

**Written Statement of Tyler Moran
Policy Director, National Immigration Law Center**

**House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement**

Hearing on: "E-Verify- Preserving Jobs for American Workers"

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The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to advance and promote the rights of low-income immigrants and their family members. 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 national advocacy groups, policymakers, attorneys and legal aid groups, workers' rights advocates, labor unions, government agencies, and the media. NILC has analyzed and advocated for improvements of E-Verify since it was first implemented in 1997 as the Basic Pilot program, and has extensive experience assisting immigrant advocates, attorneys, unions and other worker advocates in responding to problems with the program as it affects workers – immigrants and U.S.-born alike.

Overview

Making E-Verify mandatory without broader reform to our immigration system will drive down the wages and working conditions of *all* workers. Expanding the program is not the key to ending the employment of unauthorized workers. E-Verify—and any immigration enforcement-only policy—will not address the economic incentive that employers have to hire undocumented workers. Expanding E-Verify will also have severe repercussions for our economy and workforce.

Mandatory E-Verify has been 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.¹ The key to every effort, however, has been to pair E-Verify with a path to legal status for undocumented immigrants. Mandatory E-Verify without creating a fully legal labor force will set the program up for failure and exacerbate our current economic challenges. The unintended consequences of implementing the program will be grave, sending more workers and jobs into the underground economy, while other jobs go overseas. States, localities, and the federal government will lose out on tax revenue, and unscrupulous employers will have *more tools* to coerce and control workers. Instead of layering this program on top of a broken immigration system, we need to fix the system and ensure that *all* workers are protected.

NILC believes the key to good jobs for all workers is (1) reforming our immigration laws in a comprehensive and realistic way, that also includes strengthening our labor, employment, and civil rights laws, and (2) vigorously enforcing these laws. Protecting the rights of all workers in this way will strengthen our economy. Mandatory E-Verify will do the opposite.

¹ See, for example, Electronic Employment Verification Systems and Comprehensive Immigration Reform Legislative Priorities (NILC, April 2007), http://www.nilc.org/immsemplymnt/cir/eevs_legpriorities_2007-04-01.pdf.

E-Verify will not change the fact that undocumented workers are a core part of the U.S. economy

There are currently 8 million undocumented workers in the country representing 5.2 percent of the U.S. labor force.² Our economy is highly dependent upon low-wage, low-skill labor provided by undocumented workers and our country would face significant economic consequences if undocumented workers were to suddenly leave the workforce. For example, California, Texas and New Jersey account for approximately 25 percent of U.S. Gross Domestic Product. In those states, undocumented immigrants account for about 9 percent of the work force. Removing undocumented workers from these states—virtually overnight—from the above ground workforce would “deal a staggering blow” to one quarter of the U.S. economy.³

U.S. workers in certain industries would be particularly affected. Between 50 and 75 percent of the U.S. agricultural labor force is comprised of unauthorized workers.⁴ If these workers left the industry, it would increase production costs and prices and result in the mass off-shoring of millions of U.S. jobs. The U.S. Department of Agriculture reports that for every on-farm job there are about 3.1 “upstream” and “downstream” jobs in America—jobs that support and are created by the growing of agricultural products.⁵ The vast majority of these complementary jobs are held by U.S. workers, who would also face unemployment if on-farm jobs are eliminated or moved out of the country. In other words, for each undocumented farm worker we deport, we are essentially deporting the jobs of three American workers.

Throughout American history, immigrants have been scapegoated in tough economic times as taking jobs away from American workers. And while it’s popular—even easy—to blame immigrants, the facts indicate a different reality. With unemployment hovering at 9 percent, and industries like construction facing a 20 percent unemployment rate,⁶ people are frustrated and are looking for someone to blame. But there is no statistically significant relationship between unemployment and recent immigration.⁷ In fact, unemployment rates among native-born workers are actually lower in areas with higher levels of immigration, because spending by immigrants stimulates the economy and creates additional jobs.

Policymakers have asserted that if we deport all undocumented workers that we can simply move Americans into those jobs.⁸ But this oversimplification fails to grasp a general understanding of the labor market. Immigrants and native-born workers with similar educational attainment and experience possess unique skills that lead them to specialize in different occupations. Bottom line – immigrant workers and native-born workers are “imperfect substitutes.”⁹

² 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>, pp. 17.

³ Lee Hockstader, “Illegal Immigrants: Here to Stay,” *The Washington Post*, Feb. 1, 2011, <http://voices.washingtonpost.com/postpartisan/2011/02/illegal-immigrants-here-to-stay.html>.

⁴ Dan Zak, “Stephen Colbert, in GOP Pundit Character, Testifies on Immigration in D.C.,” *The Washington Post*, Sept. 25, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092402734.html.

⁵ Dan Griswold, *ICE Worksite Enforcement – Up to the Job?: Testimony Before the Subcommittee on Immigration Policy and Enforcement, Committee on the Judiciary, U.S. House of Representatives* (Cato Institute, Jan. 26, 2011), www.cato.org/pub_display.php?pub_id=12730.

⁶ *The Construction Industry in 2011* (Aronson Blogs, Jan. 11, 2011), <http://www.aronsonblogs.com/cisg/?p=76>.

⁷ *Immigration and Native-Born Unemployment Across Racial/Ethnic Groups: Untying the Knot, Part II of II* (Immigration Policy Center, Rob Paral and Associates, May 2009), www.immigrationpolicy.org/sites/default/files/docs/Part%202%20-%20Unemployment%20Race%20Disconnect%2005-19-09.pdf, pp. 3–5.

⁸ Letter to U.S. House of Representatives Democratic colleagues from Lamar Smith, Feb. 4, 2010.

⁹ Giovanni Peri and Chad Sparber, *Task Specialization, Immigration and Wages* (University of California, Davis and NBER and Colgate University, Jan. 2009), http://www.econ.ucdavis.edu/faculty/gperi/publications/peri_sparber_main_appendix_final.pdf, p. 2.

Making E-Verify mandatory will have a devastating impact on our economy.

Undocumented workers are not going to leave the country simply because Congress makes it harder for them to work here. It is clear that undocumented immigrants fill a niche in our economy and are here to stay, despite imposition of a verification system. And because these workers are a central part of our economy, employers will use any means necessary to keep them, including moving into the underground economy, misclassifying workers as independent contractors, and simply not participating in any employment verification system.¹⁰ In analyzing a 2008 bill that would have made E-Verify mandatory (without also providing a way for unauthorized workers to become work-authorized) the Congressional Budget Office (CBO) found that it would decrease federal revenue by more than \$17.3 billion over ten years—because it would increase the number of employers and workers who resort to the black market, outside of the tax system.¹¹

Arizona, the first state to make E-Verify mandatory for all employers in 2008, provides a window into the economic consequences of implementing the program with undocumented workers in the labor force. In 2008, the first year the law was in effect, income tax collection dropped 13 percent from the year before. Sales taxes, however, only dropped by 2.5 percent for food and 6.8 percent for clothing. The conclusion was that workers weren't paying income taxes, but were still earning money to spend—meaning that the underground economy was growing.¹² This loss in tax revenue was happening at a time when the state was facing a \$3 billion budget gap.

Employers who don't move into the underground economy may simply not use or misuse the system because they want to keep their workforce. Though Arizona employers made 1.3 million new hires in the fiscal year that ended in September 2009 and were required by state law to check all of them via E-Verify, they actually checked only 730,000 of them—or slightly more than half.¹³ U.S. Immigration and Customs Enforcement (ICE) officials also report that unscrupulous employers in Arizona have learned that E-Verify's photo-matching tool (which is used to confirm workers' identities through a photo comparison) accepts only two documents, and therefore they ask employees whom they suspect are not work-authorized to provide some other identity document that the photo-matching tool does not accept.¹⁴

Mandatory E-Verify will lower wages and working conditions for all workers

E-Verify will not create jobs for American workers. In fact, without creating a fully legal workforce, it will simply force undocumented workers into the underground economy because the economic incentive for businesses to keep immigrant workers far exceeds the cost of complying with immigration, labor, or

¹⁰ 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 Classroom Edition*, April 2005, 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), www.wiego.org/papers/FooImmigrantWorkers.pdf.

¹¹ 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.

¹² 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.

¹³ 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-e-verify.html.

¹⁴ 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.

employment laws.¹⁵

Sometimes, fact mirrors fiction. For workers in the underground economy, the working conditions are abysmal and akin to those in the early 20th century novel *The Jungle*. By moving underground, lawbreaking flourishes and there is a parallel labor system created where there is no overtime, no breaks, underpayment of wages, and unsafe working conditions. And when workers are off the books, they are stripped of the “entire package of social insurance programs that helped lay the basis for a broad middle class in the country,” including workers’ compensation, Social Security, minimum wage, and paid time off.¹⁶

As history has shown, a large underground economy hurts the above-ground workforces as well. American workers have to compete against easily-exploited undocumented workers who are forced to accept lower wages and substandard working conditions in order to remain employed. When some workers are easy to exploit, the conditions of all workers suffer because of “race to the bottom” competition and because opportunities for collective action by workers are undermined.¹⁷

E-Verify error rates will cause American workers to lose their jobs

While the much-discussed E-Verify error rates have improved since the program was implemented in 1997, there is still significant cause for concern. In its current form, 97.4 percent of workers are immediately confirmed as work authorized.¹⁸ As a statistic, this may sound accurate, but the actual numbers of workers affected is concerning—particularly when national unemployment hovers at 9 percent and so many Americans are looking for work. We can’t afford to have one person denied employment because of government error.

Using Westat’s statistical model, approximately 0.8 percent of tentative nonconfirmations – or TNCs – are issued in error.¹⁹ Since there were 16 million E-Verify queries by employers in fiscal year 2010, 128,000 workers had to go to a government agency to fix a database error or lose their jobs.²⁰ Of the 0.8

¹⁵ See, for example, Jenny Schulz, *Grappling with a Meaty Issue: IIRIRA’s Effect on Immigrants in the Meatpacking Industry* (Gender Race & Just. 137, 145-46, 1998) and Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking* (Harvard Latino Law Review, Vol. 9, 2006), <http://www.law.harvard.edu/students/orgs/llr/vol9/tanger.pdf>.

¹⁶ James A. Parrot, *Testimony Before the New York State Senate Standing Committee on Labor: Public Hearing on Employee Misclassification in New York’s Underground Economy* (Fiscal Policy Institutes, Jan. 13, 2010), http://www.fiscalspolicy.org/FPI_Testimony_MisclassificationStateSenate.pdf.

¹⁷ See, for example, Amy M. Traub, *Principles for an Immigration Policy to Strengthen & Expand the American Middle Class: 2007 Edition* (Drum Major Institute for Public Policy, 2007), available at <http://drummajorinstitute.org/immigration/>; Jennifer Gordon, *Testimony before the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, U.S. House of Representatives* (Fordham University School of Law, June 21, 2005).

¹⁸ See Stana, *supra* note 14.

¹⁹ 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 erroneous TNC rate, see *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, p. 117.

²⁰ There were approximately 16 million E-Verify queries in fiscal year 2010. See *E-Verify Gets High Marks from Employers in Customer Satisfaction Survey* (U.S. Citizenship and Immigration Services, Jan. 18, 2011), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a6adb46adba9d210VgnVCM100000082ca60aRCRD&vgnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD. Approximately 0.8 percent of work-authorized individuals receive a TNC in error. See Westat, *supra* note 19. The 128,000 figure was arrived at by multiplying these two numbers.

percent of workers who received a TNC in error, 0.3 percent²¹ were able to correct the issue and keep their job—meaning 0.5 percent of all workers receive a *final* nonconfirmation in error. A final nonconfirmation obligates the employer to fire the worker or risk being liable for immigration violations.²² This means that in fiscal year 2010 approximately 80,000 workers likely received erroneous findings from the system and may have lost their jobs as a result.²³

For example –

- *A U.S. citizen born in Florida was hired for a good-paying telecommunications position in October 2010. After hire, she was run through E-Verify and received a TNC. Her employer did not sit down with her to explain to her what a TNC means, nor to explain any of her rights. The worker went to her local SSA office and to try and resolve the situation, but due to agency paperwork errors, 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 has gone to great lengths to try and correct this error, but has been unable to do so. She was unemployed for over 3 months, including over the Christmas holiday, but recently accepted a new lower-paid position.*²⁴
- *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.*²⁵
- *A U.S. citizen applied for a position with a temporary agency in California, only to be turned away because E-Verify was unable to confirm her work authorization. The employer did not advise her of her right to contest the finding and violated the law by asking her to show additional documents. She was unemployed for over four months without health insurance and was diagnosed with a serious illness during that time.*²⁶

If use of 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 jobs²⁷ and about 770,000

²¹ *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>.

²² 8 USC §1324a note.

²³ There were approximately 16 million E-Verify queries in fiscal year 2010. See U.S. Citizenship and Immigration Services *supra* note 20. 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 80,000 figure was arrived at by multiplying these two numbers.

²⁴ 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.

²⁵ 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.”

²⁶ Summary of charge filed with the Dept. of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices in 2008.

²⁷ About 0.8 percent of workers receive an *erroneous* tentative nonconfirmation, or “TNC.” Westat, *supra* note 19, p. 117. There are currently about 154,287,000 million workers in the U.S. The 1.2 million figure was arrived at by multiplying these two numbers.

workers would likely lose their jobs.²⁸ These numbers, however, are likely underestimates. As discussed above, Westat uses a statistical model to determine error rates versus actual experiences of employers. Employers that audit their own E-Verify data report higher error rates than federal government 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 Social Security Administration (SSA) were erroneous in 2008-09.²⁹

Mandatory E-Verify for all workers: estimated error rates

Source of estimate	Erroneous TNC rate	# of workers affected
2009 Westat report	0.8%	1.2 million
2008 Intel corporation data ³⁰	12%	18.5 million
2008-2009 LA County data	2.0%-2.7%	3 million – 4.1 million

The error rates affect all workers, but Westat found that they have a discriminatory impact on lawful foreign-born workers. Westat’s 2009 report found the erroneous TNC rate for foreign-born workers was 20 times higher than that of U.S.-born workers.³¹ As described in the section below, receipt of an erroneous TNC puts an enormous burden on the worker and can result in loss of wages to challenge the error, adverse action by employers, and loss of employment. The impact of having to fix government database errors is significant. In fact, GAO called it “formidable.”³²

When workers receive a TNC notice, they often have to take unpaid time off from work to follow up with SSA, 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 \$100.³³ 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. 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. Further, in fiscal year 2009, about 3.3 million visitors left a field office without receiving service.³⁴ 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.³⁵

²⁸ Approximately 0.5 percent of work-authorized individuals receive a final nonconfirmation in error. See note 23, *supra*. There are currently 154,287,000 million workers in the U.S. The 771,435 figure was arrived at by multiplying 154,287,000 million by the 0.5 erroneous final nonconfirmation rate.

²⁹ Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), <http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf>.

³⁰ Intel Corporation, “Comments on Proposed Employment Eligibility Regulations Implementing Executive Order 12989 (as amended),” Aug. 8, 2008.

³¹ Westat *supra* note 19, p. xxxv.

³² Stana, *supra* note 14, p. 34.

³³ Westat *supra* note 19, pp. 203-204

³⁴ *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.

³⁵ American Council on International Personnel, “Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008),” August 11, 2008.

E-Verify will undermine businesses ability to create new jobs

Federal Reserve officials stated in December 2010 that progress toward cutting unemployment remained “disappointingly slow”³⁶ and that “it would take four to five more years for the job market to normalize fully.”³⁷ According to Tom Donohue, president and CEO of the U.S. Chamber of Commerce, government regulation is a primary barrier to businesses ability to grow jobs and businesses are already struggling with a “tsunami” of regulations that are “depriving our economic system of the needed oxygen to grow and expand.”³⁸ Businesses need to hire U.S. workers to grow the economy. If businesses are forced to divert scarce resources to implementing and maintaining E-Verify, it will take away from their ability to create new jobs and revenue.

The biggest impact of making E-Verify mandatory will be on small businesses that employ over 50 percent of the U.S. workforce and have generated 64 percent of net new jobs over the last 15 years.³⁹ Most small businesses in the country are not enrolled in E-Verify and current users are predominately large corporations.⁴⁰ In a survey of employers who currently do not use E-Verify, 25 percent of small employers said that they were not enrolled due to lack of resources and 10 percent said that they lacked a computer with an Internet connection or had a slow connection.⁴¹ The fiscal impact on small businesses using E-Verify is significant. According to data compiled by Bloomberg, if use of E-Verify were mandatory in fiscal year 2010, it would have cost small businesses \$2.6 billion.⁴² These costs handicap their ability to hire new workers.

The following quotes from small business owners highlight the concerns with mandatory use of E-Verify:

- *Arizona small business owner Mike Castillo states that “the program isn’t user-friendly for small-business owners.” He recently tried to hire a part-time worker, but a technical glitch that took days to fix made it difficult. “If you don’t have the luxury of a human-resources staff, E-Verify takes time away from your core business,” he said.*⁴³
- *One small business in Maryland has estimated that it would cost approximately \$27,000 for the company to use E-Verify for one year,⁴⁴ thereby handicapping the owner’s ability to hire new workers.*
- *One employer in a national focus group noted, “There are many small employers that still exist without any type of computers in use—forcing them to purchase a computer and pay for monthly Internet charges could be a hardship.”⁴⁵*

³⁶ Courtney Schlisserman, “Employers in 2010 Announced Fewest U.S. Job Cuts in 13 Years,” *Bloomberg*, Jan 5, 2011, www.bloomberg.com/news/2011-01-05/employers-in-2010-announced-fewest-u-s-job-cuts-in-13-years.html.

³⁷ Scott Lanman, “Bernanke Sees Slow Drop in Unemployment Amid Recovery,” *Bloomberg*, Jan. 7, 2011, www.bloomberg.com/news/2011-01-07/bernanke-sees-slow-drop-in-joblessness-even-with-growth-pickup.html, emphasis added.

³⁸ Thomas Donohue, *The Regulatory Tsunami: How a Tidal Wave of Regulations Is Drowning America* (U.S. Chamber of Commerce, Oct. 7, 2010), www.uschamber.com/press/speeches/2010/regulatory-tsunami-how-tidal-wave-regulations-drowning-america, emphasis added.

³⁹ *How Important are Small Businesses to the U.S. Economy?* (U.S. Small Business Association, Office of Advocacy), <http://www.sba.gov/advocacy/7495/8420>.

⁴⁰ Although 89 percent of businesses in the U.S. are small employers (with 2-14 employees), only 8 percent of E-Verify users are small businesses. See *The Practices and Opinions of Employers Who Do Not Participate in E-Verify* (Westat, Dec. 2010), <http://www.uscis.gov/USCIS/Resources/Reports/E-Verify/e-verify-non-user-dec-2010.pdf>, p. 29.

⁴¹ *Id.* p. 25.

⁴² Jason Arvello, “‘Free’ E-Verify May Cost Small Businesses \$2.6 billion: Insight,” *Bloomberg*, Jan. 28, 2011.

⁴³ See Berry, *supra* note 13.

⁴⁴ *Chamber of Commerce of the USA v. Chertoff*, No. 08-CV-3444-AW (D.Md.).

⁴⁵ See Westat *supra* note 40, p. 40.

- *In commenting on a Florida bill to require all employers to use E-Verify, Rick Roth, owner of Roth Farms, said that the policy would “bankrupt farmers.”*⁴⁶

Small businesses create two out of every three new jobs each year.⁴⁷ At a time when we need these businesses to grow and hire new workers, it is critical that they are not mandated with additional requirements like E-Verify that divert resources.

Employer misuse will increase if E-Verify is made mandatory

Employer non-compliance with E-Verify rules directly impacts job stability and job quality. Employer noncompliance with the program’s rules is extremely high. For example, over 66 percent of employers took adverse actions against workers receiving a TNC.⁴⁸ Actions include prohibiting workers for whom they had received a TNC from working; restricting such workers’ work assignments; and delaying job training for such workers.⁴⁹ And, at least 57 percent of employers using E-Verify violate the program’s rules by using it to prescreen workers.⁵⁰ When workers are prescreened and not offered a job, it took them at least three weeks to find other employment.⁵¹

Although required by law to do so, employers do not always notify workers of a TNC. Workers who do not contest database errors lose 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.⁵² 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.⁵³

It is anticipated that employer misuse 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. Noncompliance with program rules would almost certainly increase if all employers were required to use the system. In Arizona, the first state to make E-Verify mandatory, employers are less compliant with E-Verify procedures than other E-Verify employers.⁵⁴ The likely reason is that, unlike most E-Verify users, most Arizona employers did not volunteer to use the program.

The real solution to improving our economy and strengthening American jobs

Making E-Verify mandatory for all employers will not create jobs and will result in poorer working conditions and the loss of jobs for American workers. At minimum, for expansion of E-Verify to be considered, the following steps must be taken –

⁴⁶ John Lantigua, “Big foes await gun, E-Verify bills,” *The Palm Beach Post*, Jan. 22, 2011, <http://www.palmbeachpost.com/news/big-foes-await-gun-e-verify-bills-1203265.html>

⁴⁷ See Small Business Association, *supra* note 39.

⁴⁸ Westat *supra* note 19, p. 157. Thirty-seven percent of employers self-reported that they took adverse actions against workers receiving a TNC, and workers reported that an additional 29 percent of employers took adverse action against them, with a total of over 66 percent of employers take adverse action.

⁴⁹ Westat, *supra* note 19, pp. 157, 204.

⁵⁰ *Id.* at 149

⁵¹ *Id.* at 140

⁵² *Id.* at pp. 154, 199

⁵³ 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.

⁵⁴ Westat, *supra* note 19, p. 237.

1. **Reform our immigration system to provide a path to citizenship for the current undocumented population.** Any mandatory E-Verify proposal should only be considered in the context of a broader reform of our immigration system. According to the AFL-CIO, legalization is an important worker protection and that legalizing immigrants “benefits all workers.”⁵⁵ Not only will it benefit workers, but it will give a much-needed boost to our economy. Immigration reform that includes a legalization program would increase U.S. GDP by at least 0.84 percent, which translates into \$1.5 trillion to the nation’s economy over ten years. This is compared to a deportation-only policy which would result in the loss of \$2.6 trillion over 10 years.⁵⁶
2. **Prevent unscrupulous employers from using immigration law to avoid their obligations under labor law.** Under current law, employers seek out and hire undocumented workers to exploit them for their labor, and then threaten them with deportation when they exercise their labor rights. The employer pays no penalty for the labor violations. Holding employers liable for these labor law violations, and preventing them from using immigration law to “deport their problem” will reduce the economic incentive to seek out these vulnerable workers. It will also prevent the churning of the workforce that undermines U.S. jobs. Legislation like the POWER Act (S. 3207) does just that. It lessens the incentives for employers to use threats of immigration enforcement as a means to avoid compliance with labor laws and helps create safe workplaces for all workers.

Conclusion

Making E-Verify mandatory outside of broader reform of our immigration system undermines American jobs and will ultimately impose new burdens on our economy, workers and businesses. We have been trying an “immigration enforcement-only approach” for at least two decades now, and it has not worked. We need enforcement of labor, employment and civil rights laws, not the current churning of the workforce, where undocumented workers are preferred over documented workers because they are easier to hire and fire. That only results in further downward pressure on wages and working conditions of all U.S. workers.

⁵⁵ *Responsible Reform of Immigration Laws Must Protect All Workers in the U.S.* (AFL-CIO, March. 1, 2006), <http://www.aflcio.org/aboutus/thisistheaflio/ecouncil/ec02272006e.cfm>.

⁵⁶ *The Economic Benefits of Comprehensive Immigration Reform* (Center for American Progress, Jan. 14, 2010), http://www.americanprogress.org/issues/2010/01/pdf/cir_factsheet.pdf.