



July 23, 2009

Members of the House Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

RE: Oppose proposals to expand or mandate E-Verify

Dear Representative:

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On behalf of the American Civil Liberties Union (“ACLU”), a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals, and its hundreds of thousands of members, activists, and 53 affiliates nationwide, we urge you to oppose any proposals that expand or mandate electronic employment verification. The Government Management, Organization, and Procurement Subcommittee of the House Oversight and Government Reform Committee has scheduled a hearing entitled “E-Verify: Challenges and Opportunities.” on Thursday, July 23, 2009. The ACLU opposes the DHS plan to mandate E-Verify for all federal contractors, effective September 8, 2009. The mandatory E-Verify rule for federal contractors will have a devastating impact on U.S. workers and our struggling economy. The ACLU opposes any expansion or mandate of E-Verify, which could jeopardize the livelihood of millions of innocent U.S. workers, retirees, and persons with disabilities.

The E-Verify program remains fraught with database errors involving U.S. citizens, permanent residents, and lawful workers. The data error rates in both Social Security Administration (“SSA”) and Department of Homeland Security (“DHS”) files concerning work-eligible U.S. citizens, lawful permanent residents, and visa holders are well-documented. False tentative non-confirmations (“TNCs”) result from many types of errors including human error (paper files being converted to electronic formats, resulting in errors); misspellings and incorrect name order (many names have multiple possible spellings, especially in the case of transliteration from non-Latin alphabets; some immigrants come from cultures in which naming and name-order conventions differ from those in mainstream U.S. culture); user error (employers inputting workers’ I-9 data make mistakes in reading handwriting, documents, complex names); and database maintenance and aggregation (Verification Information System database aggregates eight different DHS and legacy INS databases).

By the most conservative estimates, one percent of all queries under the current E-Verify program result in false TNCs for legal workers.¹ Under the new mandatory E-Verify rule for federal contractors, a best-case scenario one-percent error rate would translate into at least 38,000 legal workers affected annually – 38,000 workers who will be tagged with false TNCs through no fault of their own. Under E-Verify program rule requirements, these 38,000 workers will have to contact DHS or visit a SSA field office within eight days in order to correct their erroneous record. SSA has estimated that if Congress were to mandate E-Verify for all employers nationwide without improving the government databases, database errors alone could result in 3.6 million workers annually being misidentified as unauthorized to work.² Congress should not expand E-Verify unless and until DHS purges its databases of incorrect and outdated data that misidentify many U.S. workers as unauthorized to work.

The mandatory E-Verify rule for federal contractors and subcontractors will threaten the livelihood of tens of thousands of U.S. workers at a time of rising unemployment. Under the current E-Verify program, employers and workers have experienced problems with false tentative non-confirmations (“TNCs”). The E-Verify process requires extensive follow-up by employer and workers in order to clear up TNCs. Intel Corporation reported that E-Verify queries in 2008 resulted in over 12 percent of workers being initially flagged as unauthorized to work. All of these workers were eventually cleared as work-authorized, but only after “significant investment of time and money” by Intel and “lost productivity.”³ Similarly, in 2008 the CIS Ombudsman interviewed a variety of Arizona employers operating under mandatory E-Verify, and found that the “concern most frequently identified” by employers is that TNC notices are “issued on work-authorized individuals.”

These time demands on innocent U.S. workers are unfair and impractical. Each TNC requires a new worker to take hours, perhaps days, off of his or her new job in order to deal with DHS or SSA. The government database errors will wrongly and unfairly delay the start of employment or block the ability to work altogether for lawful U.S. workers. Congress should focus on promoting ways to facilitate quick employment for unemployed U.S. workers, not on imposing new obstacles that punish innocent U.S. workers who happen to have faulty records due to government database errors.

The mandatory E-Verify rule for federal contractors will drive more businesses and workers into the underground economy, thereby depriving the government of tax revenue. Mandatory E-Verify will not solve the problem of unlawful employment in the U.S. Rather, it will result in employers and workers moving into the underground economy, at great cost to U.S. citizens, business, government, and society. In 2008 the Congressional Budget Office estimated that the mandatory electronic employment verification system proposed in the Shuler-Tancredo SAVE Act of 2008 would decrease Social Security trust fund revenue by more than 22 billion dollars over the next decade because it would increase the number of employers and workers

¹ “The Next Generation of E-Verify: Getting Employment Verification Right,” Migration Policy Institute [Doris Meissner and Marc Rosenblum] (July 2009) at 12.

² Transcript from hearing on Employment Eligibility Verification Systems, Subcommittee on Social Security, House Committee on Ways and Means, June 7, 2007.

³ Intel Corporation, Comments on Proposed Employment Eligibility Regulations Implementing Exec. Order 12989 (as amended), Aug. 8, 2008.

who would resort to the underground economy, outside of the tax system.⁴ This has been borne out in the Arizona experience where, according to The Arizona Republic, the 2008 mandatory E-Verify law has resulted in businesses and workers moving off the books into the cash economy, thus depriving Arizona of income-tax revenue at the same time the state is facing a budget gap.⁵

The mandatory E-Verify rule for federal contractors will exacerbate employment discrimination against workers who look or sound “foreign.” U.S. Government Accountability Office, Congressional Research Service, and DHS studies have documented employer abuse in the existing voluntary E-Verify system, including screening out workers with “foreign” surnames, failing to explain TNCs to employees, and punishing employees with TNCs by withholding wages and assignments during the period until any discrepancy is resolved. An increasing number of employers unlawfully use E-Verify to pre-rescreen applicants, and many employers also assume that all employees who received

TNC findings are unauthorized workers and therefore require them to work longer hours and in poorer conditions.⁶ This has been the reported experience under the current voluntary E-Verify program which tends to attract good-faith employers who want to comply with the E-Verify program rules and U.S. immigration law. A mandatory E-Verify program would include a higher proportion of employers who would intentionally or inadvertently misuse the system.⁷⁸

Given the high employer noncompliance rates under the current E-Verify program, the ACLU is particularly concerned that federal contractors, operating under the new E-Verify mandate, will pre-screen job applicants suspected to be TNC candidates – namely, those applicants perceived to look or sound “foreign.” Such pre-screening would violate federal civil rights laws that prohibit employment discrimination on the basis of race or national origin.

DHS and SSA are ill-equipped to operate a mandatory E-verify system for all federal contractors and subcontractors. As of July 2009, more than 134,000 employers are enrolled in the E-Verify program.⁹ The new federal contractor rule will require an additional 168,324 federal contractors and subcontractors to enroll in the E-Verify program, come this September; this will represent a *120 percent increase* in utilization of the E-Verify program. DHS and SSA are not prepared to handle this increase in demand.

Resource strains will be especially severe when U.S. workers tagged with false TNCs are required to visit SSA, which, at its lowest staffing level since the early 1970s, is overwhelmed with a clogged disability benefits backlog and is facing a looming baby boom retirement

⁴ Letter from Peter Orzag, Cong. Budget Office Director, to Chairman Conyers, House Judiciary Committee, Apr. 4, 2008.

⁵ Daniel Gonzalez, “Illegal Workers Manage to Skirt Arizona Employer-Sanctions Law: Borrowed Identities, Cash Pay Fuel an Underground Economy,” The Arizona Republic, Nov. 30, 2008.

⁶ Andorra Bruno. “Electronic Employment Eligibility Verification.” Congressional Research Service Report. March 13, 2009. Available at <http://nilc.org/immsemplymnt/ircaempverif/e-verify-CRS-rpt-2009-03.pdf>

⁷ “Electronic Employment Eligibility Verification,” Cong. Research Service [Andorra Bruno] (Mar. 13, 2009) at 18.

⁸ “The Next Generation of E-Verify: Getting Employment Verification Right,” Migration Policy Institute [Doris Meissner and Marc Rosenblum] (July 2009) at 14.

⁹ “Sec. Napolitano Strengthens Employment Verification with Administration’s Commitment to E-Verify,” DHS press release, July 8, 2009.

workload bubble.¹⁰ Both SSA and DHS are ill-equipped to implement a mandatory E-Verify regiment for all federal contractors and subcontractors. The new DHS rule will impair SSA's ability to fulfill its primary obligations to serving the nation's retirees and people with disabilities.

Mandatory employment verification poses unacceptable threats to American workers' privacy rights and increases the risk of identity theft. A nationwide mandatory electronic employment verification system would be one of the largest and most widely accessible databases ever created in the U.S. Its size and openness would be an irresistible target for identity theft and almost inevitably lead to major data breaches. Workers victimized by identity theft would face significant bureaucratic obstacles to correcting their information.

For the aforementioned reasons, the ACLU urges you to reject any attempts to expand or mandate E-Verify. Instead the ACLU urges Congress to mandate a thorough clean-up of the error-ridden DHS and SSA databases before any employment verification program is expanded.

If you would like more information, please do not hesitate to contact Joanne Lin, Legislative Counsel, at jlin@dcaclu.org or (202) 675-2317.

Sincerely,



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Interim Director, Washington Legislative Office



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¹⁰ SSA estimates that mandating all employers to screen new hires through E-Verify would result in between 1.3 million and 3/6 million U.S. citizens being required to visit SSA field offices annually to resolve Tentative Non-Confirmations. See "The Facts on Employment Verification: Current Proposals Are Unworkable for SSA, Threaten Progress in Reducing Disability Claims Backlog," Letter from Rep. McNulty (D-NY) and Rep. Rangel (D-NY) to Democratic colleagues, Mar. 27, 2008.