

**Statement of Emily Tulli**  
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**House Committee on the Judiciary**  
**Subcommittee on Immigration Policy and Enforcement**

**Hearing “How E-Verify Works and How it Benefits American Employers and Workers”**

**February 27, 2013**

Chairman Gowdy, Ranking Member Lofgren, and members of the Subcommittee, thank you for the opportunity to share the National Immigration Law Center’s perspectives on E-Verify.

The National Immigration Law Center (NILC) is a nonpartisan organization exclusively dedicated to defending and advancing the rights of low-income immigrants and their families. We conduct policy analysis, advocacy, and impact litigation, as well as provide training, publications, and technical assistance for a broad range of groups throughout the U.S.

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 and labor laws is an important resource for immigrant rights coalitions, and faith and community-based organizations, as well as policymakers, legal aid 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. Throughout the years, we have worked closely with the Department of Homeland Security (DHS), Social Security Administration (SSA), and the Department of Justice’s Office of Special Counsel for Immigration-related Unfair Employment Practices (OSC) on issues related to E-Verify and its adverse impact on workers.

As Congress considers reforming our nation's broken immigration policies, we remain strongly opposed to a federal requirement that all employers use E-Verify because of the program's database error rates, lack of worker protections, lack of due process, insufficient privacy protections, and the significant amount of employer misuse of the program. Any mandatory electronic employment eligibility verification regime should, at a minimum, address these concerns, and must be coupled with a broad legalization program.

NILC advocates for passage of broad and humane immigration reform legislation that provides a clear roadmap to full citizenship for the 11 million aspiring citizens. This would make it possible

for immigrants to fully integrate into the nation’s social and economic fabric, with all the rights and responsibilities entailed in full integration. Full citizenship should ensure that everyone living in the U.S. has access to economic supports, affordable health care, workers’ rights, and the freedom to live free from fear of detention and deportation.

## **Overview**

Now is the time for Congress to pass an expansive immigration reform bill that creates a road to citizenship for unauthorized immigrants and ensures robust protections of all workers’ rights so that abusive employers cannot undercut employers who comply with our employment and labor laws. For years, this committee has discussed E-Verify, debated its merits, questioned its efficacy, and lauded its successes, while immigration reform proposals introduced in Congress languished. And while the problems associated with E-Verify are worthy of discussion, its use does not prevent employers from hiring unauthorized workers effectively. E-Verify does nothing to address the underlying economic realities that drive the employment of unauthorized workers and will actually serve to make matters worse.

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 ensures due process, worker protections, and privacy safeguards for all workers. The starting point for any mandatory E-Verify proposal, however, is a road to citizenship for the 11 million immigrants who are currently unauthorized.

However, mandating E-Verify without creating a fully work-authorized labor force will set the program up for failure and exacerbate our current economic challenges. With 8 million unauthorized workers living and laboring the United States, a worksite enforcement-only approach has resulted in more workers being pushed into the underground economy and has robbed state and federal governments of much-needed tax revenue. Unscrupulous employers have had more tools to coerce and control their employees, driving down working conditions for all workers—immigrant and citizen alike. Employers in certain industries, like agriculture, have struggled to fill positions. And because of E-Verify’s error rate and lack of due process, mandatory E-Verify will require hundreds of thousands of U.S. citizens and work-authorized immigrants to visit a government office or lose their jobs.

E-Verify will not succeed unless it is paired with a broad and inclusive legalization package and substantial reforms to ensure due process and worker protections.

### **I. E-Verify makes workers more vulnerable.**

Without a fully authorized workforce, E-Verify makes workers more vulnerable. In workplaces across the country, workers are routinely mistreated, experiencing violations of basic labor rights, like nonpayment of minimum wage or overtime and retaliation. The U.S. Department of Labor estimates that nearly *half* of the businesses they investigate have labor law violations.<sup>1</sup> These problems are even worse for workers in low wage employment. According to one study,

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<sup>1</sup> Interfaith Worker Justice Toolkit, available at <http://www.wagetheft.org/resources/resources.html>.

26 percent of workers were paid less than minimum wage for their previous week's work and nearly 76 percent did not receive the legal wage for overtime hours.<sup>2</sup> Workers even face retaliation for merely asserting their legal right to work in the U.S.<sup>3</sup> E-Verify compounds workers' vulnerability and undermines labor and employment laws and standards. Worksite enforcement efforts, like E-Verify, weaken the ability of federal and state agencies to effectively enforce labor and employment laws. In addition, employers readily use immigration compliance tools, such as verification and reverification of employees' work authorization, to retaliate against workers who complain about mistreatment and to undercut workers' efforts to improve their working conditions.<sup>4</sup>

Instead of strengthening the enforcement of labor laws in the workplace, without immigration reform, use of E-Verify does just the opposite. In fact, worksite immigration enforcement actually incentivizes worker mistreatment, including misclassification of workers as independent contractors, subjecting them to sham subcontracting arrangements,<sup>5</sup> or retaliating against them if they complain about their boss' illegal activity.<sup>6</sup> Making E-Verify mandatory would only exacerbate that problem. In addition to hurting workers, a nationwide E-Verify mandate would create a competitive advantage for bad employers. Almost everyone, including U.S. Immigration and Customs Enforcement (ICE),<sup>7</sup> agrees that mistreatment of unauthorized workers provides bad employers with a competitive advantage over good employers.

## **II. Employers routinely misuse E-Verify and workers suffer.**

Although E-Verify has employer rules governing the treatment of workers, employer noncompliance with these rules is very high. For instance, the United States Citizenship and Immigration Service (USCIS) requires employers to notify a worker of an E-Verify Tentative Nonconfirmation (TNC) and prohibits adverse treatment of the worker.<sup>8</sup> However, employers often do not notify workers of a TNC. This is particularly problematic because workers must contest a TNC, *or risk losing 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

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<sup>2</sup> National Employment Law Project, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* at [http://nelp.3cdn.net/59719b5a36109ab7d8\\_5xm6bc9ap.pdf](http://nelp.3cdn.net/59719b5a36109ab7d8_5xm6bc9ap.pdf).

<sup>3</sup> Department of Justice, Office of Public Affairs, Press Release "Justice Department Settles with Florida Janitorial Services Company Over Immigration and Nationality Act Violations," available at <http://www.justice.gov/opa/pr/2012/September/12-crt-1169.html>.

<sup>4</sup> Written Statement of Emily Tulli, Worker Rights Policy Attorney, National Immigration Law Center, submitted to the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Hearing on ICE Worksite Enforcement: Up to the Job?, Jan. 26, 2011, [www.nilc.org/document.html?id=360](http://www.nilc.org/document.html?id=360), p. 5.

<sup>5</sup> 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 CLASS ROOM EDITION, April 2005, available at [http://wsjclassroom.com/archive/05apr/econ\\_underground.htm](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, available at [www.wiego.org/papers/FooImmigrantWorkers.pdf](http://www.wiego.org/papers/FooImmigrantWorkers.pdf).

<sup>6</sup> Broken Laws, *supra* note 2, at 3

<sup>7</sup> "Responsible employers who seek to conduct their business lawfully are put at an unfair disadvantage as they try to compete with unscrupulous businesses. Such businesses gain a competitive edge by paying illegal alien workers low wages." *Immigration and Customs Enforcement Worksite Enforcement Factsheet* available at <http://www.ice.gov/news/library/factsheets/worksite.htm>.

<sup>8</sup> E-Verify User Manual for Employers, September 2012, at p. 10

contest the finding.<sup>9</sup> In fact, 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.<sup>10</sup> Moreover, some employers use E-Verify to illegally prescreen workers. Under the current E-Verify rules, 33 percent of these workers prescreened are not offered a job and 47 percent of these workers could not find a new job for two months or longer.<sup>11</sup> Often, 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 falsely assume that foreign-born workers who receive a TNC are undocumented.<sup>12</sup>

In a mandatory system, employer misuse of E-Verify will likely rise. Current E-Verify users are disproportionately large businesses who use the program voluntarily. Size and the voluntary use of the program make them more likely than an “average” 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. For example, 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.<sup>13</sup>

### **III. E-Verify does not prevent the hiring of unauthorized workers.**

Based on the experiences of Arizona and Alabama after passage of their mandatory E-Verify laws, it is clear that E-Verify does not prevent unauthorized workers from getting hired. In 2008, the Arizona legislature passed the Legal Arizona Workers Act (LAWA), a bill mandating E-Verify’s use for all employers in the state.<sup>14</sup> LAWA contains severe penalties and fines for failure to use E-Verify, including revocation or suspension of a business license. However, 5 years after the bill’s enactment, one out of three employers are using E-Verify and only 43 percent of businesses had enrolled in the program.<sup>15</sup> In 2011, Alabama’s legislature passed the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, an anti-immigrant law containing an E-Verify mandate. In the months after enactment, between 79 and 96 percent of employers had not even signed up to use E-Verify, despite the law’s penalties.<sup>16</sup>

In this economic environment, employers are desperate to keep their workforces and most do not comply with E-Verify mandates, despite stiff penalties imposed by states. When employers do comply with an E-Verify mandate, ICE agents report that some unscrupulous employers coach

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<sup>9</sup> *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](http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf), p. 154, 199

<sup>10</sup> 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](http://www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700).

<sup>11</sup> Westat, *supra* note 9, p. 140.

<sup>12</sup> *Findings of the Web-Based Basic Pilot Evaluation* (Westat, Sept. 2007), <http://tinyurl.com/2tddqs>, p. 77.

<sup>13</sup> Westat, *supra* note 9, p. 237.

<sup>14</sup> Legal Arizona Workers Act (LAWA), Ariz. Rev. Stat. §§ 23-211 to -216 (2009)

<sup>15</sup> Joe Henke, “Arizona’s E-Verify employment checks are spotty,” *Cronkite News Service*, available at <http://www.yumasun.com/news/verify-84245-businesses-arizona.html>

<sup>16</sup> See Jay Reeves, “Most Alabama Firms Miss Immigration Goals,” *The Associated Press*, April 4, 2012. The percentage range cited was calculated by dividing the stated number of AL registered companies (provided by USCIS equaling 18,137) by the number of total companies doing business in the state as reported by the Alabama Department of Revenue (368,613) and the state Department of Industrial Relations (85,000).

workers 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, which are not in the databases E-Verify uses).<sup>17</sup>

In addition to employer noncompliance with E-Verify mandates, the program does not effectively identify unauthorized workers. Westat researchers found that in 2008, 54 percent of unauthorized workers for whom E-Verify checks were run were erroneously confirmed as being work-authorized.<sup>18</sup>

#### **IV. E-Verify is costly.**

E-Verify currently costs the federal government about \$100 million per year.<sup>19</sup> If made mandatory nationwide, these costs would rise dramatically. Mandatory E-Verify would cost the government and employers billions in lost revenue and implementation costs without ridding U.S. workplaces of unauthorized workers. After reviewing a mandatory E-Verify proposal in 2008, the Congressional Budget Office (CBO) found that implementation of mandatory E-Verify would decrease federal revenue by more than \$17.3 billion over ten years because it would increase the number of employers who pay workers under the table, outside of the tax system.<sup>20</sup> The reality is that unauthorized workers will continue to work for employers, despite the existence of an electronic verification system. Many abusive employers will recruit unauthorized workers as part of their workforce knowing they can get away with violating state and federal employment laws because they can threaten workers with deportation. These employers often move unauthorized workers into the underground economy, misclassifying them as independent contractors, and simply not running them through any employment eligibility verification system.<sup>21</sup> As workers move off the books, revenue is drained from federal and state governments' dwindling coffers.

In addition to robbing the federal and state governments of revenue, an E-Verify mandate would threaten the solvency of the Social Security trust fund. When employers move workers into the underground economy, the trust fund loses those workers' contributions. This is particularly troubling given the needs of America's aging baby boomers.<sup>22</sup> 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

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<sup>17</sup> 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](http://www.gao.gov/new.items/d11146.pdf), p. 22.

<sup>18</sup> Westat, *supra* note 9, p. 118.

<sup>19</sup> *DHS Budget in Brief 2012*, p. 154, available at: [www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf](http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf)

<sup>20</sup> 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](http://www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf).

<sup>21</sup> McTague, *supra* note 5.

<sup>22</sup> Baby boomers gobbling up Social Security surplus, *The Associated Press*, available at: [http://www.oregonlive.com/today/index.ssf/2012/08/baby\\_boomers\\_gobbling\\_social\\_s.html](http://www.oregonlive.com/today/index.ssf/2012/08/baby_boomers_gobbling_social_s.html)

will be “supported by a smaller workforce that is struggling to meet its own needs.”<sup>23</sup> 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.<sup>24</sup> 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.”<sup>25</sup> Mandatory E-Verify would drive unauthorized workers in the underground economy, robbing the trust fund of their contributions and threatening the entire system’s solvency.

Mandatory E-Verify would cost business billions as well. Based on 2010 data, if E-Verify was made mandatory, it would cost 2.7 billion dollars, with America’s small businesses paying 2.6 billion dollars of that cost.<sup>26</sup> Small businesses have noted that mandatory E-Verify would be a “direct threat” to businesses and local economies.<sup>27</sup> Realizing that mandatory E-Verify forces small businesses “to act as immigration agents,” they have urged Congress to “do better” and comprehensively reform the immigration system.<sup>28</sup>

#### V. **E-Verify errors cause U.S. citizens and work authorized immigrants to lose their jobs.**

DHS has significantly improved the program’s error rate since its initial implementation. But with E-Verify, program errors that threaten the economic livelihood of U.S. citizens and work-authorized immigrants are a cause of great concern. According to the USCIS’s statistics, E-Verify immediately confirms 98.3 percent of workers.<sup>29</sup> Using the agency’s most recent estimate of errors, in fiscal year 2011 between .28 and 1.65 percent of all workers run through E-Verify receive a TNC.<sup>30</sup> That means that for fiscal year 2011, between 46,515 and 274,103 U.S. citizens

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<sup>23</sup> 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>.

<sup>24</sup> 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>.

<sup>25</sup> *Id.*

<sup>26</sup> Jason Arvello, “‘Free’ E-Verify May Cost Small Businesses \$2.6 billion: Insight,” *Bloomberg*, Jan. 28, 2011.

<sup>27</sup> Letter to Rep. Lamar Smith, Chair, Committee on the Judiciary, U.S. House of Representatives, Sept 14, 2011, available at: <https://salsa.democracyinaction.org/o/371/images/MSA-letter-to-House-Judiciary-Committee-on-HR-2885%20-Sept-2011.pdf>

<sup>28</sup> J.Kelly Conklin, “E-Verify program would be costly to small businesses,” *Houston Chronicle*, July 14, 2011, available at: <http://www.chron.com/opinion/outlook/article/E-Verify-program-would-be-costly-to-small-2078257.php>.

<sup>29</sup> *Statistics and Reports*, (USCIS, Fiscal Year 2011), available at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=7c579589c db76210VgnVCM100000b92ca60aRCRD>.

<sup>30</sup> USCIS states that for fiscal year 2011, .28 percent of employees were confirmed as work authorized after contesting and resolving a TNC. The agency reports that 1.13 percent of employees received TNCs and did not contest the TNC because they did not choose to or were unaware of the opportunity to contest the TNC. USCIS does not provide estimates for the percentage of these workers who actually have work authorization, but were unaware of their opportunity to contest the TNC. The agency reports that 0.24 percent of employees received a TNC which remained unresolved at the end FY 2011. USCIS also does not provide estimates for the percentage of these workers

and work-authorized immigrants experienced an E-Verify error that required them to contact a government agency to fix a database error or risk losing their jobs.<sup>31</sup>

Westat, an independent evaluator of the E-Verify program, states that approximately 0.8 percent of TNCs are issued in error.<sup>32</sup> Since there were 20 million E-Verify queries by employers in fiscal year 2012, 160,000 workers had to contact a government agency to fix a database error or risk losing their jobs.<sup>33</sup>

More startling, the Westat model can be used to evaluate the number of individuals who likely received a final nonconfirmation (FNC). An FNC requires an employer to fire the worker or incur liability for violations of immigration law.<sup>34</sup> Of the 0.8 percent of workers who received a TNC in error, 0.3 percent<sup>35</sup> were able to correct the error and keep their job—meaning 0.5 percent of all workers receive a final nonconfirmation in error. In fiscal year 2012, approximately 100,000 workers likely received erroneous findings from the system and may have lost their jobs as a result.<sup>36</sup>

#### Examples of job loss include:

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who likely have work authorization, but were unaware of their opportunity to contest the TNC. Given the lack of data specifying number of work-authorized individuals within the 1.13 percent and .24 percent, the error rate and estimate of workers experiencing a TNC error is stated as a range. See United States Citizenship and Immigration Services, Statistics and Reports, Fiscal Year 2011, available at:

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=7c579589c db76210VgnVCM100000b92ca60aRCRD>

<sup>31</sup> In FY 2011, there were 16,612,333 E-Verify cases. Of those cases, .28 percent of employees were confirmed as work authorized after contesting and resolving a TNC (meaning the employee was work authorized); 1.13 percent of employees received TNCs and did not contest the TNC (meaning the employees were possibly work authorized); and .24 percent of employees received a TNC which remained unresolved (meaning the employees were possibly work authorized). In total 1.65 percent of all E-Verify cases resulted in a TNC. The 46,514 figure was arrived at by multiplying 16,612,333 by .28 percent. The 274,103 figure was arrived at by multiplying 16,612,333 by 1.65 percent.

<sup>32</sup> Employers receive a 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 erroneous TNC rate, see Westat, *supra* note 9, p. 117.

<sup>33</sup> There were approximately 20 million E-Verify queries in fiscal year 2012. See *E-Verify Receives High Ratings in Customer Survey* (U.S. Citizenship and Immigration Services, Feb. 21, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=1671ed7ebecfc310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. Approximately 0.8 percent of work-authorized individuals receive a TNC in error. See Westat, *supra* note 19. The 160,000 figure was arrived at by multiplying these two numbers.

<sup>34</sup> 8 USC §1324a

<sup>35</sup> *Statistics and Reports* (U.S. Citizenship and Immigration Services, Feb. 4, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=7c579589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=7c579589cdb76210VgnVCM100000b92ca60aRCRD>.

<sup>36</sup> There were approximately 20 million E-Verify queries in fiscal year 2012. See U.S. Citizenship and Immigration Services *supra* note 40. 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.) The 100,000 figure was arrived at by multiplying these two numbers.

- A U.S. citizen in Tennessee was fired in October 2012 despite properly resolving her TNC. Although the worker visited an SSA office to resolve the issue in a timely fashion, E-Verify issued a final nonconfirmation (FNC) and the worker was fired. After advocacy by the Department of Justice Office of Special Counsel, the worker was reinstated.<sup>37</sup>
- A U.S. citizen received a TNC notice from an employer based on a mistyped Social Security number. However, when the worker showed up at an SSA office to resolve the TNC, SSA personnel were unable to assist her because the referral letter was not signed by the employer and the worker eventually received an FNC and was fired. After advocacy by the Department of Justice Office of Special Counsel, the worker was reinstated.<sup>38</sup>
- A U.S. citizen from Florida was hired for a well-paying telecommunications position in October 2010. After she was hired, her employer ran her information through E-Verify and received a TNC. Her employer did not explain to her what a TNC meant, nor did he explain any of her rights. The worker went to an SSA office to resolve the situation, but she could not resolve the issues. She tried to communicate this to the employer, but she ultimately received an FNC and was fired. After her termination, she went to great lengths to correct the error, but was unable to do so. She was unemployed for over 3 months, including over the Christmas holiday, but accepted a new lower-paid position.<sup>39</sup>
- A U.S. citizen and former captain in the U.S. Navy with 34 years of service and a history of having maintained high security clearance was flagged by E-Verify as not eligible for employment. It took him and his wife, an attorney, two months to resolve the discrepancy.<sup>40</sup>

If E-Verify is made mandatory, the number of workers experiencing errors, and possibly losing their job, would be dramatic. Currently, E-Verify is used by only 7 percent of employers.<sup>41</sup> However, if E-Verify were to become mandatory, using Westat’s statistical model, ***about 1.2 million workers would have to contact a government agency or risk losing their jobs and about 770,000 workers would likely lose their jobs.***<sup>42</sup> These numbers are likely underestimates. Employers that audit their own E-Verify data report higher error rates than federal government

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<sup>37</sup> Department of Justice, Office of Special Counsel, Hotline Interventions, available at: [http://www.justice.gov/crt/about/osc/htm/telephone\\_interventions/index.php](http://www.justice.gov/crt/about/osc/htm/telephone_interventions/index.php)

<sup>38</sup> *Id.*

<sup>39</sup> Jessica St. Fleur, *Written Statement for the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement: Hearing on E-Verify – Preserving Jobs for American Workers*, Feb. 10, 2011.

<sup>40</sup> Account related at a Jan. 24, 2009, town hall meeting in Ashtabula, OH, sponsored by Building Unity in the Community and billed as “Why We Need Comprehensive Immigration Reform.”

<sup>41</sup> See *E-Verify Receives High Ratings in Customer Survey* (U.S. Citizenship and Immigration Services, Feb. 21, 2013),

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1671ed7ebecfc310VgnVCM10000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. There are 6,049,655 employers in the United States. See *Statistics about Business Size (including Small Business)* (U.S. Census Bureau) available at <http://www.census.gov/econ/smallbus.html>

<sup>42</sup> About 0.8 percent of workers receive an *erroneous* tentative nonconfirmation, or “TNC.” Westat, *supra* note 9, p. 117. There are currently about 154,794,000 million workers in the U.S. The 1,234,296 figure was arrived at by multiplying these two numbers. Approximately 0.5 percent of work-authorized individuals receive a final nonconfirmation in error. The 773, 970 figure was arrived at by multiplying 154,794,000 million by the 0.5 erroneous final nonconfirmation rate.



estimates. For example, when Los Angeles County audited its use of E-Verify for county workers, it found that 2.0 to 2.7 percent of its E-Verify findings from the SSA were erroneous in 2008-09.<sup>43</sup>

Perhaps most disturbing about these statistics is the fact that workers who experience an erroneous FNC *have no formal way to resolve it*. Mandatory E-Verify would mean that **770,000 workers would likely lose their job with no formal way to correct errors or be reinstated**.

## **VI. Citizens and work authorized immigrants face tremendous challenges correcting E-Verify errors.**

When workers receive a notice of a TNC, they often have to take unpaid time off from work to correct an error at an SSA office, 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.<sup>44</sup> 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.<sup>45</sup> During the period March 1, 2009 through April 30, 2010, about 3.1 million visitors waited more than 1 hour for service, and of those visitors, over 330,000 waited more than 2 hours.<sup>46</sup> Further, in fiscal year 2009, about 3.3 million visitors left a field office without receiving service.<sup>47</sup> American Council on International Personnel members report that corrections at SSA usually take in excess of 90 days, and that employees must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected.<sup>48</sup> *If E-Verify was made mandatory, these wait times are likely to increase significantly.*

## **VII. Recommendations**

### ***1) Enact immigration reform that protects workers' labor and employment rights.***

Instead of focusing on ineffective “solutions,” Congress should pass commonsense legislation that overhauls our nation’s immigration system and protects all workers’ rights. Unlike E-Verify, which would decrease contributions to state and federal tax revenue, passage of immigration reform would provide an estimated \$1.5 trillion dollar benefit to the gross domestic product over 10 years in addition to \$66 billion boost in federal tax collection.<sup>49</sup> If implemented as part of broad and inclusive immigration reform, protections for workers’ labor and employment rights

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<sup>43</sup> Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), <http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf>

<sup>54</sup> Westat *supra* note 9, pp. 203-204

<sup>44</sup> *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.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> American Council on International Personnel, “Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008),” August 11, 2008.

<sup>48</sup> *Customer Waiting Times in the Social Security Administration's Field Offices*, *supra* note 44

<sup>49</sup> The Financialist, *The Cost of Partisan Politics* (Immigration Reform) <http://www.thefinancialist.com/the-cost-of-partisan-politics/>

can “help rid the system of bottom-feeding employers who hire and underpay and otherwise exploit cheap immigrant labor, dragging down wages and workplace standards for everyone.”<sup>50</sup> In addition to creating E-Verify worker protections, immigration reform should include the Protect Our Workers from Exploitation and Retaliation Act (POWER Act, H.R. 2169, S.1195) and other essential safeguards to ensure that workers can enforce their workplace rights.<sup>51</sup>

2) ***Ensure that E-Verify is not used to undermine workers’ rights under labor and employment law.***

Too often, workers experience egregious violations of their most basic workplace rights. When these workers complain about the unlawful treatment, they face retaliation, in the form of firing, suspension, or even physical abuse. Some workers face retaliation for merely asserting their right to work in the U.S.<sup>52</sup> Because E-Verify compounds workers’ vulnerability and undermines labor law, the program should explicitly prohibit the use of E-Verify to undermine workers’ rights under labor and employment law. This prohibition should come with meaningful penalties. Because worksite enforcement undermines the enforcement of labor law, the Department of Labor should be given additional resources that allow them to expand labor law enforcement in states mandating E-Verify’s use.

3) ***Create a review process that would allow citizens and work authorized individuals to correct errors in their records and maintain their jobs.***

Using USCIS’s minimum estimates, nearly 56,000 U.S. citizens and work authorized immigrants would experience an E-Verify TNC.<sup>53</sup> Using Westat’s statistical model, approximately 100,000 U.S. citizens and work authorized individuals experienced an FNC, meaning that they were likely terminated. Workers experiencing an FNC had no formal way to resolve this error, get their job back, or get compensation for the time they were out a job due to the government’s mistake. USCIS should create a process to allow U.S. citizens and work authorized individuals to correct TNCs and FNCs easily, remain on the job while they correct these government errors, and receive compensation for any time they are out of a job.

4) ***Prohibit employer misuse of E-Verify.***

There continues to be significant employer misuse of E-Verify—including prescreening of workers and adverse action against workers who receive TNCs. Workers who report mistreatment should be treated as whistleblowers. Without significant penalties for employer mistreatment, and strong worker protections, employer misuse flourishes. We should learn from the failure of employer sanctions created by the Immigration Reform and Control Act of 1986

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<sup>50</sup> *Immigration Reform and Workers’ Rights*, The New York Times, February 20, 2013, available at: [http://www.nytimes.com/2013/02/21/opinion/immigration-reform-and-workers-rights.html?\\_r=0](http://www.nytimes.com/2013/02/21/opinion/immigration-reform-and-workers-rights.html?_r=0)

<sup>51</sup> More information about worker protections and immigration reform is available at “Strengthening Our Country and Promoting Shared Prosperity: Workers’ Rights Priorities for Immigration Reform 2013” available at <https://nilc.org/workerpriorities2013.html>

<sup>52</sup> Department of Justice, *supra* note 3.

<sup>53</sup> USCIS’s minimum error rate estimate is 0.28 was for FY 2011. The 56,000 was reached at by multiplying USCIS’s error rate to the to the 20 million E-Verify queries by employers in FY 2012.

(IRCA),<sup>54</sup> and ensure that the penalties do not result in *employee sanctions*, as has been the case with IRCA. As a result of IRCA, employees who speak up in the face of abusive treatment are often fired or detained and deported while the employer simply turns around to hire another unauthorized worker without any penalties.

- 5) ***Before any expansion of E-Verify as part of immigration reform, ensure that the program meets specified requirements regarding database accuracy, low error rates, privacy, and measurable employer compliance before implementation.***

Mandatory employment verification would represent an enormous increase in utilization of the program, from only 20 million name checks—only 7% of employers—in fiscal year 2012 to over 60 million name checks if applied only to new hires. Moving forward without addressing problems within the system will result in harm to all workers and businesses. In Georgia, the implementation of state E-Verify mandate resulted over 1,000 doctors and other medical practitioners temporarily losing work eligibility because of insufficient staffing at local licensing offices.<sup>55</sup> Performance evaluations should address, at a minimum: wrongful terminations due to system errors, employer compliance with program rules, and the impact of the system on workers' privacy. The best way to ensure that implementation of mandatory E-Verify is accurate is to set standards for system performance upfront, clear benchmarks that need to be met, and timelines for meeting those metrics. These metrics should be met *before* any expansion of E-Verify is implemented.

## **Conclusion**

E-Verify is a costly, ineffective program that does not prevent employers from hiring unauthorized workers, but does threaten all workers' rights. With annual price tag of \$100 million, U.S. taxpayers should expect more. A wide variety of organizations, including privacy advocates and business associations, oppose the program's mandatory use and have called on Congress to reform the program.<sup>56</sup> And with immigration reform on the horizon, before any expansion of E-Verify is considered, significant problems must be addressed. As a voluntary program, nearly one third of all E-Verify employers use the program to prescreen workers and over 40 percent of workers are robbed of their ability to contest a possible program error. Last year alone, nearly 50,000 workers experienced an E-Verify error that required them to contact the government or risk losing their jobs. And if E-Verify were made mandatory, about 1.2 million workers would have to contact a government agency or risk losing their jobs. 770,000 workers would likely lose their jobs. It is time for Congress to stop focusing on ineffectual worksite enforcement and instead focus on passing commonsense immigration reform. It is clear that the public is ready for the 11 million Americans at heart to become Americans on paper, as diverse constituencies are expressing their support for immigration reform. For example, the AFL-CIO and the Chamber of Commerce support immigration reform,<sup>57</sup> as do faith leaders,<sup>58</sup>

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<sup>54</sup> 8 U.S.C. §§ 1324a-1324b

<sup>55</sup> Jim Burrell, *Georgia Immigration Law Trips up Doctors and Nurses*, NPR, November 13, 2012.

<sup>56</sup> Coalition Letter Against Mandatory E-Verify, February 20, 2013, available at: [http://www.aclu.org/files/assets/everify\\_coalition\\_letter\\_final\\_short\\_-\\_signatories.pdf](http://www.aclu.org/files/assets/everify_coalition_letter_final_short_-_signatories.pdf).

<sup>57</sup> Joint Statement of Shared Principles by U.S. Chamber of Commerce President and CEO Thomas J. Donohue & AFL-CIO President Richard Trumka, February 21, 2013, available at: <http://www.aflcio.org/Press-Room/Press->

small business owners,<sup>59</sup> and educators.<sup>60</sup> The time has come for Congress to respond to the country's growing consensus, and pass commonsense immigration reform.

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Releases/Joint-Statement-of-Shared-Principles-by-U.S.-Chamber-of-Commerce-President-and-CEO-Thomas-J.-Donohue-AFL-CIO-President-Richard-Trumka

<sup>58</sup> 1000 Faith Leaders Call for Immigration Reform, January 23, 2012, New America Media,  
<http://newamericamedia.org/2013/01/1000-faith-leaders-call-for-immigration-reform.php>

<sup>59</sup> Commonsense Immigration Reform Will Boost the Economy, Battle Creek Enquirer,  
<http://www.battlecreekenquirer.com/article/20130222/OPINION02/302220028/Mark-Anthony-Common-sense-immigration-reform-will-boost-economy>

<sup>60</sup> National Education Association, Wisconsin Teacher Fights for His Students and Immigration Reform, available at: <http://educationvotes.nea.org/2013/02/19/wisconsin-teacher-fights-for-his-students-and-immigration-reform/>