

US Immigration Policy & Reform:

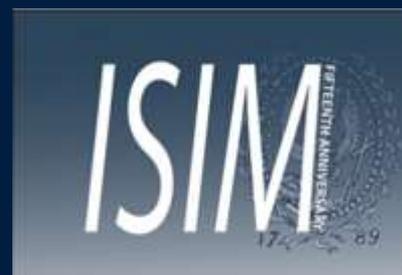
What does the evidence tell us?

Institute for the Study of International Migration

GEORGETOWN
UNIVERSITY

Enforcement in the Workplace: Challenges, Past and Present

Report on an experts' roundtable
Georgetown University, Washington D.C.



ABOUT THE PROJECT

The Institute for the Study of International Migration, with the support of the MacArthur Foundation, is organizing a series of public presentations, as well as expert roundtables that address the multiple challenges of immigration reform. The aim of the project is to inform debate on immigration reform, with a focus on addressing the challenges of implementation

SUMMARY

The Institute of the Study of Migration at Georgetown University hosted an expert round table to address worksite enforcement within the current debate over immigration reform. The roundtable participants followed Chatham House rules and there are no attributions to individuals in this report.

The Immigration Reform and Control Act of 1986 (IRCA) implemented employer sanctions for employers who fail to document or knowingly hire unauthorized workers; it introduced the I-9 form to record the documents used as proof of identity. Critics have long questioned the effectiveness of the nationwide I-9 which co-exists with the electronic employment verification system (E-Verify) currently used in select states and workplaces. Some experts caution that E-Verify may not be ready for nation-wide implementation.

A work authorization system must be effective and simple. Most employers act in good faith and do what they can to ensure the authenticity of the documents provided by employees. Perhaps the greatest problem with E-Verify is the Tentative Nonconfirmation (TNC) that results when the information entered for new hires does not initially match the electronic records. False negative TNC determinations have severe consequences for undeserving workers, while false positive determinations permit unauthorized workers to retain employment. Successful national mandatory E-Verify will require interagency coordination between the Social Security Administration and Homeland Security.

To address fraudulent identity, attending experts were divided between biometrics and knowledge-based identification systems. Biometrics are promising, but some experts questioned whether it is feasible to implement on a national scale. A knowledge-based employee verification system, where information provided by the worker is compared against a database that collects third-party information, could be an alternative. However there are ample challenges, particularly with the accuracy and privacy of the information collected.

The participants discussed possible challenges to the rollout of a nationwide program, as well as strategies that might improve its success. The initial challenges are the assurance of data accuracy and prevention of identity theft. All administrative actions should provide clear guidelines on how to combat misuse and to safeguard privacy. A well-run system would assist both victims of identity fraud and law enforcement, encouraging compliance. More controversially, some participants considered a national identity database, similar to those in other OECD countries.

At the same time, some employers misuse the system and place workers, authorized and unauthorized alike, in a vulnerable position. The E-Verify and I-9 form can be

used to threaten workers who might report workplace violations. There have been incidences where employers have used E-Verify with retaliatory intent to undermine worker rights. Creating the right incentives for employers will remain important for effective worksite enforcement and to offset exploitation of the system. For workers, reforms should include protections for whistle-blowers. Employee should be able to remain on the job while contesting a TNC determination.

E-Verify will not automatically abolish the presence of all unauthorized workers in the labor force. Even given a widespread amnesty, unauthorized workers are not likely to disappear. Instead some employers will hire workers off-the-books or subcontract them from middlemen, other employers will simply take their entire operation underground. Additional measures will need to be taken to identify intentionally negligent employers.

The stepped up enforcement of labor laws will be necessary. When labor laws are weak or not enforced all workers are affected. The legal risk faced by unauthorized workers was heightened in 2002 when the Supreme Court limited worker protections in *Hoffman Plastic Compounds, Inc. versus the National Labor Relations Board (NLRB)*. And there are many cases that have demonstrated how immigration status can undermine worker rights. Employers may use the threat of an I-9 audit or identify unauthorized workers to ICE as a way of circumventing their legal obligations to all workers. And employees are sometimes misclassified as independent contractors.

There are strategies that would reduce workers' vulnerabilities. In several European countries the ultimate employer, the end-users, are held responsible for workers' rights and status. The U.S. Senate's last comprehensive reform legislation (S.744 passed in 2013) addressed the adverse consequences of the Hoffman case and provided whistle-blower protection in disputes. California requires that companies verify that labor standards are upheld by their suppliers. One expert argued that proactive education campaigns could also improve compliance.

The enforcement challenge must also address the overlapping responsibilities of ICE and the national and state labor departments. A good example is found in the recent Memorandum of Understanding (MOU) between the US Department of Labor and ICE that states that they will respect the labor rights of all workers, regardless of immigration status. When labor laws are properly enforced it lessens demand for unauthorized workers.

The enforcement of labor law can and should play a key role in the enforcement of U.S. immigration laws, to protect the rights of all workers, but also to counter demand for unauthorized workers. Authorized immigrant workers and native workers alike benefit from worksite enforcement of both work status and rights.

INTRODUCTION

The Institute of the Study of Migration at Georgetown University hosted an expert round table to address worksite enforcement within the current debate over immigration reform. National and international experts in the field of immigration policy discussed the impact of both work authorization and labor law enforcement for workers, employers, and government agencies. The roundtable participants followed Chatham House rules and there are no attributions to individuals in this report.

EMPLOYMENT VERIFICATION CHALLENGES

The Immigration Reform and Control Act of 1986 (IRCA) implemented employer sanctions for employers who fail to document or knowingly hire unauthorized workers. That law introduced the I-9 form to record the documents used as proof of identity. Critics have long questioned the effectiveness of the I-9, claiming that it is easy for aliens to use fraudulent documents. And the I-9 does not provide employers a reliable means of verifying that documents are real.

With introduction of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, the electronic employment verification (E-Verify) process was piloted as a supplement to the I-9 form. Most employers today use E-Verify on a voluntary basis, though contractors in some states are required to use it, and last year about one-third of all new hires were cleared through E-Verify. It is primarily used by companies with lower skilled workers, such as the service industry, the staffing industry, and public employers. Most Congressional debates and legislation entertain mandatory E-Verify on a nationwide basis. While E-Verify system has become more effective since it was introduced by the IIRIRA, many experts caution that E-Verify may not be ready for nation-wide implementation.

A work authorization system must be functional, effective and simple in order to best ensure wide-scale use. The current E-Verify system has not offset the continued requirement for employers to keep employee work authorization forms, i.e. the I-9 form, which adds to the costs of employer compliance. Many experts regard the I-9 form as ineffective. Perhaps 75 percent of unauthorized workers provide fraudulent authorizing documents. The E-Verify system has not yet eliminated fraud or identity theft, though some experts argued that the I-9 form provides a valuable tool for establishing authentic documentation.

Policymakers should consider how the system meets employers' needs and how to efficiently enforce sanctions. The reliable identification of work authorization status is of concern to employers. Most employers act in good faith and do what they can to ensure the authenticity of the documents provided by employees. Reducing risk matters and employers tend to respond favourably to E-Verify, but that acceptance might lessen if an E-Verify system or nationwide enforcement creates new risks. In the past, employers who are E-Verify and I-9 compliant have not been compensated for their loss when employees are removed after worksite raids.

Perhaps the greatest problem with E-Verify is the Tentative Nonconfirmation (TNC) that results when the information entered for new hires does not initially match the electronic records. That does not necessarily mean that the employee is not work authorized, that can only be finally confirmed after establishing a (mis-) match between the worker's name and alien or social security numbers. Evaluations of E-Verify find substantial improvements over time, lower rates of TNCs and improved resolution of nonconfirmations, though the Government Accountability Office (GAO) has published criticisms.¹

False negative TNC determinations have severe consequences for undeserving workers; misidentified TNCs can lose income while waiting to resolve errors or eventually lose their jobs. Even legal immigrant workers experience incorrect TNCs because their SSNs are not updated on a timely basis with the Social Security Administration (SSA). Immigrants who are newly naturalized do not have automatically updated data at DHS. The successful implementation of national mandatory E-Verify will require interagency coordination between the Social Security Administration and Homeland Security. Monitoring and updating the SSA database; and improved coordination between the two agencies will improve E-Verify and reduce misidentification.

Although there have been improvements, the number of adversely affected workers is still rather high. What is more, E-Verify can incorrectly flag a new hire as authorized when they are not (false positive) because they use fraudulent social security numbers and names. To address fraudulent identity, the experts were divided between biometrics and knowledge-based identification systems. Each strategy provides advantages and disadvantages. Long considered the primary option, biometrics are promising and widely used in other contexts. Some experts questioned, nevertheless, whether it is feasible to implement biometrics on a national scale. In the past such systems have proven to be flawed and the costs involved are substantial. What is more, the experts agreed that a biometric system would limit, but not fully prevent identity fraud.

¹ Reports by the GAO and Westat can be found on the USCIS website "E-Verify Program Reports" <http://www.uscis.gov/e-verify/about-program/e-verify-program-reports>

A knowledge-based employee verification system, where information provided by the worker is compared against a database that collects third-party information from credit companies and public records, could be an alternative. In 2011, the USCIS introduced a self-check knowledge-based identification system for workers. But there are ample challenges, particularly with the accuracy and privacy of the information collected. As the information is collected from a third party, it is difficult for the worker to verify the information until after his or her status has been determined. Privacy becomes an issue as personal information is shared between third parties without the authorization and verification of the worker.

Planning is required to meet the demand for work verification if the program were to go nationwide. The participants discussed possible challenges to the rollout of a nationwide program, as well as strategies that might improve its success. The initial challenges are the assurance of data accuracy and prevention of identity theft. Both biometrics and knowledge based systems have pros and cons, so additional methods should be considered. For example, algorithms might flag outlier inquiries using the same name, social security number, and date of birth, but resident in different states.

It is important that a nationwide E-Verify program be transparent to be effective. All administrative actions should provide clear guidelines on how to combat misuse and safeguard privacy. A well run system would assist both victims of identity fraud and law enforcement, encouraging compliance. More controversially, some participants considered that a national identity database, similar to those in other OECD countries, could benefit the United States because of the reliability of information on identity.

There are many challenges to effective worksite enforcement beyond better means of establishing identity. Improvements will require interagency cooperation and improved IT systems. The experts at this roundtable, however, were very concerned that worksite enforcement not infringe on the rights of workers. One expert argued that the best way to effectively balance the risk of misidentification, while ensuring that authorized workers have full access to the labor market, is to ensure that employees know their rights. If all employees are made aware of how E-Verify works and their right to appeal, fewer incorrect TNC designations would be left uncontested. By encouraging workers to exercise their rights, and continually updating the databases, the effectiveness of E-Verify should improve.

WORKSITE ENFORCEMENT CHALLENGES

Some employers misuse the system and place workers, authorized and unauthorized alike, in a vulnerable position. The E-Verify and I-9 form can be used to threaten workers who might report workplace violations. There have been incidences where employers have used E-Verify with retaliatory intent to undermine worker rights.

Some employers begin using E-Verify only after a labor dispute to discipline their workforce. E-Verify should not be used as a tool to suppress the labor rights of any worker because this emboldens dishonest employers and undercuts the workplace for legal residents and citizens.

Creating the right incentives for employers will remain important for effective worksite enforcement, and to offset exploitation of the system. The public sector plays an important role in E-Verify, particularly through the government contracting process. Bids by companies that already use E-Verify might be awarded priority, creating an incentive for companies to participate. The Government Accountability Office (GAO) recently moderated a dispute between two companies bidding for a government contract: one employers' non-use of E-verify led to an appeal by the losing employer that had initially used E-Verify. The appeal was not successful, but the first employer adopted E-Verify. Employers respond to incentives.

For workers, future reforms, whether legislative or administrative, should include protections for whistle-blowers. An employee's ability to report labor violations should not be compromised, regardless of their legal status. Reform should allow an employee to remain on the job while contesting a TNC determination. This protects authorized workers and acts as a protection for workers that have their identity stolen.

Many participants expressed concerned with the vulnerability of legally resident foreign-born workers to false TNC determinations. They argued that successful enforcement requires that unauthorized workers have a path to legalization and later to citizenship. If large numbers of unauthorized workers remain, that increases risk for employers and creates a potentially uneven playing field for employers who skirt employer sanctions law. One participant noted that many companies will choose to risk fines and penalties in order to keep their workforce intact.

To ensure a successful national rollout, Congress and DHS should continuously monitor and evaluate the E-Verify system. Meeting participants were in broad agreement that mandatory E-Verify must protect workers' rights. Innovations in enforcement should be welcome including random investigations of employer records. At the same time, there is a high rate of satisfaction among employers with E-Verify; it provides managers with a sense of security. A renewed effort to enforce US immigration laws in the workplace can extend that sense of security to the public and elected officials.

Mandating E-Verify will not automatically abolish the demand for, or presence of, all unauthorized workers in the labor force. Even if amnesty effectively clears workforces of currently unauthorized workers, unauthorized workers are not likely to disappear. Instead some employers will hire workers off-the-books or subcontract them from middlemen, other employers will simply take their entire operation underground. Additional measures will need to be taken to identify intentionally

negligent employers. When employers move underground it becomes increasingly difficult to ensure that labor standards are upheld. A failure to address the segmented employment of unauthorized workers could lead to abusive working conditions and also create unfair competition for compliant employers.

LABOR LAW ENFORCEMENT

Stepped up enforcement of America's labor laws that apply to all workers will be a necessary adjunct to enforcement of employer sanctions. Labor and immigration law overlap. Unauthorized workers are vulnerable to abuse of wage and overtime payment; and they abet conditions that may foster the abuse of co-workers who are authorized. When labor laws are weak or not properly enforced, all workers are affected regardless of legal status. Government data and special surveys find high percentages of all workers in low-wage jobs are not paid a minimum wage and overtime. Unauthorized workers may be especially likely to be underpaid and their status creates opportunities for employers to penalize their workforces.

The legal risk faced by unauthorized workers was heightened in 2002 when the Supreme Court limited worker protections for unauthorized workers. In *Hoffman Plastic Compounds, Inc. versus the National Labor Relations Board (NLRB)* the Court established that unauthorized workers may not be awarded back pay. This has made unauthorized workers particularly vulnerable as they are likely to work jobs where employers fail to meet their legal obligations. The Hoffman decision limits the worker's right to seek legal assistance on their right to minimum wage or overtime payment, permitting some employers to exploit unauthorized workers.

A number of cases have demonstrated how immigration status can undermine worker rights. In one well-known case ICE initially issued an I-9 audit notice against Palermo Pizza which, in turn, notified workers who had just signed a petition to unionize that their authorization status was to be re-verified. While ICE suspended its audit due to complaints that Palermo was undermining employee efforts to unionize, the company fired many workers in retaliation for their attempt to form the union. The NLRB later confirmed that nine of the workers had been unlawfully fired. Employers may use the threat of an I-9 audit or identify unauthorized workers to ICE as a way of circumventing their legal obligations to pay all workers fairly and permit union activities.

At the same time, there have been cases where large numbers of workers lost their jobs as a consequence of ICE enforcement efforts. Some experts argue that the consequences on workers of losing income and employment outweigh the employer's burden of having to find new workers. Others note that the displacement of large numbers of workers adversely affects employers as well. In the case of Agriprocessor,

which was one of the biggest suppliers of kosher meat, a 2008 worksite raid ultimately resulted in the company terminating a large majority of the company's workers. Along with other legal violations, these actions resulted in Agriprocessor selling its plant at auction a year later. Sanctions compliance is in the interest of employers.

Individuals who should be classified as employees are sometimes misclassified as independent contractors. While some misclassifications are made in good faith, some employers use it to avoid their obligations to employees.

There are strategies that would reduce workers' vulnerabilities. In several European countries the ultimate employer, the end-users, are held responsible for the labor rights and immigration status of workers. The U.S. Senate's last comprehensive reform legislation (S.744 passed in 2013) recognized the need to protect workers. It addressed the adverse consequences of the Hoffman case and provided whistle-blower protection in labor disputes. It made it possible for U-visas to be issued to victims of immigration extortion. California in the meantime has passed laws to protect unauthorized workers from employer threats, providing a degree of protection to vulnerable employees. It has taken additional steps, part way to the European practice, requiring that companies verify that labor standards are upheld by their direct suppliers. One expert argued that proactive education campaigns, making employers aware of their responsibilities, could also improve compliance.

The enforcement challenge must also address the overlapping responsibilities of ICE and the national and state labor departments. A good example is found in the recent Memorandum of Understanding (MOU) between the US Department of Labor and ICE that states that they will respect the labor rights of all workers, regardless of immigration status. In addition, the MOU draws jurisdiction boundaries between the two agencies, stating that ICE will not conduct worksite enforcement activities when there is a pending labor dispute. Cooperation between ICE and labor inspectors best safeguards all workers. When labor laws are properly enforced it lessens demand for unauthorized workers and immigration law is more likely to be upheld.

While the experts agreed on stepping up enforcement of labor laws, and implementing better stratagems for coordinating efforts across agencies, they acknowledged that it will be costly. For example, 2013 Senate legislation S.744 did not designate funding for labor law enforcement, despite addressing some of the overlaps between labor and immigration laws. In theory, labor law enforcement could pay for itself through fines; however, levying of fines to support inspections is problematic. Fines are necessary to deter employers' violations of workers' labor rights. But to avoid improper use of fines, perhaps fees paid for services such as foreign labor certification would be a better source of supplemental funding. Some of the funding set aside for border security ought to be considered for labor law enforcement.

CONCLUSIONS

Reform to immigration laws must ensure a just system and a labor market that provides protection for workers and their employers. This can best be achieved through a multifaceted approach to worksite enforcement and immigration reform. While not a central part of this roundtable discussion, many experts view temporary work visas as an integral reform. Legal temporary workers would meet the demand, to which unauthorized workers have hitherto responded, and which will remain in the future. The required size of temporary work programs is, however, unknown and that challenge is addressed by other ISIM roundtable discussions.

Experts at this roundtable briefly debated how reforms should address the existing unauthorized workforce. Removing all unauthorized workers would require near-impossible logistical oversight, and would also strongly disrupt the economy. Instead, some participants argued that legal temporary work visas could be awarded to unauthorized workers who should be able to opt after time for legal permanent status. Others argued for stepped-up employer sanctions of worksites and removals, contending that no less is needed for the integrity of the immigration system and to protect the American worker. Regardless, clearing the workforce of unauthorized workers would substantially enhance any future worksite enforcement regime.

Due to the serious consequences of erroneous tentative non-confirmation (TNC) determinations, it is important to minimize false negative or false positive TNC determinations. The discussion on E-Verify emphasized ways to address those issues. Some argued that before nationwide mandatory E-Verify, there should be an assessment of the relevance of the I-9 form and its continued role, ways to increase transparency, methods to address data accuracy and privacy, and the identification of best practices. In anticipation of those challenges, it would be crucial to have a practical plan of implementation including flexible rollout with the ability for companies to phase in compliance. And there is a need for increased and ongoing monitoring and evaluation.

Finally, there was some consensus that the significant challenges to worksite enforcement incorporate both immigration and labor law. The enforcement of labor law can and should play a key role in the enforcement of U.S. immigration laws, to protect the rights of all workers but also to counter demand for unauthorized workers. Authorized immigrant workers and native workers alike benefit from worksite enforcement of both work status and rights.



*Institute for the Study of International Migration,
Georgetown University*

Enforcement in the Workplace: Challenges, Past and Present

WEDNESDAY, NOVEMBER 20, 2013

Georgetown University

School of Continuing Studies, Room C-228

640 Massachusetts Ave NW, Washington, DC

This invitation-only roundtable will address the implementation and impact of worksite enforcement for workers, employers and government agencies. Comprehensive immigration reform legislation is likely to strengthen enforcement against the hiring of unauthorized workers. It will also generate a need for the enforcement of workers' rights. This meeting will focus on both work authorization and the enforcement of labor laws to control future unauthorized work and safeguard the conditions of domestic workers.

MEETING AGENDA

8:15 AM – 9:00 AM Continental Breakfast

9:00 AM – 9:15 AM Introductions

9:15 AM – 10:45 AM Employer Sanctions Employment Verification

Employers have checked worker authorization since IRCA, but the methods have been faulty and national e-verification is championed as the solution. This session will examine the evidence about e-verify; privacy issues; identity and the use of biometrics; costs for developing a workable system; and comparisons with systems in other countries.

11:00 AM – 12:30 PM Labor Law Compliance

A stepped up work authorization regime will lead some businesses to move into the shadows. Past commissions and President Obama today have recommended stepping up labor law enforcement. This session will address the enforcement of labor laws by national and state Departments of Labor, what would be required to step up enforcement, lessons from MOU agreements between DHS/DOL, and lessons from other countries.

12:30 PM – 1:30 PM Summary Discussion: Working Lunch

PROVISIONAL LIST OF ATTENDING EXPERTS

Jason Ackleson, US Citizenship and Immigration Services
Ana Avendano, AFL-CIO, Special Assistant to the President on Immigration
Andorra Bruno, Congressional Research Service
Jonathan Chaloff, Organisation for Economic Co-operation and Development
Daniel Costa, Economic Policy Institute
Lucas Guttentag, Yale University
Tim Harrison, Migration Advisory Committee
Robert C. Hill, Hill Visa Law
Tamar Jacoby, Immigration Works USA
Stephen Legomsky, Washington University School of Law
Kathy Lotspeich, US Department of Homeland Security
B. Lindsay Lowell, ISIM, Georgetown University
Philip Martin, University of California at Davis
Susan Martin, ISIM, Georgetown University
Michael Martin, University of Maryland
Natasha McCann, USCIS, Office of Policy & Strategy
Joseph McCartin, Georgetown University
Mark Miller, University of Delaware
Tyler Moran, White House Domestic Policy Council
Ann Morse, National Conference of State Legislatures
David North, Center for Immigration Studies
Rebecca Peters, Council on Global Immigration
Lisa Roney, Independent Immigration Consultant
Marc R. Rosenblum, Congressional Research Service
Patrick Shen, Fragomen, Del Rey, Bernsen & Loewy, LLP
Emily Tulli, National Immigration Law Center
Ruth Wasem, Congressional Research Service
Michele Waslin, Pew Charitable Trusts