

E-Verify: A TROJAN HORSE AT THE EMPLOYER'S DOORSTEP

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The morning of August 25 dawned like any other Monday morning at the Howard Industries electric transformer manufacturing plant in Laurel, Mississippi. But the day would turn out to be anything but normal. Immigration and Customs Enforcement (ICE) officials raided the plant early that morning, sealing off exits and even spraying mace at one worker who tried to escape.¹ Although Howard Industries is a registered user of E-Verify, the Department of Homeland Security's (DHS) voluntary verification system for checking worker eligibility, in accordance with Mississippi state law,² the raid turned up nearly 600 illegal workers.³ About 475 of these workers were sent to a detention center in Jena, Louisiana, for deportation.⁴ One hundred six were released for humanitarian reasons to care for a child or tend to medical conditions.⁵ Nine juveniles detained from the raid were transferred to a refugee resettlement agency.⁶ Eight workers face charges of criminal identity theft.⁷ Now a billboard on the small town's main thoroughfare of 16th Street reads, "Howard Industries is Hiring!" as the company attempts to rebuild in the wake of the ICE raid.

The raid on Howard Industries echoes the December 2006 ICE raid on six Swift & Co. (now JBS Swift & Co.) meat processing plants. The company had long used E-Verify, the federal government's voluntary electronic employment verification system, yet the raid turned up over 1,200 workers who were detained on immigration and criminal charges. The raid cost the company a reported \$53 million in losses and severely disrupted its labor force.⁸

E-Verify, formerly called the Basic Pilot/Employment Eligibility Verification Program, was created by the former Immi-

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gration and Naturalization Services (INS) and Social Security Administration (SSA) in accordance with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁹ of 1996. IIRIRA required these agencies to create and test three voluntary programs to evaluate the possibility of using an electronic verification system to check an employee's eligibility to work.¹⁰ E-Verify, which checks employees' social security numbers against centralized databases, outlasted the other two pilot programs, which were discontinued in 2003,¹¹ and is now operated by the

Department of Homeland Security (DHS) and the SSA.¹² The program works as follows: (1) An employer enters information from an employee's I-9 into the E-Verify system where it is checked against the SSA database and, if necessary, against DHS databases. (2) The system returns either an authorization response or a "tentative nonconfirmation," meaning that there is a mismatch between the employee's information and the information in the databases. (3) Employees have eight federal working days to take action with a local SSA office to con-



test the tentative nonconfirmation. If successful, the employee's eligibility is verified. (4) If an employee is unable to resolve the mismatch or fails to contest the tentative nonconfirmation within eight days, a "final nonconfirmation" is issued, and the employer must either terminate the employee or inform DHS of the continued employment of the unauthorized worker.¹³

Many companies, like Howard Industries and JBS Swift & Co., join E-Verify thinking that the system will prevent them from hiring illegal workers, who would cost employers millions of dollars if they turned up in a government raid.¹⁴ Indeed, DHS promises a fast and easy way to verify an employee's eligibility to work.¹⁵ However, Howard Industries has insisted that it "runs every check allowed to ascertain the immigration status of all applicants for jobs," including checking new hires through the E-Verify system.¹⁶ Why do these raids still turn up so many illegal workers at companies that use the E-Verify system?

The answer lies in part in one of the main weaknesses of E-Verify: while the system can determine whether a social security number provided by an employee is valid, it cannot determine whether that social security number actually belongs to that employee.¹⁷ Many workers use another person's identification to evade detection, as was allegedly the case for several workers detained from the Howard Industries raid.¹⁸ Methods for addressing this inadequacy, such as the introduction of a photograph screening tool designed to match an employee's photo identification document with a copy in the database, are still in the early stages.¹⁹ Indeed, this screening tool is only available in cases where the employee presents a green card or an employment authorization document as identification.²⁰ A majority of applicants—about 95% of E-Verify queries—present other forms of identification and cannot be checked using this tool.²¹

While DHS is looking for ways to expand the use of the photograph screening tool by incorporating other documents, such as passports and driver's licenses, into the database, there are privacy and security issues involved in such an expansion.²² A solution to the worker identification issue in E-Verify is a long time coming for the majority of queries.²³ Meanwhile, many have voiced concerns that the present situation will fuel identity theft and a black market for social security numbers as illegal workers seek to exploit this weakness in the system.²⁴

Even if DHS expands the photograph screening tool to include more documents and queries, identification problems will still persist. The only way to ensure worker identity would be through the use of biometrics in the screening process, but this assurance may come at too high a price. The inclusion of such personal information in government databases, and the need for employees to present this information to employers, raises security and privacy concerns, as well as civil liberties issues. There is concern that the government would abuse the possession of this information to take greater control over the lives of American workers.²⁵ Also, the incorporation of biometrics into the screen-

ing process would only alleviate problems with worker identity; other existing errors in the system would continue to plague both employers and employees.

E-Verify is a flawed system, and those employers looking for a quick and easy way to verify employment eligibility will be sorely disappointed. It is important to understand that E-Verify is an additional step in verifying worker eligibility. The 1996 Immigration Reform and Control Act (IRCA) established the I-9 Employment Eligibility Verification Process, which requires the presentation of documents from a select list to verify identity and employment authorization.²⁶ Employers are still required to comply with the I-9 system, but must also run new hires through the E-Verify system. The E-Verify system is an additional tool to ensure I-9 compliance; use of E-Verify does not excuse an employer from its legal obligations under the I-9 system.

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In reviewing the impact of E-Verify enrollment on its members, the American Council on International Personnel (ACIP) stated that significant costs can be expected, particularly for larger and more complex organizations, from the process of planning implementation of the E-Verify system.²⁷ Costs included performing necessary legal reviews, changing the process for bringing new employees on board and documenting work authorization, developing processes for handling tentative and final nonconfirmations, and training staff.²⁸ One ACIP member company with over 42,000 employees reported that from early June to early August 2008, the Immigration Manager and ten full time staff members had devoted 50% of their time to working on a transition plan for E-Verify. Another member company decided to outsource verifying new hires through E-Verify after eighteen months of planning and is still establishing which center or centers will cover the \$40,000 annual cost.²⁹ Moreover, these estimates do not account for E-Verify's continuing development; every change to the system will require reevaluation of the employer's obligations and retraining of the staff.

Even after companies incur substantial costs implementing the E-Verify system, E-Verify may bring further scrutiny to these companies. While information does not flow freely between DHS's E-Verify program and ICE, ICE officials have requested evidence from DHS for investigation of companies that are

voluntarily enrolled in the E-Verify system.³⁰ As the Howard Industries and JBS Swift raids show, the consequences of ICE scrutiny can be devastating even for companies that choose to use E-Verify in good faith. In cases where ICE officials obtain data from the DHS E-Verify system, E-Verify may actually fuel investigations and consequent raids by ICE officials.

E-Verify's failure to effectively screen for illegal workers is not the only risk that employers face when using the system. While the inadequacies in the system continue to expose companies to the hiring of illegal workers, the inaccuracies in the system may lead to new problems like labor disruptions and additional costs and hassles in the hiring process because errors in the databases E-Verify uses turn up tentative nonconfirmations for those legally authorized to work, including U.S. citizens.³¹

Take, for example, the story of Traci Hong. Ms. Hong became a naturalized U.S. citizen fifteen years ago. She also happens to be a government immigration attorney working for the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, chaired by Congresswoman Zoe Lofgren of California. With her location in Washington, DC, her expertise, and her resources in the immigration community, Ms. Hong is one of the best-equipped people in the world to navigate through immigration bureaucracy. Even so, it purportedly took her a full week, three trips to the Social Security office, three trips to the House Employment Office, and three trips to the Judiciary Committee to resolve a tentative nonconfirmation.³² Other workers lacking the same knowledge and resources could expect more significant delays in clearing their work authorization. In another case, a U.S. citizen and high-level employee of ICE spent over three months sorting out a mismatch in information with the SSA's database.³³ The time and effort needed to sort out such tentative nonconfirmations is of even greater concern to companies considering E-Verify's error rate. The DHS report, "Debunking the E-Verify Error Rate" touts the accuracy of the E-Verify system based on 1,000 queries carried out by Westat, an independent reviewer.³⁴ The study found that 942 of the queries (94.2%) returned automatic confirmations.³⁵ Of the remaining fifty-eight applicants, five (.5%) were able to successfully contest the tentative nonconfirmation by resolving the mismatch with the SSA.³⁶ The remaining balance of fifty-three (5.3%) applicants did not resolve the tentative nonconfirmation, resulting in a final nonconfirmation after eight days.³⁷

While supporters of the E-Verify system suggest that the 5.3% who did not contest their tentative nonconfirmations were probably illegal workers, and that the system is therefore deterring them as it was designed to do,³⁸ whether the rejected appli-

cants were illegal workers, erroneous rejections, or expelled by the employer is unknown.³⁹ E-Verify relies on the SSA database, which SSA acknowledges has a 4.1% error rate.⁴⁰ Given that the SSA database contains over 435 million entries, approximately 17.8 million of those entries contain errors.⁴¹ These types of errors, including names or dates of birth that have not been entered correctly, will cause a mismatch in E-Verify and yield a tentative nonconfirmation response. DHS and SSA insist that a majority of erroneous tentative nonconfirmations are the result of citizenship or other information that the individual failed to update with SSA when changes occurred, such as a name change after a marriage, divorce, or a change in citizenship status after naturalization.⁴² In promoting the benefits of the system, these agencies assure employers that such mismatches are easily resolved when the individual contacts the SSA office to contest the nonconfirmation.⁴³ As the above cases illustrate, resolving a tentative nonconfirmation can be anything but quick and easy.

Tentative nonconfirmations cause disruptions in the hiring process, adding time, cost and hassle for both the company and the new employee. Imagine the impact of such delays on companies such as Howard Industries as employees must take the time to sort through SSA and DHS errors. The delays currently experienced will likely increase as the E-Verify system grows. Should the system go national, the 4.1% error rate would force over six million workers of a 155 million member workforce to resolve mismatches with SSA.⁴⁴ Currently employers are only required to verify new hires through the system; re-verifying current employees with the system violates E-Verify policy. But even within the 55 million new hires expected each year, this error rate would result in 11,000 tentative nonconfirmations per workday.⁴⁵ Organizations such as the American Immigration Lawyers Association (AILA) are concerned that as E-Verify spreads, tens of thousands of U.S. citizens and qualified, legally-

authorized foreign nationals will get stuck sorting through errors in an already overburdened and underfunded system that will be unable to effectively cope with these new demands.⁴⁶ This would result in backups and increased delays for employers and employees.

Reliance on E-Verify removes human assessment from the hiring process. Employment decisions will be left to an automated government system that will not uniformly apply the law to specific employment situations. Indeed, employers may find certain categories of workers who fall through the cracks in E-Verify to be a particular problem. For example, foreign students applying for Curricular Practical Training (CPT) must obtain work authorization from their Designated School Official.⁴⁷ No employment authorization from DHS is needed, only annota-

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tion in the students' Student and Exchange Visitor Information System (SEVIS) record.⁴⁸ Katherine Lotspeich, Deputy Chief of the United States Citizenship Immigration Services (USCIS) Verification Division for DHS, confirmed that employers using E-Verify are required to run CPT hires through the system and that the system cannot automatically check a student's SEVIS record.⁴⁹ This means that employers will receive a tentative nonconfirmation response each and every time they run a CPT student through the system.

Refugees and asylees might face similar problems with consistent tentative nonconfirmations. A refugee or asylee's I-94 Arrival/Departure Record, which indicates employment authorization, is an acceptable document to prove employment eligibility. Refugees and asylees are not required to obtain employment authorization documents from DHS in order to work.⁵⁰ Because information for refugees and asylees who do not apply for employment authorization documents would not be reflected in the DHS database, employers could expect a tentative nonconfirmation response from E-Verify.

Workers applying for H-1B portability make up another group that would receive tentative nonconfirmations if E-Verify were used to determine certain H-1B employee work eligibility. H-1B work eligibility is employer specific. However, the law authorizes employment with a new employer as soon as the new employer files an H-1B Portability petition; it is not necessary to wait until the petition is approved to switch employers.⁵¹ Therefore, because the DHS database cannot reflect the employee's eligibility to work in H-1B portability cases, the E-Verify system cannot determine eligibility for H-1B employers. To avoid tentative nonconfirmations that would run counter to the effective promotion of E-Verify as a workable solution, the E-Verify system checks only that the I-94 number has work authorization; it does not currently validate that the employee is working for the correct employer.⁵² Hence, DHS eliminates tentative nonconfirmations while simultaneously doing away with a system that actually determines employment eligibility for H-1B employees leaving little practical utility from E-Verify in that regard.

These categories of workers, thus far neglected in a DHS analysis of the effectiveness of E-Verify, would increase the percentage of queries returning tentative nonconfirmations beyond those projected by DHS. According to data provided by an ACIP member company seeking to hire student interns from January 1, 2008 to May 22, 2008, 92 out of 598 queries, or

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15.38%, resulted in tentative nonconfirmations.⁵³ Expansion of the program could turn up additional issues that might push the number of tentative nonconfirmations even higher.

The insufficient scope of the studies that form the basis of DHS analysis leads to this inaccurate and incomplete picture of the challenges the system faces, yet DHS seems content to let employers and employees bear the brunt of the cost for discovering these problems.

Unfortunately, new employees cannot know whether their information will turn up a nonconfirmation stemming from database error until their new employer runs their information through E-Verify. Only then, when the timing is of great consequence to both the employee and the employer, is the employee made aware that there is a problem that needs resolving. If DHS were to devise a system that allowed employees to "self-verify" by running their information through the databases themselves,, legal workers might be able to identify errors and inconsistencies that would return tentative nonconfirmations and sort out these issues beforehand instead of only discovering the problem after an employer runs an E-Verify check. Such an option would be particularly useful for sorting out simple errors such as name misspellings and date of birth typos in the databases. When an employer checks this employee as a new hire, the database would reflect that individual's already-corrected information and return an authorization response. This could benefit both the employer and employee by eliminating the disruptions and hassle after hiring caused by tentative nonconfirmations. For now, employers and employees continue to sort through DHS and SSA errors as part of a costly and inefficient addition to the hiring process.

However, self-verification could create another problem: a self-verification system could be abused by employers as a way to discriminate against individuals who have not self-verified. Unfortunately for companies using E-Verify, there is little they can do to avoid complications and delays caused by tentative nonconfirmations. Practices such as pre-screening employees or avoiding hiring anyone who might turn up a tentative nonconfir-

mation, such as foreign-born U.S. citizens who have a higher error rate in the E-Verify system than their U.S. born counterparts,⁵⁴ are in direct violation of non-discrimination laws as enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices.⁵⁵ These laws prohibit, among others, the following actions by the employer: (1) using the program selectively based on either a suspicion that a new or current employee may not be authorized to work in the U.S. or based on national origin; (2) using the program to pre-screen employment applicants; (3) influencing or coercing an employee not to contest a tentative non-confirmation; (4) terminating—or taking other adverse action against—an employee who is contesting a tentative non-confirmation; (5) asking an employee to obtain a printout or other written verification from SSA or DHS when referring that employee to either agency; (6) asking an employee to provide additional documentation of his or her employment eligibility after obtaining a tentative non-confirmation; and (7) requesting specific documents in order to use E-Verify's photo tool.⁵⁶ DHS has created a branch within the USCIS Verification Office for monitoring the misuse or noncompliance with E-Verify that addresses many of the same issues. This relatively new addition, still in the early stages of development, has identified fifty-three employer and employee behaviors of noncompliance, including: (1) using E-Verify to verify existing employees or pre-screen employees; (2) firing employees who receive tentative non-confirmations or failing to fire unauthorized employees; and (3) failing to perform verifications within specific time frames.⁵⁷ Companies can expect closer scrutiny of their E-Verify use as this branch develops, so compliance is key.



additional tool for checking the authenticity of documentation against a database, but the I-9 verification process, not E-Verify, establishes worker eligibility. Firing an employee based only on an E-Verify nonconfirmation could mean discriminating against a legally authorized worker who passes the I-9 verification. Sorting through such legal issues would prove costly and time consuming and could leave companies vulnerable to discrimination lawsuits.

Companies thus end up caught between the poles of enforcement and discrimination in the immigration debate. On the one side is the need for enforcement of the law to deter employers from the hiring of illegal workers.⁵⁹ On the other side is the need to protect those who are legally authorized to work from being barred from jobs due to citizenship discrimination. In that vein, Governor Don Carcieri of Rhode Island signed an executive order in March requiring state agencies and companies that do business with the state to use E-Verify to check the status of new hires.⁶⁰ Companies that fail to do so run the risk of losing their contracts and possibly face being suspended or debarred from doing business with the state.⁶¹ In response, the Rhode Island branch of the American Civil Liberties Union (ACLU) filed a lawsuit to block the requirement, citing the disproportionate number of legal foreign-born workers who are not automatically cleared through the system as a problem that might encourage employers to discriminate against workers who appear to be foreign.⁶² In this situation, employers must use E-Verify in order to maintain their government contracts, but in doing so they face scrutiny and possibly disciplinary actions from government agencies, like the USCIS Monitoring and Compliance Branch, and lawsuits from NGOs, like ACLU. Companies will have to step carefully to avoid accusations of discrimination and misuse while remaining within the boundaries of the law, and even the best attempts to comply with demands may not be enough, as the recent Howard Industries raid demonstrates.

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By using E-Verify, companies must ensure compliance not only with the law but also with a whole new set of regulations to ensure the proper use of the system, and these two sets of rules may not always agree. Inconsistencies between E-Verify policy and the employment regulations may leave companies with no way out of hiring situations without exposing themselves to sanctions, fines, and other harmful repercussions. What happens if E-Verify results in an incorrect final nonconfirmation? In the current system there is no process for contesting a final nonconfirmation;⁵⁸ however, employers may violate the law if they fire someone for a final nonconfirmation, as required by E-Verify policy, if that person is eligible to work. E-Verify is an

The Howard Industries raid highlighted some of the shortcomings of the E-Verify system, calling the program's effectiveness into question. The system has apparently failed to protect compliant companies from government raids, or even the hiring of illegal workers. It creates an additional layer of bureaucracy in the hiring process while exposing employers to further scrutiny, delays, and added costs. These issues make companies wary of enrolling in the E-Verify system. As Randy Johnson, Vice President for Labor, Immigration, and Employee Benefits at the U.S. Chamber of Commerce stated, "If it's not going to be a safe harbor from investigations, why bother?"⁶³

Unfortunately for companies, while participation in the program is for the most part voluntary, recent legislation is making it mandatory for more and more employers. Arizona state law now requires all employers to use the E-Verify system to check new hires' eligibility.⁶⁴ Mississippi began phasing in similar requirements for all employers in July of this year.⁶⁵ Several other states, including Rhode Island, require employers in certain sectors to use the system, and still more states have similar legislation currently pending.⁶⁶ Despite concerns over the problems with E-Verify, the Bush administration also issued an Executive Order in June which, if implemented, would require all federal contractors to use E-Verify for new hires.⁶⁷ These moves suggest that the government will continue to push ahead with mandatory use of E-Verify before the major issues with the system are resolved.

Other state governments have taken the opposite approach as to E-Verify use. Indeed, Illinois passed a law banning companies from using E-Verify to check for employment eligibility.⁶⁸ In September 2007, DHS sued the state of Illinois and asked a court to declare this new law invalid; Illinois agreed to not to enforce the new law until the adjudication of the DHS lawsuit. Also, California has been considering a similar ban.⁶⁹

Inconsistent state law confuses companies that operate in multiple states and must try to comply with each state's individual requirements. Sorting through various legal obligations by state will further burden employers caught in the middle of the conflict over the effectiveness and appropriate application of the E-Verify system.

The fate of Howard Industries may become an all too familiar story as other "Now Hiring" signs represent some of the casualties of a broken system. Companies that rely on E-Verify to protect them from hiring illegal workers and immigration raids may nonetheless find substantial numbers of their workers being carted away by ICE. Other companies that sought a quick and easy verification system may nonetheless find projects grinding to a halt as employees sort out errors in the SSA and DHS databases. And so, the use of E-Verify, whether voluntary or in compliance with new legislation, will open the floodgates to added costs and delays in the hiring process, labor disruptions and accusations of discrimination while doing little to stem the flow of illegal workers. **BLB**

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¹ See Emma James, *Detainees Say Employer Sealed Off Escape Routes*, HATTIESBURG AMERICAN, Aug. 27, 2008, http://nl.newsbank.com/cgi-bin/ngate/MHAB?ext_docid=hat37164644&ext_hed=Detainees%20say%20employer%20sealed%20off%20escape%20routes&site=hattiesburgamerican&ext_theme=gannett&pubcode=MHAB&usefield=sqn.

² See Mississippi Employment Protection Act, MISS. CODE ANN. § 71-11-3 (West 2008) (phasing in the required use of electronic employment verification for all employers from 2008 to 2011).

³ See Press Release, U.S. Immigration and Customs Enforcement, 595 arrested in ICE and Department of Justice joint immigration enforcement action initiated at Mississippi transformer manufacturing facility, approximately 106 identified with humanitarian issues, eight charged criminally (Aug. 26, 2008), <http://www.ice.gov/pi/nr/0808/080826laurel.htm>.

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See Spencer S. Hsu et al., *Businesses Cite a Catch-22 After Miss. Immigration Raid*, WASH. POST, Aug. 28, 2008, at A1.

⁹ See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, §§ 401-404, 110 Stat. 3009-546, 3009-655-65 (1996).

¹⁰ See *id.* at § 401(a).

¹¹ See *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing Before the Subcomm. on Social Security, Comm. on Ways & Means*, 110th Cong. 5 n.9 (2007) (statement of Richard M. Stana, Director Homeland Security and Justice Issues) (discussing The Citizen Attestation Verification Pilot Program and The Machine Readable Document Pilot Program, which were discontinued in 2003).

¹² See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, STATEMENT FOR THE RECORD: E-VERIFY (last modified May 20, 2008), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=bca6fa693660a110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (discussing collaborative efforts with SSA) (last visited Nov. 2, 2008).

¹³ See Stana, *supra* note 11, at 7-9.

¹⁴ See Karen Dimirjian, *E-Verify Draws Attention, but Senate Still Expected to Move on Bill*, CQ TODAY ONLINE NEWS, Aug. 28, 2008, available at 2008 WLNR 16602014 (addressing the issues with E-Verify that the Howard Industries raid has brought to light).

¹⁵ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, E-VERIFY PROGRAM HIGHLIGHTS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a16988e60a405110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD> (promoting E-Verify as a free and simple to use system that returns results within seconds) (last visited Nov. 2, 2008).

¹⁶ See Leader-Call, *Howard Industries Responds to ICE Raid*, 25 Aug. 2008, http://www.leadercall.com/local/local_story_238170242.html (covering Howard Industries' immediate reaction to the raid) (last visited Nov. 2, 2008).

¹⁷ See Dimirjian, *supra* note 14.

¹⁸ See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 3.

¹⁹ See Stana, *supra* note 11, at 3 (discussing E-Verify's vulnerability to fraud).

²⁰ See *id.* at 12.

- ²¹ See *id.*
- ²² See generally Jim Harper, *Electronic Employment Eligibility Verification: Franz Kafka's Solution to Illegal Immigration*, 612 CATO INST. POLICY ANALYSIS 9 (2008) (analyzing the potential misuse of database information).
- ²³ DHS and USCIS have not yet reached an agreement on document sharing of passports and visas for inclusion in the databases. USCIS is additionally seeking to use state issued driver's licenses in the database, but thus far no state motor vehicle associations have been willing to participate in an image-sharing pilot program. See Stana, *supra* note 11, at 16 (discussing the obstacles to expanding the E-Verify photo tool).
- ²⁴ See Harper, *supra* note 22, at 3.
- ²⁵ See *id.* at 3.
- ²⁶ See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 100 Stat 3359 (1986).
- ²⁷ See American Council for International Personnel, *Comments on Proposed Rule published at 73 Fed. Reg. 33374 (June 12, 2008)* at 12 (August 11, 2008) (addressing the underestimation of cost to employers of implementing the E-Verify system).
- ²⁸ See *id.* at 12-13.
- ²⁹ See *id.* at 13.
- ³⁰ See Stana, *supra* note 11, at 14 (discussing comments made by ICE officials on the possibilities for using E-Verify data in identifying target companies).
- ³¹ See OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATIONS NUMIDENT FILE at ii (2006) (addressing the error rate for the SSA database, one for the databases on which E-Verify relies).
- ³² See *Proposals for Improving the Electronic 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. 100 (2007) (statement of Zoe Lofgren, Chairwomen).
- ³³ See ICE Official Speech at the ABA 2008 CLE Midyear Conference: Avoiding the Wipe-Out: Mastering the Challenges of Today's Business Immigration Practice (January 18, 2008).
- ³⁴ See Stewart Baker, *Debunking the E-Verify Error Rate*, DEPARTMENT OF HOMELAND SECURITY LEADERSHIP JOURNAL, May 16, 2008, <http://www.dhs.gov/journal/leadership/2008/05/debunking-e-verify-error-rate.html> (promoting the accuracy of the E-Verify system).
- ³⁵ See *id.*
- ³⁶ See *id.*
- ³⁷ See *id.*
- ³⁸ See *id.* (arguing that legal workers would have no reason not to address the tentative nonconfirmation).
- ³⁹ See WESTAT, *Findings of the Web Basic Pilot Evaluation*. Chap. II § C(1)(c), at 38-39 (Department of Homeland Security Sept. 2007) (noting that the study was unable to determine the situation of tentative nonconfirmation recipients more specifically).
- ⁴⁰ See OFFICE OF THE INSPECTOR GENERAL, *supra* note 31, at ii.
- ⁴¹ See *id.*
- ⁴² See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *supra* note 12.
- ⁴³ See *id.* (ensuring that legal workers who contest tentative nonconfirmations will be employment authorized and suffer no permanent adverse consequences).
- ⁴⁴ See BUREAU OF LABOR STATISTICS, *The Employment Situation: August 2008*, U.S. Department of Labor, at 3 (estimating the current civilian labor force to be about 154.9 million).
- ⁴⁵ See Jim Harper, *Can E-Verify Help Stem Tide of Illegal Immigration?*, DAILY HERALD, Mar. 30, 2008.
- ⁴⁶ See AILA InfoNet Doc. No. 08030660, Mar. 6, 2008.
- ⁴⁷ See 8 C.F.R. 214.2 (f)(10)(i) (2003).
- ⁴⁸ See *id.*
- ⁴⁹ See American Immigration Lawyers Association. Doc. No. 08091769 (September 17, 2008).
- ⁵⁰ See 8 C.F.R. § 274a, 12(a), INA § 208(c)(1)(B) (2008). See also Memorandum on "The Meaning of 8 C.F.R. 274a12(a) as it Relates to Refugees and Asylee Authorization for Employment," HQADJ 70/21.1.13 (U.S. Dept. of Justice, INS 2003) (upholding that employment authorization for refugees and asylees is incident to status).
- ⁵¹ See The American Competitiveness in the 21st Century Act, Pub. L. No. 106-313, § 105, 114 Stat. 1253 (2000) (amending the Immigration and Nationality Act 8 U.S.C. 1184(2008)).
- ⁵² A report drafted by American Immigration Lawyers Association (AILA) Member Josie Gonzales, E-Verify Questions and Comments: Program Administration and the MOU. See AILA Doc. No. 08061761, published June 16, 2008.
- ⁵³ See ACIP, *supra* note 27, at 16.
- ⁵⁴ A 2007 report commissioned by DHS found the rate of tentative nonconfirmations for foreign born U.S. citizens to be 30 times that of native born U.S. citizens. See Westat, *supra* note 38, Chap. IV § D(3)(a), at 96-97.
- ⁵⁵ The Office of Special Council for Immigration-Related Unfair Employment Practices enforces antidiscrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (1986).
- ⁵⁶ See U.S. DEPARTMENT OF JUSTICE, OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION-RELATED UNFAIR EMPLOYMENT PRACTICES, E-VERIFY DOS AND DONT'S, available at http://www.usdoj.gov/crt/osc/pdf/e_verify.pdf.
- ⁵⁷ See Stana, *supra* note 11, at 18.
- ⁵⁸ See Jim Harper, *E-Verify Debunking Exposes Debunking Errors*, CATO INST. (May 21, 2008), available at <http://www.cato-at-liberty.org/2008/05/21/e-verify-debunking-exposes-debunking-errors> (discussing the failings of DHS analysis of E-Verify and of the system itself).
- ⁵⁹ See 8 U.S.C. § 1324(a) (1986) (stating that it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien with respect to such employment).
- ⁶⁰ See R.I. Exec. Order No. 2008-01, §1-2 (2008).
- ⁶¹ See STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS DEPARTMENT OF ADMINISTRATION E-VERIFY FREQUENTLY ASKED QUESTIONS (FAQs) at Question 5 (revised July 11, 2008).
- ⁶² See Ray Henry, *ACLU Sues to Halt RI Governor's Immigration Order*, Associated Press, Sept. 3, 2008, available at http://ap.google.com/article/ALeqM5iDXvSndpsEiF_BDdiemz_jRH8dUwD92VEVE81.
- ⁶³ See Dimirjian, *supra* note 14.
- ⁶⁴ See Legal Arizona Workers Act, H.R. 2779, 48th Leg., 1st Reg. Sess. (R.I. 2007).
- ⁶⁵ See Mississippi Employment Protection Act, S. 2988, 110th Cong. (2008).
- ⁶⁶ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *supra* note 12.
- ⁶⁷ See Exec. Order 12,989, 40 U.S.C. § 121(a), 3 U.S.C. § 301 (2008) (amending Exec. Order 12,989, as amended (1996)).
- ⁶⁸ See Illinois Right to Privacy in the Workplace Act, P.A. 095-0138 § 12(a).
- ⁶⁹ See AB 2076, Cal. Leg. 2007-08 Reg. Sess. (C.A. 2008).