

**Statement of Tyler Moran
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**House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement**

Hearing on the Legal Workforce Act

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Members of the Committee, thank you for the opportunity to provide my thoughts on E-Verify and the electronic employment verification system (EEVS) created in the Legal Workforce Act. My name is Tyler Moran, and I am Policy Director at the National Immigration Law Center (NILC). NILC is a nonpartisan national legal advocacy organization that works to advance and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment laws is an important resource for immigrant rights coalitions and community groups, as well as policymakers, attorneys, workers' rights advocates, labor unions, government agencies, and the media. NILC has analyzed and advocated for improvements to the E-Verify program since it was first implemented in 1997 as the Basic Pilot program, and has extensive experience assisting advocates and attorneys in responding to problems with the program as it affects workers—immigrants and U.S.-born alike.

Overview

The Legal Workforce Act will mandate the use of an ineffective and expensive employment eligibility verification system that has grave consequences for our economy and unemployment rate. And despite all the rhetoric, the bill does nothing to create jobs and will even exacerbate the problems caused by our broken immigration system. The Legal Workforce Act will worsen unemployment rates, cause billions of dollars in lost tax revenue, and leave both employers and workers in the agricultural industry vulnerable. And this is all for a program that doesn't work: 54 percent of undocumented workers who are run through E-Verify are not detected.

Mandatory E-Verify has been part of every immigration reform bill since 2005, and NILC has worked on a bipartisan basis to craft proposals as part of immigration reform that ensure due process and privacy protections for all workers. The critical starting point for any mandatory E-Verify proposal, however, is a path to legal status for undocumented immigrants. Mandating E-Verify without creating a legal labor force will set the program up for failure. Eight million undocumented workers are not going to leave the country because the Legal Workforce Act is signed into law; they and their employers will simply move off the books into the cash economy. This massive shift into the underground economy will result in staggering losses of federal, state, and local tax revenues, including a drastic reduction in contributions to the Social Security trust fund. An unregulated economy will also provide unscrupulous employers with *more tools* to coerce and control workers. Instead of superimposing the EEVS created in the Legal Workforce Act onto a broken immigration system, we need to fix the system and ensure that *all* workers are protected.

NILC believes the key to good jobs for all workers is (1) reforming our immigration laws in a comprehensive and realistic way that also includes strengthening our labor, employment, and civil rights laws, and (2) vigorously enforcing these laws. Protecting the rights of all workers in this way will strengthen jobs and our economy. The Legal Workforce Act will do precisely the opposite. My testimony will focus on the role that undocumented workers play in our economy, concerns with the Legal Workforce Act, and specific recommendations to create a workable EEVS that are missing from Chairman Smith's bill.

The Legal Workforce Act ignores the fact that undocumented workers are a core part of the U.S. economy.

There are currently 8 million undocumented workers in the country, representing 5.2 percent of the U.S. labor force.¹ Our economy is highly dependent upon low-wage, low-skilled labor provided by undocumented workers, and our country would face significant economic consequences if undocumented workers were to suddenly leave the workforce. For example, California, Texas and New Jersey account for approximately 25 percent of U.S. Gross Domestic Product. In those states, undocumented immigrants account for about 9 percent of the workforce. Removing undocumented workers from these states—virtually overnight—from the above-ground workforce would “deal a staggering blow” to one quarter of the U.S. economy.²

Arizona made E-Verify mandatory in 2008, and its experience provides valuable evidence about the implications of the Legal Workforce Act. First, many Arizona employers choose not to use E-Verify, despite the Arizona law's provisions mandating tough penalties, including fines and the suspension or revocation of business licenses, for failure to use the system. Though 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, they actually checked only 730,000.³ In this economic environment, employers are desperate to keep their workforces and, despite the stiff penalties, nearly 50 percent simply aren't complying with the law. Second, U.S. Immigration and Customs Enforcement (ICE) officials report that, of the 50 percent of Arizona employers who *do* comply with the mandate to use E-Verify, some unscrupulous employers coach employees whom they suspect are not work-authorized, helping them get around the system. They do this by asking the workers to provide an identity document that E-Verify's photo-matching tool (which is used to confirm workers' identities through a photo comparison) cannot verify (e.g., driver's license pictures are not in the databases E-Verify uses).⁴ Third, none of this has kept undocumented workers out of the workforce in Arizona. Instead, it has driven them into the underground economy, where they make less money and face more victimization—which continues to make it harder for Arizona's good employers to compete against low-road employers.

¹ Jeffrey Passell and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends*, 2010 (Pew Hispanic Center, Feb. 1, 2011), <http://pewhispanic.org/files/reports/133.pdf>, p. 17.

² Lee Hockstader, “Illegal Immigrants: Here to Stay,” *The Washington Post*, Feb. 1, 2011, <http://voices.washingtonpost.com/postpartisan/2011/02/illegal-immigrants-here-to-sta.html>.

³ Jahna Berry, “Most Arizona Employers Aren't Using E-Verify,” *The Arizona Republic*, July 28, 2010, www.azcentral.com/arizonarepublic/news/articles/2010/07/28/20100728arizona-employers-ignoring-e-verify.html.

⁴ 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.

The reality is that this bill is really just history repeating itself. Throughout American history, immigrants have been scapegoated in tough economic times as taking jobs away from American workers. With unemployment hovering at 9 percent and industries such as construction facing a 20 percent unemployment rate,⁵ people are frustrated and are looking for someone to blame. But there is no statistically significant relationship between unemployment and recent immigration.⁶ In fact, unemployment rates among native-born workers are actually lower in areas with higher levels of immigration, because spending by immigrants stimulates the economy and creates additional jobs.

Policymakers who support the Legal Workforce Act are capitalizing on workers' understandable frustrations about the stagnant economy and have introduced a bill that plays on these erroneous assumptions about the undocumented workforce. They have asserted that if we deport all undocumented workers, we can then simply move Americans into the jobs they leave behind.⁷ But this oversimplification fails to grasp a general understanding of the labor market. As the Cato Institute and other researchers have pointed out, immigrants and native-born workers with similar educational attainment and experience possess unique skills that lead them to specialize in different occupations.⁸ Despite the fact that immigrant workers and native-born workers are "imperfect substitutes" for one another,⁹ these policymakers have put forth a bill that makes the U.S. workforce more vulnerable while failing to provide actual solutions to any of the problems it identifies.

Concerns with the Legal Workforce Act include:

1. It will cost federal and state governments billions of dollars in lost tax revenue, but it detects undocumented workers less than half of the time. Undocumented workers are not going to leave the country if the Legal Workforce Act is enacted. It is clear that undocumented immigrants fill a niche in our economy and are here to stay, despite the existence of a verification system. And because these workers are a central part of our economy, employers will use any means necessary to keep them, including moving into the underground economy, misclassifying workers as independent contractors, and simply not participating in any employment eligibility verification system.¹⁰ In analyzing a 2008 bill similar to the Legal Workforce Act that would have made use of E-Verify mandatory (without also providing a way for unauthorized workers to become work-authorized) the Congressional Budget Office (CBO) found that it would decrease federal revenue by more than \$17.3 billion over ten years—because

⁵ *The Construction Industry in 2011* (Aronson Blogs, Jan. 11, 2011), <http://www.aronsonblogs.com/cisg/?p=76>.

⁶ *Immigration and Native-Born Unemployment Across Racial/Ethnic Groups: Untying the Knot, Part II of II* (Immigration Policy Center, Rob Paral and Associates, May 2009), www.immigrationpolicy.org/sites/default/files/docs/Part%20%20-%20Unemployment%20Race%20Disconnect%2005-19-09.pdf, pp. 3–5.

⁷ Letter to U.S. House of Representatives Democratic colleagues from Lamar Smith, Feb. 4, 2010.

⁸ Dan Griswold, *ICE Worksite Enforcement – Up to the Job?: Testimony Before the Subcommittee on Immigration Policy and Enforcement, Committee on the Judiciary, U.S. House of Representatives* (Cato Institute, Jan. 26, 2011), www.cato.org/pub_display.php?pub_id=12730.

⁹ Giovanni Peri and Chad Sparber, *Task Specialization, Immigration and Wages* (University of California, Davis and NBER and Colgate University, Jan. 2009), http://www.econ.ucdavis.edu/faculty/gperi/publications/peri_sparber_main_appendix_final.pdf, p. 2.

¹⁰ See Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," *The Wall Street Journal Classroom Edition*, April 2005, http://wsjclassroom.com/archive/05apr/econ_underground.htm; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation* (Yale Law Journal, 103 Yale L.J. 2179, May 1994), www.wiego.org/papers/FooImmigrantWorkers.pdf.

it would increase the number of employers and workers who resort to the black market, outside of the tax system.¹¹

As noted, in Arizona use of E-Verify has been mandatory for all employers since 2008, and its experience provides a snapshot of the most likely economic consequences of implementing the Legal Workforce Act without first providing a way for unauthorized workers to legalize their status. The Public Policy Institute of California found that, despite the law's intention of reducing the number of unauthorized immigrants in the state, it has simply shifted undocumented workers into the cash economy or other informal work arrangements. In fact, 83 percent of undocumented immigrants remained in the state after enactment of the law.¹² Additionally, the *Arizona Republic* reported that in 2008, the first year the law was in effect, income tax collection dropped 13 percent from the previous year. Sales taxes, however, dropped by only 2.5 percent for food and 6.8 percent for clothing. The conclusion by state economists was that workers weren't paying income taxes, but were still earning money to spend—meaning that the underground economy was growing.¹³ This loss in tax revenue happened at a time when the state was facing a billion dollar budget gap.

Eight million undocumented workers moving off the books will also threaten the solvency of the Social Security trust fund. Over the next 20 years, the number of senior citizens relative to the number of working-age Americans will increase by 67 percent, which means that they will “transition from being net taxpayers to net recipients.” They will be “supported by a smaller workforce that is struggling to meet its own needs.”¹⁴ It is estimated that two-thirds of undocumented immigrants currently pay payroll taxes, which added \$12 billion to the Social Security trust fund in 2007.¹⁵ In fact, the trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants by 2007, which represents 5.4 to 10.7 percent of the trust fund's total assets. The chief actuary of SSA has stated that without undocumented immigrants' contributions to the trust fund, there would have been a “shortfall of tax revenue to cover [payouts] starting [in] 2009, or six years earlier than estimated under the 2010 Trustees Report.”¹⁶

All of these enormous costs and limitations occur even as E-Verify has faltered in detecting undocumented workers. Westat researchers found that, in 2008, 54 percent of unauthorized workers for whom E-Verify checks were run—or 56,000 workers—were erroneously confirmed as being work-

¹¹ 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.

¹² Magnus Lofstrom, Sarah Bohn, and Steven Raphael, *Lessons from the 2007 Legal Arizona Workers Act* (Public Policy Institute of California, March 2011), http://www.ppic.org/content/pubs/report/R_311MLR.pdf.

¹³ Daniel Gonzalez, “Illegal Workers Manage to Skirt Arizona Employer-Sanctions Law: Borrowed Identities, Cash Pay Fuel an Underground Economy,” *The Arizona Republic*, Nov. 30, 2008.

¹⁴ Dowell Myers, *Thinking Ahead About Our Immigrant Future: New Trends and Mutual Benefits in Our Aging Society* (Immigration Policy Center, Jan. 2008), <http://www.immigrationpolicy.org/sites/default/files/docs/Thinking%20Ahead%201-08.pdf>.

¹⁵ Edward Schumatcher-Matos, “How illegal immigrants are helping Social Security,” *The Washington Post*, Sept. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html>.

¹⁶ *Id.*

authorized.¹⁷ The Migration Policy Institute estimates that E-Verify erroneously confirmed 230,000 unauthorized workers as work-authorized in 2009.¹⁸

2. It will prevent millions of American workers from getting a job and cause many more to lose their jobs.

Impact on new hires. If the Legal Workforce Act is signed into law, it will deny millions of Americans the chance to earn their first paycheck at their next new job. The bill allows—and even encourages—employers to use the EEVS to prescreen workers before they are allowed to start their first day of work. This is a radical change from current law, which prohibits employers from using E-Verify before hire. Currently, between .08 percent and 2.3 percent of all workers whose employment eligibility verification is checked through E-Verify are issued erroneous tentative nonconfirmations, or TNCs.¹⁹ This means that, with 60 million new hires each year, between 480,000 and 1.3 million U.S. citizen and legal workers will be flagged as having errors in their records that need to be fixed before they can begin work.²⁰ The Westat study also reports that when employers have illegally prescreened workers under the current E-Verify rules, 33 percent of these workers prescreened are not offered a job.²¹ Westat also found that 47 percent of workers who were not offered a job because of prescreening couldn't find a new job for two months or longer.²² Employers likely do not offer workers who receive TNCs a job because of the amount of time and resources it costs to fix the errors, and because many employers erroneously assume that foreign-born workers who receive a TNC are undocumented.²³

Workers who erroneously receive a TNC may also be locked out of a job due to inability to correct their records. According to Westat, of the workers who erroneously receive a TNC, 47 percent are unable to fix their records and so they receive a final nonconfirmation in error, which prohibits their employer from proceeding with the hire.²⁴

Impact on the current workforce. The Legal Workforce Act will also force millions of currently-employed workers to lose their jobs. While the bill purports to only verify new hires, the various

¹⁷ *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.

¹⁸ Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform*, Senate staff briefing handout (Migration Policy Institute, Feb. 17, 2011).

¹⁹ Employers receive a “tentative nonconfirmation” notice-or TNC—from either SSA or DHS when the agencies are unable to automatically confirm a worker’s employment eligibility. A “tentative nonconfirmation” notice is not an indication of an immigration violation, and workers have the right to contest the finding with the appropriate agency. For the .08 percent erroneous TNC rate, see Westat, *supra* note 17, p. 117. For the 2.3 percent erroneous TNC rate, see description of LA County audit at Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), <http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf>, footnote 13.

²⁰ The 480,000 figure was reached by multiplying the number of new hires per year (60 million) by the .8 percent Westat error rate. The 1.3 million figure was reached by multiplying the number of new hires per year by the 2.3 percent LA County error rate.

²¹ 114 workers in the Westat survey reported that they were prescreened and 38 who were prescreened report that they were not offered a job. The 33 percent was reached by dividing 114 by 38. See Westat, *supra* note 17.

²² Westat, *supra* note 17, p. 140.

²³ *Findings of the Web-Based Basic Pilot Evaluation* (Westat, Sept. 2007), <http://tinyurl.com/2tddqs>, p. 77.

²⁴ Westat, *supra* note 17.

reverification mechanisms it provides for essentially would require reverification of the U.S.'s entire workforce over a relatively short period of time. Those subject to reverification would include:

- Federal, state and local employees;
- Workers with expiring employment authorization;
- Workers who require a security clearance because they work in a federal, state or local government building, a military base, a nuclear energy site, a weapons site, or an airport or other facility that requires workers to carry a Transportation Worker Identification Credential;
- Workers assigned to a federal or state contract;²⁵
- Workers whose employers have errors on their Wage and Tax Statements, which result in an SSA no-match letter; and
- Workers identified by SSA as potentially not employment-authorized due to use of another individual's Social Security number.

Additionally, employers may elect to reverify their workers as long as it is done on a “nondiscriminatory” basis. In such a case, each individual employee must be reverified. There are currently 154,287,000 workers in the labor force. Conservatively, even if only half of the current workforce were reverified and the error rate range of .8 percent to 2.3 percent were applied, this would mean between 617,148 and 1.8 million U.S. citizen and legal immigrant workers erroneously receiving TNCs and between 290,059 and 846,000 workers who would have to be fired because of erroneous final nonconfirmations.²⁶

Burdens on workers to correct records. When workers receive a TNC notice, they often have to take unpaid time off from work to check and correct their records with SSA—which may take more than one trip. In fiscal year 2009, 22 percent of workers spent more than \$50 to correct database errors and 13 percent spent more than \$100.²⁷ Challenging a TNC at a local SSA office may take more than one trip, and in 2009, the waiting times for SSA office visits were 61 percent longer than they were in 2002. During the period March 1, 2009, through April 30, 2010, about 3.1 million visitors to SSA offices waited more than 1 hour for service and, of those visitors, over 330,000 waited more than 2 hours. Further, in fiscal year 2009, about 3.3 million visitors left an SSA field office without receiving service.²⁸ The American Council on International Personnel members report that corrections at SSA usually take in excess of 90 days and that workers visiting an SSA office must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected.²⁹ For low-income

²⁵ The obligation only applies to contracts over \$100,000, and to individuals who do not hold Federal security clearances, are not administrative or overhead personnel, and are not working solely on contracts that provide Commercial Off The Shelf goods or services as set forth in the Federal Acquisition Regulation (See 73 FR 67651–705 (Nov. 14, 2008) and 74 FR 26981 (June 5, 2009)).

²⁶ Half of 154,287,000 is 77,143,500. The 617,148 figure was reached by multiplying this number by the .8 percent Westat error rate. The 1.8 million figure was reached by multiplying the 77,143,500 figure by the 2.3 percent LA County error rate.

²⁷ Westat *supra* note 17, pp. 203-204

²⁸ *Customer Waiting Times in the Social Security Administration's Field Offices* (Social Security Administration Office of the Inspector General, Oct. 2010), <http://www.socialsecurity.gov/oig/ADOBEPDF/A-04-10-11034.pdf>, p. 3.

²⁹ American Council on International Personnel, “Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008),” August 11, 2008.

workers, this de facto layoff will have grave consequences, including inability to pay rent or for other basic necessities, despite their being *fully authorized* to work legally in the U.S.

Lack of any meaningful due process. The Legal Workforce Act contains almost no meaningful due process for workers who become victims of either errors in the verification system or abuse by employers who misuse it. The act bars workers from bringing any claim under virtually any law—including under laws explicitly designed to provide labor protections—for loss of their job or violations that occur as a result of an employer’s use of the system.

The only avenue for redress that the bill allows workers who unjustly lose employment because of the EEVS is to sue the federal government under the Federal Tort Claims Act (FTCA) for lost wages. This is an ephemeral remedy, at best. Few workers who lose employment because of the EEVS will overcome obstacles imposed by the FTCA’s strict requirements. An FTCA lawsuit against the federal government in our crowded federal courts can take many months, if not years. Prior to filing suit, a plaintiff must file an administrative claim and wait for either a denial of that claim or the passage of six months to determine whether the administrative agency will deny the claim. Only after those six months have run may a plaintiff even commence a suit.³⁰ Compensation will be further delayed after a settlement or judgment is final because the U.S. Dept. of Justice must submit the settlement or judgment to the U.S. Government Accountability Office (GAO) for payment. Payments typically are not even sent until six to eight weeks from the date the settlement or judgment is sent to the GAO. The responsible United States Attorney’s office or the Department of Justice attorney must then process payment. Moreover, because of the FTCA’s restrictions on attorney’s fees, coupled with possibly low recovery amounts for lost wages, it will be difficult if not impossible for most workers to find counsel to litigate their claims.

And it won’t be enough for a worker to prove only that an error was made, even if the results for the worker are devastating. Under the FTCA, the worker must prove that the error resulted from “negligent or wrongful acts of omission of any employee of the Government.”³¹ The “discretionary function exception” may also bar suit for a government agency’s inclusion of erroneous data about an employee. In a wrongful discharge or negligence case arising out of, for example, improper maintenance of a database, the government would undoubtedly argue that the claim was barred by the “discretionary function exception.”³² The bottom line is that most workers who lose employment under the Legal Workforce Act will never receive any compensation.

3. It fails to address the real needs of the agricultural industry and leaves employers, workers, and the American people vulnerable. Because up to 75 percent of agricultural workers are unauthorized immigrants,³³ the bill attempts to treat agriculture workers and employers differently through carve-outs that extend the time for implementation and exempt farm workers from verification if they return to an employer with whom they have worked in the past. But this is just a facade. Other provisions in the bill

³⁰ 28 U.S.C. 2675.

³¹ 28 U.S.C. § 1346(b).

³² 28 U.S.C. § 2680 (a).

³³ Dan Zak, “Stephen Colbert, in GOP Pundit Character, Testifies on Immigration in D.C.,” *The Washington Post*, Sept. 25, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092402734.html.

require employers to reverify the current workforce over time—which simply delays the devastating impact on agriculture.

The bill’s carve-out acknowledges how a mandatory E-Verify regime will wreak havoc on American agriculture but fails to provide tangible solutions that produce reform. Instead, the bill puts forth half-solutions that put family farms, American jobs, and workers at risk and create a regime in which workers will be vulnerable to increased labor exploitation. For example, the U.S. Department of Agriculture reports that for every on-farm job there are about 3.1 “upstream” and “downstream” jobs in America—jobs that support and are created by the growing of agricultural products.³⁴ Given current levels of unemployment, these jobs are vital for American workers—but they also ensure that small family farms can produce commodities that are economically viable. The bill threatens to reduce or eliminate these while simultaneously creating an even larger pool of pliable, easily exploited workers. The bill exempts from verification agricultural workers who return to an employer for whom they worked previously, creating an incentive for workers to return to jobs for which, in the past, they may have been paid illegally low wages or where they may have had to endure other abusive working conditions. Similarly, this carve-out ensures that unauthorized workers will stay in the agricultural industry, ensuring that it remains low-wage and that American workers will continue to have extremely low incentive to apply for these jobs.

Additionally, the Legal Workforce Act requires most employers of agricultural workers assigned to state or federal contractors to have their employment eligibility verified through the EEVS. But because the bill provides does not make contractors or subcontractors legally liable for knowingly hiring unauthorized workers, the bill will result in growers’ continued and expanded use of labor contractors to hire agricultural workers. U.S. agriculture relies heavily on workers recruited and supplied by often unscrupulous labor contractors, which practice ensures that wages are kept low and working conditions barely tolerable for the workers who harvest the fruits and vegetables we eat. The Legal Workforce Act does nothing to stop or even counteract this. At best, the bill perpetuates the abysmal status quo; at worst, it incentivizes the expanded use of labor contractors, making already vulnerable workers more vulnerable. The treatment of agriculture in the bill acknowledges the problem farmers face in getting authorized workers, but the bill offers no realistic solution. Instead, it creates a system that works neither for agricultural workers, for employers, or for Americans who want and need the agricultural products our nation produces.

- 4. It will increase discrimination against Latino, Asian, and other foreign-born workers.** The existing E-Verify system already results in discrimination against foreign-born workers, since they are more likely to be the subject of errors in the databases the program relies upon. E-Verify error rates are 30 times higher for naturalized U.S. citizens and 50 times higher for legal nonimmigrants than for native-born U.S. citizens.³⁵ This means that under the Legal Workforce Act, it is more likely that Latinos, Asians and other foreign-born workers will be locked out of jobs than other workers. These are workers already facing higher unemployment rates than the general population.³⁶ The bill will also likely *increase* discrimination against foreign-born workers, since it allows employers to prescreen workers, i.e., to

³⁴ Griswold, *supra* note 8.

³⁵ Rosenblum, *supra* note 19.

³⁶ In May 2011, the Latino unemployment rate was 11.3 percent, *Employment Situation Summary* (Bureau of Labor Statistics, June 3, 2011), <http://www.bls.gov/news.release/empsit.nr0.htm>.

screen them before they are actually hired. Prescreening is forbidden under current law, because Congress knew that prescreening would result in work-authorized foreign-born workers being discriminated against and unjustly denied employment as a result of errors in E-Verify's databases.

Because foreign-born workers are subject to higher database error rates, they are more likely to have adverse actions taken against them by their employers who don't follow the rules. The rate of employer noncompliance with E-Verify rules is extremely high. For example, over 66 percent of employers took adverse actions against workers receiving a TNC.³⁷ Such actions include prohibiting workers for whom they had received a TNC from working, restricting such workers' work assignments, and delaying job training for such workers.³⁸

Although required by law to do so, employers do not always notify workers of a TNC. Workers who do not contest database errors lose their jobs. In fiscal year 2009, 42 percent of workers reported that they were not informed by their employer of a TNC, resulting in the denial of their right to contest the finding.³⁹ A survey of 376 immigrant workers in Arizona found that 33.5 percent had been fired, apparently after receiving an E-Verify TNC, but that *none* had been notified by employers that they had received a TNC or given information to appeal the finding.⁴⁰

Employer misuse will likely increase in a mandatory system. Current E-Verify users are disproportionately large businesses and federal contractors, and most users that have enrolled in the system have chosen to do so on a voluntary basis—all factors that make them *more likely* than a "typical" U.S. employer to use the system properly. Noncompliance with program rules would almost certainly increase if all employers were required to use the system. In Arizona, the first state to make E-Verify mandatory, employers are less compliant with E-Verify procedures than E-Verify employers outside of Arizona.⁴¹ The likely reason is that, unlike most E-Verify users, most Arizona employers did not volunteer to use the program.

The increase in database errors and employer misuse that will increase under the Legal Workforce Act will be felt disproportionately by Latino, Asian, and other foreign-born U.S. citizens and authorized workers.

5. It hurts women who change their name due to marriage or divorce and others with mismatches in SSA's database. The Legal Workforce Act requires employers to reverify any worker who is the subject of a "notice" to the employer regarding a mismatched wage and tax statement. Currently, mismatched wage and tax statements result in SSA no-match letters to employers. An SSA no-match letter indicates that workers are not receiving proper credit for their earnings, which will affect the level of retirement or disability benefits they may receive in the future if they do not correct the discrepancy in SSA's

³⁷ Westat *supra* note 17, p. 157. Thirty-seven percent of employers self-reported that they took adverse actions against workers receiving a TNC, and workers reported that an additional 29 percent of employers took adverse action against them, with a total of over 66 percent of employers take adverse action.

³⁸ Westat, *supra* note 17, pp. 157, 204.

³⁹ *Id.* at pp. 154, 199

⁴⁰ Caroline Isaacs, *Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law* (Washington, DC: American Friends Service Committee, 2009), www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700.

⁴¹ Westat, *supra* note 17, p. 237.

records. There are numerous reasons why employees' names and Social Security numbers might not match SSA records, including name changes due to marriage or divorce, incorrect data entry, and misspelled names. No-matches are not a proxy for unauthorized immigration status. In fact, SSA estimates that 17.8 million (or 4.1 percent) of its records contain discrepancies and that 12.7 million (about 70 percent) of those records with errors belong to native-born U.S. citizens.⁴²

The number of SSA no-match letters sent by SSA could affect an estimated 10 million or more workers who would need to be reverified by their employers each year.⁴³ And because the bill does nothing to fix the errors that are the subject of the SSA no-match letter, it is almost certain that when employers submit these workers' names to the EEVS, they will receive a TNC. As noted in the section above, workers with TNCs are more likely to be fired and have adverse action taken against them by their employers.

Additionally, because employers know that receipt of a no-match letter will trigger an EEVS reverification, they may be overly cautious and fire these employees. Already, thousands of workers have been fired due to the mistaken assumption that an SSA no-match letter indicates an immigration violation.⁴⁴

6. **The implementation timeline is impractical and unworkable.** Every employer in the country—all 5.5 million of them (not including agricultural employers)—will have to participate in the EEVS within two years of its enactment. It took 10 years to enroll the 250,000 employers who currently participate in E-Verify. Ramping up to 5.5 million employers is a 2,100 percent increase over the prior rate of enrollment and would require DHS to enroll approximately 219,492 employers per month for two years. DHS would then have to enroll all 482,186 agricultural employers that have to use the system within 3 years of enactment.⁴⁵

Despite E-Verify's many flaws, the Legal Workforce Act includes no performance evaluations or metrics to ensure that the huge EEVS system it proposes is working as intended. Requiring such a dramatic and large-scale implementation of the EEVS—without addressing the existing data, technology, and infrastructure problems evident in E-Verify—would be a recipe for chaos. According to the Association for Computing Machinery, turning E-Verify into a mandatory program is a very “serious architectural issue,” because it would have to handle at least a thousand-fold increase in users,

⁴² *Congressional Response Report: Accuracy of the Social Security Administration's Numident File* (Office of the Inspector General, Social Security Administration, December 2006, A-08-06-26100).

⁴³ <http://www.immigrationpolicy.org/sites/default/files/docs/InFocusSSANo-Match05-08.pdf>, pg. 5 and 6.

⁴⁴ C. Mehta, N. Theodore, and M. Hincapié, *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (Center for Urban Economic Development, University of Illinois at Chicago; and National Immigration Law Center, Nov. 2003) at 2, available at www.uic.edu/cuppa/uicued/npublications/recent/SSANomatchreport.pdf.

⁴⁵ Table 7: Hired Farm Labor – Workers and Payroll, *2007 Census of Agriculture – State Data*, http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1_Chapter_2_US_State_Level/st99_2_007_007.pdf, pp. 336-344.

queries, transactions, and communications volumes. Each time a system grows even just ten times larger, serious new technical issues arise that were not previously significant.⁴⁶

How can the shortcomings of E-Verify be mitigated?

Making E-Verify mandatory for all employers without legalizing the status of immigrants in the labor force who currently are undocumented or fixing the weaknesses in the current system will *not* create jobs and *will* result in poorer working conditions, the loss of jobs for American workers, and billions in dollars of lost tax revenue. At minimum, for expansion of E-Verify to be considered, the following steps must be taken:

1. **Consider making use of the EEVS mandatory only if this is paired with a legalization program.** The EEVS program will not work as long as the U.S. still has a large population of unauthorized workers. If it is implemented without legalizing the 8 million undocumented workers in our economy, employers will simply move their unauthorized workers off their books into the underground economy, causing billions of dollars in lost tax revenue.
2. **Apply the EEVS only to new hires.** Reverification of the entire workforce would place a huge administrative burden on workers and businesses alike. A current turnover/separation rate of 40 percent a year (50-60 million employees hired each year) means that most people's employment eligibility will be verified by the new system in a timely manner without forcing employers to go through old records and reverify existing workers. While the Legal Workforce Act purports to verify only new hires, the practical implications of the bill are that almost all existing workers will have to be reverified.
3. **Phase in the EEVS with evaluations of its performance.** Phase in E-Verify incrementally, by size of employer or by industry, while requiring that its performance be vigorously reevaluated prior to each expansion. Evaluations should address, at minimum, wrongful terminations due to system errors, employer compliance with program rules, and the impact of the system on workers' privacy. Minimum performance criteria should be met within each of these areas before subsequent expansions of the system. The Legal Workforce Act does not include provision for any evaluation of the program.
4. **Ensure data accuracy.** Establish data accuracy standards that are subject to annual review to ensure that the data accessed by employers is accurate and continuously updated. The Legal Workforce Act contains no provisions to ensure data accuracy, yet would roll out the system under an extremely short timeline.
5. **Protect workers from misuse of the system.** Prohibit use of the EEVS to selectively verify only certain workers, prescreen workers before a job offer, take adverse employment actions based on system determinations, or fail to inform workers of their rights under the program. Establish an oversight and penalty structure to ensure employer compliance with program rules. The Legal Workforce Act contains no meaningful worker protections.
6. **Ensure due process for workers subject to database errors.** Provide for administrative and judicial review and allow workers to remain employed while they challenge government errors. Provide compensation from the government, costs, and attorney's fees when an error in the databases results in wrongful denial or termination of employment. Under the Legal Workforce Act, workers would be unlikely to receive any remedy.

⁴⁶ Peter Neumann, "Security and Privacy in the Employment Eligibility Verification System (EEVS) and Related Systems," Testimony before the Subcommittee on Social Security of the House Committee on Ways and Means, June 7, 2007, <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6099>.

7. **Protect the privacy of workers.** Minimize the amount of data collected and stored, and create penalties for collecting, maintaining, or distributing data not authorized in the statute. Create penalties to deter the use E-Verify data to commit identity fraud or for any other unauthorized purpose.
8. **Fund an outreach program.** Following in the footsteps of the process instituted when the I-9 employment eligibility verification form was first introduced in 1986, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) should be charged with conducting outreach and education to both workers and employers in order to inform them about how the system works, rights and responsibilities under the new system, and avenues for redress in the case of error or unfair employment practices. Despite mandating a 2,300 percent increase (over the rate of enrollment in E-Verify) in employer utilization, the Legal Workforce Act provides for no outreach program to educate employers and workers of their responsibilities and rights.
9. **Create a term-limited employment eligibility verification advisory panel.** The advisory panel would advise SSA and DHS on implementation of the EEVS, including standards of database accuracy, privacy, and compliance, in addition to outreach to workers and employers. The panel would include representatives from appropriate federal agencies, organizations with technological and operational expertise in database accuracy, and other stakeholders that represent the interests of persons and entities affected by database inaccuracies, including business, labor unions, privacy advocates, and immigration organizations.
10. **Clarify that states are preempted from requiring businesses to use the EEVS.** Clarifying the statute's language with respect to this issue would ensure that the federal government controls uniform expansion of the program. The Legal Workforce Act still allows states such as Arizona to impose their own penalty scheme on employers.
11. **Prevent unscrupulous employers from using immigration law to avoid their obligations under labor laws.** Under current law, employers seek out and hire undocumented workers to exploit them for their labor and then threaten them with deportation when they exercise their labor rights. The employer pays no penalty for the labor violations. Holding employers liable for these labor law violations and preventing them from using immigration law to "deport their problem" will reduce the economic incentive to seek out these vulnerable workers. It will also prevent the churning of the workforce that undermines U.S. jobs. Legislation such as the POWER Act (the Protect Our Workers from Exploitation and Retaliation Act) would do just that. It would lessen the incentives for employers to use threats of immigration enforcement as a means to avoid compliance with labor laws and help create safe workplaces for all workers.

Conclusion

Making use of E-Verify or any electronic employment eligibility verification system mandatory, outside of broader reform of our immigration system, will undermine American jobs and ultimately impose new burdens on our economy, workers and businesses. We have been trying an "immigration enforcement-only approach" for at least two decades now, and it has not worked. We need enforcement of labor, employment and civil rights laws, not the current churning of the workforce, where undocumented workers are often preferred over documented workers because they are easier to hire and fire. That only results in further downward pressure on wages and working conditions of all U.S. workers.