

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

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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.¹ 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, 2009.² 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,³ 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.⁴
- 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is not prepared to handle this increase in demand, and it won’t be until its databases are purged of incorrect and outdated data that misidentify many lawful immigrants and U.S. citizens as not being authorized to work, resulting in employers losing authorized workers.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.⁵
- 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.”⁶
- 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."⁷

■ **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.⁸
- 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."⁹

■ **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.¹⁰
- *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.¹¹ 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."¹² 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.¹³
- 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.¹⁴

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¹ 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/immseplymnt/ircaempverif/e-verify-FAR-summary-2009-08-31.pdf (this URL updated 8/31/09).

² “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.

³ *Id.*

⁴ 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, at 10.

⁵ *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.

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

⁷ *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, emphasis added.

⁸ 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.

⁹ 73 FR 67699 (Nov. 14, 2008).

¹⁰ 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.

¹¹ 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.

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

¹³ *Id.* at 71, 76 and 77.

¹⁴ *Id.* at 77.