

## **E-Verify: Expansion and Recent Developments**

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**ABSTRACT:** Enrolled employers can electronically verify the employment eligibility of newly hired employees within seconds through E-Verify, a voluntary Internet-based program jointly operated by the Department of Homeland Security and the Social Security Administration. Efforts are underway to expand E-Verify by making it mandatory for certain employers. Too broad an expansion of E-Verify, however, could adversely affect employers and workers alike. This note provides an overview of how the system works, how it is expanding, its vulnerabilities, and the efforts to address them, as well as its role in immigration reform efforts.

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## I. INTRODUCTION

E-Verify, previously known as the voluntary Basic Pilot/Employment Eligibility Verification Program, is a free program operated by the U.S. Citizenship and Immigration Service (“USCIS”) that allows employers to confirm the legal status of new hires within three to five seconds.<sup>1</sup> According to USCIS, E-Verify is currently the best means available for participating employers to electronically compare employee information taken from the Form I-9 with more than 425 million records in the Social Security Administration’s (“SSA”) database and more than 60 million records in the Department of Homeland Security (“DHS”) immigration databases.<sup>2</sup>

After the completion of an I-9 by the employee and the employer, E-Verify provides the employer with available information from SSA databases that allows the employer to confirm the accuracy of social security numbers provided by all newly hired employees.<sup>3</sup> E-Verify also provides the employer access to selected data from the DHS’s USCIS database to enable the employer to “conduct automated verification checks on newly hired alien employees by electronic means” and “photographic verification checks (when available) on newly hired alien employees.”<sup>4</sup> Several administrative changes have recently been made to E-Verify in an effort to expand its utilization and make the program mandatory. This note briefly reports on the history of E-Verify, the efforts to expand the program and make it mandatory, the vulnerabilities of the program and efforts to address them, and the program’s relationship to immigration reform.

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<sup>1</sup> U.S. Citizenship and Immigr. Servs., E-Verify Program Highlights, <http://www.uscis.gov/portal/site/uscis> (follow “E-Verify” hyperlink; then follow “Program Highlights” hyperlink) (last visited Jan. 26, 2009).

<sup>2</sup> *Id.* Form I-9 is the form that all employees, citizens and noncitizens, must complete at the time of hire in order for employers to verify that they are authorized to work in the United States. U.S. CITIZENSHIP AND IMMIGR. SERVS., FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION I (2007), <http://www.uscis.gov/files/form/I-9.pdf>.

<sup>3</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., E-VERIFY MEMORANDUM OF UNDERSTANDING 1–12 (2007) [hereinafter UNDERSTANDING E-VERIFY], <http://www.uscis.gov/files/nativedocuments/MOU.pdf>. (“Authority for E-Verify is found in Title IV, Subtitle A, of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. 104-208, 110 Stat. 3009, as amended.” (8 U.S.C. § 1324a note))

<sup>4</sup> UNDERSTANDING E-VERIFY, *supra* note 3, at 2.

## II. HISTORY AND STATUS OF E-VERIFY

The Basic Pilot/Employment Eligibility Verification Program, the predecessor of E-Verify, was implemented in 1997. It was one of three pilot programs created under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), which required the SSA and the Immigration and Naturalization Service (“INS”), now USCIS, a DHS component, to initiate employment verification pilot programs.<sup>5</sup> By comparing information entered on the I-9 with records contained in the SSA and USCIS databases, the program helps employers verify the identity and employment eligibility of newly hired employees.<sup>6</sup> Between 1997 and 1999, six states operated the Basic Pilot Program. In 2003, Congress extended the Basic Pilot to all 50 states, along with the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands.<sup>7</sup> The Basic Pilot was authorized by Congress until November 30, 2008, under the Basic Pilot Program Extension and Expansion Act of 2003.<sup>8</sup> The DHS first rebranded the Basic Pilot as “E-Verify” in August 2007.<sup>9</sup> E-Verify is currently free of charge to participating employers.<sup>10</sup>

The DHS states that E-Verify “reduces unauthorized employment, minimizes verification-related discrimination, is quick and non-burdensome to employers, and protects civil liberties and employee privacy.”<sup>11</sup> As of June 2008, more than 69,000 employers have

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<sup>5</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVS., E-VERIFY USER MANUAL 4 (2008), [http://www.uscis.gov/files/nativedocuments/E-Verify\\_Manual.pdf](http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> NAT’L IMMIGR. LAW CTR., DHS BASIC PILOT/E-VERIFY PROGRAM: BASIC INFORMATION BRIEF 1 (2008) [hereinafter E-VERIFY BASIC INFORMATION], [http://www.nilc.org/immsemplymnt/ircaempverif/e-verify\\_infobrief\\_2008-03-13.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf).

<sup>8</sup> *Id.* In September 2008, President Bush signed a continuing resolution extending E-Verify until March 6, 2009. See Alice Lipowicz, *E-Verify Extended to March 2009*, FED. COMPUTER WK., October 15, 2008, <http://fcw.com/articles/2008/10/15/everify-extended-to-march-2009.aspx>.

<sup>9</sup> E-VERIFY BASIC INFORMATION, *supra* note 7, at 1.

<sup>10</sup> E-VERIFY USER MANUAL, *supra* note 5, at 6.

<sup>11</sup> U.S. Citizenship and Immigr. Servs., Why E-Verify, <http://www.uscis.gov/portal/site/uscis> (follow “E-Verify” hyperlink; then follow “Why E-Verify?” hyperlink) (last visited Jan. 26, 2009).

enrolled in the program, and more than 4 million employment verification queries have been run in E-Verify.<sup>12</sup>

To participate in E-Verify, employers must register online and accept the electronic Memorandum of Understanding (“MOU”), a written agreement with the DHS and SSA.<sup>13</sup> The employer must agree to:

1. Post a notice provided by DHS that says the company is participating in E-Verify, as well as an anti-discrimination notice.
2. Wait until after a worker is hired and an I-9 has been completed to submit an inquiry to E-Verify.
3. Nondiscrimination against employees based on national origin or citizenship status.<sup>14</sup>

Once an employer has registered and agreed to the MOU, they may begin the multi-step E-Verify process. First, participating employers must enter information, such as an employee’s name, date of birth, social security number, and citizenship status, from the Form I-9 into E-Verify within three days of hiring the employee.<sup>15</sup> The

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<sup>12</sup> Press Release, Dep’t of Homeland Sec., DHS Designates E-Verify as Employment Eligibility Verification System for All Federal Contractors (June 9, 2008) [hereinafter E-Verify as Employment Eligibility for Federal Contractors], *available at* <http://www.dhs.gov/xnews> (follow “2008” archives hyperlink; then follow “June” hyperlink; then follow “June 9” hyperlink).

<sup>13</sup> U.S. Citizenship and Immigr. Servs., *Getting Started*, <http://www.uscis.gov/portal/site/uscis> (follow “E-Verify” hyperlink; then follow “Getting Started” hyperlink) (last visited Nov. 9, 2008). Employers can register for E-Verify on-line at <http://www.dhs.gov/E-Verify>.

<sup>14</sup> E-VERIFY MEMORANDUM OF UNDERSTANDING, *supra* note 3; *see also* U.S. DEP’T. OF HOMELAND SEC., HANDBOOK FOR EMPLOYERS: INSTRUCTIONS FOR COMPLETING THE FORM I-9 (Nov. 2007), <http://www.uscis.gov/files/natedocuments/m-274.pdf>. “Discrimination under this context occurs when an employer treats employees differently based on their citizenship, immigration status, or national origin in regard to hiring, firing, or recruitment or referral for a fee. An employee’s national origin relates to the employee’s place of birth, country of origin, ancestry, native language, accent, or because he or she is perceived as looking or sounding ‘foreign.’”). *Id.*

<sup>15</sup> U.S. Citizenship and Immigr. Servs., *Statement for the Record: E-Verify* [hereinafter *Statement for the Record*], <http://www.uscis.gov> (follow “E-Verify” hyperlink; then follow “Statement for the Record: E-Verify” hyperlink at bottom of page) (last modified May 20, 2008).

employer then receives a response from the query within seconds.<sup>16</sup> The system transmits the new hire's information to SSA, and for those employees whose work authorization status can be verified immediately, the process ends with a confirmation of U.S. citizenship.<sup>17</sup> If there is no match, the system issues a SSA Tentative Non-Confirmation ("TNC") form to the employer.<sup>18</sup> The employer is supposed to give the employee the opportunity to contest the finding, this period is generally eight days within which the employee provides the SSA with the documents necessary to initiate the process of proving identity and to support correction of the SSA record.<sup>19</sup> Until the TNC is resolved, the employee must be allowed to continue working and cannot be fired because of the TNC.<sup>20</sup> If an employer receives a TNC when work authorization information for a noncitizen employee is matched against DHS databases, the employee must have a similar opportunity to provide the documentation necessary to contest it, as with the SSA process. If the employee cannot resolve the situation, and the system provides the employer with a "final nonconfirmation" of eligibility, employers may terminate workers based upon such receipt or upon notice that an employee has chosen not to contest a TNC.<sup>21</sup> According to the USCIS, 99.5% of all work-authorized employees queried through E-Verify were verified without receiving a TNC as of May 20, 2008.<sup>22</sup>

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<sup>16</sup> *Id.* ("If the query involves a noncitizen worker, the employee's name, date of birth, and SSN are matched with SSA records as with U.S. citizen cases. If the information matches SSA records, then the DHS identification number and work authorization information are also matched against DHS databases.").

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., EMPLOYEES— YOU SHOULD KNOW YOUR RIGHTS AND RESPONSIBILITIES UNDER E-VERIFY 1–2 (2008), <http://www.uscis.gov/files/nativedocuments/e-ver-employee-rights.pdf>.

<sup>22</sup> Statement for the Record: E-Verify, *supra* note 15.

### III. STATUS OF EFFORTS TO EXPAND E-VERIFY INTO A MANDATORY PROGRAM

In 1997, under the IIRIRA, the Basic Pilot Program first operated on a voluntary basis in California, Florida, Illinois, New York and Texas before it expanded to all 50 states in 2004.<sup>23</sup> By May 2008, ten states required the use of E-Verify for public and/or private employers, seven through legislation and three through executive orders.<sup>24</sup> Arizona and Mississippi passed legislation requiring all employers in the state, both public and private, to use E-Verify; while Colorado, Georgia, North Carolina, Oklahoma, and Utah passed legislation that only require some employers to use it.<sup>25</sup> Idaho, Minnesota, and Rhode Island also require some employers to use E-Verify by means of an executive order.<sup>26</sup>

On June 9, 2008, in an effort to expand and improve worksite enforcement, the DHS has designated E-Verify as the electronic employment verification system that all federal contractors and vendors must use pursuant to Executive Order 13,465.<sup>27</sup> Then

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<sup>23</sup> Nat'l Immigr. Law Ctr., *"Basic Pilot" Employment Eligibility Verification Program Expanded Nationwide*, IMMIGRANTS' RTS. UPDATE, Dec. 22, 2004, <http://www.nilc.org/immsemplmmt/ircaempverif/irca060.htm>.

<sup>24</sup> Nat'l Conf. of State Legis., *E-Verify: Frequently Asked Questions* (March 30, 2009), <http://www.ncsl.org/programs/immig/EVerifyFAQ.htm>.

<sup>25</sup> *Id.*; Dep't of Homeland Sec., *Notice for Illinois Employers about E-Verify*, [http://www.dhs.gov/ximgmtn/programs/gc\\_1199120920203.htm](http://www.dhs.gov/ximgmtn/programs/gc_1199120920203.htm) (last visited Nov. 9, 2008) (In 2007, Illinois passed a law, Section 12(a) of the Illinois Right to Privacy in the Workplace Act, which would prohibit employers from enrolling in E-Verify. The law was scheduled to take effect on January 1, 2008, but DHS sued Illinois because of the unconstitutionality of the law, and the state has agreed not to enforce this law until the DHS lawsuit is over.).

<sup>26</sup> *Id.*

<sup>27</sup> Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 6, 2008) (Section 5(a) of the Executive Order reads: "Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract."). As of January 2009, however, this Federal Contractor Rule has been delayed until May 21, 2009, and it will only affect those federal contractors who are awarded a new contract that includes the E-Verify Clause. U.S. Citizenship and Immigr. Servs., *Information for Federal Contractors*, <http://www.uscis.gov/e-verify> (follow "E-

Homeland Security Secretary Michael Chertoff stated, “[a] large part of our success in enforcing the nation’s immigration laws hinges on equipping employers with the tools to determine quickly and effectively if a worker is legal or illegal.”<sup>28</sup> The DHS has designated E-Verify:

[a]s the system of choice to ensure that the federal government only does business with companies that agree to verify the legality of their new hires and further, that the specific employees tapped to perform contract services in the United States for the federal government are authorized to work in this country.<sup>29</sup>

Because there are more than 200,000 companies doing federal business, the DHS believes this mandate will significantly expand the use of E-Verify.<sup>30</sup>

#### IV. E-VERIFY’S VULNERABILITIES AND WEAKNESSES

Because E-Verify relies on the accuracy of the Social Security Administration database, critics are concerned about the possibility and consequences of errors. Opponents of E-Verify include national labor groups and unions, business associations, and faith-based organizations;<sup>31</sup> while proponents, or those that voluntarily enroll,

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Verify” hyperlink; then follow “Information for Federal Contractors” hyperlink on the left side of page) (last modified Jan. 29, 2009).

<sup>28</sup> E-Verify as Employment Eligibility for Federal Contractors, *supra* note 12.

<sup>29</sup> *Id.*

<sup>30</sup> Press Release, Dep’t of Homeland Sec., Fact Sheet: Improving Border Security and Immigration Within Existing Law (Aug. 10, 2007), *available at* [http://www.dhs.gov/xnews/releases/pr\\_1186757867585.shtm](http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm).

<sup>31</sup> NAT’L IMMIGR. LAW CTR, FACTS ABOUT BASIC PILOT/E-VERIFY 4 (2008), <http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-facts-about-2008-10.pdf>. See also NAT’L IMMIGR. LAW CTR, WHAT ARE FAITH-BASED ADVOCATES SAYING ABOUT A MANDATORY BASIC PILOT/E-VERIFY? 1–2 (2008), <http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-faith-saying-2008-05.pdf>. See also NAT’L IMMIGR. LAW CTR, WHAT ARE BUSINESSES SAYING ABOUT PROPOSALS TO MAKE BASIC PILOT/ E-VERIFY MANDATORY? 1–2 (2008), <http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-business-quotes-2008-06-18.pdf>.

generally include government and employment agencies.<sup>32</sup> Specifically, individuals and organizations are concerned that a mandatory E-Verify program would place high demands on SSA and DHS resources. Additionally, these organizations have raised concerns about the costs of wrongly denied jobs for employees and wrongful termination lawsuits on employers, as well as potential identity and employer fraud.

In early 2007, Congress debated two bills, H.R. 1645 and S.AMDT 1150, that would mandate the use of E-Verify by all of the nation's six million employers.<sup>33</sup> Although both bills failed to pass, momentum is building to make E-Verify mandatory, and states are falling in line.<sup>34</sup>

In June 2007, a Government Accountability Office ("GAO") study found that mandating participation in E-Verify by all six million employers in the U.S. would "substantially increase" the demands on DHS and SSA resources.<sup>35</sup> Increasing the capacity of E-Verify to meet this demand could cost the DHS \$70 million annually for program management and \$300-400 million dollars annually for compliance activities.<sup>36</sup> Additionally, the increased workload of the SSA field offices, which would be responsible for resolving queries that cannot be immediately confirmed, would add a significant financial burden.<sup>37</sup> According to SSA estimates, making the program mandatory would result in 3.6 million additional visits or calls to SSA field offices per year, requiring more staff, and incurring hundreds of millions of dollars more in annual expenses.<sup>38</sup> The GAO stated that about 7% of

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<sup>32</sup> See Martin E. Martinez, *E-Verify Immigration Program Draws Criticism*, VIDA EN EL VALLE, Apr. 2, 2008, <http://www.vidaenelvalle.com/news/english/story/66983.html>.

<sup>33</sup> Elec. Privacy Info. Ctr., *E-Verify System: DHS Changes Name, But Problems Remain for U.S. Workers*, July 2007, [http://epic.org/privacy/surveillance/spotlight/0707/default.html#\\_ftnref31](http://epic.org/privacy/surveillance/spotlight/0707/default.html#_ftnref31).

<sup>34</sup> Jim Giuliano, *Momentum builds for making 'E-Verify' mandatory*, HR MORNING, May 15, 2008, <http://www.hrmorning.com/momentum-builds-for-making-e-verify-mandatory>.

<sup>35</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYMENT VERIFICATION: CHALLENGES EXIST IN IMPLEMENTING A MANDATORY ELECTRONIC VERIFICATION SYSTEM, GAO-07-924T (2007) [hereinafter EMPLOYMENT VERIFICATION CHALLENGES], <http://www.gao.gov/new.items/do7924t.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> NAT'L IMMIGR. LAW CTR, BASIC PILOT/E-VERIFY: NOT A MAGIC BULLET 3 (Jan. 2008) [hereinafter NOT A MAGIC BULLET]; see also *Employment Eligibility Verification Systems: Hearing Before the Subcomm. on Social Security of the Comm. on Ways & Means*, 110th

the queries “cannot be immediately confirmed by SSA,” and about 1% “cannot be immediately confirmed by DHS.”<sup>39</sup> Resolving each resulting TNC can take several days, or in some cases, even weeks.<sup>40</sup> USCIS and SSA officials have told the GAO that “the majority [of TNCs] occur because employees’ citizenship status or other information, such as name changes, is not up to date in the SSA database,” and the SSA “does not update records unless an individual requests the update in person and submits the required evidence to support the change in its records.”<sup>41</sup>

Critics also worry about costs to both eligible individuals who receive a TNC and to employers facing wrongful termination lawsuits. There is concern that the Program’s expansion will cause legitimate job applicants to be wrongly denied employment because of SSA records that have not been updated to reflect citizenship, among other reasons.<sup>42</sup> The National Immigration Law Center found that because of database errors, “foreign-born lawful workers (including those who have become U.S. citizens) are 30 times more likely than native-born U.S. citizens to be incorrectly identified as unauthorized for employment.”<sup>43</sup> In 2007, E-Verify inaccurately identified 10% of foreign-born U.S. citizens as unauthorized to work, while only 0.1% of native-born U.S. citizens were similarly miscategorized.<sup>44</sup>

The effect of this miscategorization is not small. According to selected examples from the National Immigration Center, U.S. Citizens who are misidentified and given a TNC can be fired, a violation of E-Verify, and may have to apply for a new naturalization

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Cong. 1 (2007) (Statement of Frederick G. Streckewald, Assistant Deputy Comm’r Program Policy, Office of Disability and Income Sec. Programs, Soc. Sec. Admin.).

<sup>39</sup> EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 35.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 10.

<sup>42</sup> Jennifer Ludden, *Immigration Verification System Flawed, Critics Say*, NPR.ORG, Nov. 8, 2007, <http://www.npr.org/templates/story/story.php?storyId=16126268>.

<sup>43</sup> NOT A MAGIC BULLET, *supra* note 38, at 2. *See also Employment Eligibility Verification Systems: Hearing Before the Subcomm. on Social Security of the Comm. on Ways & Means*, 110th Cong. 1 (2007) (Statement of Tyler Moran, Emp. Pol’y Dir., Nat’l Immigr. Law Ctr.).

<sup>44</sup> NOT A MAGIC BULLET, *supra* note 38, at 2; *see also* WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION (2007), <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

certificate with USCIS, a cost that can easily reach \$400 and is accompanied by a waiting time of ten months.<sup>45</sup> Lawful permanent residents who receive a TNC can incur similar costs.

Employers also face a cost from incorrect TNCs. Employers are not protected in the event of a wrongful discrimination suit “brought by an individual who is legally authorized to work in the USA but is terminated because of E-Verify’s mistake.”<sup>46</sup> If the final non-confirmation by E-Verify is incorrect and an employer terminates an employee upon receipt, “the employer may be liable for wrongful termination and national origin or unfair immigration-related claims.”<sup>47</sup>

Critics also recognize that E-Verify is vulnerable because, while the program “may help reduce document fraud, it cannot yet fully address identity fraud issues.”<sup>48</sup> “If newly-hired employees present false information, [E-Verify] would not confirm the employees’ work eligibility because their information, such as a false name or social security number, would not match SSA and DHS database information.”<sup>49</sup> In addition, the program is vulnerable when employees present borrowed or stolen legitimate documents, such as a social security card or birth certificate belonging to someone else.<sup>50</sup> Critics state that “unauthorized workers are using stolen social security numbers, fake certificates, and fraudulently-obtained but ‘legitimate’ photo IDs to bypass the system and gain employment.”<sup>51</sup>

Lastly, E-Verify is also vulnerable to acts of employer fraud. For example, employers could misuse the program by “limiting work

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<sup>45</sup> Letter from Grisella M. Martinez, Immigration Policy Analyst, Nat’l Immigr. Law Ctr, to Federal Acquisitions Regulations Secretariat (Aug. 11, 2008), *available at* <http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-execorder-cmnts-nilc-2008-08-11.pdf>.

<sup>46</sup> E-Verify: A Helpful Big Brother, <http://blog.immigration-america.com/archives/66> (July 13, 2008).

<sup>47</sup> *E-Verify Program Requirements for F-1 OPT Extensions in STEM Fields*, MVALAW.COM, <http://www.mvalaw.com/f-21.html> (last visited Mar. 14, 2009).

<sup>48</sup> EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 35, at 2.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> *Id.*

<sup>51</sup> Susan Mesinger, Submitted Testimony Before the Subcomm. on Social Security of the House Comm. on Ways and Means (May 6, 2008), *available at* <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6899>.

assignments or pay while employees are undergoing the verification process” following receipt of a TNC.<sup>52</sup> Moreover, an evaluation of E-Verify in 2007 showed that around 9% of employers did not notify workers of a TNC notice, and 7% who gave workers the notice did not encourage them to contest it because it took too much time.<sup>53</sup> Twenty-two percent of employers restricted work assignments, sixteen percent delayed job training, and two percent reduced pay based on TNC notices.<sup>54</sup> It has also been argued that DHS does not screen those who enroll in the program to verify that they are bona fide employers; therefore, anyone posing as an employer can access E-Verify and all its data.<sup>55</sup>

## V. STATUS OF EFFORTS TO ADDRESS E-VERIFY CONCERNS

The USCIS implemented a new case resolution process on May 5, 2008, in an effort to ease the hardship employees experienced as a result of naturalization-related TNCs.<sup>56</sup> When an individual fails to notify the SSA of an update in citizenship status, TNCs may occur, even if the individual has become a naturalized U.S. citizen.<sup>57</sup> E-Verify checks the DHS naturalization records, and as long as a DHS record is not uncovered, employees who receive a wrongful SSA TNC can avoid a visit to an SSA field office by calling a USCIS toll-free number to amend their record.<sup>58</sup> This program reduces the work for SSA field offices, and eases the burden on employees.<sup>59</sup> The USCIS also announced that E-Verify will rectify the problem of wrongly issued TNCs for workers who enter the country legally by including “real time

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<sup>52</sup> EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 35, at 13.

<sup>53</sup> WESTAT, FINDINGS OF THE WEB-BASED BASIC PILOT EVALUATION 76–77 (2007), <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

<sup>54</sup> *Id.* at 77.

<sup>55</sup> *Id.* at xxvi.

<sup>56</sup> Statement for the Record, *supra* note 15.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

arrival data” from the Integrated Border Inspection System.<sup>60</sup> Lastly, the USCIS proposes a citizenship status records information sharing process with the SSA to prevent TNCs from being wrongly issued in the first place.<sup>61</sup> USCIS Acting Director Jonathan Scharfen stated that, as of May 5, 2008, “less than one percent of all work-authorized employees receive a TNC through E-Verify,” and “while this is a very small percentage, we believe every employee who is authorized to work in the United States should be instantly authorized by the program.”<sup>62</sup>

To address the issue of identity fraud, the DHS introduced a photo screening capability to the verification process in September 2007.<sup>63</sup> Although still under development, the photo tool allows employers who use E-Verify to identify instances in which an employee has tried to use a document with a substituted photo, such as on a driver’s license or passport. The tool has already identified cases of suspected document and identity fraud and prevented unauthorized workers from illegally obtaining employment.<sup>64</sup> As of May 2008, E-Verify allows registered employers to use a photo screening process to compare documents furnished by employees, such as Employment Authorization Documents (“EAD”) or Permanent Resident Cards (green cards) with photo images stored in USCIS databases.<sup>65</sup>

In an effort to further detect and deter improper use of the system by employers, the DHS has also created a monitoring and compliance unit.<sup>66</sup> The monitoring and compliance unit works to safeguard the privacy of personal information and to prevent the fraudulent use of counterfeit documents.<sup>67</sup> It also directs occasions of employer fraud, discrimination and illegal or unauthorized use of the system to

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<sup>60</sup> News Release, U.S. Citizenship and Immigr. Servs., USCIS Announces Enhancements to E-Verify Program (May 5, 2008), *available at* <http://www.uscis.gov/files/article/everify050508.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Statement for the Record, *supra* note 15.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

enforcement authorities.<sup>68</sup> In addition, E-Verify's monitoring and compliance unit plans to offer assistance and education on compliance procedures and guidelines through compliance assistance calls.<sup>69</sup>

## VI. E-VERIFY'S RELATIONSHIP TO IMMIGRATION REFORM

There are more than 13 million illegal immigrants in the United States.<sup>70</sup> When it comes to comprehensive immigration reform, it has been argued that Congress remains unable to agree on legislation.<sup>71</sup> The Executive Branch and the individual states are attempting to move forward with immigration legislation.<sup>72</sup> "Immigration policy was a major focus of President Bush's agenda when he began his first term in office in 2001."<sup>73</sup> After the attacks of September 11, 2001 the focus shifted "from providing paths to citizenship for those already in the country illegally to strengthening borders in the name of national security."<sup>74</sup> Moreover, opponents of illegal immigration argue that undocumented immigrants are "taking American jobs, draining state coffers and eroding U.S. culture."<sup>75</sup> The GAO has stated that "the

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The unit will also conduct follow-up with desk audits and/or site visits to unresponsive employers if necessary, and refer cases of fraud, discrimination, and illegal use to the Department of Justice Office of Special Counsel ("OSC") or U.S. Immigration and Customs Enforcement ("ICE"), as appropriate.

<sup>70</sup> Federation for American Immigration Reform, *FAIR Estimates There Are 13 Million Illegal Aliens*, Nov. 2008, <http://www.fairus.org> (select "Illegal Immigration" from the pull-down menu on the left; then follow "FAIR Estimates there are 13 million illegal aliens" hyperlink).

<sup>71</sup> *States Continue the Battle to Require E-Verify*, IMMIGRATION E-AUTHORITY (Ogletree Deakins, Atlanta, Ga.), June 2008, available at <http://www.ogletreedeakins.com> (follow "firm publications" hyperlink; follow "view archives" hyperlink; type "e-verify" on the search box; follow "States Continue the Battle to Require E-Verify" hyperlink).

<sup>72</sup> *Id.*

<sup>73</sup> Jennifer Luden, *Q&A: Inside the Immigration Debate*, NPR.ORG, Mar. 28, 2006, <http://www.npr.org/templates/story/story.php?storyId=5303676>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

opportunity for employment is one of the most powerful magnets attracting unauthorized illegal immigration to the United States.”<sup>76</sup>

Although E-Verify has been seen as “the magic bullet that would curb the hiring of unauthorized workers” by the DHS, the National Immigration Law Center argues that if E-Verify is significantly expanded without first addressing all of its current flaws, workers and employers alike will be adversely impacted.<sup>77</sup> For example, if an expansion was implemented outside the context of “a comprehensive program to legalize the status of currently unauthorized workers, it would cause certain businesses and industries to move into the unregulated underground cash economy.”<sup>78</sup> Expansion of E-Verify will pose other challenges if the expansion effort is not accompanied by increased enforcement of labor and employment laws.<sup>79</sup> Employers could continue to have an incentive to evade their legal responsibilities by “recruiting and exploiting unauthorized workers.”<sup>80</sup> Proponents of E-Verify insist that its benefits outweigh the imperfections, insisting that the program is a straightforward way for employers to comply with immigration law and that better education of employers can ensure that the program is properly used.<sup>81</sup>

The National Immigration Law Center has argued that making E-verify mandatory will not meet its stated goal of ending undocumented immigration, as undocumented workers will not easily leave the country simply because Congress makes it harder for them to work in the United States.<sup>82</sup> Instead, they and their employers will simply find a way around any immigration worksite enforcement system “by not following program rules, seeking out more sophisticated fraudulent documents, or moving into the underground economy, a prospect that has serious consequences for tax revenues at

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<sup>76</sup> EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 35.

<sup>77</sup> NOT A MAGIC BULLET, *supra* note 38.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Alexandra Marks, *With E-Verify, Too Many Errors to Expand its Use?*, THE CHRISTIAN SCI. MONITOR, July 7, 2008, <http://www.csmonitor.com/2008/0707/p02s01-usgn.html>.

<sup>82</sup> *Shuler-Tancredo Employment Eligibility Verification System: Poorly Designed, Dangerous for the Economy* (NILC, Los Angeles, CA), Feb. 2008, at 3 (discussing the SAVE Act of 2007).

the federal, state, and local levels.”<sup>83</sup> Alternatively, Janice Kephart, director of national security studies at the Center for Immigration Studies in Washington D.C. has argued that E-Verify still works better than any interior immigration program we have yet to see, and it is undergoing improvements to address the error rates and costs.<sup>84</sup>

## VII. FUTURE PROSPECTS

Although the debate surrounding E-Verify’s accuracy and effectiveness continues, the federal government and many states are considering or are already implementing regulations that would mandate employer enrollment in the system for all new hires; the latest one being Executive Order No. 13,465.<sup>85</sup> The USCIS reports that companies are enrolling at the rate of 1000 per week, and this number is expected to grow.<sup>86</sup> DHS has taken steps to address E-Verify’s vulnerabilities, including the creation of the monitoring and compliance unit in order to deter improper use of the program and a photo-screening process to reduce document fraud. In July 2008, the U.S. House of Representatives passed H.R. 6633, which would extend E-Verify for five years, instead of letting it expire in November 2008.<sup>87</sup> The bill, however, was placed on legislative hold in the Senate.<sup>88</sup> A continuing resolution bill, H.R. 2638, was signed by President Bush in September 2008, which extends E-Verify temporarily until March 6, 2009, when Congress can revisit the issue.<sup>89</sup>

Concurrent with this major push for broader use of E-Verify and worksite enforcement, critics continue to express concerns such as the

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<sup>83</sup> *Id.*

<sup>84</sup> Janice Kephart, *E-Verify Ambush*, THE WASH. TIMES, Sept. 21, 2008, <http://washingtontimes.com/news/2008/sep/21/e-verify-ambush>.

<sup>85</sup> Exec. Order No. 13,465, *supra* note 27.

<sup>86</sup> News Release, USCIS Announces Enhancements, *supra* note 60.

<sup>87</sup> *House Passes Bill that would Reauthorize E-Verify for Five Years*, WOLTERS KLUWER, Aug. 5, 2008, <http://hr.cch.com/news/employment/o80508a.asp>.

<sup>88</sup> The bill is H.R. 6633. See Federation for American Immigration Reform, *House Appropriations Committee Adds E-Verify Amendments to Stimulus Bill*, Jan. 26, 2009, [http://www.fairus.org/site/News2?page=NewsArticle&id=19761&security=1601&news\\_iv\\_ctrl=1721](http://www.fairus.org/site/News2?page=NewsArticle&id=19761&security=1601&news_iv_ctrl=1721).

<sup>89</sup> *Id.*

difficulty of implementing the program for all employers, the disproportionate impact on some populations, such as foreign-born citizens, and the difficulty of ensuring that eligible employees are not discriminated on the basis of national origin. While the program is admittedly on the defensive, states such as Arizona, Mississippi, and others have embraced it. In an effort to combat unauthorized workers and, in a broader sense, illegal immigration absent comprehensive reform, E-Verify is likely to continue to grow.