COSTLY AND INEFFECTIVE
What Arizona's Experience with Mandatory E-Verify Teaches Us

MAY 2011

Arizona's E-Verify law, the Legal Arizona Workers Act, went into effect January 1, 2008, and the U.S. Supreme Court recently found that the law is not preempted by federal law.[1] The law requires all employers in the state to use E-Verify to check the employment authorization of new hires. Businesses risk losing their licenses if caught hiring undocumented workers. While the purpose of the law was to "turn off the job magnet,"[2] it has simply resulted in the growth of Arizona's cash economy, U.S. workers losing their jobs, and burdens on small businesses. As federal policymakers consider making E-Verify mandatory for every employer in the country, they should heed the warning of Arizona's experience.

■ Arizona's E-Verify law has resulted in the growth of the state's cash economy.

- Mandating the use of E-Verify without legalizing the current undocumented workforce would reduce federal and state payroll tax revenues as many employers move undocumented workers off the books into the cash economy to avoid detection by the program.

- This is the case in Arizona. In 2008, the first year the law was in effect, income tax collection dropped 13 percent from the year before. Sales taxes, however, dropped by only 2.5 percent for food and 6.8 percent for clothing. Analysts have concluded that workers weren't paying income taxes, but were still earning money to spend — meaning that the cash economy was growing. [3]

- According to Arizona economist Elliott Pollack, "What you've done, because of that law, is taken tax-paying people" and shifted them off the tax rolls. [4]

- Nationally, the Congressional Budget Office (CBO) estimates that mandating use of E-Verify (without also providing a way for unauthorized workers to become work-authorized) would increase the number of employers and workers who resort to the black market, outside of the tax system. This would decrease federal revenue by more than $17.3 billion over ten years.[5]

■ Arizona's E-Verify law has not stopped unauthorized work.

- U.S. Immigration and Customs Enforcement (ICE) officials report that unscrupulous employers have learned that E-Verify's photo-matching tool (which is used to confirm workers' identities through a photo comparison) accepts only two documents, and therefore they ask employees whom they suspect are not work-authorized to provide some other identity document that the photo-matching tool does not accept, to get around the system.[6]

- Nationally, according to a Dept. of Homeland Security evaluation of E-Verify, the program isn't even effective at preventing unauthorized work: 54 percent of unauthorized workers for whom E-Verify checks were run were erroneously confirmed as being work-authorized.[7]

- Consider Pei Wei restaurants in Arizona. On March 4, 2011, approximately two dozen employees were arrested after Maricopa County Sheriff's Office deputies raided four Pei Wei restaurants. Pei Wei ran E-Verify checks on all of its employees. [8]

- The law also hasn't stopped unauthorized work, because many employers aren't even using the system, despite harsh penalties for hiring undocumented workers, including the suspension of a business license for the first violation and revocation of a business license for a second violation during a probationary period. For example:

  - Only one-third of the Arizona's estimated 100,000 employers have signed up for the E-Verify program.[9]

  - Arizona employers made 1.3 million new hires in the fiscal year that ended in September 2009 and were required by state law to check all of them via E-Verify, but they actually checked only 730,000 of them—or slightly more than half.[10]

■ Arizona's E-Verify law has hurt American workers.

- In Arizona, the "concern most frequently identified" is that notices of database error are "issued on work-authorized individuals," the U.S. Citizenship and Immigration Services Ombudsman found when it interviewed a variety of employers there.[11] For example:

  - Francisco Romero, a U.S. citizen from Arizona, has been fired twice from jobs as a construction worker after E-Verify failed to confirm his employment eligibility. He has been a U.S. citizen since 1996, but in 2008 he spent months shuttling between Social Security Administration (SSA) and human resource offices trying to obtain confirmation that he is eligible to work. Romero was able to return to work only after a community advocate took on his case and located the error that was keeping him from being able to secure employment.[12]

  - Ken Nagel, a restaurant owner in Phoenix, Arizona, expressed concern regarding E-Verify after he hired one of his daughters, a native-born U.S. citizen, and, upon feeding her information into the system, received a nonconfirmation of her eligibility to be employed in the U.S.[13]

- If use of E-Verify were to become mandatory nationwide, about 1.2 million workers would have to contact a government agency or risk losing their jobs[14] and about 770,000 workers would likely lose their jobs.[15] Already, in fiscal year 2009 about 80,000 workers likely received erroneous findings from the system and may have lost their jobs as a result.[16]

- When workers are notified that there is a problem with their database record, they face significant burdens trying to correct the information. A government-commissioned study found that 49.5 percent of such workers lost partial or complete days of work, and 14 percent lost more than 2 days of work.[17] Many such workers must make multiple trips to an SSA office and wait in long lines to try to correct their records.

- As a result of Arizona's law, some employers have avoided hiring U.S. citizen and work-authorized Latinos altogether. Since 2008, the U.S. Equal Employment Opportunity Commission has received numerous discrimination complaints and calls from Latino workers.[18]

■ Arizona's E-Verify law has hurt small businesses.

- Although E-Verify has been called a "fast and free program,"[19] small businesses in Arizona have reported that it is difficult to use.[20] Unlike large firms, they do not have human resources departments or large workforces to compensate for lost productivity while employees resolve errors. The start-up cost associated with technology purchases is absorbed more easily in larger companies than in small "mom and pop" operations.

- For example, Mike Castillo, owner of PostalMax of Scottsdale, signed up for E-Verify in 2008. When he wanted to hire a part-time worker, a technical glitch made it difficult to file the paperwork with U.S. Citizenship and Immigration Services (USCIS). "If you don't have the luxury of a human resources staff, E-Verify takes time away from your core business," said Castillo.[21]

- Data compiled by Bloomberg Government show it would have cost the nation's employers $2.7 billion using E-Verify had been mandatory in fiscal year 2010. Small businesses would have borne the burden for $2.6 billion of that amount.[22]

- In a survey of employers who currently do not use E-Verify, 25 percent of small employers said that they were not enrolled due to lack of resources and 10 percent said that they lacked a computer with an Internet connection or had a slow connection.[23] Nationwide, small businesses are roughly two and a half times as likely as the largest businesses to report insufficient access to high-speed Internet.[24]

■ Federal policymakers should learn from Arizona.

- Policymakers should take heed of the outcome of Arizona's law. It is costly and ineffective in that it hasn't stopped undocumented work, yet has grown Arizona's cash economy and hurt American workers and small businesses.

- Undocumented workers are not going to leave the U.S. because Congress makes it harder for them to work here. Rather, a mandatory E-Verify law without legalizing the current undocumented workforce will:

  o Decrease federal tax revenues by over $17 billion.

  o Force 3.6 million workers to either try to get their records corrected by a government agency or lose their jobs.

  o Cause 770,000 workers to lose their jobs.

  o Mire small businesses in red tape at a time that we are trying to grow our economy.

  o Destroy American agriculture, driving up food costs, sending jobs overseas, and forcing us to import more of our produce from foreign sources.

- The answer is <u>comprehensive immigration reform</u> — requiring undocumented workers to legalize their immigration status, pay a fine, pay their taxes, learn English, and get on a path to full citizenship. Making E-Verify mandatory is a band-aid approach that doesn't fix our broken immigration system and only hurts our economy.

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[1] *Chamber of Commerce of United States v. Whiting,* No. 09-115 (S.Ct., May 26, 2011), www.supremecourt.gov/opinions/10pdf/09-115.pdf.

[2] Daniel Gonzalez, "Sanctions Law Begins Thursday," *The Arizona Republic*, Dec. 30, 2007, www.azcentral.com/arizonarepublic/news/articles/1230sanctionsstart.html?&wired.

[3] Daniel Gonzalez, "Illegal Workers Manage to Skirt Ariz. Employer-Sanctions law," *The Arizona Republic*, Nov. 30, 2008, www.azcentral.com/news/articles/2008/11/30/20081130underground1127.html.

[4] *Id.*

[5] Letter to Rep. John Conyers, Chair, Committee on the Judiciary, U.S. House of Representatives, from Peter Orszag, Director, Congressional Budget Office, Apr. 4, 2008, www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf.

[6] Richard M. Stana, *Report to the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: Employment Verification, Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain* (Government Accountability Office, Dec. 2010, GAO-11-146), www.gao.gov/new.items/d11146.pdf, p. 22.

[7] *Findings of the Web-Based E-Verify Program Evaluation* (Westat, Dec. 2009), www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf, p. 118.

[8] Max Jarman, "Some Pei Weis Able to Reopen," *The Arizona Republic,* Mar. 27, 2011, www.azcentral.com/arizonarepublic/business/articles/2011/03/27/20110327biz-insider0327jarman.html.

[9] Jahna Berry, "Most Arizona Employers Aren't Using E-Verify," *The Arizona Republic*, July 28, 2010, www.azcentral.com/business/articles/2010/07/28/20100728arizona-employers-ignoring-e-verify.html#ixzz1CLol2B5c.

[10] *Id.*

[11] *Observations on the E-Verify Experience in Arizona and 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, emphasis added.

[12] Kerry Howley, "Get in Line! Will Americans Have to Prove Their Right to Work Via an Error-plagued Database?" *Reason*, Oct.1, 2008, p. 38.

[13] Ronald J. Hansen, "Economy Serves Up Unhappy Meal: Worst Lull in 2 Decades is Hurting Valley Restaurateurs," *Arizona Republic*, Mar. 3, 2008, www.azcentral.com/business/articles/0303biz-econ-restaurants0303.html.

[14] About 0.8 percent of workers receive an *erroneous* tentative nonconfirmation, or "TNC." Westat, *supra* note 6, p. 117. There are currently about 154,287,000 million workers in the U.S. The 1.2 million figure was arrived at by multiplying these two numbers.

[15] Approximately 0.5 percent of work-authorized individuals receive a final nonconfirmation in error. (0.8 percent receive an *erroneous* TNC, and 0.3 percent are able to correct their TNC. This results in 0.5 percent of individuals receiving an erroneous TNC that could not be corrected and therefore became an erroneous final nonconfirmation.) There are currently 154,287,000 million workers in the U.S. The 771,435 figure was arrived at by multiplying 154,287,000 million by the 0.5 erroneous final nonconfirmation rate.

[16] There were approximately 16 million E-Verify queries in fiscal year 2010. See *E-Verify Gets High Marks from Employers in Customer Satisfaction Survey* (U.S. Citizenship and Immigration Services, Jan. 18, 2011), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a6adb46adba9d210VgnVCM100000082ca60aRCRD&vgnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD. Approximately 0.5 percent of work-authorized individuals receive a final nonconfirmation in error. See note 14, *supra*. The 80,000 figure was arrived at by multiplying these two numbers.

[17] Richard M. Stana, *supra* note 5, p. 22.

[18] Mike Sunnucks, "Immigration Law Cutting into Hispanic Hires," *Phoenix Business Journal*, April 30, 2010, www.bizjournals.com/phoenix/stories/2010/04/26/daily37.html.

[19] "E-Verify" webpage on USCIS's website (last updated May 20, 2011), www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD.

[20] *E-Verify and Arizona: Early Experiences for Employers, Employees, and the Economy Portend a Rough Road Ahead, (*Immigration Policy Center, May 2008), www.immigrationworksusa.org/uploaded/file/IPC%20--%20Early%20Experiences.pdf.

[21] See Berry, *supra* note 8 (emphasis added).

[22] Jason Arvello, "Insight: 'Free' E-Verify May Cost Small Businesses $2.6 Billion," *Bloomberg,* Jan. 28, 2011.

[23] Westat, *supra* note 6, p. 25.

[24] "Small Business & Broadband: Quick Fact Sheet," SCORE, Nov. 7, 2010, www.docstoc.com/docs/46776238/43381-SCORE_Broadband_Consortium_Fact_Sheet_4_1_10.