

B-VERIFY: TRANSFORMING E-VERIFY INTO A BIOMETRIC EMPLOYMENT VERIFICATION SYSTEM

*Lora L. Ries**

INTRODUCTION	272
I. 1986 IMMIGRATION REFORM AND CONTROL ACT	274
II. 1996 ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT	277
A. <i>How E-Verify Works</i>	278
B. <i>Improvements and Remaining Challenges of E- Verify</i>	283
C. <i>Mandatory Use and Contractors</i>	288
III. COMPREHENSIVE IMMIGRATION REFORM	295
A. <i>2006 Comprehensive Immigration Reform</i>	295
B. <i>2007 Comprehensive Immigration Reform</i>	297
C. <i>Alternatives to E-Verify</i>	299
D. <i>Going Biometric</i>	302
1. <i>Model One: Biometric Card</i>	304
2. <i>Model Two: Central Database</i>	308
E. <i>The Path Forward: Improve E-Verify and Design B- Verify</i>	310
CONCLUSION	319

* Lora L. Ries, Senior Counsel, Monument Policy Group, LLC, Washington, D.C.

INTRODUCTION

The United States has experienced illegal immigration as a problem of national attention since the 1970s. Congress has tried to combat the problem through major, but periodic, legislation for nearly as long. In the early 1980s, experts identified employment as the main incentive for illegal immigration.¹ Accordingly, in 1986, Congress passed legislation making it unlawful to knowingly hire illegal immigrant workers.² The legislation was very difficult for employers to properly administer, however, and illegal immigrants continued to obtain employment with relative ease. Congress again passed sweeping immigration legislation in 1996, requiring the federal government to pilot test employment verification systems to strengthen immigration enforcement.³ During the past thirteen years, the Basic Pilot program, now known as “E-Verify,” expanded from five to fifty states, became permanent, underwent several improvements, and is now a well-respected, widely used program, albeit with important remaining challenges. The program’s fundamental challenge is identity management—authenticating an individual’s true identity based on biographical information in underlying personal identification documents. As proponents of E-Verify seek to make the program mandatory nationwide and/or expand its use to verify current employees, this identity management challenge must first be overcome.

For the past four years, Congress has again tried to legislate a solution to the hiring of illegal immigrant workers, either through adjustments to E-Verify, or re-designing employment verification altogether. Lawmakers and advocates from across the immigration policy spectrum have recognized that electronic employment verification is the key to successful immigration enforcement. As a result, E-Verify has become the platform to not only prevent illegal immigration, but to reform many of this nation’s immigration policies. Congress tried to enact “comprehensive immigration reform” (CIR) in 2006 and again in

¹ See *Plyer v. Doe*, 457 U.S. 202, 228 (1982).

² Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 274A(a)(1)(A), 100 Stat. 3359, 3360; *E-Verify: Challenges & Opportunities: Hearing on E-Verify Before the Subcomm. on Government Management, Organization & Procurement of the H.R. Comm. on Oversight & Government Reform*, 111th Cong. (2009) [hereinafter *E-Verify Hearing*] (statement of Jena Baker McNeill, Heritage Foundation).

³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

2007.⁴ Although Congress was unsuccessful both times, Congress and President Barack Obama have expressed their commitment to CIR and are willing to pursue passing a bill this year.⁵ Congress now has a third opportunity to design an employment verification system that is accurate and reliable.⁶ Members of Congress, think tanks, and organizations have proposed a variety of solutions, some of which include the introduction of biometrics into the verification system.

As the federal government has been making improvements to the 1996-based employment verification system over the past thirteen years, biometric technology has advanced radically. The use of biometrics in American society is now much more accepted, common, and appreciated than in years past. In addition, the remaining challenges of the 1996-based system, particularly fraud, are well-understood and cannot be sufficiently overcome with marginal improvements while continuing to rely on a system of paper identification, documentation, and authorization. If Congress is going to pass legislation designing the next generation of employment verification, the design must include a reliable and accurate form of identity management. To do so, Congress should first address biographic identification data before requiring that a biometric be linked to an employee's identity within the employment verification system. A biometric employment eligibility verification system can shift much of the burden and decision making from the employers to the federal government, creating a simpler and more accurate system for employers to use, while also eliminating the discrimination issues that emerged over the past two decades.

Section I of this article will provide a history of Congress' steps toward an employee verification system. Section II describes Congress' second major legislation addressing employment verification, from which began the Basic Pilot program that

⁴ See Editorial, *Immigration's Lost Year*, N.Y. TIMES, Sept. 19, 2006, at A24; Robert Pear & Carl Hulse, *Immigrant Bill Dies in the Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1.

⁵ See Ginger Thompson & David Herszenhorn, *Obama Set for First, Tentative Step Today on Immigration Overhaul*, N.Y. TIMES, June 25, 2009, at A16.

⁶ See *Ensuring a Legal Workforce: What Changes Should Be Made to Our Current Employment Verification System?: Hearing Before the Subcomm. on Immigration, Refugees & Border Security of the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Ensuring a Legal Workforce Hearing*] (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (stating “[c]omprehensive reform will fail if the next generation of employment verification—whether it is E-Verify or some other variation—is not accurate and reliable”).

became today's E-Verify. This section will explain how E-Verify works, noting the remaining challenges and areas for improvement. It will also discuss the related issue of mandatory verification, including the new requirement for federal contractor verification. Section III explains Congress' on-going third attempt to improve employment verification through legislation, including the provisions in the 2006 and 2007 CIR bills, and other alternatives to E-Verify proposed by legislators, think tanks, and organizations. Section III will also discuss biometrics, the two biometric employment verification models that have materialized in the public debate, and the requirements for the next generation of E-Verify, here named "B-Verify." Finally, this article will advocate for further congressional commitment to E-Verify, including added improvements to the program, while Congress and the Department of Homeland Security (DHS) design the next generation of E-Verify, adding biometrics to the program.

I. 1986 IMMIGRATION REFORM AND CONTROL ACT

Many pull factors attract immigrants to the United States, but experts have identified employment as one of the strongest.⁷ While some prospective immigrants choose to wait outside the United States until a work visa is available to enter the country lawfully, more choose not to wait and either enter the United States without inspection, or enter with a temporary visa and unlawfully remain in the United States after the visa expires. As a result, for decades, the United States has had millions of illegal immigrants working here. In the early 1980s, to prevent future illegal immigration into the United States, Congress decided to prohibit employers from knowingly hiring illegal immigrants.

The Senate passed an employer sanctions bill in 1982 that would have created a national Identity Data (ID) card to demonstrate both identity and work authorization for those lawfully in the country.⁸ In 1984, both the House and Senate passed employer sanctions bills that would have created a national call-in system to verify work authorization.⁹ In 1986,

⁷ See *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation).

⁸ Marc Rosenblum, *The Basics of E-Verify, the US Employer Verification System*, MIGRATION INFO. SOURCE, Apr. 30, 2009, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=726>. The House leaders, however, failed to bring the bill to the House floor for a vote. *Id.*

⁹ *Id.* House and Senate conferees could not work out differences in the bill's

when the illegal alien population was estimated to be 3.2 million,¹⁰ Congress passed the Immigration Reform and Control Act (IRCA), in which it provided a legalization program for illegal immigrants already in the country.¹¹ Also, to combat future illegal immigration, IRCA made it unlawful for individuals and entities to knowingly hire, continue to employ, or recruit or refer for a fee unauthorized workers.¹²

With respect to employment authorization, IRCA established a two-prong approach: (1) an employment verification process, through which employers verify all newly hired employees' work eligibility; and (2) a sanctions program for fining and prosecuting employers who do not comply with the Act.¹³ For the first time, employers were required to examine one or two documents for each new employee to confirm the employee's identity and to verify that the employee was authorized to work in the United States.¹⁴ Because employers and civil libertarians successfully lobbied to weaken the bill's verification language, IRCA contained neither the national ID card, nor the call-in system from prior bills.¹⁵ IRCA compliance is based on the Employment Eligibility Verification Form (Form I-9), on which employees attest that they are authorized to work in the United States and the employers record information from the identification documents presented to them by the employee.¹⁶ The Form I-9 is not filed with any federal agency, but rather employers must retain the form for a set period of time and make them available for inspection by federal officials.

The Form I-9 process has proven to be extremely unreliable because unauthorized immigrants can easily obtain fraudulent identities and well-counterfeited work authorization documents. Under § 274A of the Immigration & Nationality Act (INA), the standard of review for employers examining documents is: whether a "document reasonably appears on its face to be

legalization provisions and the bill was not reported out of conference committee. *Id.*

¹⁰ RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERV., UNAUTHORIZED ALIENS IN THE UNITED STATES: ESTIMATES SINCE 1986, at 2 (2009), http://assets.opencrs.com/rpts/RL33874_20090825.pdf.

¹¹ Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3994 (1986) (codified at Immigration & Nationality Act (INA) § 245A, 8 U.S.C. § 1255a (2006)).

¹² INA § 274A(a)(1)–(2), 8 U.S.C. § 1324a(a)(1)–(2).

¹³ INA § 274A(b), (f), 8 U.S.C. § 1324a(b), (f).

¹⁴ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration); Rosenblum, *supra* note 8.

¹⁵ Rosenblum, *supra* note 8.

¹⁶ *Id.*

genuine.”¹⁷ Employers are in a Catch-22 because while they are required to review the documents, they are not document experts. At the same time, IRCA also undermines their ability to do a thorough document examination.¹⁸ To prevent discrimination and to facilitate the I-9 process for lawful workers, IRCA established a lengthy list of acceptable documents to prove work authorization.¹⁹ The law prohibits employers from scrutinizing the authenticity of the documents presented by the employee.²⁰ Not surprisingly, good-faith employers seeking to comply with the law are often fooled by fraudulent documents. In addition, bad-faith employers who may know or suspect the employee is not work-authorized may go through the motions of reviewing the employee’s documents to safeguard themselves from employer sanctions.²¹ As a result, document fraud has been undermining immigration enforcement in the workplace since IRCA took effect.²²

In the Immigration Act of 1990, Congress created and authorized the U.S. Commission on Immigration Reform to review and evaluate the implementation and impact of U.S. immigration policy.²³ The bipartisan Commission concluded in its 1994 report that the single most important step to reduce illegal

¹⁷ INA § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A) (“A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.”).

¹⁸ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (relaying the Hobson’s choice employers find themselves in: risk employer sanctions by Immigration and Customs Enforcement (ICE) if they accept the document, or face a discrimination lawsuit if they reject the document).

¹⁹ See Rosenblum, *supra* note 8. Currently, a new employee can present a combination of twenty-six different documents. *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services).

²⁰ INA § 274A(a)(6), 8 U.S.C. § 1324b(a)(6).

²¹ See Rosenblum, *supra* note 8 (explaining that the common use of fraudulent documents caused one out of five U.S. employers to selectively screen identity documents or lower wages based on a worker’s national origin).

²² See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute); *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation) (testifying that the prohibition of hiring illegal workers was nearly meaningless).

²³ Pub. L. No. 101-649, § 141(c)(1)(B), 104 Stat. 4978, 5001–02.

immigration was development of an electronic eligibility verification system (EEVS).²⁴ Specifically, the Commission recommended a computerized registry using the Social Security Administration (SSA) and the Immigration and Naturalization Service (INS) data based on social security numbers (SSN).²⁵ The Commission believed such a system would both strengthen worksite enforcement and prevent discrimination based on national origin.²⁶

II. 1996 ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which established the Basic Pilot program, now known as E-Verify, to provide an effective, nondiscriminatory employment eligibility verification process.²⁷ With the Basic Pilot program, employers were to verify the immigration status and work authorization of new hires against INS and SSA databases, as the U.S. Commission on Immigration Reform had suggested.²⁸

IIRIRA required that the voluntary Basic Pilot be implemented in at least five of the seven states with the highest estimated illegal immigrant population in the United States.²⁹ The five states selected were California, Florida, Illinois, New York, and Texas.³⁰ Nebraska was added in 1999 to assist employers in the

²⁴ See U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRATION POLICY: REPORT TO CONGRESS 113 (1997), <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf>; Rosenblum, *supra* note 8.

²⁵ U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 24, at 114. INS was dismantled when Congress created the Department of Homeland Security (DHS) in 2003. 6 U.S.C. § 291 (2006). Within DHS, the agency responsible for employment verification is United States Citizenship and Immigration Services (USCIS). § 271(a)–(b).

²⁶ U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 24, at 114; Rosenblum, *supra* note 8.

²⁷ Pub. L. No. 104-208, § 401(c), 110 Stat. 3009-546, 3009-655 to -656; see JANICE L. KEPHART, CTR. FOR IMMIGRATION STUDIES, IF IT'S FIXED, DON'T BREAK IT: MOVING FORWARD WITH E-VERIFY 4 (2008), <http://www.cis.org/articles/2008/back1108.pdf>; see also *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration); Rosenblum, *supra* note 8 (noting that IIRIRA established three pilot electronic verification programs, but only the Basic Pilot has continued).

²⁸ IIRIRA § 404(c), 110 Stat. at 3009-664; see Rosenblum, *supra* note 8.

²⁹ IIRIRA § 401, 110 Stat. at 3009-655 to -656.

³⁰ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration).

meat packing industry.³¹ Employers in these six states were also permitted to use the Basic Pilot for new hires at their work sites located in other states.³²

Congress has repeatedly extended authorization for the Basic Pilot and in 2003, expanded the voluntary program to include employers in all fifty states.³³ In 2004, the Basic Pilot became a Web-based program.³⁴ The Bush Administration advocated to “expand employer enrollment in the program beginning in July 2006, and changed the name to E-Verify in 2007 . . . to rebrand the program and raise its profile.”³⁵ Congress has continued to renew the program, but recently for shorter periods of time, raising the question of whether some in Congress are using the popular E-Verify program as “a bargaining chip” to achieve other immigration goals, namely a legalization program.³⁶ Fortunately, in October 2009, Congress extended E-Verify authorization for three years.³⁷

A. How E-Verify Works

Currently, U.S. Citizenship and Immigration Services (USCIS), in conjunction with SSA, operates the voluntary electronic employment verification program.³⁸ Employers register with

³¹ *Id.*

³² *Id.*

³³ Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 2–3, 117 Stat. 1944, 1944–45; *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration); *see* KEPHART, *supra* note 27, at 4.

³⁴ KEPHART, *supra* note 27, at 4.

³⁵ Rosenblum, *supra* note 8; *see* CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, U.S. DEP’T OF HOMELAND SEC., OBSERVATIONS ON THE E-VERIFY EXPERIENCE IN ARIZONA & RECOMMENDED CUSTOMER SERVICE ENHANCEMENTS 2 (2008), http://www.dhs.gov/xlibrary/assets/cisomb_everify_recommendation_2008-12-22.pdf.

³⁶ *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies).

³⁷ *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2141, 2177 (2009). The U.S. House of Representatives included funding and a two-year authorization extension for E-Verify in its version of the fiscal year 2010 DHS appropriations bill. H.R. 2892, 111th Cong. § 545 (2009). The Senate passed an amendment that would permanently re-authorize E-Verify. S. Amend. 1371 to H.R. 2892, 155 Cong. Rec. S7200 (daily ed. July 7, 2009). The three-year extension compromise was reached in Conference Committee.

³⁸ *Hearing on Employment Eligibility Verification Systems and the Potential Impacts on SSA’s Ability to Serve Retirees, People with Disabilities, and Workers Before the Subcomm. on Social Security of the H.R. Comm. on Ways & Means*, 110th Cong. (2008) [hereinafter *Hearing on EEVS*] (statement of Richard M.

USCIS' E-Verify to use the free, automated, Web-based system to verify a newly hired employee's SSN and work authorization status.³⁹ The employer enters information from the new employee's Form I-9: name, birth date, SSN, and for non-citizens, the Alien ID number (A number), into the secure Web-based system.⁴⁰ "The system automatically searches for the information in the two main databases containing information about work-eligible US citizens and aliens: the SSA's Numident and USCIS' "Verification Information System (VIS)."⁴¹ For employees stating that they are U.S. citizens, SSA confirms citizenship status for DHS, allowing USCIS to confirm work authorization.⁴² If the SSA cannot confirm U.S. citizenship of a naturalized citizen, USCIS will verify naturalization status, and accordingly, work authorization.⁴³ For non-citizens, if there is a match with the more than 455 million SSA records, USCIS then determines the current work authorization status using more than eighty million DHS immigration records.⁴⁴

"Within three to five seconds, the E-Verify system notifies the employer of the verification result," indicating whether the new hire is work-authorized.⁴⁵ E-Verify returns one of the following

Stana, U.S. Government Accountability Office).

³⁹ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration); *see id.* (statement of Janice Kephart, Center for Immigration Studies) (reporting that, "[enrollment] in E-Verify and signing the E-Verify Memorandum of Understanding takes about 10 minutes and [it] can be e-signed"); KEPHART, *supra* note 27, at 5, 8 (stating, contrary to other claims, the initial cost of setting up E-Verify would cost employers less than \$100). Also, the USCIS has "replaced paper-based instructional materials with an online training manual that requires employers to pass a test on E-Verify procedures before finalizing their enrollment in the program." Rosenblum, *supra* note 8.

⁴⁰ Rosenblum, *supra* note 8. When studying Arizona's mandatory use of E-Verify, the Citizenship and Immigration Services Ombudsman found that many employers wondered why E-Verify does not negate the requirement for employers to complete a paper Form I-9. CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 8.

⁴¹ *See* Rosenblum, *supra* note 8; *see also* Notice of Alteration, 73 Fed. Reg. 75,445 (Dep't of Homeland Sec. Dec. 11, 2008). VIS is actually a compilation of several different DHS databases. Notice of Alteration, 73 Fed. Reg. at 75,446. "When SSA assigns a Social Security number, it creates a Numident file, or master record, of the number and the individual to whom it is assigned." *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation).

⁴² *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration).

⁴³ *Id.*

⁴⁴ *See id.*; *id.* (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); Rosenblum, *supra* note 8.

⁴⁵ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security

system responses: (1) Employment Authorized; (2) SSA Tentative Non-Confirmation; (3) DHS Tentative Non-Confirmation; (4) DHS Verification in Process; or (5) DHS Case in Continuance.⁴⁶ If a non-citizen's data is not immediately matched, USCIS verification agents conduct a secondary, manual search of the component databases.⁴⁷ In these cases, verification takes one to three days.⁴⁸ If the new hire's information cannot be confirmed immediately or after a manual search, E-Verify sends the employer a tentative non-confirmation (TNC) and instructions for how the employee may appeal the TNC.⁴⁹ The employer must then notify the employee of the TNC and give the employee an opportunity to contest the finding.⁵⁰ If the new hire contests the TNC, he or she has eight workdays to contact a SSA field office or DHS office with the required documents to correct the record.⁵¹ If the record has been corrected, the appropriate agency provides a final work authorization determination within two business days.⁵² The employer must check the E-Verify system a second time to determine whether the TNC has been resolved.⁵³ "If a worker is nonconfirmed after appealing, or if the worker fails to appeal within eight workdays, the employer receives a final nonconfirmation."⁵⁴ In a small number of cases, the USCIS verification process exceeds ten days. When this occurs, the employer will receive a "DHS Case in Continuance" message in E-

Administration).

⁴⁶ CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 4.

⁴⁷ Rosenblum, *supra* note 8.

⁴⁸ *Id.* (noting that these cases accounted for about eight percent of foreign-born workers verified between 2006 and 2007).

⁴⁹ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration); Rosenblum, *supra* note 8.

⁵⁰ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration). Employers must follow specific procedures designed to protect employee rights during the verification process. Rosenblum, *supra* note 8. Employers may not fire a worker (except for cause) or suspend pay, training, or other privileges while the worker is appealing a TNC. *Id.*

⁵¹ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration).

⁵² CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 5.

⁵³ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration). SSA and DHS implemented the E-Verify SSA Tentative Non-confirmation Automated Response system (EV-STAR) in 2007, through which SSA field office representatives input actions taken to resolve a TNC directly into E-Verify. *Id.* The testimony further notes that, "[a]s a result, employers can now determine the status of pending cases by querying E-Verify." *Id.* Before EV-STAR, the employee carried paperwork from SSA back to the employer to resolve a TNC. *See id.*; Rosenblum, *supra* note 8.

⁵⁴ Rosenblum, *supra* note 8.

Verify.⁵⁵ The employer must check E-Verify a third time in these cases.⁵⁶ If the employer receives a final non-confirmation and does not fire the non-confirmed worker, the employer has a rebuttable presumption to be knowingly employing an unauthorized worker, and may be subject to employer sanctions.⁵⁷ No formal appeal process exists for an employee or an employer to appeal a final non-confirmation.⁵⁸

With respect to privacy, the personal information entered into E-Verify is the same information included on the Form I-9, which the employer completes for each employee. E-Verify does not permit employers to view SSA or other government agency information.⁵⁹ In addition, the federal government routinely collects similar information for income and FICA taxes.⁶⁰ The USCIS employees who operate E-Verify only have access to information submitted through E-Verify and the confirmation or non-confirmation of that submission.⁶¹ To protect employee privacy and ensure compliance with the Privacy Act, USCIS established a Privacy Branch within the E-Verify Program. This Branch conducts Privacy Threshold Analyses, Privacy Impact Assessments (PIAs), and develops System of Records Notices (SORNs), all of which promote transparency in the program.⁶²

Employer participation in the E-Verify Program has increased significantly since 2004.⁶³ This is partly due to a number of states

⁵⁵ CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 5.

⁵⁶ *Id.*

⁵⁷ Rosenblum, *supra* note 8.

⁵⁸ *Id.*

⁵⁹ *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship & Immigration Services); see U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE VERIFICATION INFORMATION SYSTEM 7 (2008), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cis_visupdate.pdf; U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE VERIFICATION INFORMATION SYSTEM: SUPPORTING VERIFICATION PROGRAMS 1 (2007), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf; Notice of Alteration, 74 Fed. Reg. 46,655 to 46,656 (Dep't of Transp. Sept. 10, 2009).

⁶³ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration) ("An average of 1,000 employers enroll each week and participation has more than doubled each fiscal year since 2007."); *id.* (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); see Rosenblum, *supra* note 8 (stating the "use of E-Verify more than tripled between 2006 and 2008 from 1.7 million to 6.6 million queries" and providing the number of businesses and firms enrolled in E-Verify by State). SSA designed its system to accommodate 60 million queries a year because U.S. employers hire about 60 million workers each year. *E-Verify Hearing*, *supra* note 2 (statement of David

enacting legislation that requires all or some of their employers in the state to use E-Verify.⁶⁴ Program growth is also due in large part to both the ease of the program and the greater confidence employers have that they are complying with the law using E-Verify as opposed to the paper Form I-9 process.⁶⁵ The most recent independent E-Verify evaluation found that the majority of queries entered by employers—approximately 96.9%—confirmed within seconds that the employee is authorized to work.⁶⁶ About 3.1% of the queries resulted in a mismatch or a TNC.⁶⁷ Of the 3.1% TNCs, 0.3% successfully contested the case.⁶⁸ The majority of SSA erroneous TNCs occur because employees' citizenship or other information, such as name changes, are not up to date in the SSA database, usually because individuals do not request

A. Rust, Social Security Administration).

⁶⁴ See *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies) (illustrating the number of employers that use E-Verify by state).

⁶⁵ "According to the 2007 independent Westat evaluation of E-Verify, '[m]ost employers found . . . [E-Verify] to be an effective and reliable tool for employment verification' and 96 percent strongly disagreed that E-Verify was a burden." *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); see *id.* (statement of Janice Kephart, Center for Immigration Studies) ("E-Verify is fast, efficient, and inexpensive for employers to use."). According to the 2007 Westat report, the cost to employers is \$100 or less in initial set-up costs for E-Verify and a similar amount annually to operate the system. *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies). Some, however, dispute claims that E-Verify is free and simple to manage. See *Hearing on EEVS*, *supra* note 38 (statement of Mitchell C. Laird, Pres., MCL Enterprises, Inc.) (testifying for the U.S. Chamber of Commerce about the related costs to use E-Verify); see also *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (explaining that "a new employee can present a combination of 26 different documents" and employers must familiarize themselves with different, complicated immigration statuses and which provide work authorization).

⁶⁶ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration). Westat, USCIS' independent evaluator, periodically analyzes E-Verify. *Id.* (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services). These percentages are based on statistics from October through December 2008. *Id.* USCIS expects the next independent evaluation to be submitted to USCIS by the end of the 2009 calendar year. *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Michael Aytes, U.S. Citizenship and Immigration Services).

⁶⁷ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services). When examining Arizona's mandatory use of E-Verify, the concern the Ombudsman heard most frequently from Arizona employers was that TNCs are sometimes issued for work-authorized employees. CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 5.

⁶⁸ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services).

these SSA updates.⁶⁹ The remaining 2.8% of the TNCs were found not work-authorized either in fact or because the employee chose not to contest, failed to follow the procedures to successfully contest, “or was unaware of the TNC or the opportunity to contest because the employer did not follow proper procedures.”⁷⁰

B. Improvements and Remaining Challenges of E-Verify

USCIS has made several improvements to the Basic Pilot/E-Verify, including reducing typographical errors,⁷¹ incorporating a photo screening tool for certain DHS and Department of State (DOS) data to combat certain types of document fraud,⁷² establishing a Monitoring and Compliance Branch to help employers use the program correctly, and permitting naturalized U.S. citizens to call a USCIS toll-free number to address citizen mismatches instead of physically going to an SSA office.⁷³ USCIS

⁶⁹ *Hearing on EEVS, supra* note 38 (statement of Richard M. Stana, U.S. Government Accountability Office); *E-Verify Hearing, supra* note 2 (statement of David A. Rust, Social Security Administration).

⁷⁰ *E-Verify Hearing, supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services). *But cf. id.* (statement of Janice Kephart, Center for Immigration Studies) (stating the fact that approximately 488,000 individuals receive a non-confirmation shows that E-Verify is doing its job).

⁷¹ Rosenblum, *supra* note 8.

⁷² Employers receive an electronic copy of the employee’s ID photo with confirmation of the employment authorization. Rosenblum, *supra* note 8. The employer can compare the electronic photo to the photo on the ID that the employee presents, allowing the employer to confirm that the worker is the same person to whom USCIS issued a document and authorized employment. *Id.* If the photo does not match, the employer is required to take further action, including sending a copy of the employee-provided photo ID to USCIS. CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 4. DHS signed a Memorandum of Agreement with the State Department in December 2008 to share passport and passport card data from State’s records. *E-Verify Hearing, supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services). USCIS began incorporating such data into E-Verify in February 2009 to verify citizenship status for citizens who present a passport or passport card during the Form I-9 process. *Id.*

⁷³ *E-Verify Hearing, supra* note 2 (statement of David A. Rust, Social Security Administration); Rosenblum, *supra* note 8. The 2007 Westat independent evaluation concluded that many authorized employees who overcame TNCs were newly naturalized citizens. *E-Verify Hearing, supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services). USCIS then added an automatic USCIS naturalization data check to E-Verify before issuing a citizenship-related TNC, which decreased this type of mismatch by nearly 40%. *Id.* With the addition of the USCIS toll-free telephone number for naturalized citizens, walk-in visits to SSA field offices for E-Verify citizenship mismatches have decreased and more than 90% of the citizenship mismatch calls are successfully resolved by USCIS as work-authorized. *Id.* The E-Verify priority for SSA is to reduce the need for employees to visit SSA field offices to resolve

also added the Integrated Border Inspection System (IBIS) to E-Verify in May 2008 to provide real-time arrival and departure information for non-citizens, reducing many mismatches that occur for newly arriving workers who begin work immediately after lawfully entering the country.⁷⁴

USCIS is pursuing additional improvements to E-Verify in the short term to both decrease erroneous TNCs and prevent fraud. For example, in fiscal year 2010, USCIS plans to “automatically verify international and exchange visitors through the incorporation of Immigration and Customs Enforcement’s (ICE) Student and Exchange Visitor Information System (SEVIS) data.”⁷⁵ Currently, the SEVIS database is checked manually by “immigration status verifiers” after a TNC is issued.⁷⁶ To further prevent fraud, USCIS is pursuing photographs from state departments of motor vehicles to supplement the photo tool for employers.⁷⁷ This would be a significant improvement to the program because most new hires provide a driver’s license for Form I-9 compliance.⁷⁸ Unfortunately, however, no state has yet agreed to this USCIS proposal,⁷⁹ due to federal and state law privacy issues. To combat document fraud, USCIS also reduced the number of documents acceptable for Form I-9.⁸⁰ Finally,

TNCs. *Id.* (statement of David A. Rust, Social Security Administration).

⁷⁴ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services); Rosenblum, *supra* note 8.

⁷⁵ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services).

⁷⁶ *Id.* USCIS “also plans to provide automated system updates for any new hire with Temporary Protected Status (TPS)” and an expired Employment Authorization Document (EAD) “but who is within an auto-extension time period.” *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* *But see* DORIS MEISSNER & MARC R. ROSENBLUM, MIGRATION POL’Y INST., THE NEXT GENERATION OF E-VERIFY: GETTING EMPLOYMENT VERIFICATION RIGHT 12 (2009), http://www.migrationpolicy.org/pubs/Verification_paper-071709.pdf (stating implementation of a uniform national identification system, possibly the proposed PASS ID (Providing for Additional Security in States’ Identification) Act of 2009 (S. 1261), would be required for photo screening to be effective).

⁷⁹ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); MEISSNER & ROSENBLUM, *supra* note 78, at 11.

⁸⁰ Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76,505 (Dec. 17, 2008) (to be codified at 8 C.F.R. pt. 274a). The E-Verify Program is also designing an electronic Form I-9 “to allow employers to electronically create, sign, and store the complete forms.” A future electronic Form I-9 will pre-fill the fields in E-Verify, eliminating the double step of inputting the data after it was already filled out on the paper form. This will decrease both employer workload and input errors. *E-Verify Hearing*, *supra*

USCIS is developing an initiative to enable victims of identity theft to lock and unlock their records in E-Verify after filing reports with both the police and the Federal Trade Commission.⁸¹

USCIS has been successful in decreasing the erroneous TNC rate through a variety of changes. Nonetheless, E-Verify's accuracy rate is a subject of debate among program supporters and opponents.⁸² The Center for Immigration Studies found that the percentage of those not authorized to work in the E-Verify Program mirrors the percentage of unauthorized immigrants in the U.S. workforce—about 4 to 5%.⁸³ Yet the program remains vulnerable to misuse by employers, which affects the accuracy rate of TNCs. The 2007 independent Westat evaluation found “substantial employer non-compliance with program rules.”⁸⁴ Misuse of the program can result in discrimination and/or job loss for U.S. citizens and work-authorized immigrants, as well as reducing the effectiveness of the program.⁸⁵ To detect and deter misuse, USCIS established a Monitoring and Compliance Branch to “prevent the fraudulent use of counterfeit documents,” protect personally identifiable information, and refer cases of “fraud, discrimination, misuse . . . and unauthorized use of the system to enforcement” officials.⁸⁶ USCIS refers non-compliance cases to

note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services).

⁸¹ Rosenblum, *supra* note 8. *But see* MEISSNER & ROSENBLUM, *supra* note 78, at 12 (stating E-Verify could not accommodate the large number of TNCs that would result when a worker's data is blocked).

⁸² *See* Rosenblum, *supra* note 8 (stating that it is difficult to estimate E-Verify's accuracy for two reasons: (1) an unknown number of US citizens and legal aliens erroneously receive final non-confirmations after failing to appeal a TNC, either because the process is too burdensome or because their employers fail to notify them of the result; and (2) the system erroneously confirms an unknown number of unauthorized workers using borrowed or stolen identity data). After developing a statistical model, the 2007 Westat study reported an erroneous final non-confirmation rate of 0.81%; a 2006 SSA study estimated the SSA database error rate at 4.1%; and the Intel Corporation reported in August 2008 that its workers were erroneously non-confirmed 12% of the time. *Id.*

⁸³ *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies); *see* Rosenblum, *supra* note 8 (citing Pew Hispanic Center's analysis of 2008 U.S. Census Bureau data and conclusion that unauthorized workers make up about five percent of the U.S. workforce).

⁸⁴ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); *see* Rosenblum, *supra* note 8 (explaining employers admitted to violating one or more rules regarding a worker's ability to appeal erroneous TNCs, such as screening job applicants before making offers, not providing employees with written notification of a TNC, or discouraging employees from appealing a TNC).

⁸⁵ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services).

⁸⁶ *Id.* USCIS launched the Case Tracking and Management System (CTMS)

ICE and potential discrimination cases to the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices.⁸⁷

Just as employer misuse of E-Verify can affect accuracy rates of both confirmations and non-confirmations, employee fraud affects accuracy through erroneous confirmations.⁸⁸ E-Verify helps employers detect some fraudulent documents, but it cannot prevent identity fraud or detect all forms of fraudulent documents.⁸⁹ If a worker “has stolen an identity and presents legitimate documents connected to that identity, or presents fraudulent documents” using stolen identity data, “the purpose of employment eligibility verification” is defeated.⁹⁰ The photograph screening tool that USCIS has added to E-Verify, while helpful, has a limited effect because only a small percentage of documents used by employees for verification are currently included in the photo tool, namely the Employment Authorization Document (EAD) and the Permanent Resident Card (green card).⁹¹ The

on June 22, 2009, which supports the Monitoring and Compliance Branch’s ability to review “E-Verify transaction data to detect and deter employer misuse.” *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Michael Aytes, U.S. Citizenship and Immigration Services).

⁸⁷ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services). USCIS and ICE signed a Memorandum of Agreement (MOA) in December 2008, establishing guidelines for referrals and sharing of information. USCIS and the Office of Special Counsel are currently drafting an MOA to formalize their cross-referral of cases and sharing of E-Verify information. *Id.*

⁸⁸ See Rosenblum, *supra* note 8 (explaining the USCIS and Westat calculations of false non-confirmations and TNC rates).

⁸⁹ *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); see *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Rep. Luis V. Gutierrez) (describing E-Verify’s incapability of preventing or determining fraud or identity theft as a serious security flaw); *id.* (statement of James W. Ziglar, Migration Policy Institute) (stating E-Verify is significantly weak in detecting and preventing identity fraud); *id.* (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (describing E-Verify’s identity theft problem as fundamental).

⁹⁰ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute).

⁹¹ *Id.* (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services); see CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 7. The approximately 15 million EADs and green cards amount to about 5 to 7% of job applicants. MEISSNER & ROSENBLUM, *supra* note 78, at 11. *But cf.* *Hearing on EEVS*, *supra* note 38 (statement of Richard M. Stana, U.S. Government Accountability Office); *E-Verify Hearing*, *supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services); *id.* (statement of Janice Kephart, Center for Immigration Studies) (describing the increase in photos available with the Photo Screening Tool as a great help to further decrease work authorization fraud).

DOS entered into a Memorandum of Agreement (MOA) with DHS in December 2008 to provide DHS with U.S. citizen passport photographs, visa photos, and state-issued driver's license photos in the State Department system, however, only DHS-issued identity documents are currently displayed in the photo tool.⁹² Data and privacy issues are slowing USCIS' pursuit of incorporating the State Department photographs into the photo tool.

The unintended consequences of E-Verify are the effects of erroneous non-confirmations, the increased threat of identity theft, and the burden on the SSA.⁹³ Among the outcomes of an E-Verify query, an erroneous non-confirmation is the most worrisome scenario because it may deprive a work-authorized person of his or her job. Erroneously denying a person's livelihood and ability to support his or her family and self is an egregious outcome.

Privacy experts are concerned that E-Verify creates new opportunities for identity theft by providing program administrators better access to workers' identity data.⁹⁴ Unlike the paper-based system, E-Verify gives employers, HR contractors, and E-Verify administrators access to electronic data, which is easy to copy and transmit.⁹⁵ Also, the data is more valuable than I-9 forms because the data has been confirmed or denied as a match to eligibility databases.⁹⁶

A third unintended consequence of E-Verify is the taxing use of SSA's limited resources. As a participant in E-Verify, the SSA has had to divert resources to resolve TNCs. Every action SSA takes assisting a new employee to resolve a TNC is time taken away from performing SSA's critical mission—assisting applicants with Social Security benefits.⁹⁷ As a result, SSA's primary focus regarding E-Verify is reducing the need for new employees to visit SSA field offices to resolve TNCs.⁹⁸

USCIS and SSA have worked diligently to reduce the number

⁹² *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Michael Aytes, U.S. Citizenship and Immigration Services); *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies).

⁹³ Rosenblum, *supra* note 8; *see E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration).

⁹⁴ Rosenblum, *supra* note 8.

⁹⁵ *Id.*; MEISSNER & ROSENBLUM, *supra* note 78, at 11.

⁹⁶ Rosenblum, *supra* note 8.

⁹⁷ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration).

⁹⁸ *Id.*

of erroneous non-confirmations. The results are visible through increased E-Verify accuracy rates and rapid increases in program use. Overall, E-Verify has become an effective and efficient employment verification program.

C. Mandatory Use and Contractors

While participation in E-Verify generally remains voluntary, four categories of employers are required to use E-Verify: (1) certain federal government employers; (2) certain employers who have been previously convicted of hiring unauthorized workers; (3) some or all employers in certain states;⁹⁹ and now, (4) federal contractors. Regarding state-required participation, Arizona likely receives the most attention because it was the first state to require the program, former Governor Janet Napolitano is now responsible for E-Verify at the federal level as Secretary of Homeland Security, and the state law was challenged but upheld by the Ninth Circuit Court of Appeals in *Chicanos Por La Causa, Inc. v. Napolitano*.¹⁰⁰ Business groups oppose this patchwork of

⁹⁹ See *Hearing on EEVS*, *supra* note 38 (statement of Richard M. Stana, U.S. Government Accountability Office); COUNCIL ON FOREIGN RELATIONS, INDEPENDENT TASK FORCE REPORT NO. 63: U.S. IMMIGRATION POLICY 66 (2009), http://www.cfr.org/content/publications/attachments/Immigration_TFR63.pdf (reporting some states pressure employers to participate in E-Verify by doing state business only with companies using the system); Rosenblum, *supra* note 8 (including a table of states requiring E-Verify by category of employer). Three states—Arizona, Mississippi, and South Carolina—apply E-Verify to all employers in the state, public and private. *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies). Nine states—Colorado, Georgia, Idaho, Minnesota, Missouri, North Carolina, Oklahoma, Rhode Island, and Utah—require E-Verify for employees in the public domain: state agencies, contractors, and subcontractors. *Id.* Tennessee encourages use of E-Verify and Illinois limits its use. *Id.* Some of the state laws are being challenged in court. For example, in Rhode Island, Governor Donald Carcieri issued Executive Order 08-01, requiring all persons and businesses, including grantees, contractors and their subcontractors and vendors doing business with the State of Rhode Island to register and utilize the services of the E-Verify program to ensure compliance with federal and state law. *R.I. Coal. Against Domestic Violence v. Carcieri*, NO. 08-5696, 2009 R.I. Super. LEXIS 36, *1–*2 (Apr. 3, 2009). In *Rhode Island Coalition Against Domestic Violence v. Carcieri*, the plaintiffs sought declaratory relief, requesting the E-Verify executive order be invalidated and sought a permanent injunction barring enforcement of the order and regulation. The court found that the Governor had the authority to issue the Executive Order and the Chief Purchasing Officer had the authority to impose an E-Verify requirement as part of public procurement. *Carcieri*, NO. 08-5696, 2009 R.I. Super. LEXIS 36, at *20.

¹⁰⁰ *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 979 (9th Cir. 2008) (affirming the district court's decision that the Legal Arizona Workers Act was a "licensing" law within the meaning of the federal provision and therefore

mandatory participation. They argue that having a voluntary federal employment verification system and a mandatory system in some states creates a confusing and burdensome application of laws and regulations for employers, particularly those that operate across the country.¹⁰¹

A new category of workers is now subject to mandatory participation in E-Verify—federal contractors. Without the passage of CIR legislation in 2006 and 2007, the Bush Administration focused on worksite enforcement, including encouraging employers to use E-Verify.¹⁰² In June 2008,

was not expressly preempted by federal immigration law), *amended and superseded by* *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *petition of cert. filed*, 2009 WL 2331990 (U.S. July 24, 2009) (No. 09-115). As Governor of Arizona, Janet Napolitano signed the Legal Arizona Workers Act, mandating all employers in the state use E-Verify. The Arizona law imposes civil penalties, including the possible suspension or permanent revocation of all Arizona business licenses, for employers found to intentionally or knowingly employ an unauthorized worker. Rosenblum, *supra* note 8. According to DHS, implementation of the Arizona legislation received high marks from Arizona employers and the USCIS Ombudsman in a December 2008 report. See Press Release, Dep't of Homeland Sec., Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify (July 8, 2009), *available at* http://www.dhs.gov/news/releases/pr_1247063976814.shtm. See generally CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 1.

¹⁰¹ *E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce); *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services).

¹⁰² *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation); Rosenblum, *supra* note 8. In addition to encouraging use of E-Verify, the Bush Administration published a final rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." 72 Fed. Reg. 45,611 (Dep't of Homeland Sec. Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a). Employers can receive an "Employer Correction Request" letter (commonly known as a "no-match" letter) from SSA if the employee name and SSN reported to SSA by the employer do not match SSA records. This "No-Match" rule set forth steps an employer had to follow after receiving a no-match letter to receive "safe harbor" protection against a legal finding that it has knowingly employed an unauthorized worker in violation of federal immigration law. See generally Social Security Online, Overview of Social Security Employer No-Match Letters Process, <http://www.ssa.gov/legislation/nomatch2.htm> (last visited Jan. 17, 2010). Various unions and immigrant advocacy groups sued DHS, seeking to permanently block the rule from taking effect. The groups alleged that the No-Match rule was beyond the authority of DHS and SSA, imposed costly and burdensome compliance obligations on employers, and would result in increased discrimination against workers. The U.S. District Court for the Northern District of California preliminarily enjoined implementation of the rule. See *AFL-CIO v. Chertoff*, 552 F. Supp. 2d 999, 1002–03 (N.D. Cal. 2007) (order granting motion for preliminary injunction). In March 2008, DHS published a supplemental proposed rule to clarify the August 2007 rule and to

President Bush signed an executive order, requiring executive departments and agencies entering into contracts to agree to use an EEVS to verify the employment eligibility of contractors and subcontractors.¹⁰³ The Administration revised federal regulations to require most federal contractors to register for E-Verify, which would expand participation by an estimated 165,000 employers.¹⁰⁴ The U.S. Chamber of Commerce and other business associations

respond to the three findings underlying the district court's injunction. Supplemental Proposed Rule, 73 Fed. Reg. 15,944 (Dep't of Homeland Sec. Mar. 26, 2008). In October 2008, DHS published a supplemental final rule, finalizing the March 2008 rule and reaffirming the safe harbor regulation. Supplemental Final Rule, 73 Fed. Reg. 63,843 (Dep't of Homeland Sec. Oct. 28, 2008). DHS also asked U.S. District Court Judge Charles Breyer for an expedited hearing to receive a final decision before President Bush left office. Judge Breyer denied the request in December 2008, stating he wanted the Obama Administration to consider the issue. Muzaffar Chishti & Claire Bergeron, *DHS Rescinds "No-Match" Rule, Moves Forward with E-Verify as It Shifts Enforcement Focus to Employers*, MIGRATION INFO. SOURCE, July 15, 2009, <http://www.migrationinformation.org/USFocus/display.cfm?id=735>.

¹⁰³ Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008). Prior to the effective date of September 8, 2009, federal employees were verified through E-Verify, but contractors receiving federal funds were not required to enroll in the program. *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation). The Office of Management and Budget (OMB) analyzed the costs of requiring federal contractors to use E-Verify for their employees. OMB estimated that firms would have start-up and administrative costs of about \$15 per screened employee, largely due to the initial and recurring costs of training personnel to use E-Verify. The operational cost of processing employees (including the costs of managing temporary and final non-confirmations) would be about \$6.70 per vetted worker. The total cost to a business to administer and operate E-Verify, therefore, would be about \$22 per screened employee. *Id.* OMB did not examine whether costs could be reduced by contracting with designated agents or personnel service companies to operate E-Verify. DHS has "designated agents" who operate E-Verify queries for other businesses on a fee-for-service basis. On average, these firms charge from \$2 to \$15 per employee query. *Id.*

¹⁰⁴ Federal Acquisition Regulation, 73 Fed. Reg. 33,374 (proposed June 12, 2008) (to be codified at 48 C.F.R. pts 2, 22, 52); Rosenblum, *supra* note 8. The Federal Acquisition Regulation (FAR) E-Verify rule requires a federal contractor, and any covered subcontractors on a federal contract, to enroll in the E-Verify program within thirty calendar days of the contract or subcontract award date. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008). The final rule applies to solicitations issued and contracts (1) awarded after September 8, 2009; and (2) that include the FAR E-Verify clause. *Id.* Federal contractors may not use E-Verify to verify current employees until the rule becomes effective and they are awarded a contract that includes the FAR E-Verify clause. The rule also covers federal subcontractors and those who receive American Recovery and Reinvestment Act funds. Press Release, U.S. Citizenship & Immigration Servs., Federal Contractors Required to Use E-Verify Beginning Sept. 8, 2009 (Sept. 1, 2009), <http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%2009/far-rule-1-sep-09.pdf>.

sued the Secretary of DHS and the Chairman of the Civilian Agency Acquisition Council to block implementation of the rule. The parties agreed to delay the effective date of the rule to provide the new Administration time to consider Executive Order 13,465 and the final rule.¹⁰⁵ The Obama Administration further delayed the effective date of the final rule several times until July 8, 2009, when Secretary Napolitano announced the Administration's support for the regulation that will award federal contracts only to employers who use E-Verify to confirm employee work authorization.¹⁰⁶ The Administration stated it would pursue full implementation of the rule, which applies to federal solicitations and contract awards Government-wide made on or after September 8, 2009.¹⁰⁷ The U.S. District Court for the District of Maryland ruled in favor of DHS and the federal E-Verify contracting rule on August 25, 2009.¹⁰⁸ The U.S. Chamber of Commerce filed a notice of appeal on August 31.¹⁰⁹

¹⁰⁵ Chamber of Commerce v. Napolitano, No. AW-08-3444, 2009 WL 2632761, at *4 (D. Md. Aug. 25, 2009).

¹⁰⁶ Amendment, 74 Fed. Reg. 26,981 (June 5, 2009); Amendment, 74 Fed. Reg. 17,793 (Apr. 17, 2009); Amendment, 74 Fed. Reg. 5621 (Jan. 30, 2009); see Press Release, Dep't of Homeland Sec., *supra* note 100. In the same July 8 DHS announcement, Secretary Napolitano declared the Department's intention to rescind the Social Security No-Match Rule, which had not been implemented due to the U.S. District Court's injunction. The Department explained that these No-Match notices usually inform an employer many months or even a year later that an employee's name and Social Security Number provided for a W-2 earnings report do not match SSA records—often due to typographical errors or unreported name changes. The Department stated that E-Verify addresses data inaccuracies that can result in No-Match letters more quickly and effectively, combating illegal employment. See Press Release, Dep't of Homeland Sec., *supra* note 100. *But see E-Verify Hearing, supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation) (testifying that rescinding the No-Match rule is a significant impediment to immigration enforcement generally and the success of E-Verify). DHS proposed a new regulation in August 2009, rescinding the 2007 No-Match Rule. Proposed Rule, 74 Fed. Reg. 41,801 (Dep't of Homeland Sec. Aug. 19, 2009). The Department issued the final rescission rule in October 2009, and it became effective November 6, 2009. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 74 Fed. Reg. 51,447 (Dep't of Homeland Sec. Oct. 6, 2009).

¹⁰⁷ See Press Release, Dep't of Homeland Sec., *supra* note 100.

¹⁰⁸ *Chamber of Commerce*, 2009 WL 2632761, at *1 (noting two administrations believe Executive Order 13,465 and the Final Rule promote efficiency and economy in procurement).

¹⁰⁹ Notice of Appeal of Plaintiff, *Chamber of Commerce v. Napolitano*, No. AW-08-3444 (Aug. 31, 2009). On September 1, the business groups also filed a motion for emergency injunction to block implementation of the final rule on September 8, pending the appeal. Memorandum of Law in Support of Plaintiffs' Emergency Motion for an Injunction Pending Appeal, *Chamber of Commerce v. Napolitano*, No. AW-08-3444 (Sept. 1, 2009). The district court denied plaintiffs' motion for emergency injunction on September 4. *Id.* (ordering that the motion

As these state verification laws and federal regulation battles have proceeded over the past few years, members of Congress have introduced bills expanding electronic employment verification. Some bills change E-Verify from a voluntary program to a nationwide mandatory one, requiring employers to use the electronic employment verification program for all newly hired employees.¹¹⁰ Other proposals would also require employers to electronically verify work authorization of *current* employees.¹¹¹

Immigration enforcement advocates view nationwide mandatory participation in E-Verify as a critical tool for immigration control.¹¹² Supporters of a nationwide mandatory system argue that a voluntary system permits unlawful workers to move to a non-registered employer or to a state that does not mandate use of the program.¹¹³ Advocates of E-Verify also argue the program improves upon the paper I-9 system in two ways. First, it correctly non-confirms workers using traditional fraudulent IDs because the ID information does not match database records.¹¹⁴ Second, due to the objective nature of E-Verify, the program may reduce immigration-related employment discrimination.¹¹⁵ Mandatory E-Verify proponents support the provision found in many mandatory verification bills which allows employers that use the system in good faith to be exempt from employment penalties.¹¹⁶ Likewise, mandatory proponents

filed Sept. 4, 2009 was denied).

¹¹⁰ See *Hearing on EEVS*, *supra* note 38 (statement of Richard M. Stana, U.S. Government Accountability Office).

¹¹¹ See *E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (stating the U.S. Chamber of Commerce objects to verifying current employees and that this is the number one concern of large businesses). In July 2009, the U.S. Senate agreed to an amendment by Senator Grassley (R-IA) to permit employers to voluntarily verify work authorization for current employees. See S. Amend. 1415 to H.R. 2892, 155 Cong. Rec. S7269 (daily ed. July 8, 2009). The amendment was not kept in the conference report, however. See Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2141 (2009).

¹¹² Rosenblum, *supra* note 8. *But see* MEISSNER & ROSENBLUM, *supra* note 78, at 2 n.3 (stating that mandatory verification would more significantly affect U.S. citizens because they make up 85% of the workforce).

¹¹³ Rosenblum, *supra* note 8.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (stating nearly one in five employers using Basic Pilot in 2006–2007 told analysts they were more likely to hire foreign-born workers under E-Verify); COUNCIL ON FOREIGN RELATIONS, *supra* note 99, at 97 (recommending a mandatory verification system as the “single most effective and humane enforcement tool available to discourage illegal migration”).

¹¹⁶ See COUNCIL ON FOREIGN RELATIONS, *supra* note 99, at 98–99 (arguing that because using the database will provide employers immunity, the government will have the burden to ensure the system is accurate and fraud-proof).

advocate for tougher employer sanctions for those who do not comply with the system.¹¹⁷

Opponents of mandatory electronic verification argue that E-Verify does not prevent unlawful employment. First, E-Verify cannot detect identity fraud—the use of a bona fide name and ID data by someone other than its true owner.¹¹⁸ As a result, even the most conscientious employers face a DHS audit or raid, both of which disrupt work operations.¹¹⁹ Second, they argue that E-Verify cannot prevent underground employment because bad-faith employers will move some or all of their production off-the-books.¹²⁰ Some employers and business groups, such as the U.S. Chamber of Commerce, believe E-Verify is too costly, particularly when employers must continue to employ workers with TNCs (sometimes waiting weeks or months for a conclusion) when the employer may eventually have to fire the worker and find a replacement.¹²¹ Many businesses and pro-immigration groups

¹¹⁷ *Id.* at 98 (noting tougher sanctions will motivate employers to connect with E-Verify).

¹¹⁸ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services); *see E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies) (stating that E-Verify's one weak point of false confirmations will continue as DHS must work hard to combat fraud—like it does with any program reliant on identity verification); Rosenblum, *supra* note 8 (noting that even though Swift & Company had carefully participated in the Basic Pilot/E-Verify program since 1997, hundreds of employees were found to have used fraudulent identities to obtain employment at Swift & Company). The Vice President of Swift & Company testified in the U.S. House of Representatives in 2007 and stated “[i]t is particularly galling to us that an employer who played by all the rules and used the only available government tool to screen employee eligibility would be subjected to adversarial treatment by our government.” *Problems in the Current Employment Verification and Worksite Enforcement System: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 40 (2007) (statement of John W. Shandley, Swift & Company).

¹¹⁹ *See Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (noting many employers believe the federal government plays the game of “gotcha”).

¹²⁰ *See* MEISSNER & ROSENBLUM, *supra* note 78, at 15 (off-the-books hiring leads to lost federal revenues and Social Security payments).

¹²¹ *See* Rosenblum, *supra* note 8 (explaining also that the costs to establish secure procedures, upgrade computer hardware or software, take training courses, and absorb legal fees are proportionally higher for small businesses). Westat found the following employer costs to set up E-Verify and operate it over a year: (1) firms with 100–250 employees reported average setup costs and annual operating expenses of \$646, or about \$4 per employee; (2) firms with 251–500 employees reported average costs of \$746, or around \$2 per employee; and (3) firms with 501–1,000 employees reported average setup and annual

want E-Verify to remain a voluntary program until the database is more reliable and other corrections are made.¹²²

Proponents and opponents of a nationwide mandatory E-Verify program agree the system needs more improvements.¹²³ Labor and privacy groups have suggested establishing special offices in DHS and SSA to continuously audit and “clean” the databases.¹²⁴ Such offices would also permit workers to review and correct their records before the records are put into the system.¹²⁵ These groups also propose strengthening due process protections for workers subject to erroneous non-confirmations, including the ability to appeal a final non-confirmation, the right to sue employers or the government for lost wages if they are fired as a result of user or system errors, and stronger oversight of employer compliance with the program’s worker protections.¹²⁶

Business groups oppose additional labor protections, stating they would create longer delays in the verification process and greater liability for noncompliant employers, both of which would impose new costs on employers.¹²⁷ Business groups prefer a verification system that brings more certainty, such as providing employers immunity from employer sanctions if they participate in E-Verify, or allowing private firms to use biometric data in the verification process.¹²⁸

A nationwide mandatory E-Verify program would require

operating costs of \$473, or less than \$1 per employee. *E-Verify Hearing, supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation). *See generally id.* (statement of Angelo I. Amador, U.S. Chamber of Commerce).

¹²² *See* Rosenblum, *supra* note 8.

¹²³ *See* MEISSNER & ROSENBLUM, *supra* note 78, at 2 (questioning the suitability of E-Verify as a mandatory system when, despite the decreased error rates and the system’s significant improvement over the paper I-9 process, the system remains unable to authenticate identity). *See generally* Rosenblum, *supra* note 8 (stating the system’s architecture is the main source of problems, including the use of existing SSA and DHS databases, which were not designed for employment verification).

¹²⁴ Rosenblum, *supra* note 8; *see Ensuring a Legal Workforce Hearing, supra* note 6 (statement of Rep. Luis V. Gutierrez) (demanding privacy safeguards, including encryption, regular testing of the system, and implementing regular security updates).

¹²⁵ Rosenblum, *supra* note 8; *see Ensuring a Legal Workforce Hearing, supra* note 6 (statement of Rep. Luis V. Gutierrez) (stating that the screening of approximately 163 million workers with an error rate of even one percent would result in 1.63 million workers being wrongfully denied work).

¹²⁶ *See* Rosenblum, *supra* note 8; *see also Ensuring a Legal Workforce Hearing, supra* note 6 (statement of Rep. Luis V. Gutierrez) (advocating for administrative and judicial review, including compensation from the government for attorneys’ fees and lost wages).

¹²⁷ Rosenblum, *supra* note 8.

¹²⁸ *Id.*

additional resources at both USCIS and SSA to respond to the estimated 7.4 million employers in the United States.¹²⁹ USCIS estimated that a mandatory E-Verify program could cost a total of \$765 million for fiscal years 2009 through 2012 if only new hires are subject to the program and about \$838 million over the same period if both new and current hires must be electronically verified.¹³⁰ SSA estimated that implementing a mandatory E-Verify program would cost \$281 million and require hiring 700 new employees for fiscal years 2009 through 2013.¹³¹

III. COMPREHENSIVE IMMIGRATION REFORM

A. 2006 Comprehensive Immigration Reform

With the illegal immigrant population estimated to number approximately twelve million people, Congress and the Bush Administration pursued sweeping immigration reform that included changes to both legal and illegal immigration.¹³² Senator Arlen Specter (D-PA) introduced the Comprehensive Immigration Reform Act (CIRA) in April 2006.¹³³ During consideration of the bill, the Senate passed an amendment introduced by Senator Chuck Grassley (R-IA) that substituted the Title III Unlawful Employment of Aliens provisions.¹³⁴

As amended, Title III would have prohibited an employer from using a contract or subcontract with “knowing, or with reckless disregard” that the immigrant is unauthorized to work, or if the subcontractor did not comply with document verification requirements and participate in the EEVS.¹³⁵ Section 301 would have significantly reduced the number of acceptable documents to present for proof of identification and employment authorization.

¹²⁹ *Hearing on EEVS, supra* note 38 (statement of Richard M. Stana, U.S. Government Accountability Office).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See STEVEN A. CAMAROTA & KAREN JENSENIUS, CTR. FOR IMMIGRATION STUDIES, A SHIFTING TIDE: RECENT TRENDS IN THE ILLEGAL IMMIGRANT POPULATION 1 (2009), <http://www.cis.org/articles/2009/shiftingtide.pdf>.

¹³³ S. 2611, 109th Cong. § 301 (2006). At the time of introduction, Senator Specter was in the Republican Party. *Id.* The bill's original co-sponsors were Sam Brownback (R-KS), Chuck Hagel (R-NE), Mel Martinez (R-FL), Lindsey Graham (R-SC), Edward Kennedy (D-MA), and John McCain (R-AZ). *Id.*

¹³⁴ The Grassley Amendment passed 58–40 on May 23, 2006. See Rollcall Vote No. 140 Leg., 152 Cong. Rec. S4953–54 (daily ed. May 23, 2006) (providing the rollcall vote for passing S. Amend. 4177).

¹³⁵ S. 2611, 109th Cong. § 301.

For proof of identity, it would have required U.S. citizens to present a U.S. passport or REAL ID-compliant driver's license or identity card, and permanent legal residents to present a permanent resident card.¹³⁶ For proof of employment authorization, immigrants would have been required to present an employment authorization card that: (1) contains a photograph of the individual or other identifying information, including the individual's name, date of birth, gender, and address; and (2) contains security features to make the document resistant to tampering, counterfeiting, and fraudulent use.¹³⁷ If individuals could not present the documents prescribed, they would be permitted to present a document designated by the Secretary of Homeland Security with these same two requirements.¹³⁸

Section 301 would have required employers to participate in the EEVS and provided a good-faith defense to employer sanctions for employers who did so.¹³⁹ With respect to new hires, all employers would have been required to participate in the EEVS no later than eighteen months from the date that at least \$400 million was appropriated and available to implement the EEVS.¹⁴⁰ Section 301 provided the Secretary of Homeland Security authority to require certain employers to participate before the eighteen month period with respect to *all* employees: (1) "critical" employers (based on an assessment of homeland security or national security needs); and (2) employers that the Secretary has reasonable cause to believe have engaged in material violations related to unlawful employment of immigrants.¹⁴¹

For EEVS participation, section 301 would have required employers to follow similar registration, TNC, and final non-confirmation steps as are currently required under E-Verify, while also withholding liability for employers taking employment-related action in good-faith reliance on EEVS-provided information.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* Until an employer participated in the EEVS, § 301 permitted employers to accept identity documents acceptable under the law at the date of enactment. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*; see Press Release, Soc. Sec. Admin., Senate Passes S. 2611: The Comprehensive Immigration Reform Act of 2006 (June 22, 2006), http://www.ssa.gov/legislation/legis_bulletin_062206.html.

¹⁴¹ S. 2611, 109th Cong. § 301 (2006).

Section 301 would have created an administrative and judicial review process for erroneous non-confirmations.¹⁴² Section 301 would also have required the Commissioner of SSA to prevent fraudulent or other misuse of SSNs by establishing procedures for an individual to block the use of his or her SSN under the EEVS and remove such block.¹⁴³ To protect privacy, section 301 limited the data that could be collected and maintained in the EEVS.¹⁴⁴ It also made it a misdemeanor (with a fine of \$1,000 for each violation) for anyone to willfully and knowingly collect and maintain data that is not required.¹⁴⁵ Section 301 made it a felony (with a fine under Title 18 or prison term of not more than five years, or both) to knowingly access, disclose, or use any information in the EEVS: (1) “for the purpose of committing identify fraud, or assisting another person in committing identify fraud”; (2) “for the purpose of unlawfully obtaining employment”; or (3) “for any purpose other than as provided for under any provision of law.”¹⁴⁶

After eight days of amendments and consideration, the Senate passed the CIRA by a vote of 62–36.¹⁴⁷ The House of Representatives, however, did not act upon the bill that year, and the bill died with adjournment of the 109th Congress.

B. 2007 Comprehensive Immigration Reform

The following year started a new Congress and, with a continued strong push from the Bush Administration to pass immigration reform, a new bill. The Senate considered Senator Edward Kennedy’s bill to provide for CIR.¹⁴⁸ Again, Title III contained the worksite enforcement provisions, which were very similar to the 2006 bill. Under section 302 of the bill, employers would have been required to comply with both I-9 rules and a new EEVS that would be a permanent implementation of E-Verify.¹⁴⁹ Section 302 also would have required employers, including the federal government, to add language to contracts, requiring the

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Rollcall Vote No. 157 Leg., 152 Cong. Rec. S5190 (daily ed. May 25, 2006) (providing the rollcall vote on S. 2611, broken down by Yeas and Nays).

¹⁴⁸ S. 1639, 110th Cong. (2007).

¹⁴⁹ S. 1639, § 302.

contractor or subcontractor to adhere to immigration laws.¹⁵⁰

Compared with the 2006 bill, section 302 made similar changes to the list of acceptable I-9 documents. For U.S. citizens, acceptable identification documents would be a U.S. passport or a REAL ID-compliant driver's license.¹⁵¹ For permanent residents, however, the acceptable documents for proof of identity and employment authorization would be the permanent resident card and a biometric Social Security card.¹⁵² Section 302 would have increased the number of years employers must retain the I-9 forms from three years to seven years.¹⁵³ It also would have required employers, for the first time, to retain copies of each employee's identification and work authorization documents presented to the employer.¹⁵⁴ Further, it would have required employers to maintain records of all employer actions taken relating to questioning an alien's identity or work authorization.¹⁵⁵

Like the 2006 bill, section 302 would have phased in the mandated use of EEVS, requiring all employers to participate in the EEVS, and verify new employees within eighteen months of the date of enactment. Within three years from date of enactment, all employers would have been required to participate in EEVS for all new employees and to verify all current employees not already verified through EEVS.¹⁵⁶

Section 302 set out similar EEVS procedures as those in E-Verify and the 2006 bill. It provided employees a right to administrative and judicial review of a non-confirmation finding.¹⁵⁷ Unlike the prior bill, however, S. 1639 would have excluded an entitlement to any fees or damages to an employee who prevails on an appeal.¹⁵⁸ Section 302 also included language to protect privacy and secure personal information similar to that in the 2006 bill.¹⁵⁹

Section 305 would have required the Commissioner of SSA to begin issuing fraud-resistant, tamper-resistant Social Security cards and to report on the feasibility of including a photograph

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; S. 2611, 109th Cong. § 301 (2006).

and other biometric information on the card.¹⁶⁰ The most significant addition in Title III of the 2007 bill, however, was section 307, which would have required DHS to establish the Voluntary Advanced Verification Program so employers could voluntarily submit an employee's fingerprints to verify the employee's identity and work authorization.¹⁶¹ Section 307 would have limited the retention period of the fingerprint records to ten days before requiring DHS to purge them, unless the records required further investigation.¹⁶² It also created an exception for U.S. citizens to request DHS to retain their fingerprints for employee verification purposes and to prevent identity theft.¹⁶³ DHS would have been authorized to use the fingerprints solely for verifying identity and work authorization.¹⁶⁴

After four days of procedural wrangling, consideration of the Senate bill failed when cloture on S. 1639 was not invoked, largely due to the contentious issue of legalizing at least twelve million illegal immigrants.¹⁶⁵ Congressional consideration of sweeping immigration changes, including mandatory nationwide E-Verify and a biometric verification program, came to an end after two years of controversial and arduous debate.

C. Alternatives to E-Verify

Despite the failure of two CIR bills, the pursuit for an improved employment verification system continues. Labor and immigrant advocacy groups and members of Congress have subsequently offered alternative proposals to E-Verify.¹⁶⁶ The first proposal is

¹⁶⁰ S. 1639, 110th Cong. § 305.

¹⁶¹ S. 1639, § 307.

¹⁶² *Id.*

¹⁶³ *Id.* (“[T]he Secretary must purge such fingerprint records within 10 business days unless the fingerprints have been ordered to be retained for purposes of a fraud or similar investigation by a government agency with an independent criminal or other investigative authority.”). A U.S. citizen could withdraw consent and DHS would then have ten business days to purge the records. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Senators voted against terminating debate on the Kennedy bill by a yeayay vote of 46–53 on June 28, 2007. See Rollcall Vote No. 235 Leg., 153 Cong. Rec. S8650–51 (daily ed. June 28, 2007) (providing the rollcall vote on the cloture motion of S. 1639).

¹⁶⁶ Rosenblum, *supra* note 8. In addition to a biometric card and database model discussed below, the Migration Policy Institute also suggests a Personal Identification Number (PIN) Pre-Verification pilot alternative. See MEISSNER & ROSENBLUM, *supra* note 78, at 20–22 (“A personal identification number (PIN) pre-verification system would give individual workers responsibility for managing their own eligibility verification, rather than relying exclusively on

the New Employee Verification Act (NEVA) of 2009, which aims to eventually eliminate the voluntary E-Verify system, replacing it with a mandatory one.¹⁶⁷ NEVA would give employers two options of verification: (1) EEVS, a government-based system that is mandatory; unless the other, (2) the Secure Employment Eligibility Verification System (SEEVS), a government-certified private entity, is used.¹⁶⁸ Under NEVA, employees' immigration status would be added to the SSA's National Database of New Hires (NDNH).¹⁶⁹ Sponsors of NEVA view the NDNH as an attractive alternative to E-Verify databases because of the high employer compliance rate with NDNH's data collection requirements.¹⁷⁰ SSA would have to substantially retrofit the NDNH, however, because the database contains no employment eligibility information.¹⁷¹ In addition, SSA's core mission is to administer the nation's social insurance programs and the Supplemental Security Income program.¹⁷² Just as E-Verify is not one of SSA's core workloads and can be a significant burden on SSA field offices, particularly with aging baby boomers and the current poor economy, diverting SSA resources to expand the NDNH with worker's immigration status would be a poor use of very limited resources.¹⁷³

Second, NEVA authorizes an optional alternative system,

employers as E-Verify currently does. Employers would be responsible for verifying that a worker had checked in with the system and for photo screening those they hire.”). In December 2009, Representative Solomon Ortiz (D-TX) introduced the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, which would establish a voluntary self-verification system in which employees may block use of their SSN with a PIN. H.R. 4321, 111th Cong. § 201 (2009).

¹⁶⁷ H.R. 2028, 111th Cong. (2009). Representative Sam Johnson (R-TX) also introduced NEVA in the 110th Congress as H.R. 5515. *See* H.R. 5515, 110th Cong. (2008).

¹⁶⁸ H.R. 2028.

¹⁶⁹ *Id.* § 103. Congress created NDNH in 1996 to help states track absentee parents and enforce child support orders. *See* Administration of Children and Families, U.S. Department of Health and Human Services, FPLS Brochure-National Directory of New Hires, <http://www.acf.hhs.gov/programs/cse/newhire/library/brochures/fpls/ndnh.htm> (last visited Jan. 17, 2010).

¹⁷⁰ Rosenblum, *supra* note 8.

¹⁷¹ *Id.*

¹⁷² *See E-Verify Hearing, supra* note 2 (statement of David A. Rust, Social Security Administration).

¹⁷³ *Id.* (stating E-Verify TNCs create an additional workload for SSA's already strained local offices). Each year, USCIS and SSA must agree to the funds USCIS will provide SSA to cover SSA's cost of E-Verify. *Id.*; *see* H.R. 6633, 110th Cong. § 3 (2008) (as passed by House, July 31, 2008) (protecting other SSA programs by requiring USCIS to provide SSA the funds for the full costs of SSA responsibilities under section 404 of IIRIRA).

SEEVS, in which employers would contract with private verification firms to authenticate workers' identities.¹⁷⁴ These firms would also have access to DHS and SSA databases to confirm work authorization.¹⁷⁵ Some civil libertarians support shifting all verification tasks from the government to private firms.¹⁷⁶ Those who oppose the government collecting and maintaining identity data favor private firms performing identity authentication and employment authorization, and many expect the private sector would do a better job managing employment verification.¹⁷⁷

Third, some labor advocates have proposed a Personal Identification Number (PIN)-based system, which is based on (1) one secure personal identification document with biometric data, upon which every employer must rely; and (2) an accurate database to ensure that the person with the identification document is truly who the individual claims to be and is authorized to work in the United States.¹⁷⁸ In the first stage, all newly work-authorized immigrants and employees would enroll in the new database, and each would be provided with a PIN number and the secure identification document.¹⁷⁹ Before accepting a new job, enrolled workers would use their PIN number to receive a verification code from the local DHS or other appropriate authority to be used only for this purpose.¹⁸⁰ Employees would then present the verification code and identification document to the employer, who then verifies the information by telephone or other electronic means and receives a confirmation number from the authorizing agency to place in the employees' records.¹⁸¹

Supporters of this proposal state that it would give workers control of their personal information and give trained federal professionals, rather than employers, the responsibility for verification.¹⁸² This multi-step system may resolve TNCs earlier

¹⁷⁴ H.R. 2028, 111th Cong. § 103 (2009).

¹⁷⁵ Rosenblum, *supra* note 8.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ RAY MARSHALL, ECON. POLICY INST., IMMIGRATION FOR SHARED PROSPERITY: A FRAMEWORK FOR COMPREHENSIVE REFORM 31 (2009).

¹⁷⁹ *Id.* at 34.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 34–35. The AFL-CIO has adopted Marshall's approach which "calls for the establishment of an independent commission to monitor industry trends and labor needs for future immigration." Posting of James Parks, Here's How to Fix Nation's Broken Immigration System to aflcioNOWBLOG,

in the process, greatly reducing the costs to employers. Ending use of the SSN, the PIN system could offer greater privacy and identity theft protections.¹⁸³ It should be noted, however, that authorized workers could sell their PIN numbers to unauthorized immigrants, undermining this system.¹⁸⁴

D. Going Biometric

Many of these recent proposals, including the 2007 CIR bill, provide biometric solutions to improve employment verification and to combat identity theft. Biometrics are certain unique physiological characteristics that every person has, and that can be measured to definitively identify that individual.¹⁸⁵ The most well-known and widely used biometric is the fingerprint.¹⁸⁶ Biometric experts consider the iris, fingerprint, and DNA to be the most reliable biometrics to capture, accurately measure, and then match to an established record.¹⁸⁷

While the Federal Bureau of Investigation and other law enforcement agencies have used fingerprints for decades to investigate crimes and perform background checks for criminal and civil purposes, the federal government has implemented several other biometric programs in recent years. In 2004, DHS launched the United States Visitor and Immigrant Status Indicator Technology (US-VISIT).¹⁸⁸ In this program, a State Department consular officer scans a visa applicant's ten fingers and takes the applicant's photograph during the visa application process overseas.¹⁸⁹ When the visa traveler arrives at a U.S. port of entry, a U.S. Customs and Border Protection (CBP) inspector

<http://blog.aflcio.org/2009/04/16/heres-how-to-fix-nations-broken-immigration-system> (Apr. 16, 2009, 16:12 EST).

¹⁸³ See MARSHALL, *supra* note 178, at 34–35.

¹⁸⁴ *Id.* at 35.

¹⁸⁵ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute).

¹⁸⁶ *Id.* (listing the iris, DNA, facial structure, handwriting, and voice patterns as other examples of biometrics).

¹⁸⁷ *Id.* Facial-recognition technology is about 80% accurate while iris scans are almost 100% accurate, and fingerprinting ranks between the two. Erin Kelly, *Biometric Technology Opens New Security Frontiers*, ARIZ. REPUBLIC, Aug. 20, 2009, at 1.

¹⁸⁸ Press Release, U.S. Dep't of Homeland Sec., DHS Launches US-VISIT Program Nationwide to Enhance Security, Facilitate Travel (Jan. 5, 2004), http://www.dhs.gov/xnews/releases/press_release_0332.shtm.

¹⁸⁹ *Id.*; see DEP'T OF HOMELAND SEC., US-VISIT BROCHURE (2007), http://www.dhs.gov/xlibrary/assets/usvisit/usvisit_edu_traveler_brochure_english.pdf [hereinafter US-VISIT BROCHURE].

swipes the traveler's passport containing the visa, from which the State Department record and photograph appear on the inspector's screen.¹⁹⁰ The CBP officer takes a 10-print finger scan and photograph of the traveler to verify that the traveler seeking entry into the United States is the same person who applied for the visa overseas.¹⁹¹ Simultaneously, the traveler's fingerprints are run against criminal and other databases to determine whether the traveler is admissible into the United States.¹⁹²

A second recent biometric program, also used by CBP, is the Global Entry Trusted Traveler Program.¹⁹³ Global Entry provides U.S. citizen and lawful permanent resident travelers who have passed a background check, use of an automated kiosk in international airports to clear passport control in an expedited fashion.¹⁹⁴ After an applicant fills out an on-line application, the applicant has a brief in-person interview with a CBP inspector, during which time, the applicant provides his or her fingerprints and has a photograph taken.¹⁹⁵ Once approved for the program, the traveler proceeds to the Global Entry kiosk in lieu of waiting in the immigration lane upon arrival at the airport, inserts the passport into the machine, places fingers on the machine for finger scans, and looks into the camera for a photograph.¹⁹⁶ The database verifies the traveler is a program member and the kiosk prints out a receipt card for the traveler to turn into a CBP officer when departing the federal inspection service area after retrieving luggage.¹⁹⁷ No membership card is used in this program; it is based on an individual's fingerprints and a photograph.

¹⁹⁰ TIEN-LI LOKE WALSH & BERNARD P. WOLFSORF, ALLIANCE OF BUSINESS IMMIGRATION LAWYERS, "SECURE BORDERS, OPEN DOORS": CONSULAR PROCESSING ISSUES IN 2007, at 21, 34 (2007), <http://www.abil.com/articles/ABIL%20Articles%20-%20Consular%20Processing%20-%20Wolfsdorf.pdf>.

¹⁹¹ Press Release, U.S. Dep't of Homeland Sec., *supra* note 188; see US-VISIT BROCHURE, *supra* note 189.

¹⁹² Press Release, U.S. Dep't of Homeland Sec., *supra* note 188.

¹⁹³ U.S. Customs and Border Protection, Global Entry Program Overview, http://www.cbp.gov/xp/cgov/travel/trusted_traveler/global_entry/global_entry_discription.xml (last visited Jan. 17, 2010) [hereinafter Global Entry Program Overview].

¹⁹⁴ U.S. CUSTOMS & BORDER PROT., GLOBAL ENTRY FACT SHEET (2009), http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/ge_fact_sheet.ctt/ge_fact_sheet.pdf.

¹⁹⁵ U.S. CUSTOMS & BORDER PROT., GLOBAL ENTRY PROGRAM: INFORMATION GUIDE 6 (2008), http://www.cbp.gov/linkhandler/cgov/newsroom/publications/travel/global_brochure.ctt/global_brochure.pdf.

¹⁹⁶ *Id.*

¹⁹⁷ Global Entry Program Overview, *supra* note 193.

The Transportation Security Administration and U.S. Coast Guard use a third biometric program, the Transportation Worker Identification Credential (TWIC).¹⁹⁸ TWICs are tamper-resistant, biometric credentials issued to workers who require unescorted access to secure areas of ports, vessels, outer continental shelf facilities, and to all credentialed merchant mariners.¹⁹⁹ The cards, which have been issued to more than one million longshoremen, truck drivers, and other transportation workers,²⁰⁰ each contain a photograph and a chip with the worker's fingerprints.²⁰¹ The program is designed to incorporate card readers at the secure areas that, after the worker swipes the card, enters a PIN, and provides a fingerprint, will read the card and biometric to perform a one-to-one match between the card and the worker. No central database is used.

With increased discussion of adding biometrics to employment verification,²⁰² and as these federal biometric programs above demonstrate, two biometric models have emerged as the most likely design for the next generation of EEVS. Employees' biometrics would be collected during an enrollment process and subsequently, employees' identities and work authorizations would be authenticated and verified by comparing the employees' biometrics to either: (1) a biometric card; or (2) a central database.²⁰³

1. Model One: Biometric Card

The first biometric model is a biometric identification card system. Although this model has been discussed for years, it regained attention in June 2009 when Senate immigration subcommittee Chairman Charles Schumer (D-NY) announced the need for a biometric identification card to successfully verify employment authorization.²⁰⁴

¹⁹⁸ Transportation Security Administration, Program Information: Transportation Worker Identification Credential, http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm (last visited Jan. 17, 2010).

¹⁹⁹ *Id.*

²⁰⁰ Kelly, *supra* note 187.

²⁰¹ *Id.*

²⁰² Human resource professionals, for example, support a biometric employment verification system to replace E-Verify. Rosenblum, *supra* note 8.

²⁰³ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute); MEISSNER & ROSENBLUM, *supra* note 78, at 22.

²⁰⁴ Press Release, Sen. Charles E. Schumer, Schumer Announces Principles for Comprehensive Immigration Reform Bill in Works in Senate (June 24, 2009),

An employment verification system based on a secure card could introduce a new work authorization card or use a limited number of existing secure documents—green cards and work authorization cards for non-citizens, and U.S. passports/pass cards for U.S. citizens.²⁰⁵ With respect to driver's licenses and Social Security cards, both would need to become much more secure, including at least the addition of a photograph to Social Security cards.²⁰⁶ One proposal is to add a fingerprint to the Social Security card and use it for E-Verify.²⁰⁷

Similar to the TWIC program, a biometric card model would include two steps. First, an employee would apply for a biometric card, at which point, a government or private agency would authenticate the employee's identity, authorize work eligibility, and collect the employee's biometrics and photograph.²⁰⁸ The agency would issue the employee a card containing the employee's biographic data, biometrics, and photograph.²⁰⁹ Second, the employee would bring the biometric card to the employer, who would swipe or scan the card in a reader, collect the employee's biometric, and compare the information to that on the card.²¹⁰

Proponents of a biometric card cite several advantages. First, a card provides workers access to and greater control over their

http://schumer.senate.gov/new_website/record.cfm?id=314990 (noting that reform would give the public and Republicans in Congress greater confidence that the Democrats are committed to immigration enforcement and combating illegal immigration).

²⁰⁵ MEISSNER & ROSENBLUM, *supra* note 78, at 17. U.S. citizens would be most affected by this requirement because many lawful non-citizens already have secure identification documents. While some U.S. citizens have passports, most depend on driver's licenses, which have varying degrees of security features, for identification. *Id.* at 19. In addition, approximately 11% of adult U.S. citizens do not have any current government identification document. *Id.*

²⁰⁶ *See id.* at 17.

²⁰⁷ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Rep. Luis V. Gutierrez); Alice Lipowicz, *Biometric Requirement Could Make E-Verify Worth Billions*, WASH. TECH., Aug. 6, 2009, available at <http://www.washingtontechnology.com/Articles/2009/08/10/Policy--EVerify-biometrics.aspx>; see S. 1639, 110th Cong. § 305 (2007) (requiring the Commissioner of SSA to report on the feasibility of including a photograph and other biometric information on the Social Security card).

²⁰⁸ *See* MEISSNER & ROSENBLUM, *supra* note 78, at 19.

²⁰⁹ *Id.* at 18–19 (stating a “perfect card system would eliminate the electronic verification altogether”).

²¹⁰ *Id.* at 22; see COUNCIL ON FOREIGN RELATIONS, *supra* note 99, at 97 (recommending that those coming to the United States under temporary or provision work visas be issued biometric, tamper-proof identification cards that authorize them to work).

employment records.²¹¹ Instead of learning about errors in government databases through an employer, workers would apply for their biometric card outside of the hiring process, allowing workers to directly address questions of eligibility and not encumbering employers to wait for final confirmations.²¹² Second, a biometric card would prevent pre-screening by an employer because an employer would only be able to submit a query with the worker's consent through the swipe of the card.²¹³ Third, the use of a card would also eliminate employer entry errors while submitting queries to the system.²¹⁴ Fourth, requiring the swipe of a card's magnetic strip or scan of its biometric chip, along with the in-person verification of a biometric indicator, would significantly reduce fraud, according to card proponents, because an employee would be unable to assume or borrow another's identity in the hiring process.²¹⁵ Finally, use of a card would allow DHS to easily reduce the number of acceptable documents; the biometric card would become the acceptable document.²¹⁶

The greatest disadvantage of the card model is that fraud-proof cards do not exist.²¹⁷ Sophisticated criminals break down and duplicate the security features as quickly as the government releases them.²¹⁸ Accordingly, linking employment verification to a secure card could create a false sense of security.²¹⁹

A system that depends on a biometric card rather than a database query would require every American and lawful immigrant worker to obtain a card. This resembles a national ID card for some, which has received strong opposition in the past.²²⁰ On the other hand, Americans have adapted to producing identification for everyday activities, such as air travel, entering buildings, or making purchases. In addition, identity theft is a real and frightening prospect for many Americans.²²¹ As such, a

²¹¹ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Rep. Luis V. Gutierrez).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See id.* (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (testifying Congress and DHS must reduce the number of acceptable documents).

²¹⁷ MEISSNER & ROSENBLUM, *supra* note 78, at 18.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.* (noting the long political and philosophical opposition to a national ID card and the database needed to support the ID card).

²²¹ According to the Federal Trade Commission, approximately 8.3 million

requirement for Americans to obtain a uniform identification card would likely be more tolerable now than in years past.²²²

Implementation of a biometric card model would be extremely time consuming and costly.²²³ The enrollment portion of implementation would require all U.S. workers (both U.S. citizens and lawful non-citizens) to visit a government/private agency to authenticate their identity, and to submit a digital photograph and a biometric—most likely either fingerprints and/or an iris scan.²²⁴ Upon authenticating a worker's identity, the agency would also need to, in the case of non-citizens, verify the applicant's employment authorization. The agency would then need to produce and issue the biometric work authorization cards to the 163 million workers in the United States.²²⁵

For the employer verification half of the process, employers need the ability to verify the biometric card presented by the new employee. Employers could purchase biometric card readers to swipe or scan the card and to collect the new employee's biometric to match against the biometric inside the card.²²⁶ Purchasing biometric card readers, however, could be unappealing to employers, particularly small businesses, due to the added cost.²²⁷ In addition, just as employers have opposed the responsibility to collect and assess Form I-9 documents from employees, employers may oppose the responsibility of collecting biometrics from employees.²²⁸ Collecting reliable fingerprints and iris scans

U.S. adults discovered they were victims of identity theft in 2005. FED. TRADE COMM'N, 2006 IDENTITY THEFT SURVEY REPORT 4 (2007), <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>.

²²² See MEISSNER & ROSENBLUM, *supra* note 78, at 18 (stating identity document requirements are no longer viewed as un-American).

²²³ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Rep. Luis V. Gutierrez) (noting that the bulk of the changes necessary would be at the front end of implementation, for which Congress would need to commit sufficient resources and to a workable timeline); *id.* (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (stating the single swipe card model raises questions about the equipment cost for employers and the time needed to issue cards to all workers when they change jobs).

²²⁴ MEISSNER & ROSENBLUM, *supra* note 78, at 19.

²²⁵ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Rep. Luis V. Gutierrez).

²²⁶ See *id.*; see MEISSNER & ROSENBLUM, *supra* note 78, at 23.

²²⁷ Currently, biometric card readers cost about \$3,000 per unit. See MEISSNER & ROSENBLUM, *supra* note 78, at 19 (noting small businesses would be reluctant to purchase swiping or scanning equipment when they only hire a few new employees each year).

²²⁸ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration

requires training with the equipment. This would surely be an added cost in time and resources for employers.

As an alternative, employers could contract with a private company to scan or swipe the biometric card, collect an employee's biometrics, and verify that the card's biometrics match those of the worker in front of them.²²⁹ The private market for registering and enrolling Americans' biometrics is robust and competitive. While this would reduce an employer's role and responsibility, contracting the service to a private firm may not be a cost savings to the employer. Hiring a contractor to verify employees also raises a logistical issue of where the verification should occur. Biometric firms can go to the client workplace with mobile biometric capture hardware, or the employees can go to the biometric firms' enrollment centers.²³⁰ If the verification occurs at the private company's office or center, rather than at the worksite, how does the employer know the person verified by the private company is the same person reporting to work? The logical conclusion would be that if employers contract out the verification service, employers should require the verification company to perform the service at the worksite. This, however, may also be cost-prohibitive for some companies.

2. Model Two: Central Database

The second biometrics model would use a person's biometric to be verified against a database in lieu of a card. Like the card model, workers would need to enroll with a government or private agency, providing biographic and biometric data. Unlike the card model, however, the workers' data would be placed only in an employment verification database; no card would be used. Then, when an employer hires a new employee, the employee's biometrics would be scanned and verified with the biometric data stored in the central database. An employee's biometric data would be used in lieu of the employer's review of documents as the tool for identity authentication.²³¹ After the agency would perform the biometric match thus verifying identity, the government would send a response to the employer indicating

Services) (stating that employers already bear most of the administration cost for the federal paper-based system, completing and storing the I-9 documents).

²²⁹ See MEISSNER & ROSENBLUM, *supra* note 78, at 23.

²³⁰ *Id.* (arguing that the history of subcontractor agreements in immigration employment demonstrates the need for careful planning of such relationships and services).

²³¹ *Id.* at 22.

whether the employee is authorized to work. As such, “the government would be responsible both for identity authentication and work authorization verification.”²³²

The database model has significant advantages. Verifying an employee’s biometrics directly against a central database to authenticate identity and authorize employment shifts the verification burden from employers to the government. This eliminates both employer input error because employers would no longer be entering biographical data into a system, and the opportunity for document check abuse, because employers would no longer be examining identification documents.²³³ Verifying biometrics directly against a central database also eliminates the middle step of issuing and verifying a card. No card is needed when an individual can simply provide his or her fingertips for a scan or look into a camera.

A disadvantage to the central database model is the cost. The federal government would likely bear most of the cost of establishing a database, biometric matchers, and other back-end equipment needed to enroll and verify 163 million U.S. workers.²³⁴ Employers could purchase biometric readers to collect and submit the employee’s biometrics to the agency for verification. Employers, particularly small businesses, may oppose this added cost. Similar to the card model above, employers may prefer to contract with a private firm to collect and submit biometrics for identity and employment verification.

The central database model also raises the significant issue of for what purpose or purposes the data may be used. Should the use of the database be limited to just employment verification?²³⁵ What if employers want to use employees’ fingerprints to run criminal background checks? Also, should a biometric verification just be a one-to-one match, or should additional databases be checked to determine whether the data is being used at other places of employment through identity theft?²³⁶

²³² *Id.*

²³³ *See id.* at 23 (stating removal of the burden on employers would “reduce defensive hiring and related offenses”).

²³⁴ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Rep. Luis V. Gutierrez).

²³⁵ *See id.* (stating information stored in the databases should be limited and only used for employment verification purposes).

²³⁶ *See E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (testifying that a certain amount of inter-agency information sharing is required to determine whether an identification data is being used in multiple places of employment).

Clearly, the central database model raises larger privacy issues than the biometric card model. The more expansive the use of the data, the more opposition would form against a central database model proposal, and the more likely it would fail passage in Congress.²³⁷

E. The Path Forward: Improve E-Verify and Design B-Verify

Program authorization and funding for E-Verify approached expiration dates multiple times in 2008 and 2009.²³⁸ When Congress has reauthorized the Basic Pilot/E-Verify Program in the past, it has typically provided extensions of at least two years. Although Congress just extended the program to 2012, the two most recent reauthorizations only provided six-month extensions.²³⁹ Supporters of E-Verify grew concerned regarding Congress' and the Obama Administration's commitment to the program.²⁴⁰ Meanwhile, however, Congress and the Administration continue to state that they intend to move comprehensive immigration legislation and plan to include electronic employment-verification reform in the bill.²⁴¹ This

²³⁷ See MEISSNER & ROSENBLUM, *supra* note 78, at 23–24. The American Civil Liberties Union (ACLU) wrote the Senate Judiciary Committee that a nationwide mandatory EEVS would be one of the largest databases ever created in the U.S. See Lipowicz, *supra* note 207. The interim director of the ACLU's Washington, D.C. office wrote that the database's "size and openness would be an irresistible target for identity theft and almost inevitably lead to major data breaches." *Id.*

²³⁸ See Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 106, 122 Stat. 3574, 3575 (2008) (extending E-Verify authorization from Sept. 30, 2008 to Mar. 6, 2009); Omnibus Appropriations Act, Pub. L. No. 111-8, § 101, 123 Stat. 524, 988 (2009) (extending authorization to Sept. 30, 2009).

²³⁹ Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2141, 2177 (2009); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 § 106 (extending E-Verify authorization from Sept. 30, 2008 to Mar. 6, 2009); Omnibus Appropriations Act § 101 (extending authorization to Sept. 30, 2009); see *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies); *id.* (statement of Angelo I. Amador, U.S. Chamber of Commerce) (stating the Chamber of Commerce continues to support lengthier reauthorizations of E-Verify than Congress has been enacting).

²⁴⁰ *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies).

²⁴¹ The Congressional Budget Office estimated that requiring employers to use E-Verify without a legalization program would decrease federal tax revenues by \$17.3 billion over a ten-year period. Letter from Peter Orszag, Director, Congressional Budget Office, to the Honorable John Conyers, Jr., Chairman of H. Comm. on Judiciary (Apr. 4, 2008), <http://www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf>. But see *E-Verify*

raises the question whether proponents of a legalization program have been using the E-Verify program, which is popular among immigration enforcement proponents, as a “bargaining chip” for a legalization bill.²⁴²

Congress should continue to support E-Verify. It is the most effective and fair tool to ensure only authorized workers are hired, which will in turn significantly discourage illegal immigration to the United States.²⁴³ It was reckless of Congress to hold such a well-run program in repeated limbo to maneuver support for a legalization program.²⁴⁴ As USCIS further improves the program to increase accuracy, Congress should make the program mandatory rather than voluntary. In addition, when the next generation of E-Verify is designed and implementation is underway, the program should be made permanent. As such, Congress should simultaneously extend and improve E-Verify, as it also designs the next version of electronic employment verification.

Employment verification has been the law now for twenty-four years.²⁴⁵ Employers understand it and the majority want to comply with the law.²⁴⁶ At the same time, employers want a

Hearing, supra note 2 (statement of Jena Baker McNeill, Heritage Foundation) (testifying that immigration enforcement does not require Congress to pass comprehensive immigration reform or a costly amnesty, which would undermine the law and be unfair to lawful immigrants).

²⁴² See *E-Verify Hearing, supra* note 2 (statement of Janice Kephart, Center for Immigration Studies) (opining that the attacks on E-Verify may be due to the program’s success).

²⁴³ *E-Verify Hearing, supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation); COUNCIL ON FOREIGN RELATIONS, *supra* note 99, at 97; see *E-Verify Hearing, supra* note 2 (statement of Gerri Ratliff, U.S. Citizenship and Immigration Services) (stating that E-Verify will continue to be a key element of our nation’s ability to ensure U.S. jobs are filled with citizens and authorized workers); see also *id.* (statement of Janice Kephart, Center for Immigration Studies) (stating E-Verify may be the most successful interior enforcement program in place).

²⁴⁴ See *E-Verify Hearing, supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (testifying that the business community supports expansion of E-Verify and other EEVS alternatives independent of comprehensive immigration reform); *id.* (statement of Jena Baker McNeill, Heritage Foundation) (testifying that reform should be incremental and designed to decrease the incentive for illegal immigration).

²⁴⁵ See *Ensuring a Legal Workforce Hearing, supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (stating “the overwhelming majority of employers” already invest significant resources in their compliance processes).

²⁴⁶ See *id.* (noting the majority of employers want to join the current political and economic environment; employers do not even want to be perceived as hiring unauthorized workers).

reliable, accurate verification system.²⁴⁷ If the federal government is going to hold employers responsible for verifying employees through the use of employer sanctions, employers want and need the federal government to provide them with the mechanism to verify employee identities and work authorization by comparing an employee's identity information with federal database information.

The employer process in the E-Verify program is a continuation of the flawed IRCA Form I-9 process, which establishes an employer-centric model rather than an employer-neutral model. Both the federal government, through E-Verify, and employees rely on employers to make decisions and take steps in the E-Verify program multiple times throughout the verification process.²⁴⁸ These include: (1) examining the personal identification and work authorization documents presented by the employee for Form I-9; (2) after E-Verify issues a TNC to the employer, notifying the employee of the TNC and giving the employee an opportunity to contest the finding; and (3) checking E-Verify to determine if TNCs have been resolved or made final.²⁴⁹ This keeps the system prone to more erroneous TNCs than necessary.²⁵⁰ In addition, both the Form I-9 process and E-Verify establish the employer as the defense against identity fraud because employers are responsible for authenticating identity through document examination.²⁵¹ Although the federal government, through E-Verify, electronically verifies work authorization for employers, it does not eliminate the Hobson's choice employers face regarding identity authentication.²⁵²

The future EEVS should remove reliance on employer judgment and give employers an unambiguous response as to whether an employee is authorized to work.²⁵³ A red-light/green-light system is appropriate for employers who need not know the data or reasons for whether an individual is authorized to work. In addition, the next employment verification system should

²⁴⁷ See *E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (testifying employers are willing to participate so long "as the system is fair and workable").

²⁴⁸ MEISSNER & ROSENBLUM, *supra* note 78, at 13.

²⁴⁹ *Id.* at 13–14.

²⁵⁰ *Id.* (stating that the employer as the central actor in managing a TNC increases the number of false non-confirmations and the cost to workers).

²⁵¹ *Id.* at 14.

²⁵² See *id.*

²⁵³ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute).

eliminate as much manual input as possible and reduce the number of steps in the process so as to reduce opportunities for error and abuse.²⁵⁴

To accomplish these goals, Congress should design a biometric EEVS. The use of biometrics to authenticate and verify identity is becoming a more common practice in our society.²⁵⁵ Several industries in the United States already require collection of biometric and biographic information and background checks for employment, including financial services, transportation, education, and health care.²⁵⁶ Likewise, the federal government is increasing its use of biometrics in a number of programs, as discussed above. Accordingly, the American public would tolerate the use of biometrics as part of employment verification.²⁵⁷ With biometric technology advancing so rapidly, the question is not whether Congress should incorporate biometric identification and verification into the employment verification process, but rather the question is how?²⁵⁸

²⁵⁴ MEISSNER & ROSENBLUM, *supra* note 78, at 2 (stating “a red-light/green-light system is the best avenue to unbiased implementation”); *see* CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 8 (recommending that USCIS develop a tickler/calendar system in E-Verify to timely prompt employers regarding their next appropriate step for each open and unresolved TNC); *see also E-Verify Hearing, supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (testifying that if the federal government wants to take over the job of employment authorization verification, employers would likely welcome the change so long as no new fees or taxes were part of the package).

²⁵⁵ *See Ensuring a Legal Workforce Hearing, supra* note 6 (statement of James W. Ziglar, Migration Policy Institute) (stating biometric technologies are currently used globally “to provide access to offices, homes, cars, medical records, security vaults, voting booths,” and many other non-law enforcement applications); Kelly, *supra* note 187 (writing biometrics is now about making our lives “better and more convenient”).

²⁵⁶ *Ensuring a Legal Workforce Hearing, supra* note 6 (statement of James W. Ziglar, Migration Policy Institute) (citing DHS’ US-VISIT program as one of the most visible and successful applications of biometrics); *see* Kelly, *supra* note 187 (stating the Nashville school system became the first in the country to test facial-recognition cameras for identifying intruders attempting to enter school buildings).

²⁵⁷ *See* REP. SAM JOHNSON, THE “NEW EMPLOYEE VERIFICATION ACT OF 2009” (NEVA): H.R. 2028 QUESTIONS AND ANSWERS 5 (Apr. 23, 2009), http://www.republicans.waysandmeans.house.gov/UploadedFiles/NEVA_Qs_and_As.pdf (stating that poll results “showed that nearly 8 in 10 people would endorse using biometrics in the employment verification process; and that many Americans are familiar with this technology and already use biometrics in a current job, when traveling, when purchasing groceries, or in ensuring security in financial transactions”).

²⁵⁸ *See Ensuring a Legal Workforce Hearing, supra* note 6 (statement of James W. Ziglar, Migration Policy Institute) (stating that it would be almost irresponsible to not seriously analyze incorporating biometrics into E-Verify).

With either the biometric card model or the central database model described above, the core issue is the same—identity management. The fundamental problem to solve is: how can an identity be authenticated when the document(s) presented to establish identity (“breeder documents”), such as birth certificates, driver’s licenses, and Social Security cards, can be stolen, easily counterfeited, and quickly obtained? Before linking a biometric to an identity, a government or private agency must first identity-proof a person’s *biographic* identity. This can be done with knowledge-based questions, including questions the individual provides and questions the government/private agency forms from the individual’s information in the database.²⁵⁹

Once an individual’s biographic identity is established, a biometric can be linked to the biographic information.²⁶⁰ This is not a perfect solution because an individual could create a false identity through the breeder documents, successfully answer the knowledge-based questions, and then solidify the identity with the use of biometrics.²⁶¹ Nevertheless, a perfect solution does not likely exist. In addition, some fraudulent biometric identities will be exposed over time due to data conflicts with a perpetrator’s true identity and/or the victim’s identity.²⁶² A biometric identity authentication would be the best form of identity management to prevent identity fraud.²⁶³

With the addition of biometrics to employment verification, both the government and employers will have greater confidence in both the accuracy and reliability of the system.²⁶⁴ A biometric

²⁵⁹ Gary R. Gordon, Econ. Crime Inst. at Utica College, Information-Based Identity Authentication, Presentation at the Knowledge Based Authentication Symposium (Feb. 2004), <http://csrc.nist.gov/archive/kba/Presentations/Day%201/Gordon-Info%20Based%20Identity.pdf>.

²⁶⁰ See Lipowicz, *supra* note 207 (noting a potential scenario of a race to enroll fingerprints to gain the advantage of being the first person to claim an identity).

²⁶¹ See *id.* (questioning “whether an enrolling entity would do mandatory checks with state and local agencies to verify the authenticity of the documents offered as proof of identity, such as birth certificates”); MEISSNER & ROSENBLUM, *supra* note 78, at 19 (stating the most powerful tool to prevent such fraud would be to link enrollment in a new identity database to legalization, eliminating the greatest source of demand for employment-related stolen identities).

²⁶² But see MEISSNER & ROSENBLUM, *supra* note 78, at 23 (noting if biometric data is compromised, it is much more difficult for identity theft victims to restore their identity than through the use of documents alone).

²⁶³ *Id.* at 22; see *E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (stating verification should move towards using biometrics to detect whether the person presenting a document is the same person whom the document represents).

²⁶⁴ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden

system would also be employer-neutral, preventing employers from exercising discretion during the verification process.²⁶⁵ Another significant advantage would be the elimination of employer discrimination based on an employee's perceived identity or national origin.²⁶⁶

Given the already high accuracy rate and success of E-Verify, Congress should add biometrics to E-Verify rather than start over, designing a new program.²⁶⁷ The next generation of E-Verify could be named "B-Verify." To best achieve the employer-neutral model described above, B-Verify should follow the central database model described above in section D, part 2.²⁶⁸ E-Verify currently uses the central database model, but it is based on biographic data. Introduction of a biometric card into the process creates an additional and unnecessary step in employment verification. An employee's biometric is all that is needed to verify identity and work authorization through a central database.²⁶⁹

Just as E-Verify began as a pilot program in a handful of states, B-Verify should be pilot-tested, including testing two different modes of biometrics—fingerprints and iris scans.²⁷⁰ While use of fingerprints has become more common and accepted for non-criminal purposes, Americans may prefer to use the iris scan. It is extremely accurate and can be scanned without physical contact, which is appealing during world health alerts such as the current H1N1 flu virus outbreak. Furthermore, a population of manual workers cannot provide reliable fingerprint

D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services).

²⁶⁵ See *id.* (statement of James W. Ziglar, Migration Policy Institute); see also *id.* (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (stating the verification system will fail if employers must make subjective decisions regarding a worker's identity and/or whether the individual is work-authorized); MEISSNER & ROSENBLUM, *supra* note 78, at 2 (stating employers should be neutral actors to the greatest extent possible).

²⁶⁶ Rosenblum, *supra* note 8, at 2, 11.

²⁶⁷ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute) (stating a biometric component could be effectively added to E-Verify rather than scrapping the present system); *id.* (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (suggesting Congress consider "using E-Verify as a platform and expanding photo-tool for currently issued documents and/or incorporating a new biometric identification document").

²⁶⁸ See *supra* Part III.D.2.

²⁶⁹ See Rosenblum, *supra* note 8, at 11 (labeling biometrics a "gold standard").

²⁷⁰ See MEISSNER & ROSENBLUM, *supra* note 78, at 16 (stating Congress should authorize voluntary verification pilots because new approaches can only be fully assessed by implementing them).

scans due to damaged or worn fingertips.²⁷¹ In designing the pilots, it is important that USCIS meet with stakeholders, including employers of different sizes, to collect user requirements.

USCIS should also phase in implementation of B-Verify.²⁷² The agency could start with enrolling nonimmigrants and immigrants entering the United States with temporary or permanent visas who are authorized to work during the visa issuance process.²⁷³ Designing the pilots and implementing the program would require significant public education and outreach campaigns, including for small businesses.²⁷⁴

Civil libertarians argue that a biometric verification system is not necessary and poses a threat to Americans' privacy.²⁷⁵ USCIS should go to great lengths to limit the use of the data and to protect the information. USCIS has established sound privacy practices with E-Verify, including establishing a privacy office; limiting the collection and use of, and access to, the data; and publishing PIAs and SORNs with each change in data collection. USCIS should continue these practices to protect the data in the B-Verify system.

A redress process is an important part of identity management and privacy protection. Current databases, and any future database, will have errors due to government or employee error. As such, it is necessary to permit workers to verify their information before locking it in with a biometric as well as to provide workers with a redress process to correct government error.²⁷⁶ Currently, an individual may not learn of problems in

²⁷¹ *Id.* at 23; see Kelly, *supra* note 187 (explaining that fingerprints can change in appearance with dirty or greasy fingertips).

²⁷² See *E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (stating the best approach for mandating E-Verify would be to phase-in the system as it is being improved to fix inaccuracies and inefficiencies identified during the earlier phase). The U.S. Chamber of Commerce urged Congress to exempt employers with less than fifty employees to permit Congress to study the impact of mandatory E-Verify on small businesses and alternative solutions such as a telephonic option. *Id.*

²⁷³ See MEISSNER & ROSENBLUM, *supra* note 78, at 24 (providing three categories of non-citizens who will already be in contact with USCIS).

²⁷⁴ See CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 7–8 (recommending that education and outreach efforts reach small businesses, many of which do not belong to chambers of commerce or industry associations, and often do not engage legal counsel).

²⁷⁵ Kelly, *supra* note 187.

²⁷⁶ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services); see Lipowicz, *supra* note 207 (writing that an EEVS is only as good as the

his or her SSA file, for example, until the time comes to apply for retirement benefits.²⁷⁷ If an individual can confirm his or her SSA record independently from the job application process, the individual can ensure full credit for employment to properly calculate future Social Security benefits.²⁷⁸ The noted disadvantage of permitting record self-verification and redress is the uncertainty it brings to the hiring process and employers' operations.²⁷⁹ This disadvantage is outweighed, however, by the need to have as accurate an employment verification system as possible. Therefore, both the self-verification and the redress periods should be of a limited duration.²⁸⁰

For the biographic portion of establishing identity, the number of acceptable identity documents should be further reduced to passports/pass cards, green cards, EADs, and REAL ID-compliant driver's licenses.²⁸¹ Each includes a digital photograph for comparison. Social Security cards and numbers should no longer be used for identity purposes. Social Security cards were not designed to be secure documents and SSNs can be easily stolen or made up.²⁸² SSNs were created as a record-keeping mechanism for employers to identify and accurately report a worker's earnings.²⁸³ The SSN card has an even narrower purpose. It is a record of the number assigned to the individual to allow the person to provide the employer with the correct number.²⁸⁴ The card "was never intended, and does not serve, as a personal identification document."²⁸⁵ It neither contains information for proof of identity, nor establishes that the person presenting the card is the person whose name and SSN appear on the card.²⁸⁶

vetting; if the vetting fails, there needs to be procedures to correct it).

²⁷⁷ *E-Verify Hearing*, *supra* note 2 (statement of Jena Baker McNeill, Heritage Foundation).

²⁷⁸ *Id.*

²⁷⁹ *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services).

²⁸⁰ *See id.* (recommending that Congress balance the time it takes for an employee, DHS, and SSA to resolve an error with the employer's need to know whether it can keep the employee).

²⁸¹ *See E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (stating identity theft can be better addressed with fewer acceptable work authorization documents).

²⁸² *See* KEPHART, *supra* note 27, at 3 (providing 2007 Westat findings that duplicate SSNs were found more than twice in 21.9% of all transactions).

²⁸³ *E-Verify Hearing*, *supra* note 2 (statement of David A. Rust, Social Security Administration).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

Finally, to create uniformity and certainty for both employers and employees nation-wide, Congress should include preemption language in the E-Verify bill to preempt current and future state employment verification laws.²⁸⁷

The government would need to financially support the development of B-Verify.²⁸⁸ A biometric employment verification system would be extremely expensive to implement.²⁸⁹ DHS would have to change its databases to incorporate biometrics for employment authorization purposes, including increasing its matching capacity significantly. Enrolling all employees in the database would be both lengthy, with the largest share of the burden on U.S. citizens, and costly.²⁹⁰ Congress must carefully consider any additional costs to employers as it analyzes a new employment verification system.²⁹¹ Employers would be wise to contract with private biometric firms, if economically feasible, rather than bear the responsibility of collecting biometrics within the company or organization.

In the meantime, additional changes to E-Verify would

²⁸⁷ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (testifying that the preemption language should prevent any state attempt to build upon or weaken the federal system); *E-Verify Hearing*, *supra* note 2 (statement of Angelo I. Amador, U.S. Chamber of Commerce) (advocating for a stronger preemption provision because having one federal law helps eliminate employers' confusion about their role under the law).

²⁸⁸ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute); COUNCIL ON FOREIGN RELATIONS, *supra* note 99, at 99.

²⁸⁹ For example, the Government Accountability Office estimated that a mandatory dial-up version of E-Verify for all employers would cost the federal government, employers, and employees about \$11.7 billion total per year, with employers bearing most of the cost. *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services). Biometric industry executives, however, indicate that the program's cost would range from \$1 billion to \$4 billion or higher, exceeding the US-VISIT program, which has collected at least 90 million fingerprints from foreign visitors and has cost around \$3 billion thus far. Lipowicz, *supra* note 207.

²⁹⁰ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of James W. Ziglar, Migration Policy Institute) (describing the process of enrolling all workers in the database as financially significant and politically volatile).

²⁹¹ See *Ensuring a Legal Workforce Hearing*, *supra* note 6 (statement of Lynden D. Melmed, Former Chief Counsel, U.S. Citizenship and Immigration Services) (stating that employers already bear most of the administration cost for the federal paper-based system, completing and storing the I-9 documents); MEISSNER & ROSENBLUM, *supra* note 78, at 23; see also Kelly, *supra* note 187 (explaining that five years ago, it would have cost a company around \$30,000 to buy 10-print scanning equipment, but now, the same system would cost a maximum of \$6,000).

increase the accuracy rate and further reduce the number of erroneous TNCs. Such changes would include: (1) converting pre-1995 naturalization records into an electronic format so they can be more quickly accessed; (2) adding U.S. citizen passport, foreign national visa, and driver's license photos to the photo-tool;²⁹² and (3) eliminating the need to fill out the paper Form I-9 in addition to inputting the data in E-Verify. The USCIS Ombudsman found during his Arizona E-Verify review that some employers logically, but erroneously, thought that because they were using E-Verify, they no longer needed to fill out the paper I-9 form.²⁹³ Private vendors offer employers a fee-for-service that satisfies the I-9 requirement and simultaneously runs an E-Verify query in the background through a one-step data collection process.²⁹⁴ In enforcement actions, ICE prefers to review the paper I-9s, which contain handwritten signatures for compliance attestations.²⁹⁵ On the other hand, "ICE itself authorized the use of electronic signatures for I-9 purposes."²⁹⁶ Filling out both the paper Form I-9 and filling E-Verify electronic fields with the same information is duplicative for employers and leads to input errors. USCIS has indicated that it is designing an electronic Form I-9 to eliminate this duplicate step. The Form I-9 process can be eliminated entirely with the addition of biometrics to E-Verify. As mandatory E-Verify is phased-in, the Form I-9 requirement should be phased-out.

CONCLUSION

In the 1980s, Congress correctly identified employment as the main incentive for illegal immigration to the United States. Likewise, Congress wisely made it unlawful to knowingly hire an illegal immigrant to combat illegal immigration in 1986. Congress, however, failed to design an effective employment eligibility verification system under IRCA due to competing interests. As a result, immigrants continue to illegally reside in the United States because they can continue to gain employment through fraud. The Basic Pilot/E-Verify Program has come a long way toward meeting the intent of IRCA, however, challenges

²⁹² See *E-Verify Hearing*, *supra* note 2 (statement of Janice Kephart, Center for Immigration Studies) (reporting rollout was planned for fall 2009, but has been postponed without explanation).

²⁹³ CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 35, at 8.

²⁹⁴ *Id.* at 8–9.

²⁹⁵ *Id.* at 9.

²⁹⁶ *Id.*

remain with the program, largely due to the limitations of biographic data.

Congress now has a third opportunity to design an employment verification system that is as fraud-proof and unburdensome to employers as possible. By introducing biometrics to a well-established and efficient E-Verify Program, Congress can finally meet the intent of IRCA. Implementing a nationwide mandatory biometric employment verification system would be a major challenge for DHS and SSA, employers, and employees, particularly U.S. citizens. B-Verify would also be expensive to implement. Nonetheless, after twenty-four years, Congress should continue to support the intent of IRCA.²⁹⁷ Adding biometrics to E-Verify would create the most reliable verification system, use cutting edge technology to screen out unauthorized workers, build confidence in the legality of our workforce, significantly decrease employment discrimination, and bring integrity to our immigration system.

²⁹⁷ See MEISSNER & ROSENBLUM, *supra* note 78, at 23 (reporting that the public would have confidence in the government combating illegal immigration).