

# Why States and Localities Should Not Require Employer Participation in Basic Pilot/E-Verify

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**B**asic Pilot/E-Verify is a voluntary Internet-based program whose purpose is to allow employers to electronically verify the information that workers present to prove their employment eligibility by accessing information in databases maintained by the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA).<sup>1</sup> As of January 8, 2009, only slightly more than 1 percent of the approximately 7.4 million employers in the U.S. were enrolled in Basic Pilot/E-Verify.

While state and local policymakers often portray Basic Pilot/E-Verify as the magic bullet that would curb the hiring of unauthorized workers, since its inception in 1997 the program has been plagued by a multitude of problems that adversely affect both workers and businesses, including its reliance on government databases that have unacceptably high error rates.<sup>2</sup> Basic Pilot/E-Verify also fails to stop unauthorized employment, as it cannot detect if workers and employers get around the system by using borrowed or stolen documents.

A much better proposal for states and localities is to more effectively enforce state and local labor laws and to enact stronger labor protections to hold employers accountable for labor law violations. This would remove the economic incentive to seek out and unfairly exploit undocumented immigrants. In addition, states and localities should call on Congress to reform our immigration system and provide a comprehensive opportunity for currently undocumented noncitizens to earn legal status.

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

- 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 cannot confirm a worker’s employment eligibility are “issued on work-authorized individuals.”<sup>3</sup>
- A 2007 independent evaluation of the program commissioned by DHS found that the Basic Pilot/E-Verify database “is still not sufficiently up to date” to meet the requirements for “accurate verification.”<sup>4</sup>
- SSA has estimated that if Basic Pilot/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>

## ■ Mandatory participation in Basic Pilot/E-Verify would impose exorbitant costs at a time when our economy is most vulnerable.

- State budget shortfalls for the remainder of this fiscal year and state fiscal years 2010 and 2011 currently stand at \$350 billion.<sup>6</sup> *The Arizona Republic* reported that a 2008 state law requiring businesses to use Basic Pilot/E-Verify has resulted in workers and businesses moving off the books into the cash economy.<sup>7</sup> This is depriving the state of income-tax revenue at the same time the state is facing a \$1.6 billion budget gap.



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- Nationally, according to the Congressional Budget Office, implementation of a mandatory program 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>8</sup>
- In Utah, a bipartisan bill has been proposed delaying implementation of a 2008 law requiring state agencies to use Basic Pilot/E-Verify due to budget constraints. According to one of the bill sponsors, the cost of implementing the law is estimated to be \$1.7 million.<sup>9</sup>

### ■ **Mandatory participation in Basic Pilot/E-Verify would further increase the cost of doing business in a tough economic climate.**

- MCL Enterprises, an employer in Arizona, found enrollment in Basic Pilot/E-Verify “extremely costly” and “disruptive” to operations.<sup>10</sup>
- According to a manager of a small business in Maryland, it takes seriously its legal obligation to confirm its employees are eligible to work in the U.S. but has not enrolled in Basic Pilot/E-Verify because it does not have “the luxury of a large human resources department” and the costs for one year would total approximately \$27,000.<sup>11</sup>
- Small businesses employ approximately half of the entire U.S. workforce and have generated 60 to 80 percent of net new jobs annually over the last decade.<sup>12</sup> These businesses, already struggling in the current economy, will face additional burdens and unanticipated problems if they are required to use Basic Pilot/E-Verify, potentially harming their ability to create new jobs and revenue.

### ■ **Qualified workers won’t have a chance to prove they are authorized to work.**

- U.S. citizen Abel Pacheco went to look for a job in Arizona (where use of E-Verify is mandatory) when he lost his job as a truck driver. He applied with eight different companies, but couldn’t figure out why no one called him back with a job offer. When he finally found work, his new employer notified him that Basic Pilot/E-Verify could not confirm his work eligibility, which turned out to be due to an error in SSA’s database. Pacheco cleared up the problem, but those few weeks of lost income had a serious financial impact on his family.<sup>13</sup>
- An evaluation of Basic Pilot/E-Verify commissioned by DHS found that 9.4 percent of employers did not notify workers of a database error, and 7 percent who notified workers did not encourage them to contest the finding because, they said, the process of contesting the notice takes too much time.<sup>14</sup>
- The same study found that 22 percent of employers restricted work assignments, 16 percent delayed job training, and 2 percent reduced pay based on Basic Pilot/E-Verify database errors.<sup>15</sup>

### ■ **Workers’ privacy could potentially be compromised because DHS databases do not comply with government and industry-based standards for protecting information.**

- The DHS Data Privacy and Integrity Advisory Committee issued a report that it is concerned that “inadequate assurance controls” in Basic Pilot/E-Verify pose “significant personal privacy risks.”<sup>16</sup>
- According to the Cato Institute, making Basic Pilot/E-Verify mandatory “would have far greater privacy consequences than the current system—consequences that would fall on American citizens, not on illegal immigrants.”<sup>17</sup>

- Anyone posing as an employer can access Basic Pilot/E-Verify and all its data. DHS does not screen those who enroll in the program to verify that they are bona fide employers.<sup>18</sup>
- According to the Heritage Foundation, Basic Pilot/E-Verify “would run afoul of legitimate privacy concerns. Both the government and employers would have access to massive databases of information, which would surely tempt some to traffic in identity theft.”<sup>19</sup>

### ■ State and local proposals that require employers to use the Basic Pilot/E-Verify program are costly to litigate.

- Federal immigration law expressly preempts any state or local government from imposing employer sanctions on those who employ, recruit, or refer for a fee unauthorized immigrants (with a narrow exception for legitimate licensing laws).<sup>20</sup> Thus, any state or local legislation that attempts to regulate the hiring of undocumented workers through Basic Pilot/E-Verify may subject states and localities to unnecessary litigation that will waste taxpayers’ money, as some localities have already discovered.
- For example, in July 2007 a federal judge struck down an anti-immigrant ordinance passed by the Hazelton, Pennsylvania, city council that banned the employment of unauthorized immigrants, largely based on a conclusion that the law was federally preempted.<sup>21</sup> The cost to the city of Hazelton for defending its ordinance totaled more than \$200,000, and the potential plaintiff’s legal fees could be as high as \$2.4 million.<sup>22</sup>
- Similarly, after the township of Riverside, New Jersey, passed an ordinance in 2006 that, among other things, punished businesses for hiring undocumented immigrants, it faced a legal challenge.<sup>23</sup> After incurring \$82,000 in legal costs to defend the ordinance, and facing the risk of having to pay the plaintiff’s legal fees if the township lost in court, Riverside rescinded the ordinance in September 2007.<sup>24</sup>

### ■ States and localities should support reform that includes strong worker protections as the real solution to the problem created by employers hiring undocumented workers.

- Unscrupulous employers will continue to have an economic incentive to recruit, hire, and exploit undocumented workers as long as employers know they will not be liable for violating state and federal labor and employment laws.
- Rather than wasting taxpayers’ money on legislation that is flawed, states and localities should support efforts aimed at improving the lives of all workers by holding unscrupulous employers accountable for violating employment laws, including but not limited to enacting and enforcing minimum wage, overtime, health and safety, workers’ compensation, and antidiscrimination laws.<sup>25</sup>
- Stronger enforcement of labor laws will prevent unscrupulous employers from gaining an unfair economic advantage over those employers who play by the rules.

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#### FOR MORE INFORMATION, CONTACT

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<sup>1</sup> 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).

<sup>2</sup> For more information on Basic Pilot/E-Verify's limitations, see *Basic Pilot/E-Verify: Why Mandatory Employer Participation Will Hurt Workers, Businesses, and the Struggling U.S. Economy* (NILC, Feb. 2009), [www.nilc.org/immsemplymnt/ircaempverif/e-verify-facts-2009-01-29.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-facts-2009-01-29.pdf), emphasis added.

<sup>3</sup> *Observations on the E-Verify Experience in Arizona & Recommended Customer Service Enhancements* (U.S. Dept. 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).

<sup>4</sup> *Findings of the Web-Based Basic Pilot Evaluation* (Westat, Sept. 2007) (hereinafter "Westat 2007") at xxi, emphasis added, available at <http://tinyurl.com/2tdqqs>. Section 404g of the Illegal Immigration Reform and Immigrant Responsibility Act states: "The Commissioners of Social Security and the Immigration and Naturalization Service shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process. . . ."

<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> Elizabeth McNichol and Iris Lav, *State Budget Troubles Worsen* (Center on Budget and Policy Priorities, Feb. 10, 2009), [www.cbpp.org/9-8-08sfp.htm](http://www.cbpp.org/9-8-08sfp.htm).

<sup>7</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>8</sup> Letter to Chairman John Conyers, Chair, Committee on the Judiciary, U.S. House of Representatives, from Peter Orszag, Director, Congressional Budget Office, Apr. 4, 2008.

<sup>9</sup> Emily Bazar, "Some Places Revisit Immigration Laws," *USA Today*, Feb. 10, 2009, [www.usatoday.com/news/nation/2009-02-10-revisit10\\_N.htm](http://www.usatoday.com/news/nation/2009-02-10-revisit10_N.htm).

<sup>10</sup> Mitchell C. Laird, *Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives: "Employment Eligibility Verification Systems (EEVS) and the Potential Impacts on the Social Security Administration's (SSA's) Ability to Serve Retirees, People with Disabilities, and Workers"* (MCL Enterprises, Inc., May 6, 2008), <http://waysandmeans.house.gov/media/pdf/110/laird.pdf>, emphasis added.

<sup>11</sup> *Chamber of Commerce of the USA v. Chertoff*, No. 08-cv-3444-AW (D.Md.).

<sup>12</sup> *Frequently Asked Questions* (Small Business Association Office of Advocacy, Sept. 2008), [www.sba.gov/advo/stats/sbfaq.pdf](http://www.sba.gov/advo/stats/sbfaq.pdf).

<sup>13</sup> Christina Boomer, "Some Valley Workers Having Trouble with E-Verify," KPNX-TV, Phoenix, Mar. 24, 2008, [www.abc15.com/news/local/story.aspx?content\\_id=07e5d455-d95b-4fbb-be43-2d1ee7318972](http://www.abc15.com/news/local/story.aspx?content_id=07e5d455-d95b-4fbb-be43-2d1ee7318972).

<sup>14</sup> See Westat 2007, *supra* note 4, at 76–77.

<sup>15</sup> *Id.* at 77.

<sup>16</sup> *Options for Verifying the EIN or Otherwise Authenticating the Employer in the E-Verify Program* (Data Privacy & Integrity Advisory Committee, Report No. 2008-02, Dec. 3, 2008), [www.dhs.gov/xlibrary/assets/privacy/privacy\\_advcom\\_e\\_verify\\_12-2008.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_advcom_e_verify_12-2008.pdf), emphasis added.

<sup>17</sup> Jim Harper, *Electronic Employment Eligibility Verification: Franz Kafka's Solution to Illegal Immigration* (Cato Institute, Mar. 5, 2008), [www.cato.org/pubs/pas/pa-612.pdf](http://www.cato.org/pubs/pas/pa-612.pdf), emphasis added.

<sup>18</sup> Westat 2007, *supra* note 4, at xxvi.

<sup>19</sup> James Jay Carafano, *Workplace Enforcement to Combat Illegal Migration: Sensible Strategy and Practical Options* (The Heritage Foundation, Aug. 2006), [www.heritage.org/Research/NationalSecurity/hl957.cfm](http://www.heritage.org/Research/NationalSecurity/hl957.cfm), emphasis added.

<sup>20</sup> See 8 USC § 1324a(h)(2).

<sup>21</sup> *Lozano et al. v. City of Hazleton*, 2007 U.S. DIST. LEXIS 54320 (M.D. Pa. July 26, 2007). For more information about the Hazleton, PA, decision, see "Hazleton, Penn., Anti-Immigrant Ordinances Preempted and

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<sup>22</sup> Wade Malcom, “Hazelton Slapped with \$2.4 M Bill,” *Small Town Defenders*, Sept. 1, 2007, [www.smalltowndefenders.com:80/public/node/234](http://www.smalltowndefenders.com:80/public/node/234).

<sup>23</sup> *Riverside Coalition of Business Persons v. City of Riverside* (D.N.J., complaint filed Oct.18, 2006).

<sup>24</sup> Adam Karczewski, “Coming to America: How States and Municipalities Deal with Undocumented Immigrants,” *New Jersey Lawyer*, Nov. 21, 2007, [www.njlnews.com/articles/2007/11/30/in\\_re\\_magazine/f3-karczewski.txt](http://www.njlnews.com/articles/2007/11/30/in_re_magazine/f3-karczewski.txt).

<sup>25</sup> For examples of pro-worker policies, see *From Anti-Immigrant to Pro-Worker: What Can States and Cities Do About Immigration and Workers’ Rights* (National Employment Law Project), [www.nelp.org/page/-/Justice/fromantiimmigrant2009.pdf](http://www.nelp.org/page/-/Justice/fromantiimmigrant2009.pdf).