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LEGAL WORKFORCE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 2164

JUNE 15, 2011

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LEGAL WORKFORCE ACT

WEDNESDAY, JUNE 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION
POLICY AND ENFORCEMENT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:19 a.m., in room 2141, Rayburn House Office Building, the Honorable Elton Gallegly (Chairman of the Subcommittee) presiding.

Present: Representatives Gallegly, Smith, King, Lungren, Poe, Lofgren, Jackson Lee and Conyers (ex officio).

Staff Present: (Majority) Andrea Loving, Counsel; Marian White, Clerk; and David Shahoulian, Minority Counsel.

Mr. GALLEGLY. We will move ahead with our opening statements in order to facilitate getting the meeting going. I will call the hearing to order. Good morning.

Currently there are nearly 14 million unemployed Americans. Making sure that they have every opportunity to find work is more important now than ever. One way to do this is it to reduce the number of jobs that go to illegal immigrants. The E-Verify program will clearly do just that.

E-Verify allows employers to check the work eligibility of new hires by running the employee's Social Security number or alien identification number against Department of Homeland Security and Social Security Administration records.

In 1995, I chaired the Congressional Task Force on Immigration Reform. We published a 200-plus-page report with more than 80 specific recommendations. One of those was an electronic employment eligibility verification system, which was included in Chairman Smith's 1996 immigration reform bill. The system is now known as E-Verify. It is currently a voluntary program for most of the almost 250,000 employers who use it. It is free, Internet-based, and very easy to use, and the employers who use it all agree.

I am pleased to be an original cosponsor of the Legal Workforce Act. The bill mandates that all employers in the United States use E-Verify to help make sure their workforce is legal. The result of that will be that jobs are reserved for citizens and legal residents.

The bill requires that employers be notified when they submit one or more mismatched W-2 statements. Once the employer receives the notice, they must use E-Verify to check the employee's work eligibility and are subject to penalty if they do not then follow the requirements of E-Verify in good faith.

And the Legal Workforce Act requires employees who submit a Social Security number for which there is a pattern of unusual multiple use to be notified of the use so that the rightful owner can be determined. The employer must then be notified of the unusual use and follow the E-Verify procedures for that employee.

Another important change the bill makes to the E-Verify process will help alleviate some of the burden on business. Currently an employer is prohibited from using E-Verify until after they have hired the employee. So sometimes they invest time, money and resources into an employee only to have it turn out that the employee is not work eligible. But the Legal Workforce Act allows the employer to make a job offer conditioned on an E-Verify confirmation. This change is simply common sense.

The Legal Workforce Act implements a process whereby employers can help ensure a legal workforce, and Americans will have a chance to get every job possible in the U.S.

I look forward to the testimony of our witnesses today. And at this point, I will recognize my friend, the Ranking Member from California, Ms. Lofgren.

[The text of the bill, H.R. 2164, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 2164

To amend the Immigration and Nationality Act to make mandatory and permanent requirements relating to use of an electronic employment eligibility verification system, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 14, 2011

Mr. SMITH of Texas (for himself, Mr. CALVERT, Mr. GALLEGLY, Mr. CHAFFETZ, Mr. BILBRAY, Mr. ROYCE, Mr. GARY G. MILLER of California, Mrs. MYRICK, Mr. SENSENBRENNER, Mr. FRANKS of Arizona, Mr. CARTER, Mr. KINGSTON, Mr. DANIEL E. LUNGREN of California, and Mr. GOODLATTE) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Education and the Workforce and Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Immigration and Nationality Act to make mandatory and permanent requirements relating to use of an electronic employment eligibility verification system, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Legal Workforce Act".

SEC. 2. EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS.

Section 274A(b) of the Immigration and Nationality Act (8 U.S.C. 1324a(b)) is amended to read as follows:

"(b) EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS.—

"(1) NEW HIRES, RECRUITMENT, AND REFERRAL.—The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the following:

"(A) ATTESTATION AFTER EXAMINATION OF DOCUMENTATION.—

"(i) ATTESTATION.—During the verification period (as defined in subparagraph (F)), the person or entity shall attest, under penalty of perjury and on a form, including electronic and telephonic formats, designated or established by the Secretary by regulation not later than 6 months after the date of the enactment of the Legal Workforce Act, that it has verified that the individual is not an unauthorized alien by—

"(I) obtaining from the individual the individual's social security account number and recording the number on the form (if the individual claims to have been issued such a number), and, if the individual does not attest to United States citizenship under subparagraph (B), obtaining such identification or authorization number established by the Department of Homeland Security for the alien as the Secretary of Homeland Security may specify, and recording such number on the form; and

"(II) examining—

"(aa) a document described in clause (ii); or

"(bb) a document described in clause (iii) and a document described in clause (iv).

"(ii) DOCUMENTS EVIDENCING EMPLOYMENT AUTHORIZATION AND ESTABLISHING IDENTITY.—A document described in this subparagraph is an individual's—

"(I) unexpired United States passport or passport card;

"(II) unexpired permanent resident card that contains a photograph;

"(III) unexpired employment authorization card that contains a photograph;

"(IV) in the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I–94 or Form I–94A bearing the same name as the passport and containing as endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form;

"(V) passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I–94 or Form I–94A indicating nonimmigrant admission under the Compact of Free Association Between the United Sates and the FSM or RMI; or

"(VI) other document designated by the Secretary of Homeland Security, if the document—

"(aa) contains a photograph of the individual and biometric identification data from the individual and such other personal identifying information relating to the individual as the Secretary of Homeland Security finds, by regulation, sufficient for purposes of this clause;

"(bb) is evidence of authorization of employment in the United States; and

"(cc) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

"(iii) DOCUMENTS EVIDENCING EMPLOYMENT AUTHORIZATION.—A document described in this subparagraph is an individual's social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States).

"(iv) DOCUMENTS ESTABLISHING IDENTITY OF INDIVIDUAL.—A document described in this subparagraph is—

"(I) an individual's unexpired State issued driver's license or identification card if it contains a photograph and information such as name, date of birth, gender, height, eye color, and address;

"(II) an individual's unexpired U.S. military identification card;

"(III) an individual's unexpired Native American tribal identification document; or

"(IV) in the case of an individual under 18 years of age, a parent or legal guardian's attestation under penalty of law as to the identity and age of the individual.

"(v) AUTHORITY TO PROHIBIT USE OF CERTAIN DOCUMENTS.—If the Secretary of Homeland Security finds, by regulation, that any document described in clause (i), (ii), or (iii) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Secretary may prohibit or place conditions on its use for purposes of this paragraph.

"(vi) SIGNATURE.—Such attestation may be manifested by either a hand-written or electronic signature.

"(B) INDIVIDUAL ATTESTATION OF EMPLOYMENT AUTHORIZATION.—

"(i) IN GENERAL.—During the verification period (as defined in subparagraph (F)), the individual shall attest, under penalty of perjury on the form designated or established for purposes of subparagraph (A), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this Act or by the Secretary of Homeland Security to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or electronic signature. The individual shall also provide that individual's social security account number (if the individual claims to have been issued such a number), and, if the individual does not attest to United States citizenship under this subparagraph, such identification or authorization number established by the Department of Homeland Security for the alien as the Secretary may specify.

"(ii) CRIMINAL PENALTY.—

"(I) OFFENSES.—Any individual who, pursuant to clause (i), provides a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to another person, knowing that the number does not belong to the individual providing the number, shall be fined under title 18, United States Code, imprisoned not less than 1 year and not more than 15 years, or both. Any individual who, pursuant to clause (i), provides, during and in relation to any felony violation enumerated in section 1028A(c) of title 18, United States Code, a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to another person, knowing that the number does not belong to the individual providing the number, in addition to the punishment provided for such felony, shall be fined under title 18, United States Code, imprisoned for a term of 2 years, or both.

"(II) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

"(aa) a court shall not place on probation any individual convicted of a violation of this clause;

"(bb) except as provided in item (dd), no term of imprisonment imposed on an individual under this section shall run concurrently with any other term of imprisonment imposed on the individual under any other provision of law, including any term of imprisonment imposed for the felony enumerated in section 1028A(c) of title 18, United States Code, during which the violation of this section occurred;

"(cc) in determining any term of imprisonment to be imposed for the felony enumerated in section 1028A(c) of title 18, United States Code, during which the violation of this clause occurred, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this clause; and

"(dd) a term of imprisonment imposed on an individual for a violation of this clause may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that individual for an additional violation of this clause, except that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the United States Sentencing Commission pursuant to section 994 of title 28, United States Code.

"(C) RETENTION OF VERIFICATION FORM AND VERIFICATION.—

"(i) IN GENERAL.—After completion of such form in accordance with subparagraphs (A) and (B), the person or entity shall—

"(I) retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Department of Homeland Security, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending—

"(aa) in the case of the recruiting or referral of an individual, 3 years after the date of the recruiting or referral; and

"(bb) in the case of the hiring of an individual, the later of 3 years after the date of such hire or one year after the date the individual's employment is terminated; and

"(II) during the verification period (as defined in subparagraph (F)), make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of an individual.

"(ii) VERIFICATION.—

"(I) VERIFICATION RECEIVED.—If the person or other entity receives an appropriate verification of an individual's identity and work eligibility under the verification system within the time period specified, the person or entity shall record on the form an appropriate code that is provided under the system and that indicates a final verification of such identity and work eligibility of the individual.

"(II) TENTATIVE NONVERIFICATION RECEIVED.—If the person or other entity receives a tentative nonverification of an individual's identity or work eligibility under the verification system within the time period specified, the person or entity shall so inform the individual for whom the verification is sought. If the individual does not contest the nonverification within the time period specified, the nonverification shall be considered final. The person or entity shall then record on the form an appropriate code which has been provided under the system to indicate a tentative nonverification. If the individual does contest the nonverification, the individual shall utilize the process for secondary verification provided under subsection (d). The nonverification will remain tentative until a final verification or nonverification is provided by the verification system within the time period specified. In no case shall an employer terminate employment of an individual because of a failure of the individual to have identity and work eligibility confirmed under this section until a nonverification becomes final. Nothing in this clause shall apply to a termination of employment for any reason other than because of such a failure. In no case shall an employer rescind the offer of employment to an individual because of a failure of the individual to have identity and work eligibility confirmed under this subsection until a nonconfirmation becomes final. Nothing in this subclause shall apply to a recission of the offer of employment for any reason other than because of such a failure.

"(III) FINAL VERIFICATION OR NONVERIFICATION RECEIVED.—If a final verification or nonverification is provided by the verification system regarding an individual, the person or entity shall record on the form an appropriate code that is provided under the system and that indicates a verification or nonverification of identity and work eligibility of the individual.

"(IV) EXTENSION OF TIME.—If the person or other entity in good faith attempts to make an inquiry during the time period specified and the verification system has registered that not all inquiries were received during such time, the person or entity may make an inquiry in the first subsequent working day in which the verification system registers that it has received all inquiries. If the verification system cannot receive inquiries at all times during a day, the person or entity merely has to assert that the entity attempted to make the inquiry on that day for the previous sentence to apply to such an inquiry, and does not have to provide any additional proof concerning such inquiry.

"(V) CONSEQUENCES OF NONVERIFICATION.—

"(aa) TERMINATION OR NOTIFICATION OF CONTINUED EMPLOYMENT.—If the person or other entity has received a final nonverification regarding an individual, the person or entity may terminate employment of the individual (or decline to recruit or refer the individual). If the person or entity does not terminate employment of the individual or proceeds to recruit or refer the individual, the person or entity shall notify the Secretary of Homeland Security of such fact through the verification system or in such other manner as the Secretary may specify.

"(bb) FAILURE TO NOTIFY.—If the person or entity fails to provide notice with respect to an individual as required under item (aa), the failure is deemed to constitute a violation of subsection (a)(1)(A) with respect to that individual.

"(VI) CONTINUED EMPLOYMENT AFTER FINAL NONVERIFICATION.—If the person or other entity continues to employ (or to recruit or refer) an individual after receiving final nonverification, a rebuttable presumption is created that the person or entity has violated subsection (a)(1)(A).

"(D) CONTINUATION OF SEASONAL AGRICULTURAL EMPLOYMENT.—An individual shall not be considered a new hire subject to verification under this paragraph if the individual is engaged in seasonal agricultural employment and is returning to work for an employer that previously employed the individual.

"(E) EFFECTIVE DATES OF NEW PROCEDURES.—

"(i) HIRING.—Except as provided in clause (iii), the provisions of this paragraph shall apply to a person or other entity hiring an individual for employment in the United States as follows:

"(I) With respect to employers having 10,000 or more employees in the United States on the date of the enactment of the Legal Workforce Act, on the date that is 6 months after the date of the enactment of such Act.

"(II) With respect to employers having 500 or more employees in the United States, but less than 10,000 employees in the United States, on the date of the enactment of the Legal Workforce Act, on the date that is 12 months after the date of the enactment of such Act.

"(III) With respect to employers having 20 or more employees in the United States, but less than 500 employees in the United States, on the date of the enactment of the Legal Workforce Act, on the date that is 18 months after the date of the enactment of such Act.

"(IV) With respect to employers having 1 or more employees in the United States, but less than 20 employees in the United States, on the date of the enactment of the Legal Workforce Act, on the date that is 24 months after the date of the enactment of such Act.

"(ii) RECRUITING AND REFERRING.—Except as provided in clause (iii), the provisions of this paragraph shall apply to a person or other entity recruiting or referring an individual for employment in the United States on the date that is 12 months after the date of the enactment of the Legal Workforce Act.

"(iii) AGRICULTURAL LABOR OR SERVICES.—With respect to an employee performing agricultural labor or services (as defined for purposes of section 101(a)(15)(H)(ii)(a)), this paragraph shall not apply with respect to the verification of the employee until the date that is 36 months after the date of the enactment of the Legal Workforce Act. An employee described in this clause shall not be counted for purposes of clause (i).

"(iv) TRANSITION RULE.—Subject to paragraph (4), the following shall apply to a person or other entity hiring, recruiting, or referring an individual for employment in the United States until the effective date or dates applicable under clauses (i) through (iii):

"(I) This subsection, as in effect before the enactment of the Legal Workforce Act.

"(II) Subtitle A of title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), as in effect before the effective date in section 7(c) of the Legal Workforce Act.

"(III) Any other provision of Federal law requiring the person or entity to participate in the E-Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), as in effect before

the effective date in section 7(c) of the Legal Workforce Act, including Executive Order 13465 (8 U.S.C. 1324a note; relating to Government procurement).

"(F) VERIFICATION PERIOD DEFINED.—

"(i) IN GENERAL.—For purposes of this paragraph:

"(I) In the case of recruitment or referral, the term 'verification period' means the period ending on the date recruiting or referring commences.

"(II) In the case of hiring, the term 'verification period' means the period beginning on the date on which an offer of employment is extended and ending on the date that is 3 business days after the date of hiring. The offer of employment may be conditioned in accordance with clause (ii).

"(ii) JOB OFFER MAY BE CONDITIONAL.—A person or other entity may offer a prospective employee an employment position that is conditioned on final verification of the identity and employment eligibility of the employee using the procedures established under this paragraph.

"(2) REVERIFICATION FOR INDIVIDUALS WITH LIMITED WORK AUTHORIZATION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), a person or entity shall make an inquiry, as provided in subsection (d), using the verification system to seek reverification of the identity and employment eligibility of all individuals with a limited period of work authorization employed by the person or entity during the 30-day period ending on the date the employee's work authorization expires as follows:

"(i) With respect to employers having 10,000 or more employees in the United States on the date of the enactment of the Legal Workforce Act, beginning on the date that is 6 months after the date of the enactment of such Act.

"(ii) With respect to employers having 500 or more employees in the United States, but less than 10,000 employees in the United States, on the date of the enactment of the Legal Workforce Act, beginning on the date that is 12 months after the date of the enactment of such Act.

"(iii) With respect to employers having 20 or more employees in the United States, but less than 500 employees in the United States, on the date of the enactment of the Legal Workforce Act, beginning on the date that is 18 months after the date of the enactment of such Act.

"(iv) With respect to employers having 1 or more employees in the United States, but less than 20 employees in the United States, on the date of the enactment of the Legal Workforce Act, beginning on the date that is 24 months after the date of the enactment of such Act.

"(B) AGRICULTURAL LABOR OR SERVICES.—With respect to an employee performing agricultural labor or services (as defined for purposes of section 101(a)(15)(H)(ii)(a)), subparagraph (A) shall not apply with respect to the reverification of the employee until the date that is 36 months after the date of the enactment of the Legal Workforce Act. An employee described in this subparagraph shall not be counted for purposes of subparagraph (A).

"(C) REVERIFICATION.—Paragraph (1)(C)(ii) shall apply to reverifications pursuant to this paragraph on the same basis as it applies to verifications pursuant to paragraph (1), except that employers shall—

"(i) use a form designated or established by the Secretary by regulation for purposes of this paragraph in lieu of the verification form under paragraph (1); and

"(ii) retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Department of Homeland Security, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during the period beginning on the date the reverification commences and ending on the date that is the later of 3 years after the date of such reverification or 1 year after the date the individual's employment is terminated.

"(D) NOTICE.—The Secretary of Homeland Security shall notify a person or entity employing a person with limited work authorization of the date on which the limited work authorization expires.

"(3) PREVIOUSLY HIRED INDIVIDUALS.—

"(A) ON A MANDATORY BASIS FOR CERTAIN EMPLOYEES.—

"(i) IN GENERAL.—Not later than the date that is 6 months after the date of the enactment of the Legal Workforce Act, an employer

shall make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of any individual described in clause (ii) employed by the employer whose employment eligibility has not been verified under the E-Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note).

"(ii) INDIVIDUALS DESCRIBED.—An individual described in this clause is any of the following:

"(I) An employee of any unit of a Federal, State, or local government.

"(II) An employee who requires a Federal security clearance working in a Federal, State or local government building, a military base, a nuclear energy site, a weapons site, or an airport or other facility that requires workers to carry a Transportation Worker Identification Credential (TWIC).

"(III) An employee assigned to perform work in the United States under a Federal or State contract, except that this subclause—

"(aa) is not applicable to individuals who have a clearance under Homeland Security Presidential Directive 12 (HSPD 12 clearance), are administrative or overhead personnel, or are working solely on contracts that provide Commercial Off The Shelf goods or services as set forth by the Federal Acquisition Regulatory Council, unless they are subject to verification under subclause (II); and

"(bb) only applies to contacts over the simple acquisition threshold.

"(B) ON A MANDATORY BASIS FOR MULTIPLE USERS OF SAME SOCIAL SECURITY ACCOUNT NUMBER.—In the case of an employer who is required by this subsection to use the verification system described in subsection (d), or has elected voluntarily to use such system, the employer shall make inquiries to the system in accordance with the following:

"(i) The Commissioner of Social Security shall notify annually employees (at the employee address listed on the Wage and Tax Statement) who submit a social security account number to which more than one employer reports income and for which there is a pattern of unusual multiple use. The notification letter shall identify the number of employers to which, and the States in which, income is being reported as well as sufficient information notifying the employee of the process to contact the Social Security Administration Fraud Hotline if the employee believes the employee's identity may have been stolen. The notice shall not share information protected as private, in order to avoid any recipient of the notice being in the position to further identity theft.

"(ii) If the person to whom the social security account number was issued by the Social Security Administration has been identified and confirmed by Commissioner, and indicates that the social security account number was used without their knowledge, the Secretary and the Commissioner shall lock the social security account number for employment eligibility verification purposes and shall notify the employers of the individuals who wrongfully submitted the social security account number that the employee may not be work eligible.

"(iii) Each employer receiving such notification of invalid social security account number shall use the verification system described in subsection (d) to check the work eligibility status of the applicable employee within 10 business days of receipt of the notification of invalid social security account number under clause (ii).

"(C) ON A MANDATORY BASIS FOR CERTAIN MISMATCHED WAGE AND TAX STATEMENTS.—

"(i) IN GENERAL.—In the case of an employer who is required by this subsection to use the verification system described in subsection (d), or has elected voluntarily to use such system, and who receives a notice described in clause (ii) identifying an individual employee, the employer shall, not later than 30 calendar days after receipt of such notice, use the verification system described in subsection (d) to verify the employment eligibility of the employee in accordance with the instructions in such notice if the individual is still on the payroll of the employer.

"(ii) NOTICE.—The Commissioner of Social Security shall issue a notice to an employer submitting one or more mismatched wage and

tax statements or corrected wage and tax statements containing the following:

"(I) A description of the mismatched information.

"(II) An explanation of the steps that the employer is required to take to correct the mismatched information.

"(III) An explanation of the employment eligibility verification requirement described in clause (i).

"(D) ON A VOLUNTARY BASIS.—Subject to paragraph (2), and subparagraphs (A) through (C) of this paragraph, beginning on the date that is 30 days after the date of the enactment of the Legal Workforce Act, an employer may make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of any individual employed by the employer. If an employer chooses voluntarily to seek verification of any individual employed by the employer, the employer shall seek verification of all individuals so employed. An employer's decision about whether or not voluntarily to seek verification of its current workforce under this subparagraph may not be considered by any government agency in any proceeding, investigation, or review provided for in this Act.

"(E) VERIFICATION.—Paragraph (1)(C)(ii) shall apply to verifications pursuant to this paragraph on the same basis as it applies to verifications pursuant to paragraph (1), except that employers shall—

"(i) use a form designated or established by the Secretary by regulation for purposes of this paragraph in lieu of the verification form under paragraph (1); and

"(ii) retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Department of Homeland Security, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during the period beginning on the date the verification commences and ending on the date that is the later of 3 years after the date of such verification or 1 year after the date the individual's employment is terminated.

"(4) EARLY COMPLIANCE.—

"(A) FORMER E-VERIFY REQUIRED USERS, INCLUDING FEDERAL CONTRACTORS.—Notwithstanding the deadlines in paragraphs (1) and (2), beginning on the earlier of the date that is 6 months after the date of the enactment of the Legal Workforce Act and the date on which the Secretary implements the system under subsection (d), the Secretary is authorized to commence requiring employers required to participate in the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), including employers required to participate in such program by reason of Federal acquisition laws (and regulations promulgated under those laws, including the Federal Acquisition Regulation), to commence compliance with the requirements of this subsection (and any additional requirements of such Federal acquisition laws and regulation) in lieu of any requirement to participate in the E-Verify Program.

"(B) FORMER E-VERIFY VOLUNTARY USERS AND OTHERS DESIRING EARLY COMPLIANCE.—Notwithstanding the deadlines in paragraphs (1) and (2), beginning 30 days after the date of the enactment of the Legal Workforce Act, the Secretary shall provide for the voluntary compliance with the requirements of this subsection by employers voluntarily electing to participate in the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) before such date, as well as by other employers seeking voluntary early compliance.

"(5) COPYING OF DOCUMENTATION PERMITTED.—Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

"(6) LIMITATION ON USE OF FORMS.—A form designated or established by the Secretary of Homeland Security under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this Act and any other provision of Federal criminal law.

"(7) GOOD FAITH COMPLIANCE.—

"(A) IN GENERAL.—Except as otherwise provided in this subsection, a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

"(B) EXCEPTION IF FAILURE TO CORRECT AFTER NOTICE.—Subparagraph (A) shall not apply if—

"(i) the failure is not de minimus;

"(ii) the Secretary of Homeland Security has explained to the person or entity the basis for the failure and why it is not de minimus;

"(iii) the person or entity has been provided a period of not less than 30 calendar days (beginning after the date of the explanation) within which to correct the failure; and

"(iv) the person or entity has not corrected the failure voluntarily within such period.

"(C) EXCEPTION FOR PATTERN OR PRACTICE VIOLATORS.—Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2).".

SEC. 3. EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM.

Section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)) is amended to read as follows:

"(d) EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM.—

"(1) IN GENERAL.—Patterned on the employment eligibility confirmation system established under section 404 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), the Secretary of Homeland Security shall establish and administer a verification system through which the Secretary (or a designee of the Secretary, which may be a nongovernmental entity)—

"(A) responds to inquiries made by persons at any time through a toll-free telephone line and other toll-free electronic media concerning an individual's identity and whether the individual is authorized to be employed; and

"(B) maintains records of the inquiries that were made, of verifications provided (or not provided), and of the codes provided to inquirers as evidence of their compliance with their obligations under this section.

"(2) INITIAL RESPONSE.—The verification system shall provide verification or a tentative nonverification of an individual's identity and employment eligibility within 3 working days of the initial inquiry. If providing verification or tentative nonverification, the verification system shall provide an appropriate code indicating such verification or such nonverification.

"(3) SECONDARY VERIFICATION PROCESS IN CASE OF TENTATIVE NONVERIFICATION.—In cases of tentative nonverification, the Secretary shall specify, in consultation with the Commissioner of Social Security, an available secondary verification process to confirm the validity of information provided and to provide a final verification or nonverification within 10 working days after the date of the tentative nonverification. When final verification or nonverification is provided, the verification system shall provide an appropriate code indicating such verification or nonverification.

"(4) DESIGN AND OPERATION OF SYSTEM.—The verification system shall be designed and operated—

"(A) to maximize its reliability and ease of use by persons and other entities consistent with insulating and protecting the privacy and security of the underlying information;

"(B) to respond to all inquiries made by such persons and entities on whether individuals are authorized to be employed and to register all times when such inquiries are not received;

"(C) with appropriate administrative, technical, and physical safeguards to prevent unauthorized disclosure of personal information;

"(D) to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including—

"(i) the selective or unauthorized use of the system to verify eligibility; or

"(ii) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants; and

"(E) to limit the subjects of verification to the following individuals:

"(i) Individuals hired, referred, or recruited, in accordance with paragraph (1) or (4) of subsection (b).

"(ii) Employees and prospective employees, in accordance with paragraph (2), (3), or (4) of subsection (b).

"(iii) Individuals seeking to confirm their own employment eligibility on a voluntary basis.

"(5) RESPONSIBILITIES OF COMMISSIONER OF SOCIAL SECURITY.—As part of the verification system, the Commissioner of Social Security, in consultation with the Secretary of Homeland Security (and any designee of the Secretary selected to establish and administer the verification system), shall establish a reliable, secure method, which, within the time periods specified under paragraphs (2) and (3), compares the name and social security account number provided in an inquiry against such information maintained by the Commissioner in order to validate (or not validate) the information provided regarding an individual whose identity and employment eligibility must be confirmed, the correspondence of the name and number, and whether the individual has presented a social security account number that is not valid for employment. The Commissioner shall not disclose or release social security information (other than such verification or nonverification) except as provided for in this section or section 205(c)(2)(I) of the Social Security Act.

"(6) RESPONSIBILITIES OF SECRETARY OF HOMELAND SECURITY.—As part of the verification system, the Secretary of Homeland Security (in consultation with any designee of the Secretary selected to establish and administer the verification system), shall establish a reliable, secure method, which, within the time periods specified under paragraphs (2) and (3), compares the name and alien identification or authorization number which are provided in an inquiry against such information maintained by the Secretary in order to validate (or not validate) the information provided, the correspondence of the name and number, and whether the alien is authorized to be employed in the United States.

"(7) OFFENSES.—

"(A) IN GENERAL.—Any person or entity that, in making an inquiry under subsection (b)(1)(C)(i)(II), provides to the verification system a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to a person other than the individual whose identity and employment authorization are being verified, knowing that the number does not belong to the individual whose identity and employment authorization are being verified, shall be fined under title 18, United States Code, imprisoned not less than 1 year and not more than 15 years, or both. If the person or entity, in making an inquiry under subsection (b)(1)(C)(i)(II), during and in relation to any felony violation enumerated in section 1028A(c) of title 18, United States Code, provides to the verification system a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to a person other than the individual whose identity and employment authorization are being verified, knowing that the number does not belong to the individual whose identity and work authorization are being verified, in addition to the punishment provided for such felony, shall be fined under title 18, United States Code, imprisoned for a term of 2 years, or both.

"(B) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

"(i) a court shall not place on probation any person or entity convicted of a violation of this paragraph;

"(ii) except as provided in clause (iv), no term of imprisonment imposed on a person or entity under this section shall run concurrently with any other term of imprisonment imposed on the person or entity under any other provision of law, including any term of imprisonment imposed for the felony enumerated in section 1028A(c) of title 18, United States Code, during which the violation of this paragraph occurred;

"(iii) in determining any term of imprisonment to be imposed for the felony enumerated in section 1028A(c) of title 18, United States Code, during which the violation of this section occurred, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of

imprisonment imposed or to be imposed for a violation of this paragraph; and

"(iv) a term of imprisonment imposed on a person or entity for a violation of this paragraph may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person or entity for an additional violation of this paragraph, except that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the United States Sentencing Commission pursuant to section 994 of title 28, United States Code.

"(8) UPDATING INFORMATION.—The Commissioner of Social Security and the Secretary of Homeland Security shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process described in paragraph (3).

"(9) LIMITATION ON USE OF THE VERIFICATION SYSTEM AND ANY RELATED SYSTEMS.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, nothing in this section shall be construed to permit or allow any department, bureau, or other agency of the United States Government to utilize any information, data base, or other records assembled under this subsection for any other purpose other than as provided for under this section.

"(B) NO NATIONAL IDENTIFICATION CARD.—Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

"(10) REMEDIES.—If an individual alleges that the individual would not have been dismissed from a job but for an error of the verification mechanism, the individual may seek compensation only through the mechanism of the Federal Tort Claims Act, and injunctive relief to correct such error. No class action may be brought under this paragraph.".

SEC. 4. RECRUITMENT, REFERRAL, AND CONTINUATION OF EMPLOYMENT.

(a) ADDITIONAL CHANGES TO RULES FOR RECRUITMENT, REFERRAL, AND CONTINUATION OF EMPLOYMENT.—Section 274A(a) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)) is amended—

(1) in paragraph (1)(A), by striking "for a fee";

(2) in paragraph (1), by amending subparagraph (B) to read as follows:

"(B) to hire, continue to employ, or to recruit or refer for employment in the United States an individual without complying with the requirements of subsection (b).";

(3) in paragraph (2), by striking "after hiring an alien for employment in accordance with paragraph (1)," and inserting "after complying with paragraph (1),"; and

(4) in paragraph (3), by striking "hiring," and inserting "hiring, employing," each place it appears.

(b) DEFINITION.—Section 274A(h) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)) is amended by adding at the end the following:

"(4) DEFINITION OF RECRUIT OR REFER.—As used in this section, the term 'refer' means the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person. Only persons or entities referring for remuneration (whether on a retainer or contingency basis) are included in the definition, except that union hiring halls that refer union members or nonunion individuals who pay union membership dues are included in the definition whether or not they receive remuneration, as are labor service entities or labor service agencies, whether public, private, for-profit, or nonprofit, that refer, dispatch, or otherwise facilitate the hiring of laborers for any period of time by a third party. As used in this section the term 'recruit' means the act of soliciting a person, directly or indirectly, and referring the person to another with the intent of obtaining employment for that person. Only persons or entities referring for remuneration (whether on a retainer or contingency basis) are included in the definition, except that union hiring halls that refer union members or nonunion individuals who pay union membership dues are included in this definition whether or not they receive remuneration, as are labor service entities or labor service agencies, whether public, private, for-prof-

it, or nonprofit that recruit, dispatch, or otherwise facilitate the hiring of laborers for any period of time by a third party.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date that is 1 year after the date of the enactment of this Act, except that the amendments made by subsection (a) shall take effect 6 months after the date of the enactment of this Act insofar as such amendments relate to continuation of employment.

SEC. 5. GOOD FAITH DEFENSE.

Section 274A(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(3)) is amended to read as follows:

"(3) GOOD FAITH DEFENSE.—

"(A) DEFENSE.—An employer (or person or entity that hires, employs, recruits or refers for fee, or is otherwise obligated to comply with this section) who establishes that it has complied in good faith with the requirements of subsection (b)—

"(i) shall not be liable to a job applicant, an employee, the Federal Government, or a State or local government, under Federal, State, or local criminal or civil law for any employment-related action taken with respect to a job applicant or employee in good-faith reliance on information provided through the system established under subsection (d); and

"(ii) has established compliance with its obligations under subparagraphs (A) and (B) of paragraph (1) and subsection (b) absent a showing by the Secretary of Homeland Security, by clear and convincing evidence, that the employer had knowledge that an employee is an unauthorized alien.

"(B) FAILURE TO SEEK AND OBTAIN VERIFICATION.—Subject to the effective dates and other deadlines applicable under subsection (b), in the case of a person or entity in the United States that hires, or continues to employ, an individual, or recruits or refers an individual for employment, the following requirements apply:

"(i) FAILURE TO SEEK VERIFICATION.—

"(I) IN GENERAL.—If the person or entity has not made an inquiry, under the mechanism established under subsection (d) and in accordance with the timeframes established under subsection (b), seeking verification of the identity and work eligibility of the individual, the defense under subparagraph (A) shall not be considered to apply with respect to any employment, except as provided in subclause (II).

"(II) SPECIAL RULE FOR FAILURE OF VERIFICATION MECHANISM.—If such a person or entity in good faith attempts to make an inquiry in order to qualify for the defense under subparagraph (A) and the verification mechanism has registered that not all inquiries were responded to during the relevant time, the person or entity can make an inquiry until the end of the first subsequent working day in which the verification mechanism registers no nonresponses and qualify for such defense.

"(ii) FAILURE TO OBTAIN VERIFICATION.—If the person or entity has made the inquiry described in clause (i)(I) but has not received an appropriate verification of such identity and work eligibility under such mechanism within the time period specified under subsection (d)(2) after the time the verification inquiry was received, the defense under subparagraph (A) shall not be considered to apply with respect to any employment after the end of such time period.".

SEC. 6. PREEMPTION.

Section 274A(h)(2) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(2)) is amended to read as follows:

"(2) PREEMPTION.—The provisions of this section preempt any State or local law, ordinance, policy, or rule, including any criminal or civil fine or penalty structure, insofar as they may now or hereafter relate to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens. A State, locality, municipality, or political subdivision may exercise its authority over business licensing and similar laws as a penalty for failure to use the verification system described in subsection (d) to verify employment eligibility when and as required under subsection (b).".

SEC. 7. REPEAL.

(a) IN GENERAL.—Subtitle A of title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1234a note) is repealed.

(b) REFERENCES.—Any reference in any Federal law, Executive order, rule, regulation, or delegation of authority, or any document of, or pertaining to, the Department of Homeland Security or the Social Security Administration, to the employment eligibility confirmation system established under section 404 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) is deemed to refer to the employment eligibility confirmation system established under section 274A(d) of the Immigration and Nationality Act, as amended by section 3 of this Act.

(c) EFFECTIVE DATE.—This section shall take effect on the date that is 36 months after the date of the enactment of this Act.

SEC. 8. PENALTIES.

Section 274A of the Immigration and Nationality Act (8 U.S.C. 1324a) is amended—

(1) in subsection (e)(4)—

(A) in subparagraph (A), in the matter before clause (i), by inserting ", subject to paragraph (10)," after "in an amount";

(B) in subparagraph (A)(i), by striking "not less than $250 and not more than $2,000" and inserting "not less than $2,500 and not more than $5,000";

(C) in subparagraph (A)(ii), by striking "not less than $2,000 and not more than $5,000" and inserting "not less than $5,000 and not more than $10,000";

(D) in subparagraph (A)(iii), by striking "not less than $3,000 and not more than $10,000" and inserting "not less than $10,000 and not more than $25,000"; and

(E) by amending subparagraph (B) to read as follows:

"(B) may require the person or entity to take such other remedial action as is appropriate.";

(2) in subsection (e)(5)—

(A) in the paragraph heading, strike "PAPERWORK";

(B) by inserting ", subject to paragraphs (10) through (12)," after "in an amount";

(C) by striking "$100" and inserting "$1,000";

(D) by striking "$1,000" and inserting "$25,000";

(E) by adding at the end the following: "Failure by a person or entity to utilize the employment eligibility verification system as required by law, or providing information to the system that the person or entity knows or reasonably believes to be false, shall be treated as a violation of subsection (a)(1)(A).";

(3) by adding at the end of subsection (e) the following:

"(10) EXEMPTION FROM PENALTY FOR GOOD FAITH VIOLATION.—In the case of imposition of a civil penalty under paragraph (4)(A) with respect to a violation of subsection (a)(1)(A) or (a)(2) for hiring or continuation of employment or recruitment or referral by person or entity and in the case of imposition of a civil penalty under paragraph (5) for a violation of subsection (a)(1)(B) for hiring or recruitment or referral by a person or entity, the penalty otherwise imposed may be waived or reduced if the violator establishes that the violator acted in good faith.

"(11) AUTHORITY TO DEBAR EMPLOYERS FOR CERTAIN VIOLATIONS.—

"(A) IN GENERAL.—If a person or entity is determined by the Secretary of Homeland Security to be a repeat violator of paragraph (1)(A) or (2) of subsection (a), or is convicted of a crime under this section, such person or entity may be considered for debarment from the receipt of Federal contracts, grants, or cooperative agreements in accordance with the debarment standards and pursuant to the debarment procedures set forth in the Federal Acquisition Regulation.

"(B) DOES NOT HAVE CONTRACT, GRANT, AGREEMENT.—If the Secretary of Homeland Security or the Attorney General wishes to have a person or entity considered for debarment in accordance with this paragraph, and such an person or entity does not hold a Federal contract, grant or cooperative agreement, the Secretary or Attorney General shall refer the matter to the Administrator of General Services to determine whether to list the person or entity on the List of Parties Excluded from Federal Procurement, and if so, for what duration and under what scope.

"(C) HAS CONTRACT, GRANT, AGREEMENT.—If the Secretary of Homeland Security or the Attorney General wishes to have a person or entity considered for debarment in accordance with this paragraph, and such person or entity holds a Federal contract, grant or cooperative agreement, the Secretary or Attorney General shall advise all agencies or departments holding a contract, grant, or cooperative agreement with the person or entity of the Government's interest in having the person or entity considered for debarment, and after soliciting and considering the views of all such agencies and departments, the Secretary or Attorney General may refer the matter to any appropriate lead agency to determine whether to list the person or entity on the List of Parties Excluded from Federal Procurement, and if so, for what duration and under what scope.

"(D) REVIEW.—Any decision to debar a person or entity under in accordance with this paragraph shall be reviewable pursuant to part 9.4 of the Federal Acquisition Regulation.";

(4) by amending paragraph (1) of subsection (f) to read as follows:

"(1) CRIMINAL PENALTY.—Any person or entity which engages in a pattern or practice of violations of subsection (a)(1) or (2) shall be fined not more than $15,000 for each unauthorized alien with respect to which such a violation occurs, imprisoned for not less than one year and not more than 10 years, or both, notwithstanding the provisions of any other Federal law relating to fine levels."; and

(5) in subsection (f)(2), by striking "Attorney General" each place it appears and inserting "Secretary of Homeland Security".

SEC. 9. PROTECTION OF SOCIAL SECURITY ADMINISTRATION PROGRAMS.

(a) FUNDING UNDER AGREEMENT.—Effective for fiscal years beginning on or after October 1, 2012, the Commissioner of Social Security and the Secretary of Homeland Security shall enter into and maintain an agreement which shall—

(1) provide funds to the Commissioner for the full costs of the responsibilities of the Commissioner under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by section 3 of this Act, including (but not limited to)—

(A) acquiring, installing, and maintaining technological equipment and systems necessary for the fulfillment of the responsibilities of the Commissioner under such section 274A(d), but only that portion of such costs that are attributable exclusively to such responsibilities; and

(B) responding to individuals who contest a tentative nonconfirmation provided by the employment eligibility verification system established under such section;

(2) provide such funds quarterly in advance of the applicable quarter based on estimating methodology agreed to by the Commissioner and the Secretary (except in such instances where the delayed enactment of an annual appropriation may preclude such quarterly payments); and

(3) require an annual accounting and reconciliation of the actual costs incurred and the funds provided under the agreement, which shall be reviewed by the Office of Inspector General of the Social Security Administration and the Department of Homeland Security.

(b) CONTINUATION OF EMPLOYMENT VERIFICATION IN ABSENCE OF TIMELY AGREEMENT.—In any case in which the agreement required under subsection (a) for any fiscal year beginning on or after October 1, 2012, has not been reached as of October 1 of such fiscal year, the latest agreement between the Commissioner and the Secretary of Homeland Security providing for funding to cover the costs of the responsibilities of the Commissioner under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)) shall be deemed in effect on an interim basis for such fiscal year until such time as an agreement required under subsection (a) is subsequently reached, except that the terms of such interim agreement shall be modified by the Director of the Office of Management and Budget to adjust for inflation and any increase or decrease in the volume of requests under the employment eligibility verification system. In any case in which an interim agreement applies for any fiscal year under this subsection, the Commissioner and the Secretary shall, not later than October 1 of such fiscal year, notify the Committee on Ways and Means, the Committee on the Judiciary, and the Committee on Appropriations of the House of Representatives and the Committee on Finance, the Committee on the Judiciary, and the Committee on Appropriations of the Senate of the failure to reach the agreement required under subsection (a) for such fiscal year. Until such time as the agreement required under subsection (a) has been reached for such fiscal year, the Commissioner and the Secretary shall, not later than the end of each 90-

day period after October 1 of such fiscal year, notify such Committees of the status of negotiations between the Commissioner and the Secretary in order to reach such an agreement.

SEC. 10. FRAUD PREVENTION.

(a) BLOCKING MISUSED SOCIAL SECURITY ACCOUNT NUMBERS.—The Secretary of Homeland Security and the Commissioner of Social Security shall establish a program in which social security account numbers that have been identified to be subject to unusual multiple use in the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by section 3 of this Act, or that are otherwise suspected or determined to have been compromised by identity fraud or other misuse, shall be blocked from use for such system purposes unless the individual using such number is able to establish, through secure and fair additional security procedures, that the individual is the legitimate holder of the number.

(b) ALLOWING SUSPENSION OF USE OF CERTAIN SOCIAL SECURITY ACCOUNT NUMBERS.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program which shall provide a reliable, secure method by which victims of identity fraud and other individuals may suspend or limit the use of their social security account number or other identifying information for purposes of the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by section 3 of this Act. The Secretary may implement the program on a limited pilot program basis before making it fully available to all individuals.

(c) BLOCKING USE OF CERTAIN SOCIAL SECURITY ACCOUNT NUMBERS.—

(1) IN GENERAL.—The Secretary of Homeland Security shall establish a program in which the social security account numbers of an alien described in paragraph (2) shall be blocked from use for purposes of the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by section 3 of this Act, unless the alien is subsequently admitted lawfully to the United States in, or the Secretary has subsequently changed the alien's status lawfully to, a status that permits employment as a condition of the alien's admission or subsequent change of status, or the Secretary has subsequently granted work authorization lawfully to the alien.

(2) ALIENS DESCRIBED.—An alien is described in this paragraph if the alien—

(A) has a final order of removal from the United States;

(B) voluntarily departs the United States;

(C) is voluntarily returned; or

(D) is a nonimmigrant described in section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) whose work authorization has expired and who is not the subject of an application or petition that would authorize the alien's employment.

SEC. 11. BIOMETRIC EMPLOYMENT ELIGIBILITY VERIFICATION PILOT PROGRAM.

(a) IN GENERAL.—Not later than 18 months after the date of the enactment of the Legal Workforce Act, the Secretary of Homeland Security, after consultation with the Commissioner of Social Security and the Director of the National Institute of Standards and Technology, shall establish by regulation a Biometric Employment Eligibility Verification pilot program (the "Biometric Pilot"). The purpose of the Biometric Pilot shall be to provide for identity authentication and employment eligibility verification with respect to enrolled new employees which shall be available to subject employers who elect to participate in the Biometric Pilot. Any subject employer may cancel the employer's participation in the Biometric Pilot after one year after electing to participate without prejudice to future participation.

(b) MINIMUM REQUIREMENTS.—In accordance with the regulations prescribed by the Secretary pursuant to subsection (a), the following shall apply:

(1) IDENTITY AUTHENTICATION AND EMPLOYMENT ELIGIBILITY VERIFICATION BY ENROLLMENT PROVIDERS.—The Biometric Pilot shall utilize the services of private sector entities ("enrollment providers"), with appropriate expertise, which shall be subject to initial and periodic certification by the Secretary, to provide—

(A) enrollment under the Biometric Pilot of new employees by means of identity authentication in a manner that provides a high level of certainty as to their true identities, using immigration and identifying information maintained by the Social Security Administration and the Department of Homeland Security, review of identity documents, and background screening verification techniques using publicly available information;

(B) protection of the authenticated information through biometric technology; and

(C) verification of employment eligibility of such new employees.

(2) DATABASE MANAGEMENT.—The Biometric Pilot shall provide for databases of identifying information which may be retained by the enrollment providers. Databases controlled by the Commissioner and Secretary of Homeland Security shall be maintained in a manner to capture new entries and new status information in a timely manner and to interact with the private enrollment databases to keep employment authorization status and identifying information current on a daily basis. The information maintained in such databases shall be subject to the requirements established pursuant to subsection (e), except that—

(A) use of the data shall be limited to obtaining employment eligibility verification only, unless the new employee consents to use the data for other purposes, as provided in regulations prescribed by the Secretary; and

(B) other identifying traits of the new employees shall be stored through an encoding process that keeps their accurate names, dates of birth, social security numbers, and immigration identification numbers (if any) separate, except during electronic verification.

(3) ACCESSIBILITY TO EMPLOYERS.—Availability of data maintained in the Biometric Pilot shall be managed so that any subject employer who participates in the Biometric Pilot can obtain verification with respect to any new employee enrolled with any enrollment provider serving in the Biometric Pilot.

(4) LIMITATIONS RELATING TO BIOMETRIC DATA.—Any biometric data maintained in the Biometric Pilot relating to any new employee shall be—

(A) encrypted and segregated from identifying information relating to the new employee, and

(B) maintained and linked to identifying information relating to the new employee only by consent of the new employee for the purpose of verifying employment eligibility or approved correction processes or for other purposes specifically authorized by the employee as provided in regulations prescribed by the Secretary.

(5) ACCURACY OF ASSOCIATION OF DATA WITH ENROLLED NEW EMPLOYEES.—The enrollment process under the Biometric Pilot shall be managed, in the case of each new employee enrolled in the Biometric Pilot, so as to result in the accurate association of data consisting of name, date of birth, social security number, and immigration identification number (if any) with the established identity of the new employee.

(6) LIMITATIONS ON ACCESSIBILITY OF INFORMATION.—Data stored in Biometric Pilot relating to any enrolled new employee shall not be accessible to any person other than those operating the Biometric Pilot and for the sole purpose of identity authentication and employment eligibility verification in connection with the new employee, except—

(A) by the written consent of the new employee given specifically for each instance or category of disclosure for any other purpose as provided in regulations prescribed by the Secretary; or

(B) in response to a warrant issued by a judicial authority of competent jurisdiction in a criminal proceeding.

(7) PUBLIC EDUCATION.—The Secretary shall conduct a program of ongoing, comprehensive public education campaign relating to the Biometric Pilot.

(c) EMPLOYER RESPONSIBILITIES.—In accordance with the regulations prescribed by the Secretary pursuant to subsection (a), the following shall apply:

(1) USE LIMITED TO ENROLLED NEW EMPLOYEES.—Use of the Biometric Pilot by subject employers participating in the Biometric Pilot shall be limited to use in connection with the hiring of new employees occurring after their enrollment in the Biometric Pilot.

(2) USE FOR LIMITED PERIOD.—Use of the Biometric Pilot by any subject employer participating in the Biometric Pilot in connection with any new employee may occur only during the period beginning on the date of hire and ending at the end of the third business day after the employee has reported for duty. Use of the Biometric Pilot with respect to recruitment or referral for a fee may occur only until the first day of such recruitment or referral.

(3) RESPONSIBILITY OF EMPLOYERS TO ENROLL NEW EMPLOYEES.—In connection with the hiring by any subject employer of a new employee who has not been previously enrolled in the Biometric Pilot, enrollment of the new employee shall occur only upon application by the subject employer submitted to an enrollment provider, together with payment of any costs associated with the enrollment.

(4) LIMITATIONS ON SELECTIVE USE.—No subject employer may use the Biometric Pilot selectively to verify any class, level, or category of new employees. Nothing in this subparagraph shall be construed to preclude subject employers from utilizing the Biometric Pilot in connection with hiring at selected employment locations without implementing such usage at all locations of the employer.

(d) EMPLOYEE PROTECTIONS.—In accordance with the regulations prescribed by the Secretary pursuant to subsection (a), the following shall apply:

(1) ACCESS FOR EMPLOYEES TO CORRECT AND UPDATE INFORMATION.—Employees enrolled in the Biometric Pilot shall be provided access to the Biometric Pilot to verify information relating to their employment authorization and readily available processes to correct and update their enrollment information and information relating to employment authorization.

(2) RIGHT TO CANCEL ENROLLMENT.—Each employee enrolled in the Biometric Pilot shall have the right to cancel such employee's enrollment at any time after the identity authentication and employment eligibility verification processes are completed by the subject employer described in subsection (c)(3). Such cancellation shall remove from the Biometric Pilot all identifying information and biometrics in connection with such employee without prejudice to future enrollments.

(e) MAINTENANCE OF SECURITY AND CONFIDENTIALITY OF INFORMATION.—

(1) IN GENERAL.—Every person who is a subject employer participating in the Biometric Pilot or an officer or contractor of such a subject employer and who has access to any information obtained at any time from the Department of Homeland Security shall maintain the security and confidentiality of such information. No such person may disclose any file, record, report, paper, or other item containing information so obtained at any time by any such person from the Secretary or from any officer or employee of the Department of Homeland Security except as the Secretary may by regulations prescribe or as otherwise provided by Federal law.

(2) PENALTY FOR DISCLOSURE IN VIOLATION OF SUBPARAGRAPH (A).—Any person described in paragraph (1) who knowingly violates paragraph (1) shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.

(3) PENALTY FOR KNOWING DISCLOSURE OF FRAUDULENT INFORMATION.—Any person who willfully and knowingly accesses, discloses, or uses any information which such person purports to be information obtained as described in paragraph (1) knowing such information to be false shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.

(4) RESTITUTION.—

(A) IN GENERAL.—Any Federal court, when sentencing a defendant convicted of an offense under this paragraph, may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to the victims of such offense specified in subparagraph (B). Sections 3612, 3663, and 3664 of title 18, United States Code, shall apply with respect to the issuance and enforcement of orders of restitution to victims of such offense under this subparagraph. If the court does not order restitution, or orders only partial restitution, under this subsection, the court shall state on the record the reasons therefor.

(B) VICTIMS SPECIFIED.—The victims specified in this clause are the following:

(i) Any individual who suffers a financial loss as a result of the disclosure described in paragraph (2) or (3).

(ii) The Secretary of Homeland Security, to the extent that the disclosure described in paragraph (2) or (3) results in the inappropriate payment of a benefit by the Commissioner of Social Security.

(C) DEPOSIT IN THE TRUST FUNDS OF AMOUNTS PAID AS RESTITUTION TO THE COMMISSIONER.—Funds paid to the Commissioner as restitution pursuant to a court order under this subparagraph shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, as appropriate.

○

Ms. LOFGREN. Thank you, Mr. Chairman.

Since the beginning of this new Congress, the new majority has repeatedly emphasized four key priorities: growing our economy, creating new jobs, decreasing spending and reducing the size of government. These are the crucial needs they say that must be focused on; nothing else matters. They say this, but then we see this bill, a bill that undermines every one of their stated priorities.

Rather than grow the economy and reduce the size of government, this bill seems to confuse those goals. It grows the government, dramatically increases government intrusion into all of our lives, and adds tens of billions to the burden already shouldered by taxpayers. At the same time it shrinks our economy, decimates at least one industry, and destroys millions of jobs. All that, and the program it mandates doesn't even work half the time.

There is no greater proponent of technology in this Congress than me. It makes sense to have an electronic system for checking work authorization that works and contains sufficient safeguards. Since 2005, every serious proposal to fix our broken immigration laws has included such an electronic system to ensure we have a legal workforce, but it can't be done alone. Our system has been broken far too long for one-sided solutions. The E-Verify provisions in each of those former bills were paired with other reforms to fix the entire system. Without those other reforms, mandatory E-Verify would wreak tremendous damage.

The majority says this bill is meant to protect American jobs. They claim that every time we remove an undocumented worker from the country, we open that job for a native-born worker, but this ignores the realities of our complex economy. A bill cannot be said to protect jobs when it destroys many more jobs than it ostensibly saves.

Let us be clear, mandatory E-Verify does not mean that undocumented works will pack up and leave the country. Most of these workers have been here for many years, and they have family and other ties to the country. They aren't just going to leave because this bill passes. Instead employers will simply move these workers off the books or misclassify them as independent contractors, which this bill does nothing about. This is exactly what happened in Arizona after it made E-Verify mandatory. Rather than leave for other States that don't mandate E-Verify, the vast majority of undocumented workers stayed right in Arizona and either went off the books or became independent contractors.

If implemented nationwide, this would have tremendous costs. The Congressional Budget Office has scored other mandatory E-Verify bills such as the SAVE Act of 2008, and it has concluded that mandating E-Verify without other reforms would cost taxpayers $17.3 billion in lost tax revenues as employers and employees move into the underground economy. We would also see depressed wages and working conditions for all workers as unscrupulous employers are further able to abuse workers and undercut employers that play by the rules.

This bill also disproportionately affects small businesses, the engines of job creation in America, just when we needs those businesses to create jobs the most. A recent Bloomberg government study concluded that mandatory E-Verify would cost small busi-

nesses about $2.6 billion every year to verify new hires through E-Verify. But because the bill requires checks on many existing hires as well, the cost of small business would be even greater.

If the intent is to provide jobs, it makes no sense to impose massive costs on small businesses when they would be spending this money to actually create jobs. This is essentially economic suicide.

We also need to take into account that E-Verify is not a perfect system. The Social Security Administration has estimated that mandatory E-Verify would force 3.6 million workers to go to the Social Security Administration to correct their records or lose their jobs. This assumes the worker is even told by an employer that there is a discrepancy. An independent study by the Department of Homeland Security shows that up to 42 percent of applicants who receive tentative nonconfirmations are not informed of the discrepancy by the employer, thereby denying them the right to contest the finding. At a time of 9 percent unemployment, putting millions of American workers' jobs on the line is grossly irresponsible.

Finally we must consider that some industries like agriculture are at least partially dependent on undocumented workers. Up to 75 percent of migrant farm workers are undocumented, and the percentage is growing. Losing those workers would be devastating. American farms would go under, America would be less secure, and we would see a mass offshoring of jobs, including all of the upstream and downstream American jobs supported by agriculture.

This bill appears to recognize this by delaying implementation in agriculture and providing some special carve-outs to protect the industry. But upon closer inspection, those carve-outs are just illusions. Carve-outs to the carve-outs require the eventual verification of all workers, turning this bill into a ticking time bomb for agriculture and all of the jobs supported by it.

On this I must make one more point. The bill recognizes that our farmers need undocumented farm workers, but the bill then does nothing, absolutely nothing, to address this. Instead the bill actual increases criminal penalties on farmers and farm workers alike, making each of them even more vulnerable than they already are. What kind of bill recognizes our dependence on certain workers and then ups jail time and fines on those workers and those that hire them?

After paying them lip service, this bill leaves American farms and American jobs at risk, and it makes both American and immigrant farm workers further vulnerable to exploitation. Please tell me we can do better than that. And please don't tell me the solution is the H2A reform. Don't tell me that the solution to this problem is to deport 1.5 million experienced farm workers who are already doing this important work just to replace them with millions of new temporary guest workers which would have to come and go every single year. This would be a massive and terribly expensive undertaking and is simply just never going to work.

Now I think we have reached a milestone here. We have finally recognized that undocumented farm workers fill a need that we desperately need filled, and now that we have recognized that, let us do something about it.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. GALLEGLY. I thank the gentlelady.

The gentleman from Texas, the Chairman of the full Committee and sponsor of this important bill, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

The Legal Workforce Act will open up jobs for millions of unemployed Americans. With unemployment at 9 percent, jobs are scarce, especially for low-skilled Americans.

Twenty-four million Americans are unemployed or have given up looking for work, yet according to the Pew Hispanic Center, 7 million people are working in the United States illegally. These jobs should go to legal workers.

The E-Verify system allows Social Security numbers and alien identification numbers of new hires to be checked against Social Security Administration and Department of Homeland Security databases. This will help employers determine who is eligible to work in the U.S. The program is free, quick and easy to use.

You have to show your Social Security number to visit the doctor, go to the bank, or buy a home. It makes sense that businesses would use the same identification to ensure they have a legal workforce by checking the legal status of their employees.

The E in E-Verify could just as well stand for easy and effective. It takes just a few minutes to use and easily confirms 99.5 percent of work-eligible employees.

The Legal Workforce Act requires that all U.S. employers use E-Verify to check the work eligibility of new hires in the U.S.

H.R. 2164 balances immigration enforcement priorities and legitimate employer concerns. It gives employers a workable system under which they cannot be held liable if they use the system in good faith.

The bill preempts State E-Verify laws, but respects States' and localities' inherent authority to condition business license issuance and maintenance on compliance with the Federal E-Verify mandate.

The Legal Workforce Act increases penalties on employers who knowingly violate the requirements of E-Verify. It creates a fully electronic employment eligibility verification system, and it allows employers to voluntarily check their current workforce if done in a nondiscriminatory manner.

Furthermore, the Legal Workforce Act gives USCIS additional tools to help prevent identity theft. For example, the bill requires DHS to allow individuals to lock their own Social Security number so that it cannot be used by imposters to verify work eligibility. And it requires USCIS to lock the individual Taxpayer Identification Number or Social Security number of non-U.S. Citizens who are deported are voluntarily returned, voluntarily depart, or whose work authorization expires so that no one can get a job using those same numbers. It also imposes criminal penalties on employers and employees who engage in or facilitate identity theft.

Studies by Westat and USCIS showed that E-Verify's work eligibility confirmation rates continue to improve as the system is upgraded.

Last year's USCIS data shows that 98.3 percent of employees were confirmed as work authorized within 24 hours. And a 2009 Westat report found that those eligible to work are immediately confirmed 99.5 percent of the time.

And importantly, the American people support E-Verify. A recent Rasmussen poll found that 82 percent of likely voters "think businesses should be required to use the Federal Government's E-Verify system to determine if a potential employee is in the country legally."

Unfortunately, many States do not enforce their own E-Verify laws, and others only apply E-Verify in a very limited way. The Legal Workforce Act will help ensure that employers from every State are on equal footing when it comes to hiring employees. This bill could open up millions of jobs for unemployed Americans.

Mr. Chairman, before I yield back, I want to thank our witnesses for being here today and look forward to a very informative hearing, but I would also like to single out and especially thank our colleague Ken Calvert, who has been a partner in this effort for—Ken, how many years now have we been working on this?

Mr. CALVERT. A long time.

Mr. SMITH. A long time, many years. And I think we are getting to the point where we can pass a good bill. But thank you for being here.

Thank you, Mr. Chairman, I yield back.

Mr. GALLEGLY. I thank the gentleman from Texas.

Our next speaker will be the gentleman from Michigan, the former Chairman of the full Committee and current Ranking Member of the full Committee, my good friend Mr. Conyers.

Mr. CONYERS. Thanks, Chairman Gallegly.

This is in some ways a traditional breakdown of views between labor and the business sector in our country. I have statements from the president of the AFL-CIO, the United Farm Workers, church organizations, American Civil Liberties Union, the National Immigration Forum all telling me that this is a measure that we ought to move very carefully on. And so from the outset, since there is always a possibility that this bill might happen to get accepted or get through the Senate some kind of way, we are dangerously close to the possibility of getting legislation. What that means to me is we are going to need more than one hearing.

I want to say that very clearly in advance, and I say that in the presence of the distinguished full Committee Chairman as well as the Subcommittee Chairman. I can see now we are going to need another hearing on this matter. But why?

Mr. GALLEGLY. Would the gentleman yield on that?

Mr. CONYERS. Of course.

Mr. GALLEGLY. Just to set the record straight, and, of course, we want to make sure that we fully review the text of this bill, but I would remind the gentleman that this Subcommittee already had a hearing on E-Verify in February, so this is our second hearing.

Mr. CONYERS. Well, there wasn't any legislation then.

Ms. LOFGREN. Would the gentleman yield?

We did raise a concern with the Chairman of the full Committee that the bill kept changing. And our staff was up until early hours of the morning every day this week. The actual final bill was not received by us until 3 o'clock yesterday afternoon. And so I understand there are many things that need to be worked out, but to have a legislative hearing on a bill that didn't exist in its current

form before 3 yesterday I find troubling and something that when we were in the majority we did not do. And I yield back.

Mr. GALLEGLY. Well, would the gentlelady yield on that, or the gentleman? The Committee, the minority did receive a copy of the draft bill, if I am not mistaken, a week ago today. Subsequent to that there were some changes, I don't believe of any significant substance, which was gone over with your staff yesterday morning. And this is not——

Ms. LOFGREN. Mr. Chairman, that is incorrect, and I like your staff.

Mr. GALLEGLY. I do, too.

Ms. LOFGREN. I am not critical of the staff, but the bill was changed in ways we consider significant and less than 24 hours ago. So I just point that out. It is something that we think is a problem. We think there are significant changes. I understand your staff has worked very hard to try and refine this. I don't criticize them for that, I just note that the policy of having a legislative hearing on a bill that didn't exist 24 hours ago I find problematic. And it is something that when we were in the majority we did not do. And I yield back to Mr. Conyers.

Mr. CONYERS. What I am suggesting in asking for another hearing in advance isn't whether we had one before when there wasn't a bill or not. So we have three hearings on a measure; what is so awful about that? I mean, there are huge implications involved in what we are doing here. We get 5 minutes to question four witnesses, to ask them questions. We seldom have time to even have a second round because the demands on the floor are so pressing.

So anyway, I am just throwing it out. Please don't foreclose that possibility. That is why I am asking for it now instead of waiting until we all start running out of here and then say, can I have a second hearing; and you will say, well, I think this is enough. And I think it is not enough.

Now, back to the substance here. There is one overriding problem with this bill: It won't work. Outside of that it is pretty good. But we have some very serious considerations.

Could I have an extra couple minutes, sir?

Mr. GALLEGLY. Without objection, the gentleman will be given an additional 2 minutes.

Mr. CONYERS. Thank you very much.

The first thing is it is going to create an increasing underworld of employers going off the books to classify workers as independent contractors. In other words, the gamesmanship, if you think there's some going on in immigration and agriculture now, you haven't seen anything yet if the bill that is before us becomes law. It would cost lots of tax money that we would lose. It would push undocumented workers—and, by the way, I hope somebody mentions the fact that if it weren't for undocumented workers, I think our agricultural system would collapse. I would like any of the witnesses who would like to react to that, please do, and any of my colleagues as well.

I remember we had a hearing once, Ms. Lofgren, where one fellow said that you could get American workers, you don't even need undocumented workers. And we said, well, where would you get American workers to do stoop labor in the United States in the

21st century? I think everybody here acknowledges the answer is that you couldn't get anybody. You have got to use immigrant labor. The question is how do you make it as legal as possible. And the way that it is being done here, as our witness Attorney Moran will explain in more detail, is that this isn't going to work. As a matter of fact, it is going to cost American jobs because this system won't work, the immigrant system won't work as it is created here. Why? And I conclude because of the error rate that everyone in this hall knows is around 30 percent. You can't have a system with a 30 percent error rate. It won't work no matter how many hearings we have. And therein lies the problem.

And so I ask unanimous consent, Chairman Gallegly, to put in a Trumka statement, and an American Civil Liberties Union statement, and some church statements as well.

Mr. GALLEGLY. Without objection, they will be made a part of the record of the hearing.

[The information referred to follows:]

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Statement by AFL-CIO President Richard Trumka
On The Legal Workforce Act
June 14, 2011

At its root, this E-Verify bill substitutes tough talk for real solutions. Lamar Smith thinks that if he talks tough about holding employers accountable for breaking workplace immigration laws, no one will notice that his bill allows employers to avoid E-Verify altogether by misclassifying employees as independent contractors. Smith thinks that if he talks tough about protecting the jobs of U.S. workers, no one will notice that he is laying the groundwork for a vast expansion of temporary foreign guest worker programs, programs which will displace U.S. workers and drive down wages.

Unemployed workers are fed up with tough talk on immigration that adds up to nothing more than a free pass for Big Business and the Farm Lobby to continue with the same business-as-usual. If Smith were serious about holding employers accountable, he would eliminate the "ostrich defense" by holding corporations strictly liable for subcontractors who fail to use E-Verify and by penalizing businesses who misclassify employees as independent contractors to avoid E-Verify requirements. And if Smith were serious about protecting the jobs of U.S. workers, he would have closed the numerous loopholes in this bill.

The plain truth is that workplace immigration enforcement can only work if the federal government addresses the economic factors that lead U.S. corporations to routinely break the law by hiring unauthorized workers in the first place. That's why the labor movement remains united around a comprehensive approach to immigration reform and labor law enforcement and why the labor movement reject false attempts like this one that serve only to obscure the challenges involved in immigration reform rather than seek to solve them.

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Written Statement of the
American Civil Liberties Union

Laura W. Murphy
Director, Washington Legislative Office

Christopher Calabrese
Legislative Counsel

Before U.S. House Judiciary Committee
Subcommittee on Immigration Policy and Enforcement

June 15, 2011

Hearing on H.R. 2164 the "Legal Workforce Act"

Chairman Gallegly, Ranking Member Lofgren, and members of the Subcommittee:

On behalf of the American Civil Liberties Union ("ACLU"), America's oldest and largest civil liberties organization, and its more than half a million members, countless additional supporters and activists, and 53 affiliates across the country, we write to oppose H.R. 2164 because it expands the E-Verify system of electronic employment verification and lays the groundwork for a possible biometric national ID card. E-Verify has proven to be a flawed and burdensome electronic employment eligibility screening system that imposes unacceptable burdens on America's workers, businesses and society at large. A biometric ID system would be unworkable and impose significant privacy and civil liberties costs. The costs to lawful workers, businesses, and taxpayers associated with both these proposals are significant while the benefits are speculative.

Electronic Employment Verification

The ACLU opposes a mandatory Electronic Employment Verification System (EEVS) for five reasons:

(i) it poses unacceptable threats to American workers' privacy rights by increasing the risk of data surveillance and identity theft;

(ii) data errors in Social Security Administration (SSA) and Department of Homeland Security (DHS) files will wrongly delay or block the start of employment for lawful American workers and may lead to discrimination;

(iii) it lacks sufficient due process procedures to protect workers injured by such data errors;

(iv) neither SSA or DHS are able to implement such a system and SSA's ability to continue to fulfill its primary obligations to the nation's retirees and disabled individuals would deteriorate; and

(v) it will lead to rampant employer misuse in both accidental and calculated ways.

I. Mandating Electronic Employment Eligibility Verification Poses Unacceptable Threats to American Workers' Privacy Rights

A nationwide mandatory EEVS would be one of the largest and most widely accessible databases ever created in the U.S. Its size and openness would be an irresistible target for identity theft. Additionally, because the system would cover anyone eligible to work in the United States it could easily be expanded to a host of other uses by the intelligence community, law enforcement and private parties.

The current E-Verify system, implemented in a small fraction of the country's workplaces, contains an enormous amount of personal information including names, photos (in

some cases), social security numbers, phone numbers, email addresses, workers' employer and industry, and immigration information like country of birth. It contains links to other databases such as the Customs and Border Patrol (CBP) TECS database (a vast repository of Americans' travel history) and the Bureau of Citizenship and Immigration Services (CIS) BSS database (all immigration fingerprint information from US VISIT and other sources).[1] CIS has recently announced the inclusion of drivers' license information from at least one state.[2]

The data in E-Verify, especially if combined with other databases, would be a gold mine for intelligence agencies, law enforcement, licensing boards, and anyone who wanted to spy on American workers. Because of its scope, it could form the backbone for surveillance profiles of every American. It could be easily combined with other data such as travel, financial, or communication information. 'Undesirable' behaviors – from unpopular speech to gun ownership to paying for items with cash – could be tracked and investigated by the government. Some of these databases linked to E-Verify are already mined for data. For example, the TECS database uses the Automated Targeting System (ATS) to search for suspicious travel patterns. Such data mining would be even further enhanced by the inclusion of E-Verify information

We recommend strict limits on the use of information in any employment verification system. It should only be used to verify employment or to monitor for employment-related fraud. There should be no other federal, state, or private purpose. Because E-Verify contains photos and will very soon contain drivers' license information it could very quickly change into a national identity system. E-Verify is internet-based and hence available anywhere with internet access. If the system is expanded it could easily be used to very drivers' licenses at airports or federal facilities. The errors and problems with E-Verify would then quick become not only employment issues but also problems with travel and other fundamental freedoms.

Additionally, the system must guard against data breaches and attacks by identity thieves. Since the first data breach notification law went into effect in California at the beginning of 2004, more than 510 million records have been hacked, lost or disclosed improperly including e-e-verify databases.[3] In October 2009, and again in December 2009, Minnesota state officials learned that the company hired to process their e-verify forms had accidentally allowed unauthorized individuals to gain access to the personal information of over 37,000 individuals due to authentication practices and web application vulnerabilities in their system[4]. In 2007, it was reported that the FBI investigated a technology firm with a $1.7 billion DHS contract after it failed to detect "cyber break-ins".[5] If DHS and states are unable to provide proper data security we cannot possibly expect small business to if the system is made mandatory.

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[1] 73 Fed. Reg. 75449.
[2] Notice of Privacy Act System of Records, 76 Fed. Reg. 26738 (May 9, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-05-09/html/2011-11291.htm
[3] Privacy Rights Clearinghouse Chronology of Data Breaches, http://www.privacyrights.org/ar/ChronDataBreaches.htm.
[4] John Fay, *FTC Settlement Highlights the Importance of Protecting Sensitive I-9 Data in an Electronic World*, Gaurdian I-9 And E-Verify Blog, May 4, 2011.
[5] Ellen Nakashima and Brian Krebs, *Contractor Blamed in DHS Data Breaches*, WASHINGTON POST, Sept. 24, 2007.

The December 2010 GAO Report on E-Verify repeatedly references the risk of identity theft associated with the system. In one example, Immigration and Customs Enforcement (ICE) found that 1,340 employees of a meat processing plant were unauthorized workers even though each had been processed through E-Verify. Of the 1,340 unauthorized workers, 274 were charged with identity theft, including using valid Social Security numbers of others in order to work[6]. Data breaches continue to be a contributing factor to identity theft and a constant erosion of Americans' privacy and sense of security. An E-Verify database must not be subject to such threats.[7]

In order to help protect Americans' privacy, we recommend that Congress limit the retention period for queries to the E-Verify system to three to six months, unless it is retained as part of an ongoing compliance investigation or as part of an effort to cure a non-confirmation. This is a reasonable retention limitation for information necessary to verify employment. By comparison, information in the National Directory of New Hires, which is used on an ongoing basis to allow states to enforce child support obligations, is deleted after either 12 or 24 months.[8] The current retention period for E-Verify (set by regulation) is an astonishing 10 years. Deadbeat dads have greater privacy protections than American workers.

II. Data Errors Will Injure Lawful Workers by Delaying Start Dates or Denying Employment Altogether and May Lead to Discrimination

Recent government reports acknowledge that huge numbers of SSA and DHS files contain erroneous data that would cause "tentative non-confirmation" (TNC) of otherwise work-eligible employees and, in some cases, denial of their right to work altogether. CIS reported that 2.6%, or over 211,000 workers, received a TNC and, according to the Westate report, about 0.8% of these TNCs are erroneous.[9] Since only 0.3% of those mistaken TNCs were resolved, approximately 0.5%, or **80,000 legal workers,** were improperly denied the right to work due to faults in the system.[10] **If E-Verify becomes mandatory under H.R. 2164, at least 1.2 million workers would have to correct their records at SSA or DHS.**

Correcting a record or contesting a determination is a difficult and in some cases impossible task. Sometimes a worker doesn't have the time or never learns they have the right to contest their determinations and seek different employment. Studies from cities and states where E-Verify has been implemented has shown this, with disastrous consequences. A survey of 376 immigrant workers in Arizona (where use of E-Verify is required) found that 33.5% were fired immediately after receiving a TNC and never given chance to correct errors in the system. Furthermore, not one of those workers was notified by the employer, as required in the

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[6] GAO, *Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, p. 24

[7] The breech last week at the Dallas based marketing firm Epsilon which revealed millions of Americans names and email addresses was only the most recent example of this trend.

[8] The data retention limitation for the National Directory of New Hires is governed by 42 U.S.C. §653 (i).

[9] Westat Report, *Findings of the E-Verify Program Evaluation*, can be found at: http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf

[10] National Immigration Law Center, *Expanding E-Verify Will Undermine Job Growth and Cripple Small Businesses*, January 2011.

memorandum of understanding (MOU) that all employers sign with DHS before using the program, that he or she had the right to appeal the E-Verify finding.[11]

Some workers are never able to resolve an error. For example, Jessica St. Pierre, a U.S. citizen telecommunications worker in Florida, was initially hired for a position. However she was never able to start work due to an E-Verify error. Despite her pleas to government officials, she was unemployed for several months and eventually had to take a lower paying job.[12]

H.R. 2164 is likely to worsen this problem because it mandates E-Verify checks by almost all employers throughout the U. S. before a worker may be hired. This new process would virtually guarantee that anyone who has a TNC will not be offered a job. What employer would take a chance on a worker who has a problem with his or her record? Even worse, that employer might not even tell an applicant why he or she didn't receive the job. Workers could very likely lose multiple job opportunities before they discover their information is incorrect in E-Verify.

These error rates are caused by a variety of factors. First, women or men who changed their names at marriage, divorce or re-marriage may have inconsistent files or may have never informed either SSA or DHS of name changes. Second, simple key stroke or misspelling errors contribute to the volume of erroneous data. Third, individuals with naming conventions that differ from those in the Western world may have had their names anglicized, transcribed improperly, or inverted. The GAO predicted that if E-Verify were made mandatory for new hires nationwide, approximately 164,000 citizens per year would receive a TNC just for name-change related issues.[13] It would be even more damaging if applied not just to new hires, but to existing workers as well.

The high number of error rates occurring among certain cultural groups can lead to an appearance of discrimination in the employment process. Five out of 25 employers acknowledged to GAO that TNCs were more likely to occur with Hispanic employees having hyphenated or multiple surnames.[14] Additionally the TNC rate for employees who were eventually authorized to work was approximately 20 times higher for foreign-born employees than for U.S.-born employees from April through June of 2008.[15] These striking disparities could easily lead employees to believe they were being judged on more than just their credentials. Moreover, employers may shy away from hiring non-native-born individuals or those with foreign names because of a fear they would be harder to clear through the system.

III. Pending Legislative Proposals Lack Meaningful Due Process Protections for Lawful Workers Injured by Data Errors

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[11] Caroline Isaacs, Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law (American Friends Service Committee, 2009), www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700.
[12] Written Statement of Jessica St. Pierre, *"E-Verify Preserving Jobs for American Workers" House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement Hearing*, February 10, 2011.
[13] GAO, *Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, p.19.
[14] *Id.* p. 20.
[15] *Id.* p. 40

Workers injured by data errors need a way to resolve data errors quickly and permanently so they do not become presumptively unemployable. Workers face two distinct challenges. The first is to learn that there are errors in their records and the second is the lack of fundamental due process protections in resolving those errors.

Self-Check

We commend CIS for beginning the process of creating a self-check system that allows workers to check on their E-Verify data. It is a fundamental privacy principle that individuals should have access to their own information in order to assure its completeness and correctness. However, this self-check process is still in its infancy and has only been rolled out on a limited basis.

We have some specific concerns about how the self-check program will be implemented. First of all, self-check is a tool for allowing workers to correct their records. It must not be used as a pre-screening tool. If employers imposed a self-check requirement – effectively serving as an E-Verify pre-screening tool – they would shift the cost from the employer to the employee. In keeping with the statistics cited above, such costs would fall disproportionately on members of minority classes. This would undermine the anti-discrimination provisions built into the system to ensure that authorized workers are able to contest TNCs and document their eligibility to work.

Second, the system must protect the privacy of both employers and employees. Considering high rates of identity fraud associated with the E-Verify system, it is no surprise that individuals are very concerned about the retention of their personal information in a database to which more and more people are gaining access. There must be clearly defined limits in regard to potential sharing of personal information.

Third, there must be an option for self-check access to people without credit histories. If self-check relies on background check information, then it will be unavailable to populations of foreign nationals who have only recently arrived in the U.S. and have not yet developed a credit history. This would include some of those with the most complicated immigration situations such as refugees, asylum seekers, and people with temporary protected status.[16]

Due Process Protections

More significantly, senior officials in the DHS Privacy Office have said that individuals face formidable challenges in correcting inaccurate or inconsistent information including in some cases requiring the filing of Privacy Act notices in order to access their own information. The Office of Special Counsel for Immigration-Related Unfair Employment Practices and DHS Office of Civil Rights and Civil Liberties have both said that employees have expressed difficulty in understanding the TNC notification letters and the process for correcting errors. Moreover, as of 2009 the average response time for Privacy Act requests was a staggering 104

[16] The American Immigration Lawyers Association, *E-Verify Self Check Program*, November 29, 2010

days.[17] This is time that an employee would be unable to work under a mandatory E-Verify system. Congress must prevent the creation of a new employment blacklist – a "No-Work List" – that will consist of would-be employees who are blocked from working because of data errors and government red tape.

The only remedy for this problem provided in H.R. 2164 is the Federal Tort Claims Act (FTCA). The FTCA falls short and does not provide an adequate procedure for the hundreds of thousands who would be impacted unfairly by the imposition of a mandatory E-Verify procedure. The U.S. Court of Claims reported an extensive backlog of cases and requires a worker to exhaust a six-month long waiting period before filing suit. During the pendency of the FTCA administrative procedure and lawsuit, the worker would be barred from working.

The best current model for due process protections can be found in Title II of the 'Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 - H.R. 4321 from the 111th Congress. This provision would have created worker protections for both tentative and final non-confirmations, allowed workers to recover lost wages when a government error cost them a job, limited retention of personal information, and created accuracy requirements for the system.

IV. Government Agencies are Unprepared to Implement a Mandatory Employment Eligibility Prescreening System

As government reports evaluating E-Verify have repeatedly made clear, both SSA and DHS are woefully unprepared to implement a mandatory employment eligibility pre-screening system. The most recent GAO report expressed concerns over how CIS has estimated the cost of E-Verify. It found that the estimates do not reliably depict current E-Verify cost and resource needs for mandatory implementation and that they fail to fully assess the extent to which their workload costs could increase in the future.[18] In order to implement such a system, both agencies would need to hire hundreds of new, full-time employees and train staff at every SSA field office. DHS has an enormous backlog of unanswered Freedom of Information Act (FOIA) requests from lawful immigrants seeking their immigration files. Those files, many of which are decades old, are the original source of numerous data errors. If DHS cannot respond to pending information requests in a timely fashion now, how much worse will the problem be when lawful immigrants, including naturalized citizens, lawful permanent residents, and visa holders need the documents immediately to start their next jobs? Consequently, DHS would need to hire hundreds more employees to respond to these FOIAs.

Businesses seeking to comply with any newly imposed system would also put additional strain on these government agencies. Problems can be anticipated in attempting to respond to employers' requests and in establishing connectivity for businesses located in remote regions or that do not have ready access to phones or the internet. These agency deficiencies will surely wreak havoc on independent contractors and the spot labor market for short-term employment.

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[17] Department of Homeland Security, 2009 Annual Freedom of Information Act Report to the Attorney General of the United States

[18] Peck, Amy, *Latest Report on E-Verify: the Good, the Bad, and the Unresolved*, January 20, 2011

Scaling up the existing software platform for E-Verify to respond to the enormous task of verifying the entire national workforce is likely to be a very difficult task. It makes little sense to adopt a system that is pre-destined to cause chaos within these agencies, not to mention the lives of the thousands of Americans wrongfully impacted.

V. CIS has Not Been Able to Achieve a Sufficient Degree of Employer Compliance in Order to Protect Worker's Rights

Despite the fact that CIS has more than doubled the number of staff tasked with monitoring employers' use of E-Verify since 2008, it still does not have the means to effectively identify and address employer misuse or abuse of the system. A recent report from the SSA Office of the Inspector General (OIG) found that SSA itself had failed to comply with many of regulations put in place to protect employees. The agency failed to confirm the employment of 19% of the 9,311 new SSA employees hired for fiscal year 2008. Of those who were processed, SSA did not comply with the 3-day time requirement for verifying eligibility. The OIG also found that SSA verified the employment eligibility of 26 employees who were not new hires but had sought new positions within the agency, 31 volunteers who were not federal employees, and 18 job applicants whom SSA did not hire.[19] If the government is unable to maintain compliance within its own agencies, we cannot expect private businesses to follow the regulations put in place to protect workers.

Employer misuse has resulted in discrimination and anti-worker behavior in the past and there is no reason to suggest that pattern will change with a new verification system in place. From the inception of E-Verify, the GAO and DHS studies have repeatedly documented various types of misuse. The CIS's Westat report also confirmed the fact that many employers were engaging in prohibited activity. Of the employers they contacted, they found that 17.1% admitted to restricting work assignments until authorization was confirmed; 15.4% reported delaying training until employment authorization was confirmed; and 2.4% reported reducing pay during the verification process.

If Congress imposes a mandatory system, it will need to create effective enforcement mechanisms that prevent the system from being a tool for discrimination in hiring. Such discriminatory actions will be difficult to prevent and even more difficult to correct. Congress should ask: how will the government educate employers and prevent misuse of E-Verify or any similar system?

Biometric National ID System

In response to concerns about the E-Verify system, some have suggested using biometric identification and H.R. 2164 contains a biometric verification pilot program.[20] Such a program

[19] Social Security Administration. Office of the Inspector General, *The Social Security Administration's Implementation of the E-Verify Program for New Hires*, A-03-09-29154, January 6, 2010.
[20] A biometric is a physical characteristic of an individual that can be used to uniquely identify them. Common examples include fingerprints, DNA and facial characteristics.

would take the country down a dangerous path that would ultimately have enormous negative implications for privacy, civil liberties and due process.

I. A Biometric National ID System Will Create a Hugely Expensive New Federal Bureaucracy and Will Not Stop Unauthorized Employment

In order to understand the practical problems with national ID, it is necessary to understand how the system would work. The key to a biometric system is the verification of the individual. In other words, an individual must visit a government agency and must present documents such as a birth certificate or other photo ID to prove his or her identity. The agency must then fingerprint the person (or link to some other biometric) and place the print in a database. The agency might also place the biometric on an identification card. H.R. 2164 contemplates private sector "enrollment providers" would play this role. If mandated for all workers, such a process would create a quintessential national ID system because it would be nationwide, it would identify everyone in the country, and it would be necessary to obtain a benefit (in this case the right to work).

The closest current analogy to this system is a trip to the Department of Motor Vehicles to obtain a drivers' license. The federalizing of that system (without the addition of a new biometric) under the Real ID Act was estimated to cost more than $23 billion if carried out to completion, though 24 states have rejected the plan, putting its completion in grave doubt.[21] The cost to build such a system from scratch would be even more staggering. It would involve new government offices across the country, tens of thousands of new federal employees and the construction of huge new information technology systems. Every worker would have to wait in long lines, secure the documents necessary to prove identity, and deal with the inevitable government mistakes. Imagine the red tape necessary to provide documentation for 150 million U.S. workers. It is far beyond the capacity of any existing federal agency.

These problems are not hypothetical. After spending billions, the United Kingdom effectively abandoned its efforts to create a biometric national ID card, making it voluntary. Dogged by public opposition, data privacy concerns, and extensive technical problems, the program has been an embarrassment for the British government.

II. A Biometric National ID System Will Not Prevent Unauthorized Employment

Despite a popular assumption to the contrary, a biometric national ID system would largely fail to solve the problem of undocumented immigration. Security systems must be judged not by their successes, but rather by their failures. After enduring a host of bureaucratic hassles and costs, most Americans would likely be able to enroll in the biometric system. But that does not make the system a success – those workers were already working lawfully. The system only succeeds if it keeps the undocumented workers in this country from securing employment and a biometric national ID system is unlikely to do that.

The first and most obvious failure is that this system would do nothing about employers who opt out of the system altogether (work "off the books"). Already, by some reports, more

[21] 72 Fed. Reg. 10820.

than 12 million undocumented immigrants are working in the United States. Many of these workers are part of the black market, cash wage economy. Unscrupulous employers who rely on below-market labor costs will continue to flout the imposition of a mandatory employment eligibility pre-screening system and biometric national ID. These unscrupulous employers will game the system by running only a small percentage of employees through the system or by ignoring the system altogether. In the absence of enforcement by agencies that lack resources to do so, employers will learn there is little risk to gaming the system and breaking the law.

Law abiding employers, however, will be forced to deal with the hassle and inconvenience of signing up for E-Verify and a biometric system. Then they'll be forced to watch and wait when they are blocked from putting lawful employees to work on the planned date due to system inaccuracies or other malfunctions. The inevitable result will be more, not fewer, employers deciding to pay cash wages to undocumented workers. Similarly, cash wage jobs will become attractive to workers who have seemingly intractable data errors. Instead of reducing the number of employed undocumented workers, this system will create a new subclass of employee – the lawful yet undocumented worker.

Additional failures will come when the worker is initially processed through the system. Crooked insiders will always exist and be willing to sell authentic documents with fraudulent information.[22] Undocumented immigrants will be able to contact these crooked insiders though the same criminals whom they hired to sneak them into the United States. Securing identification will simply be added to the cost of the border crossing.

Since 2004, more than 260 million records containing the personal information of Americans have been wrongly disclosed.[23] Many individuals' personal information, including social security numbers, are already in the hands of thieves. There is nothing to prevent a criminal from obtaining fraudulent access to E-Verify (pretending to be a legitimate employer), verifying that a worker is not already registered in the system and sending an undocumented worker to get a valid biometric using someone else's information.

Additional problems inherent in any biometric will materialize both when an individual is enrolled, and at the worksite. For example, according to independent experts there are a number of problems that prevent proper collection and reading of fingerprints, including:

- Cold finger
- Dry/oily finger
- High or low humidity
- Angle of placement
- Pressure of placement
- Location of finger on platen (poorly placed core)
- Cuts to fingerprint; and
- Manual activity that would mar or affect fingerprints (construction, gardening).[24]

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[22] Center for Democracy and Technology, "Unlicensed Fraud." January 2004 (www.cdt.org/privacy/20040200dmv.pdf).

[24] International Biometrics Group, http://www.biometricgroup.com/reports/public/reports/biometric_failure.html

When these failures occur it will be difficult and time consuming to re-verify the employee. Running the print through the system again may not be effective, especially if the print has been worn or marred. Returning to the biometric office for confirmation of the print is not likely to be a viable solution because it creates another potential for fraud; the person who goes to the biometric office may not be the person who is actually applying for the job. These are complex security problems without easy solutions.

There would also be mounting pressure to "fix" many of these problems with more databases filled with more identifying information such as birth certificates or DNA in an attempt to identify individuals earlier and more completely. This would mean more cost, more bureaucracy, and less privacy. From a practical point of view, a biometric system is the worst of both worlds. It puts enormous burdens on those already obeying the law while leaving enough loopholes so that lawbreakers will slip through.

III. A Biometric National ID System Will Trammel Privacy and Civil Liberties

The creation of a biometric national ID would irreparably damage the fabric of American life. Our society is built on privacy, the assumption that as long as we obey the law, we are all free to go where we want and do what we want – embrace any type of political, social or economic behavior we choose. Historically, national ID systems have been a primary tool of social control. It is with good reason that the catchphrase "your papers, please" is strongly associated with dictatorships and other repressive regimes. As Americans, we have the right to pursue our personal choices all without the government (or the private sector) looking over our shoulders monitoring our behavior. This degree of personal freedom is one of the keys to America's success as a nation. It allows us to be creative, enables us to pursue our entrepreneurial interests, and validates our democratic instincts to challenge any authority that may be unjust.

A biometric national ID system would turn those assumptions upside down. A person's ability to participate in a fundamental aspect of American life – the right to work – would become contingent upon government approval. Moreover, such a system will almost certainly be expanded. In the most recent attempt to create a national ID though a state driver's license system called Real ID, at the outset the law only controlled access to federal facilities and air travel. Congressional proposals quickly circulated to expand its use to such sweeping purposes as voting, obtaining Medicaid and other benefits, and traveling on interstate buses and trains.[25] Under a national ID system, every American would need a permission slip simply to take part in the civic and economic life of the country.

The danger of a national ID system is greatly exacerbated by the huge strides that information technology ("IT") has made in recent decades. There is an enormous and ever-increasing amount of data being collected about Americans today. Grocery stores, for example, use "loyalty cards" to keep detailed records of purchases, while Amazon keeps records of the books Americans read and airlines keep track of where they fly. Congress has acknowledged

[25] See, e.g. H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (110th Congress).

these practices and has held numerous hearings to discuss the issues of online privacy.[26] A biometric national ID system would add to these problems by helping to consolidate this data. The pilot program under H.2164 actually exacerbates this problem by relying on commercial databases as part of the verification programs and integrating it with government information from SSA and DHS.

The sordid history of national ID systems combined with the possibilities of modern IT paint a chilling picture. These problems cannot be solved by regulation or by tinkering around with different types of biometrics. Instead, the entire unworkable system must be rejected so that it does not intolerably impinge on American's rights and freedoms.

VI. Conclusion: Congress Must Not Enact a Mandatory Employment Eligibility Pre-Screening System or Pilot Biometric Database

The goal of E-Verify is to reduce the number of unauthorized workers in the United States. Unfortunately, its success rate is extremely low. According to the CIS's Westat report, the inaccuracy rate for unauthorized workers is approximately 54 percent.[27] According to the government's own reports, **E-Verify is fulfilling its intended purpose less than half the time**. In addition, experience in Arizona shows that many employers are failing to comply in spite of the state mandate. Therefore, while E-Verify continues to burden employers, cost the government billions of taxpayer dollars, and deny Americans' their right to work—all the while potentially subjecting them to discrimination—it is not even adequately performing its core function.

The ACLU urges the Subcommittee to reject imposition of a mandatory electronic employment eligibility pre-screening system and the use of any biometric system. Each would cause great harm to employers across the country and to lawful workers and their families while doing little to dissuade undocumented workers. The likelihood for harm is great and the prospect for gain has so far proved illusory.

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[26] *Behavioral Advertising: Industry Practices and Consumers' Expectations: Hearing before the H. Subcomm. on Communications, Technology and the Internet of the H. Comm. on Energy and Commerce, and the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. (2009); *The State of Online Consumer Privacy: Hearing before the S. Commerce, Science and Transportation Committee*, 112th Cong. (2011).

[27] 2009 Westat Report at 118.

June 15, 2011

The Honorable Elton Gallegly
Chair, House Subcommittee on Immigration Policy and Enforcement
U.S. House of Representatives
Washington, DC 20515

The Honorable Zoe Lofgren
Ranking Member, House Subcommittee on Immigration Policy and Enforcement
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Gallegly and Ranking Member Lofgren:

As leaders of the Asian American and Pacific Islander (AAPI) community, we write to express our opposition to a mandatory E-Verify program. Unless our immigration system is reformed, expanding E-verify will weaken our already fragile economy. Expanding E-Verify will have a harmful impact on AAPI workers and business owners.

If E-Verify is made mandatory, a disproportionate number of AAPIs – including citizens and green card holders - will be misidentified and have their jobs jeopardized. A 2009 government-funded report found the error rate for foreign-born workers was *20 times higher* than that of U.S.-born workers.[1] Throughout the U.S., more than 8 million AAPIs are foreign born.[2] The E-Verify program is of particular concern for the Limited English Proficient members of our community. The already confusing program will be impossible to navigate for the nearly 50% of the AAPI community who speak English less than very well.[3]

E-Verify promotes discrimination against AAPIs, as under-trained employers may assume a worker is undocumented and fire or not hire the worker at all. Employer noncompliance with the E-Verify pilot program's rules was "substantial,"[4] where: 1) employers engaged in prohibited practices such as pre-employment screening, 2) took adverse employment actions based on tentative non-confirmation notices, and 3) failed to inform employees of their rights. Furthermore, the U.S. General Accountability Office reports that USCIS is limited in its ability to identify and prevent its misuse, with little or no authority to impose penalties.[5]

E-Verify also increases regulatory burdens on employers, particularly small business owners. AAPIs own more than 1.5 million small businesses in the U.S., with receipts of $507.6 billion.[6] E-Verify requires compliance training and capable infrastructure for electronic submission and subsequent work verification, taking away time and resources from employers that may not have an infrastructure in place.

Resolving tentative and false non-confirmations remains especially challenging for employees and employers. Workers with errors in their records often have to take unpaid time off to follow up with the Social Security Administration (SSA) or the Department of Homeland Security, whose databases the program employs. Members of the American Council on International Personnel reported that corrections at SSA usually take in excess of 90 days, a wait of 4 or more hours per trip, and frequent trips to SSA to get their records corrected.[7] This greatly decreases the productivity of the workers and employers alike.

Lastly, the U.S. cannot afford to divert scarce governmental and financial resources towards funding this deeply flawed program. According to the U.S. Congressional Budget Office, implementing a mandatory E-Verify program (without legalizing the current undocumented population) would force employers and workers to resort to the black market, outside of the tax system. This would decrease federal revenue by more than $17.3 billion over ten years.[8]

Instead of layering E-Verify on top of a broken immigration system, we need to fix our system through broad reform that includes legalizing unauthorized immigrants. This would result in a large economic benefit—a cumulative $1.5 trillion in added U.S. gross domestic product over 10 years.[9] Therefore, for the reasons stated, we oppose an expansion of the E-Verify program.

Respectfully,

Asian American Action Fund
Asian American Institute, Member of the Asian American Center for Advancing Justice
Asian American Justice Center, Member of the Asian American Center for Advancing Justice
API Equality - LA
Asian Law Caucus, Member of the Asian American Center for Advancing Justice
Asian Pacific American Labor Alliance
Asian Pacific American Legal Center, Member of the Asian American Center for Advancing Justice
Asian & Pacific Islander American Health Forum
Asian Pacific Islanders Community Action Network (APIsCAN)
Central American Resource Center (CARECEN)
California Immigrant Policy Center
Chinese for Affirmative Action
Desis Rising Up & Moving (DRUM)
Empowering Pacific Islander Communities (EPIC)
Family Bridges
Filipino Advocates for Justice (formerly Filipinos for Affirmative Action)
Kizuna
Korean American Coalition
Korean American Resource & Cultural Center
Koreatown Immigrant Workers Alliance (KIWA)
Korean Resource Center
K.W. Lee Center for Leadership
Life Bridge Journeys
Liwanag Kultural Center
National Korean American Service & Education Consortium
Nikkei for Civil Rights and Redress
OCA
Out4Immigration
South Asian Americans Leading Together
Southeast Asian Community Alliance - LA
South Asian Network

Southeast Asian Resource Action Center
Thai Community Development Center (Thai CDC)
Tongan Community Service Center
United Sikhs

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[1] Westat, Findings of the E-Verify Program Evaluation (December 2009), 210 available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.
[2] U.S. Census Bureau, We the People: Asians in the United States: Census 2000 Special Reports, 20 available at http://www.census.gov/prod/2004pubs/censr-17.pdf.
[3] U.S. Census Bureau, Language Use and English-Speaking Ability: 2000 (Issued October 2003), 4 available at http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.
[4] Westat, Findings of the Web Basic Pilot Evaluation (September 2007), xxii available at http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.
[5] Richard M. Stana, U.S. Government Accountability Office, Testimony: Employment Verification: Federal Agencies Have Improved E-Verify, but Significant Challenges Remain, 6 available at http://www.gao.gov/new.items/d11330t.pdf.
[6] U.S. Census Bureau, Facts for Features: Asian/Pacific American Heritage Month (May 2011), available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff06.html.
[7] Tyler Moran, National Immigration Law Center, Written Statement to House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, Hearing on: "E-Verify: Preserving Jobs for American Workers" (February 11, 2011), available at http://www.nilc.org/immsemplvmnt/ircaempverif/e-verify-testimony-nilc-2011-02-10.pdf (citing American Council on International Personnel, "Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008)," August 11, 2008).
[8] Peter R. Orszag, Director, Congressional Budget Office, Letter to Rep. John Conyers (April 4, 2008), available at http://www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf.
[9] Raul Hinojosa-Ojeda, University of California Los Angeles, Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform (January 2010), 10 available at http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf.



www.lirs.org

Statement of Lutheran Immigration and Refugee Service

House Judiciary Subcommittee on Immigration Policy and Enforcement

June 15, 2011 Hearing: H.R. 2164, the "Legal Workforce Act"

BALTIMORE, June 15, 2011—Lutheran Immigration and Refugee Service (LIRS) is the national organization established by Lutheran churches in the United States to serve uprooted people. "Through our extensive work with churches, network partners, refugees and migrants all across the country, LIRS sees the increasingly important role that migrants play in the U.S. economy, starting up new businesses, revitalizing communities, increasing tax revenues, and filling jobs that many Americans are unwilling to perform," said Linda Hartke, LIRS President and CEO. "The Legal Workforce Act will not accomplish what it promises, will put many workers who are legally allowed to work at risk of being fired, and will be burdensome to small businesses. Widespread use of E-verify will only be fair and meaningful for our country when it protects the rights of workers and is implemented in the context of broader immigration reform."

The Legal Workforce Act and E-Verify
The Legal Workforce Act (H.R. 2164), legislation introduced yesterday, is a broad-reaching bill that would impact millions of individuals in the United States – both U.S. citizens and non-citizens. Within just three years, H.R. 2164 would require all U.S. businesses to use E-Verify, an internet-based employer verification program, including small businesses with as few as one employee.

E-Verify was created in 1997 and is currently implemented by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration. Use of E-Verify for new hires is required for federal agencies; and some federal contractors and subcontractors must use the system for both newly hired workers and employees already working on contract.[1] Some states have also passed legislation that requires E-Verify for new hires. However, for all other U.S. employers, E-Verify is voluntary. While program participation continues to increase, only three percent of the approximately 7 million U.S. employers – or just over 250,000 employers – are enrolled.[2]

Impact of Mandatory Expansion of E-Verify
If E-Verify were required for every U.S. business, it would have a broad reaching impact on all sectors of our economy. Here are some important data points to keep in mind:

[1] "Employer Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain," Government Accountability Office, 2010, http://www.gao.gov/new.items/d11146.pdf
[2] "Chairman Smith Introduces Legal Workforce Act," News Release, Congressman Lamar Smith, June 14, 2011, http://lamarsmith.house.gov/News/DocumentSingle.aspx?DocumentID=246558

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- Based on current E-Verify error rates, if all U.S. businesses in the United States were required to use E-Verify, it is estimated that more than 770,000 workers would be wrongly fired.[3]
- According to the non-partisan Congressional Budget Office, without any other accompanying immigration reforms, mandatory E-Verify would decrease federal revenues by more than $17 billion over a period of ten years as more workers would work off the books for businesses that do not pay their fare share of taxes.
- Nearly 75 percent of all U.S. businesses have fewer than ten employees. However, only 12 percent of all employers that use E-Verify are small businesses.[4]
- Undocumented workers are estimated to make up between 50 and 75 percent of the U.S. agricultural labor force.[5] If these workers were forced out of their jobs, production costs and prices would increase, impacting Americans all over the country.

These figures should give policymakers caution before rushing ahead with mandatory expansion plans.

E-Verify is Also Problematic for Refugees and Asylees
E-Verify expansion would also create more obstacles for lawful migrants, some of whom have arrived to the United States in search of protection, such as refugees and migrants granted asylum in the United States (asylees). Federal government data reveals a number of cases of refugees and asylees whose employment was terminated, suspended or was delayed because of problems with E-Verify. Here are a few examples:[6]

- DHS issued a Somali refugee in Nebraska with an employment authorization card that listed an incorrect birth date. When the refugee was hired by an employer who uses E-Verify, the system could not confirm the worker's eligibility. The refugee contested the notice. However, the employer did not provide the refugee with the proper way to resolve the issue. Because the refugee did not know how to contact the correct DHS office and, thus, did not contact DHS in a timely way, the refugee's job was terminated.
- When a Burmese refugee in Texas was hired, his employer incorrectly entered his date of birth. Therefore, when the employer tried to confirm the refugee's work eligibility, the E-Verify system issued a tentative non-confirmation. The employer then incorrectly suspended the employee until they could resolve the issue. To make matters worse, the employer did not provide the refugee with the proper letter and contact information to follow up with DHS.
- In Tennessee, an asylee from Guinea was hired by a trucking company. However, the company incorrectly listed his information and the system indicated that it could not confirm the asylee's work authorization. The employer then did not provide him with information about how to resolve the issue.

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[3] According to DHS-commissioned data, about 0.8 percent of workers receive an erroneous tentative nonconfirmation and .3 percent are able to correct those errors. Since there are currently about 154,287,000 million workers in the United States, multiplying the .5 error rate by the total number of workers results in 771,435 workers who would erroneously fired from their jobs.

[4] "Findings of the Web-Based E-Verify Program Evaluation," Westat, 2009, www.uscis.gov/USCIS/EVerify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf

[5] Dan Zak, "Stephen Colbert, in GOP Pundit Character, Testifies on Immigration in DC," The Washington Post, September 25, 2010, www.washingtonpost.com/wpdyn/content/article/2010/09/24/AR2010092402734.html

[6] "OSC Interventions: E-Verify," Department of Justice, Civil Rights Division, Office of Special Counsel, FY 2009, http://www.justice.gov/crt/about/osc/htm/telephone_interventions/ti_e-verify.php

Although all three of these individuals were ultimately able to regain their jobs, they all faced undue harm, lost wages, and had to take additional steps to navigate a government bureaucracy to fix errors made by the federal government or their employers. These cases underscore the challenges that national expansion of E-Verify would likely create for thousands of work authorized non-citizens.

Mandatory Employer Verification must be Accompanied by Other Reforms
As the U.S. economy struggles to fully recover, some have suggested that a simple solution to solve the country's economic woes would be to force undocumented migrant workers out of their jobs by requiring all U.S. businesses to use E-Verify. The United States needs a functional employment verification system to ensure U.S. employers hire legal workers, to identify unscrupulous employers and to protect all workers. However, while the government should continue to improve employer verification programs to reduce their impact on U.S. citizen and legal workers, policymakers must keep in mind that there are more than 11 million unauthorized immigrants in the country with important ties to American communities.

The success of a mandatory employment verification program will depend on full participation by both U.S. employers and workers. However, "H.R. 2164 would drive undocumented workers off the books and result in the likely growth of a large underground economy, not to mention force undocumented community members even further into a shadowed existence," said the Rev. Gerald Mansholt, Bishop of the Central States Synod of the Evangelical Lutheran Church in America. "The bill would have a devastating impact on our communities and economy."

To ensure full participation in a national employer verification system, Congress must fix the broken U.S. immigration system by including a pathway to earned legal status for undocumented workers, protecting families and workers, and ensuring the humane enforcement of immigration laws. Absent an immigration overhaul, Congress and the Administration must pursue smart policies that protect and create jobs and identify new ways to leverage the contributions of all workers in the United States.

LIRS welcomes refugees and migrants on behalf of the Evangelical Lutheran Church in America, the Lutheran Church—Missouri Synod and the Latvian Evangelical Lutheran Church in America. LIRS is nationally recognized for its leadership advocating with and on behalf of refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration and other vulnerable populations, and for providing services to migrants through over 60 grassroots legal and social service partners across the United States.

If you have any questions about this statement, please feel free to contact Eric B. Sigmon, Director for Advocacy at (202) 626-7943 or via email at esigmon@lirs.org.

To read an employer verification statement from the Rev. Gerald Mansholt, Bishop of the Central States Synod of the Evangelical Lutheran Church in America, click here: http://bit.ly/kkj2tw.

To read an LIRS statement on employer verification, click here: http://bit.ly/m6NYoF.

NATIONAL IMMIGRATION FORUM

Statement for the Record

House Subcommittee on Immigration Policy and Enforcement

"H.R. 2164, the 'Legal Workforce Act'"

June 15, 2011

The National Immigration Forum works to uphold America's tradition as a nation of immigrants. The Forum advocates for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

We are submitting our views about the subject of this hearing, the "Legal Workforce Act, H.R. 2164."

The National Immigration Forum is opposed to the mandatory use of an electronic work authorization verification system absent the reform of our immigration laws that include a realistic way of dealing with undocumented workers now living and working in the U.S. Without immigration reform, we believe such a worker verification system cannot succeed.

If an electronic work authorization verification system is forced on the estimated 7.7 million American employers and 154 million workers in the U. S. without fixing our broken immigration system, the results will be disastrous for everyone in our nation and our economy.

A large percentage of our workforce is without legal status—five percent overall and substantially more in some industries. It is common sense to address the problem holistically, by bringing undocumented workers in to the legal system so that companies in industries which are very dependent on undocumented workers—agriculture, for example—will not face the choice of risking the consequences of non-compliance or moving their operations to other countries.

Whether employers move their workers off the books or off shore, the effect on American workers would not be positive. While supporters of mandatory verification legislation would like to portray the legislation as a solution for unemployment among Americans, the reality will likely be quite different. American workers would either have to compete in a workforce that would be largely underground, or they would be put out of a job as their employer moved operations outside of the U.S. In agriculture, which is very dependent on an undocumented workforce, for every job lost in farming, three jobs are lost in related support industries.

According to the Congressional Budget Office, the imposition of the E-Verify absent immigration reform would result in a loss of more than $17 billion in revenue for the government over a period of ten years due to the increase in workers who would be working off the books. In

contrast, by focusing on the broken immigration system as a whole and finding real solutions, an additional $1.5 trillion of economic activity would be generated over the same period, according to some estimates. Instead of sinking yet more money into the black hole that an enforcement-only approach has become, Congress should deal with the immigration problem realistically. Additional layers of enforcement bureaucracy cannot shield us from the reality that our broken immigration system must be fixed.

The Subcommittee should reject this legislation and instead turn its attention to comprehensively fixing the immigration system. Simply trying to enforce the rules of a broken system has been, and will continue to be, expensive and ineffective.

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GENERAL COUNSEL
LENORE R. KRETMAN



June 15, 2011

House Judiciary Subcommittee on Immigration Policy and Enforcement
U.S. House of Representatives
Washington, DC 20515

Dear Representative:

As the Subcommittee on Immigration Policy and Enforcement considers H.R. 3164, the "Legal Workforce Act," we are writing to raise concern about efforts to make the Electronic Employment Eligibility Verification Program (E-Verify) mandatory and permanent.

As an advocate for both fair immigration policy and robust border security, ADL supports comprehensive reform that will reduce illegal immigration, require undocumented immigrants to legalize their status, and replace the black market smuggling system with a properly regulated, enforceable immigration policy. To this end, ADL opposes the piecemeal approach by which a patchwork of measures focuses solely on enforcement and deportation. Instead we favor a broad systemic remedy that will reduce illegal immigration by providing a legal flow of foreign labor into the U.S. and create a path to legalization for many undocumented who are already living in our communities.

We recognize the challenge of enforcing the law while preventing racial and ethnic discrimination. But the findings of misuse by two government commissions raise serious concern that expanding the E-Verify Program will only foment discrimination by prospective employers on a broader scale. Even well-intentioned employers may turn away applicants based on their names, accents, and skin color so as to not risk being fined.

ADL is committed to reform that would address the flaws in the current immigration system, including preventing the hiring of unauthorized workers. However, E-Verify has been problematic and has been plagued by a multitude of problems since its inception in 1997. It is known to be error-ridden and can wrongly identify U.S. citizens as undocumented and ineligible to work. While the GAO found, in its December 2010 report, that the system's accuracy had improved, it also concluded that errors persist and that Tentative Non-Confirmations (TNC) are "more likely to affect foreign-born employees" and "... can lead to the appearance of discrimination." Indeed, the report found that authorized workers who are foreign-born are up to twenty (20) times more likely than U.S.-born workers to be incorrectly tagged as unauthorized to work.

Effectively enforcing the law and preventing the hiring of undocumented workers are important components of comprehensive immigration reform at the federal level that would also address security, business and humanitarian interests and needs. Only a broad, comprehensive solution can ensure that current and future immigration is legal, effectively secures our borders, and restores order to a broken system.

We very much appreciate the opportunity to provide this input.

Sincerely,

Deborah M. Lauter
Deborah M Lauter
Civil Rights Director

Stacy Burdett
Stacy Burdett
Director, Washington Office

FOR RELEASE: June 15, 2011
Contacts: Maria Machuca, UFW Communications Director, media@ufwpress.com
Jessica Felix-Romero, Farmworker Justice, 571-275-1249, jromero@farmworkerjustice.org

WEDNESDAY, JUNE 15

REP. LAMAR SMITH'S MANDATORY E-VERIFY PROPOSAL LEADS TO MORE EXPLOITATION OF FARMWORKERS

UFW AND FARMWORKER JUSTICE OPPPOSE E-VERIFY WITHOUT LEGALIZATION

UFW, FARMWORKER JUSTICE ON HOUSE SUBCOMMITTEE HEARING

The "Legal Workforce Act," a mandatory E-Verify bill introduced by House Judiciary Committee Chairman Lamar Smith (R-Texas), will harm the farmworkers who put food on our tables, according to the United Farm Workers and Farmworker Justice. The bill would require employers, as well as those recruiting and referring job applicants, to check job applicants' immigration status with a government database but would not offer a constructive solution to the fact that more than one-half of the nation's seasonal farmworkers are undocumented. The House Subcommittee on Immigration Policy and Enforcement has scheduled a hearing entitled the "Legal Workforce Act" on June 15 at 10 a.m. EST in the Rayburn House Office Building.

Despite his claims about the need for E-Verify, Smith's bill contains exceptions for agriculture. The bill delays application of E-Verify to agricultural employers for three years; at that point employers would still not be required to verify seasonal workers who had worked for them in the past. These rules and exceptions would lead to further harm. First, under the bill, undocumented farmworkers would feel tied to their employers, and would be reluctant to challenge illegal or unfair conduct for fear of losing their job and the ability to work. Second, the much larger problem is that this bill would allow – indeed, encourage – employers to evade the law by using farm labor contractors to hire workers and thus claim that they don't employ any farmworkers. Labor contractors are notorious for violating immigration and labor laws. The expansion of the farm labor contracting system will harm the wages and working conditions of all farmworkers, including U.S. workers.

We expect some members of Congress will respond to E-Verify by proposing changes to the H-2A agricultural guestworker program to weaken worker protections and "streamline" the program by removing government oversight, and thereby increase the number of guestworkers. The H-2A program is fundamentally flawed and rife with abuse; more protections for U.S. and foreign workers are needed, not fewer. In addition, H-2A changes would not solve the current challenge in the agricultural labor market: the presence of about one million undocumented workers. Undocumented farmworkers should be given an opportunity to earn legal immigration status and help ensure a productive food system.

"Instead of pursuing this misguided expansion of E-Verify and promoting an immigration policy based on an easy-to-exploit farm labor force, Congress must pass the bipartisan AgJOBS bill, negotiated by the UFW and the nation's growers, which would assure a prosperous agricultural sector while imposing the rule of law on all parties," said Arturo Rodriguez, president of the United Farm Workers.

"Rep. Smith's proposal would deepen problems in the farm labor force by encouraging even more employers to use farm labor contractors to avoid obligations under E-Verify. Farm labor contractors are notorious for poor wages and working conditions," said Bruce Goldstein, President of Farmworker Justice. He added, "The AgJOBS bill would create a balanced, workable and sensible approach."

- end -

the MAIN STREET alliance

Small business owners. Small business values.

June 15, 2011

Chairman Elton Gallegly
Subcommittee on Immigration Policy & Enforcement
of the Committee on the Judiciary
B-353 Rayburn House Office Building
Washington, DC 20515

Ranking Member Zoe Lofgren
Subcommittee on Immigration Policy & Enforcement
of the Committee on the Judiciary
B-353 Rayburn House Office Building
Washington, DC 20515

Re: June 15 Subcommittee on Immigration Policy & Enforcement hearing on "E-Verify"

Dear Chairman Gallegly and Ranking Member Lofgren:

On behalf of the Main Street Alliance network and small business owners across America, we write to express our opposition to a mandatory expansion of the current "E-Verify" system to every employer in the United States.

The Main Street Alliance is a national network of small business leaders that creates opportunities for Main Street business owners to speak for ourselves on issues that matter to our businesses and our local economies. A mandatory E-Verify system would be, quite simply, a direct threat to both.

The current broken immigration system is failing our businesses, failing our economy, and failing our country. That's something we can all agree on. But a mandatory E-Verify program is not the solution. Indeed, mandatory E-Verify will be bad for small businesses, bad for our employees, bad for the economy and bad for the federal budget.

A recent report from Bloomberg Government indicates that, had the use of E-Verify been mandatory last year, it would have cost the nation's employers $2.7 billion. Small businesses would bear the bulk of those costs, paying millions of dollars to verify employees' work eligibility in this time when we're trying to stretch every dollar we have to meet payroll, keep people employed, and find ways to grow our businesses and create jobs.

The government's own figures suggest that the errors in a mandatory E-Verify system will cause close to 800,000 Americans to lose their jobs incorrectly, and another 3.6 million to spend time correcting government mistakes in order to keep them. That's bad not only for these workers, but also for their employers, who will be losing work hours while workers take time off to get their records fixed and, in the case of wrongful terminations, losing trained employees.

These problems will be especially acute for employers who hire naturalized citizens, legal permanent residents, and refugees. Research suggests that permanent residents and naturalized citizens are at least 10 times (and perhaps as much as 32 times) more likely to by wrongly identified as "unauthorized" by the E-Verify system. In this way, expansion of the E-Verify system will discriminate against these workers and the businesses that employ them.

Looking at the broader impact of this policy on the economy and the federal budget, estimates suggest that mandatory E-Verify will drive a significant portion of economic activity into the underground economy, reducing federal tax revenues by $17 billion over a ten year window, according to the Congressional Budget Office. This is in addition to the actual costs of implementing the law (on the government side) and complying with it (on the business side). In this time of fiscal challenges, this is a price we can ill afford.

We can and must do better – for our businesses, our economy, and the country's balance sheet. What we need is a comprehensive reform of the immigration system, not expansion of a piecemeal and flawed program like E-Verify that forces small business owners to act as immigration agents and creates new costs both for our businesses and for the country. Comprehensive immigration reform, on the other hand, by cutting down on the underground economy and realigning our immigration system with economic realities and the needs of employers, could add $1.5 trillion to the nation's economy over ten years. That's the kind of policy we need now.

A vibrant small business sector is critical to ensuring the vitality of the U.S. economy overall. Expanding or mandating E-Verify would do serious harm to small businesses, local economies, and the country's fiscal outlook. We strongly urge you to oppose it.

Sincerely,

Melanie Collins
Melanie's Home Childcare
Falmouth, ME
MSA National Steering Committee

Kelly Conklin
Foley-Waite Associates
Bloomfield, NJ
MSA National Steering Committee

ReShonda Young
Alpha Express, Inc
Waterloo, IA
MSA National Steering Committee

Hollis Berendt
Green Irene
Greeley, CO
MSA National Steering Committee

Jim Houser
Hawthorne Auto Clinic
Portland, OR
MSA National Steering Committee

Daniel Coates
Small Business United – New York
Queens, NY

Sue Dinsdale
Iowa Main Street Alliance
Des Moines, IA

Dan Lombardi
Main Street Alliance of Oregon
Portland, OR

Joshua Welter
Main Street Alliance of Washington
Seattle, WA

CHRISTIANS FOR COMPREHENSIVE
IMMIGRATION REFORM

Statement from Christians for Comprehensive Immigration Reform for submission to the Congressional Record, pertaining to the House Judiciary Committee Hearing on Employment Verification (E-Verify), Wednesday, June 15, 2011

As Christians for Comprehensive Immigration Reform (CCIR), a coalition of Christian organizations, churches, and leaders who are united in support of comprehensive immigration reform, we wish to express our concern about the recent proposal to mandate the use of the E-Verify program.

Our Christian faith calls us to seek justice and to advocate for the marginalized of our society. Therefore, we are deeply troubled by the proliferation of policies that seek to target and negatively impact immigrant communities in this country. Specifically, we are very concerned with the recent efforts to make the flawed online employment verification system, E-Verify, mandatory for all businesses in the country. We can all agree that our immigration system is broken and in dire need of reform. However, if we make E-Verify mandatory without first fixing interrelated components of our federal immigration system, we will make a bad situation much worse.

With more than 11 million undocumented immigrants in the country at this time, we must acknowledge that immigrants are a vital part of our communities and businesses. To mandate use of the E-Verify system without a method for recognizing these millions of workers would further create an underground economy and subject these workers to greater risk of coercion and abuse by unscrupulous employers[1]. Furthermore, the program will impose new costs upon employers, increase unemployment, and cause a loss of tax revenue as these workers begin to work "off the books"[2].

Instead of mandating E-Verify with no regard to the consequences, we urge Congress to focus on fixing our immigration system and creating pathways for those who wish to live and work here legally to do so. Instead of tearing apart families and deporting some of America's hardest workers, we should be ensuring that employers are not exploiting immigrants for their own profits. Instead of narrowing solutions to enforcement-only measures, we should be looking for ways to holistically overhaul our immigration system so that the United States can continue to be the vibrant and welcoming country it has always been.

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[1] Findings of the E-Verify Program Evaluation, Westat, Rockville, MD. Dec. 2009. http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf

[2] 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.

Immigration is a deeply relevant issue for all people in our nation, but for Christians the Bible is clear: We must care for the marginalized, extend grace, and welcome the stranger among us. Mandating E-Verify, without first creating efficient methods to allow immigrants the chance to work in our country legally, will only lead to further abuses of our immigrant brothers and sisters.

It is our prayer that the Obama administration and our national legislators will work to implement comprehensive immigration reform that simultaneously respects every person's humanity, creates jobs, sustains our economy, and protects the marginalized.

Mr. GALLEGLY. And I thank the gentleman for his testimony, and we will move on with our witnesses.

Mr. CONYERS. Thank you very much.

Mr. GALLEGLY. We are very fortunate to have a very distinguished panel of witnesses today. Each of the witnesses' written statements will be entered into the record in its entirety. And I would ask the witnesses to make every effort to summarize his or

her testimony to 5 minutes in order that we can get into the questioning session. And as I said, your entire statement will be made a part of the record of the hearing. We provided the lights there to kind of give you a guideline to see how the 5 minutes is moving along.

Our witnesses today, the first one is a very good friend of mine and colleague of mine from California, Ken Calvert, who represents the 44th District. He was first elected to Congress in 1992. Rep Calvert is a graduate of San Diego State University, where he received his bachelor of arts degree in economics; a former small business owner, employer of 17 years, and currently sits on the House Committee on Appropriations.

Mr. Barry Ruttenberg serves as the 2011 first vice president of the board of National Association of Home Builders. He also is president of the Barry Ruttenberg & Associates, Incorporated, in Florida, which has developed more than 1,000 homes in the Gainesville area. He is a graduate of Northwestern University and earned his MBA from Harvard University. I won't hold that against you.

Mr. Craig Miller is the former president and chief executive officer of Ruth's Chris Steakhouse, Incorporated, and was the founder and chairman of the Miller Partners Restaurant Solutions. From May 2005 to May 2006, Mr. Miller served as chairman of the National Restaurant Association, and he holds a bachelor's degree from the University of Central Florida.

And our fourth witness, Ms. Tyler Moran, is policy director at the National Immigration Law Center, where she coordinates the development and implementation of the center's policy agenda. Prior to being appointed policy director, Ms. Moran directed the National Immigration Law Center employment policy work.

With that, we will start with my friend from California Mr. Calvert.

TESTIMONY OF THE HONORABLE KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CALVERT. Thank you, Mr. Chairman, and I apologize in advance if I have to leave. We are having a markup at the present time, so I may have to go for a vote before questions. Hopefully I will be able to be here for the entire hearing.

I would like to thank you and my good friend Chairman Gallegly, Ranking Member Lofgren, the entire Subcommittee for inviting me to testify on the Legal Workforce Act, which would require employers to conduct mandatory employment eligibility verification. I would like to thank Chairman Smith for the hard work that he and his staff have put into the Legal Workforce Act.

As mentioned, before I came to Congress, I operated several restaurant businesses. I was required by law to hire a legal workforce, but there was no tool available to determine if identifying documentation presented at the time of employment was fraudulent. As someone here who has actually owned a small business and employed people, I am somewhat offended to say that I would actively illegally—or businessmen in general would go off the books and hire people. By the way the illegal element would be involved in

doing such a thing is pretty bad. Most small businessmen are honest people, and they would do the right thing.

When I first created employment verification in 1996, we wanted to build a system that would utilize existing information processes that were reliable, fair and simple to use. At that time and still today, every employer is required to file an I-9 form on paper identification documents. The solution was simple: Provide employers a way to check that a given name and a Social Security number match government records.

Today E-Verify has over 268,000 employers, representing 900,000 hiring sites. In fiscal year 2011, they have documented more than 2.9 million queries run through the system.

The Legal Workforce Act would essentially make E-Verify mandatory by requiring the Secretary of the Homeland Security to implement a verification process for a mandatory employment verification. Of the millions run through the computer E-based system—let us get this off the table about this error rate. Of the millions run through the E-verification system, 98.3 percent of employees are instantly verified, instantly. Individuals who are given a tentative nonconfirmation are given 8 business days to contact the Social Security Administration or Department of Homeland Security regarding their case.

Currently 1 percent, 1 percent, of all queried employees choose to contest the E-Verify result, and only one-half of them, that is 1/2 of 1 percent, are successful in contesting that the government's information was incorrect. E-Verify is doing its job it was intended to do: denying employment to people in the United States not authorized to work. E-Verify is ready for mandatory use.

The Legal Workforce Act would phase in mandatory requirement over 24 months for most employers, with the exception for agricultural labor, which will be given 36 months to comply. As a Member from an agricultural State, as is the Chairman, I think it is important to ensure our agricultural community has the labor they need. I support parallel legislation to provide a workable guest labor program that includes the necessary safeguards to ensure that guest workers leave on time. This should be easier to do, because with mandatory employment verification, guest workers will not be able to secure a legal job in the United States after their seasonal work visa expires.

The Legal Workforce Act also implements worker protections for mismatched Social Security numbers and use of multiple Social Security numbers. The bill provides a good faith exemption for employers who use the program, while increasing the penalties for employers who knowingly, knowingly, hire illegal immigrants.

The Legal Workforce Act is a thoughtful, comprehensive approach to mandatory employment verification, and E-Verify is ready to fulfill that obligation. America is ready for mandatory employment verification. Over 80 percent of Americans support this program, as mentioned by the Chairman. Employers are required by law to hire a legal workforce, and mandatory E-Verify will ensure they are complying with the law.

While the legal name of the current program is the basic pilot program, the effective brand name is E-Verify. Many businesses have incorporated the term "E-Verify" into their business and mar-

keting plans. I would strongly suggest we enshrine that name to provide clarity and continuity for businesses currently using E-Verify.

E-Verify is an extremely effective program, as we have seen from recent actions all over the country. Arizona to Rhode Island, mandatory employment verification is quickly becoming a reality.

As Members of Congress responsible for controlling the border and enforcing legal employment, let us build upon what works and give the American people what they want, a Federal law mandating employment verification.

Thank you, and I will be happy to answer any questions.

Mr. GALLEGLY. Thank you, Ken.

[The prepared statement of Mr. Calvert follows:]

TESTIMONY OF CONGRESSMAN KEN CALVERT

Judiciary Subcommittee on Immigration Policy and Enforcement

June 15, 2011

Hearing on the "Legal Workforce Act"

I would like to thank my colleague from California, Chairman Gallegly, Ranking Member Lofgren, and the entire subcommittee for inviting me to testify on the Legal Workforce Act, which would require employers to conduct mandatory employment eligibility verification. I would also like to thank Chairman Smith for the hard work both he and his staff have put into the Legal Workforce Act.

Before I came to Congress, I owned and operated several restaurant businesses. I was required by law to hire a legal workforce but there was no tool available to determine if the identifying documentation presented at the time of employment was fraudulent. When I first created employment verification in 1996, I wanted to build a system that would utilize existing information and processes that was reliable, fair and simple to use.

At that time, and still today, every employer is required to file an I-9 form based on paper identification documents. My solution was simple: provide employers a way to check that a given name and Social Security number match government records. Today, the E-Verify program has over 268,000 employers representing 900,000 hiring sites. In fiscal year 2011, there have been more than 10.9 million queries run through the system. The Legal Workforce Act would essentially make E-Verify mandatory by requiring the Secretary of Homeland Security to implement a verification process for mandatory employment verification.

Of the millions of queries run through the computer based E-Verify system, 98.3% of employees are instantly verified. Individuals who are given a tentative non-confirmation are given eight business days to contact SSA or DHS regarding their case. Currently one percent of all queried employees choose to contest an E-Verify result and only half of them - **point five percent** - are successful in contesting that the governments information was incorrect. E-Verify is doing the job it was intended: denying employment to people in the United States not authorized to work.

E-Verify is ready for mandatory use. The Legal Workforce Act would phase in the mandatory requirement over 24 months for most employers with the exception for agricultural labor which will have 36 months to comply. As a member from an agriculture state, I think it is important to ensure our agriculture community has the labor they need. I support parallel legislation to provide a workable guest worker program that includes the necessary safeguards to ensure that guest workers leave on time. This should be easier to do because with mandatory employment verification guest workers will not be able to secure a legal job in the U.S. after their seasonal work visa expires.

The Legal Workforce Act also implements worker protections for mismatched Social Security numbers and use of multiple Social Security numbers. The bill also provides good faith exemptions for employers who use the program while increasing the penalties for employers who knowingly hire illegal immigrants.

The Legal Workforce Act is a thoughtful and comprehensive approach to mandatory employment verification and E-Verify is ready to fulfill the obligation. America is ready for mandatory employment verification: employers are required by law to hire a legal workforce, and mandatory E-Verify will ensure that they are complying with the law.

While the legal name of the current program is "Basic Pilot Program," the effective brand name is E-Verify. Many businesses have incorporated the term "E-Verify" into their business and marketing plans. I would strongly suggest that we enshrine the name in law to provide clarity and continuity for businesses currently using E-Verify.

E-Verify is an extremely effective program and as we've seen from recent actions all over the country, from Arizona to Rhode Island, mandatory employment verification is quickly becoming a reality. As Members of Congress responsible for controlling our borders and enforcing legal employment, let's build upon what works and give the American people what they want: a federal law mandating employment verification.

Thank you again for inviting me to testify and I welcome any questions you may have.

Mr. GALLEGLY. Mr. Ruttenberg.

TESTIMONY OF BARRY RUTENBERG, FIRST VICE CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. RUTTENBERG. Thank you, Chairman Gallegly, Ranking Member Lofgren, Chairman Smith and Members of the Subcommittee.

Thank you for this opportunity to testify on H.R. 2164, the Legal Workforce Act. My name is Barry Rutenberg, and I am the first vice chairman of the Board of Directors of the National Association of Home Builders. NAHB appreciates the efforts of Chairman Smith and the Subcommittee to work proactively to craft E-Verify legislation that will be workable for U.S. employers.

The immigrant community has historically played a vibrant and important role in the construction industry, comprising about 21 percent of our workforce. However, the influx of illegal immigrants into the U.S. is a concern, and NAHB members do not support illegal immigration. Our members do seek workable solutions to effective employment verification, such as the legislation being considered today which would mandate E-Verify for all employees.

As Congress considers mandating E-Verify, we want to share some of our key concerns. First, the program must continue to work on the direct employer/employee relationship, holding every employer accountable for the work authorization status of direct employees, only those whom they had the power to hire and fire. The legislation maintains current law in this regard, and NAHB strongly supports that decision.

Second, the legislation must require all entities who refer workers to employers, like union hiring halls and day labor centers, to also verify workers. We are pleased to note that legislation does create that requirement.

And third, legislation must have a strong preemption clause creating one set of Federal rules and preventing State and local governments from creating their own patchwork of differing verification requirements. NAHB is pleased to note that the legislation includes language to expressly preempt State or local laws relating to hiring, employment or status verification of unauthorized aliens; however, we urge the Subcommittee to provide clarity regarding limits to the States' use of business licensing laws to ensure that States through licensing do not create a new conflicting series of immigration regulations related to enforcement.

Fourth, a mandatory program must contain a robust safe harbor for employers in order to ensure that those who use the system in good faith will not be held accountable by DHS or by employees for errors in the E-Verify system. The draft legislation provides employers with a good faith defense to prosecution and limits employees to recourse under the Federal Tort Claims Act. NAHB believe that these safe harbors fairly protect employers who are using the system in good faith.

And fifth, any attempt to mandate E-verify must include provisions to ensure the system is workable for all U.S. employers, including small employers. To that end E-Verify must permit telephonic access to the system so that employers who do not have high-speed Internet access, who do not work in traditional office settings can comply. The legislation specifically requires the system to operate through toll-free telephone and other toll-free electronic media.

E-Verify should allow employers to begin the worker verification process as soon as possible in the hiring process to provide businesses with enough time to rectify a tentative nonconfirmation before an employee's start date. This will also prevent instances

where an employee has completed training and started working, only to be terminated due to the belatedly received final nonconfirmation.

NAHB appreciates that the final legislation provides employers with the opportunity to begin the E-Verify process on the date on which an offer of employment is extended, and also provides that the job offer can be conditioned on final verification of the worker's work authorization.

A mandatory E-verify system must be phased in based on business size, with larger, better equipped employers first. This will provide a test of E-Verify's ability to handle increased demand and provide smaller employers time to learn about the system.

The draft legislation has a 2-year phase-in based on business size. With over 7 million employers being brought into the system and the possibility of overload issues occurring, NAHB urges the Subcommittee to consider extending the total phase-in time period.

In conclusion, NAHB recognizes the importance of the employer's role in addressing the illegal immigration issues and looks forward to working with you as you move forward on this legislation. While mandatory E-Verify must be a first step toward addressing illegal immigration issues, it should not be the only step. Congress must improve the Nation's broken immigration and visa system to find a better way for workers to legally enter the U.S. For employment when our economy needs them.

I appreciate the opportunity to speak with the Subcommittee today, and I look forward to any questions.

Mr. GALLEGLY. Thank you, Mr. Rutenberg.

[The prepared statement of Mr. Rutenberg follows:]



Testimony of Barry Rutenberg

On Behalf of the

National Association of Home Builders

Before the

House Judiciary Committee
Subcommittee on Immigration Policy and Enforcement

Hearing on

"*Legal Workforce Act*"

June 15, 2011

Chairman Gallegly, Ranking Member Lofgren, Chairman Smith and Members of the Subcommittee on Immigration Policy and Enforcement, on behalf of the 160,000 members of the National Association of Home Builders (NAHB), I want to thank you for this opportunity to testify today on the potential for a mandatory E-Verify program and the employer community's role in addressing the illegal immigration issue. My name is Barry Rutenberg and I am the First Vice Chairman of the Board of the National Association of Home Builders, and a single family builder from Gainesville, Florida.

The immigrant community has throughout our nation's history played a vibrant and important role in the construction industry. Each wave of immigrants—from Irish, to Italian, to German, to Hispanic—have been active participants in the industry, often bringing their trade-related expertise and skills to enhance the quality of our finished product. Immigrant workers and American workers working alongside of one another is not a new development for us, and we are proud to say that many immigrants who have come to America and joined our industry have been able to develop their skills, start their own industry-related businesses, and get a firm foothold in the American middle class. There has always been a significant presence of immigrants in the industry, and in 2009 foreign-born workers accounted for almost 21% of the workforce in residential construction nationwide.

However, the influx of illegal immigrants into the United States is a concern for all business owners, and the members of the National Association of Home Builders do not support illegal immigration. For many years, NAHB has supported Congressional efforts to examine the illegal immigration issue and find ways to appropriately address the problem, and we continue to believe that a significant driver of illegal immigration is the broken legal immigration and visa system in the United States.

Perhaps a more immediate and integral part of addressing the problem of illegal immigration is investigating the ways in which the employer community can and should be playing an enhanced role to ensure that all workers in the United States are work-authorized. Without a doubt, the American public has been clear that it believes employers must step forward to be part of the solution to the problem. As you know, employers already play a role—and have since 1986—by complying with the I-9 process, which requires them to review the identity and work authorization documents of each new hire. Yet given the numbers of illegal immigrants estimated to be in the U.S. workforce, it is clear that the I-9 system is not sufficient to track and identify those who are not work-authorized.

The voluntary Basic Pilot Program, now known as E-Verify, has increasingly become an attractive tool for employers to verify work authorization. Given the advancements in everyday

technology and the average American's increasing access to computers, the E-Verify program is much more accessible than it was only a few years ago. Yet NAHB, and the employer community generally, has often expressed grave concerns about mandating the E-verify program for all U.S. employers. Many of those concerns have come from a natural business and employer apprehension over increasing the layers of federal bureaucracy, paperwork, and regulation of their hiring decisions. Many employer concerns have also been about the question of how to successfully mandate E-Verify without addressing issues like the legal flow of future workers; but concerns have also frequently been related to the workability and efficiency of an E-Verify program that was suddenly expanded from a small, voluntary program to one mandated for all U.S. employers.

As Congress looks into mandating E-Verify, and the Subcommittee works to prepare legislation for consideration in the House this year, we hope that you will take into consideration the key concerns of NAHB as they relate to ensuring that any mandatory E-Verify program is fair, efficient and workable for all U.S. employers and workers.

First, NAHB strongly believes that the program must continue to focus on the direct employer-employee relationship; holding every U.S. employer accountable for the identity and work authorization status of their direct employees. NAHB and the construction industry are not alone in their desire to ensure that an employer's responsibility in the E-Verify system is held to those employees whom they actually have the power to hire and fire. Under current law, employers are responsible for verification of the identity and work authorization status of their direct employees only. And, while employers do not verify the employees of subcontractors, they are precluded from knowingly using unauthorized subcontracted workers as a means of circumventing the immigration law. The draft legislation maintains current law in this matter, and NAHB strongly supports that decision.

Second, NAHB strongly believes that those entities whose primary purpose is to refer or supply workers to employers should also be required to verify the identity and work authorization of those workers before they are referred or supplied to an employer, regardless of whether that service is done for a fee. Unauthorized workers should not be able to make use of state hiring agencies, union hiring halls, and day laborer centers as a facilitating method of gaining employment. And, employers should not be put into the difficult position of going through the effort and expense of obtaining a worker through one of these entities only to find out after the fact that the worker is unauthorized.

The draft legislation currently under consideration requires that all entities who refer workers must also utilize the E-Verify system. NAHB supports this concept, and urges the Subcommittee to endorse this effort to make every entity accountable for the verification of workers that they refer for employment.

Third, NAHB strongly believes that any legislation which mandates the use of E-Verify by all U.S. employers must include a strong pre-emption clause, preventing state and local governments from creating and enforcing their own versions of verification requirements for employers. Many employers have already faced this problem as a number of states and localities have adopted E-Verify mandates, each mandating the program in subtlety different ways, applicable in differing circumstances, and for different employers. Given the recent Supreme Court decision in *Chamber of Commerce v. Whiting*, NAHB believes that many states will speed up consideration of their own verification laws. The result will be a patchwork quilt effect of varying laws which will be of great concern to employers who do not want to be placed into a position where compliance with one state's law could potentially make them non-compliant with federal requirements, or the requirements of another state or locality where the employer may have operations.

For this reason NAHB strongly believes that any federal legislation that mandates the use of E-Verify must include pre-emption language sufficient to address this issue. If employers are going to be required to use the federal E-Verify program, they must be assured there are only one set of rules needed for compliance: those established by the federal government that are applicable nationwide, and not a series of various conflicting state and local laws. Therefore, NAHB is pleased to note that the draft legislation includes language that would preempt any "State or local law, ordinance policy or rule....relate[d] to the hiring, continued employment, or status verification for employment eligibility purposes of unauthorized aliens."

We note in addition, however, that the language goes further to allow states and localities to use their authority over business licensing and similar laws to penalize employers who do not comply with this legislation. On the surface, this seems to be a reasonable use of state authority in the mandated federal program. However, we are concerned this language could open the door for every state to develop its own enforcement programs and requirements. There could be potential for finding ourselves in the same position we are in now: with a patchwork quilt of differing state-level enforcement regulations of the federal mandate, all related to business licensing. We look forward to working with the Subcommittee to ensure that the role of the states in this pre-emption language is clear.

Fourth, NAHB strongly believes that any mandatory federal E-Verify program must contain a robust safe harbor for employers in order to ensure that those who use the system in good faith will not be held accountable by the Department of Homeland Security, or by the employer's workers, for errors in the E-Verify system. While the agencies have worked aggressively over the past few years to minimize the error rates in the E-Verify system, NAHB believes that universal use of E-Verify by all employers will necessarily lead to a significant increase in errors as more and more workers are run through the system, testing the limits of its capacity. It is

vitally important that employers are assured that their good faith efforts to comply will provide them with a safe harbor from prosecution by DHS, or from a discrimination lawsuit by an employee, if mistakes are made due to system error. An employer who hires a worker who has cleared E-Verify, and who later turns out to be unauthorized, or who terminates an actually legal worker that E-Verify says is unauthorized should not be penalized because the federal database was wrong.

The draft legislation appears to address NAHB's concerns with these issues by providing employers with a good faith defense, and by limiting recourse for workers who believe they were unfairly terminated due to a database error to action under the *Federal Tort Claims Act*. NAHB believes that this safe harbor provides a balance that fairly protects 'good actor' employers who are using the system in good faith, and any workers unfairly terminated due to system error.

Tangential to NAHB member concerns about a robust safe harbor is one of the most significant and biggest criticisms of the E-Verify program—and one that is not easily fixed: the issue of identity theft. Under the law, employers are required to use the "reasonable person test" when reviewing identity and work authorization documents. When a new hire presents documents that would to a reasonable person appear to be genuine documents, an employer must accept them, and the employer may not demand additional documents to test their validity.

However, E-Verify as it is currently structured can only confirm work authorization based on those documents that are presented. E-Verify cannot confirm whether the person presenting these documents *is* in fact the same person represented in the documents. The issue of identity fraud must be better addressed by Congress to ensure that a mandated, universally-used E-Verify system is not rendered useless by a resultant upswing in the utilization of false documents that reflect information gleaned from the stolen identities of U.S. citizens and other authorized workers. This is further reason why NAHB members feel so strongly about having an effective safe harbor in any new legislation. Until E-Verify is a system that can detect cases of fraud, employers who use E-Verify should not be held accountable for unauthorized workers who have cleared the system because of identity theft.

The draft legislation addresses this issue by creating a system that allows for better coordination and understanding on the part of the government in circumstances where identities are being used multiple times with multiple employers. The legislation also establishes a biometric employment eligibility verification pilot program. While NAHB has not formed an opinion as to the sufficiency of these specific efforts, we do strongly support the efforts of the drafters to address the issue of identity theft.

Fifth, any attempt to mandate E-Verify must include provisions to ensure that the system is workable for all U.S. employers, including small employers. According to NAHB's most recent

membership census, approximately 84% of our members have ten or fewer employees. It is vitally important that a mandatory E-Verify system recognize some basic facts: not all U.S. employers own computers or are computer savvy, not all U.S. employers conduct business or hiring in an office setting, and not all U.S. employers have a human resources or a legal department. If E-Verify is mandated, it must work for the smallest U.S. employer, as well as the largest. NAHB believes that several key components must be in place in order for the smaller employers in our industry to effectively utilize the E-Verify system:

· E-Verify must permit telephonic access to the system. While more Americans have access to computers and smart phones, the government cannot assume that every employer has closed the "technology gap" and has a high-speed internet connection. Also, many employers in our industry spend most of their days—not at computers—but working out of their pickup trucks or on active jobsites. To comply with E-Verify, these employers must have access to the system over a telephone.

The draft legislation specifically provides that the system operate "through a toll-free telephone and other toll-free electronic media". NAHB appreciates the drafters' acknowledgement of the technological diversity among small businesses. NAHB further appreciates the drafters' acknowledgement that the system should not be operated on a fee-for-use basis. NAHB supports establishing a system that is free for employers, given concerns that a fee-based system—that charges an employer each time they verify a worker—might encourage some employers to go around the system.

· E-Verify should allow employers to begin the worker verification process as soon as possible in the hiring process. Under a mandatory E-Verify system, backlogs of tentative non-confirmations may be likely. Employers should have the opportunity to begin the verification process as soon as possible, thus allowing businesses enough lead time to handle tentative non-confirmations, to ensure these are rectified before the employee's start date. This will also work to prevent instances where an employee has completed training and started critical job functions, only to necessarily be terminated at this late date because a final non-confirmation was belatedly received.

The draft legislation clearly creates an expanded opportunity to begin the verification earlier in the hiring process by allowing employers to conduct verifications as early as the application stage. NAHB appreciates the drafters' acknowledgement that commencing the verification process earlier will help to make a smoother hiring process for both the employer and worker. However, we do have some questions about how other requirements in the draft legislation would work for employers who choose to verify during the application stage.

The draft legislation requires employers to retain copies of the completed verification form for five years following the date of "recruiting" the individual. NAHB has concerns that this would require employers who verify the work authorization of job applicants to maintain verification paperwork for five years on every person who applies for a job, regardless of whether they are hired by the company.

The draft legislation also states that "in no case shall an employer terminate employment of an individual" because that individual has received a tentative non-verification (TNV) from the E-Verify system. While NAHB supports the concept that an employer should never terminate an employee because of a TNV, the draft legislation is silent on whether an employer would have the right not to pursue a job *applicant* who has received a TNV. Would employers be required to await final confirmation or non-confirmation for each job applicant before deciding whether they want to move forward with an applicant? NAHB looks forward to working with the Subcommittee to address and clarify our questions on these issues.

· A mandatory E-Verify system must be phased in based on business size, ensuring that larger employers—who have human resources and legal departments—enter the system first, and then gradually bringing in smaller and smaller businesses in future phases. NAHB members, as previously stated, typically have ten or fewer employees and their average annual gross receipts as a business are just under $1 million. NAHB remains concerned that mandatory, universal E-Verify usage will place strains on system capacity and functionality. Moving the best-equipped businesses into the system first will provide a test of E-Verify's ability to handle increased demand, and will ensure the transition to universal use is not short-circuited by a systemic failure. A reasonable phase-in period will also provide smaller employers time to learn about the new E-Verify requirements and how to use the online or telephonic system.

The draft legislation provides for a phase in of employers based on size, but one that only extends for two years. Given the need to bring over seven million employers into the system, and the strong likelihood that the system could become encumbered with a backlog and errors as it adjusts to the higher usage, NAHB urges the Subcommittee to consider extending the total phase-in time period to at least four years.

· As for future changes in the E-Verify system (e.g., a future decision by the Secretary to eliminate the use of a certain verification document), the government must create a better notification system beyond a simple notice in the *Federal Register*. Small businesses, for the most part, have never heard of the *Federal Register* and do not have ready access to or read the *Federal Register*. There must be a broader effort to inform and educate small businesses about changes that are to be made in the program. NAHB urges the Subcommittee to consider including in either bill language or report language information on how an employer would be notified and educated about future changes beyond a simple *Federal Register* notification.

· It is vitally important that any mandatory E-Verify program's enforcement component allow employers the ability to fix paperwork errors, rather than simply being fined immediately for a mistake that was made as part of a good faith effort to comply. Given the fact that most small businesses do not have human resources departments, it is essential that these small employers be given a fair opportunity to correct paperwork- related errors.

The draft legislation provides an exemption from penalty for an initial good faith violation and also provides that the Secretary of Homeland Security must give employers no less than 30 days to correct a paperwork violation if the violation was made in good faith. NAHB strongly supports allowing employers who are acting in good faith a 30 day window to fix paperwork errors.

Conclusion

NAHB recognizes the importance of the employer's role in addressing the illegal immigration issue. Over the years, as more and more states have taken it upon themselves to pass their own versions of mandatory E-verify laws, it has become increasingly obvious to our members that a single, federal requirement is the best way to address the issue to avoid confusion, and resultant compliance failures. Using E-Verify, provided it is fair, efficient, and workable, would greatly enhance employers' ability to determine who is work-authorized in the United States, thus making federal immigration law much more viable and effective.

NAHB looks forward to working with you as you seek to advance mandatory E-Verify legislation, and we hope to play a productive role in not only creating that fair, efficient and workable system, but also in doing our part to help address the illegal immigration issue through creating an enhanced role for employers in the work authorization program. However, we also continue to strongly believe that Congress should not stop in its efforts to address immigration issues by only enacting a mandatory E-Verify program. E-Verify may be a first step, but it should not be the only step. It is vitally important that Congress continue to work towards a revision and improvement of the nation's broken immigration and visa systems, and to seek a pathway for workers to legally enter the United States for employment when the economy needs them.

I appreciate the opportunity to speak with the Subcommittee about our thoughts on the possibility of a mandatory E-Verify program, and we look forward to continuing to work with you as this issue moves forward.

Mr. GALLEGLY. Mr. Miller.

TESTIMONY OF CRAIG S. MILLER, CHAIR, NATIONAL RESTAURANT ASSOCIATION (2005–2006), CURRENT MEMBER, BOARD'S JOBS AND CAREERS COMMITTEE

Mr. MILLER. Good morning, Ranking Member Lofgren and distinguished Members of the Subcommittee, thank you very much for allowing me to testify today.

Mr. GALLEGLY. Mr. Rutenberg, could you turn your mic off? Thank you very much.

Mr. MILLER. I could run a dishwasher, but these microphones sometimes.

Distinguished Members of the Committee, thank you for allowing me to testify today on behalf of the National Restaurant Association on the Legal Workforce Act, which would create a national E-Verify mandate. My name is Craig Miller. I am a lifetime restaurateur that has directly created over 40,000 jobs during my restaurant career. I served as chairman of the board of directors of the National Restaurant Association from 2005 to 2006, and I am currently serving as a member of the Board's Jobs and Careers Committee, which has policy oversight at the association over employment verification issues.

For many years the National Restaurant Association has provided input on the best ways to improve the E-Verify program. After reviewing a draft of the Legal Workforce Act, we are pleased to see that our concerns are being taken seriously, while so many other attempts to move forward without careful consideration of the impact of such a mandate on employers could have had devastating effects.

As you may know, many of our members and their suppliers have been earlier adopters of the voluntary E-Verify program. Some owners have been requiring the use of E-Verify by their operations back as early as 2006. Our members use the program, and the association itself also uses the program and have found E-Verify to be both cost-effective and fast in helping guarantee a legal authorized workforce.

I would like to outline some improvements that the Federal E-Verify program should have to gain broad support within our industry and compare those potential improvements to the version of the Legal Workforce Act we have been able to review.

First, there needs to be one law of the land. Out of frustration, States and local communities have responded to the lack of action at the Federal level with a patchwork of employment verification laws, leaving employers who must deal with a broken legal structure exposed to unfair liability and the burden of numerous State and local laws. Under this act States and localities are preempted, preempted, from legislating different requirements or imposing additional penalties. But they may decide to revoke a business license for failure to participate in the program as required under Federal law.

Second, special consideration for small business must be made. Smaller employers do not have universal access to high-speed Internet connections, are less likely to have human resource staffs or legal staffs, and in our industry, unlike others, management

does not work at a desk or behind a computer all day. Thus we are glad to see that the Legal Workforce Act calls for the creation of a toll-free telephonic option for doing E-Verify inquiries and allows, but does not mandate, the copying of additional documents.

Third, to maintain an equal playing field, the association believes an E-Verify mandate should be applicable to all employers in our industry, all employers. However, we understand that small businesses may need more help and more time to adapt. Thus we are encouraged by the Legal Workforce Act tiered approach for rolling out E-Verify, starting with employers having more than 10,000 employees and ending 3 years after enactment with agricultural employees.

As the president and CEO of Ruth's Chris Steakhouse, I implemented E-Verify in 2006, and I can tell you it works.

Fourth, there is a good tool that employers should be allowed to use that is unavailable under the current E-Verify framework. Currently employers are not allowed to preverify prior to hire. In essence, a business owner has to hire someone before they can even check whether they are legally able to work in this country. The association supports the options to check the employment authorization status of job applicants at the time of a job offer. Encouraging job applicants to self-check and allowing them to fix any errors before they begin employment is a very good approach.

Fifth, the association supports the inclusion of the strictly voluntary reverification provision, but objects to mandatory reverification provisions of the entire workforce. We have been using I-9s since the late 1990's. One of the association's foremost concerns is to ensure that any new E-Verify mandate does not become overly costly or burdensome for our industry and others.

Sixth, the employer needs to be able to affirmatively rely on the responses to the inquiries into the E-Verification system. With the rate of acceptance now well into over 99 percent, as Chairman Smith said, employers would like to have the tools to determine in real time or near real time the legal status of a prospective employee or applicant to work. The association appreciates that, as we understand the Legal Workforce Act, 13 days after the initial inquiry there will be a final response for those that do not come back as work authorized during the initial inquiry.

The association agrees that employers who knowingly employ unauthorized aliens ought to be prosecuted under the law. Respect for the law is very important. The current "knowing" legal standard for liability, also found in the Legal Workforce Act, is fair and objective and gives employers some degree of certainty regarding their responsibilities under the law and should therefore be maintained. Penalties should not be inflexible, and we would urge you to incorporate statutory language that allows enforcement agencies to mitigate penalties based on the size of the employer and the good-faith effort that employers are taking to comply, rather than tying to specific, nonnegotiable dollar amounts.

Eight, the association objects to the expansion of antidiscrimination provisions beyond what is found in current law. However, we understand that those wrongfully harmed by the system should have some mechanism to seek relief. Thus we support the Legal

Workforce Act's provision that allows these wrongfully harmed employees to seek relief under the Federal Torts Claims Act.

Ninth, the Federal Government will need adequate funding to maintain and implement an expansion of E-Verify. The cost should not be passed on to the employer with fees or inquiries or through other mechanisms. This association supports the Legal Workforce Act provision that keeps the requirements as in current law where an employer does not need to keep copies of driver's license, Social Security cards, et cetera.

Mr. GALLEGLY. Mr. Miller.

Mr. MILLER. Part of the government's effort to roll out E-Verify to all employers should be closing loopholes for unauthorized workers. In the National Restaurant Association's opinion, notwithstanding a few clarifications, a broad Federal E-Verify mandate that is both fast and workable for business of every size under practical, real-world working conditions. I thank you for the opportunity to speak with you today.

Mr. GALLEGLY. Thank you, Mr. Miller.

[The prepared statement of Mr. Miller follows:]

NATIONAL RESTAURANT ASSOCIATION®

Statement
On behalf of the
National Restaurant Association

ON: THE LEGAL WORKFORCE ACT

TO: U.S. HOUSE OF REPRESENTATIVES, JUDICIARY SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

BY: CRAIG S. MILLER
CHAIR OF THE NATIONAL RESTAURANT ASSOCIATION (2005-2006)
CURRENT MEMBER OF THE BOARD'S JOBS & CAREERS COMMITTEE

DATE: JUNE 15, 2011

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Statement on: "The Legal Workforce Act"
By: Craig S. Miller
On Behalf of the National Restaurant Association
House Judiciary Subcommittee on Immigration Policy and Enforcement
2141 Rayburn House Office Building
June 15, 2011

Good Morning Chairman Gallegly, Ranking Member Lofgren, and distinguished members of the Subcommittee. Thank you for allowing me to testify today on behalf of the National Restaurant Association on the Legal Workforce Act, which would create a national E-Verify mandate.

My name is Craig Miller and I served as Chairman of the Board of Directors of the National Restaurant Association from 2005 until 2006. I am currently a member of the Board's Jobs and Careers Committee, which has policy oversight at the Association over employment verification issues.

The restaurant and food service industry is comprised of 960,000 restaurant and foodservice outlets employing 12.8 million people, which makes it the nation's second-largest private-sector employer. It is important to note that, despite its size, the industry is composed of predominately small businesses.

For years, the National Restaurant Association has provided input on the best ways to improve the E-Verify program. After reviewing a draft of the "Legal Workforce Act," we were pleased to see that our concerns are being taken seriously under consideration, while so many other attempts to move forward without careful consideration of the impact of such a mandate on employers could have devastating effects.

As you may know, many of our members and their suppliers have been early adopters of the voluntary E-Verify program—some owners have been requiring the use of E-Verify by their operations as early as 2006. When I was President and Chief Executive Officer of Ruth's Chris Steak House, I also implemented it in my company operations in 2006. The National Restaurant Association is also a user of E-Verify. Our members that use the program, and the head of Human Resources at the National Restaurant Association, have found E-Verify to be both cost effective and fast in helping guarantee a legally authorized workforce.

We realize that E-Verify is not infallible, as unauthorized workers using stolen or borrowed identifications might still pass an E-Verify check, but we support Congress' efforts to establish a more effective federal system for all employers.

For businesses across the country, particularly small businesses, it is imperative that any mandated E-Verify program be successful, efficient, and cost-effective within their own administrative structure. A federal E-Verify mandate would have an impact on the day-to-day activities, obligations, responsibilities, and exposure to liability of all restaurants, regardless of size.

To be clear, the Association believes that designing an employment authorization verification system is indeed, unequivocally, a federal role. Actions by 50 different states and numerous local governments in passing employment verification laws create an untenable system for employers and their prospective employees.

I would like to outline some improvements that the federal E-Verify program should have to gain broad support within our industry and compare those potential improvements to the version of the Legal Workforce Act we were able to review.

A WORD OF CAUTION

Back in 1986, businesses supported the first employer-run employment authorization verification system, which is what we have now. Some argue that the current "I-9" mandatory employment verification program was supported by business because employers wanted to have a tool to find out who was an unauthorized worker and use that information to force those workers to work longer hours and in poorer conditions. This is nonsensical given that most undocumented workers were legalized in the same legislation that created the current mandatory employment verification system.

I would expect similar arguments to be raised against our continued support for an improved federally-mandated E-Verify system. The truth is that employers are willing to do their part to address this controversial issue, as long as the system is fair and workable.

THERE SHOULD BE ONE LAW OF THE LAND

The current federal employment verification system is clearly in need of an overhaul. Out of frustration, states and localities have responded to the lack of action at the federal level with a patchwork of employment verification laws. This new patchwork of immigration enforcement laws expose employers, who must deal with a broken legal structure, to unfair liability and the burden of numerous state and local laws. A new federal E-Verify mandate must address this issue specifically, so employers will know with certainty what their responsibilities are under employment verification laws regardless of where they are located.

Under the Legal Workforce Act, as we understand it, states and localities are preempted from legislating different requirements or imposing additional penalties, but they may decide to revoke a business license for failure to participate in the program, as required under federal law. While we might prefer blanket preemption, we understand the need to reach a balance.

SPECIAL CONSIDERATIONS FOR SMALL BUSINESSES MUST BE MADE

Smaller employers do not have universal access to high speed internet connections, are less likely to have Human Resources or Legal staff, and, in our industry, management does not work at a desk or behind a computer all day. In fact, even some well known restaurants are composed of a collection of small franchisees that may or may not even

have a copier at the restaurant location. Thus, we were glad to see that the Legal Workforce Act calls for the creation of a toll-free telephonic option for doing E-Verify inquiries and allows, but does not mandate, the copying of additional documents. Unlike the current E-Verify, the mandate found in the Legal Workforce Act would permit a small restaurant to start using the program without the need to buy any new equipment or signing up for high-speed internet access.

ENFORCEMENT PROVISIONS MUST BE FAIR

Full and fair enforcement of an improved E-Verify system should protect employers acting in good faith. Businesses are overregulated and piling on fines and other penalties for even small paperwork errors is not the answer. The Legal Workforce Act states that an employer cannot be held liable for good-faith reliance on information provided through the E-Verify system. Furthermore, the Association was glad to see that the Legal Workforce Act provided relief from penalties for a first time offense, if the employer acted in good faith.

Under the Legal Workforce Act, as we understand it, employers would also be given at least 30 days to rectify errors. While the language in the legislation in this area may need some further clarification, it is certainly a step in the right direction. Any opportunity to rectify errors would protect employers that are doing their very best to comply in good faith with the myriad of federal regulations from unnecessary litigation.

NO EXEMPTIONS, BUT A REASONABLE ROLL-OUT OF E-VERIFY IS ENCOURAGED

To maintain an equal playing field, the Association believes an E-Verify mandate should be applicable to all employers in our industry. However, we understand that small businesses may need more time to adapt. Thus, we are encouraged by the Legal Workforce Act tiered approach for rolling out E-Verify, starting with employers having more than 10,000 employees and ending three years after enactment with agricultural employers.

One concern we do have with the roll-out in the draft we reviewed is that it dismisses the requirements of the Administrative Procedure Act (APA). It is vital that the government give employers an opportunity to comment on significant new regulatory requirements, before imposing those requirements upon businesses. The APA is extremely helpful in making sure that specific issues with proposed regulations are considered by the Administration, regardless of whether it is a Democrat or a Republican holding the executive office.

The Executive Branch sometimes tries to implement programs in conflict with the intent of Congress. The APA is a helpful check to overreaching by any Administration. If speed and the implementation timeline is the concern, the Legal Workforce Act could mandate deadlines for the publication of the regulations, instead of dismissing the APA's requirements altogether.

VERIFICATION OF POTENTIAL HIRES

There is a good tool that employers should be allowed to use that is unavailable under the current E-Verify framework. Currently, employers are not allowed to pre-verify, prior to hire. In other words, while an employer can check references, conduct drug tests, and background checks, before an individual is officially hired, the work authorization does not take place until the employee is officially on the books. Given that job applicants can now self-check, employers should be given authority to check work authorization status as early as possible and allow the employee to start working with the government to fix any discrepancies before they show up for their first day of work.

While the language in the draft we reviewed could be further clarified, particularly with regard to recordkeeping of job applicants ran through the system, but not chosen for employment, the Association supports the option to check the employment authorization status of job applicants before official hiring.

Two years ago, a restaurant owner from Arizona testified that in over fourteen percent (14%) of their queries, the initial response was something other than "employment authorized." When the initial response from E-Verify is something other than "employment authorized," and the employee has already been hired as mandated in current law, there are additional costs to the employer. Federal law requires that the employer continue to treat the employee as fully authorized to work during the time that the tentative nonconfirmation is being contested.

This means the employer cannot suspend the employee or even limit the hours or the training for the employee. Someone must monitor any unresolved E-Verify queries on a daily basis to make sure that employee responses are being made in a timely manner. Under current regulations, if an employee contests the tentative nonconfirmation, but does not return with a referral letter, the employer must re-check that employee's work authorization after the tenth federal work day from the date that the referral letter was issued.

Some restaurants are fortunate to have the staff to deal with these issues and allow for redundancy and backup. For smaller operations that do not have that luxury, the burdens are greater. Encouraging job applicants to self-check and allowing them to fix any errors before they begin employment is certainly the best approach.

VOLUNTARY REVERIFICATION SHOULD BE ALLOWED

The Association supports the inclusion of the strictly voluntary reverification provision, but objects to mandatory reverification provisions of the entire workforce. While some small size restaurants may not mind reverifying their workforce, all large-size operations—even those currently using E-Verify—that have contacted the Association list a mandatory reverification requirement as their number one concern.

For the industry's workforce, a restaurant is an employer of choice because they can take advantage of the flexible scheduling we offer, work only during school breaks or move between employers often. The nature of the restaurant business is such that it produces a great amount of movement of the workforce below management level, meaning that a mandatory requirement, in addition to being expensive, would also be redundant.

One of the Association's foremost concerns is to ensure that any new E-Verify mandate does not become too costly or burdensome for our members. Existing employees have already been verified under the applicable legal procedures in place when they were hired.

PRESERVE THE CONTRACTOR-SUBCONTRACTOR RELATIONSHIP

All employers should be held liable for the work authorization status of their own employees. Thus, as mentioned above, we oppose exemptions. However, the government should not create cross-liability by requiring employers to run the employees of other employers (those with whom they have a contract, subcontract or exchange) through E-Verify. As with current law, all employers who knowingly use subcontract labor to violate immigration laws should be prosecuted.

Similarly, the House voted overwhelmingly for an amendment to H.R. 4437 in 2005, H. Amdt. 664. This amendment is commonly known in the business community as the "Westmoreland Amendment." The language of the amendment would have ensured that contractors would not be held liable for the actions of a subcontractor, when the contractor is not aware that the subcontractor was hiring undocumented workers. H. Amdt. 664 passed by a vote of 270-174—a larger margin of support than was received by the underlying bill on passage. If a similar amendment came up during consideration of the Legal Workforce Act, the Association would encourage you to continue supporting this safe harbor language for contractors.

ROLE OF BIOMETRIC DOCUMENTS IN E-VERIFY

One of the main flaws in the current E-Verify system is the uncomplicated manner through which an undocumented alien can fool the system through the use of someone else's documents. The issues of document fraud and identity theft are exacerbated because of the lack of reliable and secure documents acceptable under the current E-Verify system.

Documents should be re-tooled and limited so as to provide employers with a clear and functional way to verify that they are accurate and relate to the prospective employee. There are two ways by which this can be done, either by issuing a new tamper and counterfeit resistant work authorization card or by limiting the number of acceptable work authorization documents to, for example, social security cards, driver's licenses, passports, and alien registration cards (green cards).

The draft we reviewed followed the latter approach with a voluntary biometric program available to employers. With fewer acceptable work authorization documents, the issue of identity theft can be more readily addressed.

INTER-AGENCY INFORMATION SHARING WITH EMPLOYERS

When an employer sends a telephonic or internet based inquiry, the system must not only be able to respond as to whether an employee's name and social security number matches, but also whether they are being used in multiple places of employment by persons who may have assumed the identity of other legitimate workers. However, an annual letter requesting that those with more than one job be run through E-Verify again would catch a high percentage of our workforce.

The Association's members have a high proportion of both students and part-time workers that have several jobs in any given year. The Association understands that this provision is trying to get at id theft and social security number misuse. However, the language we reviewed is too broad.

The Association suggests deleting that requirement, but having employers be notified when someone is first ran through the system if their social security number is being used in multiple places of employment. In the alternative, the language should be amended to request reverification only of those individuals with very unusual multiple uses of their social security numbers. The framework should create a threshold for reverification that reliably identifies a true pattern of id theft of a person's social security number. The legislation should not, unintentionally, target the millions of workers with more than one job.

AN E-VERIFY CHECK NEEDS TO HAVE AN END DATE

The employer needs to be able to affirmatively rely on the responses to inquiries into the E-Verify system. Either a response informs the employer that the employee is authorize and can be hired or retained, or that the employee cannot be hired or must be discharged. Employers would like to have the tools to determine in real time, or near real time, the legal status of a prospective employee or applicant to work.

The Association appreciates that, as we understand it, thirteen days after the initial inquiry there will be a final response for those that do not come back as work authorize during the initial inquiry. This will help avoid the costs and disruption that stems from employers having to employ, train, and pay an applicant prior to receiving final confirmation regarding the applicant's legal status. Employers cannot wait months for a final determination of whether they need to terminate an employee.

LIABILITY STANDARDS AND PENALTIES SHOULD BE PROPORTIONATE

The Association agrees that employers who knowingly employ unauthorized aliens ought to be prosecuted under the law. The current "knowing" legal standard, also found in the

Legal Workforce Act, for liability is fair and objective and gives employers some degree of certainty regarding their responsibilities under the law and should, therefore, be maintained. Lowering this test to a subjective standard would open the process to different judicial interpretations as to what an employer is expected to do. Presumptions of guilt without proof of intent are unwarranted.

Penalties should not be inflexible, and we would urge you to incorporate statutory language that allows enforcement agencies to mitigate penalties based on size of employer and good faith efforts to comply, rather than tying them to a specific, non-negotiable, dollar amount.

THE GOVERNMENT SHOULD ALSO BE HELD ACCOUNTABLE FOR E-VERIFY

The Association objects to the expansion of antidiscrimination provisions beyond what is found in current law. Employers should not be put in a "catch22" position in which attempting to abide by one law would lead to liability under another one. However, we understand that those wrongfully harmed by the system should have some mechanism to seek relief.

Thus, we support the Legal Workforce Act provision to allow those wrongfully harmed to seek relief under the Federal Torts Claims Act (FTCA). The government must be held accountable for the proper administration of E-Verify. FTCA provides a fair judicial review process that would allow workers to seek relief.

AN E-VERIFY MANDATE SHOULD NOT MEAN ADDITIONAL COSTS FOR EMPLOYERS

The federal government will need adequate funding to maintain and implement an expansion of E-Verify. The cost should not be passed on to the employer with fees for inquiries or through other mechanisms. Additionally, there should not be a mandatory document retention requirement, other than the form where employers record the authorization code for the employees they hire. Keeping copies of official documents in someone's desk drawer increases the likelihood of identity theft.

The Association supports the Legal Workforce Act provision that keeps the requirements as in current law, where an employer does not need to keep copies of driver licenses, social security cards, birth certificates, or any other document shown to prove work authorization. The fact that the information in these documents will now be run through the E-Verify program makes the need for making copies of these documents unnecessary.

AN EXPANSION OF E-VERIFY SHOULD NOT SERVE AS A BACK DOOR TO EXPAND EMPLOYMENT LAWS

The new system needs to be implemented with full acknowledgment that employers already have to comply with a variety of employment laws. Thus, verifying employment

authorization, not expansion of employment protections, should be the sole emphasis of an E-Verify mandate. In this regard, it should be emphasized that there are already existing laws that govern wage requirements, pensions, health benefits, the interactions between employers and unions, safety and health requirements, hiring and firing practices, and discrimination statutes.

The Code of Federal Regulations relating to employment laws alone covers over 5,000 pages of fine print. And, of course, formal regulations, often unintelligible to the small business employer, are just the tip of the iceberg. Thousands of court cases provide an interpretive overlay to the statutory and regulatory law, and complex treatises provide their own nuances. The Association is encouraged by the Legal Workforce Act's emphasis on keeping it simple—a workable, national E-Verify system, nothing more, nothing less.

PARTICIPATION LOOPHOLES IN THE SYSTEM SHOULD BE CLOSED

Part of a government effort to roll out E-Verify to all employers should be closing loopholes for unauthorized workers to get into the employment system. The Association is glad that the Legal Workforce Act requires state workforce agencies and labor union hiring halls to clear through E-Verify all workers whom they refer to employers.

For employers who receive workers through any of these venues, finding out that the worker is unauthorized after they are on the jobsite creates additional problems in addition to having to go find another worker. For example, with regard to hiring halls, it may also create problems with the labor union, depending on contract requirements. If any of these venues are going to refer workers to employers, they should ensure that those workers are work authorized before they do so.

LEGAL IMMIGRATION WILL STILL BE NEEDED

While this hearing is on employment verification, we must not forget that foreign born workers are an essential part of the restaurant industry's strength—complementing, not substituting, our American workforce. In general, historical immigration policies have brought vigor to the U.S. economy, as immigration creates growth and prosperity for the country as a whole.

During downturns in our economy, as is currently the case, fewer immigrants are needed. But, as the economy improves, operators expect to face a dwindling pool of potential native employees. The nation's long-term demographic shifts suggest that the challenge to recruit and retain employees in our industry will continue well into the future.

Historically, teenagers and young adults made up the bulk of the restaurant industry workforce, as nearly half of all restaurant industry employees were under the age of 25. Over the last several decades, this key labor pool steadily declined as a proportion of the total labor force. According to data from the Bureau of Labor Statistics, the 16- to 24-year-old age group represented 24 percent of the total U.S. labor force in 1978, its highest

level on record. However, by 2008, 16-to-24-year-olds represented only 14 percent of the labor force, and is projected to shrink to only 13 percent by 2018.

I hope that in the near future we can turn our collective attention to undoing the damage being done to the H-2b seasonal and temporary workers program by regulations coming out of the U.S. Department of Labor. The predictions in demographic shifts tell us that we will also need to create a legal channel for employers in the service sectors, such as restaurants and construction, to bring other than seasonal workers in a legal and orderly fashion. History tells us that when our economy picks up again, we will need those workers.

IN SUMMARY, THE LEGAL WORKFORCE ACT SHOWS THAT THERE IS LEADERSHIP IN WASHINGTON

It would have been easy to ignore the real concerns of the business community with a national E-Verify mandate and simply pass a law requiring its use. It is harder to pass a responsible E-Verify mandate that accommodates the different needs of the close to eight million employers in the U.S., which are extremely different in both size and levels of sophistication.

In the National Restaurant Association's opinion, notwithstanding the few clarifications and minor changes needed, the Legal Workforce Act reaches the right balance—a broad federal E-Verify mandate that is both fast and workable for businesses of every size under practical real world working conditions. Without the assurances and improvements to the E-Verify system found in the Legal Workforce Act, it should not be imposed on businesses.

I want to thank you for seeking our input and urge you to continue to engage the business community to create a workable E-Verify program for all employers, regardless of location, that accommodates their different needs. The National Restaurant Association stands ready to continue assisting in the process of tweaking and, then, moving the Legal Workforce Act forward.

Thank you again for this opportunity to share the views of the Association, and I look forward to your questions.

Mr. GALLEGLY. Ms. Moran.

TESTIMONY OF TYLER MORAN, POLICY DIRECTOR, NATIONAL IMMIGRATION LAW CENTER

Ms. MORAN. Thank you. Thank you, Chairman Gallegly and Ranking Member Lofgren, for the opportunity to testify on E-Verify and share my thoughts on the Legal Workforce Act. The National Immigration Law Center has analyzed and advocated for improvements in E-Verify since it was first implemented, and I have personally work on the program since 2003.

Despite what we have heard today, the Legal Workforce Act is not going to create jobs, but it will result in the loss of jobs for hundreds of thousands of American workers at a time of 9 percent unemployment. And because the bill doesn't legalize the 8 million undocumented workers in our economy, it is going to result in billions of dollars in lost tax revenue, in addition to criminalizing both farmers and workers in the agricultural industry. And as Mr. Conyers points out, it doesn't work. Fifty-four percent of undocumented workers who are put through the system are not detected.

So I want to start out by addressing the error rates. As a percentage it might sound very impressive and like the system works, but when you look at the actual numbers, it is very, very concerning. Making E-Verify mandatory is going to force anywhere conservatively from 1.2 million to 3.4 million workers to stand in line at a government agency or lose their jobs, and close to a million workers are going to lose their jobs.

And I think that the Legal Workforce Act is actually going to increase the number of workers that are going to lose their jobs because it now allows and even encourages prescreening of employment eligibility. Right now this is prohibited. It is very concerning that it would be allowed because currently of the employers that illegally prescreen workers and discover that their worker has an error, 33 percent of them never offer them the job. And of those workers who aren't offered a job, it takes almost half of them 2 months or longer to find their next job.

I want to highlight a story of a U.S. citizen that called us for help because she is one of 80,000 workers that lost their jobs in FY 2010. Her name is Jessica. She applied for a job at a good-paying telecommunications company in Florida. Her employer told her that she had an error, so she went to the Social Security Administration. She had her name changed, and so she had to fix the record. They told her it was okay.

She went back to the employer. The employer said, sorry, you are not confirmed. She drove back to Social Security. Social Security said, our records are fine, you should be fine. She went back to her employer, and the employer said, I am sorry, but the system can't confirm you, I have to fire you. Despite pleas to SSA, DHS, the toll-free hotline, she didn't get her job back, and she was out of work for 3 months over the Christmas holiday. And she now has a lower-paying job.

Like Jessica's experience with E-Verify, the Legal Workforce Act doesn't include any real due process for workers who were fired due to this system.

I also want to point out that this bill provides absolutely no protections for workers. Sixty-six percent of workers report that their employer has taken some type of adverse action against them by firing them, demoting them, giving them lesser pay. And, in fact, I think, Mr. Smith, you highlighted that if you reverify the workforce, you have to do so in a nondiscriminatory manner. That language is not in the final copy of the bill, if I am correct.

On the economy, if the Legal Workforce Act is passed without legalizing the workforce, the results are going to be devastating. Undocumented workers are not going to leave the country because of the Legal Workforce Act. They and their employers are simply going to move off the books into the cash economy, or they are going to be misclassified as independent contractors.

I think Ms. Lofgren noted the CBO score of $17 billion in lost tax revenue. Arizona, that law has been in effect for 3 years, and guess what? It hasn't worked. People didn't go home, they didn't leave the State. Eighty-three percent of workers still in the State, and they have gone off the tax rolls, or they have reappeared as independent contractors.

The Legal Workforce Act also fails to recognize the needs of agriculture, I think, as Mr. Conyers and Ms. Lofgren have pointed out, up to 75 percent of which is undocumented. There is this illusion of a carve-out that really isn't a carve-out because of the reverification. And the bill incentivizes companies to rely on labor contractors who aren't the true employer to get around the verification requirements. So while the bill goes after union hiring halls and day labor centers, it lets these labor contractors get off scott-free.

So what are the solutions? I know this bill has been sold as a commonsense solution, but it is anything but that. I know people are frustrated with unemployment, everyone is frustrated, but this just isn't the answer. It is just a fantasy to think that if we put an employment verification system on line that people are going to leave the country. It is just not going to happen. It is not how the labor market works, and I think Cato Institute has testified that it is not a 1-to-1.

So I have included a number of recommendations in my written testimony, but I want to highlight three for what it takes to create a system that works, and I have done a lot of thinking about this. One, you have to do it when you legalize the undocumented workforce so you don't just kick them off the rolls. An immigration reform bill would increase GDP by a cumulative amount of $1.5 trillion over 10 years.

Two, you have to have real due process. Workers cannot be fired because of a system and have no recourse.

And three, the system needs to be phased in over a longer period of time, with performance evaluation, database accuracy, employer misuse to ensure that it is working as you all actually intend it to.

So this bill doesn't make sense for a lot of reasons. Not only is it the antithesis of big government conservatism, but in a year when Congress is talking about cutting budgets and only funding high-performance programs, this program just doesn't make the cut. Thank you.

Mr. GALLEGLY. Thank you very much, Ms. Moran.

[The prepared statement of Ms. Moran follows:]

Statement of Tyler Moran
Policy Director, National Immigration Law Center

House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

Hearing on the Legal Workforce Act

June 15, 2011

Members of the Committee, thank you for the opportunity to provide my thoughts on E-Verify and the electronic employment verification system (EEVS) created in the Legal Workforce Act. My name is Tyler Moran, and I am Policy Director at the National Immigration Law Center (NILC). 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 policymakers, attorneys, workers' rights advocates, labor unions, government agencies, and the media. NILC has analyzed and advocated for improvements to the E-Verify program since it was first implemented in 1997 as the Basic Pilot program, and has extensive experience assisting advocates and attorneys in responding to problems with the program as it affects workers—immigrants and U.S.-born alike.

Overview

The Legal Workforce Act will mandate the use of an ineffective and expensive employment eligibility verification system that has grave consequences for our economy and unemployment rate. And despite all the rhetoric, the bill does nothing to create jobs and will even exacerbate the problems caused by our broken immigration system. The Legal Workforce Act will worsen unemployment rates, cause billions of dollars in lost tax revenue, and leave both employers and workers in the agricultural industry vulnerable. And this is all for a program that doesn't work: 54 percent of undocumented workers who are run through E-Verify are not detected.

Mandatory E-Verify has been part of every immigration reform bill since 2005, and NILC has worked on a bipartisan basis to craft proposals as part of immigration reform that ensure due process and privacy protections for all workers. The critical starting point for any mandatory E-Verify proposal, however, is a path to legal status for undocumented immigrants. Mandating E-Verify without creating a legal labor force will set the program up for failure. Eight million undocumented workers are not going to leave the country because the Legal Workforce Act is signed into law; they and their employers will simply move off the books into the cash economy. This massive shift into the underground economy will result in staggering losses of federal, state, and local tax revenues, including a drastic reduction in contributions to the Social Security trust fund. An unregulated economy will also provide unscrupulous employers with *more tools* to coerce and control workers. Instead of superimposing the EEVS created in the Legal Workforce Act onto 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 jobs and our economy. The Legal Workforce Act will do precisely the opposite. My testimony will focus on the role that undocumented workers play in our economy, concerns with the Legal Workforce Act, and specific recommendations to create a workable EEVS that are missing from Chairman Smith's bill.

The Legal Workforce Act ignores 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.[1] Our economy is highly dependent upon low-wage, low-skilled 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 workforce. 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.[2]

Arizona made E-Verify mandatory in 2008, and its experience provides valuable evidence about the implications of the Legal Workforce Act. First, many Arizona employers choose not to use E-Verify, despite the Arizona law's provisions mandating tough penalties, including fines and the suspension or revocation of business licenses, for failure to use the system. 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.[3] In this economic environment, employers are desperate to keep their workforces and, despite the stiff penalties, nearly 50 percent simply aren't complying with the law. Second, U.S. Immigration and Customs Enforcement (ICE) officials report that, of the 50 percent of Arizona employers who *do* comply with the mandate to use E-Verify, some unscrupulous employers coach employees whom they suspect are not work-authorized, helping them get around the system. They do this by asking the workers to provide an identity document that E-Verify's photo-matching tool (which is used to confirm workers' identities through a photo comparison) cannot verify (e.g., driver's license pictures are not in the databases E-Verify uses).[4] Third, none of this has kept undocumented workers out of the workforce in Arizona. Instead, it has driven them into the underground economy, where they make less money and face more victimization—which continues to make it harder for Arizona's good employers to compete against low-road employers.

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[1] Jeffrey Passell and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends*, 2010 (Pew Hispanic Center, Feb. 1, 2011), http://pewhispanic.org/files/reports/133.pdf, p. 17.

[2] Lee Hockstader, "Illegal Immigrants: Here to Stay," *The Washington Post*, Feb. 1, 2011, http://voices.washingtonpost.com/postpartisan/2011/02/illegal_immigrants_here_to_sta.html.

[3] 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.

[4] 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.

The reality is that this bill is really just history repeating itself. Throughout American history, immigrants have been scapegoated in tough economic times as taking jobs away from American workers. With unemployment hovering at 9 percent and industries such as construction facing a 20 percent unemployment rate,[5] people are frustrated and are looking for someone to blame. But there is no statistically significant relationship between unemployment and recent immigration.[6] 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 who support the Legal Workforce Act are capitalizing on workers' understandable frustrations about the stagnant economy and have introduced a bill that plays on these erroneous assumptions about the undocumented workforce. They have asserted that if we deport all undocumented workers, we can then simply move Americans into the jobs they leave behind.[7] But this oversimplification fails to grasp a general understanding of the labor market. As the Cato Institute and other researchers have pointed out, immigrants and native-born workers with similar educational attainment and experience possess unique skills that lead them to specialize in different occupations.[8] Despite the fact that immigrant workers and native-born workers are "imperfect substitutes" for one another,[9] these policymakers have put forth a bill that makes the U.S. workforce more vulnerable while failing to provide actual solutions to any of the problems it identifies.

Concerns with the Legal Workforce Act include:

1. **It will cost federal and state governments billions of dollars in lost tax revenue, but it detects undocumented workers less than half of the time.** Undocumented workers are not going to leave the country if the Legal Workforce Act is enacted. It is clear that undocumented immigrants fill a niche in our economy and are here to stay, despite the existence 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 eligibility verification system.[10] In analyzing a 2008 bill similar to the Legal Workforce Act that would have made use of 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

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

[6] *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.

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

[8] 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.

[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.

[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.

it would increase the number of employers and workers who resort to the black market, outside of the tax system.[11]

As noted, in Arizona use of E-Verify has been mandatory for all employers since 2008, and its experience provides a snapshot of the most likely economic consequences of implementing the Legal Workforce Act without first providing a way for unauthorized workers to legalize their status. The Public Policy Institute of California found that, despite the law's intention of reducing the number of unauthorized immigrants in the state, it has simply shifted undocumented workers into the cash economy or other informal work arrangements. In fact, 83 percent of undocumented immigrants remained in the state after enactment of the law.[12] Additionally, the *Arizona Republic* reported that in 2008, the first year the law was in effect, income tax collection dropped 13 percent from the previous year. Sales taxes, however, dropped by only 2.5 percent for food and 6.8 percent for clothing. The conclusion by state economists was that workers weren't paying income taxes, but were still earning money to spend—meaning that the underground economy was growing.[13] This loss in tax revenue happened at a time when the state was facing a billion dollar budget gap.

Eight million undocumented workers moving off the books will also threaten the solvency of the Social Security trust fund. Over the next 20 years, the number of senior citizens relative to the number of working-age Americans will increase by 67 percent, which means that they will "transition from being net taxpayers to net recipients." They will be "supported by a smaller workforce that is struggling to meet its own needs."[14] It is estimated that two-thirds of undocumented immigrants currently pay payroll taxes, which added $12 billion to the Social Security trust fund in 2007.[15] In fact, the trust fund had received a net benefit of somewhere between $120 billion and $240 billion from unauthorized immigrants by 2007, which represents 5.4 to 10.7 percent of the trust fund's total assets. The chief actuary of SSA has stated that without undocumented immigrants' contributions to the trust fund, there would have been a "shortfall of tax revenue to cover [payouts] starting [in] 2009, or six years earlier than estimated under the 2010 Trustees Report."[16]

All of these enormous costs and limitations occur even as E-Verify has faltered in detecting undocumented workers. Westat researchers found that, in 2008, 54 percent of unauthorized workers for whom E-Verify checks were run—or 56,000 workers—were erroneously confirmed as being work-

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[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] Magnus Lofstrom, Sarah Bohn, and Steven Raphael, *Lessons from the 2007 Legal Arizona Workers Act* (Public Policy Institute of California, March 2011), http://www.ppic.org/content/pubs/report/R_311MLR.pdf.

[13] 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.

[14] Dowell Myers, *Thinking Ahead About Our Immigrant Future: New Trends and Mutual Benefits in Our Aging Society* (Immigration Policy Center, Jan. 2008), http://www.immigrationpolicy.org/sites/default/files/docs/Thinking%20Ahead%201-08.pdf.

[15] Edward Schumatcher-Matos, "How illegal immigrants are helping Social Security," *The Washington Post,* Sept. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html.

[16] *Id.*

authorized.[17] The Migration Policy Institute estimates that E-Verify erroneously confirmed 230,000 unauthorized workers as work-authorized in 2009.[18]

2. It will prevent millions of American workers from getting a job and cause many more to lose their jobs.

Impact on new hires. If the Legal Workforce Act is signed into law, it will deny millions of Americans the chance to earn their first paycheck at their next new job. The bill allows—and even encourages—employers to use the EEVS to prescreen workers before they are allowed to start their first day of work. This is a radical change from current law, which prohibits employers from using E-Verify before hire. Currently, between .08 percent and 2.3 percent of all workers whose employment eligibility verification is checked through E-Verify are issued erroneous tentative nonconfirmations, or TNCs.[19] This means that, with 60 million new hires each year, between 480,000 and 1.3 million U.S. citizen and legal workers will be flagged as having errors in their records that need to be fixed before they can begin work.[20] The Westat study also reports that when employers have illegally prescreened workers under the current E-Verify rules, 33 percent of these workers prescreened are not offered a job.[21] Westat also found that 47 percent of workers who were not offered a job because of prescreening couldn't find a new job for two months or longer.[22] Employers likely do not offer workers who receive TNCs a job because of the amount of time and resources it costs to fix the errors, and because many employers erroneously assume that foreign-born workers who receive a TNC are undocumented.[23]

Workers who erroneously receive a TNC may also be locked out of a job due to inability to correct their records. According to Westat, of the workers who erroneously receive a TNC, 47 percent are unable to fix their records and so they receive a final nonconfirmation in error, which prohibits their employer from proceeding with the hire.[24]

Impact on the current workforce. The Legal Workforce Act will also force millions of currently-employed workers to lose their jobs. While the bill purports to only verify new hires, the various

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[17] *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. 118.

[18] Marc Rosenblum, E-Verify: Strengths, Weaknesses, and Proposals for Reform, Senate staff briefing handout (Migration Policy Institute, Feb. 17, 2011).

[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 the .08 percent erroneous TNC rate, *see* Westat, *supra* note 17, p. 117. For the 2.3 percent erroneous TNC rate, see description of LA County audit at Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf, footnote 13.

[20] The 480,000 figure was reached by multiplying the number of new hires per year (60 million) by the .8 percent Westat error rate. The 1.3 million figure was reached by multiplying the number of new hires per year by the 2.3 percent LA County error rate.

[21] 114 workers in the Westat survey reported that they were prescreened and 38 who were prescreened report that they were not offered a job. The 33 percent was reached by dividing 114 by 38. See Westat, *supra* note 17.

[22] Westat, *supra* note 17, p. 140.

[23] *Findings of the Web-Based Basic Pilot Evaluation* (Westat, Sept. 2007), http://tinyurl.com/2tddqs, p. 77.

[24] Westat, *supra* note 17.

reverification mechanisms it provides for essentially would require reverification of the U.S.'s entire workforce over a relatively short period of time. Those subject to reverification would include:

- Federal, state and local employees;
- Workers with expiring employment authorization;
- Workers who require a security clearance because they work in a federal, state or local government building, a military base, a nuclear energy site, a weapons site, or an airport or other facility that requires workers to carry a Transportation Worker Identification Credential;
- Workers assigned to a federal or state contract;[25]
- Workers whose employers have errors on their Wage and Tax Statements, which result in an SSA no-match letter; and
- Workers identified by SSA as potentially not employment-authorized due to use of another individual's Social Security number.

Additionally, employers may elect to reverify their workers as long as it is done on a "nondiscriminatory" basis. In such a case, each individual employee must be reverified. There are currently 154,287,000 workers in the labor force. Conservatively, even if only half of the current workforce were reverified and the error rate range of .8 percent to 2.3 percent were applied, this would mean between 617,148 and 1.8 million U.S. citizen and legal immigrant workers erroneously receiving TNCs and between 290,059 and 846,000 workers who would have to be fired because of erroneous final nonconfirmations.[26]

Burdens on workers to correct records. When workers receive a TNC notice, they often have to take unpaid time off from work to check and correct their records 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.[27] 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 to SSA offices 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 an SSA field office without receiving service.[28] The American Council on International Personnel members report that corrections at SSA usually take in excess of 90 days and that workers visiting an SSA office must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected.[29] For low-income

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[25] The obligation only applies to contracts over $100,000, and to individuals who do not hold Federal security clearances, are not administrative or overhead personnel, and are not working solely on contracts that provide Commercial Off The Shelf goods or services as set forth in the Federal Acquisition Regulation (See 73 FR 67651–705 (Nov. 14, 2008) and 74 FR 26981 (June 5, 2009)).

[26] Half of 154,287,000 is 77,143,500. The 617,148 figure was reached by multiplying this number by the .8 percent Westat error rate. The 1.8 million figure was reached by multiplying the 77,143,500 figure by the 2.3 percent LA County error rate.

[27] Westat *supra* note 17, pp. 203-204

[28] *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.

[29] American Council on International Personnel, "Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008)," August 11, 2008.

workers, this de facto layoff will have grave consequences, including inability to pay rent or for other basic necessities, despite their being *fully authorized* to work legally in the U.S.

Lack of any meaningful due process. The Legal Workforce Act contains almost no meaningful due process for workers who become victims of either errors in the verification system or abuse by employers who misuse it. The act bars workers from bringing any claim under virtually any law—including under laws explicitly designed to provide labor protections—for loss of their job or violations that occur as a result of an employer's use of the system.

The only avenue for redress that the bill allows workers who unjustly lose employment because of the EEVS is to sue the federal government under the Federal Tort Claims Act (FTCA) for lost wages. This is an ephemeral remedy, at best. . Few workers who lose employment because of the EEVS will overcome obstacles imposed by the FTCA's strict requirements. An FTCA lawsuit against the federal government in our crowded federal courts can take many months, if not years. Prior to filing suit, a plaintiff must file an administrative claim and wait for either a denial of that claim or the passage of six months to determine whether the administrative agency will deny the claim. Only after those six months have run may a plaintiff even commence a suit.[30] Compensation will be further delayed after a settlement or judgment is final because the U.S. Dept. of Justice must submit the settlement or judgment to the U.S. Government Accountability Office (GAO) for payment. Payments typically are not even sent until six to eight weeks from the date the settlement or judgment is sent to the GAO. The responsible United States Attorney's office or the Department of Justice attorney must then process payment. Moreover, because of the FTCA's restrictions on attorney's fees, coupled with possibly low recovery amounts for lost wages, it will be difficult if not impossible for most workers to find counsel to litigate their claims.

And it won't be enough for a worker to prove only that an error was made, even if the results for the worker are devastating. Under the FTCA, the worker must prove that the error resulted from "negligent or wrongful acts of omission of any employee of the Government."[31] The "discretionary function exception" may also bar suit for a government agency's inclusion of erroneous data about an employee. In a wrongful discharge or negligence case arising out of, for example, improper maintenance of a database, the government would undoubtedly argue that the claim was barred by the "discretionary function exception."[32] The bottom line is that most workers who lose employment under the Legal Workforce Act will never receive any compensation.

3. **It fails to address the real needs of the agricultural industry and leaves employers, workers, and the American people vulnerable.** Because up to 75 percent of agricultural workers are unauthorized immigrants,[33] the bill attempts to treat agriculture workers and employers differently through carve-outs that extend the time for implementation and exempt farm workers from verification if they return to an employer with whom they have worked in the past. But this is just a facade. Other provisions in the bill

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[30] 28 U.S.C. 2675.
[31] 28 U.S.C. § 1346(b).
[32] 28 U.S.C. § 2680 (a).
[33] 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.

require employers to reverify the current workforce over time—which simply delays the devastating impact on agriculture.

The bill's carve-out acknowledges how a mandatory E-Verify regime will wreak havoc on American agriculture but fails to provide tangible solutions that produce reform. Instead, the bill puts forth half-solutions that put family farms, American jobs, and workers at risk and create a regime in which workers will be vulnerable to increased labor exploitation. For example, 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.[34] Given current levels of unemployment, these jobs are vital for American workers—but they also ensure that small family farms can produce commodities that are economically viable. The bill threatens to reduce or eliminate these while simultaneously creating an even larger pool of pliable, easily exploited workers. The bill exempts from verification agricultural workers who return to an employer for whom they worked previously, creating an incentive for workers to return to jobs for which, in the past, they may have been paid illegally low wages or where they may have had to endure other abusive working conditions. Similarly, this carve-out ensures that unauthorized workers will stay in the agricultural industry, ensuring that it remains low-wage and that American workers will continue to have extremely low incentive to apply for these jobs.

Additionally, the Legal Workforce Act requires most employers of agricultural workers assigned to state or federal contractors to have their employment eligibility verified through the EEVS. But because the bill provides does not make contractors or subcontractors legally liable for knowingly hiring unauthorized workers, the bill will result in growers' continued and expanded use of labor contractors to hire agricultural workers. U.S. agriculture relies heavily on workers recruited and supplied by often unscrupulous labor contractors, which practice ensures that wages are kept low and working conditions barely tolerable for the workers who harvest the fruits and vegetables we eat. The Legal Workforce Act does nothing to stop or even counteract this. At best, the bill perpetuates the abysmal status quo; at worst, it incentivizes the expanded use of labor contractors, making already vulnerable workers more vulnerable. The treatment of agriculture in the bill acknowledges the problem farmers face in getting authorized workers, but the bill offers no realistic solution. Instead, it creates a system that works neither for agricultural workers, for employers, or for Americans who want and need the agricultural products our nation produces.

4. **It will increase discrimination against Latino, Asian, and other foreign-born workers.** The existing E-Verify system already results in discrimination against foreign-born workers, since they are more likely to be the subject of errors in the databases the program relies upon. E-Verify error rates are 30 times higher for naturalized U.S. citizens and 50 times higher for legal nonimmigrants than for native-born U.S. citizens.[35] This means that under the Legal Workforce Act, it is more likely that Latinos, Asians and other foreign-born workers will be locked out of jobs than other workers. These are workers already facing higher unemployment rates than the general population.[36] The bill will also likely *increase* discrimination against foreign-born workers, since it allows employers to prescreen workers, i.e., to

[34] Griswold, *supra* note 8.
[35] Rosenblum, *supra* note 19.
[36] In May 2011, the Latino unemployment rate was 11.3 percent, *Employment Situation Summary* (Bureau of Labor Statistics, June 3, 2011), http://www.bls.gov/news.release/empsit.nr0.htm.

screen them before they are actually hired. Prescreening is forbidden under current law, because Congress knew that prescreening would result in work-authorized foreign-born workers being discriminated against and unjustly denied employment as a result of errors in E-Verify's databases.

Because foreign-born workers are subject to higher database error rates, they are more likely to have adverse actions taken against them by their employers who don't follow the rules. The rate of employer noncompliance with E-Verify rules is extremely high. For example, over 66 percent of employers took adverse actions against workers receiving a TNC.[37] Such 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.[38]

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 reported that they were not informed by their employer of a TNC, resulting in the denial of their right to contest the finding.[39] 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.[40]

Employer misuse will likely 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 use the system properly. 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 E-Verify employers outside of Arizona.[41] The likely reason is that, unlike most E-Verify users, most Arizona employers did not volunteer to use the program.

The increase in database errors and employer misuse that will increase under the Legal Workforce Act will be felt disproportionately by Latino, Asian, and other foreign-born U.S. citizens and authorized workers.

5. **It hurts women who change their name due to marriage or divorce and others with mismatches in SSA's database.** The Legal Workforce Act requires employers to reverify any worker who is the subject of a "notice" to the employer regarding a mismatched wage and tax statement. Currently, mismatched wage and tax statements result in SSA no-match letters to employers. An SSA no-match letter indicates that workers are not receiving proper credit for their earnings, which will affect the level of retirement or disability benefits they may receive in the future if they do not correct the discrepancy in SSA's

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[37] Westat *supra* note 17, 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.
[38] Westat, *supra* note 17, pp. 157, 204.
[39] *Id.* at pp. 154, 199
[40] 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.
[41] Westat, *supra* note 17, p. 237.

records. There are numerous reasons why employees' names and Social Security numbers might not match SSA records, including name changes due to marriage or divorce, incorrect data entry, and misspelled names. No-matches are not a proxy for unauthorized immigration status. In fact, SSA estimates that 17.8 million (or 4.1 percent) of its records contain discrepancies and that 12.7 million (about 70 percent) of those records with errors belong to native-born U.S. citizens.[42]

The number of SSA no-match letters sent by SSA could affect an estimated 10 million or more workers who would need to be reverified by their employers each year.[43] And because the bill does nothing to fix the errors that are the subject of the SSA no-match letter, it is almost certain that when employers submit these workers' names to the EEVS, they will receive a TNC. As noted in the section above, workers with TNCs are more likely to be fired and have adverse action taken against them by their employers.

Additionally, because employers know that receipt of a no-match letter will trigger an EEVS reverification, they may be overly cautious and fire these employees. Already, thousands of workers have been fired due to the mistaken assumption that an SSA no-match letter indicates an immigration violation.[44]

6. **The implementation timeline is impractical and unworkable.** Every employer in the country—all 5.5 million of them (not including agricultural employers)—will have to participate in the EEVS within two years of its enactment. It took 10 years to enroll the 250,000 employers who currently participate in E-Verify. Ramping up to 5.5 million employers is a 2,100 percent increase over the prior rate of enrollment and would require DHS to enroll approximately 219,492 employers per month for two years. DHS would then have to enroll all 482,186 agricultural employers that have to use the system within 3 years of enactment.[45]

Despite E-Verify's many flaws, the Legal Workforce Act includes no performance evaluations or metrics to ensure that the huge EEVS system it proposes is working as intended. Requiring such a dramatic and large-scale implementation of the EEVS—without addressing the existing data, technology, and infrastructure problems evident in E-Verify—would be a recipe for chaos. According to the Association for Computing Machinery, turning E-Verify into a mandatory program is a very "serious architectural issue," because it would have to handle at least a thousand-fold increase in users,

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[42] *Congressional Response Report: Accuracy of the Social Security Administration's Numident File* (Office of the Inspector General, Social Security Administration, December 2006, A-08-06-26100).

[43] http://www.immigrationpolicy.org/sites/default/files/docs/inFocusSSANo-Match05-08.pdf, pg. 5 and 6.

[44] C. Mehta, N. Theodore, and M. Hincapié, *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (Center for Urban Economic Development, University of Illinois at Chicago; and National Immigration Law Center, Nov. 2003) at 2, available at www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf.

[45] Table 7: Hired Farm Labor – Workers and Payroll, *2007 Census of Agriculture – State Data*, http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_007_007.pdf, pp. 336-344.

queries, transactions, and communications volumes. Each time a system grows even just ten times larger, serious new technical issues arise that were not previously significant.[46]

How can the shortcomings of E-Verify be mitigated?

Making E-Verify mandatory for all employers without legalizing the status of immigrants in the labor force who currently are undocumented or fixing the weaknesses in the current system will *not* create jobs and *will* result in poorer working conditions, the loss of jobs for American workers, and billions in dollars of lost tax revenue. At minimum, for expansion of E-Verify to be considered, the following steps must be taken:

1. **Consider making use of the EEVS mandatory only if this is paired with a legalization program.** The EEVS program will not work as long as the U.S. still has a large population of unauthorized workers. If it is implemented without legalizing the 8 million undocumented workers in our economy, employers will simply move their unauthorized workers off their books into the underground economy, causing billions of dollars in lost tax revenue.
2. **Apply the EEVS only to new hires.** Reverification of the entire workforce would place a huge administrative burden on workers and businesses alike. A current turnover/separation rate of 40 percent a year (50-60 million employees hired each year) means that most people's employment eligibility will be verified by the new system in a timely manner without forcing employers to go through old records and reverify existing workers. While the Legal Workforce Act purports to verify only new hires, the practical implications of the bill are that almost all existing workers will have to be reverified.
3. **Phase in the EEVS with evaluations of its performance.** Phase in E-Verify incrementally, by size of employer or by industry, while requiring that its performance be vigorously reevaluated prior to each expansion. Evaluations should address, at minimum, wrongful terminations due to system errors, employer compliance with program rules, and the impact of the system on workers' privacy. Minimum performance criteria should be met within each of these areas before subsequent expansions of the system. The Legal Workforce Act does not include provision for any evaluation of the program.
4. **Ensure data accuracy.** Establish data accuracy standards that are subject to annual review to ensure that the data accessed by employers is accurate and continuously updated. The Legal Workforce Act contains no provisions to ensure data accuracy, yet would roll out the system under an extremely short timeline.
5. **Protect workers from misuse of the system.** Prohibit use of the EEVS to selectively verify only certain workers, prescreen workers before a job offer, take adverse employment actions based on system determinations, or fail to inform workers of their rights under the program. Establish an oversight and penalty structure to ensure employer compliance with program rules. The Legal Workforce Act contains no meaningful worker protections.
6. **Ensure due process for workers subject to database errors.** Provide for administrative and judicial review and allow workers to remain employed while they challenge government errors. Provide compensation from the government, costs, and attorney's fees when an error in the databases results in wrongful denial or termination of employment. Under the Legal Workforce Act, workers would be unlikely to receive any remedy.

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[46] Peter Neumann, "Security and Privacy in the Employment Eligibility Verification System (EEVS) and Related Systems," Testimony before the Subcommittee on Social Security of the House Committee on Ways and Means, June 7, 2007, http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6099.

7. **Protect the privacy of workers.** Minimize the amount of data collected and stored, and create penalties for collecting, maintaining, or distributing data not authorized in the statute. Create penalties to deter the use E-Verify data to commit identity fraud or for any other unauthorized purpose.
8. **Fund an outreach program.** Following in the footsteps of the process instituted when the I-9 employment eligibility verification form was first introduced in 1986, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) should be charged with conducting outreach and education to both workers and employers in order to inform them about how the system works, rights and responsibilities under the new system, and avenues for redress in the case of error or unfair employment practices. Despite mandating a 2,300 percent increase (over the rate of enrollment in E-Verify) in employer utilization, the Legal Workforce Act provides for no outreach program to educate employers and workers of their responsibilities and rights.
9. **Create a term-limited employment eligibility verification advisory panel.** The advisory panel would advise SSA and DHS on implementation of the EEVS, including standards of database accuracy, privacy, and compliance, in addition to outreach to workers and employers. The panel would include representatives from appropriate federal agencies, organizations with technological and operational expertise in database accuracy, and other stakeholders that represent the interests of persons and entities affected by database inaccuracies, including business, labor unions, privacy advocates, and immigration organizations.
10. **Clarify that states are preempted from requiring businesses to use the EEVS.** Clarifying the statute's language with respect to this issue would ensure that the federal government controls uniform expansion of the program. The Legal Workforce Act still allows states such as Arizona to impose their own penalty scheme on employers.
11. **Prevent unscrupulous employers from using immigration law to avoid their obligations under labor laws.** 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 such as the POWER Act (the Protect Our Workers from Exploitation and Retaliation Act) would do just that. It would lessen the incentives for employers to use threats of immigration enforcement as a means to avoid compliance with labor laws and help create safe workplaces for all workers.

Conclusion

Making use of E-Verify or any electronic employment eligibility verification system mandatory, outside of broader reform of our immigration system, will undermine American jobs and 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 often 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.

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Mr. GALLEGLY. Ms. Moran, in your written testimony, and as you elaborated in your verbal testimony that workers won't leave the country if E-Verify is mandated, you did say that pretty specifically in your opinion.

Ms. MORAN. Yes.

Mr. GALLEGLY. But isn't it true that illegal immigrants are leaving States that institute E-Verify mandates? In fact, just last week in the Atlantic Journal Constitution published an article entitled "Many Illegal Immigrants Leaving"—or "Many Immigrants Leav-

ing Georgia Behind," outlining how illegal immigrants are leaving the State since they cannot find jobs after the State mandated businesses use E-Verify. That is a common known thing at least in the State of Georgia.

In your written testimony, page 3, you point out that the construction industry has a 20 percent unemployment rate. The home builders who are actually in the construction trade are sitting at this table with you, to your right, now supporting Legal Workforce Act. Do you think that you know better what is best for the industry than those who actually are in the industry?

Ms. MORAN. Well, I don't purport to know that, but let me first address the issue about people leaving. There have been no formal studies about E-Verify except in Arizona. And I think that you received a letter from one of the authors of the study from the Public Policy Institute of California, which said that 83 percent of workers actually stayed in the State. And I believe he said that if it is mandated, that you wouldn't even see as many people leave who they left in Arizona, because interstate migration is much different than leaving the country. So that is the only real actual study that we have.

Again, I know people are frustrated with unemployment, but this program doesn't solve it.

Mr. GALLEGLY. What will they do if they can't find a job?

Ms. MORAN. What will who do?

Mr. GALLEGLY. Those that are illegal, and they are E-Verified, and the employer won't hire them, what will they do?

Ms. MORAN. Well, what will happen is the employers will just move them off the books in the cash economy. I mean, our economy would be decimated if 8 million workers simply disappeared. I mean, think of not only——

Mr. GALLEGLY. Even with the increased penalties.

Ms. MORAN. Excuse me?

Mr. GALLEGLY. Even with the increased penalties.

Ms. MORAN. In Arizona you lose your business license, you are fined, you got the sheriff going after you. Half the employers in Arizona aren't even using the program, and of those who do, ICE has found that employers are coaching workers about how to get around the system and teaching them which documents to present to get around the system, and this doesn't bill doesn't address that.

Mr. GALLEGLY. I thank the gentlelady.

Mr. Miller, you know, there is a lot of discussion among the ranks that illegal immigrants only take jobs that American citizens will not take. We continue to hear that.

Recently a company in your industry, Chipotle, a large national corporation formerly owned by, I believe, the McDonald's Corporation, and I think—what do they have, 1,000 stores, plus or minus? A large, large operation. ICE found out that they had many illegals working for them and cracked down, and they were terminated. And, of course, Chipotle executives and the corporation was fined, and that process is going on.

Now, with thousands of employees that were illegal that were put away from—taking their jobs away, how in the world is Chipotle able to survive now that all of these illegal immigrants

that were working there—did they have to close down their doors, or did they have any Americans that applied for any of those jobs?

Mr. MILLER. I didn't hear, Mr. Chairman, that any of the restaurants closed. In reality what has been happening, and it happened with personal experiences in the business that I owned and operated, is in using E-Verify, when an undocumented worker is exposed, they go across the street and get another job. That is what has been happening. That is in real life.

Mr. GALLEGLY. That is really kind of where I wanted to go, and my time is running out, but the fact is there were American unemployed people standing in line to take those jobs; is that correct?

Mr. MILLER. Yes, sir.

Mr. GALLEGLY. Number two, when ICE went in and did the enforcement, they enforced sanctions against the employers, which is all well and good, and I support that, but they didn't do a doggone thing to the thousands of people that working there illegally. They just went down the street or across the street and went to work somewhere else; is that correct?

Mr. MILLER. That is correct.

Mr. GALLEGLY. That is under current law, correct?

Mr. MILLER. Yes.

Mr. GALLEGLY. Thank you very much.

At this time I would yield to the gentlelady from California Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I was reading the op-ed piece that Mr. Miller posted in the Fort Worth Star Tribune a number of years ago, and here is what that op-ed piece that he wrote says: "The economic consequences of removing the 1 in 20 employees who are undocumented from America's workforce would be devastating. The restaurant industry, the Nation's largest private-sector employer, sustains 12.5 million jobs in restaurants directly and millions more in other industries."

It goes on to say, "Clearly we can't fix our broken immigration laws simply by enforcing them more stringently. We need to make them reflect the law of supply and demand and the need to secure our borders. Only by reforming immigration policy in this way will we improve enforcement and strengthen America's economy, securities and values."

I ask unanimous consent to put this op-ed piece into the record.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

NATIONAL RESTAURANT ASSOCIATION

NEWS RELEASE

We will lead America's restaurant industry into a new era of prosperity, prominence, and participation, enhancing the quality of life for all we serve.

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FOR IMMEDIATE RELEASE
Wednesday, March 15, 2006

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Op-ed published in Ft. Worth Star-Tribune on March 15 in the need for immigration reform

Reform, with a generous helping of reality
By CRAIG MILLER
Special to the Star-Telegram

Responding to justifiable public outrage generated by our out-of-control immigration system, the Senate Judiciary Committee tomorrow will examine ways to reform it. Too long neglected, the current system undermines America's economic and security interests. It is imperative that senators get it right.

As a restaurateur, I see the economic damage done by the immigration system every day. Fast-growing industries such as mine and others, such as construction, healthcare and hospitality, face worker shortages. These are set to get worse.

Over the next decade, the National Restaurant Association projects that the number of jobs in the food-service business will grow 1.5 times as fast as the U.S. labor force. The number of 16- to 24-year-olds in the labor force—half our industry's workforce—will not grow at all.

Unfortunately, our immigration system does not reflect America's need for workers. Our economy provided 134 million jobs last year. Yet the federal government makes only 10,000 green cards available for service industry workers each year. No wonder there are an estimated 12 million undocumented individuals in America today and half a million more arriving each year.

This dysfunctional system forces America's employers to navigate tricky waters each time they hire: complex immigration regulations; a glut of seemingly valid, but counterfeit, worker identification documents; and the threat of discrimination lawsuits if they ask the "wrong" questions about employees' documents.

Immigration foes claim the answer is simple: more enforcement. This approach, typified by

a bill that passed the House of Representatives last year, proposes severe penalties for employers and undocumented employees. The idea behind the bill: make life so tough on the undocumented that they will eventually leave.

The House bill classifies undocumented immigrants as "aggravated felons"—a tough charge for the nursing home employee who cares for the elderly or the hotel worker who cleans our room. It would fine even "mom and pop" restaurants as much as $25,000 for paperwork errors.

The economic consequences of removing the one in 20 employees who are undocumented from America's workforce would be devastating. The restaurant industry—the nation's largest private sector employer—sustains 12.5 million jobs in restaurants directly and millions more in other industries.

If a restaurant cannot fill entry-level positions, fewer higher-skill jobs are viable—in our industry and many others. Overall, the National Restaurant Association estimates that removing one in 20 food-service employees would result in a $20 billion loss to America's economy.

Clearly we can't fix our broken immigration laws simply by enforcing them more stringently. We need to make them reflect the law of supply and demand and the need to secure our borders. Only by reforming immigration policy in this way will we improve enforcement, and strengthen America's economy, security and values.

Sens. John McCain, R-Ariz., and Edward Kennedy, D-Mass., have introduced legislation supported by religious groups, labor unions and employers. Sens. John Cornyn, R-Texas; Jon Kyl, R-Ariz.; Chuck Hagel, R-Neb.; and Pete Domenici, R-N.M., recognize that "more enforcement" alone won't solve the problem; each has something to add to the solution.

Now the task falls to Senate Judiciary Committee Chairman Arlen Specter, who also has new ideas to offer, and members of his committee to produce immigration legislation that finally addresses America's economic and national security needs. The stakes could hardly be higher.

Craig Miller, chairman of the National Restaurant Association, is president and chief executive officer of Ruth's Chris Steak House.

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Founded in 1919, the National Restaurant Association is the leading business association for the restaurant industry, which comprises 960,000 restaurant and foodservice outlets and a workforce of nearly 13 million employees. Together with the National Restaurant Association Educational Foundation, the Association works to lead America's restaurant industry into a new era of prosperity, prominence, and participation, enhancing the quality of life for all we serve. For more information, visit our Web site at www.restaurant.org.

Ms. LOFGREN. Ms. Moran, you studied this over a period of time as an academic, and we throw—what is it they said? There are lies, darn lies, in statistics? But I think it would be helpful if we could get actually a picture that is complete, because—and I am asking you to do that. In fact, it is true that most of the people who use this system get an instant verification. I mean, it is in the nineties,

that is correct. There are two questions about that. We have, I believe, an analysis I would like you to address that somewhere in the neighborhood of half of the people who really aren't eligible to work are cleared in that system anyhow. That is one of statistics that has been thrown out.

The other thing, DHS had an independent study done, and they said that in the case—that about 42 percent of applicants who are dinged on the system are never told, and so they don't have a chance. If they actually are eligible to work, they don't have a chance to prove that up because nobody ever told them what the issue was.

And then the second statistic I would like to you throw some light on is that when there are contests, what is the outcome? And I think that when people contest the dinging, my understanding is that more than half of them actually prove up that they are lawfully here. So if 42 percent are never told, that is a bunch of Americans presumably who actually had a right to work, but they weren't told, and now the government is going to keep them unemployed at a time of 9 percent unemployment.

The second statistic I would like you to—set of statistics—to identify is what this means across the entire American workforce. I talked to my daughter, a lawyer in San Jose. I say, look, there is an error rate of about a percent. She said, oh, my God, you would never do that in business. She is a corporate lawyer. I mean, if you had that kind of error rate in the business she is in, it would be catastrophic. Could you address how many millions of American citizens are likely to be unemployed because of defects in the database?

Ms. MORAN. Okay. Let me try to break this down. So a lot of us have been operating off this the Westat study, which DHS commissioned over a number of years, and they use a statistical model. And so their model says, as I think someone pointed out, a little under 1 percent of U.S. Citizens and legal workers are improperly dinged by the system, and about half of those who are improperly dinged never correct their records—never are able to correct their records for numerous reasons. Forty-two percent of employers don't notify them, they just can't correct their records with SSA like Jessica did. And so if you extrapolate those out, it is a little bit over a million people in a mandatory system having to go to correct records.

I want to point out, though, whenever employers have audited their own data, they have come up with much higher rates. So L.A. County, for example, audited their own use of E-Verify and found a 2.3 percent error rate, not a .8 percent error rate. And Intel a couple of years ago announced that they had a 12 percent error rate, all of these people that had been cleared.

So I guess the point is that we do have a statistical model, and I think it is alarming in and of itself that there are a few million workers that could be affected, but then you also have real-life experiences. And I think you know SSA did their own run on the numbers, and they said 3.6 million people would come to their offices.

What happens when people contest, I think that was your question, sort of what is the outcome? So approximately 1 percent are

authorized, they should never have been dinged, and half of them can correct. That means half can't correct. We estimate that a little under a million people in a mandatory system will not be able to correct their records, and they will lose their jobs. This is why the lack of due process is really, really concerning, because they can't get their job back, they can't get their wages back. And that is what is happening under the current system.

On the 54 percent of workers that can get through, I mean, right now if I present a legitimate document, the system can't detect that, and that is what is happening in Arizona. Employers know that, you know, the State driver's license won't be detected by the system, and so they coach workers in providing that document. This bill doesn't address that at all. And I think, you know, getting all 50 States to give up their driver's license data, I think we tried that in REAL ID, and they said no.

Mr. GALLEGLY. The time of the gentlelady has expired.

Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

First of all, I want to thank our witnesses. We heard some powerful testimony in favor of the bill today, and that is much appreciated.

Congressman Calvert, let me address my first comment to you. You made a very good case for why E-Verify works, both from a personal business owner's point of view, as well as being able to quote the various figures that back up our case. You actually updated my figures. I didn't realize there are now 268,000 employers who voluntarily use E-Verify, and I know that about 1,300 more businesses are now voluntarily using the program every week. So clearly it works.

And you and I both use the figure that 99.5 percent of work-eligible employees are immediately confirmed. By the way, that may make it the most effective government program in existence. I don't know of any other government program that works 99.5 percent of the time.

I basically just want to give you an opportunity to see if there is any other way you feel that we can demonstrate that the program works.

Mr. CALVERT. Well, first let me just make a point, too, Mr. Chairman. Thank you for your question. I certainly take exception to the assumption that mandatory E-Verify would turn law-abiding employers into lawbreakers because they don't want to comply with the law.

I was in private business, I was in the restaurant business, all my life as a family business. We comply with the law. And most small business people I know, 99 percent of them comply with the law. They don't go out of their way to put employees off the books in the so-called cash economy, whatever the hell that is.

These academics that make these arguments never been in business in their life. They have never employed a person in their life. They don't even know how the system works to employ an individual or how the economy works. So I just want to make that point.

One thing about preemption. I think it is important. My own county, we have cities and communities that are doing their own

preemption, I mean, their own law on E-Verify, because they are frustrated with the Federal Government. We do need a national law because it is pushing—like a State of California which will never put an E-Verify law in—pushing a lot of these people that are unemployed in the State of California. It already has a 12-1/2 percent unemployment rate. So bordering States that are putting in mandatory E-Verify are pushing folks into the State of California. So it is an important bill.

Mr. SMITH. Thank you, Mr. Calvert.

Mr. Rutenberg, I appreciated your testimony. Let me ask you the question, can small businesses just as well as large businesses comply with E-Verify? I know home builders go from small businesses to large entities, and I wanted to see if you thought it was going to be equally applicable to both.

Mr. RUTENBERG. Thank you, Mr. Chairman.

I believe it is going to be much harder for the small businesses to comply. I know that Monday, as a builder, I worked 15 hours and was only in my office for about 15 minutes at one point. We are on the mobile, on the go, and we would have to count on our subcontractors and our vendors to do the E-Verify for themselves. We would not be able to control that.

Mr. SMITH. Mr. Miller made the same point and also pointed out that in the bill we have the phase-in last for the small businesses to give them an opportunity to gear up. So we actually changed the approach on it just because we had understood that small businesses needed a little bit more time, so we took that direction.

Mr. RUTENBERG. I appreciate that.

Mr. SMITH. Mr. Miller, let me ask you, you mentioned as far as the National Restaurant Association goes and the owners, why don't you support an exemption for some employers of the E-Verify system? You made the case, I think correctly, that everybody has to play by the same rules. But why don't you support an exemption for some other entity?

Mr. MILLER. As someone that voluntarily put in e-verification, I saw what happened when it was not equally applied to all businesses. The employees that did not qualify to be employed by my company would literally walk across the street to a competing business. And this is one of those cases where we need a Federal law that will provide equal playing fields for all businesses to tap into the legal workforce.

Mr. SMITH. Thank you, Mr. Miller.

Ms. Moran, let me direct my last question to you. Let me give you some figures that I think are indisputable. If you do question them, let me know.

The first is I believe that there are 24 million Americans who are unemployed or so discouraged they have given up looking for work. Of those 24 million unemployed Americans, 19 million do not have a college degree, have a high school diploma. There are roughly 7- to 8 million people working illegally in the United States. And according to my figures, the most recent unemployment rates for Americans with only a high school education—these are the Americans that are competing with these jobs taken by illegal workers—21 percent for all Americans, but it is 25 percent unemployment

rate for Hispanic Americans, 30 percent unemployment rate for Black Americans.

It seemed to me that almost everything you have said—and it is a legitimate point of view from your perspective—but almost everything you said seemed to me to put the interest of illegal workers ahead of the interest of unemployed American workers. Why wouldn't we want to do everything we could for these unemployed Hispanic Americans and Black Americans and open up jobs for them?

Ms. MORAN. I am putting the interest of the economy first and the impact that it would have. In terms of the numbers about those without a high school diploma, I am not an economist. I mean, you know, Dan Griswold from Cato, you know, we are not best buds on most things, he is the one that says this is not how the economy works, and that, yes, there would be some workers that get jobs, but generally it is just not a 1-to-1, and that those workers——

Mr. SMITH. I wasn't talking about 1-1. Thirty percent Black Americans with only a high school education are unemployed, 25 percent Hispanic Americans. They are the ones that would benefit from the E-Verify program when we free up those jobs.

Ms. MORAN. I hear what you are saying. All I am telling you is what the economists are saying. Conservative, libertarian, liberals are all saying the same thing, which is that it is just not going to create jobs for all of those workers. I am not an economist so I can't——

Mr. SMITH. I don't think all economists are saying that, and, again, when we hear from employers, when we hear from people who had practical experience, it is just the opposite. Those jobs are being freed up. But we just have to agree to disagree on that.

Ms. MORAN. Okay.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. GALLEGLY. Thank you, Mr. Chairman.

Mr. Conyers.

Mr. CONYERS. Thank you so much.

Is there something I am missing in Mr. Miller's example of Chipotle or any other restaurant where they find an illegal working and fire him, and that he advises the Committee that the illegal just walks across the street and gets another job? Is that the way it happens in your estimation or in your experience? This is to Attorney Moran. Am I missing something there that people that get fired just go get another job somewhere else where they are not checked, and that is why he likes mandatory.

Ms. MORAN. I am an employer, and I would be affected by E-Verify because I have a babysitter, so I just want to put that on the record.

Yeah. I mean, this is going to hurt employers that abide by the rules. If you abide by the rule, you are going to use E-Verify. You know, half of them will be detected, half of them won't. But a lot of employers simply are not going to comply with the law.

And I can't remember if, Chairman Gallegly, you just made this point or someone made the point about employers are going to comply. In Arizona, half aren't complying. Half are not using the system. So it is not like these are bad employers; they just need their workforce, and they don't want to go under.

Mr. CONYERS. And a person that doesn't—that can't get a job through E-Verify just goes to an employer that doesn't use E-Verify.

Well, maybe that is a case for Mr. Miller arguing that we ought to make it mandatory, and then everybody will——

Ms. MORAN. What I am saying is when it is mandatory, employers still aren't complying with the law. In Arizona it is mandatory for every employer, and half of them are not using it, and others are using it improperly. So just because you say it is mandatory doesn't mean it is mandatory.

That is why the real solution is legalizing the 8 million undocumented workers in our economy. Otherwise everyone is just going to be figuring out how to get around the system until you find a real solution.

Mr. CONYERS. So, now, if we effect comprehensive immigration reform and get a pathway to legalizing people, then it seems to me that you might not even need E-Verify after that.

Ms. MORAN. Well, you know, we think that is the first thing that has to happen if you put E-Verify on line. There are a lot of other things. I mean, I would write a very different bill than the Legal Workforce Act that included worker protections and phase-ins. There are just lots of things that need to do to make it work. It has made a lot of improvements, but it is just not there.

Mr. CONYERS. Well, Mr. Rutenberg, do you think that we could work toward an immigration reform system that would clear up some of the fundamental problems? You know, the way I am understanding the lawyer here is that this is a kind of an attempt to put a band-aid over a bigger problem. Until we deal with immigration as a big subject, with millions of people now having no way to get to citizenship, we are going to always be in this fix.

Mr. RUTENBERG. What we tried to do in our testimony was to say that we are starting to see a quiltwork patch of different regulations at the State and the local level, which has the danger of becoming a very difficult environment to work within. We think that it is preferable to have a national E-Verify program which still—it is in the process of being refined and has made serious improvement.

Mr. CONYERS. Do you support comprehensive immigration reform?

Mr. ROBERTS. We believe that we need to have a sustainable, workable immigration policy.

Mr. CONYERS. Well, that means depending on what I mean by comprehensive immigration reform.

Mr. Miller, do you believe in comprehensive immigration reform; that is, working out a way for the 8 million people, especially the ones that have kids here and been working for years and paying their taxes, that we get it straightened out once and for all.

Mr. MILLER. The first thing I believe in is the rule of law.

Mr. CONYERS. We all, you know——

Mr. MILLER. I question whether everyone takes the same position that I do that if the law exists, that you are supposed to enter this country in a legal way——

Mr. CONYERS. Wait a minute. Do you support comprehensive immigration reform or not?

Mr. MILLER. No. I don't think that that is the answer.
Mr. CONYERS. Okay. That is fair enough.
Thanks, Mr. Chairman.
Mr. GALLEGLY. Thank you, Mr. Chairman.
Mr. King.
Mr. KING. Thank you, Mr. Chairman.

I want to thank all of the witnesses for your testimony and your presence here.

I would like to first start off with having noted in the opening remarks, of which I did not offer one, that Mr. Conyers' statement that agriculture would collapse if we didn't have illegal workers, I represent a big chunk of Iowa, and we do a lot of agriculture, and I can tell you that America is not going to go hungry if we enforce the rule of law. We will raise the food we need to feed the people in this country, and we will export a lot of food to feed people in many other countries. We have that ability, and we are resilient enough and entrepreneurial enough to take advantage of the opportunities there and create new ones. And with the genetic design that we have, we are increasing corn yields 3 to 4 percent a year, for example, and we need fewer people instead of more people.

What happens in business is that you follow the path of least resistance to maximize your profits. For example, I have a constituent that has a 16-row corn planter, and he is a master marketer, sitting at the Internet and on the phones on a regular basis maximizing his profits. He bought land in Brazil because it was an investment that looked good, and in spite of his big equipment he has in Iowa, he has 96 one-row cultivators down there. These are men with hoes that work cheaper than he can run equipment.

So we will do the things necessary as an example to raise the food and feed this country and feed the world. I just wanted to bring that part up and make an early comment on that.

I have a number of questions.

Mr. Miller, I appreciate your testimony, especially on your statement about the approval of the language in the bill that allows for a preemployment check. And I have long been aggrieved by existing E-Verify law that requires you to hire the illegals before you can verify that you have hired illegal employees, as I appreciate your reinforcement of that component of it. And there are a number of standards out there. One of them is Iowa's drug testing law as I wrote the language that would be as a condition of employment, a preemployment test for drug testing or preemployment test for legal status.

I am interested in what you might say about the difference between mandatory and voluntary testing of current or legacy employees. If we don't make it mandatory for legacy employees, then what do you think is the result on the illegal workforce that exists in employment today.

Mr. MILLER. Well, Mr. King, coming from the restaurant industry where people and employees change positions, change companies very frequently, if you looked at it from the way we do in terms of turnover of jobs, a lot of entry-level workers, a lot of people work for different companies. Some of our employees work for two or three different companies at a time.

I believe that if we start this process the way this bill is intended, and that we don't require a pre—that we verify all of the existing employees, that this is the best way that we can implement this system on a broad basis and accomplish over a period of time what we want to accomplish, and that is make sure that all workers in America are legally—are here legally and have the right to work in America.

Mr. KING. Not the whole step, but a good step in the right in the right direction, then, to summarize.

And then there is also a provision in there for agricultural seasonal employees, that if they have been employed by the employer in the past in a seasonal business, that they don't need to be verified again. And as an employer in the restaurant business, does that—do you look at that and think that that is a special provision for an individual profession? I will see it from a seasonal construction business that if I have seasonal employees that have worked for me in the past, and they have to be verified when the frost goes out every spring, but workers that come in in the San Joaquin Valley would not, what is your view on that from a justice or equity standpoint?

Mr. MILLER. Well, we have a process called the H2B visa for seasonal workers. Our industry, particularly the resort part of our industry, unfortunately right now the Department of Labor is actually creating even higher barriers that prevent the HB2 visa program to work effectively. So I believe that the way this act is written, that we can get through over time and be able to make sure that we maintain the viability of all of our businesses. And agriculture is special, to Mr. Conyers' point.

Mr. KING. Thank you.

If I could quickly ask Ms. Moran, you made the comment that the bill, the language came out of it that was a nondiscriminatory language. And I would point out that if you read the language closely, that the words "nondiscriminatory" came out, but the substance of the effect of it remain that one would have to test all the employees similarly situated or within that. And as the interpretation that I have is that if you are an employer, and you employ 10,000 or more, or any number for that matter, and you think that you have a problem with illegal workers in a certain area, might be sanitation within the plant, you would still be required to run all 10,000 of those employees through—under the language that I see in this bill, all 10,000 employees through E-Verify if you thought you might have had a problem within a small segment of your employment base, perhaps 100 of your 10,000.

You are concerned about nondiscrimination. I think that discriminates against the employer, who in good faith would want to have a legal workforce, but would be prohibited from that by the burden of having to punch 10,000 names through the computer to be able to clean up one segment of this factory. What would be your thoughts on that?

Ms. MORAN. Well, I think we saw from IRCA that there was a lot of hiring discrimination when they implemented the employer sanctions. I think there was a series of 3 or so GAO reports that documented that that actually did happen. So I do think it is im-

portant that if the employer is going to reverify someone, they have to reverify everyone.

Mr. KING. So, what is the problem with an employer reverifying a segment of their workforce if, say, it is sanitation, or mechanics, or my truck drivers, or bulldozer operators? If I have got no problem with the white collar part of this, but I do have a problem with the blue collar, why would you disagree with that philosophically? And if I could ask unanimous consent for an additional 1 minute so the gentlelady could respond?

Ms. MORAN. Because from a worker's perspective, it is really a problem. So let us say that you wanted—you know, certain workers you expect are undocumented, maybe they are Latino, so you decide to reverify them. Already we have a super high, I would say, error rate.

Mr. KING. Ms. Moran, how would an employee know if they are being reverified, and how would an employer discriminate against an employee who was a legal worker?

Ms. MORAN. Because they would be the subject of a database error. Naturalized U.S. citizens are 30 times more likely than native-born——

Mr. KING. Mr. Smith's testimony in his opening statement resolved that issue. So how does an employer discriminate against an employee? If the employee doesn't know they are using E-Verify to verify that they are a legal worker, the only thing they can do is take action against an illegal.

Mr. GALLEGLY. The time of the gentleman has expired. I will give her an opportunity to try to respond, and then we will go to the next speaker.

Ms. MORAN. I am a little bit confused by the question, because I am not quite sure how you can know that someone is an illegal worker unless you reverify them. It would result in discriminatory use. And there aren't any worker protections. I think there is a line that says that you can't take adverse action or something. There are no penalties attached, so right now there is a high level of employer misuse with voluntary users.

Mr. KING. Mr. Chairman, I would ask unanimous consent to clarify this significant point that we have here. There has been an allegation of discrimination, and I think the witness is the expert and can answer.

Mr. GALLEGLY. Without objection, the gentleman will have 1 minute for the purpose of clarifying his question.

Mr. KING. Thank you, Mr. Chairman.

My point is this, that as an employer, if you had one or several employees that you suspected were illegal, and the documentation would give you that lack of confidence, so their lawful ability to work in the United States, an employer under—the way I would propose this language—could then sit down in their HR department, light up their computer, punch the I-9 information into the E-Verify database, and verify that they could lawfully work in this country for their company.

If an employer did that, the employee would have no idea that that process was taking place. Therefore, if they were a legal employee, zero discrimination could possibly take place. And if they were illegal, they would be dismissed according to the intent of this

congressional legislation. So how does discrimination take place under E-Verify?

Mr. GALLEGLY. Ms. Moran.

Ms. MORAN. So, first of all, the Westat study, I can't remember if it was this one or the last one, found that when employers—when workers who are foreign born, Latino, Asian, foreign-born workers, are the subject of an error, they make an automatic assumption that they are undocumented.

And so the point I am trying to make is that people of color, foreign-born workers are going to be more likely to be the subject of this reverification, and when they are, they are therefore going to receive more errors and be the subject of more adverse action. So it is not direct—it is unintended maybe, or it is indirect discrimination, but it is discrimination.

Mr. KING. The computer doesn't know what color they are. I yield back.

Ms. MORAN. But the employer does.

Mr. GALLEGLY. Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I ask unanimous consent to have an additional 1 minute to be able to yield to the Ranking Member Mr. Conyers, please.

Mr. GALLEGLY. Without objection.

Ms. JACKSON LEE. Thank you. I yield 1 minute to the gentleman from Michigan.

Mr. CONYERS. Thank you.

To my friend Steve King, and I don't know much about Iowa except that last time I went in with Obama to carry your State, you guys there deal in corn, and corn is a machine-sensitive operation. There isn't any stoop labor. You are not picking apples.

Mr. KING. We used to plant it by hand.

Mr. CONYERS. You used to. But it is mostly machinery. So the kinds of questions that involve the restaurant business and homebuilding is a little bit different, Steve. And that is the only thing I wanted to point out. That is why you don't have this kind of problem much in your State.

And, by the way, I will probably be back in your State next year.

Mr. GALLEGLY. Good luck, Mr. Conyers.

I would yield to the gentlelady from Texas Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chairman very much. And I thank the Ranking Member. And let me thank all of the witnesses as well. And thank you for allowing me to acknowledge that I was in a Homeland Security hearing on radical Muslim issues that delayed me coming here. Another opportunity to set the record straight.

But in any event, in his absence, and I hope to speak to him directly on H.R. 2164, to Mr. Smith, I would greatly appreciate having the opportunity to expand the horizons of E-Verify for an amendment that would add comprehensive immigration reform. I think it is an excellent vehicle to amend it with the comprehensive immigration reform language that many of us have been working on for more than a decade. If this is going to be the vehicle that is going to travel dealing with the question of immigration, why not look at it comprehensively to answer a number of concerns.

The other question I would like to put on the record—Mr. Smith, I am sorry, I didn't see you there—is I cannot find the basis of funding in this particular legislation. And from my perspective—and I will ask Ms. Moran at a certain point—it looks as if this bill is going to exponentially add costs to the government. And as I understand it, my colleagues on the other side of the aisle are looking to slash the budget and, in fact, have no money.

So I don't see how we are going to effectively use this without tying comprehensive immigration reform, which, Ms. Moran—and I am not posing a question—to my knowledge all the bills that I have reviewed, including my legislation and other legislation, assesses fees which go back into the Treasury, and therefore it is self-providing.

Let me ask Mr. Rutenberg. I am a strong supporter of the home builders. I work a lot on the home building issues. I want you to build, build, build and employ, employ, employ. We have a strong contingent in Texas, as you well know.

My simple question to you is do you or do you know of your State organization, local organization that support comprehensive immigration reform? Do you have that body of thought among your members?

Mr. RUTENBERG. I don't think that we have a consensus on comprehensive.

Ms. JACKSON LEE. But you do have some sectors that agree with that?

Mr. ROBERTS. In 160,000 members, I have somebody who agrees with almost everything.

Ms. JACKSON LEE. Well, do you know—have you visited—I am not sure, where are you from?

Mr. RUTENBERG. Florida.

Ms. JACKSON LEE. Are you familiar with those in Texas?

Mr. RUTENBERG. I know a quite a number. I have attended your meetings frequently.

Ms. JACKSON LEE. All right. So I would imagine you have seen some body of thought in Texas agreeing of comprehensive immigration reform.

Mr. RUTENBERG. I cannot speak to that. I do know that we thought that E-Verify was a good start to this point.

Ms. JACKSON LEE. Are you against comprehensive immigration reform that would allow people to get in line in a second line and pay fees, and continue to contribute to the American public, and serve in the United States military?

Mr. RUTENBERG. I personally do not have an opinion for this Committee on comprehensive reform. I will tell you——

Ms. JACKSON LEE. I thank you. My time is short. Thank you.

Mr. Miller, I understand you represent restaurants, and is that the National Restaurant Association?

Mr. MILLER. Yes, ma'am.

Ms. JACKSON LEE. All right. And what is your position on comprehensive immigration reform?

Mr. MILLER. We tried that back in 2005 and 2006, as I am sure you recall.

Ms. JACKSON LEE. Who tried it? The restaurants tried it?

Mr. MILLER. No. Our Congress tried it.

Ms. JACKSON LEE. I don't know who tried it then. You must not be reading the legislation. But what is your answer?

Mr. SMITH. I think he is referring to the Senate bill. I would give him a chance to respond if I were you.

Ms. JACKSON LEE. The Senate bill didn't pass.

Mr. MILLER. Having lived on the front lines of an immigration policy or a lack of an immigration policy for my entire career as a restaurateur, I looked at this bill——

Ms. JACKSON LEE. You are trying to—I don't want to cut you off, but I need to get to Ms. Moran. But what you are saying is I am taking anything I can get because you need to have some order. Is that my understanding?

Mr. MILLER. I am here in support of this bill because I think it will move——

Ms. JACKSON LEE. I got it. When you are desperate, you gotta get something, and I appreciate it.

Ms. Moran, can you now just pose the question to help Mr. Miller, because as I recall, the National Restaurant Association did support comprehensive immigration reform during my lifetime in the United States Congress.

Tell us how bad this bill will be in terms of cost, in terms of small businesses, and in particular the errors that will now burden the Social Security office in order to handle people who are going to be discriminated against.

Ms. MORAN. Yeah. I talked a bit about the error rates, but definitely the impact on the Social Security Administration is going to be enormous. And I testified at the hearing last month about that, and we can submit that testimony for the record. You know, the only——

Ms. JACKSON LEE. Maybe you can help Mr. Miller, because that is why he is here.

Ms. MORAN. We have worked together in the past on comprehensive immigration reform—not "we" personally, but certainly we have worked with the businesses on a comprehensive immigration reform bill that included E-Verify and legalization in the past. I think you are referencing the Senate efforts in 2006 and 2007.

Regarding the costs, we only have one real score on the mandatory E-Verify program, and it is $17 billion in lost tax revenue. We have another score that puts about 5- or 6 billion it costs to actually run the program.

Ms. JACKSON LEE. Five- or six billion?

Ms. MORAN. To actually sort of put it on line; not the tax loss, but actually running the program.

I have—I would like to submit for the record, I have got four pages of quotes from small businesses saying, "I don't want this," testifying in Florida and other States saying that they don't want E-Verify; that they don't have an HR department, that their sister does it or their mom does it; that they don't have the expenses; that they can't handle helping people fix their errors.

So I know that we have got some business associations here, but the Main Street Alliance submitted a letter to this Committee saying this is not good for small business. So I think we have got some sort of like big business insider D.C. groups and we have got some Main Street groups that are saying this isn't for them.

Mr. GALLEGLY. I thank the gentlelady. The gentlelady's time has expired.

I ask unanimous consent that a June 14, 2011, letter, support for the Legal Workforce Act, from the American Council on International Personnel; a June 14, 2011, press release from the U.S. Chamber of Commerce supporting the Legal Workforce Act; and a June 15, 2011, letter to Chairman Smith from the Society for Human Resource Management supporting the Legal Workforce Act be made a part of the record for this hearing.

[The information referred to follows:]

American Council on International Personnel | Advancing Global Mobility

June 14, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Smith:

On behalf of the American Council on International Personnel (ACIP), I am writing to thank you for introducing the *Legal Workforce Act*, legislation that would rightly create one, federal electronic employment eligibility system.

ACIP is the leading trade association that advocates for sound business immigration policy. Our members consist of over 220 of America's largest companies, universities and non-profit research institutions. We represent the in-house human resource and legal professionals responsible for hiring and verifying the employment eligibility of employees at locations across the United States.

Our members uniquely know the challenges that a patchwork of state and local verification laws could pose, and we applaud you for including federal preemption of such a disparate network of laws in your legislation. Given the recent U.S. Supreme Court decision in *Chamber of Commerce of the United States of America et al. v. Whiting et al.*, federal preemption is the right direction.

We also applaud the legislation for embracing the latest technology to make the E-Verify system uniform for all employers and for including a biometric pilot program, which we believe is a necessary component to ensuring the accuracy and reliability of any employment verification system. Employers work hard to balance their verification duties with nondiscrimination requirements, and they must be able to hire with confidence, knowing that the person they clear for hiring is in fact the person he or she claims to be.

We thank you again for introducing the *Legal Workforce Act*, and we look forward to working with you to ensure the system created is workable for all employers.

Respectfully submitted,

Lynn Shotwell
Executive Director

cc: The Honorable John Conyers, Jr.

U.S. CHAMBER OF COMMERCE NEWS
Phone: 202-463-5682 | 888-249-NEWS | E-mail: press@uschamber.com

FOR IMMEDIATE RELEASE – June 14, 2011 Contact: Blair Latoff 202-463-5682

U.S. Chamber Statement on Chairman Smith's E-Verify Legislation

WASHINGTON D.C.—U.S. Chamber of Commerce Senior Vice President of Labor, Immigration, and Employee Benefits Randy Johnson, issued the following statement today in support of the "Legal Workforce Act," introduced by Rep. Lamar Smith, Chairman of the House Judiciary Committee:

"The Chamber commends Chairman Smith for introducing a new E-Verify bill that has strong preemption language for state and local laws mandating the use of E-Verify or establishing state or local employment verification schemes, mirrors the existing FAR rules for federal contractors using E-Verify on current workforce, and establishes a fully electronic employment verification obligation with a clear safe harbor for employers that act in good faith.

"While some concerns and technical issues may arise as the bill is subject to hearings and line by line analysis, this legislation represents a legitimate balancing of many competing interests. We hope to continue to work with the Chairman to resolve any impediments to passage as the legislation moves forward.

"The Chamber believes a workable employment verification system addresses only one part of our nation's dysfunctional immigration system in need of reform. It is our hope that Congress can also move legislation concerning other aspects of immigration reform, recognizing that compromises will be necessary."

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

www.uschamber.com # # # www.chamberpost.com

PERMALINK: U.S. Chamber Statement on Chairman Smith's E-Verify Legislation

SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

June 15, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Smith:

On behalf of approximately 260,000 members of the Society for Human Resource Management (SHRM), I am writing to thank you for introducing *The Legal Workforce Act*, which creates a fully integrated, federal, electronic employment verification system.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and over 140 countries and subsidiary offices in China and India.

HR professionals are on the front lines of employment verification and are fully committed to only hiring work-authorized individuals. We also recognize, however, that the current employment verification system is in need of real reform. The patchworks of state and local verification laws are unworkable and creating a confusing set of legal requirements for American employers and employees. We, therefore, applaud you, Mr. Chairman, for including federal preemption provisions in your legislation to address the disparate network of state laws and provide for a uniform national system.

There is also ample evidence that the employment verification system is prone to fraud, forgeries and identity theft, making it difficult, if not impossible, for an employer to differentiate between the legal and illegal worker. SHRM believes inclusion of a biometric pilot program in *The Legal Workforce Act* will give employers the tools they need to keep illegal workers off their payrolls and to hire legal workers quickly, fairly, and with confidence.

We thank you again for introducing *The Legal Workforce Act,* and we look forward to working with you on this important legislation as it works its way through Congress.

Sincerely,

Henry G. Jackson, CPA
Interim President and CEO

1800 Duke Street • Alexandria, VA 22314-3499 • +1-703-548-3440 +1-703-535-6490 Fax +1-703-548-6999 TTY/TDD • www.shrm.org

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Mr. CONYERS. Mr. Chairman, in view of the fact that one of the major authors of the bill wasn't able to stay here for the hearing, I would like to renew my consideration of the leadership here that we have another hearing on this subject.

Mr. GALLEGLY. The gentleman from Michigan's request is duly noted.

Ms. JACKSON LEE. Mr. Chairman?

Mr. GALLEGLY. Yes, Ms. Jackson Lee.

Ms. JACKSON LEE. I would like to submit some information into the record, and I would like to add, if you would, to Mr. Conyers' request, and I thank you for duly noting it, is the opportunity to have a hearing—and, Ms. Lofgren, let me thank you for your leadership—but to have a hearing on a number of comprehensive immigration reform legislation offered by a number of individuals in this Congress, some of which had bipartisan support. I would like your consideration.

But I would like to put into the record two points made with the present E-Verify structure. It is indicated that a million people will be unemployed, and that the loss of revenue will total now $23 billion based upon the implementation of H.R. 2164.

Mr. GALLEGLY. With respect to the lady's first comment, that will be so noted.

As it relates to the unanimous consent request, that will be placed into the record under unanimous consent.

Ms. JACKSON LEE. I thank the gentleman.

Mr. GALLEGLY. I would like to thank our witnesses today for their testimony, and without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which will be forwarded, and ask the witnesses to respond as promptly as they can so that the questions and answers will be made a part of the record of the hearing.

Without objection, all Members have 5 legislative days to submit additional materials for inclusion in the record. And with that, again I thank the witnesses. And the Subcommittee stands adjourned.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of Congressman John Conyers, Jr.
Hearing on H.R. 2164, the "Legal Workforce Act"
Subcommittee on Immigration Policy and Enforcement
June 15, 2011 at 10:00 a.m.
2141 Rayburn

The new majority has said over and over again that they want less spending and a smaller government. But when it comes to immigration enforcement, it is clear that no price is too high and no amount of government is too much. The bill we are considering here today is completely at odds with the fundamental principles of the party of limited government and fiscal responsibility.

It massively expands the role of government in our daily lives in the most basic way. All US citizens will be required to check with government agencies and databases, which are filled with errors, before they will be allowed to work. All while increasing our deficit, hurting small businesses and agriculture, and potentially costing millions of Americans their livelihoods. The hypocrisy inherent in this massive government expansion is even more troubling because it doesn't even work.

Let me point out some of the critical flaws of this bill.

First, my colleagues think mandatory E-Verify will create more jobs by finding undocumented workers. This is simply not true. The AFL-CIO and Change to Win, representing over 16 million workers and more than 60 unions, have opposed such an enforcement-only approach because they realize enforcement alone does not diminish the demand for willing workers.

Instead of opening up jobs for U.S. workers, this bill would simply push employers to go off-the-books or to classify workers as independent contractors. This would cost us tens of billions in tax revenues and shove undocumented workers further into the shadows, where they would be further subject to exploitation that drives down wages and working conditions for all workers.

Second, this bill will cost hundreds of thousands, if not millions, of U.S. workers their jobs. Until now, U.S. citizens have been insulated from the impact of immigration enforcement efforts. There are approximately 60 million new hires every year – most of whom are U.S. citizens. However, given current error rates in E-Verify, passing this bill would mean that we would knowingly be putting 1 to 3 million U.S. workers at risk of losing their jobs. In this economy, creating additional hurdles to employment simply makes no sense.

Finally, the impact of these errors would disproportionately fall on those least able to afford the costs – low-income workers and minorities. Nearly 21 million U.S. citizens don't have a government-issued photo ID. This group includes some of the poorest of our countrymen. These citizens have a right to work, but our colleagues will now require that they pay a *de facto* tax to acquire government-issued identification.

This bill also furthers discrimination in hiring against minorities and legal immigrants. Current law does not allow screening a job applicant before hire, yet GAO studies show that employers often ignore this prohibition, and they often don't even give applicants the opportunities to correct errors. And error rates in E-Verify are 30 times higher for foreign-born U.S. citizens and even higher for other legal, foreign-born workers. All together, this means that U.S. citizens who are of Latino or African or Asian descent will be disproportionately locked out of jobs.

Now, we can all agree that the issue of ensuring a legal workforce is a complex one. But complex problems are rarely solved with simple, one-size-fits-all solutions.

Unfortunately, that's exactly what this bill proposes to do by offering a massive government expansion as a supposed silver bullet to our country's immigration issues – while greatly hurting U.S. workers and American small businesses. Solutions should not be worse than the problems they purport to solve.

I thank the witnesses for their attendance today and look forward to your testimony.

Written Statement Submitted Rep. Judy Chu

House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

Hearing on: "H.R. __, The Legal Workforce Act"
June 15, 2011

Today, the Subcommittee on Immigration Policy and Enforcement will consider a bill to expand the E-Verify program to a mandatory nationwide program. Any expansion of E-Verify, without broader immigration reform, will only damage the still-fragile American economy further because Americans will lose their jobs and small businesses will be unduly burdened.

Mandatory E-Verify Will Cause American Citizens and Lawful Workers to Lose Their Jobs

If the Legal Workforce Act becomes law, it will delay or deny over one million Americans the chance to earn their first paycheck at their next new job. Based on current error rates, as many as 1.3 million workers would be erroneously flagged by the E-Verify system and would have to either fix their records or lose their jobs should E-Verify become mandatory. Currently, over 60 percent of U.S. citizens and lawful workers who are the subject of database errors are unable to correct their records and would lose their jobs under the proposed legislation.

Mandatory E-Verify will have a strong negative impact on Asian American and Pacific Islander (AAPI) workers. A 2009 Westat report found the error rate for foreign-born workers was *20 times higher* than that of U.S.-born workers. Indeed, error rates for naturalized U.S. citizens are*30 times higher* than that of native-born citizens. If E-Verify becomes mandatory, a disproportionate number of AAPIs will experience errors and have their jobs jeopardized since more than 8 million AAPIs are foreign-born.

E-Verify also promotes discrimination against AAPIs, Latinos and other persons of color, as under-trained employers may assume a worker is undocumented and unduly fire the worker or simply not hire them at all. Many persons of color - both

citizens and non-citizens - may experience tentative non-confirmations (TNCs) simply because of name mismatches if employers are confused by complex names, spelling or name order. Government employees unfamiliar with foreign names and different naming conventions might also incorrectly enter information into the databases that E-Verify uses to confirm work authorization, which also leads to errors in the confirmation process. According to USCIS, in 2009, over 22,000 TNCs (76% of which were for citizens) resulted from name mismatches alone.

Resolving TNCs is often burdensome and confusing for workers. When workers have an error in their records, 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% of workers spent more than $50 to correct database errors and 13% spent more than $100. Moreover, in 2009, the wait times for SSA office visits were 61% longer than they were in 2002. These numbers prove that the E-verify system will not work for American citizens.

E-Verify Will Stall Job Growth and Harm Small Businesses

E-Verify will also increase the regulatory burden on employers, particularly small business owners. The Legal Workforce Act, if passed, essentially requires all employers to spend money on compliance training, employee verification, and capable infrastructure for electronic submission and verification. These compliance costs will disproportionately affect small businesses – during a time when small businesses can least afford additional costs. Research conducted by Bloomberg Government indicated it would have cost the nation's employers $2.7 billion if the use of E-Verify had been mandatory in fiscal year 2010 – of which small businesses would have born almost the entire amount. Employers will have to put money toward complying with E-Verify, rather than creating jobs for American workers.

Conclusion

I urge the subcommittee to work toward solutions that create jobs for American workers and support small businesses. Expanding E-Verify, which is far too error-prone and costly, will hurt our struggling economy while doing nothing to fix our broken immigration system.

Testimony of The Honorable Michael M. Honda

Member, US House of Representatives

June 15, 2010

Chairman Gallegly, Vice-Chairman King, and Members of the Subcommittee on Immigration Policy and Enforcement, thank you for calling this hearing on The Legal Workforce Act and leading a discussion on the E-Verify Program.

Representative Lamar Smith's Legal Workforce Act would require U.S. employers to use an electronic employment verification system (E-Verify) that has been shown to be inefficient and costly to American workers and employers. Making the E-Verify program mandatory without addressing the program's egregious error rate would be damaging to this country at a time when we need to focus on growing our economy.

Expansion of the E-Verify program will cost 800,000 Americans their jobs every year due to government errors. In exchange, the program at current state will catch less than 50% of undocumented workers.

If we think that more bureaucracy will protect American jobs, we are mistaken. Mandatory use of E-Verify will cause headaches and unnecessary hardship for up to 4 million Americans who will have to correct government data to keep their jobs. In Representative Smith's home state of Texas, 95,143 citizens and 285,430 lawful migrant workers would either have to correct their data or lose their jobs. In addition, error rates for foreign-born lawful works is approximately 20 times higher than error rates for native-born workers, placing a heavy burden on workers who have followed our immigration laws.

Expansion will also cost federal taxpayers $17 billion in lost revenue by pushing undocumented workers off the books, out of the tax system, and into the arms of abusive employers.

I agree that our broken immigration system doesn't work and that we must take steps to fix it. However, simply expanding a flawed program without implementing other measures to protect workers is not the answer.

We cannot afford a piecemeal approach to immigration. Passing the Legal Workforce Act and expanding the E-Verify program as it currently stands will jeopardize the job security of American workers, drive jobs into the underground economy, impose new costs on employers and increase unemployment.

dunkin' brands

STATEMENT OF DUNKIN' BRANDS, INC.
HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE,
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

Hearing on "The Legal Workforce Act"

June 15, 2011

Chairman Gallegly, Ranking Member Lofgren, and distinguished members of the Subcommittee. Dunkin' Brands, Inc. seeks to submit this statement containing our views on the E-Verify program and the Legal Workforce Act.

Dunkin' Brands, Inc. is the parent company of two of the world's most recognized brands, Dunkin' Donuts and Baskin-Robbins. Dunkin' Donuts and Baskin-Robbins restaurants are essentially 100% franchised, meaning our restaurants are owned and operated by independent business owners. As of June 1, 2011, our franchisees own and operate 9,319 restaurants in 47 states across the nation. The average Dunkin' Donuts franchisee owns 5.9 restaurants and the average Baskin-Robbins franchisee owns 1.3 restaurants.

Since June 1, 2006, Dunkin' Brands has required all franchisees to use the Department of Homeland Security's E-Verify program to ensure that their new hires are legally authorized to work. The mandatory use of the program is a mandatory Brand standard for our entire system. As a franchise system, employees of Dunkin' Donuts and Baskin-Robbins are employees of the individual franchisee, not Dunkin' Brands.

The E-Verify program affords our franchisees' new employees a full and fair opportunity to resolve any questions about their eligibility to work and guarantees that those who are eligible to work get proper credit for their social security contributions. E-Verify is an effective solution



that is cost-effective, fast, and removes much of the guesswork from document review during the I-9 process.

Given the system-wide use of the E-Verify program, Dunkin' Brands is uniquely situated to comment on the Legal Workforce Act. Dunkin' Brands supports the provisions of the Legal Workforce Act, as currently drafted. Further, we support Congress' efforts to establish an effective federal employee verification program for all employers, and we believe the Legal Workforce Act strikes the right balance for all employers.

We support the Legal Workforce Act's provision to pre-empt state and local governments from setting different standards for the use of the E-verify program. Currently, numerous states and local governments have enacted or are in the process of considering employment verification laws. This patchwork of inconsistent laws could have a burdensome effect on multi-state operators such as our franchisees.

Dunkin' Brands also supports the legal protections in the bill for employers. The Legal Workforce Act protects employers who rely in good faith on the information provided by the E-Verify Program. For small and medium-sized business owners such as our franchisees and employers across the country, the importance of these protections cannot be overstated.

The Legal Workforce Act includes a provision that allows re-verification of the workforce to be voluntary. Dunkin' Brands supports a voluntary re-verification approach instead of mandating re-verification of the entire workforce. For existing employers that use the E-Verify program, existing employees have already been verified through existing legal procedures. Given the nature of the restaurant industry, re-verification of existing employees can be costly and also creates an unnecessary redundancy for all employers whether they currently use the program or not. Thus, we strongly urge Congress to maintain a voluntary



re-verification option.

Finally, Dunkin' Brands supports the Legal Workforce Act's approach to cover all employers. The E-Verify program should apply to all employers without exception. Often Congress creates "winners and losers" by exempting employers with a certain number of employees. We strongly urge Members of Congress to maintain an equal playing field by mandating the program all for employers large and small regardless of the industry. The Legal Workforce Act's phase-in approach of three years should be able to accommodate all employers and provides a reasonable roll-out of the program. Given the scope and scale of the American workforce, it is imperative that the program and the Department of Homeland Security be properly resourced to verify millions of employees. The program must able to adequately address the enormous verification needs that will be created by this legislation.

In conclusion, Dunkin' Brands supports the Legal Workforce Act as currently drafted and believes its provisions should be maintained throughout the legislative process.

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