

NATIONAL IMMIGRATION LAW CENTER

Basic Information Brief: Employment Verification Programs – The Basic Pilot and SSNVS

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Background on Employment Verification Programs

In 1996, Congress created three pilot programs – the Basic Pilot, the Citizen Attestation Pilot, and the Machine Readable Document Pilot – to test new ways for employers to verify that the employees they hire are authorized to work in the United States. The pilots allow employers to tap directly into government databases to check on workers' employment eligibility. The programs were an important feature of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and represented an attempt by Congress to "fix" the employer sanctions provisions of current law.

Since 1986, it has been unlawful for employers to knowingly hire workers who are not work-authorized. Employers who do so are subject to penalties referred to as "employer sanctions." To avoid sanctions, employers are required to verify employees' work eligibility, using an official government form called the "I-9 form." To enable employers to complete the form, workers are required to produce documents proving their identity and work eligibility. Only certain documents, as set out in the law and listed on the back of the I-9 form, may be used for this purpose. The worker chooses which of the acceptable documents to produce.

The pilot programs modify these existing procedures by allowing employers a direct look at records maintained by the Department of Homeland Security (DHS) or the Social Security Administration (SSA). While participation in these programs has been voluntary, employers who do participate gain certain legal benefits, including a presumption, in the event of a DHS investigation, that they did not violate the employer sanctions provisions of the law.

The Citizen Attestation Pilot began operation in April 1999 in Arizona, Maryland, Massachusetts, Michigan, and Virginia. The Machine-Readable Pilot began in May 1999 and operated only in Iowa. These two pilots ended in April and May 2003, respectively, and have been terminated by the DHS.

The third program created by IIRIRA – the Basic Pilot program – began in September 1997 in California, Texas, New York, Florida and Illinois (states the government estimated had the highest numbers of workers without authorization to work in 1996). In March of 1999, Congress expanded the Basic Pilot program to employers in the state of Nebraska. The program was extended in 2001 for an additional two years, and on December 1, 2004, the Basic Pilot program was expanded to allow employers in all 50 states to access its system. The nationwide expansion is a result of the Basic Pilot Program Extension and Expansion Act, which was enacted on Dec. 3, 2003.

In July of 2002, the SSA initiated another employment verification program called the Social Security Number Verification System (SSNVS). The SSA piloted the SSNVS with a small group of employers and then expanded the SSNVS to approximately 80 employers. These employers have had direct access to the SSA's database via the Internet to verify an employee's Social Security Number. Recently, the SSA has proposed the implementation of SSNVS nationally. SSA is awaiting approval for the nationwide expansion, which could take place in late Spring or early Summer 2005.



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THE BASIC PILOT PROGRAM

The Basic Pilot program gives employers direct access to government databases to verify employees' eligibility for employment. The 2003 law that expanded the Basic Pilot program also required the DHS to submit a report by June 2004 to the Committees on the Judiciary of the U.S. House of Representatives and the Senate. This report should have evaluated whether the problems identified by the independent evaluation of the Basic Pilot had been substantially resolved, and it should have outlined what steps the DHS was taking to resolve any outstanding problems identified by an independent evaluation before undertaking the expansion of the Basic Pilot program to all 50 states.

The Independent Evaluation

While the DHS did submit a report to Congress, it failed to adequately address the concerns laid out in the independent evaluation conducted by Temple University and Westat, which was published in January 2002.¹ The report confirms the concerns many immigrants' rights advocates have had — that many employers are using the pilot programs improperly, to the detriment of immigrant workers. Among advocates' main concerns have been (1) the incentive the pilot programs provide for employers to misuse the government databases, to which the programs give them access, to prescreen job applicants on the discriminatory basis of national origin or citizenship; (2) the programs' reliance on the Immigration and Naturalization Service (INS) and SSA databases that are notoriously inaccurate; (3) the insufficient time provided to workers to correct or update their records with the SSA or the INS when their employment eligibility is not initially confirmed; and (4) privacy-related concerns about how much access employers have to information about workers, as well as about the potential for employers to abuse that access.

The Basic Pilot evaluation report says that some employers surveyed are not following the federally mandated memorandum of understanding they signed as a condition of participating in the program. The report cites evidence that some employer participants are engaging in prohibited practices, such as prescreening job applicants and taking adverse action against workers who receive a "tentative nonconfirmation" in the first phase of the Basic Pilot's eligibility verification procedure. (A "tentative nonconfirmation" means that Basic Pilot program was unable to confirm the validity of the documents the employer verified.) While the evaluation found no documented case of a specific privacy violation, some employers also failed to safeguard access to the pilot program's computer—e.g., they left passwords and instructions for accessing the program's system in plain view. Finally, the report says that some employers missed deadlines required by the pilot and failed to inform workers of their rights when the system was unable to confirm their employment eligibility.

Most importantly perhaps, the evaluation explicitly recommended against expanding the Basic Pilot program into a large-scale national program until the DHS and SSA address the inaccuracies in their databases that prevent those agencies from confirming the work authorization of many workers.

The Basic Pilot Program Today

According to information provided by the DHS at a meeting with immigrants' rights advocates in September 2004, currently 4,200 employers voluntarily use the Basic Pilot employment eligibility verification system. Though many of these employers are headquartered in one of the six states in which the Basic Pilot was available before December 1, they have multiple sites at which they employ workers, so that approximately 15,000 work sites use the Basic Pilot system. With the expansion to all 50 states, the DHS estimates an increase of approximately 25 percent in the number of employers that will voluntarily sign up for the Basic Pilot program. This will also increase the number of immigrant workers

¹ A copy of the report can be found at uscis.gov/graphics/aboutus/repsstudies/piloteval/BasicFINAL0704.pdf.

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who will face obstacles to becoming employed because of the inaccuracies in the government databases and delays in entering information regarding new immigrants.

Participation in the program remains voluntary, although employers who have been found to have unlawfully hired unauthorized workers or discriminated against workers on the basis of national origin or citizenship status may be required to participate. Any employer that hires workers in one of the states in which a pilot program is operating may volunteer to participate. Additionally, if an employer in one of these states participates, any establishment that employer has in any other state may also participate.

Employers who participate in the pilot programs receive some important legal benefits. First, in the event of an investigation into their hiring practices, the DHS will presume that participating employers did not violate the employer sanctions law. In addition, employers who terminate or otherwise take action against employees based on information provided through the pilots' verification process will not be liable under any law provided they can show they relied on such information in "good faith."

Before an employer can participate in one of the pilot programs, it must enter into a memorandum of understanding (MOU)--with the DHS and, where applicable, the SSA. For a discussion of the terms of this MOU, as well as how the Basic Pilot program works generally and how workers can file complaints concerning violation of the rules and procedures governing the program (see http://www.nilc.org/immsemplymnt/TWR_Material/Attorney/Basic_Info-Basic_Pilot_2-15-05.pdf).

THE SOCIAL SECURITY NUMBER VERIFICATION SYSTEM

The Social Security Number Verification System (SSNVS) is another verification program that provides employers with the ability to verify the information employees submit in order to prove their work authorization. SSNVS is an Internet-based program that allows employers to verify the Social Security Numbers (SSNs) of its employees before the employer files its W-2 reports. Upon submitting employees' information, employers receive confirmation as to whether a worker's SSN matches the agency's database.

Like the SSA's no-match letters, the stated purpose of these programs is to ensure that workers are getting proper credit for their earnings. (For more detailed information on the SSA no-match letters, see http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm.) When an employer files a W-2 report that contains a discrepancy between the worker's name and SSN, the worker's earnings are posted to the Earnings Suspense File (the file of uncredited wages maintained by the SSA) instead of to the worker's Master Earnings File.

The SSA initiated SSNVS in July of 2002. Currently, the SSNVS is still in the pilot stage, with approximately 80 employers participating. However, in a notice published in the Federal Register on December 10, 2004 (69 FR 71865), the SSA announced its proposal to expand SSNVS nationally. As with the SSA's no-match letters, the discrepancies in workers' SSNs that appear in SSNVS exist for many reasons, ranging from simple typographical errors to the use of false SSNs by undocumented workers. Advocates are concerned the SSNVS will simply worsen the problems created by the no-match letters that have resulted in tens of thousands of workers losing their jobs. Another issue with SSNVS of significant concern is the information that will be available to the employer through SSNVS. According to the December 2004 Federal Register notice, the SSA is only to inform employers of whether there is a match or mismatch in response to the information employers submit via the SSNVS. However, when the SSNVS was first proposed, immigrants' rights advocates expressed concerns regarding the codes the SSA would provide employers explaining the reason an SSN did not match the agency's records, thus providing the employer with more information than is currently allowed under the SSA's own

guidelines.² This concern is more real than ever. The National Intelligence Reform Act of 2004, which President Bush signed into law on Dec. 17, 2004, provides that within 18 months of the enactment of the bill, the SSA is required to add death and fraud indicators to the SSNVS.

HOW DO EMPLOYMENT VERIFICATION PROGRAMS AFFECT IMMIGRANT WORKERS?

As discussed above, the Basic Pilot program and SSNVS give employers direct access to government databases to verify employees' eligibility for employment. Worker advocates have long been concerned about the accuracy of records maintained by the DHS and SSA, which struggle to keep pace with name or status changes among a fast growing population. The INS itself had estimated that it would be unable to electronically verify employment eligibility in some *35 percent* of all cases due to delays in updating computer records, name-matching problems, and errors in the database. As advocates are aware of based on problems created by the SSA no-match letters, SSA's database also contains information with numerous discrepancies that particularly affect low-wage immigrant workers.

Both programs also significantly increase opportunities for employers to circumvent laws governing the employment verification process, by unlawfully using the databases to prescreen workers for hire or preferring citizen workers over non-citizens because it may seem "easier" to confirm their employment eligibility. Additionally, the Basic Pilot program and SSNVS create a way for employers to retaliate against workers who have exercised their workplace rights, including complaining about wage and hour conditions, discrimination, and health and safety concerns. There is already ample documentation of employers using the SSA's no-match letters to interfere with union organizing and other workers' rights.

Presently, there is a serious lack of safeguarding against employers who use and abuse employment verification programs. The Basic Pilot program contains at least some protections against abuse via the MOU employers who use it must sign. But there currently are no protections against misuse built into SSNVS.

If in fact employment verification programs like Basic Pilot and SSNVS are going to be extended and expanded to employers nation-wide, they must contain protections against misuse. Congress must provide labor protections for workers who are being adversely affected by these employment verification programs. Employers who abuse these programs as a means of retaliating against workers must be penalized, and employers' incentive to hire and exploit undocumented workers must be decreased.

² See comments regarding the SSNVS submitted to the SSA in July 2002, available at www.nilc.org/immsemplymnt/comment_ltrs/NILC_SSA_Comment_Ltr.pdf.