



**Statement of Bill Beardall on Behalf of the Equal Justice Center and the
National Immigration Law Center
to the House Committee on Education and the Workforce
Subcommittee on Employer-Employee Relations**

**Field Hearing on “Immigration: Enforcing Employee Work Eligibility Laws and
Implementing a Stronger Employment Verification System”**

Monday, July 31, 2006

Members of the Committee, thank you for the opportunity to address the critical issue of employment verification laws and the pending proposals to create a new Employment Eligibility Verification System (EEVS). I am the Executive Director of the Equal Justice Center and have practiced as an employment lawyer for low-income working people for the last 28 years. I am testifying today on behalf of the Equal Justice Center and the National Immigration Law Center. The Equal Justice Center (EJC) is a non-profit employment justice and civil rights organization based in Texas which empowers low-income working families, individuals and communities to achieve systemic reforms that improve their lives. EJC provides the critical support, legal rights advocacy, and infrastructure that enable low-income working people to achieve fair treatment in the workplace, in the justice system, and in the larger civil society. The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights and opportunities of low-income immigrants and their family members. Since 1979, NILC has established a national reputation for its expertise on immigration law and the public benefit and employment rights of low-income immigrants. NILC is also a convener of the Low Wage Immigrant Worker Coalition, a nationwide coalition of labor unions, civil rights organizations, immigrant rights organizations, and others concerned with the rights of low wage immigrant workers in the U.S.

A Punitive Enforcement-Only Approach will not Reduce Undocumented Migration but Will Exacerbate the Harms Associated with Undocumented Migration

Contrary to popular opinion, our current immigration woes are not merely the result of a failure of will. Rather, increased migration is a worldwide phenomenon resulting from the powerful economic, demographic, technological and political forces that have made our world smaller and have given birth to a truly global labor market. These include explosive increases in global trade and the resulting political and social upheavals, the telecommunications revolution that has brought peoples into unprecedented proximity, and the reduced cost of travel. The United States has played a historical role in adapting and integrating large numbers of newcomers into our political, social and economic lives. Given our history as an immigrant receiving nation and our economic and political position in the world, there is little to suggest that we could significantly reduce the current levels of migration — setting aside whether this is a good or a bad thing — without taking a sledge hammer to our economy and our way of life.

We have tried. Congress has enacted almost one bill per year in the last two decades intended to further strengthen immigration enforcement as the resources devoted to immigration enforcement have grown exponentially. This trend began in 1986 with the passage of the Immigration Reform and Control Act (IRCA) of 1986, which for the first time made it unlawful for employers to “knowingly” hire unauthorized workers and created civil penalties (known as “employer sanctions”) for those who do so. The intent of this change was to stem the flow of undocumented immigrants to the United States, by removing the job magnet. Although employer sanctions have not been vigorously enforced since then, it should be noted that neither have any other employment laws such as wage and hour, employment discrimination, collective bargaining, and health and safety protections for workers.

The enforcement-without-reform policy of the last 20 years, including the initiation of employer sanctions, has been a resounding and obvious failure. Although undocumented migration appears to have plateaued, it has done so at an all time high, with 7.2 million unauthorized workers now employed in the U.S., representing almost 5 percent of the civilian labor force.¹ If we are going to be realistic, we have to recognize that our economy is now highly dependent upon low-wage, low-skill labor provided by undocumented workers. The share of undocumented workers in agriculture, cleaning, construction, food service, and other low-wage occupations is approximately three times the share of native workers in these types of jobs.² In the aggregate, these hard-working, enterprising workers are not going away, and neither are their spouses or the children who have grown up in this country and integrated into our society. Like it or not, they will play a role in our nation’s future.

Given this fact, and the reality that high immigration levels are likely to be a part of our future, the focus of our immigration policy should be on maximizing the benefits and minimizing the harms of their arrival and established presence, both for the immigrants themselves, and even more importantly, for those of us who were lucky enough to be born here.

We need to recognize that the impact of immigration is not merely a matter of numbers. Like all complex social phenomenon, immigration is neither all good nor all bad. There are winners and losers. And the impact of immigration on all of us will be substantially different depending on how we treat the immigrants. Do we punish them, marginalize them, make it harder for them to rely on labor or law enforcement protections, steer them into dangerous substandard jobs? Or do we invest in them, provide them with equal rights, with protection against exploitation, with the tools to learn English and to upgrade their skills, and with the ability to be productive, upwardly mobile participants in the economy?

If immigrants enjoy the same workplace protections and economic mobility as others, they will be less subject to exploitation at the hands of employers whose practices will then undermine the wages and working conditions of other workers. In addition, there is evidence that raising the wages and working conditions of low-wage workers will actually reduce immigration by making the existing workforce relatively more attractive to employers.³ Therefore, it is imperative, for the

¹ Jeffrey S. Passel, *SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (Pew Hispanic Center, March 2006).

² Jeffrey S. Passel, *UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS* (Pew Hispanic Center, June 2005), pp. 26–28.

³ Ivan Light, “How L.A. Kept Out a Million Migrants,” *LOS ANGELES TIMES*, April 16, 2006.

benefit of all workers, to eliminate the vulnerabilities and marginalization inherent in the existence of a large, economically vulnerable undocumented workforce. The only practical way to do this is to legalize those who are already working and raising families here. And it is equally important to ensure that all immigrants — current and future, documented and undocumented — have full labor protections.

It is in this context that efforts to impose electronic verification and increase workplace immigration enforcement should be examined. Many Americans believe that such changes would be a magic bullet, painlessly solving our immigration woes. The theory is that if there were no employment market, unauthorized workers would not come, and those who are here would leave. This might be true, but there is no evidence the measures that have been proposed to date would dry up the employment market. Rather, to the extent these measures are effective in initially reducing employment opportunities, their main effect will be to make America's 7.5 million undocumented workers even more desperate for employment and willing to accept even more marginal jobs.

History teaches us that such a willing and desperate workforce will find employers willing to take advantage of their availability and reduced-cost. This is not theory. It is exactly what happened in the late 1980's and 1990's in response to the impositions of employer sanctions in the IRCA.⁴ Experience with the current employer sanctions system gives us some indication of the increased use of exploitative practices by unscrupulous employers and the increased pressure that even legitimate employers feel to engage in similar practices or risk going out of business. Under the current system, many employers twist immigration law into a tool to punish workers seeking to enforce their labor rights. Many of them knowingly violate IRCA's employment verification provisions to hire undocumented workers whom they know will then be reluctant to hold them accountable for labor law violations. It is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do indeed complain about their deplorable working conditions. For example, an employer may not verify a worker's employment authorization at the time of hire but will conveniently remember the requirements under IRCA only after the worker complains of some labor violation or attempts to organize a union to improve their working conditions. Implementation of a system that only enforces hiring sanctions without increased enforcement and improvement of existing labor and employment protections will further exacerbate these problems, and create additional incentives for unscrupulous employers to recruit, hire and exploit unauthorized workers. This exploitation of course not only harms the undocumented worker, it just as surely harms U.S. born workers who find their job opportunities, wages and working conditions undermined by the incentives thus created for employers to hire and take advantage of vulnerable undocumented workers.

In addition to increasing the opportunity for exploitation of vulnerable workers, an exclusive reliance on employer sanctions will be counter-productive for three other important reasons. First, it will create an economic incentive for even more employers to hire workers "off-the-books" in unreported, cash-based employment relationships. Second, it will encourage more employers to evade employer sanctions by misclassifying their employees as "independent contractors." Third it will encourage companies to interpose substandard, middleman labor contractors between

⁴ K. M. Donato, J. Durand, and D. S. Massey, "Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act," *DEMOGRAPHY* 29: 139–58 (1992).

themselves and their employees, pretending the workers are employees of these sham contractors and exposing the workers to marginal fly-by-night employment practices by the middlemen. All of these practices in fact increased dramatically following the imposition of employer sanctions in the 1986 IRCA. And all of these practices have harmful economic and social impacts beyond the increased exploitation of workers. For example, they increase our reliance on an unregulated cash economy; reduce the collection of payroll and income taxes; reduce participation in the unemployment insurance, workers compensation and social security safety net programs; reduce the ability of government regulators and workers to monitor and enforce basic labor protections; and reduce employers' general respect for operating legally and above-board. These substandard practices have an adverse effect on everyone in our society, but they are especially — and ironically — harmful for U.S. workers, whose employers will be forced to compete with a growing sector of businesses that are unconstrained by the regulatory apparatus that is supposed to protect us all and is designed to underpin our basic standard of living.

As a practical matter, the only law enforcement approach that is very likely to succeed in addressing the problem of unauthorized employment in our economy is the comprehensive enforcement of labor and employment protections for all working people without regard to their immigration status. This would be by far the most effective way to remove employers' incentive to hire and exploit unauthorized workers, while also removing employers' incentive to adopt substandard employment practices that evade our core tax, social benefit, and regulatory systems. On the other hand, ramping up enforcement of employer hiring sanctions alone will surely do more harm than good, at least without vastly increased enforcement of employment protections for both undocumented and documented workers.

As Congress considers creating a mandatory Employment Eligibility Verification System (EEVS), this Committee must understand that an approach that relies only on enforcement of hiring sanctions will not solve the problems associated with unauthorized employment. In fact it is doomed to fail — again, as it did after 1986. An employment verification system has no real chance of succeeding unless it is also accompanied by (1) a comprehensive opportunity for currently undocumented immigrants to earn legal status; (2) a realistic opportunity for the future flow of immigrant workers to work in our economy with fully effective employment rights; (3) vigorous, status-blind enforcement of our nation's labor and employment laws for U.S. workers, documented immigrant workers and undocumented immigrant workers alike.

Concerns about Expanding the Basic Pilot Program

The pending legislative proposals for a mandatory Employment Eligibility Verification System (EEVS) will also do more harm than good if the EEVS is not regulated by strict safeguards and cautious implementation. These pending EEVS proposals are based on the existing Basic Pilot Program. Unfortunately, the Basic Pilot program has been plagued by problems since its inception in 1997. Most notably, the program, which is so far used only by a relatively small number of employers, has been hindered by inaccurate and outdated information in the Department of Homeland Security (DHS) and Social Security Administration (SSA) databases, lack of adequate privacy protections, and misuse of the program by employers.

The Basic Pilot Program is an internet-based program that allows employers to electronically verify workers' employment eligibility by directly checking the records maintained by the DHS and the SSA.

The program is one of the three pilots created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and began operating in six states in 1997. The other two pilot programs were discontinued. However, in December 2004 Congress extended the Basic Pilot to all 50 states, and it is now available to employers who voluntarily choose to participate in the program, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate. According to the Government Accountability Office (GAO), as of June 2006, approximately 8,600 employers were registered to use the Basic Pilot program out of the approximate 5.6 million employer firms nationwide, though only 4,300 employers are active users.⁵ A July 26, 2006 press release from DHS states that 10,000 employers are registered to use the program.

In creating the pilot programs in 1996, Congress required the former Immigration and Naturalization Service (INS) to have an independent evaluation conducted before the pilot programs could be extended. The INS selected two firms—the Institute for Survey Research at Temple University and Westat—to conduct the independent evaluation. In January 2002, an evaluation of the Basic Pilot Program was issued. The evaluation report identified several critical problems with the pilot program and concluded that it “is not ready for larger-scale implementation at this time.” Significant problems included:

- ***Database inaccuracies***

One of the most significant problems identified by the independent evaluation was that the program was seriously hindered by inaccuracies and outdated information in SSA and INS databases. For example, a sizeable number of workers who were not identified as having work authorization were in fact authorized, but for a variety of reasons the databases did not have up-to-date information. While the database accuracy has somewhat improved, a 2004 DHS report to Congress notes that SSA's databases currently are able to automatically verify the status of less than 50 percent of work-authorized non-citizens (versus 99.8 percent for native-born citizens).⁶ While most of these cases eventually are favorably resolved, resolution often requires costly and time-consuming manual reviews. Additionally, an unknown number of work-authorized applicants abandon their employment plans rather than pursuing the uncertainty of the appeals process, while another group of work authorized individuals are wrongfully terminated before they even have the opportunity to prove that they are indeed authorized to work in the U.S.

Evaluators also found that when employers contacted the INS/DHS and SSA in an attempt to clarify data, these agencies were often not accessible; 39 percent of employers reported

⁵ Statement of Richard M. Stana, Director, Homeland Security and Justice, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER WORKSITE ENFORCEMENT EFFORTS, testimony before the Subcommittee on Immigration, Border Security, and Citizenship, Committee on the Judiciary, U.S. Senate (U.S. Government Accountability Office, June 2006).

⁶ See REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM, U.S. Citizenship and Immigration Service, June 2004.

that SSA never or sometimes returned their calls promptly and 43 percent ported a similar experience with the INS.

- ***Employer misuse of the program***

The independent evaluators also discovered that employers engaged in prohibited employment practices, including pre-employment screening, which denies the worker not only a job but also the opportunity to contest database inaccuracies; taking adverse employment action based on tentative nonconfirmations, which penalizes workers while they and the appropriate agency (DHS or SSA) work to resolve database errors; and the failure to inform workers of their rights under the program. Some employers also compromised the privacy of workers in various ways, such as failing to safeguard access to the computer used to maintain the pilot system, including leaving passwords and instructions in plain view for other personnel to potentially access the system and employees' private information.

Although employers are prohibited from engaging in these practices under a Memorandum of Understanding that they sign with DHS, U.S. Citizenship and Immigration Service officials have told the GAO that their efforts to review employers' use of the pilot program have been limited by lack of staff available to oversee and examine employer use of the program.⁷

The *Basic Pilot Program Extension and Expansion Act*, which authorized expansion of the Basic Pilot Program to all 50 states, also required DHS to submit a report to the Committees on the Judiciary of the 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 before undertaking the expansion of the Basic Pilot program to all 50 states.

While the DHS did submit a report to Congress in June 2004, it failed to adequately address the concerns laid out in the independent evaluation. Most importantly, it failed to address the explicit recommendation by the independent evaluation against expanding the Basic Pilot program into a large-scale national program until the DHS and the SSA address the inaccuracies in their databases that prevent those agencies from confirming the work authorization of many workers.

In August 2005, the GAO noted in its report, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, that although DHS has taken some steps to improve the timeliness and accuracy of information in its database, it cannot effectively assess increased program usage without information on the "costs and feasibility of ways to further reduce delays in the entry of information into DHS databases." According to the GAO, DHS staff stated that they may not be able to complete timely verifications if the number of employers using the Basic Pilot Program were to significantly increase.

⁷ Richard M. Stana, *supra* note 5.

Employment Eligibility Verification Systems in the Context of Comprehensive Immigration Reform

The *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005* (H.R. 4437) and the *Comprehensive Immigration Reform Act of 2006* (S. 2611) both include a mandatory EEVS but there are significant differences between these two proposals. Most notably, S. 2611 attempts to address some of the shortcomings of the Basic Pilot program by including privacy, antidiscrimination, and due process protections, while H.R. 4437 simply expands the Basic Pilot program without addressing any of the concerns outlined above.

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437)

H.R. 4437 creates a mandatory EEVS that would make use of toll-free telephone lines and other toll-free electronic media through which workers' identities and employment authorization could be verified by the DHS. Within six years of the bill's enactment, employers would be required to verify the employment eligibility of *all* employees via the EEVS. Use of the EEVS would be required three years from enactment for all employees of federal, state, or local governments, including for all workers at a federal, state, or local government buildings, military bases, nuclear energy sites, weapons sites, airports, or other critical infrastructures.

Use of the EEVS would apply not only to employers but also to those who recruit or refer individuals for employment, including labor service agencies and nonprofit groups. This means that temporary worker agencies, worker centers, and other similar job placement or referral programs (including job fairs and websites such as *monster.com*) would have to comply with a process similar to the current I-9 process before referring workers to a job. This represents a radical expansion of the current I-9 system beyond the overly regulated employment relationship, and mandates an unworkable system whereby service providers and for-profit employment services would be deputized as immigration officials as well. This will likely result in vastly limited employment opportunities for minorities, who often use these services and job fairs to meet employers who may be seeking to diversify their workforce.

While the bill requires that the government correct and update inaccurate records that would make the EEVS unworkable, it includes *no* procedures, funds, or safeguards for ensuring that this requirement is carried out. If workers are unjustly fired due to errors in the EEVS, a provision of the bill would prevent them from filing class action lawsuits against the government or the employer to redress this injustice. Instead, they would be allowed only to file a claim against the government under the Federal Tort Claims Act, which is not equipped to handle large numbers of claims or lawsuits of this nature. Additionally, the Federal Tort Claims Act process is cumbersome, expensive, and time-consuming, making it an unrealistic form of relief from government database errors.

The Comprehensive Immigration Reform Act of 2006 (S. 2611)

S. 2611 also creates a mandatory EEVS where employers would electronically transmit information to SSA and DHS for purposes of verifying workers' employment authorization. S. 2611 requires the new EEVS to be implemented with respect to *new* hires 18 months after the date that at least \$400 million have been appropriated and made available to DHS; however, DHS has

the authority to require “critical” employers (based on an assessment of homeland security or national security needs) and employers that DHS has reasonable cause to believe have engaged in material violations related to unlawful employment of immigrants to use the EEVS to verify the work authorization status of *all* employees before the 18-month period.

S. 2611 does include important worker protections that seek to address the shortcomings of the Basic Pilot program. Specifically, the bill includes the following:

- **Antidiscrimination protections.** S. 2611 amends the section of the Immigration and Nationality Act (INA) relating to unfair immigration-related employment practices to explicitly apply to employment decisions related to the new EEVS. Additionally, it increases fines for violations of the INA’s antidiscrimination provisions and provides funding to educate employers and employees about antidiscrimination policies.
- **Due process protections.** S. 2611 includes important due process protections intended to ensure that workers can challenge erroneous findings and fix inaccurate information in the DHS and SSA databases. Specifically, it requires employers to provide employees with information in writing (in a language other than English if necessary) about their rights to contest a response from the EEVS, and the procedures for doing so, and allows individuals to view their own records and contact the appropriate agency to correct any errors through an expedited process. It also creates an administrative and judicial review process where individuals can contest findings by DHS, and seek compensation for the wages lost where there is an agency error.
- **Privacy protections.** S. 2611 includes important privacy protections intended to protect against misuse of information and identity theft. Specifically, it requires minimization of the data to be both collected and stored, and creates penalties for collecting or maintaining data not authorized in the statute. It also places limits on the use of data, and makes it a felony to use the EEVS data to commit identity fraud, unlawfully obtain employment, or any other purpose not authorized in the statute. Lastly, it requires the GAO to assess the privacy and security of the EEVS, and its effects on identity fraud or the misuse of personal data.

Provisions That Must Accompany Any Nationwide, Mandatory Employment Eligibility Verification System

After nearly a decade of experience with the Basic Pilot Program and two decades with the employer sanctions scheme, it is clear that the existing programs have significant flaws that must be addressed if Congress is to pursue the creation of a new EEVS. The creation of such a system without addressing the fundamental flaws in the current program is unadvisable and will result in severe negative consequences for immigrant and U.S. workers on a much larger scale than they currently experience. Provisions of S. 2611 take a step in the right direction by including important worker protections, and we have additional suggestions below, but these provisions are meaningless without addressing the need to legalize the undocumented population in this country, and punish employers who flout labor laws.

The following components are essential to any mandatory EEVS —

- **The EEVS must have measurable and enforceable standards.** The best way to ensure implementation of an EEVS that is accurate and implemented in a non-discriminatory manner is to set standards and expectations for system performance upfront and to hold DHS accountable for meeting those standards (e.g. the databases must have a specific level of accuracy). Experience confirms that federal agencies do not meet expectations if the standards they are given are vague and optional. The EEVS program is particularly vulnerable to poor planning because of its unprecedented scope, and the disconnect between the agency mandate to get something up and running quickly and the requirements that would ultimately determine whether it is successful, such as the need for speed, efficiency, reliability, and information security. It is much easier to make design changes in a system before it goes fully online than afterwards. That is why software manufacturers produce “beta” versions of their programs to be tested in the real world before mass public marketing distribution. Once a system is designed and put in place for all employers and workers in our economy it will be costly and difficult to implement needed changes.
- **The EEVS should be phased-in with a realistic timeline.** Any mandatory universal verification system must be implemented incrementally, with vigorous performance evaluations taking place prior to any expansion. Moving forward rapidly without addressing ongoing problems within the system will not help to achieve stated goals and will result in harm to U.S. workers. Additionally, an unrealistic timeframe would likely *delay* implementation of the new system. It is easy for Congress to pass a law requiring that something be done by some arbitrary date, but that doesn’t necessarily make it happen. If the deadline is unrealistic, it will not be met no matter how many laws Congress passes. For example, in 1996 Congress mandated implementation of an electronic entry-exit system within 2 years. Yet after repeated extensions the system still is not online. Setting an unrealistic timeframe is more than just an exercise in futility. It actually delays implementation because it leads to inadequate and unrealistic planning and misallocation of resources and taxpayer monies.
- **The EEVS must only apply to new hires.** Requiring employers to reverify their existing workforce is adding more bureaucracy to the process, will be extremely expensive and burdensome for human resource departments, and will inevitably lead to many workers losing time from work to correct the inaccuracies in the system. The current workforce has already been authorized to work under the law using the current I-9 system. Moreover, the circularity in the workplace today, with a turnover/separation rate of 40 percent a year (50-60 million employees each year), means that eventually most people will be verified by the new system in a relatively timely manner without forcing employers to go through old records and reverify all existing employees.
- **The EEVS must be designed to prevent misuse and abuse, and must not lead to increased discrimination against workers who look or sound foreign.** Experience has taught us that unscrupulous employers will use the system to unlawfully pre-screen potential employees, reverify work authorization, and engage in other unlawful activities when an employee lodges a complaint or engages in organizing. It is therefore essential that employers are explicitly prohibited from: 1) using the system selectively or without

authorization; 2) using the system prior to an offer of employment; 3) using the system to exclude certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required; 4) using the System to deny certain employment benefits, otherwise interfere with the labor rights of employees, or any other unlawful employment practice; and 5) taking adverse action against any person, including terminating or suspending an employee who has received a tentative nonconfirmation.

- **The EEVS must protect the privacy of information in the system.** The employment verification system must protect information in the database from unauthorized use or disclosure. It is critical that privacy protections be included so that the information contained in the databases is not used for non-employment verification purposes. The 2002 evaluation of the Basic Pilot program found several instances where employers or other non-authorized individuals gained access to the program for uses other than the designated purpose.
- **The EEVS must be independently assessed for program performance.** Any EEVS should be independently evaluated to ensure that the program is meeting the needs of both employers and employees. Reports should specifically evaluate the accuracy of DHS and SSA databases, the privacy and confidentiality of information in the databases, and if the program has been implemented in a nondiscriminatory manner.

The DHS proposal to use SSA “no-match” letters as an enforcement tool should be withdrawn

In an attempt to address immigration enforcement at the worksite, DHS issued proposed rules on June 14, 2006, regarding an employer’s legal obligations upon receiving a letter from the SSA stating that the information submitted for an employee does not match SSA records (otherwise known as an SSA “no-match” letter). Under the proposed rule, ICE could use the receipt of a no-match letter as evidence that the employer has “constructive knowledge”⁸ that an employee is unauthorized to work. The proposed rule includes “safe harbor” procedures that such an employer should follow in order to avoid liability under section 274A(a)(2) of the Immigration and Nationality Act.

Although the rule will cause enormous upheavals in the workplace, it will have no impact on undocumented immigration. Our past experience with no-match firings and workplace audits is very clear: the fired workers will not leave the country. They will simply find other more marginal jobs, most likely in the unregulated underground cash economy. Because of this, the proposed rule will result in growth of this underground economy. It will also erode our privacy rights, and it represents an end-run around the federal legislative process.

Proposals to use the SSA no-match letter as an enforcement tool, such as the DHS proposed rule, should be rejected for the following reasons:

⁸ As defined in 8 CFR 274a.1(l)(1).

- **The proposed rule will harm all workers regardless of immigration status.** The DHS rule will result in unnecessary, unjust, and potentially discriminatory mass firings. Out of caution, panic, and confusion employers will fire workers who receive an SSA no-match letter before workers have a chance to correct their records with SSA. The SSA database is notoriously inaccurate, and often times “no-matches” occur because of name changes and clerical errors. Hundreds of thousands of workers — including U.S. citizens and authorized noncitizens — could lose their jobs. Such firings may run afoul of federal and state antidiscrimination laws and other worker protections, and lead to costly and protracted litigations against employers for wrongful terminations. Unscrupulous employers already use the SSA no-match letter to stymie labor organizing campaigns and to retaliate against workers who have been injured on the job or complain of unpaid wages or other labor violations. In documented cases (including arbitration decisions) from across the country, employers initially ignored SSA no-match letters, and then decided to use them as a pretext to fire workers who participated in efforts to improve working conditions and wages. The proposed rule would only exacerbate this problem.
- **The proposed rule will expand the unregulated underground cash economy.** Although the proposed rule purports to provide employers with general guidance on SSA no-match letters, DHS is in fact imposing a new set of legal obligations on millions of employers. These new legal obligations will increase pressure on businesses to employ workers “off the books,” or to misclassify their employees as independent contractors, thereby promoting the unregulated underground cash economy which results in potentially billion-dollar losses in federal, state, and local tax revenues, unfair competition, and further exploitation and abuse of citizen as well as immigrant workers by unscrupulous employers. The proposed rule also has the perverse effect of punishing “good” employers who keep good records and want to stay on the books. These “good” employers will be put at a disadvantage compared with “bad” employers with whom they compete and who pay in cash and do not keep records, or who misclassify employees as independent contractors, and who consequently will not be reached by the new rule.
- **The proposed rule is an end-run around the legislative process.** The proposed rule is badly timed. Any worksite immigration enforcement proposal should happen in the context of comprehensive immigration reform. The House and the Senate have both passed bills that contain worksite enforcement mechanisms. Implementing the proposed regulations at this time would be an end-run around that process. Immigrant workers should not be subjected to unnecessary, unjust, and potentially discriminatory mass firings while the current law is clearly under debate and reformulation.
- **The SSA no-match letter program is ill-suited as a tool for immigration enforcement.** The proposed rule attempts to transform the SSA no-match letter into an immigration enforcement tool when the SSA database does not have the capacity to fulfill this objective. In addition to being error prone, the database does not contain complete information about a worker’s immigration status or employment authorization. Indeed, the database contains information about both U.S. citizens and work-authorized noncitizens who employers will presume to be undocumented simply because they appear on a no-match list. The letter is not indicative of immigration status, and explicitly states on its face that a worker’s identification in the letter does not make a statement about his or her immigration status.

Moreover, as an evidentiary matter, an employer's receipt of a SSA no-match letter by itself does not constitute "constructive knowledge" of immigration status under current law. The proposed rule dramatically alters the definition of "constructive knowledge" and makes a stark departure from existing case law and long-standing federal guidance in this area despite the fact that the SSA no-match letter provides no evidence of immigration status.

- **The proposed rule is an erosion of our privacy rights.** DHS is currently barred from direct access to the SSA database by laws protecting our privacy and tax confidentiality. These laws were put in place to protect sensitive and personal information, and to ensure compliance with tax laws. This proposed rule is an attempt by DHS to end-run these privacy protections and commandeer personal information in the SSA database for their own purposes.
- **The costs of implementing the proposed rule are prohibitive.** If the proposed rule is to be carried out as envisioned, DHS and SSA will need to make a massive investment in employer and worker education programs in order to combat the rampant panic and confusion that is almost certain to follow. The proposed rule also contains unrealistic timetables for compliance that will derail its implementation. Further, although this rule purports to make changes to how DHS interprets these letters, it has a significant impact on the way in which SSA has to respond to the inevitable increase in employer and worker inquiries about this confusing rule. The actual costs of administering the program will be astronomical for SSA, an agency whose limited resources should go towards administering Social Security benefits rather than enforcing immigration law. The proposed rule should therefore be withdrawn.

Conclusion

An enforcement-only approach (as embodied by a mandatory EEVS, the use of the SSA no-match letter as an enforcement tool, and misplaced reliance on increased worksite enforcement) will never solve the problem of unauthorized employment. If anything, the lessons of IRCA have taught us that an enforcement-only approach actually creates incentives for employers to hire unauthorized workers. If Congress is serious about addressing this issue, it must muster up the political will to address the root causes of migration in sending countries and to address the need for improved working conditions for all workers in the U.S. Congress can begin by (1) creating a legalization program for workers who are filling the jobs in demand by employers, and (2) enforcing existing labor and employment laws. If not, unscrupulous employers will continue to have a financial incentive to hire and exploit undocumented workers, legitimate employers will be placed at a competitive disadvantage, and both documented and undocumented workers will be increasingly subject to workplace abuses.