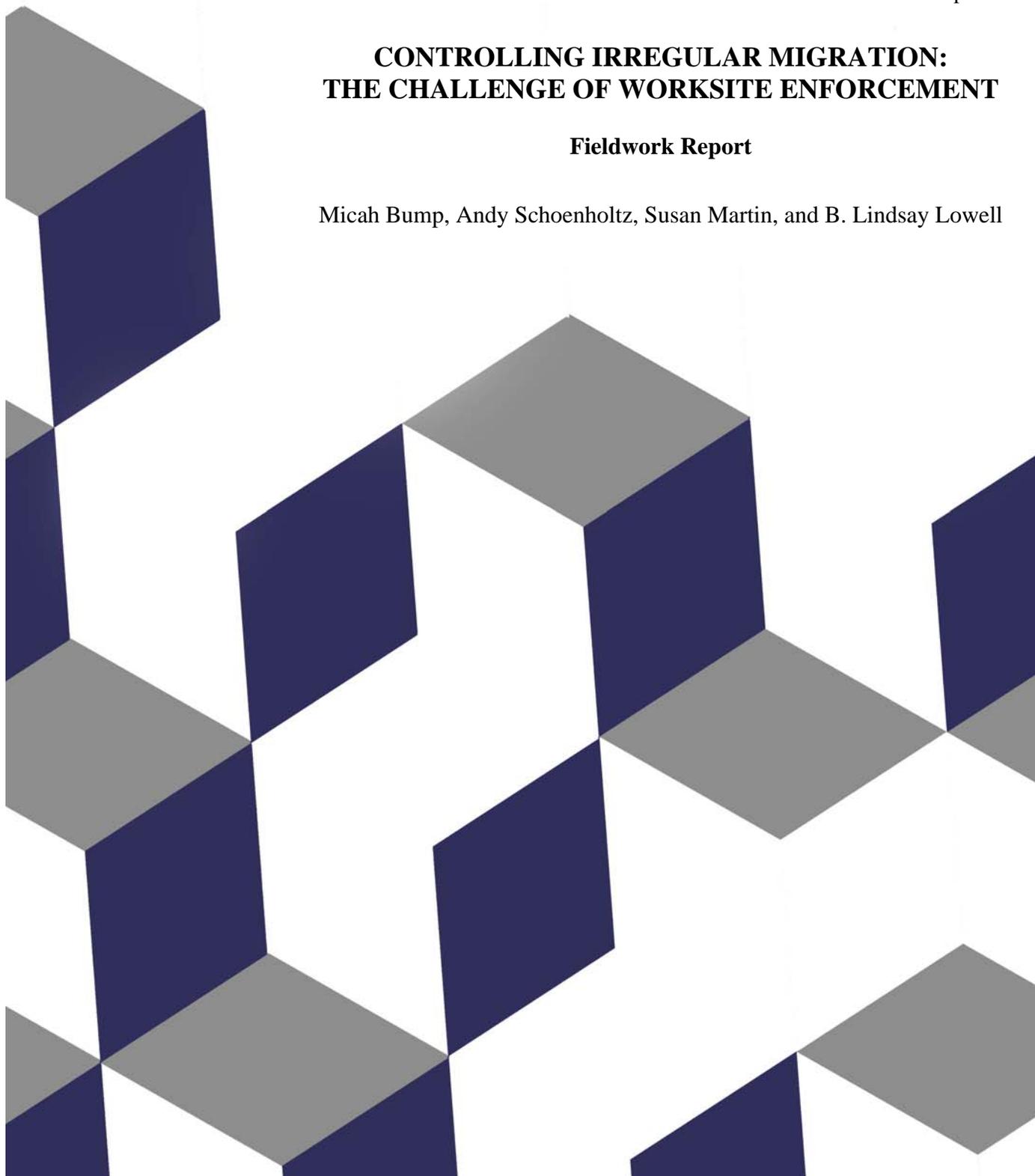


September 2007

**CONTROLLING IRREGULAR MIGRATION:
THE CHALLENGE OF WORKSITE ENFORCEMENT**

Fieldwork Report

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1. Background

In its 1997 final report to Congress, the U.S. Commission on Immigration Reform advised that “reducing the employment magnet is the linchpin of a comprehensive strategy to deter unlawful immigration.”¹ Ten years later, economic opportunity and ample opportunity for employment remain the most important factors drawing illegal aliens to the United States. While the 1986 Immigration Reform and Control Act (IRCA) made it illegal to employ unauthorized workers, authorized sanctions on employers that knowingly hired unauthorized workers, instituted a mandatory check on employment authorization, and banned unfair immigration-related employment practices, its provisions have done little to deter unauthorized migration or prevent discrimination.

The record rise in the estimated number of illegal immigrants entering the U.S. during the past decade as well as the documentation of discriminatory practices against foreign-sounding and foreign-looking applicants for employment are manifestations of IRCA’s shortcomings.² Although it is a matter of debate whether the latter practices represent discrimination caused by IRCA and subsequent programs enacted under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), even well-meaning employers have been found to unwittingly discriminate because of the confusing verification process. Despite acknowledgment of IRCA’s ineffectiveness in stemming illegal immigration by analysts from a multiplicity of political perspectives, disciplines, and institutions cross-cutting the academic, government, labor, and advocacy communities, there has been little political will for worksite enforcement since its passage in 1986.³ In its place, Congress has primarily channeled resources towards securing the southern border.⁴

¹ U.S. Commission on Immigration Reform, 1997 Report to Congress Executive Summary, p. xxxiv. Available at www.utexas.edu/lbj/uscir/bacoming/ex-summary.pdf.

² Passel, Jeffrey "Estimates of the Size and Characteristics of the Undocumented Population" (Washington, DC: Pew Hispanic Center, March 2005), www.pewhispanic.org; General Accounting Office. Immigration Reform, Employer Sanctions and the Question of Discrimination (GGD-90-62), 1990. Washington, DC;

³ Findings of the Basic Pilot Evaluation, Institute for Survey Research (Temple University) and Westat, June 2002 and Report to Congress on the Basic Pilot Program, Department of Homeland Security/U.S. Citizenship and Immigration Services, June 2002, Available at http://www.uscis.gov/files/nativedocuments/INSBASICpilot_summ_jan292002.pdf; U.S. Commission on Immigration Reform, *Curbing Unlawful Migration: Appendices*, Washington, DC; Written Statement of Tyler Moran, Employment Policy Director, National Immigration Law Center, House Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

The primary focus on border enforcement has proven ineffective in lowering levels of unauthorized migration. Considering this shortfall, the use of worksite enforcement as a necessary complement to border strategies in curbing unauthorized migration merits a renewed analysis. While the need for an effective interior enforcement strategy is understood - interior enforcement is integral to security concerns, and those who want temporary work programs see that worksite enforcement is a necessary adjunct to such programs - a fair amount of skepticism remains as to whether worksite enforcement is possible and what steps would be needed to make it succeed.

In view of the need to update our knowledge and synthesize the research and current practice related to worksite enforcement the Institute for the Study of International Migration (ISIM) at Georgetown University undertook a two year study on worksite enforcement. A principal goal of the project has been to evaluate the status quo with an eye toward bridging the gap between what is happening in the field and current debates over comprehensive immigration reform in the policymaking community. Thus, interviewing important stakeholders and holding meetings with experts has been a key part of the study methodology. The research team met with representatives of local and state government, industry organizations, immigrant employers, advocacy groups, unions, and community groups. In an effort to better understand the contours of the current national political climate, we interviewed actors in Washington, D.C with additional fieldwork in three additional and somewhat different sites:

- *Los Angeles* which has America's largest population of irregular migrants who are mostly of Mexican origin;
- *Phoenix/Tucson* which has a large immigrant and rapidly growing illegally resident population; and

Hearing on: Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System April 26, 2007. Available at http://www.nilc.org/immsemplymnt/cir/eevs_testimony_nilc_2007-05-03.pdf; Bean, Frank D., Barry Edmonston, and Jeffrey S. Passel (eds.) 1990. *Undocumented Migration to the United States: IRCA and the Experience of the 1980s*. Washington, D.C.: Urban Institute Press; Vaughn, Jessica, "Preventing Illegal Employment: Federal "Basic Pilot" Verification Program is an Effective and Business-friendly Tool," Statement to the House Committee on Labor, Rhode Island General Assembly Providence, Rhode Island March 14, 2007, <http://www.cis.org/articles/2007/jmvtestimony031407.html>

⁴ Migration Policy Institute, Immigration Facts, Number 10: Immigration Enforcement Spending Since IRCA," Migration Policy Institute. 2005. Available at http://migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf

- *Des Moines* which has a substantial illegally resident population, many working in meatpacking, in a state that sought to attract immigrants and guestworkers and has a relatively new foreign born population.

ISIM held an experts meeting on the topic of electronic worksite verification of employment eligibility to complement and discuss the results of our fieldwork. A group of government representatives, corporate security specialists, biometric technology experts, and academics met in April of 2007 to discuss the topic of electronic worksite verification in a full-day roundtable format.

This report presents the findings gleaned from our fieldwork and expert meeting on two major elements of worksite enforcement: verification of employment authorization and worksite investigations.

2.) Employment verification

Section 274 of the Immigration and National Act (INA) of 1952 makes the willful importing, transporting, or harboring of illegal aliens a felony. Until IRCA, however, non-agricultural employers did not violate U.S. law by hiring unauthorized workers. While the idea of sanctioning employers who knowingly hired illegal workers was discussed by the 1951 Truman Commission on Migratory Labor, again in the 1970s by the Judiciary Committee's Immigration Subcommittee, and by the Select Commission on Immigration and Refugee Policy in the 1981, it was not until the passage of IRCA that employers were required to verify and document the identity and work eligibility of their employees.⁵

The principal mechanism for verification of work authorization is the mandatory I-9 process. In addition, there are two services that employers may use in the verification process: the DHS-administered Basic Pilot Program and the Social Security Administration's (SSA) Social Security Number Verification Service (SSNVS). Further, employers who receive Social Security No-Match Letters have instructions as to steps that must be taken to resolve the discrepancies. Each is a different system with its own process and paperwork, as described below.

⁵ U.S. Commission on Immigration Reform, *Curbing Unlawful Migration: Appendices*, Washington, DC. Pgs. 190-191.

a.) Employment Eligibility Verification Form (I-9) Process

IRCA requirements oblige employers to verify the identity and work authorization of all their employees hired after November 6, 1986. An employer fulfills this obligation by completing the I-9 form after hire. This process is currently the only mandatory employment eligibility verification procedure in effect for employers. Employers are not barred from completing I-9 forms before hire if they do so at the same point in the application process for all potential employees, regardless of citizenship status or national origin. The employee verifies identity and work authorization by presenting a combination from a list that includes 29 approved documents. DHS recently announced its plans to lower the number of approved documents that may be accepted, but has yet to stipulate by how much.⁶ The employer must keep the I-9 form on file for either three years after the date of hire or one year after the date of determination, whichever is later, and must make these forms available to government inspectors upon request.

Employers who violate IRCA's verification provisions face different civil and/or criminal penalties, known as employer sanctions, depending on whether they committed paperwork violations or knowingly hired unauthorized workers. The penalties function on a graduated scale for repeat offenders. Employers who commit paperwork violations such as improperly completing, retaining, or making available for inspection an I-9 form may be assessed civil money penalties and employers who hire and continue to employ unauthorized workers higher fines which increase with each subsequent offense. Additionally, the employer may be ordered to cease and desist the violations, to comply with the verification requirements for all employees hired during a three-year period, and to take other appropriate remedial actions. Employers may also be fined if they require a bond or indemnity from an employee to prevent employer sanctions liability. Employers who engage in a pattern and practice of knowingly hiring, or continuing to employ,

⁶ DHS, "Fact Sheet: Improving Border Security and Immigration Within Existing Law" August 10, 2007. http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm

unauthorized workers are subject to an action enjoining future violations, criminal penalties and/or six months imprisonment under IRCA.⁷

Strengths and Weaknesses of the I-9 Process

The worksite verification measures placed in effect under IRCA and subsequent legislation have not been as effective as initially hoped at decreasing the employment of unauthorized aliens and thus reducing the employment magnet for illegal entry into the United States. The key factors limiting the effectiveness include the proliferation of counterfeit and fraudulent documents, unfamiliarity or confusion regarding the verification procedures and employer responsibility; a growing reliance on labor subcontractors; and low penalties for violations leaving the benefits of hiring unauthorized workers greater than the risks.⁸

Counterfeit Documents and Identity Theft

Widespread counterfeiting of documents that can be used for verification of identity and employment authorization has weakened the verification process since the implementation of IRCA provisions. Improvements in secure document technology since IRCA have been readily matched by counterfeiting operations. Furthermore, the fraudulent use of genuine documents is a real and growing concern. Several reports, including a recent GAO study, have concluded that it is relatively easy to obtain genuine documents, such as birth certificates or drivers licenses, by fraudulent means.⁹ Another GAO study indicated that the practice of using genuine documents obtained from friends, relatives or by purchase in the underground market is on the rise.¹⁰

Our experience in the field coincides with the GAO conclusions. For example, in Iowa, a human resource director interviewed at a Swift and Company meat processing

⁷ U.S. Commission on Immigration Reform, *Curbing Unlawful Migration: Appendices*, Washington, DC. Pgs. 198-199.

⁸ U.S. Commission on Immigration Reform, *Curbing Unlawful Migration: Appendices*, Washington, DC;

⁹ U.S. General Accounting Office. "Identity Fraud: Prevalence and Links to Alien Illegal Activities." GAO-02-363. Report to Congressional Requesters. Delivered June 25, 2002.

¹⁰ GAO, Identity Theft: Prevalence and Cost Appear to Be Growing, GAO-02-363 (Washington, D.C.: Mar. 1, 2002).

plant said that while the use of fraudulent documents has decreased steadily over the past 8 years, it has been paralleled by an increase in identity theft. Unauthorized workers do not present false documents, but rather present genuine documents that do not correspond to them.¹¹ Several instances arose where the social security number presented by a worker at one plant was already in use at another plant. Thus, Swift and Company implemented a check system to verify a social security number to see if the person has a prior work history with the company. If a discrepancy emerges, the human resources department meets with the individual and explains the necessity to resolve the problem so his/her identity is cleared. Most employees cannot resolve the issue. Even with these extra checks, the companies like Swift and Company are susceptible to hiring workers using identities other than their own. This was exemplified by the December 2006 ICE operation at six Swift and Company processing plants that resulted in the arrests of more than 1,200 people for alleged immigration violations, and in the case of 65 individuals, criminal charges, including identity theft.¹²

Since numerous documents may be shown to verify employment authorization, some of which may be unfamiliar to any given employer, employers may have difficulty in determining if these documents meet the law's test which holds that the document must reasonably appear on their face to be genuine and to relate to the person presenting them. DHS formally recognized this difficult with its announcement that it will publish a regulation to reduce the number of documents that employers must accept to confirm the identity and work eligibility of employers. While DHS recognized that employers have difficulty assessing the veracity of the 29 categories of documents that can be used to establish identity and work eligibility, it does not state what the lower number will be. Nor is it likely to eliminate some of the most often forged documents—the social security card and drivers license.

The new DHS announcement also fails to address the employer bind caused by the tension between IRCA's employer sanctions provisions and anti-discrimination measures. To avoid charges of discrimination, employers are not permitted to request

¹¹ ISIM Iowa Fieldnotes, August, 3, 2006.

¹² DHS/USCIS, News Release - U.S. Uncovers Large-Scale Identity Theft Scheme Used by Illegal Aliens to Gain Employment at Nationwide Meat Processor. December, 13, 2006.
<http://www.ice.gov/pi/news/newsreleases/articles/061213dc.htm>

more or different documents than are required and are barred from refusing to honor documents that reasonably appear to be genuine and to relate to the presenting individual. If the employer asks for additional or different documents, he or she may run afoul of provisions related to immigration-related unfair employment practices. This leads to some hiring of undocumented workers without employers knowledge and, as described above, dishonest employers and employees thwarting the verification system by using false documents or other's identities.

Employer Confusion, Misuse, and Reluctance towards Worksite Verification

While substantial education of employers has occurred since IRCA, it is clear that there are categories of employers who still do not understand their obligations with regards to the worksite verification process. The level of confusion and willingness to learn the requirements appear to be somewhat correlated to the time necessary for a verification to take place and the level of employer involvement in the process. The longer the process, the more paperwork required, and the more decisions that have to be made by the employer, the more likely an employer will be confused, reluctant to participate, and disposed to committing an error. Employers indicated that they experience more confusion and frustration with the paper based I-9 system than with web-based alternatives because the later returns results faster and requires less employer discretion in the decision-making process.¹³

A member of the American Immigration Lawyers Association (AILA) interviewed in Los Angeles indicated that from his experience there is large-scale employer frustration with worker verification because of the amount of time the process takes and as a result employers "would rather keep their head in the sand and just go through the motions" rather than take worksite enforcement seriously.¹⁴ An immigration lawyer interviewed in Iowa indicated that she has spent a good deal of time over the past 15 years counseling her clients on the I-9 process because employers do not understand their responsibilities.¹⁵ Even after completing the two-hour employer training session she

¹³ ISIM Iowa Fieldnotes, July 31-4, 2006.

¹⁴ ISIM Los Angeles Fieldnotes, March 7, 2006.

¹⁵ ISIM Iowa Fieldnotes, August, 4, 2006.

offers, her sense is that there is too much information to absorb and, as a result, employers become nervous. In Iowa, employers, members of the business community, and local politicians repeatedly stated that businesses were very compliant with regulations and genuinely wanted to uphold the rule of law. Despite the desire to comply, the immigration lawyer said that the employers she represented had a hard time accepting that they could not simply call a number, or enter a web query and instantaneously find out work authorization status. She worried that the I-9 system is too complicated for most employers to understand. Even Swift and Company, a large international corporation, described the system as complex.¹⁶

Several employers, including two large meatpackers, a janitorial services firm, a home care services organization, a painting contractor, and a produce packaging distributor, expressed their sentiment that employer sanctions can work, but only with a reliable system for verifying authorization to work.¹⁷ Employers want to obey the law, but the current process has them caught between the proverbial rock and a hard place with regards to making judgments on the status of documents. An employer must either accept documents, knowing that they might be forged, and thus live with the vulnerability to employer sanctions for hiring someone presenting false identification. Or, an employer may choose to ask particular workers for more documentation, which could potentially lead to discrimination. Immigrant advocacy groups argue that many employers are only aware of the sanctions that result from hiring unauthorized workers and not anti-discrimination provisions, and thus discriminate while trying to comply with verification provisions. Furthermore, even if employers are knowledgeable about both the verification and anti-discrimination provisions of hiring, they may not understand which documents are acceptable, whom to verify, when to re-verify, and which questions may be asked regarding status.¹⁸

The use of employment verification processes as a means of retaliation against workers who demand better working conditions or higher wages is particularly problematic. Advocates argue that “unscrupulous employers have systematically used the

¹⁶ ISIM Iowa Fieldnotes, August, 3, 2006.

¹⁷ ISIM Iowa Fieldnotes, July 31-August 4, 2006.

¹⁸ U.S. Commission on Immigration Reform, *Curbing Unlawful Migration: Appendices*, Washington, DC. Pgs. P. 242.

I-9 process in their efforts to retaliate against workers who seek to join unions, improve their working conditions, and otherwise assert their rights.”¹⁹ Although he could not cite a specific case, an Iowan government official described abuse of undocumented workers as “prevalent,” pointing out the powerlessness of workers against unscrupulous companies, and the fear of workers to assert their rights because of their precarious economic condition.

Advocates for immigrant rights point to employers who hire undocumented workers knowingly and only verify documentation if the employee tries to file a labor complaint or join a union. Once the verification indicates that the employee is undocumented the employer can terminate employment without suffering any repercussions. The representatives of the National Immigration Law Center we interviewed in Los Angeles pointed to a California case where the employer had not cared whether a worker was documented or not until she filed a claim for unpaid wages.²⁰ In retaliation, and as a means of circumventing its labor law responsibilities, the employer reported her to federal immigration authorities.

Costs versus Benefits of Hiring Unauthorized Workers

Almost 15 years after the U.S. Commission on Immigration Reform reported that “some employers...consider potential penalties [of not properly verifying work authorization] to be a cost of doing business that is still lower than would the hiring of authorized workers,” the problem remains.²¹ The unfair advantage gained by unscrupulous employers who choose to circumvent the employee verification process as part of their business model is more prevalent in some industries than others. DHS recently recognized that the fines for hiring unauthorized workers “are so modest that

¹⁹ See “Immigration,” a statement by the AFL-CIO Executive Council, Feb. 16, 2000, available at www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec0216200b.cfm. See also, National Immigration Law Center, “State and Local Proposals that Punish Employers for Hiring Undocumented Workers Are Unenforceable, Unnecessary, and Bad Public Policy.”

http://www.nilc.org/immsemplmnt/ircaempverif/employersanctionsTPs_2007-02-22.pdf

²⁰ ISIM Los Angeles Fieldnotes March 7, 2006. See *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D., Cal., 1998).

²¹ *Ibid.*, P. 218.

some companies treat them as little more than a cost of doing business.”²² In an attempt to deter illegal hiring DHS will raise the civil fines imposed on employers who knowingly hire unauthorized workers by approximately 25 percent.²³

However, the DHS announcement did not discuss how specific industries with a history of violating hiring procedures would be targeted. Industries that are heavily regulated and require a highly skilled work force are unlikely to hire unauthorized workers because of the nature of the business. Industries requiring less educated workers and less regulation tend to have a higher concentration of unauthorized workers. The six principal industries that regularly employ illegal aliens are agriculture, construction, food product manufacturers, garment manufacturers, restaurant, and hotel.

Even within the industries attracting unauthorized workers there is substantial variation on employer type in terms of their hiring practices vis-à-vis unauthorized workers. There are employers that inadvertently hire unauthorized workers but do not predicate their business model on using such workers. These employers usually take steps to remedy immigration-related problems with their employees if such a situation surfaces. For instance, a large commercial and residential painting company interviewed in Phoenix hired an immigration lawyer on behalf of one of its employees who did not have proper work authorization. The company’s stated goal was to conduct business according to the rules and take legal steps to maintain the quality of its labor force.

There are also employers who comply with I-9 verification process but who are happy to have unauthorized workers as long as they have plausible deniability. These are employers who uphold the letter of the law by perfunctorily going through the process of checking documents and completing the necessary forms in order to preclude any enforcement action against them, but give short shrift to the spirit of the law aimed at preventing employment of unauthorized workers. In many cases, this type of employer prefers undocumented workers because they are less likely to unionize, protest poor working conditions, and are easily terminated. These employers often state that there simply are not enough willing authorized workers to fill job openings so they have no

²² DHS, "Fact Sheet: Improving Border Security and Immigration Within Existing Law" August 10, 2007. http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm

²³ Ibid.

real alternative to going through the motions of employment verification even if they suspect the worker is unauthorized. The final category includes employers who knowingly hire unauthorized workers because they are the only available workforce or in order to exploit them. Often, the business model of these employers is based on the notion that they will be able to exploit undocumented workers by paying less than the minimum wage and no overtime.

Our fieldwork specifically targeted employers in food manufacturing, construction, and garment manufacturing to better understand how these dynamics played out in the field. In Phoenix, we heard complaints from within the construction industry that contractors fulfilling all the requirements of the I-9 process were being undercut by competitors who knowingly hired unauthorized workers because the risk of detection and possible penalties were perceived as a cost of doing business. In Iowa, we spoke with employers in the fruit and meat packing industries who were concerned about upholding the rule of law, but were frustrated by the seemingly low numbers of authorized workers willing to work in their factories. In Los Angeles, immigrant advocacy groups stated that employers in these industries prefer unauthorized workers with false, borrowed, or stolen work credentials because they are less likely to unionize and protest harsh working conditions. Also in Los Angeles, we observed a sweep of the garment industry, where businesses actively seek out unauthorized migrants in order to run a profitable business. These businesses close on short notice and re-open under the auspices of a different owner and are constantly engaged in a “cat and mouse” feud with authorities enforcing labor and immigration law.

Use of Labor Contractors

As a result of the IRCA mandated employer sanctions for knowingly hiring unauthorized workers, many employers have attempted to shield themselves from liability by shifting to labor subcontractors instead of directly hiring their employees. Subcontracting encompasses the use of temporary labor agencies, labor contractors, and outsourcing. In most cases, a subcontractor is used by a larger firm to perform all or part of a project. The use of labor subcontractors to avoid immigration-related hiring penalties is most prevalent in the aforementioned industries of agriculture, construction, and

manufacturing as well as custodial services. If an immigration investigation uncovers unauthorized workers, employers place the blame on the labor subcontractors and are able to avoid penalty. While this approach has been useful in protecting employers, workers have suffered because the insertion of a “middle man” into the hiring process has depressed wages for all workers and has had little effect on decreasing unauthorized work.²⁴

Employers often mistakenly believe that by using subcontractors, they can wash their hands of any immigration issues. In most cases, where more than one business shares responsibility for determining whether a person is employed and the nature of that employment, the businesses are treated as “joint employers.” IRCA, in common with the Fair Labor Standards Act, Title VII and the National Labor Relations Board has a “joint employer” concept for both employer sanctions and discrimination. However, exactly who qualifies as a joint employer depends on the specific nature of the employer-contractor relationship and the ruling law. Varying laws require different tests to determine joint employment and the test for establishing joint employment status is more easily met under some laws than others.²⁵ Recent cases involving Wal-Mart, Fresh Del Monte Produce, and their labor contractors indicate that if employers know unauthorized workers are being provided by the contractor, they are liable for the unauthorized hire.²⁶

Despite high profile investigations of improper use of subcontractors by Walmart and other large businesses, the practice continues to flourish. Employers in the construction industry in Phoenix stated that it is common practice among some companies to avoid problems caused by hiring undocumented workers by loaning workers the equipment necessary to start their own companies and paying them as subcontractors. This situation is exacerbated by workers requesting to be paid in cash as subcontractors in order to avoid taxes. Three of the immigrant rights advocacy groups interviewed in Los Angeles commented that the type of problem observed in Phoenix is

²⁴ Ruckelshaus, Catherine, and Bruce Goldstein, From Orchards to the Internet: Confronting Contingent Work Abuse, National Employment Law Project, Farmworker Justice Fund, <http://www.nelp.org/docUploads/pub120.pdf>

²⁵ Ibid, p. 10.

²⁶ See Denson, Bryan, “Feds Indict Three in Immigration Sting.” *The Oregonian*. June 12, 2007; See also, Hirschman, Carolyn. “Are your contractors legal? Minimize your liability for contractors' employment violations to avoid getting caught in the middle of legal battles. HR Magazine, March, 2004.

indicative of the national problems with worksite enforcement. Representatives of the Mexican American Legal Defense Fund, Coalition for Humane Immigrant Rights of Los Angeles, and National Immigration Law Center all stated that the current process of employment verification has increased the use of labor subcontractors by employers.²⁷

*b.) The DHS E-Verify(Basic Pilot) Program*²⁸

The E-Verify program is a voluntary Internet-based verification program that allows employers to electronically verify workers' employment eligibility with DHS and SSA. Its principle purpose is to combat the widespread document fraud that undermines the I-9 process. The program is one of three pilot programs recommended by the U.S. Commission on Immigration Reform and created under IIRIRA. It began operating on a trial basis in five states in 1997 and in a sixth state in 1999. While the other two pilot programs were discontinued after the trial periods, the Basic Pilot continued. In 2003, Congress extended the functionality of the Basic Pilot program to all 50 states under the Basic Pilot Program Extension and Expansion Act of 2003. According to DHS, as of July 2007, approximately 19,000 employers (out of about 7 million nationally) voluntarily use the Basic Pilot, representing approximately 56,000 work sites across the country. However, DHS announced that it will expand the program to approximately 10 times its current size by mandating its use by more than 200,000 federal contractors and vendors. DHS will also urge States to use the Basic Pilot for their contractors and provide assistance to their hiring agencies.

Employers who wish to use E-Verify must sign a memorandum of understanding with both DHS and SSA. This agreement outlines the proper use of the program. The system is not to be used for pre-screening of potential employees; rather employers can only submit a query to the system after hire. The program does not apply retroactively, so it can not be used on employees hired before implementation. Employers have to use E-Verify for all employees, regardless of citizenship status and may not be used for re-

²⁷ ISIM Los Angeles Fieldnotes, March 6, 7, 9, 2006.

²⁸ The Basic Pilot was renamed E-Verify in 2007. See DHS, "Fact Sheet: Improving Border Security and Immigration Within Existing Law" August 10, 2007. http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm In this paper, the two terms are used interchangeably.

verification purposes after hiring. Furthermore, if a query returns as tentatively nonconfirmed with the information in DHS or SSA databases, the employer may not take any adverse action unless notified that the employee is not authorized to work. Violation of the terms of the memorandum of understanding is grounds for dismissal from the program and opens the employer to legal action.²⁹

After completing the I-9 process, the employer enters the employees' information, which includes name, SSN, citizenship status, or A-number, into the online system. Employers have three days to enter this information. The three day limit is somewhat problematic for immigrants who are newly arrived in the country because sometimes they do not yet have social security numbers. Employers are instructed not to enter information into the system until they have the social security number of the employee—even if it is beyond three days from the time of hire.

The information the employer enters through the E-Verify website is verified against DHS and SSA databases. The SSA checks the persons name, social security number, date of birth, and citizenship status for accuracy. Newly naturalized U.S. citizens often times do not appear as such in the SSA database, so these cases are forwarded to DHS for additional verification. DHS handles the verification of employment status for all non U.S. citizens. In most cases, the information provided by the worker will match the information contained in SSA and DHS databases and no further action is required. If however, an employee's information cannot be verified, SSA will send the employer a tentative nonconfirmation. If the verification problem is on the DHS side, the employer will receive notification of a "DHS verification in progress."³⁰

In either case, the first step is for the employer to check to see if the information was entered and submitted correctly. If there is no error on the part of the employer, the worker must be notified with an official form entitled "Notice to Employee of Tentative Nonconfirmation."³¹ The employee must then check a box on that form indicating

²⁹ National Immigration Law Center. Basic Information Brief: Basic Pilot Program. March 2007, Available online at http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf

³⁰ Government Accountability Office, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813, Aug. 2005. <http://www.gao.gov/new.items/d05813.pdf>.

³¹ National Immigration Law Center. Basic Information Brief: Basic Pilot Program. March 2007, Available online at http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf

whether or not they wish to contest the nonconfirmation. Both the employee and the employer must sign the waiver. Upon receiving a notice of a tentative non-confirmation, the employee has eight working days to contact SSA and/or DHS to resolve the dispute. During this period, the employee must continue to be paid by the employer. If the E-Verify Program makes the final determination that the employee is not eligible for employment, the employer must terminate the employee.³² In the case the employee fails to make contact with DHS within the required time period, the employer will be notified of the “DHS no show,” and the employer must terminate the employee. In similar fashion, if the worker fails to contest the tentative nonconfirmation, it automatically becomes a final nonconfirmation and the employer is required to terminate employment.

Strengths and Weaknesses of the E-Verify/ Basic Pilot Program

Participating employers have been pleased that Basic Pilot takes steps to remove the uncertainty that accompanies document review during the I-9 process. The complexity of the I-9 process spurred several of the employers interviewed in Iowa to participate in the Basic Pilot, who joined primarily for the confidence it provided them that they were operating according to the letter of the law. One employer explained that his company joined out of the fear that potential future enforcement raids could disrupt his operations by cutting out 30 percent of his workforce.³³

Although the Basic Pilot offers employers added insurances, it falls short of resolving the underlying issue of employers hiring unauthorized workers because it is not capable of detecting fraud if a worker presents valid documentation that belongs to someone else or fraudulent documentation that contains valid information and appears authentic.³⁴ The program cannot stop unscrupulous employers from providing workers with documents that will clear the system or simply not processing documents. The limitations of the Basic Pilot were again brought to the forefront in the December 2006

³² “INS Basic Pilot Evaluation Summary Report.” January 2002. Prepared by the Institute for Survey Research, Temple University, Washington, DC and Westat, Rockville, Maryland.

³³ ISIM Iowa Fieldnotes, August, 1, 2006.

³⁴ See National Immigration Law Center, *The Basic Pilot Program: Not a Magic Bullet*, June 26, 2007 citing GAO, *Immigration Enforcement: Weaknesses Hinder Employer Verification and Worksite Enforcement Efforts*, (Aug. 2005) pp. 22-23. www.gao.gov/new.items/d05813.pdf

investigation of Swift and Company, which has participated in the Basic Pilot since 1997. In Congressional Testimony, a senior Swift and Company official stated that Swift found it particularly “galling” 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.”³⁵

Despite the stated preference for the web-based verification system, some employers complained that the length of time required for verification from the system can be a problem because even a forty-eight hour delay is costly to an employer needing a worker immediately. Participants at the expert meeting on worksite verification argued that employers, more than anything else, want to be able pre-screen their applicants. They have this desire because they do not want undocumented on their payroll for liability reasons and they do not want to train someone they will have to fire. The Basic Pilot specifically requires that the employer *not* prescreen. The fact that they cannot use the systems to check eligibility before hire has left some employers wondering whether it is worthwhile to participate in the Basic Pilot. For instance, a produce packaging company interviewed in Iowa recently debated quitting the Basic Pilot because of the concerns that they were cutting off potential good workers.³⁶ The managers complained about the time they wasted training potential hires who were then found to be unauthorized. The desire to know a workers status before hire leads many employers to abuse the system. The lawyer interviewed in Iowa indicated that she worries that employers do not get the process right, in particular, the proper steps to take after receiving a non-confirmation. As a result, workers are unfairly terminated from unemployment.³⁷

The lawyer’s concerns were echoed by her legal colleagues representing AILA in Los Angeles, Phoenix, and Washington DC, as well as the immigrant advocacy organizations interviewed in Los Angeles and Washington DC.³⁸ Several organizations,

³⁵ Testimony by John W. (Jack) Shandley, Senior Vice President, Human Resources Swift & Company Greeley, Colorado, Problems In The Current Employment Verification And Worksite Enforcement System, Before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, United States Congress, April 24, 2007 Washington, DC. <http://judiciary.house.gov/media/pdfs/Shandley070424.pdf>

³⁶ ISIM Iowa Fieldnotes, August, 1, 2006.

³⁷ ISIM Iowa Fieldnotes, July 31, 2006.

³⁸ ISIM Washington DC Fieldnotes, October 28, 2005, November 18, 2005, December 15, 2005; Los Angeles Fieldnotes, March 6, 7, 9, 2006.

including those commissioned to conduct two independent evaluations of the Basic Pilot in 2002 and 2006, the GAO, and the SSA's Office of the Inspector General, have found that the Basic Pilot has significant weaknesses.³⁹ The problems are not solely related to employer misuse, but this does play a large role. A 2002 Westat and Temple University Evaluation of the Basic Pilot indicated that 42 percent of the final nonconfirmations produced by the Basic Pilot were the result of employer error.⁴⁰ Furthermore, more than 30 percent of employers admitted to restricting work while temporary nonconfirmation was pending.

The advocacy groups interviewed pointed out that these high levels of error and noncompliance are taking place among employers willingly and voluntarily participating in the system and there is widespread agreement that the level of confusion and resulting error would only grow if the program was made mandatory for all employers.⁴¹ Given the high levels of confusion and error among voluntary participants in the Basic Pilot, the National Immigrant Law Center, an immigrant advocacy group, recommended that any national mandatory employment verification system that applies to all 7 million employers in the country should be implemented in stages, incrementally, with rigorous evaluation of its performance at each stage before any further expansion can take place.⁴²

³⁹ 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=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD; Interim Findings of the Web-based Basic Pilot Evaluation (Westat, Dec. 2006); 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/auditxt/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.

⁴⁰ "INS Basic Pilot Evaluation Summary Report." January 2002. Prepared by Institute for Survey Research, Temple University, Washington, DC and Westat, Rockville, Maryland.

⁴¹ ISIM Washington DC Fieldnotes, October 28, 2005, November 18, 2005, December 15, 2005; Los Angeles Fieldnotes, March 6, 7, 9, 2006. See also National Immigration Law Center, *The Basic Pilot Program: Not a Magic Bullet*, June 26, 2007, http://www.nilc.org/immseplymnt/ircaempverif/basicpilot_nomagicbullet_2007-06-26.pdf

⁴² ISIM Los Angeles Fieldnotes, March 7, 2006. See also, Written Statement of Tyler Moran, Employment Policy Director, National Immigration Law Center, House Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

This recommendation is echoed in the 2002 evaluation which stated that DHS should complete its evaluation of the Basic Pilot Program.⁴³

Errors in the government databases used in Basic Pilot are a further area of significant concern, as discussed in greater detail below. The August DHS announcement of new worksite initiatives referenced the addition of new databases to be checked in E-Verify, but it did not include steps that would be taken to improve the existing databases.

Despite the weaknesses discussed above, Congress has authorized the use of the Basic Pilot through 2008, and, given its current expansion, it is likely it will be extended. The immigration reform bills that passed the House and Senate in 2005 and 2006, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (HR 4437) and the Comprehensive Immigration Reform Act of 2006 (S 2611), would have mandated use of the Basic Pilot. The Senate Bill 2611 attempted to address some of the shortcomings of the Basic Pilot outlined in an independent evaluation of the program by including privacy, antidiscrimination, and due process protections. However, the House Bill did not include such provisions.⁴⁴

c.) Social Security Number Verification Service (SSNVS)

SSA allows employers to use an internet-based verification service as another measure to ensure that employee names and social security numbers are consistent with SSA data. Employer use is voluntary and the service is offered free of charge. As with E-Verify, this system can only confirm whether the names and SSNs submitted by the employer match SSA records. However, the system is not able to detect a worker's misuse of another person's name and SSN as long as the name and SSN matched. The system was piloted with 80 employers in 2002 and then made available to employers nationwide. Employers can submit the data by mail, hand delivery to a local SSA office,

Hearing on: Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System April 26, 2007. Available at http://www.nilc.org/immsemplymnt/cir/eevs_testimony_nilc_2007-05-03.pdf.

⁴³ "INS Basic Pilot Evaluation Summary Report." January 2002. Prepared by Institute for Survey Research, Temple University, Washington, DC and Westat, Rockville, Maryland.

⁴⁴ National Immigration Law Center. Basic Information Brief: Basic Pilot Program. March 2007, Available online at http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf

telephone, fax, magnetic media or through the internet. Starting in October 2007, SSA will no longer process magnetic media (i.e. tapes, cartridges or diskettes) for SSN verification. Employers can upload the file through SSNVS and usually receive results the next government business day. The web based verification system was implemented in 2005 and designed to respond to employer requests within 24 hours. Requests of up to 10 worker names and SSNs can be verified instantaneously. Larger requests of up to 250,000 names can be submitted in a batch file, and SSA will provide results by the next business day. As with the E-Verify, the ease of online submission is attracting more employer interest, but it is still not widely used.⁴⁵

d.) SSA No-Match Letters

A no-match letter is sent by the SSA when the names or social security numbers listed on an employer's W-2 forms are not consistent with SSA records. The stated purpose of the no-match letter is to notify the worker and the employer of the data mismatch and that employees are not receiving proper credit for their earnings. Depending on the information that SSA has on file, they will either send the notification to the worker, the employer or both. If the worker's address is on file, SSA will send the letter to the home. In 2005, the SSA sent 8.1 million letters to workers at their homes. If the worker's address is not on file at SSA, the letter is sent to the employer. In 2005, 1.5 million of these letters were sent to employers. If an employer submits more than 10 W-2s with incorrect information, he or she will receive an additional letter. SSA sent 128,000 such letters to employers in 2005.⁴⁶ If an employer receives a letter, they are required to advise the affected employee to go to SSA and resolve the problem. Anti-discrimination laws prohibit employers from asking the employee to present their documents a second time. Employers are also prohibited from taking adverse action against the employee on the sole basis of receiving a no match letter from the SSA.

⁴⁵ Government Accountability Office, "Better Coordination among Federal Agencies Could Reduce Unidentified Earnings Reports." GAO-05-154. <http://www.gao.gov/highlights/d05154high.pdf>

⁴⁶ The data presented in the last three sentences are from the National Immigration Law Center, Basic Information Brief: SSA No-Match Letters. October 2006. http://www.nilc.org/immsemplmnt/SSA-NM_Toolkit/ssa_nomatch_infobrief_2006-10.pdf, Visited July 1, 2007.

In early August of 2007, the Bush administration announced a new set of guidelines for SSA no-match letters as part of a renewed effort to enforce existing immigration law. The new regulations, which will take effect in September of 2007, finalized a DHS rule entitled “Safe Harbor Procedures for Employers Who Receive a No-Match Letter.”⁴⁷ The rule will give employers “safe harbor” from government prosecution if they oblige the affected worker to remedy the inconsistency within 90 days.

Under the new rules, employers must verify their own records within 30 days to determine that they have not made a clerical error. They must then contact the employee who has responsibility for correcting the discrepancy, either by correcting the information originally given to the employer or correcting SSA’s records. The employer must verify that the correction has been made, using the SSNVS. If the correct information cannot be verified within 90 days, the employer is required to repeat the I-9 process but cannot use any documents with a social security number to verify employment authorization. If the employer continues to employ the worker without taking these steps, the employer risks liability for knowingly hiring an unauthorized worker.

The new regulation is controversial because it will allow DHS to use the no-match as an immigration enforcement tool by allowing ICE, to use the receipt of the no-match letter as that the employer has “constructive knowledge” that an employee is not authorized to work.⁴⁸ In the past, federal prosecutors seldom put forth an employer's disregard of no-match letters as evidence of a knowing hire of an unauthorized worker. No-match letters were underutilized in part because SSA did not provide clear direction to employers on the proper response upon receipt. While SSA is not changing its procedures for issuing employer no-match letters, and SSA guidance on how to correct Social Security records remains unchanged, all new no-match letters issued by the SSA for Tax Year 2006 will be accompanied by a letter from ICE informing employers on

⁴⁷ [USE](#) DHS SOURCE, NOT NILC

⁴⁸ Aizenman, N.C., “Bush Moves To Step Up Immigration Enforcement,” *The Washington Post*, August 11, 2007; A01
<http://www.washingtonpost.com/wp-dyn/content/article/2007/08/10/AR2007081001113.html>

how to legally respond to the employer no-match letter.⁴⁹ Thus, under the new rules, it will be more difficult for employers to plead ignorance or confusion. Furthermore, in the case that an employer is deemed to have “actual knowledge” of an unauthorized hire, the safe harbor provisions will not apply.

Strengths and Weaknesses of the SSA Programs

As with the E-Verify, participating employers have praised the ease of the online system and relatively quick turn around time for verification. However, employer confusion and misuse of the SSA programs have impeded their effective use. Both the SSNVS and No-Match letter programs were designed as administrative mechanisms to help workers get their earnings credited to their correct Social Security account but have become de facto tools of worksite verification of employment eligibility. No-match letters and non confirmations by the SSNVS have been misinterpreted by employers as a legitimate reason to terminate employees.

In the most benign cases, the employer gives the worker his mandatory time allotment to clear his case. Often times, however, the employer panics and either terminates the employer immediately, requests further documentation, or gives less time than allowed to assemble the proper documents. All of these actions are discriminatory, but frequently take place.⁵⁰ In light of the August 2007 announcement to step-up enforcement of immigration law, advocates argue that employers will be even more likely to unlawfully terminate the employee.⁵¹ ICE counters that this concern is speculative because firing of an employee is “neither required by nor a logical result of the new rule being adopted.”⁵² Moreover, “if an employer obtains actual knowledge that

⁴⁹ DHS/ICE, ICE and Social Security Administration “No-Match” LettersFact Sheet, August 10, 2007, <http://www.aila.org/content/fileviewer.aspx?docid=23079&linkid=164421>

⁵⁰ Mehta, Chirag, Nik Theodore, and Marielena Hincapié, “Social Security Administration’s No-Match Letter Program: Implications for Immigration Enforcement and Workers’ Rights” (Center for Urban Economic Development, University of Illinois at Chicago; and National Immigration Law Center, Nov. 2003), available at www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf.

⁵¹ National Immigration Law Center, “DHS Announces It Has Finalized “Safe Harbor Procedures for Employers Who Receive a No-Match Letter” Rule,” August 10, 2007.

⁵² DHS, 8 CFR Part 274a [RIN 1653-AA50] ICE 2377-06, DHS Docket No. ICEB-2006-0004. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter. Final Rule. p. 41 http://www.nilc.org/immsemplymnt/SSA_Related_Info/ssa_no-match_final_rule_DRAFT_2007-08-10.pdf

a specific employee is unauthorized to work as a result of the no-match letter - for example, the employee tells the employer so - then the employer should terminate the worker.”⁵³ While the concern is speculative in the sense that it is impossible to fully understand how the new measure will affect firings until after implementation, most employers do not want to invest in an employee whose work status is unclear. Thus, the natural tendency will be to terminate the employee as soon as possible, especially since the no-match process usually occurs long after hire.

In some instances the exact opposite takes place, that is, the employer takes no action and retains the employee. A 2003 study national study on the misuse of no-match letters conducted by the University of Illinois, Chicago and the National Immigration Law Center found that 23 percent of employers retained employees receiving no-match letters. In the worst case scenario, the SSA programs have given some employers a reason and a method to take advantage of workers with unmatched SSNs. Some employers go as far as requesting verification of workers they know to be undocumented in order to quash protests over working conditions or labor organizing campaigns. For example, the management of a hotel in Emeryville, California retaliated against workers suing for better wages by requesting that the SSA verify whether the workers’ SSNs and firing those workers whose SSNs did not match.⁵⁴

Employees are also confused by the system. Resolving a no-match discrepancy often requires contacting one or more government agencies and presenting them with documentation showing their records are incorrect. Like their employers, workers often assume that a no-match letter or non-confirmation from the SSNVS is part of an immigration enforcement investigation and simply quit. The 2003 study indicated that employers found this type of abrupt turnover to be disruptive. During our interviews, representatives of immigrant worker advocacy groups in Los Angeles stressed that greater clarification and education is necessary so that employers and employees understand exactly what it means to receive a no-match letter. While federal agencies

⁵³ Ibid, 41.

⁵⁴ See Plaster, Joseph, “[Calling in the Feds: Hotel Sought Immigration Audit of Workers Asserting Their Right to a Living Wage](#),” San Francisco Bay Guardian, June 13, 2007; See also Guizar, Monica, “ICE Conducted I-9 Audit to Help Employer Retaliate against Workers,” National Immigration Law Center, Immigrants' Rights Update, Vol. 21, Issue 6, July 20, 2007. <http://www.nilc.org/immsemplymnt/ircaempverif/eev013.htm>

have tried to respond to this information gap recently the advocacy groups have stated that the proposed measures have caused only more confusion.⁵⁵

Although the SSA systems were not designed to verify an employee's immigration status and the SSA specifically states that it should not be used in such a manner,⁵⁶ the GAO has reported that a more coordinated approach to using this SSA data could help reduce unauthorized work.⁵⁷ However, there are several technological issues that plague the SSA database which hamper efforts to use the data for employment eligibility verification. Before 1970, all Social Security records were collected on paper and it was not until the 1980s that an individual had to produce proof of age or place of birth to get a social security number. Furthermore, Social Security data are dynamic in that replacement cards are often issued, people change their names, and adjust their immigration status. When an immigrant adjusts his citizenship status the SSA database is not automatically updated. As a result, a naturalized citizen may get an incorrect temporary nonconfirmation of their SSN.⁵⁸

As an enforcement tool, the no-match letters are also problematic. The new provisions do not address situations in which employees provide a matching name and social security number, even if fraudulently obtained. The no-match letter is based solely on a records check. The actual identity of the employee is not determined through this process. Moreover, the no-match letters are generated months after employment takes place. Unauthorized workers in seasonal and high-turnover industries may have completed their assignments before their employers receive the no-match letters and go through the 90 day process of verifying that the discrepancy has not been resolved. In

⁵⁵ Department of Homeland Security, Proposed Rule on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 8 CFR Part 274a [ICE 2377-06; Docket No. ICEB-2006-0004] RIN 1653-AA50, June 14, 2006; and National Immigration Law Center, Basic Information Brief: SSA No-Match Letters. October 2006. http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/ssa_nomatch_infobrief_2006-10.pdf, Visited July 1, 2007. http://www.anla.org/applications/Documents/Docs/DHS_FRDOC_0001-0055.pdf

⁵⁶ "A mismatch does not make any statement about an employee's immigration status and is not a basis, in and of itself, for taking any adverse action against an employee. Doing so could subject you to anti-discrimination labor law sanctions." Social Security Number Verification Service (SSNVS) Handbook," http://www.ssa.gov/employer/ssnvs_handbk.htm

⁵⁷ Coordinated Approach to SSN Data Could Help Reduce Unauthorized Work," Barbara Bovbjerg, GAO, February 16, 2006, GAO-06-458T, <http://www.gao.gov/new.items/d06458t.pdf>. Viewed July 9, 2007.

⁵⁸ Presentation by SSA representative at ISIM, Georgetown University Experts Roundtable on Immigration, Technology, and the Worksite, April 9, 2007.

comparison to enforcement systems based on verification at the beginning of the employment cycle, the use of no-match letters appears to be punitive to both employer and legitimate employees but not likely to deter significantly employment of unauthorized workers.

e.) Putting in Place a More Effective Electronic Verification System

Legislation adopted in both houses of Congress would mandate implementation of expanded, and eventually, mandated electronic employment verification systems. To be effective, such a system would have to meet multiple objectives: provide timely and accurate verification information; reduce the ability of unauthorized migrants to use fraudulent documents and borrowed identities to game the system; protect the rights of authorized workers, both citizens and immigrants, against discrimination and retaliation; and protect the privacy of the information used in verification. None of the current systems are effective in meeting all of these objectives. This section outlines the challenges that must be met if an electronic verification system is to work effectively. We underscore here that overcoming these problems will require financial resources, technological expertise and political will.

Problems with Government Database Integration and Maintenance

Problems with worksite verification caused by employer error and misuse are compounded by errors, updating delays, and lack of harmonization of government databases used to verify employment eligibility.⁵⁹ Updating the databases currently used by E-Verify for employment verification in a timely fashion continues to challenge government agencies. According to a GAO report, the primary reason for non-confirmations are errors caused by delays in entry of employment authorization information into DHS and SSA databases.⁶⁰ For instance, when an immigrant naturalizes as a U.S. citizen this information is not automatically updated in the SSA database and often times the individual has to proactively request the SSA to update his file.

⁵⁹ ISIM, Georgetown University Experts Roundtable on Immigration, Technology, and the Worksite, April 9, 2007.

⁶⁰ Government Accountability Office, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813, Aug. 2005. <http://www.gao.gov/new.items/d05813.pdf>.

The Basic Pilot Program Extension and Expansion Act, which authorized the national expansion of the Basic Pilot, required DHS to submit a report by June 2004 to Congress that addressed whether the problems identified by the 2002 independent evaluation of the Basic Pilot had been substantially resolved, and it should have outlined what steps the DHS was taking to resolve any outstanding problems before undertaking the expansion of the Basic Pilot program to all 50 states.⁶¹ Advocacy groups interviewed argue that the report submitted by DHS to Congress “failed to address the explicit recommendation by the independent evaluation against expanding the Basic Pilot program” into a large-scale national program until the DHS and the SSA address the inaccuracies in their databases that prevent those agencies from confirming the work authorization of many workers.⁶² DHS recently announced that it will increase the number of databases that are checked in Basic Pilot to include passport and visa data, but made no statement about improving the quality of the data that are already in use at DHS or SSA.⁶³

Recent reports uphold the assertions of worker advocacy groups. The SSA estimates over 4 percent of its records (approximately 18 million individuals) have errors related to the person’s name, birth date, and citizenship status.⁶⁴ Nine percent of the non-citizens who are authorized to work in the United States are initially incorrectly identified as not authorized.⁶⁵ Database errors currently make foreign-born workers, including naturalized citizens 30 times more likely than U.S. citizens to be incorrectly identified as not authorized for employment.⁶⁶ Congress has authorized the use of the Basic Pilot through 2008, and, given its current expansion, it is likely it will be extended. The

⁶¹ Written Statement of Tyler Moran, Employment Policy Director, National Immigration Law Center, and House Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing on: Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System April 26, 2007. Available at http://www.nilc.org/immsemplymnt/cir/eevs_testimony_nilc_2007-05-03.pdf

⁶² Ibid.

⁶³ DHS, "Fact Sheet: Improving Border Security and Immigration Within Existing Law" August 10, 2007. http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm

⁶⁴ 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/auditxt/A-08-06-26100.htm

⁶⁵ Interim Findings Of The Web-Based Basic Pilot Evaluation (Westat, Dec. 2006)

⁶⁶ Ibid.

immigration reform bills that passed the House and Senate in 2005 and 2006, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (HR 4437) and the Comprehensive Immigration Reform Act of 2006 (S 2611), would have mandated use of the Basic Pilot. According to a 2007 report of the SSA's Inspector General, if the Basic Pilot were to become mandatory and the databases were not improved, database errors could result in 2.5 million people a year being misidentified as not authorized for employment by SSA.⁶⁷

Timely and accurate resolution of problems is also due to the government databases used for worksite verification which not only include data inaccuracy, but also lack the cross-compatibility of data systems. During the initial phase of the Basic Pilot program, compatibility problems between the former-INS and SSA databases issues hampered the usefulness of the system. For instance, the INS used A-numbers for verification but only 10 percent of INS database members also had the SSN in their database. A two-stage model was implemented as a partial solution to this problem. Currently, the information the employer enters through the Basic Pilot website is verified against the DHS and SSA databases. The SSA checks the person's name, social security number, date of birth, and citizenship status for accuracy. Newly naturalized U.S. citizens often do not appear as such in the SSA database, so these cases are forwarded to DHS for additional verification. DHS handles the verification of employment status for all non U.S. citizens. In most cases, the information provided by the worker will match the information contained in SSA and DHS databases and no further action is required. If however, an employee's information cannot be verified, SSA will send the employer a tentative nonconfirmation. If the verification problem is on the DHS side, the employer will receive notification of "DHS verification in progress."⁶⁸

DHS does not have access to all of the social security numbers of migrants legally authorized to work in their system, and SSA does not have A-numbers in their database,

⁶⁷Congressional 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

⁶⁸ Government Accountability Office, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813, Aug. 2005. <http://www.gao.gov/new.items/d05813.pdf>.

so it still is not possible to have a single seamless system. The lack of matched data increases the need for secondary verifications, which was one of the major criticisms of the 2002 Basic Pilot evaluation⁶⁹ and continued to be of concern to the meeting's participants. Furthermore, under the current Basic Pilot system, in the case of any secondary verification, the onus is on the employee to prove that the non-confirmation was an error. This is problematic in the sense that the primary reason for non-confirmations is delays in entry of employment authorization information into DHS databases.⁷⁰

Technical experts who participated at the roundtable had differing opinions on whether or government databases could be successfully integrated. One view suggested that two or more databases at two different agencies will never be integrated. Federal computer systems are extremely complex and when multiple agencies are involved there are multiple security perimeters, multiple budgeting issues, political conflicts between agencies, as well as political conflicts outside agencies all working against integration. However, a contrasting view was that agencies can get databases to work together, but it will take significant time and resources to fix them. One participant observed that police officers who make traffic stops are able to access Department of Motor Vehicle databases and those that include information about criminal activity.

Scalability

The roundtable participants highlighted the fact that to date, the Basic Pilot has only functioned as a voluntary pilot system. The system has approximately 17,000 users, representing about 0.2 percent of all employers nationwide. Although the system is garnering around 1000 new employers per month, about half of the current users are deemed to be inactive. If the current system were made mandatory it would have to be successfully scaled to meet the demands of about 7 million employers. Recent expert

⁶⁹ INS Basic Pilot Evaluation Summary Report." January 2002. Prepared by Institute for Survey Research, Temple University, Washington, DC and Westat, Rockville, Maryland.

⁷⁰ Government Accountability Office, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813, Aug. 2005. <http://www.gao.gov/new.items/d05813.pdf>.

testimony on this topic indicated that “as a general rule, each time a system grows even ten times larger, serious new technical issues arise that were not previously significant.”⁷¹

Given the concerns about current levels of data accuracy, data compatibility, and employer misuse of the Basic Pilot, there are serious questions about the efficacy of a massively scaled-up version. Even if the current system were flawless, the fact that it would work for a small number of employers does not necessarily imply that it would work for a large number of employers. A mandatory nationwide system would scale the number of queries on the system up about 20 to 30 times the current level, but would scale the number of employers up approximately 400 times the current level. Since many of problems are with employer non-compliance this is a relevant economy of scale problem—especially since smaller/more informal employers would begin to participate.⁷²

Representatives from DHS and SSA reported that, at present, approximately 92 percent of all current queries on the SSA database get an automatic response within three seconds.⁷³ In Fiscal Year 2005, SSA handled approximately 980,000 queries; in FY 2006, over 1,740,000 and as of May in FY 2007, more than 1,800,000 queries, an increase of 96 percent over the same period in 2006.⁷⁴ If the current pace continues for FY 2007, there will be over 3,000,000 inquiries. If the system was scaled up from the current level of 17,000 employers to approximately 7 million employers the number of queries on the system would increase exponentially. Thus, the current rate of 8 percent of non-automatic response would need to be reduced significantly in order to keep levels of frustration among employers and the need to conduct manual reviews to a minimum.

Approximately 1-2 percent of the 8 percent of individuals who do not receive immediate confirmation personally appear to contest their cases in SSA office. The foreign born are disproportionately represented in this sample because when a foreign-

⁷¹ Neumann, Peter, Testimony Before the Subcommittee on Social Security of the House Committee on Ways and Means - Security and Privacy in the Employment Eligibility Verification System (EEVS) and Related System, June 07, 2007. <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6099>

⁷² ISIM, Georgetown University Experts Roundtable on Immigration, Technology, and the Worksite, April 9, 2007.

⁷³ Ibid.

⁷⁴ Streckewald, Frederick G., Assistant Deputy Commissioner for Program Policy Office of Disability and Income Security Programs, Testimony Before the Social Security Administration Testimony Before the Subcommittee on Social Security of the House Committee on Ways and Means, June 07, 2007. <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6093>

born resident naturalizes, the new citizenship status is not automatically updated in the SSA database. Currently, manual review of the queries that do not receive an automatic confirmation take considerable time, usually 8-10 days to complete. A government representative at the meeting stressed that if the current system were to become mandatory on a national scale, more flexibility beyond the 8-10 days would be required. Apart from being expensive, manual review is troublesome to some because it is an unevaluated, unmonitored system.

In expanding the system, there will be a need to accurately budget for the additional costs implied by the expanding human resources, associate programming, and equipment necessary to carry out such a system. A participant at the expert roundtable highlighted the results of recent research on the costs of the Systematic Alien Verification for Entitlements (SAVE) Program,⁷⁵ indicating that each automatic verification costs between 20 and 48 cents, but that each manual verification cost conducted by an Immigration Status Verifier (ISV) costs 6 dollars. Approximately 10 million queries on the SSA database would cost about 6 million dollars, most of which would be in manual response. Nevertheless, another government representative at the roundtable reported that models for a mandatory national scaling suggest there would be no need to have more than 60 verification staff or ISVs.

Secure Documentation and Biometrics

The issue of secure identification documents has long concerned multiple agencies in the federal government. Any electronic system of worksite employment authorization must take the issues of fraudulent, stolen, or borrowed documentation into account. Despite a longstanding recognition of the need to create a reliable documentation system as part of the worksite employment eligibility system, challenges

⁷⁵ The SAVE Program is responsible for administering programs involving customer access to information contained in the Verification Information System (VIS) database. This database is a nationally accessible database of selected immigration status information on over 60 million records. The SAVE Program enables Federal, state, and local government agencies and licensing bureaus to obtain immigration status information they need in order to determine a non-citizen applicant's eligibility for many public benefits. The Program also administers employment verification pilot programs that enable employers to quickly and easily verify the work authorization of their newly hired employees.

pertaining to secure documentation persist. The 1974 Federal Advisory Committee on False Identification, SCRIP Commission, IRCA, Immigration Nursing Relief Act of 1989 (INRA), Immigration Act of 1990, the 1992 Commission on Agricultural Workers, IIRIRA of 1996, the U.S. Commission on Immigration Reform, the REAL ID Act as well as several GAO studies have all attempted to deal with this issue. A unifying and repeated theme of all of these efforts has been the urgent need to improve, simplify, and strengthen the current documentation system for employment eligibility. Until this happens, worksite verification will be less than fully effective.

While the Basic Pilot has been successful in lowering the use of counterfeit documents, participants indicated that the current system cannot effectively detect identity fraud. Any electronic system of worksite employment authorization must take the issues of fraudulent, stolen, or borrowed documentation into account. Current identity verification systems, at the workplace and beyond are based on a person either (1) possessing a document or documents that verifies their identity, or (2) possessing specialized knowledge, such as a password or code to gain access. The first approach is flawed because if a document is lost, stolen, or counterfeit, it can be used by another person to falsify an identity. The flaw of the second system is that if the password is too short it can be cracked and if it is too complicated it is hard to remember, leading the owner to write it down, which, in turn, could lead it to be lost or stolen. Moreover, the proliferation of passwords for a numerous societal purposes leads owners to record even simple passwords in writing.

The use of biometrics, defined as the study of methods for uniquely recognizing humans based upon one or more intrinsic physical or behavioral traits, is often seen as a solution to the weaknesses of current verification systems because if a person's physical traits are used as an access key, it will be more difficult to use documentation obtained through theft, fraud, and misuse.⁷⁶ Biometric traits cannot be forgotten, lost, are difficult to copy, share or distribute and require the person requesting validation to be present.

⁷⁶ A. Jain, A. Ross and U. Uludag, "Biometric Template Security: Challenges and Solutions", *Proc. 13th European Signal Processing Conference (EUSIPCO) 2005*, Antalya, Turkey, September 2005. http://biometrics.cse.msu.edu/Publications/SecureBiometrics/JainRossUludag_TemplateSecurity_EUSIPC005.pdf

Furthermore, when used with traditional verification techniques biometrics enhances existing systems without the need to replace them. Biometric systems for identification have been implemented by many countries, including the U.S. For instance, the U.S. Department of Defense Common Access Card is an ID card issued to all US Service personnel and contractors on US Military sites. The ID card contains biometric data and digitized photographs. There have been over 10 million common access cards issued as of April 2007.

While using biometrics technology to create more secure documents and identity verification systems is often proposed as a solution to secure documentation challenges, research conclusions, as well as the participants at the roundtable, warn that biometrics should be viewed as a tool, rather than a solution and that there are risks to placing excessive trust in a technological solution.⁷⁷ If the U.S. were to implement a mandatory biometric identify for all eligible workers, there are concerns about how the government would enroll all eligible workers in a biometric system, given that there are a little over 150 million workers in the U.S. economy. Presumably, individuals would have to present documentation verifying their identity and work eligibility to initially join the system, which means the biometric system would be dependent on the quality of breeder documents.

Reliance on “breeder documents,” which are documents designed to verify other documents or identity, is one of the major weaknesses of a biometric system. The most common breeder documents are birth certificates, social security cards, and driver’s licenses. If the breeder documents do not match the person presenting them, then biometric data will not be tied to the proper identity. Problems arise because there is no standardized means to verify that information contained in breeder documents is legitimate. The primary ways in which breeder document fraud occurs are by obtaining breeder documents under false pretenses or counterfeiting/altering breeder documents. If too much faith is placed in a biometric system based on insecure breeder documents, the resulting problems could make the situation worse than it is at present.

⁷⁷ Ibid, p. 1.

Birth certificates are commonly used to get other breeder documents such as social security cards and drivers licenses. A 2000 study conducted by the Office of the Inspector General concluded that “efforts to make the birth certificate into a reliable identity document are complicated by the more than 14,000 different legitimate versions in existence, and the more than 6,000 entities which issue them and the processes they use to do so. Efforts are also complicated by the ease with which birth certificates can legitimately be obtained and counterfeited, and the fact that the majority of fraud is now being committed by imposters.”⁷⁸ Furthermore, any effort to use technology and tighter access control to improve the birth certificate integrity must be balanced with the original purpose of providing the public easy access to the documentation and record of a birth

Fraudulent or stolen birth certificates can be used to gain access to a Social Security card. Social Security cards can, in turn, be used to verify employment eligibility. There have been numerous legislative efforts to safeguard Social Security cards from counterfeiting, tampering, alteration, and theft; improve the system of verification of documents submitted for the issuance of primary cards and replacement cards; and increase enforcement against the fraudulent use or issuance of Social Security numbers and cards. Nevertheless, the social security card remains vulnerable to fraud and the database used to store and verify information is flawed.⁷⁹ This problem is exacerbated by the existence of multiple valid versions of the card; some of them over 20 years old and easily counterfeited.

A third type of breeder document, the driver’s license, has historically been easily obtained with a birth certificate or a social security card. Many states have implemented stricter measures for obtaining drivers licenses after the events of September 11, 2001. At the same time, many states have upgraded the security features of driver’s licenses using security features such as biometrics, holograms, magnetic strips, and scanable bar codes. In 2005, Congress passed the Real ID Act which created national standards for the issuance of state driver’s licenses and identification cards. The Real ID Act stipulates that

⁷⁸ United States Office Department of Health and Human Services, Office of Inspector General, <http://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf>

⁷⁹ See 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States (P.L. 107-206); The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458); and The Real ID Act, (P.L. 109-13).

driver's license and state ID card applicants must prove that they are either U.S. citizens or lawfully present in the U.S.⁸⁰ These standards are to be met by states by the end of 2009.

Many analysts have expressed concerns about the usefulness of the Real ID Act for purposes of worksite verification. While most observers support the notion of creating more secure documents, they see the Real ID act as an imperfect solution to the problem of worksite verification because "one in ten working Americans does not drive,...not everyone who is eligible for a REAL ID license is also work-authorized, and...the cards still leave 51 different state-level designs in place."⁸¹ The legislation was not created with the purposes of creating a secure document to be used for worksite verification, but rather to provide greater control over the access to government buildings and airports. Thus, any attempt to use a more secure driver's license as an employment verification document would need to take into account the differences that would still remain even after states produce Real ID compliant cards. For instance, although Real ID compliant cards would have swiipeable magnetic strips there is still a problem of standards and lack of encryption. Any document presented by a driver's license/ID applicant to prove his or her identity, date of birth, Social Security number, and residence will have to be verified by the agency that issued the document. This again raises concerns about the reliability and expediency of government databases. The lack of encryption is a problem because of the need to safeguard private information.

Biometrics specialists participating at the experts roundtable explained that there are several different types of biometric characteristics that could be used in a secure document or other types of identification system. The most common biometrics currently in use today are physiological and the most common are based on a person's fingerprints. Recent research from the Institute of Electrical and Electronics Engineers, Inc., indicates that there is a certain degree of non-uniqueness to fingerprints and preferably 10 but at

⁸⁰ The Real ID Act, (P.L. 109-13).

⁸¹ Rosenblum, Marc. US Immigration Reform: Can the System be Repaired?, The Center for Comparative Immigration Studies, University of California, San Diego. Working Paper 132, January 2006. p. 15. <http://www.ccis-ucsd.org/publications/wrkg132.pdf>,

least more than one print is necessary to have an acceptable level of assurance.⁸² Other examples of physiological based biometrics include face recognition, hand geometry and iris recognition, but only face recognition, in addition to finger prints, is being developed for immigration related documentation purposes.

Given that fingerprinting is the most commonly used biometric identifier and may not be 100 percent unique, any employment verification system using biometrics would have to set a threshold rates for false positive rates and false negative identifications. The false positive rate is the probability that the biometric verification system would incorrectly indicate a positive match between the biometric input and a record stored in the database. The false negative rate is the probability that the system would incorrectly indicate a negative match between a biometric input and the data stored on the system. Setting a threshold for both rates is critical because non-permitted individuals must be kept out of the system and permission must be granted to those with access.

Although there are many limitations to biometrics, participants at the experts meeting recognized the importance of “not letting the best be the enemy of the good.” There was widespread agreement that any improvement over the current situation would be welcome and that the focus should remain on raising the costs to unauthorized employment. As part of this discussion, a representative of USCIS indicated that DHS had just begun a Photo Screening Tool Pilot Program as an enhancement to the Basic Pilot Program. The program, which was designed for a three month pilot allows employers to compare Lawful Permanent Residence cards and other employment authorization documents containing photographs presented by new employees during the hiring process to the official photographs stored in DHS databases. While the program adds another level of security for employers during the hiring process, worker advocates expressed concern that it would be used to discriminate against foreign sounding or looking workers with work eligibility and stated that it was unclear how much this would decrease identity theft.

Accessibility and Education

⁸² Y. Zhu, S.C. Dass and A.K. Jain, "Statistical Models for Assessing the Individuality of Fingerprints", IEEE TIFS, 2007.
<http://biometrics.cse.msu.edu/Publications/Fingerprint/ZhuDassJainIndividualityTIFS2007.pdf>

The implementation of a nationwide system for employment verification needs to take into account the fact that there will be many different types of employers remotely accessing the system. There is a wide range in the type of employer and employees as well as the location of employers that would need to use the system. The employer who hires a day laborer to work in construction or agriculture will often not have the same resources or computer literacy as a business hiring an executive. Many of the smaller employees may lack the computer access or high-speed Internet access necessary to run a real-time verification system. Thus, any verification system would have to consider the start-up costs for these small businesses as well as alternatives such as telephone verification. It is equally important to consider the vulnerabilities to internet identity theft scams that inexperienced users, and the system as a whole, would face as a result of a mandatory system.

Moreover, education on the proper use of the system will be necessary given the levels of employer confusion and misuse with the current system. The GAO, as well as two independent reviews of the Basic Pilot Program conducted by WESTAT and Temple University has found unacceptably high instances of employer misuse that diminish the effectiveness of the system and which can adversely affect potential hires. Problems such as employers circumventing training on the use of the system by sharing entrance passwords, using the program to prescreen potential employees, reverify employees already approved, limiting work hours or training until permission is obtained, entering the same information for multiple workers have all occurred. Adequate training must be carried out in order to avoid abuses and focus limited resources on employers with malicious intent to skirt the system.

Privacy Concerns

The type and level of information that would be communicated across networks and stored on government databases would include the most important identity variables used for individuals residing in the U.S. Thus, the threat of destruction, misuse, loss, theft, or modification of identifiable information carried on an electronic employment verification database could be devastating to the individuals affected; and it could be

harmful to the overall effectiveness of the system depending on the level of the breach. Therefore it is critical that the data on the system be highly protected. The security of the data stored on the system is of paramount importance and should take precedence over speedy processing times. The tradeoff between privacy and effective, non-discriminatory verification is complex. The semblance that a secure employment verification document would have to a National ID system is important to take into account because of the strong backlash that would come from the civil liberties lobby.

While our research did not delve deep into technical detail on the exact methods of securing data, participants at the experts roundtable highlighted the need to secure data during transmission over the internet, educate users on internet identity theft and internet scams, secure the data on government as opposed to private databases, and conduct staged and ongoing evaluations of data security both during and after implementation. The privacy concerns of individuals must be upheld and thus, the system should have a method for notifying individual if their identity is compromised. A nationwide employment verification system would be accessible by tens of millions of individuals, which highlights the challenge of maintaining accountability for access to the system and controlling unauthorized access. The system should be able to log user access and have strong security measures controlling access.

Experts differentiate between a “data-heavy” and “data-light” approach to identity management. Solutions requiring a secure identity card such as the REAL-ID or the Department of Defense Common Access Card are “data-heavy” approaches in the sense that they require an ID that contains high levels of personally identifiable information. From a privacy protection point of view, “data-heavy” approaches are not ideal. The experts at the roundtable suggested that the debate should move beyond the notion that a secure “data-heavy” document is needed for worksite verification. They argue that the need for secure documents is an artifact of a system which did not have ability to do real time verification. Furthermore, documents are expensive, they wear out, must be replaced, and no matter how secure they are made, they are still vulnerable to problems caused by counterfeiting and fraud, which leads to the vulnerability of private information. This is the approach used by the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) immigration and border management system. While

the person using US-VISIT needs to provide the government with biometric and other personal data, each individual is assigned a random number and that number was the only thing anyone outside of government could see. Individuals carry a black card with a number printed or embedded in it and allows the user to access certain rights and privileges.

A similar program could work in the realm of worksite enforcement. Instead of requiring the worker to present a secure document at the worksite, the potential employee would first present themselves at a federal government office (such as a post office) where they would present biometric data and other documentation supporting their work eligibility. In exchange, they would be issued a secure number like that used in US-VISIT and that number would be presented to a potential employer. The employer could, in turn, enter that submit that number electronically to verify that the number matches the individual. The employer initiated query would produce a biometric such as a picture that would aid in verifying the worker's identity. While this program would still be susceptible to breeder document fraud and require database improvement, it is lens for viewing approaches to worksite enforcement that would, in large part, remove the employer from the document verification process. The criticism is that the employer would still have to make a judgment about the information returned to them after running a query on the number presented by the worker.

3) Worksite Investigations

a). Immigration Enforcement

With the passage of the IRCA, the principal strategy established to deter the hiring of unlawful non-citizen workers and control the employment magnet was to impose sanctions against employers who knowingly hire unauthorized laborers. Rarely during the first two decades of implementation did the federal government place significant resources and efforts behind that strategy. That has recently changed. The first part of this section examines these new developments.

Frustrated by the failure of the federal government to control undocumented migration, state and local governments have initiated significant efforts to address this

issue at the community level. Never since the federal government asserted its authority over immigration has state and local jurisdictions challenged that responsibility in such a serious way. Part two of this section reviews these extraordinary initiatives, focusing particularly on laws and policies aimed at the worksite.

Worksite Enforcement: A Low Priority

For most of the period since the passage of the IRCA, policymakers viewed worksite enforcement of illegal hiring and employment as a low priority. Both Congress and the Executive branch acted as if border control was the key problem with respect to undocumented migration. Policymakers understood that the employment magnet played a major role in attracting undocumented workers to the U.S. But the political will to do more than very occasionally tackle a major employer in a big case regarding illegal hiring did not exist. Congress did not fund such a priority, nor did the Executive branch request such funding.

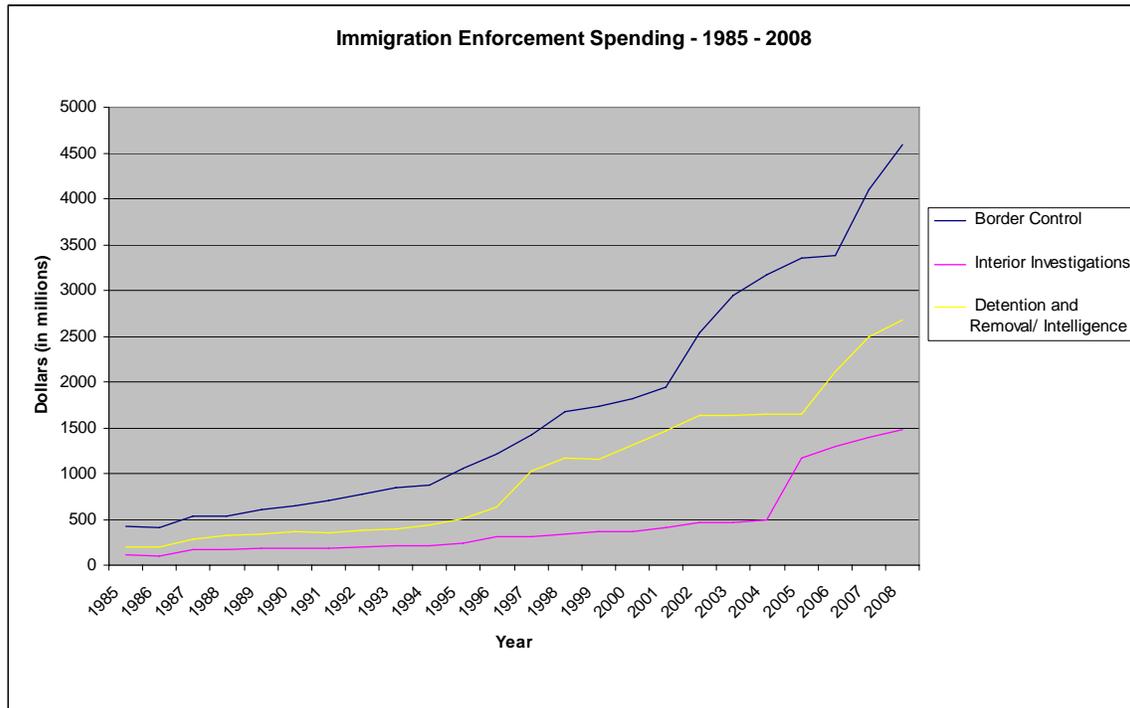
Most of the worksite enforcement activities of INS concerned paperwork violations of IRCA's documentation requirements. Employer investigations commonly resulted in administrative fines. Criminal convictions for knowingly hiring unauthorized workers required the government to carry a significant burden of proof.

Even regarding administrative actions, no matter how enforcement efforts are measured, worksite enforcement efforts declined significantly during the last decade of the INS. For example, the number of final orders of employer sanction fines decreased from over 1,000 in 1992 to just 13 in 2002.⁸³ The number of arrests declined from a high of over 17,000 in 1997 to less than 500 in 2002 and 2003.⁸⁴ Of course, these arrests mostly involved employees, not employers. Since the passage of IRCA, the government has placed more emphasis on securing the border and deportation than worksite enforcement. As shown in Figure 1, during the past 20 years worksite enforcement has received approximately one tenth of the overall immigration enforcement budget.

⁸³ 2002 INS Statistical Yearbook, Table 42: Principle Activities Fiscal Years 1992-2002. References to particular years concern fiscal years.

⁸⁴ Id.; 2003 INS Statistical Yearbook, Table 39: Principal Activities and Accomplishments of the ICE Immigration Investigations Program: Fiscal Years 1997-2003.

Figure 1



Source: ISIM Analysis of data from U.S. Immigration and Customs Enforcement. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Budget Fact Sheets 2005-2008. U.S. Customs and Border Protection, Digest of FY 2008 Budget by Activity and FYHSP Program (http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/budget/fy08_context_table.ctt/fy08_context_table.pdf.) and “Immigration Enforcement Spending Since IRCA.” Migration Policy Institute. 2005.

The following areas of activity have formed the foundation of the government’s approach to worksite enforcement since IRCA’s employers went into effect in 1988:

- a) Ongoing public and employer education;
- b) Compliance inspections conducted on a random basis;
- c) The issuance of warning notices to employers with non-egregious violations and no prior educational visits or inspections;
- d) The issuance of Notices of Intent to Fine (NIFs) to employers who knowingly employed illegal aliens after receiving educational or other types of INS visits;
- e) Generally, fines would not be imposed for paperwork violations alone or for employment of aliens whose illegal status was unknown, unless the employer refused to comply or other egregious factors existed.⁸⁵

⁸⁵ USCIS, IRCA and Employer Sanctions. From INS Reporter, Second Report on the Implementation of IRCA, Summer 1989, pp. 2, 4-5. Viewed 6/26/2007
<http://149.101.23.2/graphics/aboutus/history/sanctions.htm>

The last interior enforcement strategy of the former INS was issued in 1999. The strategy was designed to address the following priorities, in order of importance: (1) the detention and removal of criminal aliens, (2) the dismantling and diminishing of alien smuggling and trafficking operations, (3) community complaints about illegal immigration including those of law enforcement, (4) immigrant benefit and document fraud, and (5) employers' use of unauthorized aliens.⁸⁶ The primary purpose of the strategy was to deter illegal immigration, curb immigration related crimes, and deport those illegally in the United States.

The 1999 interior enforcement strategy placed a strong emphasis on reaching out to employers to educate them on their responsibilities in an effort to decrease unauthorized employment and prosecute consistent violators. In its approach towards consistent violators, the INS directed its resources to criminal employer cases. These were employers who showed a pattern of knowingly employing unauthorized workers. A special emphasis was placed on targeting employers, who in addition to violating hiring law, abused labor laws as well. Under this strategy, the INS' *modus operandi* was to audit I-9 forms in an effort to identify unauthorized workers. The largest such operation was known as *Operation Vanguard*, which targeted the meatpacking industry in Nebraska, Iowa, and South Dakota. Employee I-9s were checked against SSA and INS databases and employees whose data did not match were interviewed. The program proved to be very disruptive of communities whose livelihood depended on the meatpacking industry. The disruptive effects caused significant political backlash, and as a result, it was discontinued.

Following the events of September 11, 2001, resources for interior enforcement were redirected towards national security-related investigations. Prosecuting criminal employer cases became a subordinate priority to protecting critical infrastructure such as airports, military bases, and nuclear plants. The number of criminal employer cases presented for prosecution dropped precipitously in FY 2002 from 239 the previous year

⁸⁶ Congressional Research Service. "Immigration Enforcement Within the United States." April 6, 2006 <http://www.fas.org/sgp/crs/misc/RL33351.pdf>, page 7.

to 21.⁸⁷ A 2003 memorandum released by ICE headquarters requiring that field officers obtain permission from headquarters before initiating an investigation highlighted the degree to which ICE priorities had shifted away from workplace enforcement.⁸⁸ A GAO report pointed out that this is one of the few areas of investigation where field offices must get headquarter permission before initiating an investigation.⁸⁹

More recently, in 2006, ICE announced a focus on egregious and criminal violators, targeting large employers of low wage workers, such as WalMart, Swift and Co., and IFCO. As of this writing, ICE was in the process of, but had not completed, revamping its worksite enforcement strategy.⁹⁰ This strategy uses investigative techniques, most often, undercover agents, to uncover violations worksite verification of employment eligibility.

DHS Develops and Implements A New Strategy

As DHS ultimately recognized, administrative fines “proved to hold little deterrence value for violators. Many employers came to view these fines as simply the ‘cost of doing business.’”⁹¹ The new security-focused agency viewed unlawful workers and their employers in a different light. A new strategy began to emerge in 2005.

According to Bill Riley, the head of the worksite enforcement unit at that time, ICE was establishing three priorities.⁹² The removal of unauthorized workers from critical infrastructure facilities, such as military bases, airports or nuclear power plants, was priority one. Egregious violators—major employers with a history of violations, including criminal violations such as the production of fraudulent documents, smuggling, and worker exploitation—came next. Third, ICE decided to develop a new employer outreach program, through which ICE staff would work directly with employers to

⁸⁷ Congressional Research Service. "Immigration Enforcement Within the United States." April 6, 2006 <http://www.fas.org/sgp/crs/misc/RL33351.pdf>, p. 41.

⁸⁸ Ibid, p. 40.

⁸⁹ General Accountability Office, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts*, GAO-05-822T, June 21, 2005, p. 18.

⁹⁰ ISIM interview with Deputy Assistant Director of Investigations, DHS/ICE and Acting Unit Chief, Worksite Enforcement Unit, Office of Investigations, DHS/ICE. June 14, 2007.

⁹¹ DHS, U.S. Immigration and Customs Enforcement, Fact Sheets, “Worksite Enforcement,” June 12, 2007.

⁹² ISIM staff Interview with Bill Riley, November 30, 2005.

develop the tools needed to ensure compliance with immigration laws and self-policing of their hiring practices.

Criminal Sanctions as a Deterrent

In April 2006, DHS Secretary Michael Chertoff and ICE Assistant Secretary Julie L. Myers announced a new interior enforcement strategy that represented the second phase of the Secure Border Initiative, DHS' multi-year plan to secure the borders and reduce unauthorized migration.⁹³ The first phase focused on border control as well as detention and removal. Building strong worksite enforcement and compliance programs to deter illegal employment was the second of three primary goals of the new strategy. "Punish knowing and reckless employers of illegal aliens" is how DHS described the center of its new worksite enforcement strategy. Rather than rely on administrative fines, ICE had already initiated a focus on bringing criminal charges against such employers and seizing their assets. ICE believes that criminal sanctions would act as a much greater deterrent to illegal employment schemes than did administrative sanctions.⁹⁴ ICE claims that it now often pursues charges of harboring and/or knowingly hiring undocumented workers, as well as money laundering. Harboring and money laundering carry potential 10- and 20-year prison sentences, respectively.

How has the criminal sanction program worked so far? In 2004, ICE investigations led to 46 criminal convictions of employers and less than a half million dollars in asset seizures.⁹⁵ ICE seized over 10 million dollars of assets that year, mostly in connection with smuggling, criminal alien, and identity/benefit fraud investigations. Criminal convictions of employers increased to 127 in 2005.⁹⁶ While worksite-related seizures did not change much at a time when other ICE seizures increased almost ten-fold,⁹⁷ a single ICE investigation resulted in a settlement and forfeiture of \$15 million,

⁹³ DHS, U.S. Immigration and Customs Enforcement, News Release, "Department of Homeland Security unveils comprehensive immigration enforcement strategy for the nation's interior," April 20, 2006.

⁹⁴ "Worksite Enforcement," June 12, 2007, n. __, *supra*.

⁹⁵ Mary Dougherty, Denise Wilson, and Amy Wu, DHS Office of Immigration Statistics, Annual Report, "Immigration Enforcement Actions: 2004," Table 1, p. 4, November 2005.

⁹⁶ April 20, 2006 News Release.

⁹⁷ Mary Dougherty, Denise Wilson, and Amy Wu, DHS Office of Immigration Statistics, Annual Report, "Immigration Enforcement Actions: 2005," Table 1, p. 4.

the largest worksite enforcement penalty in U.S. history.⁹⁸ That single forfeiture surpassed the sum of all administrative fines from the previous eight years.

There is no question that ICE has stepped up criminal sanctions against employers who knowingly hire unauthorized workers compared to the past. Arrests for criminal violations have increased from 46 in FY 1999 to a record 716 in FY 2006. There have been 742 criminal arrests since the beginning of FY 2007 (through July 31).⁹⁹ During the one-year period from April 2006 through March 2007, for example, ICE conducted a dozen major operations, including those described below:

HV Connect and TN Job Service: indictment charging two temporary employment agencies and nine individuals with hiring and harboring illegal aliens, mail and wire fraud, and laundering over \$5 million.

IFCO Systems North America (largest pallet services company in the U.S.): arrested seven current and former managers, charging them with harboring illegal aliens for financial gain, and apprehended almost 1,200 unauthorized workers at 40 IFCO locations nationwide, as a result of yearlong investigation which found that more than half of 2005 employees had invalid or mismatched Social Security numbers.

Stucco Design: charged owner of company performing stucco-related services at construction sites in seven Midwest states with money laundering, harboring and transporting illegal aliens, and making false statements, which could result in imprisonment for 40 years and \$1.4 million forfeiture; company allegedly undercut bids of other contractors through cheap labor costs of undocumented workers.

Garcia Labor Companies/ABX Air: two temporary labor companies, their president, and two other corporate officers pled guilty to conspiring to provide hundreds of illegal aliens to work for ABX Air, a national air cargo company. The president agreed to forfeit \$12 million as part of the plea agreement. The three executives each face up to ten years in prison and a fine of \$250,000. The Social Security Administration issued a number of notices in 2002, 2003, and 2004 in which hundreds of workers were listed as using invalid Social Security numbers. Garcia Labor continued to employ these workers and took no substantive action to determine whether they were authorized to work.

⁹⁸ April 20, 2006 News Release.

⁹⁹ DHS, "Fact Sheet: Improving Border Security and Immigration Within Existing Law" August 10, 2007. http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm

Rosenbaum-Cunningham International (national janitorial services contractor): charged three executives in a 23-count indictment with conspiracy to defraud the U.S. and to harbor illegal aliens for profit and evading payment of federal employment taxes (allegedly over \$18 million). RCI clients between 2001 and 2005 included Planet Hollywood, Hard Rock Café, Dave and Busters, and ESPN Zone. ICE also arrested almost 200 undocumented workers at more than 60 locations in 18 states and the District of Columbia.

Michael Bianco, Inc. (textile products): charged owner, payroll manager, plant manager, and office manager with conspiring to encourage or induce illegal aliens to reside in the U.S. and conspiring to hire illegal aliens, alleging that MBI management instructed prospective employees on how to obtain fraudulent documents; arrested 360 unauthorized workers, representing more than half of the company's workforce.¹⁰⁰

The IFCO case exemplifies the potential that ICE has to conduct very extensive operations with the cooperation of federal prosecutors, and state and local law enforcement officials, and the Office of Detention and Removal at DHS. The investigation began in February 2005 when ICE agents received information that IFCO workers in one plant were witnessed ripping up their W-2 tax forms and that an IFCO assistant general manager had explained that these were unauthorized workers with fake Social Security cards.¹⁰¹ According to ICE, IFCO knowingly hired an unauthorized worker who was an informant and reimbursed this person for obtain fraudulent identity documents for other unauthorized employees. ICE also alleges that more than half of the 5,800 IFCO workers nationwide used invalid Social Security numbers, and that the Social Security Administration sent at least 13 written notifications in 2004 and 2005 to IFCO headquarters about such discrepancies on its payroll records. The arrests of unauthorized workers occurred in 26 states. Not only did the U.S. Attorney for the Northern District of New York and the New York State Police Superintendent actively support this investigation and operation, but the Secretary of DHS took this case public to underscore the new strategy:

'Employers and workers alike should be on notice that the status quo has changed,' said Homeland Security Secretary Michael Chertoff. 'These

¹⁰⁰ DHS, U.S. Immigration and Customs Enforcement, Fact Sheet, "Worksite Enforcement," April 3, 2007.

¹⁰¹ DHS, U.S. Immigration and Customs Enforcement, News Release, "ICE agents arrest seven managers of nationwide pallet company and 1,187 of the firm's illegal alien employees in 26 states," April 20, 2006.

enforcement actions demonstrate that this department has no patience for employers who tolerate or perpetuate a shadow economy. We intend to find employers who knowingly or recklessly hire unauthorized workers and we will use every authority within our power to shut down businesses that exploit an illegal workforce to turn a profit.’¹⁰²

In addition to pursuing criminal sanctions against employers, ICE has arrested large numbers of workers. In some cases, ICE has charged some workers with criminal violations related to identity theft. The majority of arrested workers have been placed in removal proceedings and detained until the completion of their proceedings, at which point those who have no legal right to remain in the U.S. are removed. At Swift & Company, for example, ICE arrested almost 1,300 unauthorized workers at meat processing plants in six states, charging 274 of these workers with criminal violations of state or federal law.¹⁰³ The company had been voluntarily participating in the Basic Pilot Program, which, as explained earlier in this report, checks the information employees provide against DHS and SSA databases but is not set up to check the actual identity of the individual providing the Social Security number and related information. An ICE review of employment eligibility forms discovered that 30 percent were suspected of being fraudulent. The arrests included a human resources employee, a union official, and current or former Swift employees identified by the Federal Trade Commission as suspected identity thieves. The company has not been charged with any criminal violations, such as harboring illegal immigrants. The investigation is ongoing.¹⁰⁴

According to top officials, ICE would like to become more proactive in focusing enforcement efforts on the most egregious violators where they can have the biggest impact. Right now they depend on leads from informants, former employees, and competitor employers whose businesses are undercut by those knowingly hiring unauthorized workers. ICE would like to be able to identify the top 100-200 companies whose employees do not have proper Social Security numbers. ICE is seeking legislation that would provide them with access to the SSA database and the authority to investigate

¹⁰² Id.

¹⁰³ DHS, U.S. Immigration and Customs Enforcement, Fact Sheet, “Worksite Enforcement,” April 3, 2007; Fact Sheet, “Worksite Enforcement: Operation Wagon Train,” March 1, 2007.

¹⁰⁴ DHS, U.S. Immigration and Customs Enforcement, Fact Sheet, “Worksite Enforcement,” August 9, 2007, http://www.ice.gov/pi/news/factsheets/worksite_operations.htm.

incidences of SSNs not correctly matching the names of the wage earners who are using them, as well as incidences of “all zero” SSN registrations.¹⁰⁵

Advocacy organizations have raised two major concerns about the new strategy and its implementation. First, the National Immigration Law Center (NILC) has argued that the perceived increase in worksite enforcement may encourage “unscrupulous employers to engage in unlawful practices, such as unwarranted reverification of work authorization documents, using ‘no match’ notices received from the SSA as a pretext to fire workers, conducting their own audits of employees’ SSNs, or discriminating against workers who appear to be foreign-born by refusing to hire them.”¹⁰⁶ NILC believes that this is precisely what happened in November 2006 when Smithfield Packing Company fired more than 50 immigrant workers at their Tar Heel, North Carolina plant. Two days later, over 1,000 plant workers walked off the job to protest the firings. According to NILC, these workers saw the firings as another example of the company’s efforts to intimidate workers challenging work conditions and organizing a union.¹⁰⁷

Second, concerns have been raised regarding the effects of the numerous employee arrests and detention on families, especially children. More than three million U.S. citizen children have at least one parent who does not have legal immigration status.¹⁰⁸ This issue arose particularly in connection with the Michael Bianco raid, Operation United Front, which occurred in New Bedford, Massachusetts. Many of the arrested workers had children, including some who were U.S. citizens. Some workers were sole caregivers. ICE claims that it tried to identify sole caregivers at the worksite and conditionally released 60 of the detained workers for humanitarian purposes.¹⁰⁹ Apparently another 35 workers subsequently identified at detention centers were granted humanitarian release related to child welfare or health reasons.¹¹⁰ In addition, starting the

¹⁰⁵ DHS, U.S. Immigration and Customs Enforcement, News Release, “Department of Homeland Security unveils comprehensive immigration enforcement strategy for the nation’s interior,” April 20, 2006.

¹⁰⁶ National Immigration Law Center, “ICE announces a new interior enforcement strategy,” *Immigrant’s Rights Update*, Vol. 20, Issue 2, May 23, 2006.

¹⁰⁷ National Immigration Law Center, 2006 Annual Report, “Raids in the Workplace,” 6.

¹⁰⁸ Jeffrey Passel, Pew Hispanic Center,

¹⁰⁹ DHS, U.S. Immigration and Customs Enforcement, Fact Sheet, “Setting the Record Straight,” March 13, 2007.

¹¹⁰ DHS, U.S. Immigration and Customs Enforcement, Fact Sheet, “Timeline for the Worksite Enforcement Operation at Michael Bianco, Inc.,” March 16, 2007.

day after the operation, ICE transferred about 90 workers to Texas to be detained¹¹¹ due to inadequate detention space in Massachusetts. Apparently, ICE had asked to use state facilities back in December 2006 and February 2007 for this operation.¹¹² It appears that coordination between ICE and state agencies was problematic. In any event, ICE did not arrange for detention space in Massachusetts in advance, and it is not clear whether coordination with the DHS Office of Detention and Removal presented particular problems in this operation. A law suit brought on behalf of 178 of the detained immigrants charges that ICE violated their due process rights.¹¹³

Working with Employers on Best Practices to Verify Lawful Employment

In July 2006, DHS announced a new initiative to help employers ensure that their workforce is legally authorized to work. The ICE Mutual Agreement between Government and Employers (IMAGE) is a voluntary partnership aimed at strengthening good hiring practices and reducing unlawful employment of unauthorized workers.

According to ICE, the IMAGE program started in connection with a 1999 Government Accountability Office report entitled “Significant Obstacles to Reducing Unauthorized Alien Employment Exist,” which found that certain industries historically have relied on a high percentage of unauthorized workers.¹¹⁴ ICE determined that only through developing partnerships with business can high levels of employment integrity be achieved. ICE leadership attributed the focus on learning about and promoting best hiring practices to the fruit of the Customs and Immigration merger, as it is based on a successful Customs program dealing with drug smuggling among shippers.¹¹⁵

¹¹¹ Raja Mishra and Brian R. Ballou, “DSS to check on detainees sent to Texas,” Boston Globe, March 9, 2007, http://www.boston.com/news/local/articles/2007/03/09/dss_to_check_on_detainees_sent_to_texas/.

¹¹² Id.

¹¹³ Massachusetts Immigrant and Refugee Advocacy Coalition, Press Release, “Immigration Attorneys return to federal court to protect due process rights of immigrants,” April 19, 2007 at http://www.miracoalition.org/press/press-releases/press-release-immigration-attorneys-return-to-federal-court-to-protect-due-process-rights-of-immigrants#jla6lxgyplz_FSZM7G2jg.

¹¹⁴ U.S. Immigration and Customs Enforcement, “IMAGE: Frequently Asked Questions,” Dec. 2006.

¹¹⁵ ISIM staff interview with Matthew C. Allen, Deputy Assistant Director of Investigations, ICE, DHS, Kevin Sibley, Acting Unit Chief, Worksite Enforcement Unit, Office of Investigations, ICE, DHS, and Marjorie Thompson, Acting Section Chief, Worksite Enforcement Unit (ICE Investigations/Worksite Enforcement officials), June 14, 2007 (notes on file with ISIM).

To participate in IMAGE, employers are asked to adopt ten best business practices, but before they do so, they must submit to an I-9 (work document verification) audit by ICE and, to ensure the accuracy of their wage reporting, verify the Social Security numbers of their existing employees utilizing the Social Security Number Verification System (SSNVS).¹¹⁶ As described earlier, if employers receive no-match letters, they are required to advise the affected employee to go to SSA and resolve the problem. In such cases, ICE expects the company to document how the no-match letter problem was resolved.

Just before the completion of this report in August 2007, DHS issued new regulations describing the legal obligations of an employer regarding a no-match letter and “safe-harbor” procedures that the employer can follow in response to such a letter. DHS says that if the employer follows these procedures, ICE will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was unauthorized to work. Importantly, the rule adds specific examples of such constructive knowledge where an employer has failed to take reasonable steps in response to a no-match letter from SSA or to a written notice from DHS regarding immigration status or employment-authorization documentation.¹¹⁷

Using the Basic Pilot, the DHS employment eligibility verification program, is one of the key best employment practices that IMAGE participants must follow. An IMAGE company must also establish an internal training program on the hiring process and on how to detect the fraudulent use of documents in the I-9 process. Once the company trains staff, only those individuals are permitted to conduct the I-9 and Basic Pilot processes. The company must arrange, then, for annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 process.

An IMAGE company is expected to establish self-reporting procedures to inform ICE of any violations or deficiencies. With regards to no-match letters received from the Social Security Administration, the company must resolve them definitively and document such resolution. An IMAGE company is also required to establish a tip line

¹¹⁶ U.S. Immigration and Customs Enforcement, “Employer Certificate Requirements: Best Employment Practices,” in *IMAGE: ICE Mutual Agreement between Government and Employers*, Jan. 2007.

¹¹⁷ DHS, “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,” DHS Docket No. ICEB-2006-0004, <http://www.ice.gov/doclib/finalsafe.pdf>.

mechanism for employees to report activity relating to the employment of unauthorized workers and a protocol for responding to such employee tips. Once a year, the company must report the number of employees removed and denied employment as a result of IMAGE participation.¹¹⁸ IMAGE participants also commit to immediately report the discovery or allegations of criminal violations.

ICE will provide training and education to IMAGE companies on proper hiring procedures, fraudulent document detection and anti-discrimination laws. ICE will also share information on the latest ruses used to circumvent legal hiring processes. In addition to reviewing the hiring and employment practices, ICE commits to working collaboratively to correct isolated, minor compliance issues. ICE also says that it will try to minimize disruption of business operations resulting from an IMAGE company's self-disclosure of possible violations.¹¹⁹

By becoming an IMAGE-certified business, a company will not be subject to Form I-9 audits or inspections for a two-year period. The idea is to encourage good self-policing practices rather than ICE verifications. ICE also says that in the event that a company faces civil penalties for employing unauthorized workers, good faith participation in IMAGE will be taken into account as a mitigating factor in the amount of any fines.¹²⁰ As of June 2006, ICE has certified eight employers and one association as IMAGE participants.¹²¹

Workers' advocates have raised some questions and concerns about the IMAGE program that echo their concerns about the Basic Pilot and SSNVS.¹²² First, they question the accuracy of the SSA and DHS databases. They point to government studies of Basic Pilot that have raised such problems about inaccurate and outdated information, resulting in eligible workers being denied employment. The government databases are very large. According to DHS Secretary Michael Chertoff, SSA has more than 425 million records and DHS has more than 60 million immigration records.¹²³ Second, they

¹¹⁸ U.S. Immigration and Customs Enforcement, "IMAGE: Frequently Asked Questions," Dec. 2006.

¹¹⁹ Ibid.

¹²⁰ U.S. Immigration and Customs Enforcement, "IMAGE Program Outline," Jan. 2007.

¹²¹ ISIM staff interview with ICE Investigations/Worksite Enforcement officials, June 14, 2007.

¹²² National Immigration Law Center, "Facts about the IMAGE Program," Jan. 2007.

¹²³ N.C. Aizenman, "Bush Moves To Step Up Immigration Enforcement," Washington Post, Aug. 10, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/10/AR2007081001113.html>.

believe that employers do not always inform workers of their rights to contest tentative non-confirmations. Third, some unscrupulous employers abuse these programs, according to workers' advocates. Here one concern is about "prescreening" workers before hiring them, or using the Basic Pilot or SSNVS selectively. Another is that employers could use the IMAGE program to undermine employees' rights during a union organizing campaign or other exercise of workplace rights. Such employers could knowingly hire unauthorized workers, then sign up for IMAGE when they want to fire, retaliate, or discourage workers from asserting their rights.

Effectiveness of ICE's New Worksite Enforcement Strategy

ICE has tripled the number of hours going into worksite enforcement, but it still constitutes only 5% of ICE's activities in terms of level of effort.¹²⁴ That said, the proportion represents a significant increase in previous levels. However, some analysts have questioned the effectiveness of these new efforts. 84% of the worksite arrests from FY 2003-2006 are of unauthorized workers, not employers.¹²⁵ These are administrative arrests aimed at deportation, not criminal prosecutions against employers. In terms of deterrence, administrative arrests and deportation cannot possibly provide enough of a disincentive such that a significant portion of the 7-8 million unauthorized workers will leave voluntarily and others won't come. Criminal sanctions against employers, along with forfeitures, however, might have a more substantial effect if this new strategy became a major priority. That would involve very significant resources, of course, and their targeted use¹²⁶

How serious is the Administration in its commitment to enhanced worksite enforcement? While the announced policies and enforcement initiatives appear to be breaking new ground, the true test will be the commitment of financial resources to allow their full implementation. Here, the record is not as promising. When the Director of

¹²⁴ ISIM staff interview with ICE Investigations/Worksite Enforcement officials, June 14, 2007.

¹²⁵ Michael Earls and Jim Kessler, "Mission Accomplished II: The Bush Record on Immigration Enforcement," The Third Way Culture Project, May 2007.

¹²⁶ . We have requested but have not yet received from ICE's Worksite Enforcement Unit the most recent funding request and an almost-finalized strategic plan that focuses on the criminal sanction policy. With that information, we might be better able to understand the degree to which this policy will be a priority in interior enforcement.

Immigration and Customs Enforcement outlined the agency's enhancement priorities in the FY2008 appropriations request, worksite enforcement was missing, although the FY 2007 request did include an additional \$30 million and 69 FTE positions. For FY 2008, the only worksite enhancement was a requested \$5 million for IMAGE to add 10 special agents, 10 forensic auditors, and nine investigative assistant positions for outreach and enforcement activities. The agency did not request additional investigators for worksite enforcement itself. By contrast, ICE requested an additional \$31 million to enhance detention capacity on top of the additional \$241 million and 280 FTEs requested in FY 2007 for the detention and removal program.

Also, will ICE find ways to address the concerns raised by workers' advocates? With regards to unscrupulous employers bringing in ICE to prevent workers from asserting their rights, it is actually a matter of whether or not ICE follows its own internal guidance. ICE's predecessor, INS, and the U.S. Department of Labor agreed in a 1998 memorandum of understanding to "avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute."¹²⁷ The internal guidance first developed by INS requires that whenever information received from any source creates suspicion that an immigration enforcement action might involve agents in a labor dispute, agents should make reasonable attempts to determine whether such a dispute exists.¹²⁸ As reflected in ICE Special Agent's Field Manual, agents are to use restraint where a labor dispute exists and the complaint about employees' immigration status is provided to interfere with these workers' labor rights such as minimum wages, overtime compensation, and safe working conditions.¹²⁹ If ICE does not abide by its own guidance and carries out worksite enforcement inappropriately when labor disputes are ongoing, Congress will need to investigate and monitor.

¹²⁷ "Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor, " Nov. 23, 1998, <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm#agreement>.

¹²⁸ See National Immigration Law Center, "Immigration Enforcement During Labor Disputes," Issue Brief, April 2007, http://www.nilc.org/immseplymnt/IWR_Material/Advocate/labordispute_infobrief_2007-04-23.pdf.

¹²⁹ See Joseph Plaster, "Calling in the feds: Hotel sought immigration audit of workers asserting their right to a living wage," Bay Guardian, June 13, 2007, http://www.sfbg.com/entry.php?entry_id=3834.

A strong argument can be made against focusing resources on large-scale raids designed to arrest unauthorized workers and place these individuals in removal proceedings. The resources ICE spends on administrative arrests and detention would be much better applied to those who knowingly hire. In light of the fact that even the arrests of large numbers of unauthorized workers will not deter unauthorized migration in a serious way, ICE should focus on criminal sanctions of employers and forfeitures. Such a focus, together with increased labor standards enforcement, discussed below, is the most effective means to prevent unscrupulous employers from hiring unauthorized workers in the first place.

To the extent that worksite enforcement activities lead to arrests of unauthorized workers, it is in ICE's interest, as well as the migrants and broader society, to ensure that such activities are carried out in a way that respects family life. As indicated above, children may be dependent on sole caregivers. ICE has asserted that it tries very hard to ensure that sole caregivers are not detained. As to where the detained workers are held, the most effective way to remove those with no rights to work in the U.S. is to detain them in the jurisdiction where they work and live. In the Bianco operation, removing arrested workers to Texas just brought on a major lawsuit and changes of venue back to Massachusetts. With respect to detention, then, the most efficient way to proceed turns out to be the most humane way. ICE also has to be concerned about political reactions to problematic detention practices. Ensuring that detention capacity in the local jurisdiction exists before a raid is carried out and that those needed to care for their children will not be detained would enable ICE to focus on its legitimate mission in worksite enforcement.

b. Labor standards enforcement

Many of the companies that develop their business plan around the use and exploitation of unauthorized workers also violate other labor standards. With an effective employment verification system, some businesses that now have plausible deniability in their hiring of unauthorized migrants may choose to go underground rather than find alternatives to their illegal workforce. Employers who knowingly recruit and hire unauthorized workers often reap an unfair competitive advantage over other companies through their failure to pay minimum wages, pay for overtime work, pay the employer

share of various taxes, adhere to safety and health standards, adhere to environmental standards and abide by other regulatory requirements. Recognizing that illegal immigration is but one part of the underground economy, there has been growing interest in a more coordinated approach that would allow for investigation of these various violations. From the immigration enforcement point of view, cooperation with and among agencies concerned with labor standards enforcement makes sense because employers who are abiding by labor standards would more likely attract a domestic U.S. workforce and have less need for illegal labor. Targeting of labor standards investigations on industries with large numbers of illegal aliens makes sense since unauthorized migrants are more vulnerable to the types of violations of concern to them. However, cooperating actively with immigration authorities is problematic for labor standards enforcement agencies because such cooperation complicates the ability of inspectors to gain needed information from the workers who already fear arrest and removal.

The Employment Standards Administration (ESA) of the U.S. Department of Labor has principal responsibility within the federal government for labor standards enforcement. In 1998, DOL signed a Memorandum of Understanding with the Immigration and Naturalization Service outlining the responsibilities of the respective agencies. The MOU acknowledged that “ESA's primary responsibility is the enforcement of labor standards statutes with the goal of ensuring that all covered workers—irrespective of their immigration status—are afforded the full benefits and protections of our labor laws. The INA provides DOL a role in the enforcement of employer sanctions because vigorous targeted enforcement of labor standards can serve as a meaningful deterrent to illegal immigration.”¹³⁰

For the most part, DOL's role is to ensure that employers, including those with unauthorized workers, comply with the full range of labor standards—particularly, minimum wage, hour, overtime, and child labor provisions. The agency also has responsibility for investigating, approving and determining compliance with requests for employment of certain foreign workers. DOL pays special attention to employers of low-wage workers, focusing enforcement efforts on such industries as agriculture, garment

¹³⁰ INS/DOL Memorandum of Understanding

manufacturing, day care, restaurants, health care, hotels and motels, janitorial services, guard services and temporary help. DOL has a “hot goods” authority to seize goods produced under illegal conditions as a way to enforce compliance. The embargo of goods raises costs for violating employers and the companies for which they are producing goods, and can remove some incentives to violate the law.¹³¹ It is particularly useful in gaining the commitment of larger companies to monitor the compliance of sub-contractors.

ESA has more than 4,000 employees and over 2,600 contract staff, distributed nationwide in over 360 offices in one of four component programs: the Wage and Hour Division (WHD), the Office of Workers' Compensation Programs (OWCP), the Office of Labor-Management Standards (OLMS), and the Office of Federal Contract Compliance Programs (OFCCP). For FY 2008, Wage and Hour—which has the largest role in immigration-related enforcement—requested \$182 million and 1,336 FTE, which would represent a base funding increase of \$5,000,000 and 36 FTE for “enhanced strategic compliance.”¹³² About \$36 million would be focused on low wage industries. The additional funding would permit the agency to continue to do directed-investigations, where violations are suspected but workers have not issued a specific complaint. Directed investigations are particularly important in industries with large numbers of unauthorized workers who are fearful of complaining about their working conditions. In its fiscal year 2008 appropriations bill, the House Appropriations Committee suggested increasing the number of investigators fluent in the languages of the workforces in which non-English-speaking workers predominate. With the additional resources and staff, WHD “could increase its performance output levels to 34,000 compliance actions”¹³³ and the number of inspectors to 816, still a small number when considered against the number of businesses in this country. The Wage and Hour Division will have experienced a drop in

¹³¹ Wendy Williams, Note, Model Enforcement of Wage and Hour Laws for Undocumented Workers: One Step Closer To Equal Protection Under the Law, 37 COLUM. HUM. RTS. L. REV. (Spring 2006), 769-772.

¹³² FY 2008 Congressional Budget Justification: Employment Standards Administration

¹³³ Ibid.

staff of 12.6 percent since fiscal year 2001, even with the additional resources provided for fiscal year 2008.¹³⁴

Partnerships of state and federal inspectors are one way to enhance capacity and better target low wage industries that hire large numbers of unauthorized workers. Representatives of California's Economic and Employment Enforcement Coalition (EEEC) indicated that in California these businesses tend to operate in the race track, car wash, garment, agriculture, landscaping, construction, and restaurant industries.¹³⁵ The EEEEC was created in 2005 as a partnership of the State of California's Division of Labor Standards Enforcement, Division of Occupational Safety and Health, Employment Development Department, Contractor's State License Board and the US Department of Labor. The primary emphasis of the EEEEC is to combine the enforcement efforts of the agencies and put as many investigators into the field as possible in order to educate business owners and employees on federal and state labor, employment, and licensing laws and conduct targeted enforcement against labor law violators.¹³⁶

Another effort in California seeks to protect immigrant workers from employers who commit insurance fraud. Many employers of unauthorized workers lack adequate workers' compensation insurance. As a result, injured workers are not given the care they need. Many do not know what coverage should be made available to them and others are fearful to demand such coverage. The Agricultural Workers Access to Healthcare Project is a collaboration effort between the state and private groups to assist low-wage immigrant workers access medical treatment, as well as related benefits under the workers' compensation system. The Workers Compensation Enforcement Collaborative (WCEC) is comprised of state and local enforcement agencies and private groups; it seeks to inform workers about their right to treatment under the workers compensation system.¹³⁷

Other States have had similar initiatives. For example, a 1999 investigation revealed that many workers in New York's greengroceries, who are mostly immigrants

¹³⁴ U.S. House Committee on Appropriations Report on the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2008 (HR 3043).

¹³⁵ ISIM Los Angeles Fieldnotes March 8, 2006. See <http://www.labor.ca.gov/eeec.htm>.

¹³⁶ ISIM Los Angeles Fieldnotes March 8, 2006. See <http://www.labor.ca.gov/eeec.htm>.

¹³⁷ Posted by Peter Rousmaniere on February 4, 2007 9:04 AM
http://www.workingimmigrants.com/2007/02/an_initiative_in_california_to.html

and often undocumented, were receiving three to four dollars an hour and working seventy-two hour weeks with no overtime. In 2002, the New York Attorney General developed a greengrocer code of conduct. Greengrocers who sign the code pledge to comply with state labor law, provide certain benefits to employees and submit to unannounced monitoring. In exchange, the Attorney General refrained from investigating past labor code violations. Greengrocers who participate receive a seal that they can post in their store windows. The code was successful in providing many immigrant workers with minimum wage, overtime, meal breaks, and days off.¹³⁸

Some structural arrangements and conflicting mandates present obstacles to a coordinated approach to the enforcement of labor standards and immigration law. For instance, DHS does not participate in California's EEEEC. EEEEC investigators expressed concern that their increased involvement in employer sanctions will impede their ability to gain the trust of illegal aliens who may be the victims of labor violations and potential witnesses against employers. For example, we accompanied the EEEEC on an enforcement sweep of the Los Angeles garment industry and upon realizing the EEEEC's presence one employer quickly told all of his 25 plus employees that it was an immigration raid and the workers scattered. They left their fourth story work space using a freight elevator that gave them access to a back alley. The EEEEC team was able to stop many of them in the alley and explain to them the purpose of their sweep. Many of the workers chose to give their information in hopes of receiving back wages.

Complicating the use of labor standards enforcement to combat unauthorized migration is the *Hoffman* case. In 2002, the Supreme Court held in *Hoffman Plastic Compounds v. NLRB* that undocumented workers are not entitled to back pay when they are illegally fired from their jobs when they are involved in union activities.¹³⁹ The worker in the case was fired when he engaged in union organizing activity and the Court reasoned that he could not recover back pay for a job he could not lawfully have. Some employers have treated the decision as if it precludes all employment benefits for undocumented workers, although this interpretation has repeatedly failed in future

¹³⁸ www.oag.state.ny.us/press/2002/sep/sep17a_02.html.

¹³⁹ 535 U.S. 137, 122 (2002)

lawsuits.¹⁴⁰ Additionally, some state legislatures and agencies have taken actions to affirm that the scope of the *Hoffman* decision is narrow. For example, a California law enacted in 2002, states that, “All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.”¹⁴¹ Similarly, a 2002 letter from the Washington State Department of Labor affirms that all workers are covered by the workers compensation system.¹⁴²

c. Anti-discrimination enforcement

The potential for IRCA’s employer sanctions to cause discrimination against foreign looking or sounding citizens, permanent residents, and others who were legally authorized to work in the United States was a major concern for Congress. Therefore, Congress included several elements to discourage employers from discriminating against those who were legally eligible to work. These provisions included language prohibiting discrimination on the basis of national origin or citizenship status, created an office to investigate and prevent discrimination, mandated a report to study the effect of employer sanctions on discrimination, and included a provision for early repeal of employer sanctions and related provisions if GAO determined that a “widespread pattern of discrimination has resulted against” eligible workers seeking employment “solely from implementation of” that section.¹⁴³ The provisions were amended in 1996 to require a showing that the employer had the *intent* to discriminate in cases of documentation violations—that is, when employers request different or additional documents in completing the I-9.

The GAO studies commissioned by Congress as part of the IRCA legislation, as well as some subsequent studies have been uniform in their conclusion that

¹⁴⁰ For a full description of these lawsuits, see National Immigration Law Center, *Immigrants’ Employment Rights and Remedies*, available at <http://www.nilc.org/immsemplymnt/emprights/index.htm>.

¹⁴¹ CA Gov’t Code § 7285(a).

¹⁴² available at www.nelp.org/iwp/reform/state/appendixwadol.cfm.

¹⁴³ U.S. Commission on Immigration Reform, *Curbing Unlawful Migration: Appendices*, Immigration Related Unfair Employment Practices, p. 231. Washington, DC

discrimination does exist and is problematic.¹⁴⁴ Opinions diverge, however, as to whether, or how much of, discrimination at the workplace is a result of IRCA's worksite enforcement provisions.¹⁴⁵ The advocacy organizations and unions interviewed in Los Angeles, Iowa, and Washington, DC continue to cite the results of the GAO reports in their arguments that federal laws should not increase discrimination of minorities who are legally authorized to work, and therefore should be repealed.

The Office of Special Council for Immigration-Related Unfair Employment Practices conducts outreach and education programs for employers, potential victims of discrimination, and the general public about the anti-discrimination and employer sanctions provisions of the immigration law. OSC awards grants to organizations across the country to conduct local public education campaigns. It also receives and investigates complaints about employers and initiates independent investigations, particularly when a large number of employees may be affected. It covers the following types of discriminatory practices:

- Citizenship or immigration status discrimination with respect to hiring, firing, and recruitment or referral for a fee by employers with four or more employees.
- National origin discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 employees. The Equal Employment Opportunity Commission has jurisdiction over employers with 15 or more employees.
- Unfair documentary practices related to verifying the employment eligibility of employees. Employers may not request more or different documents than are required to verify employment eligibility, reject reasonably genuine-looking documents, or specify certain documents over others with the purpose or intent of discriminating on the basis of citizenship status or national origin. U.S. citizens and all work authorized individuals are protected from document abuse.
- Retaliation. Individuals who file charges with OSC, who cooperate with an OSC investigation, who contest action that may constitute unfair documentary practices

¹⁴⁴ General Accounting Office. (1990). *Immigration Reform, Employer Sanctions and the Question of Discrimination* (GGD-90-62). Washington, DC; General Accounting Office. (1999). *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* (GAO/GGD-99-33). Washington, DC.

¹⁴⁵ General Accounting Office. (1990b). Memorandum dated March 12, 1990, to the Comptroller General from the Assistant Comptroller General for Program Evaluation and Methodology, Eleanor Chelmisky, re Requested Methodological Review of a GAO Draft Report.

or discrimination based upon citizenship or immigration status, or national origin, or who assert their rights under the INA's anti-discrimination provision are protected from retaliation.¹⁴⁶

According to OSC's newsletter, during FY 2006, the office received 346 charges of alleged discrimination and directly handled more than 7,567 calls on its worker and employer hotlines. In the same period, OSC successfully resolved 85 investigations.¹⁴⁷ In a number of cases, businesses voluntarily entered into agreements with the workers to remedy the situation. A small number of cases are referred to the Office of the Chief Administrative Hearing Officer in the DOJ Executive Office of Immigration Review, which hears discrimination cases as well as employer sanctions and document fraud cases. If OSC decides not to refer a case to OCAHO, the individual has the right to file his or her own complaint with OCAHO. In FY2006, OCAHO received a total of 23 cases (that is, discrimination, employer sanction and document fraud cases). This is a sharp decline from the 168 cases received in FY 1997.

4. Conclusions

The evidence from the fieldwork in four cities indicates that effective workplace enforcement remains as elusive now as it did more than twenty years ago during IRCA implementation. The sole mandatory verification system is riddled with inefficiencies stemming from cumbersome paperwork, employer confusion, and fraud. Both employers and employees circumvent proper verification through the use of subcontractors, counterfeit documents and now, more than ever before, identity theft. These core systemic problems are exacerbated by low penalties for violators which give employers in certain industries the incentive to evade the system as part of their business model.

DHS and SSA have moved to address the cumbersome aspect of the current process by implementing web-based systems for the non-mandatory verification systems currently in place. Employers, by and large, prefer web based solutions that provide answers quickly and unambiguously – indicating that the less discretion they have in the verification process the better. Although this is a step in the right direction, serious flaws

¹⁴⁶ <http://www.usdoj.gov/crt/osc/htm/Webtypes2005.htm>

¹⁴⁷ http://www.usdoj.gov/crt/osc/pdf/osc_update_APR07.pdf

still undermine the effectiveness of the Basic Pilot and SSNVS. Poor data quality and incompatibility of the information in different government databases are at the top of the list of problems plaguing the system. No system, no matter how fast and secure, will be effective if based on flawed data. Furthermore, even if the levels of data error and incompatibility were at acceptable levels, the current system would have to be scaled up dramatically to meet the demands of all of the nation's employers. Less than one-percent of employers use the electronic verification process available to them today.

Effective and targeted education of employers must accompany the implementation of an electronic verification system. The education should go beyond basic instruction in how to use the system to emphasize the importance of *proper* use. Every step should be taken to discourage employers from knowingly or unknowingly discriminating on the basis of national origin or citizenship status. The evaluations of the Basic Pilot indicate that employers routinely misuse the system to prescreen and reverify their workers. Basic education of employers who are not computer literate will be important to ensure proper data entry and to avoid data theft by hackers preying on unacquainted users. The effective safeguarding of sensitive information will be paramount as any employment verification system will contain all the principal personal identifiers. Controlling who has access to the system and implementing a method of holding end users accountable are key to this process. As it currently stands, access to the system is not well controlled.

While the improvements in biometric technology are likely to eventually increase the effectiveness of the identification documents used for verification purposes, biometrics should be viewed as a tool and not a panacea. Current biometric technologies such as fingerprinting and facial recognition are still in development and it is not clear how these would be implemented into a secure document to be used for verification purpose. The "data-light" approach employed by US-VISIT is attractive, but needs more debate on how it would apply in an employment verification scenario.

The implementation of a verification system needs to be accompanied by robust enforcement. The history of enforcement since IRCA has been spotty making it difficult to judge the long-term effects of DHS' renewed approach of targeting egregious violators of immigration law. What is clear, however, is that many of the companies that rely on

unauthorized workers also violate other labor standards. Thus, labor law is a necessary supplement to worksite enforcement, especially in industries known for the hiring of unauthorized workers. The enforcement of labor law has been complicated by the *Hoffman* decision, which has undermined the applicability of labor law to unauthorized workers.