, 2007.

<sup>2</sup> Small Business Administration, Office of Advocacy, Frequently Asked Questions (updated Sept. 2008), <http://www.sba.gov/advo/stats/sbfaq.pdf> (accessed Dec. 8, 2008).

The Ombudsman also notes that significant E-Verify system enhancements were put into place in May 2008 which eliminated the issuance of TNC determinations on newly naturalized U.S. citizens and newly arrived immigrants. Another important system enhancement was implemented by the Social Security Administration (SSA) on October 1, 2008 to simplify the verification and correction process when TNCs do occur.

Based on observations and analysis of E-Verify, the Ombudsman recommends that USCIS:

- 1. Simplify the language used in all E-Verify instructions and supporting documentation.**
- 2. Make all registration and operational documents publicly available on-line for review by prospective E-Verify end-users and employees.**
- 3. Ensure its education and outreach efforts reach small business communities.**
- 4. Develop and add a tickler/calendar system into E-Verify capable of issuing timely system prompts to employers to advise them of their next appropriate course of action for each specific open and unresolved TNC.**
- 5. Announce as a stated goal an intention to replace the current Form I-9 process for employers that voluntarily use E-Verify.**

## **II. BACKGROUND**

### **Legislative History**

In 1986, as one component of a broad piece of legislation which provided a legalization process for approximately three million illegal immigrants then present in the United States, Congress included an employment verification requirement in the "Immigration Reform and Control Act of 1986" (IRCA).<sup>3</sup> With the enactment of IRCA, all U.S. employers were required (for the first time) to verify that any newly hired employee is legally authorized to work in the United States, and to maintain proof that they verified the work eligibility of the new hire by completing and maintaining certain records (i.e., I-9 Employment Eligibility Forms). Ten years later, Congress authorized the Immigration and Naturalization Service (legacy INS) to test several pilot projects to augment and enhance efforts to assist enforcement and compliance with this earlier legislation.<sup>4</sup> The final funded pilot, an electronic employment eligibility verification system connected to government databases, first referred to as the "Basic Pilot," was re-branded by USCIS in 2007 as E-Verify.

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<sup>3</sup> The "Immigration Reform and Control Act of 1986" (IRCA), also known as the "Simpson-Mazzoli Act," is found at Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. §§ 1324a-d (Nov. 6, 1986).

<sup>4</sup> Authority for the E-Verify program is found in Title IV, Subtitle A of the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, as codified in scattered sections of the U.S. Code (Sept. 30, 1996). Among other things, this legislation required legacy INS and the SSA co-develop and pilot three new employment verification systems for the express purpose of improving IRCA compliance and enforcement. Participation in these programs was made voluntary and they were piloted in five states.

E-Verify was developed and remains the product of a partnership between USCIS and SSA. E-Verify presently draws upon information stored in various Department of Homeland Security (DHS) and SSA databases to determine an individual's employment eligibility status. To date, participation in the E-Verify program remains largely voluntary.

Congress appropriated \$100 million for continued funding of E-Verify within the DHS' FY 2009 budget, but E-Verify's authorization as a pilot expires on March 6, 2009, absent congressional action.<sup>5</sup>

### **Current Employer Usage and Operational Statistics**

As of December 4, 2008, more than 96,349 employers have registered to use E-Verify.<sup>6</sup> This figure includes voluntary users and those obligated to participate pursuant to state law.<sup>7</sup> It excludes an estimated 168,000 federal contractors and subcontractors that will be added to E-Verify beginning in January 2009 when the final rule amending the existing Federal Acquisition Regulation becomes effective.<sup>8</sup>

E-Verify usage, as measured by the number of inquiries, is likewise substantial. During fiscal year 2008, more than 6.6 million employment verification queries were run by employers.<sup>9</sup>

According to statistics provided to USCIS by Westat (an independent research group), just over 96 percent of E-Verify queries are processed within twenty-four hours as work authorized.<sup>10</sup> For a variety of reasons, the other four percent are not so quickly determinable. Typically, an underlying mismatch exists between the specific employee information entered into E-Verify by the employer and the

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<sup>5</sup> A short extension of E-Verify to move its sunset date from November 29, 2008 to March 6, 2009 was contained within the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009," Pub. L. No 110-329, 122 Stat. 3574 (Sept. 30, 2008).

<sup>6</sup> Data supplied by USCIS to the Ombudsman (Dec. 5, 2008). According to a 2003 U.S. Census Bureau Report on "County Business Patterns," the United States had 7,254,745 business establishments.

<sup>7</sup> Twelve states now mandate usage of E-Verify for public or private employers, or both. The following list identifies those states, the underlying bill number, and the year of enactment: Arizona (HB 2779/2007 -- all public and private employers), Colorado (HB 1343/2006 -- state contractors), Georgia (SB 529/2006 -- state agencies, state contractors, and subcontractors), Idaho (Executive Order/2006 -- state agencies), Minnesota (Executive Order/2008 -- state agencies, state contractors), Mississippi (SB 2988/2008 -- all public and private employers), Missouri (HB 1549/2008 -- public employers and specified state contractors), North Carolina (SB 1523/2006 -- state agencies), Oklahoma (HB 1804/2007 -- public employers, state contractors, and subcontractors), Rhode Island (Executive Order/2008 -- state agencies and state contractors), South Carolina (HB 4400/2008 -- state and local government employers), and Utah (SB 81/2008 -- public employers). Note that Illinois state law prohibits its employers from using E-Verify until USCIS and SSA can establish that it can make a determination on 99 percent of the Tentative Nonconfirmation notices within three days, but this law has been stayed pending resolution of a DHS initiated suit in U.S. District Court in Illinois.

<sup>8</sup> The estimated number of new federal contractor and subcontractor employers that would be loaded onto the E-Verify system is set forth in the Proposed Rule "FAR Case 2007-013: Employment Eligibility Verification," 73 Fed. Reg. 33374-33381 (June 12, 2008). This proposed rule was made final on publication in the Federal Register on November 14, 2008 (73 Fed. Reg. 67651-67705) and becomes effective on January 15, 2009. With few exceptions, the final rule mandates that all new and existing federal contracts shall contain a provision requiring government contractors (and subcontractors) to use E-Verify to ensure that new hires, and all existing employees who are directly performing federal contract work, are legally authorized to work in the United States.

<sup>9</sup> USCIS Fact Sheet, "USCIS Makes Major Strides During 2008" (Nov. 6, 2008), [http://www.uscis.gov/files/article/2008accomFS\\_3nov08.pdf](http://www.uscis.gov/files/article/2008accomFS_3nov08.pdf).

<sup>10</sup> According to "E-Verify Statistics" (Oct. 23, 2008), [www.uscis.gov](http://www.uscis.gov) (accessed Dec. 19, 2008). See also Westat, "Findings of the Web Basic Pilot Evaluation" (Sept. 2007); Report submitted to the U.S. Department of Homeland Security [www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf](http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf); 73 Fed. Reg. 33374-33381 (June 12, 2008).

employee information stored in a SSA or DHS database. According to Westat, E-Verify has a 99.5 percent accuracy rate for correctly confirming work eligible employees.<sup>11</sup> Also, examination and testing of the E-Verify technology and infrastructure conducted by USCIS in July 2007 suggests that E-Verify is capable of accommodating up to 45,500 new employer registrations daily, and as many as 240 million employee specific inquiries annually, rendering it sufficiently robust for all projected near and mid-term usage scenarios.<sup>12</sup>

### **E-Verify Process Overview**

Employers must first complete an E-Verify registration process. This registration process includes the execution of a memorandum of understanding, and the taking of a required on-line tutorial. As required of all employers who employ three or more employees, registered E-Verify employers must obtain an I-9 from newly hired employees within three days of their actual start date.<sup>13</sup> The same timing requirement holds true for running the E-Verify electronic check.<sup>14</sup> The employer begins this check by entering the specific employee's personal data (name, date of birth, gender, social security number), and immigration status (for example, U.S. citizen/lawful permanent resident/work authorized nonimmigrant) into E-Verify. In most cases, E-Verify will return one of the following system responses:

1. Employment Authorized
2. SSA Tentative Nonconfirmation
3. DHS Tentative Nonconfirmation
4. DHS Verification in Process
5. DHS Case in Continuance

If the employer receives an "Employment Authorized" response, that response will be displayed along with a photo of the employee (assuming a photo is available).<sup>15</sup> If the photo identification presented by the employee matches the photo displayed by E-Verify's photo tool, the employer may close out the verification case. If the photo does not match, further action, including sending to USCIS a copy of the photo identification document which was provided by the employee, is required.

If the employer receives a TNC from E-Verify, the employer is expected to print and provide to the employee an E-Verify generated "Notice to Employee of Tentative Nonconfirmation." The employer is to review that notification with the employee, and the employee must then decide whether or not to contest the TNC. If the employee does not contest the determination, the employer is expected to immediately terminate the employee, and to indicate this conclusion within E-Verify.

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<sup>11</sup> U.S. House Judiciary Committee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing on "Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse" (June 10, 2008) (testimony of Jonathan "Jock" Scharfen, former USCIS Acting Director).

<sup>12</sup> "Employment Verification: Challenges Exist In Implementing A Mandatory Electronic Employment Verification System," GAO-08-729T, p. 10 (May 6, 2008).

<sup>13</sup> 8 C.F.R. § 274a.2(b)(1)(iii) (2007).

<sup>14</sup> IIRIRA § 403(a)(3)(A).

<sup>15</sup> The E-Verify "photo tool" does not deliver a photo for every Employment Authorized response. Currently, it provides a DHS stored photo of foreign nationals who are issued Employment Authorization Documents (Form I-766) and those who are Lawful Permanent Residents (LPRs, are informally referred to as "green card" holders). DHS is in the process of completing or implementing information sharing agreements with other federal and state government entities to increase the number of secure photo identification documents that may be available for use and display by the photo tool.

Alternatively, if the employee chooses to contest the TNC, the employer is expected to print out and provide the employee a “Referral” notification which instructs the employee to make contact with either USCIS or SSA to resolve the existing work eligibility discrepancy within eight federal government working days. In many cases, including most cases involving U.S. citizens and lawful permanent residents, the employee will be given the option of resolving the mismatch discrepancy over the phone by contacting USCIS via a toll-free number. Some individuals, however, must visit a SSA field office to resolve a SSA TNC determination.

After the contesting employee visits SSA or contacts USCIS by phone, the applicable agency will provide a final work authorization determination within two business days. The employer is therefore expected to make a second E-Verify query on the employee ten business days after issuance of the Referral notification. By then, in most cases, a final E-Verify determination will have been made. If the employee was found work eligible, E-Verify will display an “Employment Authorized” result; if not, a Final Nonconfirmation (FNC) will issue. In a small percentage of cases, the DHS verification process exceeds ten days. In such cases, the querying employer will receive a “DHS Case in Continuance” message from E-Verify to signify that the query remains under active consideration. The employer must check E-Verify a third time for such employees.

Importantly, employers and employees both are warned that an initial TNC determination must not be misinterpreted as a definitive determination that the queried employee is in the United States unlawfully or is otherwise not work authorized. Employers are prohibited from terminating the employee (due to the TNC) or changing the terms or conditions of his/her employment during this contest period.<sup>16</sup> An E-Verify-based employee termination may only occur after the issuance of a FNC, or the employee abandons the resolution process.

### **Arizona Survey**

Effective January 1, 2008, all public and private Arizona employers were required to use E-Verify to determine the employment eligibility of newly hired employees pursuant to Arizona state law. The Ombudsman visited Arizona to see what lessons might be learned if E-Verify were mandated for all employers nationwide. The Ombudsman met with a variety of professional advisors and business entities in Arizona, including large and small chambers of commerce. Industry groups represented in these meetings included: high tech, Internet service providers, retail, hospitality, legal, real estate, construction, landscaping, fast food, agriculture, big box stores, health care, and employee staffing and payroll companies.<sup>17</sup>

### **E-Verify/SSA Interface**

The concern most frequently identified by Arizona employers with E-Verify is that TNCs are sometimes issued on work-authorized individuals. According to USCIS, this happens in less than 0.4 percent of the

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<sup>16</sup> IIRIRA § 403(a)(4)(B)(iii).

<sup>17</sup> The Ombudsman also met with officials from the State of Arizona Department of Administration to learn from their experience with implementing E-Verify as a governmental entity. Additionally, the Ombudsman met with officials from the National Association of Foreign Student Advisors to obtain their comments and unique perspectives on E-Verify as many foreign students obtain approved work permission during and/or after the completion of their academic programs. During this study the Ombudsman also met several times with USCIS E-Verify managers and employees, as well as various managers and individuals at SSA and U.S. Immigration and Customs Enforcement (ICE).

total number of queries run.<sup>18</sup> Both USCIS and SSA are proactively working to reduce this occurrence rate.

Systemically, E-Verify is designed to query SSA's database if the employee claims to be a U.S citizen or a lawful permanent resident. For all others workers, E-Verify queries one or more DHS databases. The SSA Office of the Inspector General found that the SSA database has an approximate plus or minus 4 percent error rate.<sup>19</sup> This error rate could result from a misspelled name, an unreported name-change, an incorrectly recorded date of birth, or gender error. Regardless, any such underlying defect could be the basis of a SSA generated TNC due to a mismatch with the employee-data entered into E-Verify, and data stored in SSA's database. When this occurs, the employee must visit a SSA office to correct and/or to update their personal identifying data. Once the SSA database is corrected/updated, the employee should not be issued another TNC absent, for example, a data entry problem or a subsequent unreported name change.

To reduce TNCs that are caused by mechanical data entry error, in September 2008, USCIS instituted a pre-mismatch typographical error check routine within the E-Verify process that prompts employers to double-check the information they entered against the documents presented by the employee. Preliminary data indicate that this enhancement reduces SSA mismatches by as much as 30 percent.<sup>20</sup>

To simplify the TNC resolution process, on October 1, 2008, SSA implemented a system enhancement to "EV-Star," its electronic interface with E-Verify. The system upgrade will instantaneously report in real time a correction of the mismatched personal identifying information causing the TNC, and in effect, proactively push a corrected E-Verify response back converting the prior TNC determination to an "Employment Authorized" determination. The EV-Star upgrade addresses a concern that E-Verify did not immediately capture corrections made in the SSA database. This system enhancement will dramatically improve the E-Verify user experience.

### **Individual Employee Customer Service**

Employers in Arizona indicated that some employees (especially younger ones) are intimidated when they receive a TNC notice, which looks to them like a formal legal document. As USCIS continues to review and refine the TNC process, and engages in outreach activities to educate employers on E-Verify best practices, the Ombudsman encourages USCIS to approach E-Verify from a multi-dimensional standpoint: to consider not just what works operationally or what is customer-friendly viewed from an employer-user standpoint, but to also consider how its processes and documents can be structured to reduce employee apprehension and anxiety.

### **Fraud Prevention**

Submissions for the record in several congressional hearings indicated concern that E-Verify is susceptible to identity fraud. The Ombudsman heard similar concerns during the Arizona survey. As USCIS designs and develops new programs and system protocols, it should do so in a manner that aligns with a parallel goal of reducing opportunities for identity fraud. The E-Verify photo tool (which USCIS

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<sup>18</sup> January through March, 2008, data supplied by USCIS to the Ombudsman (Nov. 14, 2008).

<sup>19</sup> "Accuracy of the Social Security Administration's Numident File," A-08-06-26100 (Dec. 2006), <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf>.

<sup>20</sup> *Id.*

installed in 2007) is a fraud inhibitor, but at present, is limited to LPRs and to certain nonimmigrants who are issued a USCIS Employment Authorization Document.

The Ombudsman notes that with the cooperation and assistance of the Department of State, additional identity photos could be made available for display through E-Verify in 2009, including U.S. passport photos, as well as certain nonimmigrant visa photos. The Ombudsman also understands that USCIS is examining how it may add photographs supplied by motor vehicle records departments around the nation.<sup>21</sup>

The Ombudsman is also aware that USCIS is currently developing a protocol that will register and lock the identity of employees who have been victims of identity fraud outside the E-Verify process. The Ombudsman further understands that USCIS is evaluating how it might integrate biometric technology into future iterations of E-Verify.

### **III. ANALYSIS**

**The CIS Ombudsman makes the following recommendations to USCIS:**

**1. Develop Simplified Customer Friendly Documents.** Numerous employers noted to the Ombudsman that the language used in E-Verify documents<sup>22</sup> were confusing or contained difficult legal terminology that may not be readily understood by all users. Consistent with its initiatives to promote Plain Language, USCIS should review and revise the language and layout of publicly disseminated documents to eliminate unnecessary complexity. The Ombudsman further suggests that USCIS consider using focus groups to assist in this redrafting effort.

**For these reasons, the Ombudsman recommends that USCIS simplify the language used in all E-Verify instructions and supporting documentation.**

**2. Increase Transparency.** Since the Ombudsman visited Arizona in July, USCIS has placed a number of E-Verify documents on the Internet for public viewing. However, there still are several documents, including the E-Verify tutorial, that are not available for review until after formal registration with E-Verify, which was a cause of complaint for some Arizona employers. Public posting of E-Verify documents and processes would enhance the understanding of employers and employees alike.

**For these reasons, the Ombudsman recommends that USCIS make all registration and operational documents publicly available on-line for review by prospective E-Verify end-users and employees.**

**3. Expand Educational Outreach.** Numerous small employers and chambers of commerce advised the Ombudsman that USCIS is not effectively reaching small employers with its existing education and outreach. Historically, USCIS has targeted its E-Verify outreach efforts to larger employers and organizations. However, large employers are normally well informed of such matters through their

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<sup>21</sup> "Employment Verification: Challenges Exist In Implementing A Mandatory Electronic Employment Verification System," GAO-08-729T, pp. 15-17 (May 6, 2008).

<sup>22</sup> For example, USCIS should review its memorandums of understanding, contest and referral notifications, user manuals, the E-Verify tutorial, and the E-Verify graphic user interface.

membership in various chambers of commerce and/or industry specific associations. These employers may also receive timely and accurate legal information and assistance through counsel or in-house human resource managers. The same cannot be said of smaller employers, many of which do not belong to chambers of commerce or industry associations, and frequently do not engage counsel.

**For these reasons, the Ombudsman recommends that USCIS ensure its education and outreach efforts reach small business communities.**

4. **Develop A Tickler System Upgrade.** Some E-Verify users reported to the Ombudsman that they have difficulty keeping track of the various time-based actions that the employee and employer must follow as they enter and proceed through the E-Verify system.

Specifically, when an employee contests a TNC determination, an eight federal work day count begins for the employee to initiate contact with either DHS or SSA to resolve the work eligibility discrepancy. In this situation, and others, employers must track multiple open, unresolved, E-Verify cases, and must timely re-enter E-Verify to take one or more additional steps within specified time-frames.

E-Verify does not prompt an employer to take action when one of the unresolved employee cases has been updated. For those employers that lack a dedicated personnel manager and/or sophisticated human resource software to aid them in keeping track of multiple employees as they move through the E-Verify process, this tracking requirement represents a new responsibility.<sup>23</sup> As it continues to focus its efforts on customer service, and to encourage more employers to use E-Verify, USCIS should address this issue.

**For these reasons, the Ombudsman recommends that USCIS develop and add a tickler/calendar system into E-Verify capable of issuing timely system prompts to employers to advise them of their next appropriate course of action for each specific open and unresolved TNC.<sup>24</sup>**

5. **Develop An Interactive I-9 Employment Eligibility Process.** The Form I-9 process was created as part of the mandatory compliance and enforcement regime enacted in IRCA in 1986. In conducting this review, many employers wondered why E-Verify does not replace the existing legal requirement for employers to complete a Form I-9 for their newly hired employees. Some employers logically, but wrongly, believe that because they are using E-Verify they no longer must conduct a separate I-9 process for new hires.

USCIS may encourage more employers to voluntarily register for E-Verify if it rewarded them with relief from the standard requirement to perform a separate paper-based I-9 process. Taking into account both law and technology, several private vendors currently offer employers an online fee-for-service system that provides a one-step data collection process that satisfies I-9 requirements,

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<sup>23</sup> Note however, in the "View cases" section of E-Verify, one can pull cases that are pending action, in process, or resolved, or all open cases. E-Verify does not now alert people outside of the system of any status changes, and will only provide cases' status if the user logs on and affirmatively initiates a query.

<sup>24</sup> In a teleconference with the USCIS Verification Division, the Ombudsman was advised that a tickler system is operationally possible (Oct. 23, 2008).



and in the background, can seamlessly run an E-Verify query. The Ombudsman acknowledges that DHS' Immigration and Customs Enforcement (ICE) finds it useful in enforcement actions to have access and reference to paper-based I-9s which contain handwritten signatures corresponding to certain compliance attestations. Notwithstanding, ICE itself authorized the use of electronic signatures for I-9 purposes in 2006.<sup>25</sup> USCIS should develop a strategy in coordination with ICE to replace Form I-9 with E-Verify.

**For these reasons, the Ombudsman recommends that USCIS announce as a stated goal an intention to replace the current Form I-9 process for employers that voluntarily use E-Verify.**

## **V. CONCLUSION**

The Ombudsman believes that the lessons learned from our survey of Arizona employers likely represent the concerns of employers nationwide.

USCIS has been both creative and progressive in working with SSA and other governmental agencies to enhance E-Verify's utility and the E-Verify user experience. The Ombudsman believes the five specific recommendations included in this study merit immediate consideration and adoption.

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<sup>25</sup> See "To Amend Section 274A of the Immigration and Nationality Act to Improve the Process for Verifying an Individual's Eligibility for Employment," Pub. L. No. 108-390, 118 Stat. 2242 (Oct. 30, 2004) and "Electronic Signature and Storage of Form I-9, Employment Eligibility Verification," 71 Fed. Reg. 34510-35417, 34513 (June 15, 2006), which states "[e]lectronic signatures can be accomplished using various technologies including, but not limited to, electronic signature pads, Personal Identification Numbers (PIN), biometrics, and "click to accept" dialog boxes." (Emphasis added). See also 8 CFR § 274a.2(a)(2) (2007).