

## Senate Immigration Bill Proposes Unworkable Employment Eligibility Verification System

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The 2007 Senate-White House immigration reform proposal would require every employer in the United States to verify the employment eligibility of their workforce — immigrants and U.S.-born workers — through a new Electronic Employment Verification System (EEVS). In contrast to the 2006 Senate immigration reform bill (S. 2611),<sup>1</sup> the EEVS provided for in Title III of the 2007 Senate bill falls short on creating a workable system with strong due process, antidiscrimination, and privacy protections. The most troubling provision is the requirement in Title I that the guest worker and legalization programs for which it provides may not be implemented until the EEVS (including the use of “secure” documentation and digitized photographs that do not currently exist) is implemented. Because of this pressure, the focus will be on getting the EEVS up and running as quickly as possible, rather than on implementing an accurate system that actually works without adversely impacting authorized workers.

In addition to containing this “trigger” provision, the bill does not address the weaknesses in the current electronic verification system (the Basic Pilot program), which has been in existence since 1997 and has been plagued by problems, including inaccurate databases, flawed design, and employer misuse of the program.<sup>2</sup> Only about 16,000 employers nationwide currently participate in the Basic Pilot, and its expansion to mandatory use by over 7 million employers with 160 million workers would be a complicated and logistical challenge in the best of circumstances.

The following issues reflect our top concerns with the EEVS in the new Senate immigration reform bill. It is our hope that these issues will be addressed through the amendment process this week.

### 1. The implementation timeline is unreasonable and unworkable.

At the sole discretion of the Department of Homeland Security (DHS), employers that are either part of the critical infrastructure, federal contractors, or “directly related to national security or homeland security of the United States” may be required to use the EEVS for new and existing hires as of the date of enactment (DHS is required to publish a notice in the Federal Register 30 days prior to the date this provision takes effect). No later than 6 months after the bill’s enactment, DHS must require additional employers (based on perceived risks to critical infrastructure, national security, immigration enforcement, or homeland security needs, and through a notice in the Federal Register) to use the EEVS for new hires and workers with expired work authorization documents or immigration status. All other employers must participate within

<sup>1</sup> For an analysis of the EEVS proposed in S. 2611, see SUMMARY AND ANALYSIS: THE ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM PROPOSED BY THE SENATE’S COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006 (S 2611) (NILC, August 2006), [www.nilc.org/immseplymnt/ircaempverif/eev001.htm](http://www.nilc.org/immseplymnt/ircaempverif/eev001.htm).

<sup>2</sup> For a summary of research on the Basic Pilot, see THE BASIC PILOT PROGRAM: NOT A MAGIC BULLET (NILC, Jan. 2007), [www.nilc.org/immseplymnt/ircaempverif/basicpilot\\_nomagicbullet\\_2007-01-11.pdf](http://www.nilc.org/immseplymnt/ircaempverif/basicpilot_nomagicbullet_2007-01-11.pdf).



#### LOS ANGELES (Headquarters)

3435 Wilshire Boulevard  
Suite 2850  
Los Angeles, CA 90010  
213 639-3900  
213 639-3911 fax

#### WASHINGTON, DC

1101 14th Street, NW  
Suite 410  
Washington, DC 20005  
202 216-0261  
202 216-0266 fax

#### OAKLAND, CA

405 14th Street  
Suite 1400  
Oakland, CA 94612  
510 663-8282  
510 663-2028 fax

18 months of enactment, with respect to new hires and those with expiring work authorization documents or immigration status; and within 3 years, all employers must use the EEVS for all new and continuing employees, including those in “Z” status who have not previously presented secure documentation. DHS is also given discretion to require employers to participate at an earlier date than outlined.

This rigid timetable must be met regardless of whether the EEVS actually works and whether the technology exists to implement it; nor is the timetable subject to performance benchmarks. DHS is required to create “systems and processes” to monitor the functioning of the new system (including volume of the workflow, speed of processing of queries, and the speed and accuracy of responses), and the Government Accountability Office is required to conduct audits and issue reports on DHS’s systems and processes after 9 months and 24 months. However, the audits do not include reviews of employer compliance with system requirements and do not affect the implementation timetable. (A different section of the bill does require DHS to develop policies and procedures to monitor employers’ use of the EEVS and compliance with system requirements, but these are not subject to audits or independent review.) A December 2006 report from the Social Security Administration’s (SSA’s) Office of the Inspector General found that 42 percent of employers illegally used the Basic Pilot to prescreen employees prior to their first day of work, and 30 percent of employers used the program to verify the employment eligibility of their existing workforce.<sup>3</sup>

## **2. The antidiscrimination protections are weaker than current law.**

Current law regarding “impermissible” uses of the EEVS would actually be weakened under the new bill (existing requirements are outlined in the memorandum of understanding that employers sign under the Basic Pilot).<sup>4</sup> Under the new bill, a process for workers to file complaints is to be developed by DHS and the Department of Labor (DOL), and administered by DHS. Employers are subject to civil penalties of up to \$10,000 for each violation. The language states that the section will be enforced “exclusively by DHS” and does not create a private right of action against employers. In another section, the bill states that employers shall use the EEVS without regard to national origin or citizenship status, but this section does not include enforcement provisions or remedies for those who suffer discrimination.

The language in the bill not only undermines and duplicates the authority of the Department of Justice’s Office of Special Counsel for Immigration-Related Unfair Employment Practices (which was created by the Immigration Reform and Control Act of 1986 to handle immigration-related unfair employment practices resulting from employer sanctions), but also specifically prohibits these “impermissible” practices from being covered under the antidiscrimination protections in the Immigration and Nationality Act (INA) by giving DHS exclusive enforcement authority and funding. Section 274B of the INA prohibits discrimination based on national origin and citizenship status, and provides a process for complaints, investigations, administrative and judicial review, and remedies. It is unlikely that DHS’s policy will include such procedures, since DHS has no expertise in this area. Including DOL in developing the complaint process does not solve the problem, as the agency is already under-resourced to investigate and prosecute

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<sup>3</sup> CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION’S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), [www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf](http://www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf).

<sup>4</sup> For more information about the Basic Pilot, see BASIC INFORMATION BRIEF: DHS BASIC PILOT PROGRAM (NILC, Dec. 2006), [www.nilc.org/immsemplymnt/ircaempverif/eev006.htm](http://www.nilc.org/immsemplymnt/ircaempverif/eev006.htm).

violations — such as minimum wage, overtime, and health and safety claims — that fall within its jurisdiction.

### **3. The confirmation process could punish workers for DHS errors.**

The new bill provides that in response to an inquiry by an employer, the EEVS must provide a “confirmation,” “nonconfirmation,” or “further action notice.” If the worker receives a further action notice, the worker then has ten business days to contact the appropriate agency to contest the notice or the EEVS will issue a final nonconfirmation (the bill authorizes DHS to require the worker to appear in person at the relevant state or federal agency to contest the further action notice). After the worker contests the notice, the EEVS is then required to provide a “confirmation” or “nonconfirmation” within 10 business days. This timeline must be extended if the system cannot return a final response, but only as long as the worker takes all required steps to contest the further action notice. If the worker does not take the appropriate steps, he or she will receive a final nonconfirmation. This language does not account for good cause reasons for needing more time to challenge the decision. The language should be amended to create a “good cause” exception for situations such as when the worker cannot comply due, for example, to illness of the worker or a family member, or a work-related injury.

Upon receipt of a final nonconfirmation, an employer must fire the worker unless the worker has filed an administrative appeal within the time period required and DHS or SSA stays the final nonconfirmation pending the resolution of the appeal. The employer cannot fire the worker until the EEVS issues a final nonconfirmation and the time period in which to file an administrative appeal has passed and, in the case where an administrative appeal has been denied, the time for judicial review has passed.

### **4. The due process protections are insufficient.**

Workers have only 15 days to file an administrative appeal of a final nonconfirmation notice, which will require gathering substantial paperwork. Under the administrative review provisions, a final nonconfirmation is stayed pending the administrative review decision unless SSA or DHS decides that the “petition for review is frivolous, unlikely to succeed on the merits, or filed for purposes of delay.” This means that the agency whose administrative decision is being appealed has sole authority to issue or deny a stay of a nonconfirmation notice while an appeal is pending. The employee appealing the decision faces irreparable harm through loss of employment if a stay is denied, and the legislation does not provide a method for recovery of back pay, costs or attorney’s fees for those who are wrongfully terminated due to SSA or DHS database errors, including where the agency fails to issue a stay during the appeal process.

Workers have 30 days from the completion of the administrative appeal to file for judicial review in the U.S. Court of Appeals. However, the court can decide the petition based only on the administrative record, which may be limited. The burden is on the worker to demonstrate that the agency decision was “arbitrary, capricious, not supported by substantial evidence, or otherwise not in accordance with law.” Moreover, “findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” That deferential review standard for factual findings is unwarranted. As with the administrative review process, the court must stay the final nonconfirmation notice, unless it determines that the “petition for review is frivolous, unlikely to succeed on the merits, or filed for purposes of delay.” The bill’s language should be revised to clarify that the government must file a motion for the stay to be terminated.

## 5. The documentation requirements are unattainable.

The documentation requirements are heavily focused on state compliance with the REAL ID Act, which eleven states<sup>5</sup> have now rejected on the grounds that the law violates the essential rights and liberties of the U.S. Constitution and creates a national database that will invite identity theft and invasion of privacy. In eleven additional states, legislation opposing REAL ID has passed one or more chambers of the state's legislature. Under the new bill, no driver's license or state identity card that does not comply with the REAL ID Act would be acceptable for employment eligibility verification purposes after June 1, 2013. This means that a U.S. citizen in a non-REAL ID state would have to present either a passport (passports are held by only 26 percent of the U.S. population) or a passport card, which is not yet available.

New requirements provided for in the new bill also depend on the introduction of a biometrically-enhanced Social Security card, which SSA has testified would cost \$9 billion and require the hiring of 60,000 additional SSA employees to develop and implement.

## 6. Employers, state and federal government agencies, and SSA are required to turn over to DHS confidential information about workers.

The bill permits data mining of SSA files, tax records, and other federal, state, and territorial databases covering everyone in the U.S. Multiple provisions requiring information-sharing give DHS expansive access to (a) personal employee information held by employers; (b) birth and death records maintained by states, passport and visa records, and state driver's license or identity card information; and (c) as an exception to tax code confidentiality provisions, SSA records of taxpayers when the taxpayer's Social Security number (SSN) or name or address (for whatever reason) does not match SSA records, or when just two taxpayers have the same SSN. It also allows DHS to access "information" from SSA that DHS "may require." The provisions do not require independent review, monitoring of disclosure, privacy protections, notice to workers that their private information or records have been disclosed, or recourse if overbroad information is sought or misused.

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### FOR MORE INFORMATION, CONTACT

Tyler Moran, Employment Policy Director, National Immigration Law Center  
[moran@nilc.org](mailto:moran@nilc.org) | 208.333.1424

Michele Waslin, Director of Immigration Policy Research, National Council of La Raza  
[mwaslin@nclr.org](mailto:mwaslin@nclr.org) | 202.776.1735

Tim Sparapani, Senior Counsel, American Civil Liberties Union  
[tsparapani@dcaclu.org](mailto:tsparapani@dcaclu.org) | 202.715.0839

Alison Reardon, Director of Legislation, Service Employees International Union  
[Alison.Reardon@seiu.org](mailto:Alison.Reardon@seiu.org) | 202.730.7706

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<sup>5</sup> States include Arkansas, Colorado, Georgia, Hawaii, Idaho, Maine, Missouri, Montana, Nevada, North Dakota, and Washington.