



Electronic Employment Eligibility Verification

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Summary

Many years of debate about unauthorized immigration to the United States culminated in 1986 with the enactment of the Immigration Reform and Control Act (IRCA). This law sought to address unauthorized immigration, in part, by requiring all employers to examine documents presented by new hires to verify identity and work authorization and to complete and retain employment eligibility verification (I-9) forms. Ten years later, in the face of a growing illegal alien population, Congress attempted to strengthen the employment verification process by establishing pilot programs for electronic verification, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The Basic Pilot program (known now as E-Verify), the first of the three IIRIRA employment verification pilots to be implemented and the only one still in operation, began in November 1997. Originally scheduled to terminate in November 2001, it has been extended several times. It is currently scheduled to terminate on September 30, 2009, in accordance with the Omnibus Appropriations Act, 2009 (P.L. 111-8).

E-Verify is administered by the Department of Homeland Security's U.S. Citizenship and Immigration Services (DHS/USCIS). The program, which is primarily voluntary, has been growing in recent years. On January 10, 2009, there were 103,038 employers registered, representing 414,110 hiring sites.

Under E-Verify, participating employers submit information about their new hires (name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable) from the I-9 form. This information is automatically compared with information in Social Security Administration and, if necessary, DHS databases to verify identity and employment eligibility.

The Bush Administration issued regulations to require employers to participate in E-Verify in order to take advantage of certain opportunities. One of these rules requires certain federal contracts to contain a new clause committing contractors to use E-Verify; the Obama Administration delayed the applicability date of this rule until May 21, 2009.

The 111th Congress has considered provisions on E-Verify as part of the American Recovery and Reinvestment Act of 2009 (H.R. 1) and the Omnibus Appropriations Act, 2009 (H.R. 1105). Other legislation on E-Verify or on electronic employment verification more broadly may emerge in the future. In weighing such proposals, Congress may find it useful to evaluate them in terms of their potential impact on a set of related issues: unauthorized employment; verification system accuracy, efficiency, and capacity; discrimination; employer compliance; privacy; and verification system usability and employer burden.

This report will be updated as developments warrant.

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Background

Many years of debate about unauthorized immigration to the United States culminated in 1986 with the enactment of the Immigration Reform and Control Act (IRCA).¹ That year, there were an estimated 3.2 million unauthorized immigrants (illegal aliens) in the country.² IRCA coupled legalization programs for certain segments of the unauthorized population with provisions to deter future unauthorized immigration by reducing the magnet of employment. These latter provisions reflected a belief, widely held then and now, that most unauthorized aliens enter and remain in the United States in order to work. To reduce the job magnet, IRCA amended the Immigration and Nationality Act (INA)³ to add a new §274A, which makes it unlawful to knowingly hire, recruit, or refer for a fee, or continue to employ, an unauthorized alien, and requires all employers to examine documents presented by new hires to verify identity and work authorization and to complete and retain employment eligibility verification (I-9) forms. These INA §274A provisions are sometimes referred to collectively as *employer sanctions*.

The IRCA provisions did not have the effect of curtailing future illegal immigration. After falling to an estimated 1.9 million in 1988 as eligible unauthorized aliens legalized their status, the unauthorized population began to grow. By the early 1990s, it had surpassed pre-IRCA levels.⁴ The I-9 process was effectively undermined by the ready availability of fraudulent documents.

Ten years after the enactment of IRCA, Congress attempted to strengthen the employment verification process as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁵ IIRIRA directed the Attorney General to conduct three largely voluntary pilot programs for electronic employment eligibility confirmation. After examining documents and completing I-9 forms as required under INA §274A,⁶ employers participating in a pilot program would seek to confirm the identity and employment eligibility of their new hires. IIRIRA tasked the Attorney General with establishing a confirmation system to respond to inquiries made by participants in these pilot programs “at any time through a toll-free telephone line or other toll-free electronic media concerning an individual’s identity and whether the individual is authorized to be employed.” The former Immigration and Naturalization Service (INS) had initial responsibility for administering the employment eligibility confirmation pilot programs. In 2003, the Department of Homeland Security (DHS) assumed this responsibility.⁷

¹ P.L. 99-603, November 6, 1986.

² CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem (hereafter cited as CRS Report RL33874).

³ Act of June 27, 1952, ch. 477, as amended. The INA is the basis of current immigration law.

⁴ CRS Report RL33874.

⁵ Division C of P.L. 104-208, September 30, 1996.

⁶ IIRIRA modified the I-9 requirements for pilot program participants.

⁷ The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of March 1, 2003. P.L. 108-156 (December 3, 2003) amended IIRIRA to transfer responsibility for the pilot programs from the Attorney General to the Secretary of Homeland Security.

E-Verify

The Basic Pilot program, the first of the three IIRIRA employment verification pilots to be implemented and the only one still in operation, began in November 1997 in the five states with the largest unauthorized alien populations at the time.⁸ In December 2004, in accordance with P.L. 108-156, the program became available nationwide, although it remained primarily voluntary. The Basic Pilot program has changed over the years. Since July 2005, it has been entirely Web-based. It is administered by DHS's U.S. Citizenship and Immigration Services (USCIS).

The Basic Pilot Program was briefly renamed the Employment Eligibility Verification (EEV) Program by the Bush Administration, and was again renamed E-Verify by that Administration in August 2007.⁹ IIRIRA, as originally enacted, directed the Attorney General to terminate the Basic Pilot program four years after going into effect, unless Congress provided otherwise. Congress has extended the life of the Basic Pilot program several times, most recently in the Omnibus Appropriations Act, 2009.¹⁰ Division J, Section 101 of the Omnibus Appropriations Act amends language in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009,¹¹ to extend E-Verify until September 30, 2009.

Verification Process

As part of the I-9 process, as mentioned above, all employers must review documents presented by new hires to verify their identity and employment authorization and, along with the new hires, must complete I-9 forms. Employers participating in E-Verify then must submit information from the I-9 form about their new hires (name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable) via the Internet for confirmation. This information is automatically compared with information in SSA's primary database, the Numerical Identification File (Numident), which contains records on individuals issued Social Security numbers. For those employees identifying themselves as citizens, if the information submitted by the employer matches the information in Numident and SSA records confirm citizenship, the employer is notified that the employee's work authorization is verified. If the employer-submitted information about a new hire does not match information in Numident, the employer is notified that the employee has received an SSA tentative nonconfirmation finding.

⁸ The original Basic Pilot states were California, Florida, Illinois, New York, and Texas. The other two IIRIRA pilot programs—the Machine-Readable Document Pilot (MRDP) and the Citizen Attestation Verification Pilot (CAVP)—were terminated in 2003.

⁹ The IIRIRA provisions were never amended to reflect these name changes, however. In this report, “E-Verify” is used to refer to the program generally, and “Basic Pilot” is used at times to refer to the program prior to the August 2007 E-Verify name change.

¹⁰ P.L. 111-8, March 11, 2009. The earlier extensions were enacted in P.L. 107-128, January 16, 2002 (which amended IIRIRA to direct that the program be terminated after six years); P.L. 108-156, December 3, 2003 (which amended IIRIRA to direct that the program be terminated after 11 years); P.L. 110-329, September 30, 2008 (which effectively established a March 6, 2009, termination date); and P.L. 111-6 (which effectively established a March 11, 2009, termination date).

¹¹ P.L. 110-329, September 30, 2008. Division A, Section 143 of this law directed that the termination date section of IIRIRA be applied by substituting “March 6, 2009” for the prior language, which had effectively set a November 2008 termination date.

In cases in which the employer-submitted information matches SSA records but the individual self-identifies as a noncitizen, the information is sent electronically to USCIS to verify work authorization. If the USCIS electronic check confirms work authorization, the employer is so notified. If the electronic check does not confirm work authorization, an Immigration Status Verifier (ISV) at USCIS checks additional databases. If the ISV is unable to confirm work authorization, the employer is notified that the employee has received a USCIS tentative nonconfirmation finding.

Employers are required to notify their employees about SSA and USCIS tentative nonconfirmation findings. An employee can contest a tentative nonconfirmation by contacting SSA or USCIS, as appropriate. If an employee does not contest the finding or the contest is unsuccessful, the system issues a final nonconfirmation.

Growth and Participation

E-Verify has been growing in recent years. On January 31, 2006, there were 5,272 employers registered for the program, representing 22,710 hiring sites. Three years later, on January 10, 2009, there were 103,038 employers registered, representing 414,110 hiring sites. According to a March 2009 USCIS news release, an average of 1,000 employers join the program each week.¹² In FY2008, E-Verify handled about 7 million queries.¹³ The overwhelming majority of new hires, however, are not verified through E-Verify. According to preliminary Bureau of Labor Statistics data, there were about 51 million nonfarm hires in the United States in calendar year 2008.¹⁴

As mentioned above, E-Verify is a primarily voluntary program. Under IIRIRA, however, violators of INA prohibitions on unlawful employment or those who engage in unfair immigration-related employment practices may be required to participate in a pilot program. IIRIRA also states that each department of the federal government and each Member of Congress, each officer of Congress, and the head of each legislative branch agency “shall elect to participate in a pilot program.”¹⁵ In August 2007, the Office of Management and Budget (OMB) issued a memorandum requiring all federal departments and agencies to begin verifying their new hires through E-Verify as of October 1, 2007.¹⁶

Funding

USCIS, which administers E-Verify, is a fee-supported agency. Until FY2007, funding for the Basic Pilot program came from unrelated USCIS fees. (As discussed below, employers are not charged a fee to participate in E-Verify.) In recent years, however, Congress has appropriated

¹² U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “USCIS Adds Passport Data in E-Verify Process for Foreign-Born Citizens,” news release, March 4, 2009 (hereafter cited as USCIS news release, March 2009).

¹³ Data provided to CRS by USCIS.

¹⁴ U.S. Department of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey (JOLTS).

¹⁵ IIRIRA §402(e). These IIRIRA provisions have never been amended to reflect the fact that only one pilot program remains in operation. The federal department provisions further state that the secretary of each department may limit pilot program participation to hiring in certain states or geographic areas and to specified divisions within the department.

¹⁶ U.S. Office of Management of Budget, “Verifying the Employment Eligibility of Federal Employees,” Memorandum for the Heads of Departments and Agencies, August 10, 2007.

funding for E-Verify.¹⁷ Congress appropriated \$114 million for E-Verify for FY2007 and \$60 million for FY2008. For FY2009, Division D of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, provided \$100 million for E-Verify.¹⁸

Recent Proposals on Electronic Employment Verification

Although the rate of growth of the illegal alien population has been slowing in recent years and the total unauthorized population may even be declining in size today,¹⁹ this population remains sizable. According to estimates by DHS and the Pew Hispanic Center, the unauthorized alien population numbered some 12 million in early 2007 and early 2008.²⁰ Policymakers have considered an expansion of electronic employment verification—whether through E-Verify or a new system—as a key option for addressing unauthorized employment.

Legislation in Recent Congresses

In the 109th Congress, both the House and Senate passed major immigration bills (H.R. 4437 and S. 2611, respectively) that included significant and different electronic employment eligibility verification provisions. These bills were never reconciled.²¹ In the 110th Congress, various proposals were introduced to make electronic employment eligibility verification mandatory for some or all employers. Some of these proposals were stand-alone bills; others were parts of larger immigration reform measures. Some would have applied new verification requirements only to new hires, as under current law; others also would have required or permitted verification of previously hired workers. While the FY2008 Consolidated Appropriations Act²² included limited language on E-Verify, no major electronic employment eligibility provisions were enacted—or passed by either the House or Senate—in the 110th Congress.²³

Several provisions related to electronic employment eligibility verification have been considered in the 111th Congress, prompted by efforts to prevent E-Verify from expiring. As mentioned above, the Omnibus Appropriations Act, 2009, extends E-Verify until September 30, 2009. A Senate amendment to that bill to extend the program until November 2014 was unsuccessful.²⁴ The House-passed version of the American Recovery and Reinvestment Act of 2009 (H.R. 1) also contained E-Verify provisions, including language to extend the program until November 2013

¹⁷ See CRS Report RL34004, *Homeland Security Department: FY2008 Appropriations*, by Jennifer E. Lake et al., and CRS Report RL34482, *Homeland Security Department: FY2009 Appropriations*, coordinated by Jennifer E. Lake and Blas Nuñez-Neto.

¹⁸ P.L. 110-329, September 30, 2008.

¹⁹ Jeffrey S. Passel and D'Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008 (hereafter cited as *Trends in Unauthorized Immigration*, October 2008).

²⁰ U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, by Michael Hofer, Nancy Rytina, and Bryan C. Baker, September 2008; *Trends in Unauthorized Immigration*, October 2008.

²¹ See CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, by Andorra Bruno et al.

²² P.L. 110-161, December 26, 2007.

²³ See CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*, by Andorra Bruno et al.

²⁴ S.Amdt. 604 to H.R. 1105 was tabled on a 50-47 vote on March 10, 2009.

and to require that none of the funds made available under the act be used to enter into a contract with an entity that does not participate in E-Verify. These House-passed provisions, however, were not included in the Senate-passed version of H.R. 1 or in the final enacted version of the bill.²⁵ Other bills on electronic employment verification introduced in the 111th Congress would variously extend E-Verify; make E-Verify a permanent program; require certain contractors to use E-Verify; phase in a requirement for all employers to use E-Verify; and require that SSA issue new Social Security cards that would be used to verify identity and employment eligibility.

Bush Administration Rules

An unsuccessful cloture vote in the Senate on a major immigration bill in June 2007 (S. 1639) marked the end of consideration of comprehensive immigration reform by the 110th Congress. Following this vote, in August 2007, the Bush Administration announced that it would take steps within existing law “to address border security and immigration challenges.”²⁶ Among the rules subsequently issued by the Administration were regulations to require employers to participate in E-Verify in order to take advantage of certain opportunities.

On June 6, 2008, President Bush issued an executive order to require federal contractors to conduct electronic employment eligibility verification. The order read, in part:

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.²⁷

The Secretary of Homeland Security subsequently designated E-Verify as the required employment eligibility verification system for contractors.²⁸ A final rule to implement the executive order was published in November 2008.²⁹ It requires covered federal contracts to contain a new clause committing contractors to use E-Verify “to verify that all of the contractors’ new hires, and all employees (existing and new) directly performing work under Federal contracts, are authorized to work in the United States.”³⁰ Under the rule, as amended, contracting officers are not to include the E-Verify clause in any solicitation or contract before May 21, 2009.³¹

²⁵ P.L. 111-5, February 17, 2009.

²⁶ See U.S. President (Bush), “President Bush Addresses Border Security and Immigration Challenges,” news release, August 10, 2007.

²⁷ Executive Order 13465, “Amending Executive Order 12989, as Amended,” 73 *Federal Register* 33283-33287, June 11, 2008.

²⁸ U.S. Department of Homeland Security, “DHS Designates E-Verify as Employment Eligibility Verification System for All Federal Contractors,” news release, June 9, 2008.

²⁹ U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” 73 *Federal Register* 67651-67705, November 14, 2008.

³⁰ *Ibid.*, p. 67654. The rule requires inclusion of the E-Verify clause in prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000), with some exemptions.

³¹ The rule originally had an effective date of January 15, 2009, but both the effective date of the rule and the (continued...)

In addition, new immigration regulations issued by the Bush Administration require employers to be registered users of E-Verify in order to be able to employ certain temporary residents (nonimmigrants).³² In an interim final rule, effective April 8, 2008, DHS extended the maximum period of optional practical training (OPT) for foreign students on F-1 visas who have completed a science, technology, engineering, or mathematics degree.³³ Under this rule, eligible F-1 students can extend their post-graduation OPT period, previously limited to 12 months, for 17 additional months, for a maximum OPT period of 29 months. In order to be eligible for this extension, however, the students must be employed by an employer that is enrolled in E-Verify.

A DHS final rule on the H-2A temporary agricultural worker program, effective as of January 17, 2009, likewise requires employer participation in E-Verify as a condition of receiving an employment authorization benefit. Under the rule, an H-2A worker who is waiting for an extension of H-2A status based on a petition filed by a new employer can begin working for that new employer before the extension is approved, if the new employer is a registered user in good standing of E-Verify. If the new employer is not a registered E-Verify user, the worker would not be authorized to begin working for the new employer until the extension of stay application is approved.³⁴

Policy Considerations

As mentioned above, the 111th Congress has considered provisions on E-Verify, mainly provisions to extend the life of the program. Given the November 2008 election results, the new Obama Administration, and the state of the U.S. economy, it is unclear what other types of electronic employment eligibility verification proposals, if any, may be considered in the 111th Congress. Recent political changes may shift focus in the area of immigration away from unauthorized employment and enforcement toward other issues, and employment eligibility verification may fade as an issue. On the other hand, new comprehensive immigration reform packages may be developed that once again include significant electronic employment verification provisions. Or it may be that continued increases in unemployment rates prompt renewed efforts to expand employment verification in the interest of protecting dwindling job opportunities for legal U.S. workers. Among the types of proposals that the 111th Congress may take up in the future are

(...continued)

applicability date of the rule, on or after which contracting officers would include the new E-Verify clause in relevant contracts, were subsequently changed. Two amendments to the final rule extended the effective date to January 19, 2009, and the applicability date to May 21, 2009. U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification," 74 *Federal Register* 1937, January 14, 2009; U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification," 74 *Federal Register* 5621, January 30, 2009.

³² Nonimmigrants are foreign nationals who are admitted to the United States for a designated period of time and a specific purpose. See CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

³³ U.S. Department of Homeland Security, "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 73 *Federal Register* 18944-18956, April 8, 2008. For additional information on the F-1 visa, see CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Chad C. Haddal.

³⁴ U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 *Federal Register* 76891-76914, December 18, 2008. For additional information on the H-2A visa, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

proposals to require all employers to conduct electronic employment eligibility verification, whether through E-Verify or another system. In considering any electronic employment verification proposals that emerge in the 111th Congress, policymakers may want to take the following related issues into account.

Unauthorized Employment

The primary goal of an employment eligibility verification system is to ensure that individuals holding jobs are authorized to work in the United States. Independent studies of E-Verify, conducted for INS and DHS by Westat and Temple University's Institute for Survey Research over the years, have evaluated whether the system has reduced unauthorized employment and met other policy goals.³⁵

A 2007 Westat study of the Basic Pilot program found that about 5% of new hires screened through the system in the first half of FY2007 received final nonconfirmations (i.e., final findings that the workers' employment authorization could not be confirmed). More recent analysis by Westat found that in the April 2008-June 2008 period, 3.5% of new hires received final nonconfirmations. According to the 2007 study report, "most of the tentative nonconfirmation cases that become final nonconfirmations are in fact for employees who were not work-authorized."³⁶ Thus, if and when workers receiving final nonconfirmations are terminated, unauthorized employment would decrease. As also discussed in the 2007 report, it may be that E-Verify further helps reduce unauthorized employment by deterring unauthorized workers from applying for positions with employers that participate in E-Verify. The effectiveness of E-Verify in reducing unauthorized employment through both final nonconfirmation findings and the discouragement of applications, however, is limited by the small size of the program relative to overall employment.

In order to be able to retain employment under the I-9 and E-Verify systems, workers must present documents that evidence their identity and employment authorization. As noted above, the I-9 system is susceptible to document fraud, in which employees present genuine-looking counterfeit or invalid documents. According to the 2007 Westat report:

[T]he likelihood of employers detecting counterfeit documents depends on the quality of the documents, the employers' familiarity with immigration and other documents, and their expertise in detecting fraudulent documents. The U.S. Department of Homeland Security (DHS) expects employers to exercise reasonable diligence in reviewing documents but does not expect them to be experts or to question reasonable appearing documents.³⁷

Under E-Verify, as described above, the information on the I-9 form is further checked against information in SSA and DHS databases. The system is, thereby, able to detect certain forms of

³⁵The evaluation reports are Institute for Survey Research, Temple University, and Westat, *INS Basic Pilot Evaluation Summary Report*, January 29, 2002; Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation*, June 2002 (hereafter cited as Basic Pilot Evaluation Report, June 2002); Westat, *Interim Findings of the Web-Based Basic Pilot Evaluation*, December 2006; Westat, *Findings of the Web Basic Pilot Evaluation, September 2007* (hereafter cited as Westat Report, September 2007). All are available on the USCIS website, <http://www.uscis.gov>. A new Westat evaluation report, including analysis of 2008 E-Verify data, is due to be published in 2009. Some of the 2008 Westat statistics are available on the USCIS website.

³⁶ Westat Report, September 2007, pp. 88-89.

³⁷ *Ibid.*, p. 85.

document fraud, such as when a new hire presents counterfeit documents containing information about a non-work authorized or nonexistent person. As discussed in the next section, however, E-Verify has limited ability to detect other types of document fraud and identity fraud.

The 2007 Westat report raises the issue of how unauthorized workers may adapt their behavior in light of E-Verify, especially if the program is expanded. The authors predict that as unauthorized workers become more knowledgeable about E-Verify they will increasingly obtain counterfeit or valid documents with information about work-authorized persons. The authors further speculate that the perceived need for more sophisticated forms of fraud, with more expensive price tags, may have the long-term effect of reducing unauthorized employment:

Since fraudulent or stolen documents for work-authorized persons presumably cost more than counterfeit documents with information about nonexistent persons, the primary deterrent value of the program, in the long run, may well be to increase the cost of obtaining unauthorized employment, which, in turn, would presumably reduce unauthorized employment....³⁸

On the other hand, if electronic verification becomes mandatory nationwide, unauthorized aliens who are unable to obtain documents that pass muster under the system may end up working under the table, thereby increasing the risks of worker exploitation. An opinion piece on Reason Online, affiliated with *Reason* magazine, made this argument:

In the end, E-verify will not “turn off the tap,” “dry up the pool of jobs,” or “turn off the magnet.” It will simply encourage workers underground, where they will be more vulnerable to abuse and less likely to pay taxes.³⁹

Verification System Accuracy, Efficiency, and Capacity

In order for an electronic employment eligibility verification system to reduce unauthorized employment, as discussed in the preceding section, and not deprive legal workers of job opportunities, it must respond to queries correctly—it must confirm the employment eligibility of individuals who are, in fact, authorized to work and not confirm the employment eligibility of individuals who lack work authorization. IIRIRA required that the confirmation system, intended to be used as part of all three of the original pilot programs, be designed and operated to, among other things, maximize its reliability.⁴⁰

Accuracy of Findings

The independent evaluations of E-Verify conducted by Westat and the Institute for Survey Research have analyzed the accuracy of the system. Limited by available data, evaluators have developed a variable known as the *erroneous tentative nonconfirmation rate (ETNR) for ever-authorized employees* as a measure of accuracy. This error rate is defined as the percentage of individuals ultimately verified through the system that initially receive a tentative nonconfirmation finding. The ETNR for ever-authorized employees was 4.8% for the first two years of the Basic Pilot Program (November 1997-December 1999 period); that is, 4.8% of the

³⁸ Ibid., p. 87.

³⁹ Kerry Howley, “Walls of Paper,” April 21, 2008, <http://www.reason.com>.

⁴⁰ IIRIRA §404(d)(1).

workers who were ultimately found to be work authorized first received a tentative nonconfirmation. The ETNR has decreased significantly since the late 1990s, amounting to 0.5% for the first half of FY2007 (October 2006-April 2007) and 0.4% for the third quarter of FY2008 (April 2008-June 2008). As explained below in the “Discrimination” section, however, the ETNR varies for different groups, with foreign-born citizens having the highest rate and U.S.-born citizens having the lowest rate.

There are certain limitations to the ETNR for ever-authorized employees, as discussed in the 2007 Westat report. The variable does not take into account work-authorized individuals who receive tentative nonconfirmations but who, for whatever reason, do not contest them; these individuals are not classified as “ever-authorized.” In addition, the data used to calculate the ETNR for ever-authorized employees include individuals who are found to be work-authorized by the system, but who are *not*, in fact, work authorized. Eliminating these false positives from the calculation would change the error rate. Thus, the ETNR for ever-authorized employees understates the ETNR rate for *all* employees.

The Westat evaluators were unable to devise a separate measure of individuals without work authorization who were erroneously verified through the system. The report explains this shortcoming, as follows:

Unfortunately, the evaluation team was unable to develop a comparable indicator of the *erroneous work-authorization rate* (i.e., the percentage of verifications of persons without work authorization who were found to be work-authorized). While the results of the process whereby employees contest erroneous tentative nonconfirmations can be used to inform the estimated erroneous tentative nonconfirmation rate, there are no comparable follow-up procedures for invalid findings of work authorization.⁴¹

One source of these false positives (i.e., findings that unauthorized workers are work-eligible) is fraud—both document fraud, in which employees present counterfeit or invalid documents or fraudulently obtained valid documents, and identity fraud, in which employees present valid documents issued to other individuals. While, as noted above, E-Verify can detect certain types of document fraud, it has limited ability to detect such fraud when the “counterfeit documents are of reasonable quality and contain information about actual work-authorized persons.”⁴² Valid documents obtained by using fraudulent birth certificates or other so-called breeder documents⁴³ may be even more difficult for E-Verify to detect.

Identity fraud, in which new hires present valid documents issued to other, work-authorized individuals, presents other challenges. To improve E-Verify’s ability to detect a certain type of identity fraud, USCIS launched a new photo screening tool in September 2007. The tool comes into play if a new hire chooses to present an Employment Authorization Document (EAD) or a Permanent Resident Card (green card) to establish employment authorization. In such cases, the employer checks the photo on the document against the image stored in USCIS databases. This tool enables detection of legitimately issued documents that have been altered by photo-substitution. The effectiveness of the photo tool, however, is greatly limited by the fact that new

⁴¹ Westat Report, September 2007, p. 39.

⁴² Ibid., p. 85.

⁴³ A breeder document is a document such as a birth certificate that can be easily counterfeited and used to obtain other documents, such as a driver’s license.

hires do not have to show either an EAD or a green card; they can opt to show other documents to evidence identity and employment eligibility. Fully aware of these limitations, USCIS's "long-term goal is for the E-Verify photo screening process [to] be able to verify the photos on all identity documents that an employee may present as acceptable Form I-9 documentation."⁴⁴

USCIS acknowledged the broader challenge posed by identity fraud in a May 2008 statement on E-Verify:

While we do not currently have any way to identify, upon initial verification, identity fraud by an employee who has stolen a valid SSN and identity information or has been supplied the information by their employer, we are examining ways to do so. What we are able to do with our Monitoring & Compliance unit is to identify indications that SSN fraud has taken place, and work with ICE [U.S. Immigration and Customs Enforcement, DHS's immigration enforcement agency], in cooperation with SSA, to deal with these cases.⁴⁵

As noted above, unauthorized workers could turn increasingly to fraud in response to an expanded electronic verification system. Some observers, like Jim Harper of the Cato Institute, are particularly concerned about the potential for increased identity fraud under a mandatory system. In written testimony for a 2007 House hearing on employment verification and worksite enforcement, Harper took the position that expanding E-Verify would increase identity fraud. He argued that to gain approval under a nationwide electronic system, unauthorized workers would seek "documents with genuine, but rarely used, name/SSN combinations," which would "increase illicit trade in Americans' Social Security numbers."⁴⁶

Database Accuracy

An accurate verification system requires accurate underlying data. Data inaccuracies can be a source of false positives as well as false negatives (i.e., findings that authorized workers are not work-eligible). In establishing the Basic Pilot program and the other pilots, IIRIRA directed SSA and the former INS to maintain accurate records.⁴⁷

The 2002 evaluation of the Basic Pilot Program found that there were "serious problems with the timeliness and accuracy of the INS database."⁴⁸ The 2007 Westat evaluation reported progress on this front, but indicated additional improvements were needed:

The accuracy of the USCIS database used for verification has improved substantially since the start of the Basic Pilot program. However, further improvements are needed, especially if the Web Basic Pilot becomes a mandated national program—improvements that USCIS

⁴⁴ USCIS Statement for the Record, at U.S. Congress, House Committee on Ways and Means, Subcommittee on Social Security, *Employment Eligibility Verification Systems and Potential Impacts on SSA's Ability to Serve Retirees, People with Disabilities, and Workers*, hearing, 110th Cong., 2nd sess., May 6, 2008 (hereafter cited as USCIS Statement for the Record, May 2008).

⁴⁵ Ibid.

⁴⁶ Statement of Jim Harper, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System*, hearing, 110th Cong., 1st sess., April 26, 2007, p. 10 (hereafter cited as Harper Testimony, April 2007).

⁴⁷ IIRIRA §404(g).

⁴⁸ Basic Pilot Evaluation Report, June 2002, p. 143.

personnel report are currently underway. Most importantly, the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens.⁴⁹

The accuracy of SSA's Numident database was the subject of a report issued by the SSA Inspector General in December 2006.⁵⁰ Prompted by a congressional request, this review examined the accuracy of the Numident fields relied on by E-Verify. The report found Numident to be "generally accurate," but also "identified some discrepancies" that could result in employers receiving incorrect information in the employment eligibility verification process. More specifically, the SSA Inspector General estimated that "discrepancies in approximately 17.8 million (4.1 percent) of the 435 million Numident records could result in incorrect feedback when submitted through Basic Pilot." The report noted particular concern about the "extent of incorrect citizenship information" in Numident for foreign-born U.S. citizens and noncitizens.⁵¹

Some recent changes were made to E-Verify related to database accuracy. As of May 2008, the system includes USCIS naturalization data, and arrival data for noncitizens from the Integrated Border Inspection System.⁵² In February 2009, Department of State passport data were incorporated into E-Verify.⁵³ As described below in the "Discrimination" section, these data sources are now automatically checked, as appropriate, before a tentative nonconfirmation is issued.

System Efficiency

The efficiency of an employment eligibility verification system, like its accuracy, is multidimensional. One measure of efficiency used in the independent evaluations is the percentage of employees verified automatically or after initial review by a USCIS Immigration Status Verifier—without a tentative nonconfirmation being issued (see above discussion of the verification process). In the June 2004-March 2007 period, 93% of cases were verified automatically or after initial ISV review. In April 2008-June 2008, 96% of cases were verified automatically or after initial ISV review.

At the same time, employer groups and advocates for immigrants and low-income families maintain that E-Verify is not efficient. In opposing efforts in the 111th Congress to require certain employers to use E-Verify, groups have argued that such mandatory participation would result in increased bureaucracy and hiring delays.⁵⁴

⁴⁹ Westat Report, September 2007, p. xxi.

⁵⁰ Social Security Administration, Office of the Inspector General, *Accuracy of the Social Security Administration's Numident File*, Congressional Response Report, A-08-06-26100, December 2006, <http://www.ssa.gov>.

⁵¹ *Ibid.*, p. ii.

⁵² U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Announces Enhancements to E-Verify Program," news release, May 5, 2008 (hereafter cited as USCIS news release, May 2008).

⁵³ USCIS news release, March 2009)

⁵⁴ See, for example, Richard Kaplan, "Senate Excludes E-Verify Check on Illegal Immigrant Workers from Stimulus Package," February 10, 2009, <http://www.hispanicbusiness.com>; Friends Committee on National Legislation, "Strip E-Verify from the Final Stimulus Package," February 11, 2009, <http://www.fncl.org>.

System Capacity

The capacity of an electronic employment eligibility verification system to handle queries about most or all newly hired workers in the United States has arisen as an issue in light of proposals to expand electronic verification or make it mandatory for all employers. In FY2008, as indicated above, E-Verify handled about 7 million queries. In May 2008 congressional testimony, the Government Accountability Office (GAO) cited USCIS estimates that under a mandatory E-Verify program there would be an average of 63 million queries submitted annually. GAO further reported that USCIS had tested the E-Verify system and determined that, with five additional servers, it could process up to 240 million queries annually. With respect to the cost of a mandatory program, USCIS officials have estimated the total cost for FY2009 through FY2012 at about \$765 million if only new hires are verified and at about \$838 million if both new hires and current employees are verified. For its part, SSA has estimated that a mandatory E-Verify program would cost a total of about \$281 million for FY2009 through FY2013.⁵⁵

Discrimination

At the time of IRCA's enactment, there was widespread concern that the new INA §274A provisions would result in employment discrimination against foreign-looking or foreign-sounding work-authorized individuals as, for example, employers opted not to hire them for fear that they lacked work authorization or treated them differently than other work-authorized job applicants or workers.⁵⁶ To address these types of concerns, IRCA added a new §274B to the INA to make it an unfair immigration-related employment practice to discriminate against an individual, other than an unauthorized alien, in hiring, recruitment or referral for a fee, or termination because of the individual's national origin or the individual's citizenship or permanent immigration status. IRCA, as originally enacted, also directed the Comptroller General of the United States to report to Congress on the implementation and enforcement of §274A to determine, among other things, if "a pattern of discrimination has resulted" against U.S. citizens or other work-eligible jobseekers.⁵⁷ In 1990, GAO reported that widespread discrimination had occurred as a result of IRCA.⁵⁸ Congress, however, took no action on these findings.

One goal of the IIRIRA employment eligibility verification pilot programs was to reduce the type of discrimination associated with the I-9 process. To that end, the law required that the confirmation system, intended to be used as part of all three of the original pilot programs, be designed and operated

to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including (A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer of employment; or (C) the exclusion of certain individuals from consideration for

⁵⁵ U.S. Government Accountability Office, *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*, GAO-08-729T, May 6, 2008, pp. 3-4.

⁵⁶ Employment discrimination is defined here, as in the pilot program evaluation reports, as "differential treatment based on characteristics, such as citizenship or ethnicity, that are unrelated to productivity or performance." Westat Report, September 2007, p. 93.

⁵⁷ INA §274A(j), repealed by IIRIRA (Division C of P.L. 104-208, September 30, 1996).

⁵⁸ U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, March 1990. Note: This agency is now the Government Accountability Office.

employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants.⁵⁹

These enumerated behaviors are prohibited under the E-Verify system. However, as discussed in the employer compliance section below, evaluations have found that some employers nevertheless practice them.

The potential impact of the IIRIRA pilot programs on employment discrimination was the subject of much debate. Some stakeholders maintained that the availability of electronic verification could make employers more likely to hire foreign-born individuals, thus reducing discrimination. On the other hand, immigrant advocates expressed concerns that discrimination would increase, even if employers followed proper pilot program procedures. They argued, for example, that work-authorized foreign-born individuals would be more likely than their U.S.-born counterparts to receive tentative confirmations and thus to be subject to the inconveniences and other negative consequences that these findings may entail.

Evaluations of E-Verify have found evidence to support both of these predictions. Summarizing the discrimination-related results of the 2007 Westat evaluation in 2008 congressional testimony, study director Carolyn Shettle noted that the percentage of long-time users of E-Verify who reported that the program made them more willing to hire immigrant workers was greater than the percentage of employers indicating that it made them less willing to hire such workers, “presumably leading to a net decrease in hiring discrimination.” At the same time, she stated that the evaluation found that foreign-born work-authorized individuals were more likely than U.S.-born workers to receive tentative nonconfirmations, “thereby subjecting a greater percentage of work-authorized foreign-born workers to potential harm arising from the E-Verify process.” This potential harm may include lost pay and transportation expenses to visit an SSA office.⁶⁰

The issue of differential rates of erroneous tentative nonconfirmation findings for different groups is a major concern for immigrant advocates and other interested parties. As noted above, the overall ENTNC rate for workers ultimately authorized by E-Verify for the first half of FY2007 was 0.5%. The ETNC rate varied considerably by group, however. The 2007 Westat study found that between June 2004 and March 2007, 0.1% of U.S.-born citizens who were ultimately verified through the system first received a tentative nonconfirmation. ETNC rates were higher for work-authorized foreign-born individuals, particularly foreign-born citizens. For the first half of FY2007, the ENTNC rate for naturalized citizens was 9.8% and the ETNC rate for noncitizens was 1.4%.

The main reason that the ETNC rate for naturalized citizens was higher than for other groups is that SSA records do not necessarily reflect the fact that noncitizens have naturalized, and as discussed above, SSA is responsible for verifying the employment eligibility of those claiming to be citizens. USCIS made changes to E-Verify in 2008 and early 2009 aimed at preventing naturalized citizens who have not updated their SSA records from receiving tentative nonconfirmations. As mentioned above, the agency incorporated naturalization data into E-Verify in May 2008. These data are automatically checked before a tentative nonconfirmation is issued in cases of new hires claiming to be U.S. citizens whose employment authorization is not

⁵⁹ IIRIRA §404(d)(4).

⁶⁰ Statement of Carolyn F. Shettle, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Electronic Employment Verification Systems*, hearing, 110th Cong., 2nd sess., June 10, 2008, p. 5 (hereafter cited as Shettle testimony, June 2008).

automatically confirmed during the SSA check. Also as part of this May 2008 initiative, a naturalized citizen who receives a tentative nonconfirmation has the option of telephoning USCIS, rather than visiting an SSA field office, to resolve the issue.⁶¹ In another enhancement, in February 2009, USCIS incorporated Department of State passport data into E-Verify, which enables passport numbers to be checked in cases of new hires providing passports in the I-9 verification process, whose work eligibility cannot be immediately confirmed by SSA or DHS. USCIS reports that these enhancements have reduced incidences of erroneous tentative nonconfirmation findings for foreign-born citizens.⁶²

Employer Compliance

Employer compliance in the context of E-Verify refers to employers' properly following the program's policies and procedures, which include using E-Verify to verify employment eligibility after a worker has been hired, informing employees of tentative nonconfirmation findings, and not taking adverse actions against employees who choose to contest tentative nonconfirmation findings. Employer noncompliance can reduce the effectiveness of the program in curtailing unauthorized employment and can result in discrimination. In the interest of preventing discrimination, as mentioned above, certain employer behaviors are prohibited by law. These include the selective use of the system to verify employment eligibility and the use of the system to prescreen job applicants.

The 2007 evaluation found that employer compliance under the Web-based Basic Pilot program (Web Basic Pilot)⁶³ was higher than under the original Basic Pilot program, but that "the rate of employer noncompliance is still substantial."⁶⁴ Based largely on self-reported information from employers, the evaluation identified a range of prohibited behaviors that employers were engaging in, including the following:

- Not all employers followed Web Basic Pilot procedures with respect to training employees on the Web Basic Pilot system, increasing the likelihood of more serious forms of noncompliance with pilot procedures.
- Some employers used the Web Basic Pilot to screen job applicants.
- Some employers did not notify employees of tentative nonconfirmation findings at all, did not notify employees in writing, or did not explain the process adequately to their employees, thereby making it difficult or impossible for employees to contest the finding and denying them their rights.
- Some employers encouraged employees they believed not to be work authorized to say they would contest a tentative nonconfirmation so they could extend the length of time they worked.
- There was evidence that a small number of Web Basic Pilot employers discouraged employees with tentative nonconfirmations from contesting.

⁶¹ USCIS news release, May 2008.

⁶² USCIS news release, March 2009.

⁶³ As noted above, the program has been entirely Web-based since July 2005.

⁶⁴ Westat Report, September 2007, p. xxii.

- Some employers took prohibited adverse actions against employees while they were contesting tentative nonconfirmation findings. These actions included restricting work assignments, delaying training, reducing pay, or requiring them to work longer hours or in poor conditions.
- Employers do not always follow the legal requirement to promptly terminate the employment of employees receiving final nonconfirmation findings.⁶⁵

The 2007 evaluation further found that compliance levels were lower among recently enrolled E-Verify users than among long-term users. According to the study report, these different rates of compliance may be due, in part, to differences in the characteristics of new and long-term users, such as industry, employer size, and percentage of immigrant workers.⁶⁶ In her 2008 congressional testimony, Westat study director Carolyn Shettle predicted that employer compliance levels would continue declining in the absence of countervailing measures:

As the program expands and E-Verify employers become increasingly like the national population of employers, it appears likely that this downward trend in compliance will continue unless counteracted by program changes.⁶⁷

Another key issue to consider with respect to employer compliance is the extent to which requiring employers to participate in E-Verify or another electronic employment eligibility verification system, as under some proposals in the 111th and earlier Congresses, could affect compliance. At present, the majority of employers participating in E-Verify are voluntary users. It seems plausible that, for a variety of reasons, mandatory participants as a whole may have lower levels of compliance than voluntary users.

Privacy

Employee privacy was another issue considered in the development of the original IIRIRA pilot programs. Among the IIRIRA requirements for the confirmation system was that the system be designed and operated “with appropriate ... safeguards to prevent unauthorized disclosure of personal information.”⁶⁸

The 2007 evaluation explained that in accordance with these privacy-related requirements, the Web-based version of the Basic Pilot program was designed to protect the confidentiality and privacy of employee information against unauthorized use by the federal government and employers. The report also noted the “multiple barriers SSA and USCIS employ to prevent unauthorized external access to their systems.”⁶⁹ The 2007 evaluation’s major findings about the impact of the Web-based Basic Pilot program on employee privacy were, as follows:

- There is little increased risk of misuse of Web Basic Pilot information by Federal employees.

⁶⁵ Ibid., p. xxiii.

⁶⁶ Westat Report, September 2007, pp. 142-148.

⁶⁷ Shettle testimony, June 2008, p. 4.

⁶⁸ IIRIRA §404(d)(3).

⁶⁹ Westat Report, September 2007, p. 102.

- One possible weakness of the system is that under current procedures employers joining the Web Basic Pilot are not verified against any type of listing of employers; therefore, anyone wanting access to the system could pose as an employer and get access to the system by signing an MOU.
- Employers did not consistently convey information about Web Basic Pilot tentative nonconfirmations to employees in a private setting.⁷⁰

The 2007 report concluded that recent evaluations had not found “significant evidence of problems in safeguarding employee privacy.” At the same time, however, the report cautioned that “a Web interface constitutes a significant change in the way the Basic Pilot works that could, at least in theory, have an impact on employee privacy.”⁷¹

The transition to a Web-based employment verification system and proposals to make E-Verify mandatory for all employers have heightened the concerns of some interested parties about employee privacy. In his 2007 House testimony, Jim Harper of the Cato Institute argued that a nationwide electronic employment verification system would have serious privacy consequences. He drew sharp distinctions between a paper-based I-9 system, in which employee information “remains practically obscure,” and a Web-based electronic system, in which the entered information is very easy for the participating agencies to access, copy, and use. In Harper’s view:

Unless a clear, strong, and verifiable data destruction policy is in place, any electronic employment verification system will be a surveillance system, however benign in its inception, that observes all American workers. The system will add to the data stores throughout the federal government that continually amass information about the lives, livelihoods, activities, and interests of everyone—especially law-abiding citizens.⁷²

Harper also expressed concern about data security, maintaining that an electronic employment eligibility verification system would be a target for hackers.

System Usability and Employer Burden

Another of the IIRIRA requirements for the pilot program confirmation system was that it be designed and operated to maximize its ease of use by employers.⁷³ According to the 2007 Westat evaluation, most employers found the Basic Pilot program to be an effective and reliable tool that was not burdensome. Some employers, however, reported usage problems, such as having difficulty accessing the system, and some employers terminated their participation in the program because of the perceived burden.⁷⁴

Employers are not charged by the government to participate in E-Verify, but they do incur set-up costs (such as, for training and computer hardware) and operating costs (such as, for wages for

⁷⁰ Ibid., p. xxvi.

⁷¹ Ibid., p. 102.

⁷² Harper Testimony, April 2007, p. 13.

⁷³ IIRIRA §404(d)(1).

⁷⁴ Westat Report, September 2007, p. xxii.

verification staff and computer maintenance).⁷⁵ The 2007 report included the following on employer costs:

The majority of employers reported that they spent \$100 or less in initial set-up costs for the Web Basic Pilot and a similar amount annually to operate the system; however, some employers spent much more. Eighty-four percent of employers that used the Web Basic Pilot for more than a year reported spending \$100 or less for start-up costs, and 75 percent said they spent \$100 or less annually to operate the system. However, 4 percent of long-term users said they spent \$500 or more for start-up costs, and 11 percent spent \$500 or more annually for operating costs. Because of the high costs reported by a small minority of employers, the average (mean) costs were more than \$100 (\$125 for set-up and \$728 for maintenance).⁷⁶

If E-Verify becomes a mandatory program, the percentage of employers in the higher-cost group seems likely to grow. Employers who do not currently have the personnel or hardware to conduct electronic verifications could find required participation particularly burdensome.

Conclusion

The policy issues discussed above may be especially important to consider in the context of proposals to require most or all employers to participate in E-Verify or another electronic employment eligibility verification system. A mandatory system could arguably make it possible to identify many more unauthorized workers. At the same time, under such a system, any inaccuracies, inefficiencies, or privacy breaches that occurred could affect much larger numbers of employees and employers. Employer compliance under a mandatory system would seem to be a particularly important consideration, especially since employer compliance has direct implications for other issues, notably discrimination. It may be that a mandatory system would require new strategies to promote and monitor employer compliance.

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⁷⁵ Ibid., p. 106.

⁷⁶ Ibid., p. 104.