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Unauthorized Employment in the United States: Issues, Options, and Legislation

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Unauthorized Employment in the United States: Issues, Options, and Legislation

Abstract

[Excerpt] As immigration reform and the illegal alien population have gained congressional and public attention in the past several years, the issue of unauthorized employment has come to the fore. It is widely accepted that most unauthorized aliens enter and remain in the United States in order to work. Thus, eliminating employment opportunities for these aliens has been seen as key to curtailing unauthorized immigration.

The Immigration Reform and Control Act (IRCA) of 1986 amended the Immigration and Nationality Act (INA) to add provisions, sometimes referred to as employer sanctions, that made it unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to work. These provisions also established a paper-based employment eligibility verification system, known as the I-9 system, which requires that employers examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms. There is general agreement that the I-9 process has been undermined by fraud. Employers violating INA prohibitions on unauthorized employment may be subject to civil or criminal penalties. The Department of Homeland Security's Immigration and Customs Enforcement (DHS/ICE) is responsible for enforcing the INA prohibitions on unauthorized employment.

Building on the employment verification system established by IRCA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) directed the Attorney General to conduct three pilot programs for employment eligibility confirmation. Under the Basic Pilot program (known now as E-Verify), the only one of the three pilots still in operation, participating employers verify new hires' employment eligibility by submitting information about these workers that is checked against Social Security Administration (SSA) and, if applicable, DHS databases. E-Verify is scheduled to terminate on March 6, 2009, in accordance with Division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009.

A variety of options has been put forth to curtail unauthorized employment and related practices, a selection of which is discussed in this report. Some of these options would build on the current employment eligibility verification system; these include making electronic verification mandatory, increasing existing penalties, or increasing resources for worksite enforcement. Others represent new approaches to address unauthorized employment, such as shifting responsibility for employment eligibility verification from employers to the federal government.

Multiple bills related to unauthorized employment have been introduced in the 111th Congress. Among them, the Omnibus Appropriations Act, 2009 (H.R. 1105), as introduced and as passed by the House, includes a provision to extend E-Verify through September 30, 2009. Several other provisions on the E-Verify program, including provisions to extend the program until November 2013 and to require that none of the funds made available under the act be used to enter into a contract with an entity that does not participate in E-Verify, were included in the House-passed version of the American Recovery and Reinvestment Act of 2009 (H.R. 1). These provisions, however, were not included in the Senate-passed version of H.R. 1 or in the final enacted version of the bill.

This report will be updated as developments warrant.

Keywords

immigration, public policy, immigration reform, unauthorized employment, legislation

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Unauthorized Employment in the United States: Issues, Options, and Legislation

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Summary

As immigration reform and the illegal alien population have gained congressional and public attention in the past several years, the issue of unauthorized employment has come to the fore. It is widely accepted that most unauthorized aliens enter and remain in the United States in order to work. Thus, eliminating employment opportunities for these aliens has been seen as key to curtailing unauthorized immigration.

The Immigration Reform and Control Act (IRCA) of 1986 amended the Immigration and Nationality Act (INA) to add provisions, sometimes referred to as *employer sanctions*, that made it unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to work. These provisions also established a paper-based employment eligibility verification system, known as the I-9 system, which requires that employers examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms. There is general agreement that the I-9 process has been undermined by fraud. Employers violating INA prohibitions on unauthorized employment may be subject to civil or criminal penalties. The Department of Homeland Security's Immigration and Customs Enforcement (DHS/ICE) is responsible for enforcing the INA prohibitions on unauthorized employment.

Building on the employment verification system established by IRCA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) directed the Attorney General to conduct three pilot programs for employment eligibility confirmation. Under the Basic Pilot program (known now as E-Verify), the only one of the three pilots still in operation, participating employers verify new hires' employment eligibility by submitting information about these workers that is checked against Social Security Administration (SSA) and, if applicable, DHS databases. E-Verify is scheduled to terminate on March 6, 2009, in accordance with Division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009.

A variety of options has been put forth to curtail unauthorized employment and related practices, a selection of which is discussed in this report. Some of these options would build on the current employment eligibility verification system; these include making electronic verification mandatory, increasing existing penalties, or increasing resources for worksite enforcement. Others represent new approaches to address unauthorized employment, such as shifting responsibility for employment eligibility verification from employers to the federal government.

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Introduction

In the past several years, increasing public and congressional attention has been focused on the unauthorized alien (illegal alien) population in the United States, which, according to the Pew Hispanic Center, totaled an estimated 11.8 million in March 2008.¹ It is widely accepted that most unauthorized aliens enter and remain in the United States in order to work. Thus, addressing unauthorized employment and eliminating job opportunities for unauthorized immigrants has been seen as key to curtailing illegal immigration. *Unauthorized employment*, as used in this report, refers to the employment of aliens who lack authorization to be employed in the United States. The term includes both those who are in the country in violation of the law, as well as those in the country legally who nevertheless are not authorized to work.² Legislation on unauthorized employment, specifically related to the E-Verify electronic employment eligibility verification program, is under consideration by the 111th Congress.

Estimates of Unauthorized Workers

Based on data from the Current Population Survey (CPS) and other sources, the Pew Hispanic Center has estimated that the unauthorized resident population in the United States totaled 12.4 million in March 2007 and 11.9 million in March 2008.³ Estimates by the Department of Homeland Security (DHS) of the unauthorized alien population are somewhat lower. Based on data from the American Community Survey and other sources, DHS has estimated that there were 11.8 million unauthorized aliens living in the country in January 2007.⁴

Unauthorized workers are a subpopulation of the total unauthorized alien population. According to the Pew Hispanic Center, there were an estimated 7.2 million unauthorized workers in the U.S. civilian labor force in March 2005.⁵ These workers represented about 65% of the total unauthorized population and about 5% of the labor force at the time. In some occupations and industries, however, their share of the labor force was considerably higher. **Table 1** presents data from the Pew Hispanic Center on industries with high concentrations of unauthorized workers. Unauthorized aliens accounted for about one in five workers in private households and between 10% and 15% in the other industries shown.

¹ Jeffrey S. Passel and D'Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008 (hereafter cited as Passel and Cohn, *Trends in Unauthorized Immigration*).

² For example, a number of categories of temporary visitors to the United States, known as nonimmigrants, are not authorized to work. See CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddad and Ruth Ellen Wasem.

³ Passel and Cohn, *Trends in Unauthorized Immigration*.

⁴ U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker, September 2008.

⁵ Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, March 7, 2006. In subsequent annual estimates of the unauthorized alien population, the Pew Hispanic Center did not provide comparable estimates of unauthorized workers.

Table 1. Estimates of Unauthorized Employment in Selected Industries, 2005

Industry Group	Unauthorized Workers (in Industry)
Private Households	21%
Food Manufacturing	14%
Agriculture	13%
Furniture Manufacturing	13%
Construction	12%
Textile, Apparel, and Leather Manufacturing	12%
Food Services	12%
Administrative and Support Services	11%
Accommodation	10%

Source: Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Pew Hispanic Center, March 7, 2006.

Prohibitions on Unauthorized Employment

Prior to 1986, it was not against the law for an employer to employ an individual who was not authorized to work. This changed with the enactment of the Immigration Reform and Control Act of 1986 (IRCA), which amended the Immigration and Nationality Act to add a new §274A.⁶ The §274A provisions are sometimes referred to collectively as *employer sanctions*. Under INA §274A, it is unlawful for an employer⁷ to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are required to participate in a paper-based employment eligibility verification system, commonly known as the I-9 system, in which they examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms.

With respect to the document examination requirement, INA §274A states that an employer is in compliance “if the document reasonably appears on its face to be genuine.”⁸ There is general agreement that the I-9 process has been undermined by fraud—both *document fraud*, in which employees present counterfeit or invalid documents, and *identity fraud*, in which employees present valid documents issued to other individuals.

Employers violating INA prohibitions on unauthorized employment may be subject to civil and/or criminal penalties. INA §274A establishes separate and escalating ranges of penalties for the following: failure to comply with the I-9 requirements; violations of prohibitions on knowingly hiring, recruiting, referring, or continuing to employ unauthorized aliens and a pattern or practice of violations of knowingly hiring, recruiting, referring, or continuing to employ unauthorized

⁶ P.L. 99-603, §101(a), November 6, 1986.

⁷ “Employer” is used as a shorthand in this section for “person or entity,” the phrase used in INA §§274A and 274B.

⁸ INA §274A(b)(1)(A).

aliens.⁹ As discussed below, DHS's Immigration and Customs Enforcement (ICE) is responsible for enforcing the INA prohibitions on unauthorized employment.

During the congressional debates on IRCA, major concerns were expressed that the verification and penalty provisions would result in employment discrimination based on national origin as employers opted not to hire eligible workers who looked or sounded "foreign," out of fear that they lacked work authorization. To directly address these concerns, IRCA added a new §274B to the INA, which makes it an unfair immigration-related employment practice for employers with four or more employees to discriminate against U.S. citizens or work-authorized aliens in hiring, recruiting or referring for a fee, or firing based on national origin or on citizenship or lawful immigration status. INA §274B also provided for the establishment of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the U.S. Department of Justice to enforce these provisions.¹⁰ Under INA §274B, employers found to have engaged in an unfair immigration-related employment practice shall be required to cease and desist from such practice and may be subject to other requirements, including civil penalties.

IRCA also required the then-General Accounting Office (GAO) (now the Government Accountability Office) to issue three annual reports on the implementation and enforcement of the INA §274A provisions. In each of the reports, GAO was directed to make a determination as to whether the implementation of INA §274A "has resulted in a pattern of discrimination in employment (against other than unauthorized aliens) on the basis of national origin."¹¹ GAO's third report included the following summary of its findings:

GAO found that the law has apparently reduced illegal immigration and is not an unnecessary burden on employers, has generally been carried out satisfactorily by INS [the former Immigration and Naturalization Service] and Labor, and has not been used as a vehicle to launch frivolous complaints against employers. GAO also found that there was widespread discrimination. But was there discrimination as a result of IRCA? That is the key question Congress directed GAO to answer. GAO'S answer is yes.¹²

Congress, however, did not take action on these findings.

E-Verify

Building on the employment verification system established by IRCA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) directed the Attorney General to conduct three pilot programs for employment eligibility confirmation that were to be largely voluntary—the Basic Pilot program, the Machine-Readable Document Pilot program, and the Citizen Attestation Pilot.¹³

⁹For current fine levels, see CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno (hereafter cited as CRS Report RL40002).

¹⁰For further information about INA §274B, see CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by Alison M. Smith.

¹¹IRCA §101(a).

¹²U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, March 1990, p. 3, at <http://archive.gao.gov/d24t8/140974.pdf>.

¹³IIRIRA is Division C of P.L. 104-208. The pilot programs were established under Title IV, Subtitle A. Independent evaluations of the three pilot programs were conducted by the Institute for Survey Research at Temple University and.

Under the Basic Pilot program (renamed E-Verify by the Bush Administration), the only one of the three pilots still in operation, participating employers verify new hires' employment eligibility by accessing Social Security Administration (SSA) and, if applicable, DHS databases.¹⁴ E-Verify is administered by DHS's U.S. Citizenship and Immigration Services (USCIS). It began in 1997 in the five states with the largest unauthorized alien populations,¹⁵ and was subsequently expanded to all 50 states in accordance with P.L. 108-156. Initially scheduled to terminate in 2001, the program has been extended three times, most recently by P.L. 110-329.¹⁶ The Continuing Appropriations Resolution, 2009 (Division A of P.L. 110-329) directed that the pilot program termination date section of IIRIRA be applied by substituting "March 6, 2009" for the prior language, which had effectively set a November 2008 termination date. At the same time, Division D of P.L. 110-329, which contained DHS appropriations for FY2009, appropriated \$100 million for E-Verify.

E-Verify has been growing in recent years. In January 2006, there were about 5,300 employers registered for the program, representing about 23,000 hiring sites. In January 2009, there were about 103,000 employers were registered, representing about 414,000 hiring sites.¹⁷

As mentioned above, E-Verify is a primarily voluntary program. Under IIRIRA §402(e), however, violators of INA §274A prohibitions on unlawful employment or those who engage in unfair immigration-related employment practices, as defined in INA §274B, may be required to participate in a pilot program. IIRIRA §402(e) 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."

In its final years, the Bush Administration took steps to mandate the participation of certain groups of employers in E-Verify. In August 2007, the Office of Management and Budget (OMB) issued a memorandum requiring all federal departments and agencies to verify their new hires through E-Verify as of October 1, 2007.¹⁸

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

Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.¹⁹

¹⁴ See the **Appendix** for a description of the E-Verify verification process. Over the years, independent evaluations of the Basic Pilot program have been conducted by the Institute for Survey Research at Temple University and Westat for INS/USCIS. These evaluations are: *INS Basic Pilot Summary Report* (January 29, 2002); *Findings of the Basic Pilot Program Evaluation* (June 2002); *Interim Findings of the Web-Based Basic Pilot Evaluation* (December 2006); *Findings of the Web Basic Pilot Evaluation* (September 2007). They are available at <http://www.uscis.gov>.

¹⁵ The states were California, Florida, Illinois, New York, and Texas.

¹⁶ P.L. 107-128, January 16, 2002; P.L. 108-156, December 3, 2003; P.L. 110-329, September 30, 2008.

¹⁷ Data provided by USCIS.

¹⁸ 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.

¹⁹ Executive Order 13465, "Amending Executive Order 12989, as Amended," 73 *Federal Register* 33283-33287, June (continued...)

The Secretary of Homeland Security subsequently designated E-Verify as the required employment eligibility verification system for contractors. A final rule to implement the executive order was published in November 2008.²⁰ Under the rule, covered federal contracts are to contain a new clause requiring 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.”²¹ Although the rule originally had an effective date of January 15, 2009, 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. Amendments to the final rule extended the effective date to January 19, 2009, and the applicability date to May 21, 2009.²² According to the supplementary information accompanying the later amendment, the applicability date was being extended to May 21, 2009, “in order to permit the new Administration an adequate opportunity to review the rule.”²³ Under the rule, as amended, contracting officers are not to include the E-Verify clause in any solicitation or contract before May 21, 2009.

Worksite Enforcement

Since March 2003, ICE has had responsibility for enforcing the INA prohibitions against unauthorized employment (known as *worksite enforcement*) as part of its larger responsibility to enforce federal immigration laws within the United States.²⁴ The ICE worksite enforcement strategy gives top priority to investigations at worksites related to critical infrastructure and national security, such as nuclear power plants, defense facilities, and airports. According to ICE, “worksite enforcement investigations often involve egregious violations of criminal statutes by employers and widespread abuses.” These cases “often involve additional violations such as alien smuggling, alien harboring, document fraud, money laundering, fraud or worker exploitation.”²⁵

(...continued)

11, 2008.

²⁰ Department of Defense, General Services Administration, National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” 73 *Federal Register* 67651-67705, November 14, 2008.

²¹ *Ibid.*, p. 67654.

²² Department of Defense, General Services Administration, National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” 74 *Federal Register* 1937, January 14, 2009; Department of Defense, General Services Administration, National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” 74 *Federal Register* 5621, January 30, 2009.

²³ Department of Defense, General Services Administration, National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” 74 *Federal Register* 5621, January 30, 2009.

²⁴ Immigration enforcement responsibility formerly rested with the Immigration and Naturalization Service (INS). The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of March 1, 2003.

²⁵ Description of worksite enforcement program on ICE website, <http://www.ice.gov>. For further information and data on ICE worksite enforcement, see CRS Report RL40002.

Another part of ICE's worksite enforcement strategy is the ICE Mutual Agreement between Government and Employers (IMAGE) program. Initiated in 2007, IMAGE is a voluntary program, which aims to "assist employers in targeted sectors to develop a more secure and stable workforce and to enhance fraudulent document awareness through education and training."²⁶

To enroll in IMAGE, an employer must agree to submit to an I-9 audit by ICE and to verify the Social Security numbers of its current employees through an SSA database. IMAGE participants also are required to adhere to a set of "best hiring practices," which include participating in E-Verify, arranging for annual I-9 audits, and establishing a process for reporting any violations to ICE.²⁷

Options for Addressing Unauthorized Employment

A variety of options has been put forth to curtail unauthorized employment and related practices, a selection of which is discussed below. Some of these options would build on the current employment eligibility verification system, while others represent new approaches to address unauthorized employment. The options presented here are not necessarily mutually exclusive, and some could be pursued in concert.

Mandatory Electronic Employment Eligibility Verification

One set of options would make E-Verify or a similar electronic employment eligibility verification system mandatory for all employers in the United States. Under this general approach, all employers would be required to query the system to verify the identity and employment eligibility of all *new hires*. Related questions concern what other, if any, required uses of the system there would be. For example, one key question would likely be whether employers would be required to verify the identity and employment eligibility of *previously hired workers* in addition to new hires. The Bush Administration endorsed making E-Verify mandatory for all employers,²⁸ and as discussed above, took steps to require Federal agencies and Federal contractors to use the system.

While there is considerable support for making electronic employment eligibility verification mandatory, concerns have been expressed about discrimination, employer noncompliance, and privacy.²⁹ The inability of E-Verify to detect identity fraud has also been raised.

²⁶ Description of IMAGE program on ICE website, <http://www.ice.gov>.

²⁷ Ibid.

²⁸ See, for example, Statement of DHS Secretary Michael Chertoff, at U.S. Congress, Senate Committee on the Judiciary, *Comprehensive Immigration Reform*, hearing, 110th Cong., 1st sess., February 28, 2007 (hereafter cited as Chertoff Testimony, 2007).

²⁹ For a discussion of these issues as they relate to E-Verify, see Statement of Carolyn F. Shettle, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Electronic Employment Verification Systems*, hearing, 110th Cong., 2nd sess., June 10, 2008.

Increased Penalties

Another set of options would increase existing monetary or other penalties under the INA for prohibited behavior or establish new penalties. Although there seems to be broad support for enhancing penalties, proposals differ with regard to which penalties to increase or establish and by how much.

Unauthorized Employment

One option would be to increase some or all existing penalties on employers who violate INA §274A prohibitions on unauthorized employment, as discussed above. Along these lines, former DHS Secretary Chertoff, in February 2007 testimony before the Senate Judiciary Committee, urged Congress:

to increase penalties for repeat offenders and establish substantial criminal penalties and injunction procedures that punish employers who engage in a pattern of knowing violations of the laws and effectively prohibit the employment of unauthorized aliens.³⁰

Unfair Immigration-Related Employment Practice

Another option would be to increase fines under INA §274B for engaging in unfair immigration-related employment practices, as discussed above.

New Penalty for Unauthorized Employees

Current penalties for unauthorized employment, as discussed above, apply to employers that hire, recruit or refer for a fee, or employ individuals. Another penalty-related option would be to establish a new penalty on unauthorized employees.³¹ For example, one proposal of this type would make an individual who falsely represents on the I-9 or comparable verification form that he or she is authorized to work in the United States, subject to a fine and/or imprisonment.

Increased Worksite Enforcement-Related Resources

Another set of options would make additional resources available to ICE for worksite enforcement. These resources could be in the form of additional personnel to work on worksite enforcement cases or additional funding. Historically, interior enforcement resources devoted to worksite enforcement have been limited.³² Related questions concern how any additional worksite enforcement resources would best be used. For example, should ICE's current strategy of focusing primarily on criminal employer cases continue, or should any changes be made to that strategy? A related resource option would make additional resources available to ICE to investigate cases of document and identity fraud.³³

³⁰ Chertoff Testimony, 2007.

³¹ While not subject to a penalty under INA §274A, unauthorized workers, like unauthorized aliens generally, are subject to being removed from the United States under the INA.

³² See CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin.

³³ See, for example, Statement of Carl W. Hampe, at U.S. Congress, House Committee on the Judiciary, Subcommittee (continued...)

Data Sharing

Data sharing among SSA, DHS, and employers represents another possible approach to reduce unauthorized employment and related identity fraud. There have been various proposals to increase the sharing of information for these purposes. Among these are proposals to require SSA to inform DHS of cases in which a single social security number is used with multiple names.³⁴ Former DHS Secretary Chertoff expressed his support for this type of data sharing at the February 2007 Senate Judiciary Committee hearing:

[W]e need legal authority to assure that the Social Security Administration can share with us and with employers data concerning stolen identities being misused to obtain work illegally.³⁵

Such data sharing would likely raise privacy concerns and would require SSA to assume an additional role.

Changes to Issuance and Acceptance of Documents

Another set of possible options to address unauthorized employment and related identity fraud revolves around the issuance and acceptance of documents establishing identity and employment eligibility. INA §274A establishes categories of acceptable documents for I-9 purposes. Implementing regulations list more than 20 documents that employees can present to establish their identity and/or employment eligibility.³⁶ Reducing the number of acceptable documents has long been under discussion as an option for making the I-9 verification process more secure and less confusing for employers.³⁷

Under the Bush Administration, DHS sought to make changes to the types of documents that employees could present for I-9 purposes, through an interim final rule published in the *Federal Register* in December 2008.³⁸ Among the changes in the rule, employers would no longer be able to accept expired documents to verify employment eligibility. The rule was initially to be effective on February 2, 2009. On January 30, 2009, however, USCIS announced that implementation was being delayed until April 3, 2009. According to an agency press release, “the delay will provide DHS with an opportunity for further consideration of the rule and also allows the public additional time to submit comments.”³⁹

(...continued)

on Immigration, Border Security, and Claims, *Lack of Worksite Enforcement and Employer Sanctions*, hearing, 109th Cong., 1st sess., June 21, 2005. For a discussion of immigration fraud, see CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin.

³⁴ See S. 699 (110th Congress).

³⁵ Chertoff Testimony, 2007. Current law (Internal Revenue Code §6103; 26 U.S.C. §6103) restricts SSA from sharing certain information that it receives from the Internal Revenue Service.

³⁶ 8 C.F.R. §274a.2(b)(1)(v).

³⁷ See, for example, U.S. General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Employment Exist*, GAO/GGD-99-33, April 1999, pp. 13-15, at <http://www.gao.gov/archive/1999/gg99033.pdf>.

³⁸ Department of Homeland Security, “Documents Acceptable for Employment Eligibility Verification,” 73 *Federal Register* 76505-76515, December 17, 2008.

³⁹ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “USCIS Delays Rule Changing List of Documents Acceptable to Verify Employment Eligibility,” press release, January 30, 2009. Also see (continued...)

Other options in this category would combine a reduction in the number of acceptable documents with requirements to improve the security of documents, particularly the widely counterfeited Social Security card. For example, there have been proposals to require Social Security cards to include an encrypted machine-readable electronic identification strip unique to the bearer and a digitized photograph. Under some such proposals, new hires would be required to show a card of this type to the employer, who would then use it to verify the worker's identity and work authorization. Biometrics⁴⁰ could also be incorporated into new Social Security cards or other documents. As discussed in the next section, a verification system based on more secure documents could replace the existing requirement under the I-9 process that employers examine employee-provided documents.

Reducing the number of documents for evidencing identity and employment eligibility could raise concerns that some work-authorized individuals might not be able to meet the requirements easily.⁴¹ Proposals to require all new hires to show one particular document containing various pieces of information about the bearer have been further criticized by some as undermining privacy, facilitating identity theft, and creating a de facto national identification card.⁴² The costs of issuing more secure Social Security cards or other documents would likely be another issue. In addition, SSA has long cautioned that the Social Security card is not a personal identification document, maintaining that its primary purpose is to provide a record of the number that has been assigned to an individual so the individual's employer can properly report earnings in covered jobs.

Government Responsibility for Employment Eligibility Verification

All of the options discussed, thus far, would build on the existing employer-based employment eligibility verification system. An alternative system could make the government responsible for verifying employment eligibility. In a November 2005 paper, Marc R. Rosenblum offered one such alternative, which he termed a *centralized screening* system.⁴³ He described the centralized screening system, as follows:

Under a centralized system, the responsibility for verifying work eligibility would rest with professional screeners at the point of document issuance, and proof of eligibility would be

(...continued)

Department of Homeland Security, "Documents Acceptable for Employment Eligibility Verification," 74 *Federal Register* 5899, February 3, 2009.

⁴⁰ Biometrics are physical or behavioral characteristics of a person that can be measured and used for identification. For further discussion, see CRS Report RS21916, *Biometric Identifiers and Border Security: 9/11 Commission Recommendations and Related Issues*, by Daniel Morgan and William J. Krouse.

⁴¹ In the supplementary information accompanying a 1998 proposed rule to reduce the number of acceptable documents for I-9 purposes, the former INS stated the following: "When [IRCA] was new, a consensus emerged that a long, inclusive list of documents would ensure that all persons who are eligible to work could easily meet the requirements." U.S. Department of Justice, Immigration and Naturalization Service, 63 *Federal Register* 5289, February 2, 1998.

⁴² For a discussion of these types of concerns, see Statement of Marc Rotenberg, Electronic Privacy Information Center, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Illegal Immigration Enforcement and Social Security Protection Act of 2005*, hearing, 109th Cong., 1st sess., May 12, 2005.

⁴³ Marc R. Rosenblum, *Immigration Enforcement at the Worksite: Making it Work*, Migration Policy Institute, Policy Brief, no. 6, November 2005.

embodied in a worker's identity card itself. Employers could thus assume cardholders are work-authorized, and employer responsibility would be reduced to keeping a record of new hires.

As outlined by Rosenblum, employers would be responsible for registering new hires in a new job holder database; he envisions that eventually this would be done by swiping a machine-readable card. Under such a system, employers would only be subject to penalties for failing to fulfill the registration requirements.

The effectiveness of such a system at preventing unauthorized employment would rely largely on the security of the underlying documents. According to Rosenblum:

Enforcement agents would be responsible for insuring the integrity of work authorization documents, and for analyzing employer records to search for evidence that employees are using borrowed or stolen documents.

If such a system were to receive serious consideration, there would likely be questions about whether enforcement agents could perform these functions. In addition, to the extent that it relied on one or a small number of verification documents, such a system would likely raise concerns about privacy, identity theft, and the establishment of a national identification card, as discussed in the prior section.

Shift Focus to Enforcement of Workplace Protections

Another option would be to shift the focus of enforcement from ICE worksite enforcement to enforcement of minimum wage and health and safety laws by the Department of Labor (DOL). This option is premised on an assumption that increased DOL enforcement would be more effective than ICE enforcement at protecting the jobs, wages, and working conditions of U.S. workers, and that employers who employ unauthorized aliens are likely the same employers who violate wage, hour, and safety laws.⁴⁴

Another version of this option, which represents a complete departure from the current employment eligibility verification system, would couple increased DOL enforcement with the repeal of the current INA prohibitions on unauthorized employment. Jennifer Gordon, a law professor, advocated a version of this option at a hearing of the House Judiciary Committee's Immigration subcommittee in June 2005. In her testimony, Gordon contended that the current system had "contributed significantly to undermining [the working conditions of U.S. citizens and legal immigrants] and that "effective enforcement of basic workplace rights for all employees is the lynchpin in any strategy to protect the wages and working conditions of U.S. workers." She recommended replacing the current system with a two-pronged approach. The first prong would be a statement from Congress that workplace protections apply equally to all workers regardless of their immigration status. The second part, as she characterized it, would be "a new commitment to intensive and strategically targeted government enforcement of minimum wage and health and safety laws in industries and geographic areas with high concentrations of undocumented workers."⁴⁵

⁴⁴ For further information about DOL enforcement, see CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*.

⁴⁵ Statement of Jennifer Gordon, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, (continued...)

This option is highly controversial. While Gordon argued at the hearing that it held greater promise for protecting workers than the current system, others soundly reject the idea of repealing employer sanctions. Among the opponents is Carl W. Hampe, a partner in a law firm and a former Justice Department official and congressional staffer, who also testified at the June 2005 House hearing. According to Hampe's testimony:

I believe [repealing employer sanctions] would be very unwise, as it would send a message to the world's potential unauthorized immigrants that the United States no longer will discourage illegal immigration... However large the unauthorized immigration problem is now, repeal of employer sanctions at this point would certainly make the problem far worse.⁴⁶

Selected Legislation in the 111th Congress

Multiple bills related to unauthorized employment have been introduced in the 111th Congress. Among them, the Omnibus Appropriations Act, 2009 (H.R. 1105), as passed by the House on February 25, 2009, includes a provision in Division J to extend E-Verify, which is set to terminate on March 6, 2009, through September 30, 2009. The House earlier approved E-Verify provisions as part of the American Recovery and Reinvestment Act of 2009 (H.R. 1). Among the E-Verify provisions included in the House-passed version of H.R. 1 were provisions to extend the program until November 2013 and to require that none of the funds made available under the act be used to enter into a contract with an entity that does not participate in E-Verify. These House-passed provisions, however, were not included in the Senate-passed version of H.R. 1 or in the final enacted version of the bill.⁴⁷

(...continued)

Border Security, and Claims, *Lack of Worksite Enforcement and Employer Sanctions*, hearing, 109th Cong., 1st sess., June 21, 2005.

⁴⁶ Statement of Carl W. Hampe, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Lack of Worksite Enforcement and Employer Sanctions*, hearing, 109th Cong., 1st sess., June 21, 2005.

⁴⁷ P.L. 111-5, February 17, 2009.

Appendix. E-Verify Verification Process

Employers participating in E-Verify submit information about their new hires (name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable) from the employment eligibility verification (I-9) form that all employers and new hires are required to complete. This information is automatically compared with information in SSA's primary database, the Numerical Identification File (NUMIDENT), which contains records on individuals issued Social Security numbers. For those employees identifying themselves as citizens, if the information submitted by the employer matches the information in NUMIDENT and SSA records confirm citizenship, the employer is notified that the employee's work authorization is verified. If the employer-submitted information about a new hire does not match information in NUMIDENT, the employer is notified that the employee has received an SSA tentative nonconfirmation finding.

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

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

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