

Testimony of
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on

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

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Introduction

Chairman Schumer and Ranking Member Cornyn, thank you for the opportunity to appear before this Committee to discuss the challenges that Congress faces in developing and administering an effective employment verification system. Congress has wrestled with this issue for over twenty years, and rightly so - it is the lynchpin of effective immigration enforcement. Comprehensive reform will fail if the next generation of employment verification - whether it is E-Verify or some other variation - is not accurate and reliable.

For the last two years, I served as Chief Counsel of U.S. Citizenship and Immigration Services (USCIS). I am currently a partner at BAL Corporate Immigration law firm. I work closely with the Global Personnel Alliance, a consortium of internationally active companies interested in global personnel mobility, and ImmigrationWorks, an organization that links 25 state-based business coalitions engaged in comprehensive immigration reform.

I have served as counsel to the agency that administers E-Verify and now advise companies on whether and how to participate in the program. I appear in my personal capacity today to share my thoughts on the next generation of employment verification.

Employers Need and Will Support a Prompt, Accurate, and Reliable System

Conventional wisdom says that employers are reluctant participants in the employment

verification process and will only participate in an electronic verification system if forced to do so. The recent increase in enrollment in the voluntary E-Verify system suggests otherwise.

No one will benefit more than employers from an immigration overhaul that restores the rule of the law in the workplace and provides sufficient access to a legal workforce. The overwhelming majority of employers already invest substantial resources in their verification and compliance processes and they want to be on the right side of the law - it makes good business sense. In today's political and economic environment, those same employers don't want to hire - or even be perceived as hiring - unlawful workers. Employers need and want the federal government to provide them with the means to verify employees' identities and work authorization by comparing workers' identity documents with information in federal databases - either an improved E-Verify system or a similar program that achieves the same end.

E-Verify: Recent Improvements

E-Verify is a strong foundation for a system, and USCIS should be commended for recent improvements to the program. During a period when enrollment has increased by over 1,000 employers a month, USCIS has continued to expand the system's capabilities and improve its accuracy.

In May 2008, E-Verify added the Integrated Border Inspection System (IBIS) real time arrival and departure information for non-citizens to its databases, which has reduced E-Verify mismatches that had resulted from delays in data entry into the system. Most recently, in February 2009, the agency incorporated Department of State passport data in the E-Verify process to reduce mismatches among foreign-born citizens. Each improvement reduces the number of false-negatives: work-authorized individuals who must contact and/or visit USCIS or the Social Security Administration to correct government records.

E-Verify is not without its flaws, including one fundamental problem: its inability to detect identity theft. Unlawful workers can beat E-Verify by using another individual's valid identification. USCIS has been creative in responding to that weakness, and the "photo-tool" biometric technology now allows an employer to compare identical photos - the individual's photograph on a USCIS-issued employment authorization document or green card against the image stored in USCIS' databases. The tool is designed to help an employer determine whether the document presented relates to the individual presenting it and contains a valid photo.

Unfortunately, only a small percentage of documents used by workers during verification are included in photo-tool, so its overall effect is currently very limited. The full incorporation of U.S. citizen passport, foreign national visa photos, and drivers license photos into the biometric photo-tool would go a long way to reducing identify theft.

Congress should therefore give consideration to using E-Verify as a platform and expanding photo-tool for currently issued documents and/or incorporating a new, biometric identification document.

Recommendations

Irrespective of whether Congress makes improvements to E-Verify and/or pursues an alternative approach, the following elements should be included in any future employment verification scheme:

Simple procedures that eliminate subjective decisions by employers

If we have learned anything from the 1986 law, it is the following: the verification system will fail if employers are required to make subjective decisions regarding the identity of an individual and/or whether that person is authorized to work in the United States.

Under current law, a new employee can present a combination of 26 different documents. Some combinations work, others don't. Some documents require re-verification, some don't. The USCIS employer handbook is 55 pages long. Any employer who hires a number of employees must become familiar with different immigration statuses and whether each one allows the individual to work.

Employers say that the requirement that they determine the legitimacy of a document forces them into a Hobson's choice: accept the document and risk the Department of Homeland Security (DHS) showing up after the fact to detain the employee, or reject the document and risk a lawsuit alleging discrimination.

Congress, and in turn DHS, must reduce the number of acceptable documents and establish simple, bright line rules that every employer must follow. A single swipe card would certainly be easiest, but that model raises questions about cost of equipment for employers and the time and resources it would take to issue new documents to all employees who change jobs.

Because any database will have errors (due to government or worker error), any electronic verification must incorporate a grace period in which the employee can obtain redress. But that grace period injects uncertainty into the hiring process and can disrupt an employer's operations. Congress must therefore balance the time it takes for the employee, DHS and SSA to resolve the discrepancy with the need for the employer to know whether it will be able to employ the worker going forwards. A default confirmation on a set date may be an inelegant solution until the number of false-negatives is further decreased.

A single set of laws and rules for all employers nationwide

In the vacuum of Congressional inaction on immigration reform, multiple states have stepped in and passed laws related to employment verification. At last count, twelve states have passed laws requiring some or all employers to participate in E-Verify. The result has been a complex web of laws and regulations. At one point, an employer faced the prospect of being required to enroll in E-Verify in Arizona and being prohibited from doing so in Illinois.

While the 1986 Immigration Reform and Control Act (IRCA) included preemption language, it was not airtight and creative lawyers have found ways for states to wade into the federal issue.

For employers, however, especially those that operate across the country, complying with varying requirements in different states is complicated, burdensome and introduces ambiguity into the hiring process. Congress should therefore clarify that any new verification system preempts any current or future state law that attempts to build upon, or weaken, the federal scheme.

Clear standards of liability for employers

Many employers today feel the government is engaged in a game of "gotcha." Employers may scrupulously follow the Form I-9 verification process, or even go further and utilize the best available technology (E-Verify) to screen new hires, yet still end up with unauthorized workers. As a result, even the most compliant employer could face the prospect of a DHS audit or raid and resulting workforce disruption.

In 2006, the House Subcommittee heard testimony from the Vice President of Swift & Co., a \$9 billion beef and pork processor headquartered in Colorado. He testified to the fact that Swift & Co. had participated in E-Verify since 1997, yet DHS raided the company and over 1200 employees were detained. The Vice President stated that "[i]t is particularly galling to us that an employer who played by all the rules and used the only available government tool to screen employee eligibility would be subjected to adversarial treatment by our government."

As Congress moves to the next stage of employment verification - confirming identity and work eligibility through biometrics - the government and employers will have greater confidence in the accuracy and reliability of the verification system. But until that system is in place, enforcement priorities should be focused on employers that don't follow the procedures. For employers who do comply with the rules in good faith and nevertheless end up with workers who are not lawful, there should be clear standards for when liability would attach.

Reasonable and proportional costs for employers

Employers already shoulder much of the cost of administering the paper-based federal employee verification process. After all, it is the employer - not the federal government - that completes, stores and maintains I-9 documents.

As Congress considers expansion of E-Verify and/or creation of a new system, careful consideration must be given to any additional costs that will be borne by employers. The Government Accountability Office (GAO) recently estimated "that a mandatory dial-up version of [E-Verify] for all employers would cost the federal government, employers and employees about \$11.7 billion total per year, with employers bearing most of the costs."

Employers would need to train employees to comply with any new law's requirements and devote a great deal of human resources staff time to verifying (and re-verifying when documents expire) work eligibility, resolving data errors, and dealing with wrongful denials of eligibility.

Our experience with E-Verify provides evidence that many employers may be underestimating the amount of time and training it takes to comply with a complex verification system. In its

2007 evaluation, Westat found substantial noncompliance by employers with E-Verify's rules of use. The fact that so many voluntary users of the system are not complying with the program requirements should give anyone pause about expanding the system too quickly.

Conclusion

If Congress is successful in designing and implementing an employment verification that is fast, accurate and addresses identify theft, it will be much easier to find common ground on how to phase-in such a system. But that will only be true if employers have access to a legal workforce - an open question when the economy recovers and current immigration quotas limit the availability of legal workers. Congress should therefore carefully coordinate expansion of E-Verify, or any alternative system, with broader reforms that provides employers with a legal supply of workers they need to sustain and grow their businesses.