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Electronic Employment Eligibility Verification

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Summary

Unauthorized immigration and unauthorized employment continue to be key issues in the ongoing debate over immigration policy. Today's discussions about these issues build on the work of prior Congresses. In 1986, following many years of debate about unauthorized immigration to the United States, Congress passed the Immigration Reform and Control Act (IRCA). This law sought to address unauthorized immigration, in part, by requiring all employers to examine documents presented by new hires to verify identity and work authorization and to complete and retain employment eligibility verification (I-9) forms. Ten years later, in the face of a growing unauthorized population, Congress attempted to strengthen the employment verification process by establishing pilot programs for electronic verification, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The Basic Pilot program (known today as E-Verify), the first of the three IIRIRA employment verification pilots to be implemented and the only one still in operation, began in November 1997. Originally scheduled to terminate in November 2001, it has been extended several times. It is currently authorized until September 30, 2018, in accordance with the Consolidated Appropriations Act, 2018 (P.L. 115-141).

E-Verify is administered by the Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS). As of April 2, 2018, there were 779,722 employers enrolled in E-Verify, representing more than 2.5 million hiring sites. E-Verify is a largely voluntary program, but there are some mandatory participation requirements. Among them is a rule, which became effective in 2009, requiring certain federal contracts to contain a new clause committing contractors to use E-Verify.

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

Legislation on electronic employment eligibility verification has been considered in recent Congresses. In weighing proposals on electronic employment verification, Congress may find it useful to evaluate them in terms of their potential impact on a set of related issues: unauthorized employment; verification system accuracy, efficiency, and capacity; discrimination; employer compliance; privacy; and verification system usability and employer burden.

Contents

Background 1
E-Verify 1
Verification Process 2
Growth and Participation 3
Funding 4
Recent Proposals on Electronic Employment Verification 4
Legislation in Recent Congresses 5
E-Verify Regulations 5
Policy Considerations 7
Unauthorized Employment 7
Verification System Accuracy, Efficiency, and Capacity 8
Accuracy of Findings 8
Database Accuracy 12
System Efficiency 13
System Capacity 14
Discrimination 14
Employer Compliance 16
Privacy 17
System Usability and Employer Burden 19
Conclusion 19

Contacts

Author Information 20

Background

Many years of debate about unauthorized immigration to the United States culminated in the enactment of the Immigration Reform and Control Act (IRCA) of 1986.[1] That year, there were an estimated 3.2 million unauthorized aliens[2] in the country.[3] IRCA coupled legalization programs for certain segments of the unauthorized population with provisions to deter future unauthorized immigration by reducing the magnet of employment. These latter provisions reflected a belief, widely held then and now, that most unauthorized aliens enter and remain in the United States in order to work. To reduce the job magnet, IRCA amended the Immigration and Nationality Act (INA)[4] to add a new Section 274A, which makes it unlawful to knowingly hire, recruit, or refer for a fee, or continue to employ, an unauthorized alien, and requires all employers to examine documents presented by new hires to verify identity and work authorization and to complete and retain employment eligibility verification (I-9) forms.

The IRCA provisions did not have the effect of curtailing future illegal immigration. After falling to an estimated 1.9 million in 1988 as eligible unauthorized aliens legalized their status, the unauthorized population began to grow. By the early 1990s, it had surpassed pre-IRCA levels.[5] The I-9 process was effectively undermined by the ready availability of genuine-looking fraudulent documents.

Ten years after the enactment of IRCA, Congress attempted to strengthen the employment verification process as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[6] IIRIRA directed the Attorney General to conduct three largely voluntary pilot programs for electronic employment eligibility confirmation. After examining documents and completing I-9 forms as required under INA Section 274A,[7] employers participating in a pilot program would seek to confirm the identity and employment eligibility of their new hires. IIRIRA tasked the Attorney General with establishing a confirmation system to respond to inquiries made by participants in these pilot programs "at any time through a toll-free telephone line or other toll-free electronic media concerning an individual's identity and whether the individual is authorized to be employed." The former Immigration and Naturalization Service (INS) within the U.S. Department of Justice had initial responsibility for administering the employment eligibility confirmation pilot programs. In 2003, DHS assumed this responsibility.[8]

E-Verify

The Basic Pilot program, the first of the three IIRIRA employment verification pilots to be implemented and the only one still in operation, began in November 1997 in the five states with

[1] P.L. 99-603.

[2] *Alien* is a term used in immigration law to describe a person who is not a citizen or national of the United States.

[3] See archived CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, p. 2.

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

[5] See archived CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, pp. 2-3.

[6] Division C of P.L. 104-208.

[7] IIRIRA modified the I-9 requirements for pilot program participants.

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

the largest unauthorized alien populations at the time.[9] In December 2004, in accordance with P.L. 108-156, the program became available nationwide, although it remained primarily voluntary. The Basic Pilot program has changed over the years. Since July 2005, it has been entirely internet-based. It is administered by DHS's U.S. Citizenship and Immigration Services (USCIS).

The Basic Pilot Program was briefly renamed the Employment Eligibility Verification (EEV) Program by the Administration of George W. Bush, and was again renamed E-Verify by that Administration in August 2007.[10] IIRIRA, as originally enacted, directed the Attorney General to terminate the Basic Pilot program four years after going into effect, unless Congress provided otherwise. Congress has extended the life of the Basic Pilot program/E-Verify multiple times. Most recently, it extended E-Verify until September 30, 2018, as part of the Consolidated Appropriations Act, 2018.[11]

Verification Process

As part of the I-9 process, all employers must review documents presented by new hires to verify their identity and employment authorization and, along with the new hires, must complete I-9 forms.[12] Employers participating in E-Verify then must submit information from the I-9 form about their new hires (name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable) via the internet for confirmation.

The information in the employer's query is automatically compared with information in SSA's primary database, the Numerical Identification File (Numident), which contains records of individuals issued Social Security numbers. For those employees identifying themselves as citizens, if the information submitted by the employer matches the information in Numident and SSA records confirm citizenship, the employer is notified that the employee's work authorization is verified. If the information submitted by the employer about a self-identified citizen matches

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

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

[11] P.L. 115-141. The earlier extensions were enacted in P.L. 107-128 (which amended IIRIRA to direct that the program be terminated after six years), P.L. 108-156 (which amended IIRIRA to direct that the program be terminated after 11 years), P.L. 110-329 (which effectively established a March 6, 2009, termination date), P.L. 111-6 (which effectively established a March 11, 2009, termination date), P.L. 111-8 (which established a September 30, 2009, termination date), P.L. 111-68 (which effectively established an October 31, 2009, termination date), P.L. 111-83 (which established a September 30, 2012, termination date), P.L. 112-176 (which established a September 30, 2015, termination date), P.L. 114-53 (which effectively established a December 11, 2015, termination date), P.L. 114-96 (which effectively established a December 16, 2015, termination date), P.L. 114-100 (which effectively established a December 22, 2015, termination date), P.L. 114-113 (which established a September 30, 2016, termination date), P.L. 114-223 (which effectively established a December 9, 2016, termination date), P.L. 114-254 (which effectively established an April 28, 2017, termination date), P.L. 115-30 (which effectively established a May 5, 2017, termination date), P.L. 115-31 (which established a September 30, 2017, termination date), P.L. 115-56 (which effectively established a December 8, 2017, termination date), P.L. 115-90 (which effectively established a December 22, 2017, termination date), P.L. 115-96 (which effectively established a January 19, 2018, termination date), P.L. 115-120 (which effectively established a February 8, 2018, termination date), and P.L. 115-123 (which effectively established a March 23, 2018, termination date).

[12] The Form I-9 has been periodically revised, most recently in 2017. It is available at https://www.uscis.gov/system/files_force/files/form/i-9-paper-version.pdf.

the information in Numident but SSA records cannot confirm citizenship, the information is automatically checked against USCIS naturalization databases. If this check confirms citizenship, the employer is notified that the employee's work authorization is verified. If the employer-submitted information about a new hire does not match information in Numident, the employer is notified that the employee has received an SSA tentative nonconfirmation finding.

In cases in which the employer-submitted information matches SSA records but the individual self-identifies as a noncitizen, the information is sent electronically to USCIS for verification of work authorization. If the USCIS electronic check confirms work authorization, the employer is so notified. If the electronic check does not confirm work authorization, an Immigration Status Verifier (ISV) at USCIS checks additional databases. If the ISV is unable to confirm work authorization, the employer is notified that the employee has received a USCIS tentative nonconfirmation finding.[13]

Employers are required to notify their employees about SSA and USCIS tentative nonconfirmation findings. If an employee chooses to contest a tentative nonconfirmation finding, the employer must refer the case to SSA or USCIS, as appropriate.[14] The employee has eight federal government work days from the referral date to contact the appropriate agency to resolve the issue. If an employee does not contest the finding within that period or the contest is unsuccessful, the system issues a final nonconfirmation. If an employee receives a final nonconfirmation finding that he or she believes is incorrect, the employee may contact USCIS to have the case reviewed.

Growth and Participation

The E-Verify program continues to grow. On January 31, 2006, there were 5,272 employers enrolled in the program, representing 22,710 hiring sites. Six years later, on March 17, 2012, there were 345,467 employers enrolled, representing more than 1,090,000 hiring sites. On April 2, 2018, employer enrollment in E-Verify stood at 779,722, and there were more than 2.5 million participating sites.[15] Based on the number of firms in the United States in 2015 according to U.S. Census Bureau data,[16] these enrolled employers represented about 13% of U.S. employers.

As the number of enrolled employers has grown, so has the number of employer queries, or cases, received by E-Verify. Between FY2007 and FY2017, the annual number of E-Verify queries increased more than tenfold, from about 3.3 million to about 34.9 million.[17] For general

[13] Another type of USCIS tentative nonconfirmation finding may occur if the employee presents a document that triggers the Photo Screening Tool (see "Initiatives to Improve Accuracy"). If the employer indicates that there is a mismatch between the photograph on the employee's document and the photograph in the E-Verify system, the employee receives a USCIS tentative nonconfirmation. If the employee chooses to contest the finding, the employer must send a copy of the employee's document to USCIS. See USCIS E-Verify "Tentative Nonconfirmations" page, https://www.uscis.gov/e-verify/employers/tentative-nonconfirmations.

[14] Prior to September 8, 2013, an employee who received a TNC would first be given a TNC notice by the employer. If the employee opted to contest the TNC, the employer would then provide the employee with a referral letter. As of September 8, 2013, the TNC notice and referral letter have been combined into the further action notice.

[15] All data provided to CRS by USCIS.

[16] According to U.S. Census Bureau Statistics of U.S. Businesses (SUSB) annual data, there were 5,900,731 firms in the United States in 2015 (latest year available as of the date of this report). A firm is defined as "a business organization or entity consisting of one or more domestic establishment locations under common ownership or control." 2015 SUSB annual data are available at https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html.

[17] FY2007 query data are from Statement of Theresa C. Bertucci, USCIS, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *E-Verify—Preserving Jobs for American Workers*,

comparison purposes, there were about 65.3 million nonfarm hires in the United States in calendar year 2017, according to the Bureau of Labor Statistics.[18]

As mentioned, E-Verify is a largely voluntary program. Under IIRIRA, however, violators of INA prohibitions on unlawful employment or those who engage in unfair immigration-related employment practices may be required to participate in a pilot program. IIRIRA also states that each department of the federal government and each Member of Congress, each officer of Congress, and the head of each legislative branch agency "shall elect to participate in a pilot program."[19] In August 2007, the Office of Management and Budget (OMB) issued a memorandum requiring all federal departments and agencies to begin verifying their new hires through E-Verify as of October 1, 2007.[20] In addition, federal regulations that went into effect in 2008 and 2009 included new E-Verify participation requirements, as discussed below.

Funding

USCIS, which administers E-Verify, is a fee-supported agency. Until FY2007, funding for the Basic Pilot program came from unrelated USCIS fees. (As discussed below, employers are not charged a fee to participate in E-Verify.) In recent years, however, Congress has provided funds for E-Verify as part of DHS/USCIS appropriated funding for Research, Development, Training, and Services. Since FY2009, Congress has appropriated at least $100.0 million each year for E-Verify.[21] For FY2018, the Consolidated Appropriations Act, 2018, includes $131.5 million for E-Verify.

Recent Proposals on Electronic Employment Verification

Although the unauthorized alien resident population has declined in size since its 2007 high point of an estimated 12 million, it remains substantial. According to a preliminary estimate by the Pew Research Center, unauthorized alien residents in the United States numbered about 11.3 million in 2016.[22] The Pew Research Center has also estimated that there were some 8.0 million

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hearing, 112th Cong., 1st sess., February 10, 2011, p. 1 (hereinafter cited as USCIS hearing testimony, February 2011); FY2017 query data were provided in e-mail from USCIS to CRS, May 10, 2018.

[18] U.S. Department of Labor, Bureau of Labor Statistics, "Job Openings and Labor Turnover—January 2018," news release, March 16, 2018, Table 13. Note that there are limitations to the BLS data for comparison purposes. For example, the BLS data include only nonfarm hires, while farm hires can be run through E-Verify.

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

[20] U.S. Office of Management of Budget, "Verifying the Employment Eligibility of Federal Employees," Memorandum for the Heads of Departments and Agencies, August 10, 2007.

[21] $100.0 million for FY2009, P.L. 110-329; $137.0 million for FY2010, P.L. 111-83; $103.4 million for FY2011, P.L. 112-10 (Note: This bill contained full-year continuing appropriations for FY2011 and, unlike the other bills listed, did not include a DHS Research, Development, Training, and Services title; the E-Verify appropriation was in Div. B. Title VI, §1639); $102.4 million for FY2012, P.L. 112-74; $111.9 million for FY2013, P.L. 113-6; $113.9 million for FY2014, P.L. 113-76; $124.4 million for FY2015, P.L. 114-4; $119.7 million for FY2016, P.L. 114-113; $119.1 million for FY2017, P.L. 115-31.

[22] Jens Manuel Krogstad, Jeffrey S. Passel, and D'Vera Cohn, *5 facts about illegal immigration in the U.S.*, Pew Research Center, April 27, 2017. The most recent DHS estimates put the unauthorized population at 12.1 million in 2014. See U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized*

unauthorized workers in the civilian labor force in 2014.[23] Policymakers have considered an expansion of electronic employment verification—whether though E-Verify or a new system—as a key option for addressing unauthorized employment.

Legislation in Recent Congresses

Electronic employment eligibility verification measures have been introduced in recent Congresses. Among these measures are bills that have variously proposed to make E-Verify permanent, make E-Verify mandatory for all employers or a subset of employers, permit or require the verification of previously hired workers through E-Verify, and authorize a new electronic employment eligibility verification system. Although no broad measures along these lines have been enacted, some more limited provisions have been enacted, including language to extend the E-Verify program (see "E-Verify").

Some bills with major electronic employment eligibility verification provisions, however, have seen legislative action in recent years. In the 113th Congress, the Senate passed a comprehensive immigration reform bill, the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), that included such provisions. The House Judiciary Committee considered similar versions of the Legal Workforce Act in the 113th and 114th Congresses, reporting the bill in the former Congress (H.R. 1772) and ordering it to be reported in the latter (H.R. 1147). All these measures would have amended the INA to permanently authorize a new electronic verification system modeled on E-Verify, which would have been mandatory for all employers.[24]

The 115th Congress has likewise acted on electronic employment verification measures. The House Judiciary Committee has again ordered to be reported the Legal Workforce Act (H.R. 3711), a bill similar to its predecessors in the 113th and 114th Congresses. A Legal Workforce Act title, similar to H.R. 3711, is also included in the Securing America's Future Act of 2018 (H.R. 4760), as introduced in the 115th Congress.[25] In addition, one of the immigration proposals considered on the Senate floor in February 2018 (S.Amdt. 1959)[26] included a provision to make E-Verify permanent (but not mandatory). The Senate rejected a motion to invoke cloture on this amendment.

E-Verify Regulations

Several federal rules that became effective in 2008 and 2009 require employers to participate in E-Verify in order to take advantage of certain opportunities to benefit their businesses. One of these rules implements an executive order issued by President George W. Bush in 2008 to require

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Immigrant Population Residing in the United States: January 2014, by Bryan C. Baker, July 2017.

[23] Jeffrey S. Passel and D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, Pew Research Center, November 3, 2016, p. 4.

[24] For additional information about these proposals, see CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, and CRS Report R44230, *Immigration Legislation and Issues in the 114th Congress*. The Legal Workforce Act in the 114th Congress was the subject of a USCIS report for Congress: U.S. Department of Homeland Security, *Estimated Costs and Timeline to Implement Mandatory E-Verify*, June 10, 2016.

[25] The Legal Workforce Act comprises Division B, Title I of H.R. 4760.

[26] Like the other immigration proposals, this proposal was considered as a floor amendment to an unrelated bill (H.R. 2579).

federal contractors to conduct electronic employment eligibility verification. The order read, in part:

> Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.[27]

The Secretary of Homeland Security subsequently designated E-Verify as the required employment eligibility verification system for contractors.[28] A final rule to implement the executive order was published in November 2008.[29] It requires covered federal contracts to contain a new clause committing contractors to use E-Verify "to verify that all of the contractors' new hires, and all employees (existing and new) directly performing work under Federal contracts, are authorized to work in the United States."[30] After several delays, the rule became applicable on September 8, 2009.[31]

In addition, immigration regulations issued by the Bush Administration required employers to be users of E-Verify in order to be able to employ certain temporary residents (nonimmigrants).[32] In an interim final rule, effective in April 2008, DHS extended the maximum period of optional practical training (OPT) for foreign students on F-1 visas who had completed a science, technology, engineering, or mathematics (STEM) degree. Under this rule, eligible F-1 students could extend their postgraduation OPT period, previously limited to 12 months, for 17 additional months, for a maximum OPT period of 29 months. In order to be eligible for this extension, however, the students had to be employed by an employer that was enrolled in and was a participant in good standing in E-Verify.[33] This 2008 rule was replaced by a new final rule, effective in May 2016, that, among other changes, provided for a longer STEM OPT extension

[27] Executive Order 13465, "Amending Executive Order 12989, as Amended," 73 *Federal Register* 33285-33287, June 11, 2008.

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

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

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

[31] The rule originally had an effective date of January 15, 2009, but both the effective date of the rule and the applicability date of the rule, on or after which contracting officers would include the new E-Verify clause in relevant contracts, were subsequently changed. The final amendment changed the applicability date to September 8, 2009. U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification," 74 *Federal Register* 26981, June 5, 2009.

[32] Nonimmigrants are foreign nationals who are admitted to the United States for a designated period of time and a specific purpose. See CRS Report R45040, *Nonimmigrant (Temporary) Admissions to the United States: Policy and Trends*.

[33] U.S. Department of Homeland Security, "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 73 *Federal Register* 18944, April 8, 2008.

period of 24 months, and, thus, for a new maximum OPT period of 36 months. The new final rule retained the E-Verify requirement.[34]

A DHS final rule on the H-2A temporary agricultural worker program, effective January 17, 2009, likewise requires employer participation in E-Verify as a condition of receiving an employment authorization benefit. Under the rule, an H-2A worker who is waiting for an extension of H-2A status based on a petition filed by a new employer can begin working for that new employer before the extension is approved, if the new employer is enrolled in and is a participant in good standing in E-Verify. If the new employer is not an E-Verify participant, the worker would not be authorized to begin working for the new employer until the extension-of-stay application is approved.[35]

Policy Considerations

In weighing proposals that may emerge on electronic employment eligibility verification, policymakers may want to consider potential impacts on the key issues of unauthorized employment; verification system accuracy, efficiency, and capacity; discrimination; employer compliance; privacy; and verification system usability and employer burden.

Unauthorized Employment

The primary goal of an employment eligibility verification system is to ensure that individuals holding jobs are authorized to work in the United States. Independent studies of E-Verify, conducted for INS and DHS over the years by Westat and Temple University's Institute for Survey Research, have evaluated whether the system has reduced unauthorized employment and met other policy goals.[36] An evaluation issued by Westat in 2012 considered the accuracy of E-Verify findings, particularly for employment-authorized workers.[37]

Westat evaluators have determined that most individuals receiving final nonconfirmations (FNCs), or final findings that employment authorization cannot be confirmed, are, in fact, not authorized to work. Thus, if and when workers receiving final nonconfirmations are terminated, unauthorized employment would decrease. The extent of this decrease would depend, in part, on whether these workers were able to find other employment and if so, how long it took them to do so. It may be that E-Verify further helps reduce unauthorized employment by deterring unauthorized workers from applying for positions with employers that participate in E-Verify.

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[34] U.S. Department of Homeland Security, "Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F–1 Students," 81 *Federal Register* 13040, March 11, 2016; see 8 C.F.R. §214.2(f)(10)(ii)(C).

[35] U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 *Federal Register* 76891, December 18, 2008; see 8 C.F.R. §274a.12(b)(21).

[36] The evaluation reports include Westat and Institute for Survey Research, Temple University, *INS Basic Pilot Evaluation Summary Report*, January 29, 2002; Westat and Institute for Survey Research, Temple University, *Findings of the Basic Pilot Program Evaluation*, June 2002 (hereinafter cited as Basic Pilot Evaluation Report, June 2002); Westat, *Interim Findings of the Web-Based Basic Pilot Evaluation*, December 2006; Westat, *Findings of the Web Basic Pilot Evaluation*, September 2007 (hereinafter cited as Westat Report, September 2007); Westat, *Findings of the E-Verify Program Evaluation*, December 2009 (hereinafter cited as Westat Report, December 2009); and Westat, *Findings of the E-Verify User Survey*, April 30, 2014. The latter two reports are available on the USCIS "E-Verify Evaluations" web page, https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-evaluations.

[37] Westat, *Evaluation of the Accuracy of E-Verify Findings*, July 2012 (hereinafter cited as Westat Report, July 2012). This report is available on the USCIS "E-Verify Evaluations" web page, https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-evaluations.

The effectiveness of E-Verify in reducing unauthorized employment through either final nonconfirmation findings or by discouraging applications, however, is limited by the size of the program relative to overall employment. Its effectiveness is also limited by its inability to detect various forms of fraud. Under E-Verify, the information on the I-9 form is checked against information in SSA and DHS databases. As a result, the system is able to detect certain types of document fraud, such as when a new hire presents counterfeit documents containing information about a non-work authorized or nonexistent person. (There is further discussion of fraud in the sections on accuracy, below.)

In the future, the authors of the 2009 Westat report posit, E-Verify may indirectly deter unauthorized employment by increasing the cost of securing that employment. According to the report, as unauthorized workers become more knowledgeable about E-Verify, they will increasingly obtain counterfeit, borrowed, or stolen documents with information about work-authorized persons, or will use fraudulent breeder documents, such as birth certificates, to obtain "legitimate" ones. The authors speculate that the perceived need for more sophisticated forms of fraud, with more expensive price tags, may have the long-term effect of reducing unauthorized employment:

> As it becomes harder to obtain fraudulent documents that will not be detected by E-Verify, the cost of such documents will presumably increase. Therefore, an important deterrent value of the Program ultimately may be to increase the cost of obtaining unauthorized employment, which, in turn, would cause some reduction in unauthorized employment; however, the amount of such reduction cannot be easily determined.[38]

Another possible outcome, if E-Verify makes it too difficult for unauthorized aliens to obtain legitimate employment, is that they may end up working under the table, thereby increasing the risks of worker exploitation. An opinion piece on Reason Online, affiliated with *Reason* magazine, made this argument:

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

Verification System Accuracy, Efficiency, and Capacity

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

Accuracy of Findings

Independent evaluations of E-Verify conducted by Westat and the Institute for Survey Research have analyzed the accuracy of the system using a variable known as the *erroneous tentative nonconfirmation (TNC) rate for ever-authorized employees*. This error rate, which can be

[38] Westat Report, December 2009, p. 133.

[39] Kerry Howley, "Walls of Paper," April 21, 2008, https://reason.com/archives/2008/04/21/walls-of-paper.

[40] IIRIRA §404(d)(1).

calculated from available data, is defined as the percentage of individuals ultimately verified through the system that initially receives a tentative nonconfirmation finding. The erroneous TNC rate for ever-authorized employees was 4.8% for the first two years of the Basic Pilot Program (November 1997-December 1999 period); that is, 4.8% of the workers who were ultimately found to be work authorized first received a tentative nonconfirmation.[41] The erroneous TNC rate decreased significantly in subsequent years, to 0.3% in the third quarter of FY2010 (April 2010-June 2010).[42]

There are important limitations to the erroneous TNC rate as a measurement of error, however. The variable does not take into account work-authorized individuals who receive tentative nonconfirmations but who, for whatever reason, do not contest them; these individuals are not classified as "ever-authorized." In addition, the data used to calculate the erroneous TNC rate include individuals who are found to have work authorization by the system, but who are *not*, in fact, work authorized. Eliminating these false positives (used here to refer to findings that unauthorized workers are work-eligible) from the calculation would change the error rate. Thus, as explained in the 2009 Westat report:

> [T]he erroneous TNC rate is an imperfect measure of program success because it underestimates the inaccuracy rate for authorized workers and because it is not possible to produce an estimate of an analogous inaccuracy rate for non-employment-authorized workers.[43]

There are similar limitations to the related "confirmed after initial mismatch" statistic reported by USCIS. It represents the percentage of all E-Verify cases that are confirmed as work authorized after receiving and successfully contesting a TNC finding.[44] USCIS considers this statistic an important performance metric for E-Verify but does not use it as a measure of the program's accuracy.[45]

As part of its 2009 evaluation, Westat developed new measures of inaccuracy to more fully assess the system's performance. These new inaccuracy rates are estimates of the consistency of E-Verify findings with actual work authorization status. The *inaccuracy rate for authorized workers* is an estimate of the percentage of work-authorized workers *not* initially found to be authorized to work through E-Verify. For the period from April 2008 to June 2008, the inaccuracy rate for authorized workers was approximately 0.8%, meaning that less than 1% of authorized workers were initially found by the system to lack work authorization.[46]

Analogously, the *inaccuracy rate for unauthorized workers* is an estimate of the percentage of workers without work authorization that is initially and incorrectly found to be employment authorized through E-Verify. For the April 2008-June 2008 period, the inaccuracy rate for unauthorized workers was approximately 54%, meaning that about half of the unauthorized workers checked through E-Verify were incorrectly found to be authorized to work. The *total inaccuracy rate* is an estimate of the percentage of all workers checked through E-Verify who receive inaccurate initial work authorization findings. For the April 2008-June 2008 period, E-

[41] Westat Report, September 2007, p. 57.

[42] Westat Report, July 2012, p. 22.

[43] Westat Report, December 2009, p. 116.

[44] In FY2017, 0.15% of all E-Verify cases were confirmed as work authorized after contesting a TNC. That year, 1.09% of all E-Verify cases received TNCs. USCIS E-Verify "Performance" data for FY2017.

[45] Information provided in email from USCIS to CRS, March 10, 2016.

[46] The 2012 Westat report did not include an updated inaccuracy rate for authorized workers.

Verify's total inaccuracy rate was approximately 4.1%, meaning that 4.1% of workers received initial E-Verify findings that were inconsistent with their actual work authorization status.[47]

There are several key reasons for the inconsistencies between E-Verify findings and actual work authorization status. Inaccurate findings for authorized workers are due mainly to data input errors and inaccurate or out-of-date federal government records. For unauthorized workers, incorrect work authorization findings are due mainly to fraud—both document fraud, in which employees present counterfeit or invalid documents or fraudulently obtained "valid" documents, and identity fraud, in which employees present valid documents issued to other individuals. The 2009 and 2012 Westat reports cited identity fraud as a chief source of inaccurate work authorization findings for unauthorized workers. While E-Verify can detect certain types of document fraud, it has limited ability to detect such fraud when the "counterfeit documents are of reasonable quality and contain information about actual work-authorized persons who resemble the worker providing the documentation."[48]

Some observers, like Jim Harper of the Cato Institute, are particularly concerned about the potential for increased identity fraud if E-Verify were to become mandatory for all employers. In written testimony for a 2007 House hearing on employment verification and worksite enforcement, Harper took the position that expanding E-Verify would increase identity fraud. He argued that to gain approval under a nationwide electronic system, unauthorized workers would seek "documents with genuine, but rarely used, name/SSN combinations," which would "increase illicit trade in Americans' Social Security numbers."[49]

Initiatives to Improve Accuracy

USCIS has made changes to E-Verify over the years to address the sources of inaccuracy for both authorized and unauthorized workers. One set of changes aims to reduce inaccuracies for authorized workers due to data input errors and incorrect federal government records. Since September 2007, in cases where an initial electronic check of SSA or USCIS records indicates a mismatch, the system automatically prompts the employer to double check the data in a query and make any corrections before E-Verify issues an SSA TNC or refers a case to an USCIS Immigration Status Verifier for additional database checks.[50] A December 2009 addition "enables E-Verify to recognize European date format and common clerical errors of transposed visa and passport numbers."[51]

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[47] Westat Report, December 2009, pp. 116-117. The total inaccuracy rate is much closer to the inaccuracy rate for authorized workers than to the inaccuracy rate for unauthorized workers because the overwhelming majority of workers in the labor force and checked through E-Verify are authorized to work. The 2012 Westat report did not include an updated inaccuracy rate for unauthorized workers or an updated total inaccuracy rate.

[48] Ibid., p. 131.

[49] Statement of Jim Harper, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System*, hearing, 110th Cong., 1st sess., April 26, 2007 (Washington, DC: GPO, 2007), p. 79 (hereinafter cited as Harper Testimony, April 2007).

[50] Statement of Michael Aytes, USCIS Acting Deputy Director, at U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Priorities Enforcing Immigration Law*, hearing, 111th Cong., 1st sess., April 2, 2009, p. 2.

[51] U.S. Government Accountability Office, *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, GAO-11-146, December 2010, p. 18 (hereinafter cited as GAO, *Employment Verification*).

Other enhancements involve inclusion of additional databases in the E-Verify process that are automatically checked, as appropriate, before a tentative nonconfirmation is issued. In a May 2008 change, which is known as Naturalization Phase I and is described above as part of the standard verification process, USCIS naturalization databases are automatically checked in cases in which SSA records cannot confirm citizenship for a self-identified citizen.[52] This change seeks to reduce the number of TNCs issued to naturalized citizens whose SSA records have not been updated to reflect their citizenship status.[53] In February 2009, Department of State passport records were incorporated into the E-Verify program. These records are checked when a self-identified citizen presents a U.S. passport to establish identity and employment eligibility as part of the I-9 process and DHS or SSA cannot immediately confirm work eligibility.[54] In addition, in May 2008, real time arrival data for noncitizens from the Integrated Border Inspection System was added to the system.[55] In October 2012, access to another database—DHS's Arrival and Departure Information System (ADIS) database—was added to E-Verify. These enhancements are intended to reduce mismatches for recent arrivals.

Another initiative, known as E-Verify Self Check, enables individuals to voluntarily check their work authorization status online through E-Verify to determine whether there are any mismatches between the information they enter and the information in SSA or DHS databases that need to be corrected. First implemented on a pilot basis in March 2011, E-Verify Self Check became available nationwide in February 2012.[56]

USCIS has likewise implemented enhancements to E-Verify aimed at reducing inaccuracies for unauthorized workers. In September 2007, the agency launched a Photo Screening Tool to improve E-Verify's ability to detect a certain type of identity fraud. The Photo Tool comes into play if a new hire presents an Employment Authorization Document (EAD), a Permanent Resident Card (green card), or a U.S. Passport[57] to establish employment authorization. In such cases, the employer checks the photo on the document provided by the new hire against the image stored in USCIS databases. This tool enables detection of legitimately issued documents that have been altered by photo-substitution. The effectiveness of the Photo Tool, however, is greatly limited by the fact that a new hire does not have to show either an EAD, a green card, or a U.S. Passport; a new hire can opt to show other documents to evidence his or her identity and

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

[53] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications*, January 28, 2010, p. 10 (hereinafter cited as USCIS Synopsis of Westat Report). Prior to implementation of Naturalization Phase I, if SSA records were unable to confirm citizenship for a self-identified citizen, SSA would issue a tentative nonconfirmation finding.

[54] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Adds Passport Data in E-Verify Process for Foreign-Born Citizens," news release, March 4, 2009 (hereinafter cited as USCIS news release, March 2009).

[55] USCIS news release, May 2008.

[56] On March 21, 2011, E-Verify Self Check became available to residents of five states (Arizona, Colorado, Idaho, Mississippi, and Virginia) and Washington, DC. Additional information about E-Verify Self Check is available at http://www.uscis.gov/selfcheck.

[57] U.S. Passport and U.S. Passport Card photographs were added to the Photo Tool in September 2010. USCIS hearing testimony, February 2011, p. 6.

employment eligibility.[58] According to USCIS, approximately 5% of all E-Verify cases in each of FY2016 and FY2017 used the Photo Tool.[59]

Another feature to reduce inaccurate findings for unauthorized workers is known as Records and Information from DMVs for E-Verify (RIDE). Launched in June 2011, RIDE seeks to detect document fraud in cases in which a new hire presents a driver's license or state-issued identification card to establish identity as part of the I-9 process. When a new hire presents a driver's license or state-issued identification card from a participating state, RIDE enables E-Verify to compare the information on the document against state records. Mississippi became DHS's first partner in this effort in June 2011. Since then, nine other states have joined the RIDE program.[60]

A November 2013 enhancement to E-Verify enables the system to lock Social Security numbers that appear to have been used fraudulently. According to USCIS, it "will use a combination of algorithms, detection reports and analysis to identify patterns of fraudulent SSN use and then lock the number in E-Verify."[61]

A more recent enhancement, known as myE-Verify, builds on this lock feature and the Self Check initiative described above. Launched in October 2014 in five states and the District of Columbia and available nationwide since April 2015 with additional features, myE-Verify incorporates Self Check and enables individuals to track the status of an E-Verify case. By creating a myE-Verify account, individuals also have the ability to lock their own Social Security numbers to prevent unauthorized use in E-Verify and to track where their identities have been used in E-Verify and Self Check.

Incorporating biometrics into the E-Verify system also has been suggested as a way to address identity fraud. Biometric proposals, however, are highly controversial and raise a variety of concerns, including about costs and worker privacy (see "Privacy").

Database Accuracy

An accurate verification system requires accurate underlying data. Data inaccuracies can be a source of false positives (i.e., findings that unauthorized workers are work-eligible) as well as false negatives (i.e., findings that authorized workers are not work-eligible). In establishing the Basic Pilot program and the other pilots, IIRIRA directed SSA and the former INS to maintain accurate records.[62]

[58] The 2009 Westat report recommended that USCIS discontinue use of the Photo Tool "until progress can be made on expanding it to include a broader range of documents, including documents that are less tamper-proof and counterfeit-resistant than are the documents currently in the Photo Screening Tool." Westat Report, December 2009, p. 244. USCIS rejected this recommendation, arguing that the Photo Tool was essential to its efforts to combat identity fraud. USCIS Synopsis of Westat Report, p. 8.

[59] Data provided in email from USCIS to CRS, May 17, 2018.

[60] These states are Florida (joined in December 2012), Idaho (July 2013), Iowa (September 2013), Nebraska (February 2015), North Dakota (June 2015), Wisconsin (November 2015), Arizona (July 2017), Maryland (July 2017), and Wyoming (July 2017).

[61] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "New Security Enhancement Helps E-Verify Deter Employee Fraud," news release, November 18, 2013.

[62] IIRIRA §404(g).

The 2002 evaluation of the Basic Pilot Program found that there were "serious problems with the timeliness and accuracy of the INS database."[63] The 2007 Westat evaluation reported progress on this front, but indicated that additional improvements were needed.[64]

The accuracy of SSA's Numident database was the subject of a report issued by the SSA Inspector General in December 2006.[65] Prompted by a congressional request, this review examined the accuracy of the Numident fields relied on by E-Verify. The report found Numident to be "generally accurate," but also "identified some discrepancies" that could result in employers receiving incorrect information in the employment eligibility verification process. More specifically, the SSA Inspector General estimated that "discrepancies in approximately 17.8 million (4.1%) of the 435 million Numident records could result in incorrect feedback when submitted through Basic Pilot." The report noted particular concern about the "extent of incorrect citizenship information" in Numident for foreign-born U.S. citizens and noncitizens.[66]

The 2009 Westat evaluation of E-Verify reported improvement in database accuracy, stating that "the accuracy of the USCIS database, as measured by the erroneous TNC rate for workers ever found authorized, has improved considerably" (see "Initiatives to Improve Accuracy").[67] The 2012 Westat report noted continuing efforts to improve database accuracy, while also making clear that "[m]aintaining accurate, timely, and complete information on biographic data and immigration and citizenship status presents a major challenge for Federal databases accessed by E-Verify." The report cited as reasons for these ongoing challenges the changing nature of immigration status and a lack of public knowledge about the need to report name changes to SSA and immigration agencies.[68]

System Efficiency

The efficiency of an employment eligibility verification system, like its accuracy, is multidimensional. One measure of efficiency used in the independent evaluations of E-Verify is the percentage of employees verified automatically or after initial review by a USCIS Immigration Status Verifier—without a tentative nonconfirmation being issued (see "Verification Process"). As reported by Westat, in the June 2004-March 2007 period, 93% of cases were verified automatically or after initial ISV review. In April 2008-June 2008, 96% of cases were verified automatically or after initial ISV review. According to USCIS, in FY2017, 98.9% of cases were verified automatically, either instantly or within 24 hours.[69]

At the same time, some employer groups and advocates for immigrants and low-income families have maintained that E-Verify is not efficient. In opposing legislative efforts to require certain employers to use E-Verify, groups have argued that such mandatory participation would result in increased bureaucracy and hiring delays.[70]

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[63] Basic Pilot Evaluation Report, June 2002, p. 143.

[64] See Westat Report, September 2007, p. xxi.

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

[66] Ibid., p. ii.

[67] Westat Report, December 2009, p. 233.

[68] Westat Report, July 2012, p. 28.

[69] USCIS E-Verify "Performance" page, https://www.uscis.gov/e-verify/about-program/performance.

[70] See, for example, Richard Kaplan, "Senate Excludes E-Verify Check on Illegal Immigrant Workers from Stimulus Package," February 10, 2009, http://www.hispanicbusiness.com; Friends Committee on National Legislation, "Strip E-

System Capacity

The capacity of an electronic employment eligibility verification system to handle queries about most or all newly hired workers in the United States has arisen as an issue in light of proposals to expand electronic verification or make it mandatory for all employers. In FY2017, as noted, E-Verify received about 34.9 million queries. In 2011 congressional testimony, a USCIS official reported on E-Verify's capacity to handle an expanded workload: "E-Verify currently has the capacity to receive at least 60 million electronic queries annually if all new hires were run through the E-Verify program."[71] A 2010 Government Accountability Office (GAO) report further cited information from E-Verify program officials that USCIS had tested the E-Verify system in 2007 and determined that it could process 240 million queries annually.[72]

In addition, according to USCIS, system upgrades have "increased system performance exponentially and will help support additional E-Verify traffic if the program is mandated nationally." USCIS indicated that with these upgrades, E-Verify will be able to handle up to 10,000 concurrent users.[73]

Discrimination

At the time of IRCA's enactment, there was widespread concern that the new INA Section 274A verification requirements would result in employment discrimination against foreign-looking or foreign-sounding work-authorized individuals as, for example, employers opted not to hire them for fear that they lacked work authorization or treated them differently than other work-authorized job applicants or workers.[74] To partly address these concerns, IRCA added a new Section 274B to the INA to make it an unfair immigration-related employment practice to discriminate against an individual, other than an unauthorized alien, in hiring, recruitment or referral for a fee, or termination because of the individual's national origin or the individual's citizenship or permanent immigration status. IRCA, as originally enacted, also directed GAO to report to Congress on the implementation and enforcement of Section 274A to determine, among other things, if "a pattern of discrimination has resulted" against U.S. citizens or other work-eligible jobseekers.[75] In 1990, GAO reported that widespread discrimination had occurred as a result of IRCA.[76] Congress, however, took no action on these findings.

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

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Verify from the Final Stimulus Package," February 11, 2009, http://www.fncl.org.

[71] USCIS hearing testimony, February 2011, p. 10.

[72] GAO, *Employment Verification*, p. 44. According to the report, 240 million queries per year is the "higher estimate of the number of queries expected to be generated by a mandatory E-Verify program."

[73] Email from USCIS to CRS, May 17, 2018.

[74] Employment discrimination is defined here, as in the 2009 Westat report, as "differential treatment based on individual characteristics, such as race or gender, that are unrelated to productivity or performance." Westat Report, December 2009, p. GL-2.

[75] INA §274A(j), eliminated by IIRIRA §412(c).

[76] U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, March 1990. Note: At the time of the 1990 report, GAO was the General Accounting Office. It is now the Government Accountability Office.

> to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including (A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer of employment; or (C) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants.[77]

These enumerated behaviors are prohibited under the E-Verify system, but evaluations have found that some employers nevertheless practice them (see "Employer Compliance").

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

Evaluations of E-Verify have found evidence to support both of these predictions. In 2013, Westat conducted a survey of E-Verify employers and found the following:

> Across survey years, a large majority of E-Verify users (75 percent) reported that their companies were neither more nor less willing to hire job applicants who appear to be foreign-born than they were prior to using E-Verify.[78]

Among those reporting an effect, the percentage of users across survey years who indicated that the system made them more willing to hire immigrant workers was substantially greater than the percentage who indicated that it made them less likely to do so.[79]

At the same time, evaluations of E-Verify have consistently found that work-authorized foreign-born workers are more likely than U.S.-born workers to receive erroneous tentative nonconfirmations (initial findings that an individual's work authorization cannot be confirmed). Based on this increased likelihood of receiving an erroneous TNC, the 2009 Westat report stated that "E-Verify contributes to post-hiring discrimination against foreign-born workers."[80] The report discussed some of the impacts on workers of receiving a TNC, such as missed work time to contest the finding and associated financial costs. In addition, according to the report, some work-authorized employees who receive TNCs may quit their jobs. In cases in which employers do not follow proper procedures, a TNC may result in a worker being fired.[81]

Historically, naturalized U.S. citizens have had relatively high erroneous TNC rates compared to U.S.-born citizens or work-authorized noncitizens. These relatively high rates have been attributed mainly to SSA records not reflecting the fact that the noncitizens had naturalized. USCIS has taken steps to address this problem with apparent success. The Naturalization Phase I

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[77] IIRIRA §404(d)(4).

[78] Westat, *Findings of the E-Verify User Survey*, April 30, 2014, p. 33.

[79] See Ibid., pp. 33-34.

[80] Westat Report, December 2009, p. 235.

[81] The issue of differential rates of erroneous TNC findings for different groups has been a major concern for immigrant advocates and certain other interested parties. For a comparison of erroneous TNC rates for U.S. citizens, LPRs, and other employment-authorized noncitizens, see Westat Report, July 2012, pp. 23-25.

initiative (see "Initiatives to Improve Accuracy") was credited in the 2009 Westat report with bringing about "a dramatic reduction in the erroneous TNC rate for foreign-born citizens."[82] In a March 2009 news release, USCIS reported that the addition of passport data was "already reducing the incidences of mismatches among foreign-born citizens."[83] In a related effort to correct erroneous TNCs issued to naturalized citizens, USCIS implemented the Naturalization Phase II initiative in May 2008 to give naturalized citizens who receive a tentative nonconfirmation the option of telephoning USCIS, rather than visiting an SSA field office, to resolve the issue.[84]

Employer Compliance

Employer compliance in the context of E-Verify refers to employers' properly following the program's policies and procedures, which include submitting an E-Verify query to verify a new hire's employment eligibility within three days after the hire date, providing notice to employees of tentative nonconfirmation findings, and not taking adverse actions against employees who choose to contest TNC findings. Employer compliance helps strengthen E-Verify, while employer noncompliance can reduce the effectiveness of the program in curtailing unauthorized employment and can result in discrimination. In the interest of preventing discrimination, as noted, certain employer behaviors are prohibited by law. These include the selective use of the system to verify employment eligibility and the use of the system to prescreen job applicants.

The 2009 Westat evaluation found that employer compliance with the various E-Verify requirements was "generally much higher than noncompliance." In a notable example, the data analyzed by Westat supported the idea that employers were not selectively submitting queries only for citizens or noncitizens. The discussion of employer compliance in the 2009 report, however, focused mainly on "noncompliant behaviors of interest."[85] Based on self-reported information in the 2008 employer survey, supplemented by information from worker interviews, record reviews, and other sources, the evaluation identified a range of prohibited behaviors that employers were engaging in, including the following:

- Some employers did not follow procedures with respect to training employees on the E-Verify system.
- Some employers used E-Verify to screen job applicants.
- Some employers used E-Verify for existing employees.
- Some employers did not notify employees of TNC findings at all or did not provide written notification of TNCs.
- There was evidence that a small number of employers discouraged employees with TNCs from contesting the findings.
- Some employers took prohibited adverse actions against employees while they were contesting TNC findings. These actions included restricting work assignments, delaying training, or reducing pay.

[82] Westat Report, December 2009, p. 239. The Westat report also described an "unintended consequence" of this initiative in increasing the percentage of unauthorized workers who were found work authorized. These workers were committing identity fraud by using the identity of naturalized citizens.

[83] USCIS news release, March 2009.

[84] USCIS news release, May 2008. For further discussion of these changes and their impacts, see USCIS hearing testimony, February 2011, and USCIS hearing testimony, February 2013.

[85] Westat Report, December 2009, p. 147.

- Some employers did not always follow the legal requirement to promptly terminate the employment of employees receiving FNC findings.[86]

The 2012 Westat report further discussed the negative implications for E-Verify accuracy of employers' not following proper procedures when employees receive TNCs. According to Westat, if all employment-authorized workers were properly informed of tentative nonconfirmations, there would be a significant decrease in the issuance of final nonconfirmations to work-authorized workers. As mentioned, the 2012 Westat report indicated that about 94% of workers who received FNCs in FY2009 were unauthorized workers. This measure is known as the FNC accuracy rate. The Westat evaluators estimated as part of the 2012 report that if all employment-authorized workers had been informed of their TNCs and the contesting process, the FNC accuracy rate in FY2009 would have increased to 99%.[87]

Westat's 2013 survey of E-Verify employers found that "[o]verall, users continued to report high levels of compliance with E-Verify policies." Some employers, however, did report engaging in prohibited behavior. For example, Westat found instances of selective use of E-Verify, as "some employers self-reported that they used E-Verify for workers they believed to be not work authorized."[88] With respect to TNCs, the 2013 survey found "[A]mong E-Verify employers that had ever received a TNC finding for a worker, some reported taking adverse action against such workers including restricting work assignments ... and delaying training until work authorization could be confirmed."[89] In addition, Westat reported the following:

> Across survey years, a small percentage of employers agreed with the practice of discouraging workers from contesting TNCs, either because the process was perceived to be too time-consuming or it rarely resulted in work authorizations.[90]

A key issue to consider with respect to employer compliance is the extent to which requiring employers to participate in E-Verify or another electronic employment eligibility verification system, as under some legislative proposals, could affect compliance. It seems plausible that, for a variety of reasons, mandatory participants as a whole may have lower levels of compliance than voluntary users. Westat, however, found little support for this hypothesis in its 2013 survey of E-Verify employers. It instead concluded that "with a few exceptions, mandated users were no more or less likely to comply with procedures compared to voluntary users."[91]

Privacy

Employee privacy was another issue considered in the development of the original IIRIRA pilot programs. Among the IIRIRA requirements for the confirmation system was that the system be

[86] Ibid., p. 147-160.

[87] Westat Report, July 2012, p. 39. In a related E-Verify change, an employee e-mail address field was added to the system in June 2013. In cases in which an employee opts to provide an e-mail address on the new I-9 form, the employer must enter this information into E-Verify. E-Verify can then send the employee e-mail notifications about his or her case, including TNCs. Employers, however, continue to receive E-Verify notifications as well and are still required to provide TNC notifications to employees.

[88] Westat, Findings of 2013 survey, p. xx.

[89] Ibid., p. ix.

[90] Ibid., p. 52.

[91] Ibid., p. xxii.

designed and operated "with appropriate ... safeguards to prevent unauthorized disclosure of personal information."[92]

The 2009 Westat report stated that SSA and USCIS had taken steps to protect worker privacy in connection with E-Verify. It explained that both agencies had policies to ensure the security of the databases used in E-Verify. According to the report, all employers participating in E-Verify must sign a memorandum of understanding and are only given access to the cases they submit.

The 2009 report also noted some potential privacy-related weaknesses of E-Verify. Among them is a concern that individuals could improperly use E-Verify to obtain information about others. Another potential weakness involves employers not informing workers that they have received TNCs in private settings. In the 2008 employer survey conducted as part of the 2009 Westat evaluation of E-Verify, 89% of employers that had received any TNCs reported that they consistently informed workers of TNCs in private. That figure was 93% in the 2013 survey.[93]

Proposals to expand E-Verify, particularly proposals to make the system mandatory for all employers, have heightened the concerns of some interested parties about employee privacy. In his 2007 House testimony, Jim Harper of the Cato Institute argued that a nationwide electronic employment verification system would have serious privacy consequences. He drew sharp distinctions between a paper-based I-9 system, in which employee information "remains practically obscure," and a web-based electronic system, in which the entered information is very easy for the participating agencies to access, copy, and use. In Harper's view, any electronic verification system would be at risk of becoming "a surveillance system ... that observes all American workers."[94]

The American Civil Liberties Union (ACLU) likewise expressed concerns about the threats to privacy posed by a mandatory E-Verify system, in a statement submitted to the House Judiciary Committee at the time of the committee's E-Verify hearing in February 2013.[95] The statement argued that a mandatory E-Verify system "would create a virtual national ID and would lay the groundwork for a possible biometric national ID system." In the view of the ACLU, a "national ID system" would threaten personal privacy and individual freedom:

> Our society is built on the presumption of privacy: as long as we obey the law, we are all free to go where we want and do what we want ... without the government (or the private sector) looking over our shoulders or monitoring our behavior. A national ID system would turn those assumptions upside down by making every person's ability to participate in a fundamental aspect of American life—the right to work—contingent upon government approval.

[92] IIRIRA §404(d)(3).

[93] Westat, Findings of 2013 survey, pp. 50-51. An onsite study of workers conducted in 2008 as part of the 2009 evaluation yielded different findings, with about a quarter of the workers who commented on the subject indicating that they were not notified of a TNC in a private area. Westat Report, December 2009, p. 202

[94] Harper Testimony, April 2007, p. 82.

[95] Written statement of the American Civil Liberties Union, for a hearing by U.S. Congress, House Committee on the Judiciary, How E-Verify Works and How It Benefits American Employers and Workers, February 27, 2013, http://www.aclu.org/files/assets/aclu_statement_mandatory_everify_house_hearing_022713_final.pdf. (The ACLU did not testify at the hearing.)

System Usability and Employer Burden

Another of the IIRIRA requirements for the pilot program confirmation system was that it be designed and operated to maximize its ease of use by employers.[96] According to Westat's 2008 and 2013 employer surveys, most employers found E-Verify to be an effective tool that was not unduly burdensome. More than 90% of employers in both years indicated that E-Verify was effective.[97] To measure burden, employers were asked about meeting the processing requirements of the program. In 2008, 19% of employers agreed that it was impossible to meet their obligations under E-Verify; in 2013, the comparable percentage was 11%.[98]

Employers are not charged a fee by the government to participate in E-Verify, but they may incur set-up costs (such as for training and computer hardware) and operating costs (such as for wages for verification staff and computer maintenance). In the 2008 employer survey, 74% of employers indicated that they incurred no direct set-up costs. This percentage was 78% in the 2013 survey. The median total cost for those reporting direct set-up costs in both survey years was $100. With respect to operating costs, 77% of employers in the 2008 survey and 85% in the 2013 survey reported no direct maintenance costs. The median annual cost for those reporting direct maintenance costs in the 2008 and 2013 surveys was $350 and $300, respectively.[99]

Surveys conducted by the CFI Group for USCIS have measured participating employer satisfaction with E-Verify. According to the 2017 survey report, "historically, users have been consistently satisfied with E-Verify."[100]

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

Conclusion

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

[96] IIRIRA §404(d)(1).

[97] Westat, Findings of 2013 survey, pp. 27-28.

[98] Ibid., pp. 35-36.

[99] Ibid., pp. 81-84.

[100] CFI Group, *Annual Customer Satisfaction Survey 2017, E-Verify*, Final Report, March 2018, p. 4, https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-evaluations.

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