

BASIC INFORMATION BRIEF

REVISED: March 2008*

DHS Basic Pilot/E-Verify Program

The Basic Pilot Program (recently rebranded by the U.S. Department of Homeland Security, or DHS, as “E-Verify”) is a voluntary Internet-based program that allows employers to electronically verify workers’ employment eligibility by accessing information in databases maintained by the Social Security Administration (SSA) and U.S. Citizenship and Immigration Services (USCIS), the latter a bureau within DHS. The Basic Pilot was one of three pilot programs created under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹ It began operating in five states in 1997 and in a sixth in 1999. The other two pilot programs were discontinued. In 2003, Congress extended the Basic Pilot to all 50 states and authorized it until November 30, 2008, under the Basic Pilot Program Extension and Expansion Act of 2003. DHS renamed the Basic Pilot “E-Verify” in August 2007.

According to DHS, as of February 2008, approximately 52,000 employers are voluntarily registered for Basic Pilot/E-Verify, though it is not clear how many of those employers regularly use the program. In May 2007, when 17,000 employers used the program, the Government Accountability Office (GAO) found that only half of those registered were “active” users, defined as those who have used the system at least once.²

■ 2007 Administrative Changes to Basic Pilot/E-Verify and the Employment Eligibility Verification Process

A number of administrative changes were made to Basic Pilot/E-Verify in 2007 in an attempt to expand utilization of the program. In August 2007, DHS announced changes to the program among a package of “reforms” to “improve border security and immigration within existing law,” and in November 2007 the U.S. Department of Labor (DOL) issued a memo that allows state workforce agencies (SWAs) to use the program. The changes include:

- **Making Basic Pilot/E-Verify mandatory for new federal contractors and vendors.**
DHS plans to issue regulations to require new contractors and vendors to use Basic

¹ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009-659 (Sept. 30, 1996).

² See Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES (Government Accountability Office, June 7, 2007), www.gao.gov/new.items/d07924t.pdf, at 1.

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Pilot/E-Verify. Currently, more than 200,000 companies have contracts with or supply services to the federal government. Once the regulation is finalized, federal contractors who do not use Basic Pilot/E-Verify could lose their contract due to nonperformance — i.e., failure to fulfill their obligations under the contract. DHS also announced that it will take immediate steps to modify its “Security Acquisition Manual” by designating a vendor’s participation in Basic Pilot/E-Verify as a positive consideration in evaluating who receives a DHS contract.

- **Expanding a pilot-project “photo screening tool.”** The photo-screening tool, which was piloted by a small number of employers in March 2007, was expanded to all employers as of September 2007. If a worker presents a newer employment authorization document (EAD) or newer permanent resident card as proof of employment authorization, the employer must use the photo screening tool to compare the photograph on the card with a digital photograph stored in Basic Pilot/E-Verify.
- **Verifying certain documents with the U.S. State Department.** DHS announced that it has future plans to verify documents presented by workers against information stored in visa and passport records.
- **Seeking voluntary access to state motor vehicle databases.** DHS announced that it would like states to share driver’s license photographs and records with Basic Pilot/E-Verify in order to combat identity theft. States would have the option either to participate or not participate in this program.
- **Reducing the number of documents that can be used to prove employment eligibility and identity.** On November 7, 2007, USCIS announced that it was eliminating 5 documents from the list of documents a worker may present to prove his or her work eligibility. According to USCIS, the purpose of this change was to take a “first step” toward complying with a 1997 interim final rule that implemented a portion of the document reduction requirements set out in IIRIRA.
- **Requiring all federal agencies to use Basic Pilot/E-Verify.** As of October 1, 2007, all federal agencies were supposed to use Basic Pilot/E-Verify to verify the employment eligibility of all new hires.³ As of February 2008, however, four of the 24 largest agencies were not using it, according to USCIS.⁴

³ See “Memorandum for the Heads of Departments and Agencies,” from Stephen S. McMillin, Acting Director, Executive Office of the President, Office of Management and Budget, Aug. 10, 2007, www.whitehouse.gov/omb/memoranda/fy2007/m07-21.pdf.

⁴ Maureen Groppe and Dan McFeely, “Feds Trying to Fix System to Screen Out Illegal Workers: Program That Employers in Indiana Would Have to Use Has Inaccuracies, Tests Show,” INDIANAPOLIS STAR, Feb. 16, 2008, www.indystar.com/apps/pbcs.dll/article?AID=/20080216/LOCAL1904/802160451.

- **Allowing state workforce agencies to use Basic Pilot/E-Verify for H-2A job applicants.** On November 14, 2007, DOL issued a guidance letter that “strongly recommends” that SWAs use Basic Pilot/E-Verify.⁵ DOL plans to enter into a memorandum of understanding with DHS and SSA that would allow a small number of SWAs to use Basic Pilot/E-Verify under a pilot program, with the intent of making it available to all SWAs by June 2008.

■ Background on the Employment Eligibility Verification Process and Basic Pilot/E-Verify

The Immigration Reform and Control Act of 1986 (IRCA) made it unlawful for employers in the United States to *knowingly* hire workers who are not eligible to be employed in the U.S.⁶ Employers who knowingly hire such workers are subject to penalties, referred to as “employer sanctions.” All employers are also required to verify employees’ work eligibility, using an official government form called the “Employment Eligibility Verification Form” or “I-9 form.” To enable employers to complete the form, workers are required to produce documents proving their identity and employment eligibility. Only certain documents, as set out in the law, may be used for this purpose, and IRCA’s antidiscrimination provisions provide that it is the worker’s choice which of the acceptable documents to present.

To comply with IRCA, the employer has to certify on the I-9 form that the documents presented by the employee reasonably appear to be genuine on their face, and the employer must retain such information in its files for three years after the employee’s date of hire, or one year after the date that the worker’s employment is terminated, whichever is later. Basic Pilot/E-Verify modifies these existing procedures by also requiring the employer to submit an inquiry via computer to SSA and USCIS regarding whether the information presented by the individual matches records maintained by SSA and USCIS.

While participation in Basic Pilot/E-Verify is voluntary, employers that have been found to have unlawfully hired unauthorized workers or discriminated against workers on the basis of national origin or citizenship status may be required to participate in the program. A handful of states and localities also have recently passed laws that require all employers, or those with public contracts, to use the program.⁷ Employers that do participate in the program gain certain legal benefits. First, in the event of an investigation into a participating employer’s hiring practices, DHS will presume that the employer did not violate the employer sanctions law if the employer obtained confirmation of the identity and employment eligibility of workers in compliance with the terms and conditions of Basic Pilot/E-Verify. However, DHS does clarify that employers

⁵ “Foreign Labor Certification Training and Guidance Letter No. 11-07, Change 1,” Employment and Training Administration Advisory System, U.S. Dept. of Labor, Nov. 14, 2007, <http://wdr.doleta.gov/directives/attach/TEGL/TEGL11-07c1.pdf>.

⁶ 8 USC 1324a

⁷ For more information about laws that passed in 2007, *see* “Most State Bills Mandating Use of the Employment Eligibility Verification Basic Pilot/E-Verify Fail in 2007,” IMMIGRANTS’ RIGHTS UPDATE, Oct. 5, 2007, www.nilc.org/immsemplymnt/state_local/essl003.htm.

that use Basic Pilot/E-Verify are not provided a safe harbor from immigration worksite enforcement.⁸ In addition, employers will not be liable under any law for any action taken in “good faith” on information provided through Basic Pilot/E-Verify.

Temporary agencies and employment placement agencies also can use Basic Pilot/E-Verify as a “designated agent.” These agencies perform the employment eligibility verification process, including Basic Pilot/E-Verify procedures, for other businesses. Before an employer or designated agent can participate in Basic Pilot/E-Verify, the employer must enter into a written agreement — called a memorandum of understanding (MOU) — with DHS and SSA.⁹ The MOU requires the employer to agree to, among other things, the following:

- That it will post, in an area clearly visible to prospective employees, a notice provided by DHS that says the company is participating in Basic Pilot/E-Verify, as well as an antidiscrimination notice issued by the Office of Special Council for Immigration-Related Unfair Employment Practices within the U.S. Justice Department’s Civil Rights Division.
- That it will not submit an inquiry to Basic Pilot/E-Verify until *after* a worker is hired and an I-9 employment eligibility verification form has been completed for the worker, and will not use the program for pre-employment screening of job applicants.
- That it will not use Basic Pilot/E-Verify to verify employees’ employment eligibility selectively or use the program to reverify the employment eligibility of current employees.
- That it will use Basic Pilot/E-Verify *only* to verify new employees’ employment eligibility, and not for employees hired before the employer signs the MOU.
- That it will not discriminate against employees based on national origin or citizenship status.
- That it will not take adverse action against an employee while the employee is challenging a tentative nonconfirmation result, unless the employer obtains knowledge (as defined in 8 CFR section 274a.1(1)) that the employee is not authorized to work.

Violation of the terms of the agreement by the employer is grounds for immediate termination of its participation in Basic Pilot/E-Verify, as well as appropriate legal action being taken against the employer. However, during the June 2006 GAO testimony before the Senate Subcommittee on Immigration, Border Security, and Citizenship, GAO reported that USCIS officials told GAO that “their efforts to review employers’ use of the pilot program have been limited by lack of staff available to oversee and examine employer use of the program.”¹⁰ GAO

⁸ EMPLOYMENT ELIGIBILITY VERIFICATION PROGRAM: FREQUENTLY ASKED QUESTIONS (Dept. of Homeland Security, Aug. 2007), www.dhs.gov/ximgtn/programs/gc_1185222483635.shtm.

⁹ For a copy of the MOU, *see* USCIS’s website at www.uscis.gov/files/nativedocuments/MOU.pdf.

¹⁰ Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP, COMMITTEE ON THE JUDICIARY, U.S. SENATE, IMMIGRATION ENFORCEMENT: WEAKNESSES

reported in 2007 that Basic Pilot/E-Verify is still vulnerable to misuse of the program that adversely affects workers, but that USCIS is in the process of establishing a compliance and monitoring division to help reduce employer fraud and misuse.¹¹

■ How Does Basic Pilot/E-Verify Actually Work?¹²

Employer participants in Basic Pilot/E-Verify are required to verify the employment eligibility of *all* new employees, U.S. citizen and noncitizen alike. Both the USCIS and SSA databases are used for this process. The procedures to be followed under this program are as follow:

Step 1: Employer completes the I-9 employment eligibility verification form.

Employers participating in Basic Pilot/E-Verify must still complete an I-9 form¹³ for each new worker hired within three business days of the date employment begins, as required under current law,¹⁴ but with two changes to those procedures:

1. Basic Pilot/E-Verify employers can accept a “List B” document as proof of a worker’s identity only if the document includes a photograph. It is still the employee’s choice, however, whether to produce one document from “List A” — establishing both identity *and* employment eligibility — or to produce one “List B” document to establish identity and one “List C” document to prove employment eligibility.
2. Under the photo-screening tool process, if a worker presents a permanent resident card (I-551) or employment authorization document (I-766), the employer must make a photocopy of the document and retain it in the employer’s file with the I-9 employment eligibility verification form. This is a new requirement, since employers are currently not required to make or keep copies of documents presented by employees as part of the I-9 process.

Step 2: Employer verifies identity and employment eligibility using Basic Pilot/E-Verify.

For each newly hired worker, the employer must enter the worker’s information from the I-9 form, including the person’s name, Social Security number (SSN), date of birth, citizenship status or alien number, and the type of documents presented with the I-9 form (including any

HINDER WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, June 2006), www.gao.gov/new.items/d06895t.pdf, at 12.

¹¹ See Richard Stana (2007), *supra* note 2, at 2.

¹² For detailed instructions about how the program works, see E-Verify User Manual (USCIS, Jan. 2008), www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.

¹³ A copy of the I-9 form can be found on USCIS’s website, at www.uscis.gov/files/form/i-9.pdf.

¹⁴ The MOU clarifies that if the system is temporarily unavailable, the 3-day time period is extended until it is again operational.

expiration dates) into a form on the Basic Pilot/E-Verify website within three days of the worker's hire date. According to USCIS, however, if a worker has not yet been assigned an SSN (as can be the case with newly-arrived immigrants or nonimmigrants on certain types of employment-based visas), the employer should wait and put the person's information into the Basic Pilot/E-Verify website *after* the SSN is obtained — even if it is beyond three days of the worker's hire date. (This instruction is in conflict with the requirements outlined in the MOU.) The information that is entered on the Basic Pilot/E-Verify website is then checked against information contained in SSA and USCIS databases.

SSA first uses its “Numident” database to verify that the name, SSN, and date of birth are correct. SSA also confirms whether, if the employee has stated that he or she is a U.S. citizen, this is in fact the case; if it is, this establishes that the employee is employment-eligible.

For any non-U.S. citizen employee, USCIS verifies that the worker is in an employment-authorized immigration status through its Alien Status Verification Index (ASVI) database. If the information provided by the worker matches the information in the SSA and USCIS databases, the employer will receive an “employment authorized” notice and the worker may continue employment. Basic Pilot/E-Verify procedures require only that the employer record on the I-9 form the verification ID number and result obtained from Basic Pilot/E-Verify, or print a copy of the transaction record and retain it with the I-9 form.

If SSA is unable to verify information presented by the worker, the employer will receive an “SSA tentative nonconfirmation” notice. If USCIS is unable to automatically verify that the worker is employment-authorized, the employer will receive a “DHS verification in process” notice from USCIS while an immigration status verifier (ISV) manually checks USCIS records. If the ISV is unable to verify the worker's employment authorization, the employer will receive a “DHS tentative nonconfirmation” notice from USCIS. Employers can receive a tentative nonconfirmation notice for a variety of reasons, including lags in data entry in SSA or USCIS databases, inaccurate entry of information into the form on the Basic Pilot/E-Verify website, or name changes or changes in immigration status that are not reflected in SSA or USCIS databases.

Step 3: Employee can challenge a “tentative nonconfirmation.”

If the individual's information initially does *not* match the SSA or USCIS records, the employer should first double-check that the information was entered correctly into the system. If the employer did not make an error, the employer must give the employee *written notice* of that fact, called a “*Notice to Employee of Tentative Nonconfirmation.*” A worker can receive an *SSA* tentative nonconfirmation notice or a *DHS* tentative nonconfirmation notice, or both, depending on which agency cannot verify the worker's information. If the worker receives either notice, the worker must check a box on it stating that he/she contests or does not contest the tentative nonconfirmation, and both the worker and employer must sign the notice. If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice, called a “*referral letter,*” which contains information about resolving the tentative nonconfirmation, as well as the contact information for SSA or USCIS, depending on the agency

that the employee is directed to contact. The worker then has *8 federal government work days* from the date of the referral to contact SSA and/or USCIS to try to resolve the discrepancy. (To resolve SSA tentative nonconfirmation notices, workers must visit an SSA field office. To resolve DHS tentative nonconfirmation notices, workers must call a toll-free number). SSA and/or USCIS have 10 federal government work days after the worker receives the referral notice to resolve the case. If USCIS needs more than 10 federal government work days, the employer will receive a “*case in continuance*” notice.

Under the MOU, if the worker contacts SSA or USCIS to resolve the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker while he/she awaits a final resolution from the government agency — even if it takes more than 10 federal government work days for SSA or DHS to resolve the matter. In the case of an SSA or USCIS tentative nonconfirmation, the relevant agency will electronically send the result of the referral to the employer no later than 10 federal work days after the date the worker received the referral. When an employee has failed to contact SSA or USCIS within the requisite period, the employer will be notified of the “no show” and will automatically receive a “final nonconfirmation” notice. Likewise, if the worker does *not* contest the “tentative nonconfirmation,” it automatically becomes a “final nonconfirmation,” and the employer is required to fire the worker or face a rebuttable presumption that it knowingly hired an unauthorized worker.

Step 4: Employer uses the photo screening tool.

If a worker presents a newer version of the employment authorization card (I-766) or permanent resident card (I-551) as proof of employment authorization, the employer is required to compare the photograph on the card with a digital photograph stored in USCIS’s database. More information on this is provided below.

■ How the Photo Screening Tool Works

The employer is to use the photo screening tool only *after* Basic Pilot/E-Verify confirms the employee’s employment eligibility (i.e., after any tentative nonconfirmation from SSA and/or USCIS is resolved) and only if the worker attests to being a lawful permanent resident or authorized to work in the U.S. *and* produces a newer version of the permanent resident card (I-551) or employment authorization card (I-766). Newer versions of these cards contain a fingerprint on the right side of the document, a DHS seal in the middle of the document, and an expiration date. The permanent resident card also contains a strip at the bottom with numerical indicators and the person’s name (last name first). Older versions of these cards cannot be used in the photo screening tool because the information on them cannot be uploaded into Basic Pilot/E-Verify. DHS is working towards expanding the types of documentation that the photo screening tool can review, including documents typically presented by U.S. citizens to complete the I-9 form. It is still the *worker’s choice* which documents to present in the I-9 process, and employers may *not* require that workers submit these documents in order to trigger the necessity of using the photo screening tool.

Use of the photo screening tool subjects employers to the same obligations outlined in the Basic Pilot/E-Verify MOU (see page 4, above), including a commitment to using the photo screening tool only for *new* hires. The employer also must keep photocopies of the permanent resident card or employment authorization card on file with the I-9 form.

The procedures to be followed when using the photo screening tool are as follow:

Step 1: Employer makes a determination about the photograph.

Employers are asked to determine whether the photograph transmitted by Basic Pilot/E-Verify “reasonably” appears identical to the photograph on the document presented by the worker. USCIS recognizes that employers are not document or photographic comparison experts, and that 100 percent certainty is not required to determine if the photographs are identical; but because the photograph transmitted by Basic Pilot/E-Verify is the same photograph imprinted on the document that USCIS issued to the worker, employers should be able to make a determination. Employers are advised to account for minor variances in shading and detail between the two photographs based on, but not limited to, the following factors: (1) the quality of the employer’s computer monitor; (2) the age of the worker’s DHS-issued document and the amount of wear it has undergone; and (3) whether the employer is comparing the Basic Pilot/E-Verify –generated photograph with a copy or faxed copy of a worker’s document.

If a worker presents a document that triggers the use of the photo screening tool, the employer will need to make one of three determinations and input the determination into the Basic Pilot/E-Verify system:

1. **A “photo match.”** The photograph on the worker’s document matches the photograph supplied by Basic Pilot/E-Verify, which will result in the worker being confirmed as employment-authorized.
2. **A “photo nonmatch.”** The photograph on the worker’s document does not match the photograph transmitted by Basic Pilot/E-Verify, which will result in the employer receiving a “tentative nonconfirmation” notice.
3. **“Cannot be determined.”** The employer is unable to make a determination whether the photograph on the worker’s document matches the photograph transmitted by Basic Pilot/E-Verify, which will result in the employer receiving a “DHS verification in process” notice. This notice indicates that USCIS needs to review the case and will make a final determination concerning the match.

Step 2: Employee can challenge a “tentative nonconfirmation.”

As with Basic Pilot/E-Verify procedures, if the employer receives a “tentative nonconfirmation” notice, the employer should give the worker written notice of that fact. The worker must then check a box on the notice stating that he/she contests or does not contest the tentative nonconfirmation, and both the worker and employer must sign the notice. The

employer must then file the original copy of the notice with the worker's I-9 form and give a copy of the notice to the worker. If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice, called a “referral letter,” which contains information about resolving the tentative nonconfirmation, as well as the contact information for DHS. Failure to provide the letter may constitute unlawful discrimination.

The worker then has *three federal government work days* in which to call a toll-free DHS number to try to resolve the discrepancy. The employer must also send a photocopy of the documentation the worker submitted in the I-9 process and a copy of the referral letter to USCIS headquarters in Washington, DC. The results of this verification will be reported to the employer by USCIS.

If the employer cannot make a determination about the photograph and receives a “verification in process” notice, the employer should also give the worker a referral letter and send a photocopy of the documentation the worker submitted in the I-9 process and a copy of the referral letter to USCIS headquarters in Washington, DC. The results of this verification will be reported to the employer by USCIS. If the employer receives a “final nonconfirmation” or the worker does *not* contest the “tentative nonconfirmation,” it automatically becomes a “final nonconfirmation” notice.

■ “Batch” Verification

USCIS also provides a “batch” verification method whereby employers can submit multiple inquiries to Basic Pilot/E-Verify. To use the batch verification method, a company must develop an interface between its database or electronic I-9 system and the Basic Pilot/E-Verify database.

■ How Does Basic Pilot/E-Verify Affect Immigrant Workers?

While Basic Pilot/E-Verify was created in an attempt to “fix” problems with the reliability of the I-9 employment eligibility verification process, the program has had problems since its inception in 1997. Most notably, the program, which is used by less than 1 percent of all employers, has been hindered by inaccurate and outdated information in the DHS and SSA databases and misuse of the program by employers.¹⁵

Numerous entities, including those that researched and wrote two independent evaluations commissioned by the former Immigration and Naturalization Service in 2002 and by DHS in 2006, the GAO, and the SSA's Office of the Inspector General (SSA-OIG), have confirmed these shortcomings.¹⁶ The most recent independent evaluation commissioned by DHS found

¹⁵ For a summary of NILC's concerns, see BASIC PILOT/E-VERIFY: NOT A MAGIC BULLET (NILC, Jan. 2008), www.nilc.org/immsemplmnt/ircaempverif/e-verify_nomagicbullet_2008-01-04.pdf.

¹⁶ See FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June 2002), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=2c039c7755cb9010

that “the database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification.”¹⁷ The high tentative nonconfirmation rate for lawful foreign-born workers is of significant concern — particularly because the studies have found that employers take adverse action against workers who receive tentative nonconfirmations.

Specific findings from the reports include the following:

- 17.8 million of SSA’s records contain discrepancies related to name, date of birth, or citizenship status, and 12.7 million of these discrepancies pertain to U.S. citizens.¹⁸
- Due to database errors, foreign-born workers (including those who have become U.S. citizens) are *30 times* more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment.¹⁹
- Employers engage in prohibited practices such as preemployment screening, adverse employment action based on tentative nonconfirmations, and failure to inform workers of their rights under the program.²⁰ The 2007 evaluation of the Basic Pilot/E-Verify program found that “the rate of employer noncompliance [with the program rules] is still substantial.”²¹
- Against program rules, *47 percent* of employers put workers through Basic Pilot/E-Verify *before* the employees’ first day at work.²²
- *9.4 percent* of employers did not notify workers of a tentative nonconfirmation notice, and *7 percent* who gave workers the notice did not encourage them to contest it because, they said, the process of contesting the notice takes too much time.²³

[VgnVCM10000045f3d6a1RCRD](#); FINDINGS OF THE WEB-BASED BASIC PILOT EVALUATION (Westat, Sept. 2007) (hereafter “Westat 2007”), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD; IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYER VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, Aug. 2005), www.gao.gov/new.items/d05813.pdf; CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION’S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm; 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; and CONGRESSIONAL RESPONSE REPORT: MONITORING THE USE OF EMPLOYEE VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Sept. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-36122.pdf.

¹⁷ See Westat 2007, *supra* note 12, at 3.

¹⁸ See ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION’S NUMIDENT FILE, *supra* note 12.

¹⁹ See Westat 2007, *supra* note 12, at xii–xiii.

²⁰ *Id.* at xxiii.

²¹ *Id.* at xxii.

²² *Id.* at 71.

²³ *Id.* at 76–77.

- 22 percent of employers restricted work assignments, 16 percent delayed job training, and 2 percent reduced pay based on tentative nonconfirmation notices.²⁴

Basic Pilot/E-Verify makes it the *workers'* responsibility to challenge discrepancies between government records and their own — even though the database error may be that of the federal government or employer — and allows a short timeframe (only 8 days) for them to do so. For these reasons, it becomes critical that workers and their representatives inform themselves about Basic Pilot/E-Verify and the steps that can be taken to protect workers' rights. Workers who do not understand their right to make a challenge, or the consequences if they fail to do so, may lose their jobs.

The new photo screening tool raises concerns about the potential for increased discrimination against lawful immigrants and possibly even naturalized U.S. citizens, since currently non-U.S. citizen workers are the only workers subject to the photo screening tool. For example, the program may encourage employers to violate the Immigration and Nationality Act's antidiscrimination “document abuse” provisions, which prohibit employers from demanding specific documents from workers, or more documents than the law requires, to prove their employment eligibility.²⁵ The photo screening program creates an incentive for employers, particularly those who want to protect themselves against claims that they hire unauthorized workers, to require new noncitizen employees to present either a permanent resident card or an EAD, since these are the only documents that can be checked with the new tool. Finally, the program may lead employers to refuse to hire noncitizens who present an older document since they may assume that the person presenting it is committing document fraud. The addition of another employment eligibility verification step that applies only to noncitizens also provides employers an added incentive to avoid hiring lawful immigrants, because it increases the amount of burden and expense involved in hiring them.

■ The Future of Basic Pilot/E-Verify

Basic Pilot/E-Verify is authorized until November 2008. Although Congress failed to enact immigration reform legislation in 2007, all major immigration reform bills that have been debated since 2005 have included a mandatory electronic eligibility verification system (EEVS) modeled on Basic Pilot/E-Verify. Most of these proposals, however, simply expand Basic Pilot/E-Verify without addressing any of its inadequacies.²⁶ The Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007 (HR 1645), introduced by Representatives Luis Gutierrez (D-IL) and Jeff Flake (R-AZ), is the one bill to make a real attempt at addressing the shortcomings of Basic Pilot/E-Verify by including benchmarks, as well

²⁴ *Id.* at 77.

²⁵ *See* 8 U.S.C. 1324b(a)(6).

²⁶ *See, e.g.*, SENATE BILL PROPOSED UNWORKABLE EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM (NILC, May 2007), www.nilc.org/immsemplymnt/cir/07senbill_titleIII_topconcerns_2007-05-21.pdf; and “Summary and Analysis: The Electronic Employment Eligibility Verification System Proposed by the Senate’s Comprehensive Immigration Reform Act of 2006 (S 2611),” IMMIGRANTS’ RIGHTS UPDATE, Aug. 17, 2006, www.nilc.org/immsemplymnt/ircaempverif/cev001.htm.

as privacy, antidiscrimination, and due process protections.²⁷ Any mandatory EEVS, however, will simply replicate the flawed employer sanctions system of the last 20 years if it is not also accompanied by a broad legalization program and strong labor protections for all workers, regardless of their immigration status.

Despite the fact that it is unlikely that any comprehensive immigration reform legislation will move before the 2008 elections, there will continue to be efforts to make Basic Pilot/E-Verify mandatory. For example, Representatives Heath Shuler (D-NC) and Tom Tancredo (R-CO) in the House of Representatives, and Senators Mark Pryor (D-AR) and Mary Landrieu (D-LA) in the Senate introduced the Secure America through Verification and Enforcement Act of 2007, or SAVE Act (HR 4088/S. 2368), which would make Basic Pilot/E-Verify mandatory without offering any solution for the over 7 million undocumented workers who participate in our economy.²⁸

As mentioned earlier, DHS is in the process of making administrative changes to expand the program and continues to engage in extensive outreach to employers to sign up for the system. Advocates remain concerned that increased usage will only exacerbate the problems identified in recent studies and evaluations, since the program is used by fewer than 1 percent of all employers in the U.S. GAO recently testified that a mandatory EEVS would substantially increase the demands on DHS and SSA resources and necessitate an increased capacity at both USCIS and SSA to accommodate all employers in the U.S.²⁹

■ How Do Workers Ensure That Their Rights Are Protected?

Basic Pilot/E-Verify raises a number of questions and concerns that workers' advocates must monitor closely. Because of concern about the accuracy of the government databases upon which Basic Pilot/E-Verify relies and the fact that many employers do not follow program rules, workers, organizers, unions and other employee advocates will need to make special efforts to educate themselves about the program and, most especially, about the steps workers can take to challenge erroneous nonconfirmations. Workers who are represented by unions should bring their concerns about this matter to their union representatives, as union contracts may contain provisions for workers to take time off the job with pay to contact or visit DHS or SSA, as needed, to resolve disputes over employment eligibility.

Under Basic Pilot/E-Verify rules, workers have the following rights³⁰:

²⁷ For an analysis of the employment verification system provisions in the STRIVE Act, *see* TITLE III OF THE STRIVE ACT OF 2007 (H.R. 1645): EMPLOYMENT ELIGIBILITY VERIFICATION (NILC, May 2007), www.nilc.org/immsemplymnt/cir/strive_title3_highlights_2007-03-29.pdf.

²⁸ For a summary of concerns with the SAVE Act, *see* SHULER-TANCREDO EMPLOYMENT VERIFICATION SYSTEM: POORLY DESIGNED, DANGEROUS FOR THE ECONOMY (NILC, Feb. 2008), www.nilc.org/immsemplymnt/ircaempverif/shuler_EEVS_2008-02-01.pdf.

²⁹ Richard M. Stana (2007), *supra* note 2, at 1, 2.

³⁰ *See also* EMPLOYEES — YOU SHOULD KNOW YOUR RIGHTS AND RESPONSIBILITIES UNDER E-VERIFY (USCIS, Jan. 18, 2008), www.uscis.gov/files/nativedocuments/e-ver-employee-rights.pdf.

- The right to choose which documents, of those listed on the reverse side of the I-9 form, they present to their employer to prove their identity and employment eligibility. Note that Basic Pilot/E-Verify employers can accept an I-9 form “List B” document as proof of a worker’s identity only if the document includes a photograph.
- The right *not* to comply with requests for additional documents after they have presented those required for completing the I-9.
- The right to know whether their employer is using the Basic Pilot/E-Verify program (the employer is required to post, in an area clearly visible to prospective and new employees, a notice provided by DHS that says the company is participating in Basic Pilot/E-Verify).
- The right to be offered a job and complete the I-9 form *before* their information is entered into the Basic Pilot/E-Verify system.
- The right *not* to have their information resubmitted to Basic Pilot/E-Verify after the initial verification process at hire (e.g., as retaliation for filing a wage-and-hour claim against the employer).
- The right to know if Basic Pilot/E-Verify cannot confirm their information, the right to receive and review a “Notice to Employee of Tentative Nonconfirmation” in English or Spanish,³¹ and the right to either contest or not contest the finding.
- The right to be provided 8 federal working days after receipt of the “Notice to Employee of Tentative Nonconfirmation” in which to contest a Basic Pilot/E-Verify finding with DHS or SSA.
- The right not to be terminated, or for any adverse employment action to be taken against them (e.g., pay cut, demotion, suspension, etc.) while they challenge a Basic Pilot/E-Verify finding, regardless of how long it takes the government to resolve the error.

Where there is reason to believe an employer is using its access to government databases under Basic Pilot/E-Verify in violation of the rules and procedures explained above, workers or advocates should contact one or more of the agencies listed below. Depending on the situation, workers may be able to file complaints with more than one agency.

Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Workers (and/or advocates on their behalf) should contact OSC if they believe they have been discriminated against based on national origin or citizenship status — for example, if the employer is stating a preference for hiring U.S. citizens or permanent residents because it is “easier” to verify their work eligibility. It is important to act quickly in such cases, however, as charges of discrimination must be filed with OSC within 180 days of the discriminatory act.

³¹ USCIS is in the process simplifying the tentative nonconfirmation notice and will then make it available in other languages.

OSC operates a worker hotline to assist in answering questions and determining whether an employer may be contacted directly in an attempt to resolve the problem before a charge is filed. OSC relies on its multilingual staff and has access to telephone interpreters to communicate with workers in many languages.

Contact information for OSC is:

- Information and Worker Hotline: 1-800-255-7688; or TDD for those with hearing impairment: 1-800-362-2735
- Automated Employer Hotline: 1-800-255-8155; or TDD: 1-800-362-2735
- Website: www.usdoj.gov/crt/osc

Equal Employment Opportunity Commission (EEOC). If they believe they have been discriminated against based on national origin, race, color, gender, religion, age, disability, or pregnancy, workers should contact EEOC. For example, it is unlawful for employers to use Basic Pilot/E-Verify to verify the employment eligibility of workers of a certain race or ethnicity while not subjecting workers of other races or ethnicities to the process, nor are they allowed to provide copies of tentative nonconfirmation notices to workers of a certain race or ethnicity while withholding them from other workers. EEOC also prohibits discrimination against a worker who has formally accused his or her employer, by filing a charge against the employer, of retaliating against him or her. To be accepted, charges must be filed with EEOC within 180 days of the discriminatory act, so it is important to act quickly. In states or localities that have antidiscrimination laws and an agency authorized to accept EEOC complaints, charges may be filed within 300 days of the discriminatory act. It is best to contact EEOC, or a worker advocate experienced in discrimination claims, as soon as discrimination is suspected to seek guidance on how to proceed.

Since OSC and EEOC both enforce laws against national origin discrimination, OSC has jurisdiction over small employers with 3 to 14 employees. EEOC has jurisdiction over employers with 15 or more employees.

Contact information for EEOC is:

- Contact information for EEOC field offices: www.eeoc.gov/offices.html
- If there is no field office in your immediate area, call 800-669-4000; or TDD for those with hearing impairment: 800-669-6820
- Website: www.eeoc.gov

National Labor Relations Board (NLRB). Workers should contact NLRB if their employer has retaliated against them for organizing or joining a labor union, or complaining about working conditions, if the complaint was made by a group of two or more workers who were working together to try to improve working conditions for their co-workers and themselves. For example, it is unlawful for an employer to use Basic Pilot/E-Verify to verify or reverify the employment eligibility only of those of its employees who are either collectively complaining about working conditions or organizing a union.

Contact information for the NLRB is:

- Information Hotline: 1-866-667-NLRB (1-866-667-6572); or TDD for those with hearing impairment: 1-866-315-NLRB (1-866-315-6572)
- Contact information for NLRB Regional offices:
www.nlr.gov/about_us/locating_our_offices/index.aspx
- Basic Guide to the National Labor Relations Act:
www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf
- Website: www.nlr.gov

Advocates can contact the National Immigration Law Center at 213-639-3900 or via email at info@nilc.org for assistance on these issues as well.

■ How Do Workers Contact USCIS to Better Understand Basic Pilot/E-Verify?

Workers who have questions about what Basic Pilot/E-Verify is or what the tentative nonconfirmation notice or referral notice means, or who want to report misuse of the program, should contact the USCIS Verification Division.

- USCIS Verification Division Telephone Number: 1-888-464-4218
- Website: www.uscis.gov/e-verify

FOR MORE INFORMATION, CONTACT

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