E-Verify Program: Hurting Workers, Business and our Economic Recovery

The federal E-Verify program allows employers to confirm the immigration status of newly-hired workers by checking their identity data against government databases. The program has been in use on a pilot or voluntary basis for most employers since 2004, allowing both governmental and nongovernmental studies of its effectiveness to take place. Now Congress is considering a federal bill that would require all employers in the country to use an electronic system to verify workers' immigration status.

At a time when our economy is struggling to recover from the second biggest economic downturn in our history, and when 14 million people are still out of work, the bill would cause considerable job loss. If adopted, the new proposal will prevent significant numbers of qualified workers from getting jobs because of government database errors. The bill would overburden small businesses, deprive governments of billions of dollars in tax revenue by moving workers into an underground cash economy, and significantly increase discrimination against foreign-born workers and those perceived to be foreign-born.

E-Verify and the Legal Workforce Act.

The Legal Workforce Act (H.R. 2164) introduced by Rep. Lamar Smith (R-Texas) is a lengthy federal bill that mandates the use of an electronic employment verification system ("EEVS") by every employer and for every worker in this country, in order to determine whether a worker is eligible to work in the United States. The new bill would require mandatory participation from every U.S. employer within two years of enactment – except agricultural employers who will have to comply after three years. It would require every employer in America to check in with the federal government before making a new hire, and penalize employers who fail to use the system.

During the employment verification process, the employee's information would be compared electronically to government records. The new system would have three days from the initial inquiry to provide a verification code or a temporary non-confirmation ("TNC") to a hiring employer. In cases of TNC, the Social Security Administration ("SSA") would be required to develop a secondary verification process that would provide the employer with a final verification or TNC within 10 working days. If a worker does not contest the TNC within the specified period, the TNC becomes final – exposing an employer to civil and criminal penalties if it continues to employ that person.

Database errors will cause qualified workers to lose job opportunities.

According to the Department of Homeland Security, there are 238,000 employers currently enrolled in the E-Verify program. This is only about 4 percent of the nation's 7.6 million employers. U.S. Citizenship and Immigration Services ("USCIS") and SSA estimate that about 60 million queries would be generated annually if E-Verify were made mandatory

for new hires nationwide. This deluge of additional queries will result in many more errors in a system already hindered by inaccurate and outdated information.

E-Verify checks rely on the Social Security and Homeland Security databases. SSA estimates that its own database contains 17.9 million discrepancies that could affect the results of employment verification checks by employers. A U.S. Government Accountability Office report indicates that in FY 2009, about 2.6 percent, or over 211,000 newly hired employees, received either a SSA or USCIS TNC, including about 0.3 percent who were determined to be work eligible after they contested the TNC and resolved errors or inaccuracies in their records. A government-commissioned report in 2009 by Westat estimated the inaccuracy rate to be 4.1 percent.

Employers who audit their own E-Verify data report even higher error rates than federal government estimates. Intel Corporation found that 12 percent of E-Verify findings it received were erroneous. Los Angeles County's human resource agency found that 2.9 percent of the county's E-Verify queries resulted in erroneous TNCs in 2008 and 2 percent in 2009. Even conservative estimates of error rates mean that between some 290,000 and 846,000 workers who are authorized to work in the United States would be subject to needless termination. These workers would be potentially permanently unemployable, because all subsequent employers would get the same erroneous result from an inquiry.

E-Verify will increase on the job discrimination and other unlawful or unfair practices.

Nearly 50 years after Congress passed the Civil Rights Act, race and national origin discrimination continues to be a major problem for workers of color in our country. In FY 2010, more than 47,000 race and national origin discrimination claims were filed with the EEOC. The existing I-9 verification system already results in discriminatory outcomes against foreign-born workers – including against naturalized U.S. citizens with foreign names and legal immigrants—since these workers are more likely to be the subject of errors in these databases. For example, in 2008, error rates were 30 times higher for naturalized citizens and 50 times higher for legal non-immigrants (i.e. temporary workers) than for native-born citizens. This means that fears of a government audit will lead even law-abiding employers to refuse to hire, or even interview, workers who look or sound foreign – a practice that reviews of the existing I-9 program have found to be widespread.

An SSA Office of the Inspector General report details concerns about employers who use the employment verification program to engage in unlawful and prohibited practices, including premature adverse employment action based on TNC notices, failing to inform workers of their rights under the program, and employment eligibility re-verification of existing employees without a legitimate or lawful reason. According to the Westat report, 37 percent of employers reported taking adverse action against workers receiving TNCs before the individual even had a chance to contest the verification.

Mandatory E-Verify would decrease tax collection and increase "off the books" employment.

Increasingly, American workplaces are "fissured," with workers wrongly classified as "independent contractors" instead of employees, paid off the books, or subcontracted out by companies in an attempt to shift responsibility for labor and employment obligations. By misclassifying their employees as independent contractors, employers contribute to the nation's tax gap, currently estimated by the U.S. Treasury's Inspector General at $345 billion. Mandating use of E-Verify will provide employers added incentive to use subcontractors to act as the employer, erroneously call their workers independent contractors or simply pay them "off the books" in order to skirt their E-Verify obligations. In fact, the law provides a "safe harbor" to employers who use subcontractors.   According to the Congressional Budget Office, mandating E-Verify will decrease federal tax revenues by over $17.3 billion and increase the number of employers who force workers into the grey market.

Paying workers off the books or through subcontractors will mean more labor abuses go unremedied, hurting workers and our economy.

Employers who misclassify workers, pay them off the books, or use convoluted sub-contracting schemes to avoid liability make locating the true employer and reclaiming wages a nearly impossible task. A three-city survey of 4,500 low-wage workers found that 26% were not paid minimum wage, 76% were not paid overtime wages owed, and 43% of workers who complained suffered retaliation. Workers who were paid in cash were twice as likely as those paid by check to be cheated out of minimum wages. The current cost of unpaid wages to individual workers and their families is $56.4 million per week in just the three cities (New York, Los Angeles and Chicago) surveyed.

Thus, by increasing employer incentive to misclassify employees or pay them off the books, mandating E-Verify would create the potential for a host of attendant problems including, in some instances, more difficulty to recover wages owed. In turn, workers who have not been paid the wages they are owed have less money to spend on basic necessities in their local communities, the type of consumer spending that is vital for economic recovery.

E-Verify would create a significant burden for law-abiding small businesses and non-profits.

Huge cost to small business. H.R. 2164 would require all businesses to use E-Verify, even those businesses that have only *one* employee. In order to comply with a mandatory E-Verify program, employers would need to maintain a full-time internet connection, create and maintain detailed employee records, and spend valuable time complying with government requirements.

A Bloomberg Government report indicates that it would have cost the nation's employers $2.7 billion if the use of E-Verify had been mandatory in FY 2010.   According to this report, small businesses employing less than 500 workers, which account for 99.7% of all U.S. employers, would have borne the burden for $2.6 billion of that amount.

Penalties would be levied against non-profit job referral agencies. Sanctions will be mandatory for individual employers as well as for union hiring halls and non-profit organizations that recruit or refer workers, even if these organizations receive no remuneration (fee) for their services. Entities covered by the mandatory E-Verify requirements of H.R. 2164 include union hiring halls, as well as labor service agencies or entities – whether public, private, for-profit, nonprofit or charitable – that recruit, refer, dispatch, or otherwise facilitate the hiring of laborers for any period of time. These entities would be subject to civil and criminal sanctions for failure to comply with mandatory E-Verify, even though they are not employers and offer job referrals as a service to members and to the public.

Lost productivity. Workers will be forced to take time away from work in order to correct inaccuracies in the system. A government-commissioned study, Westat, found that 49.5 percent of TNC workers lost partial or complete days of work, and 14 percent lost more than two days of work – with many more workers making multiple trips to an SSA office to wait in long lines to try to correct their records. According to an Intel Corporation report, "all of Intel's [12.2 percent] TNCs have ultimately been cleared by E-Verify as work authorized, but only after significant investment of time and money, lost productivity and, for our affected foreign national staff, many hours of confusion, worry and upset."

Real solutions for all those at work in America.

Comprehensive Immigration Reform. While enforcement-only strategies yield a net loss to the nation and to states, a January 2011 study by Dr. Raúl Hinojosa-Ojeda, conducted for the Immigration Policy Center and the Center for American Progress, estimates that during the first three years after legalization, the higher earning power of newly

legalized workers "would generate $4.5 to $5.4 billion in additional net tax revenue." This large economic benefit would result in a cumulative **$1.5 trillion in added U.S. gross domestic product over 10 years.** In addition, this higher personal income would also generate increased consumer spending—enough to support 750,000–900,000 jobs in the United States. In contrast, a deportation-only policy would result in a loss of $2.6 trillion in GDP over 10 years - which includes approximately $1.2 trillion in consumption and $256 billion in investment.

A report by the CATO Institute also found that legalization would yield significant income gains for America's workers and households. Legalization would boost the incomes of U.S. households by $180 billion in 2019.

Strong Labor Standards, robustly enforced. The real problem for state treasuries and immigrant and non-immigrant workers alike are employers who pay workers "off the books," fail to provide workers' compensation or pay their fair share of payroll taxes, fail to offer workers a lawful wage and a safe place to work, and weak labor and employment enforcement regimes in many states. The solution is real labor standards, coupled with vigorous enforcement of those rules – a new kind of "employer sanction" against low-road employers who abuse all workers. NELP's Winning Wage Justice offers some alternatives.