

Statement of Emily Tulli

Policy Attorney, National Immigration Law Center

House Committee on the Judiciary

Subcommittee on Immigration Policy and Enforcement

Hearing on: “Document Fraud in Employment Authorization: How an E-Verify Requirement Can Help”

April 17, 2012

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. NILC is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their families.

Overview

An E-Verify mandate will result in the increased use of false documents, employer misuse of the program, employers refusing to use the program, and will do nothing to fix our broken immigration system. Everyone agrees that document fraud is a problem. But mandating E-Verify is an ineffective reaction that does not provide a real solution. Like any immigration enforcement-only policy, the Legal Workforce Act and other mandatory E-Verify proposals do not alter the fundamental economic realities that encourage—and even necessitate—the employment of unauthorized workers and the attendant document fraud. *With or without mandatory E-Verify, the eight million unauthorized workers currently in the U.S. will continue to seek work and employers will continue to hire unauthorized workers.*

Attempts to mandate E-Verify are not innovative. In fact, mandatory use of the program has been a part of every immigration reform bill since 2005, and NILC has worked on a bi-partisan basis to craft proposals that ensure due process and privacy protections for all workers. However, these efforts always paired E-Verify’s use with a path to legal status for unauthorized workers laboring in our economy. Instead of piling mandatory E-Verify on top of a dilapidated system, we need

real immigration reform that provides employers with a steady workforce and unauthorized workers with a path to citizenship.

With mandatory E-Verify, many employers refuse to use the program and the use of false documents increases.

Without a path to citizenship for unauthorized workers, an E-Verify mandate results in employer nonuse of the program. Arizona and Georgia, both states that require employers to use E-Verify, show us how employers behave. In Arizona, during the first fiscal year following the law's passage, nearly half of all employers did not use E-Verify to check the work authorization of newly hired employees.¹ Similarly, in Alabama most employers are not using E-Verify, despite a state mandate. Estimates vary, but between 79 and 96 percent of Alabama employers had not registered to use E-Verify when the state law went into effect, much less used the program to verify new employee's work authorization.² Simply put, even when required by law to do so, many employers refuse to do so.

Of the employers who do register with United States Customs and Immigration Services (USCIS), some coach unauthorized workers, allowing them to beat the system's requirements, increasing the fraudulent use of documents. In Arizona, Immigration and Customs Enforcement (ICE) reports that employers have learned that E-Verify's photo matching tool accepts only two documents, permanent resident cards and employment authorization documents, which are heavily protected from tampering and counterfeiting.³ When some unscrupulous employers believe that an employee does not have valid work authorization, they ask the employee to provide other identity documents that will not trigger the photo matching tool. Senior ICE officials have said that this has increased the fraudulent use of documents which are not part of the photo matching tool.⁴ Without an overhaul of the current immigration system, mandatory E-Verify allows unscrupulous employers to continue to employ unauthorized workers while incentivizing the increased use of false documents.

Arizona and Alabama are the canaries in the coalmine. With a national E-Verify mandate, we can expect widespread employer nonuse of the program and the increased use of false documents.

¹ 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-everify.html.

² See Jay Reeves, "Most Alabama Firms Miss Immigration Goals," *The Associated Press*, April 4, 2012 <http://news.yahoo.com/apnewsbreak-most-ala-firms-miss-immigration-goal-133758590.html>. The percentage range cited was calculated by dividing the state number of AL registered companies (provided by USCIS equally 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).

³ 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.

⁴ *Id.*

With mandatory E-Verify, employer misuse will increase.

As a largely voluntary program, there is already significant employer misuse of E-Verify. This misuse of E-Verify has a tangible impact on workers' job stability and quality. For example, under the current regime, over 66 percent of employers took adverse actions against workers receiving a tentative nonconfirmation (TNC), despite program rules that direct prohibit them from doing so.⁵ Adverse actions include prohibiting workers from working; restricting such workers' work assignments; and delaying job training for such workers.⁶

Workers are often kept in the dark by employers about TNCs issued by the program. Although required by law to do so, employers do not always notify workers of a TNC, depriving workers their ability to contest the TNC and keep their jobs. In fiscal year 2009, 42 percent of workers report that they were not informed by their employer of a TNC, resulting in the denial of their right to contest the finding.⁷ *This is particularly troubling given the fact erroneous TNCs are issued for lawful workers and U.S. citizens.*

Using Westat's statistical model, approximately 0.8 percent of TNCs are issued in error.⁸ Although E-Verify's use remains voluntary in most states, there were 16 million E-Verify queries by employers in fiscal year 2010, resulting in 128,000 erroneous TNCs.⁹

Under a nationwide mandate, it is likely that employer misuse would grow and is not limited to TNC issues. At least 57 percent of employers using E-Verify violate the program's rules by using it to prescreen workers.¹⁰ When workers are prescreened and not offered a job, it takes them at least three weeks to find other employment.¹¹ Employer misuse likely will only 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 approve of the system and use it successfully. Misuse of the program would almost certainly increase if all employers were required to use the system. In Arizona, the employers are less compliant with E-Verify procedures than E-Verify employers nationwide.¹²

⁵ *Findings of the Web-Based E-Verify Program Evaluation* (Westat, Dec. 2009), www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%202012-16-09_2.pdf, p.157

⁶ *Id.* at 157, 204

⁷ *Id.* at 154, 199

⁸ 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 5, p. 117.

⁹ *Id.*

¹⁰ *See* Westat, *supra* note 5, p. 149

¹¹ *Id.*

¹² *See* Westat, *supra* note 5, p.237

Employer misuse of E-Verify is likely to grow with a national mandate, threatening to cause adverse action against even more work-authorized individuals and U.S. citizens who will receive erroneous TNCs.

Conclusion

Without immigration reform, E-Verify does not provide an effective solution to the problems that arise alongside unauthorized employment. Mandatory E-Verify, through the Legal Workforce Act or other bills, does nothing to address the underlying economic realities that drive the employment of unauthorized workers, and serves to make matters worse. There are currently 8 million undocumented workers in the country, representing 5.2 percent of the U.S. labor force.¹³ And while fraudulent use of documents is a serious problem, an E-Verify mandate fails to address employers' or workers' needs while actually incentivizing the use of false documents and misuse of the program. Lawmakers should learn from the states with E-Verify mandates and address the real issue. The immigration system is broken and needs a total overhaul, not misplaced solutions like mandatory E-Verify.

¹³ 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.