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## S U M M A R Y

Gaining control of illegal immigration to the United States would require large-scale reforms to the notoriously ineffective employer sanctions system. Such changes should make it easier for employers and migrants to comply with the law, and more punitive for those who do not.

A number of reform strategies have been proposed, each with its own economic and privacy costs. These include consolidating identification documents and making them more secure; mandating application screening through government databases; devoting additional staff to worksite enforcement; increasing penalties for noncompliance; and streamlining and strengthening the enforcement process to increase investigators' worksite access.

Two additional possibilities include creating a centralized screening system and a job holder database. These reforms could reduce the burden on employers and the likelihood of discrimination against eligible employees by "front loading" verification at the point of document issuance, and could simplify eligibility verification and streamline enforcement. Such reforms, and their trade-offs, are essential considerations for improving the integrity of the US immigration system.

# Immigration Enforcement at the Worksite: Making it Work

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## I. Introduction

Most unauthorized immigrants enter the United States in pursuit of employment, and analysts view an effective employer sanctions regime as an essential element of immigration control. Employer sanctions are also attractive to some advocates of more open policies as part of a "grand bargain," which combines tougher enforcement with more legal flows. Yet US employer sanctions laws have been notoriously ineffective because employers lack tools to verify applicants' eligibility, investigators lack tools to identify non-compliant employers, and (for these and other reasons) employers view the threat of actual punishment under the current system as an acceptable business expense.

At least six different types of reform could strengthen the employer sanctions system:

- Improvements to document security,
- Document consolidation,
- Mandatory use of employment databases,
- Increased enforcement staffing,
- A revised penalty structure, and
- Better worksite access for investigators.

Creating an effective employer sanctions regime would likely require some change within all of these areas, and bills under consideration by the 109<sup>th</sup> Congress encompass all but the

last of them. Yet within each of these areas, the potential benefits of more effective enforcement are partially offset by economic and other costs of reform. Moreover, existing congressional proposals may be overly optimistic about technological fixes to the problems of document and identity fraud and about the potential to implement a universal version of the Basic Pilot employer verification program.

Thus, in addition to reviewing the costs and benefits of these incremental reform strategies, this brief also argues for consideration of two additional kinds of changes to the existing employer sanctions regime. First, rather than requiring employers to query an eligibility database at the point of hire, a centralized screening system should be established in which the verification process occurs at the point of document issuance. Second, employers' primary responsibility would then be to submit employees' identification information to a job holder database. This database would become a primary tool of worksite enforcement, and would also enhance the integrity of the United States' overall system of migration control.

## II. Background: The Existing Employer Sanctions Regime

Any system of employer sanctions must begin with procedures to confirm the eligibility of prospective employees, a process that includes two distinct but related tasks:

- matching an individual with his or her name and relevant personal information (identification), and
- confirming that the individual is authorized to work in the United States (verification).

In the United States, the primary tool for identification and verification since passage of the 1986 Immigration Reform and Control Act

(IRCA) has been the I-9 form. The form enumerates eight documents establishing both identity and work eligibility, twelve documents only establishing identity, and seven documents only establishing eligibility (current instructions on the USCIS website narrow the list to twenty-five documents.) To demonstrate their legal status, employees are required either to produce one of the dual-purpose documents (e.g., a US passport or Green Card) or one document from each of the other two lists (e.g., a state-issued driver's license along with a Social Security card). IRCA requires employers to confirm—to the best of their ability—that new employees can satisfy this requirement, and employers document compliance by maintaining completed I-9 forms on file for every employee.

The optional Basic Pilot employment verification program, established in 1996, complements the I-9 process by allowing employers to compare a job applicant's identification information to the Social Security Administration's (SSA) database and the Department of Homeland Security's (DHS) immigrant database. Where neither automatic nor manual searches of these databases are able to confirm a worker's eligibility, the Basic Pilot issues a final non-confirmation of eligibility and employment must be terminated.

Following this verification process, sanctions enforcement consists of three tasks:

- **Targeting employers for investigation.** Most sanctions investigations have focused on individual businesses on the basis of leads provided by private citizens, the Department of Labor, and other local, state, and federal law enforcement agencies. A secondary strategy has been to target firms on the

basis of their industrial and regional characteristics. Some firms were randomly selected for inspection during the late 1980s and the 90s, but random targeting was discontinued in 1998 for lack of results.

- **Investigating and prosecuting employers.** Once a firm is targeted, investigations have primarily relied on audits of I-9 forms and other records. Audits may be followed by worksite inspections to confirm the correspondence between these records and actual personnel.
- **Penalizing non-compliant employers.** Where investigators find evidence of non-compliance (historically slightly less than half the time), penalties may range from a formal warning to a “paperwork” fine (for unintentional non-compliance), to a “substantive” fine (for intentional non-compliance), to the initiation of criminal charges (for engaging in a repeated pattern or practice of violations).

### III. Flaws in the Existing System

Deportable aliens apprehended by the INS dropped by half in the three years following IRCA’s passage, and there is considerable evidence that this reduction was partly a result of employer sanctions serving as a deterrent. Yet by the early 1990s, employers and unauthorized immigrants learned to exploit IRCA’s design flaws, especially with respect to eligibility verification. IRCA enforcement has been further undermined by statutes and regulations that protect non-compliant employers.

The existing verification system rests on the ability of employers to correctly screen prospective workers for eligibility, but the widespread availability of counterfeit documents makes doing so difficult. Many unautho-

rized immigrants also borrow or steal legitimate documents and obtain work under someone else’s name. These two problems—document fraud and identity fraud—are exponentially more difficult to prevent as a result of I-9 complexity: with at least twenty-five different documents in the system, it is simply not possible for employers who lack specialized training to reliably screen job applicants. IRCA’s well-intentioned anti-discrimination measures also undercut effective enforcement by preventing careful scrutiny of documents which appear to be genuine. Indeed, roughly half of all unauthorized workers are hired by employers who fully comply with I-9 requirements.

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The Basic Pilot program has not fixed these problems. Most importantly, because the program is voluntary, it fails to detect the vast majority of ineligible applicants, including, in particular, those hired by intentionally non-compliant employers. The program is also unable to detect the fraudulent use of borrowed or stolen documents, making it easily evaded by unauthorized migrants.

In addition, flaws in SSA and DHS databases (along with employer errors) ensure that the Pilot produces a high level of false negatives, or cases in which genuinely work-eligible individuals are not confirmed. These false negatives are particularly likely to affect recent immigrants and other legal non-citizens. And with employers prioritizing rapid resolution over fairness, false negatives often lead to lost employment opportunities.

Beyond the verification process, sanctions enforcement is fundamentally undermined

by the fact that no agency, office, or division has made a priority of worksite enforcement. The Immigration and Naturalization Service (INS) consistently placed greater emphasis on the apprehension and removal

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of unauthorized immigrants than on worksite enforcement. Indeed, the priority placed on worksite enforcement peaked during the late 1980s at

around 5 percent of the agency's budget, and spending on interior investigations increasingly lagged behind spending on border enforcement and detentions during the 1990s following the initial success of the Border Patrol's "prevention through deterrence" strategy.

Institutional commitment to employer sanctions reached a new low after the 9/11 attacks as the INS shifted its focus to terror prevention. Thus, less than 10 percent of immigration enforcement spending was dedicated to interior investigations of any kind in 2002; and only 2 percent of these interior investigations targeted employers. The shift in focus from employment to counterterrorism was formalized in 2003 when responsibility for interior investigations passed to the Immigration and Customs Enforcement (ICE) division within the Department of Homeland Security.

Beyond this general limitation, each aspect of enforcement confronts additional problems. With respect to the targeting of employers, reliance on tips has failed because neither non-compliant employers nor unauthorized immigrants have incentives to collaborate with enforcement agents. (INS efforts to foster employer collaboration through industry-wide efforts like Operation Vanguard in 1998-9 succeeded at creating

short-term disruptions in the availability of immigrant labor, but failed to build employer support for sanctions or to achieve a lasting deterrent effect.) A 1992 Memorandum of Understanding sought to elicit tips from Department of Labor (DOL) agents, who make frequent worksite inspections, but DOL commitment to protecting workers (regardless of their migration status) made it a reluctant partner. Thus, only 236 tips were generated by the collaboration between 1988 and 1998.

Even when non-compliant employers are targeted for enforcement, investigations have rarely produced convictions because of the flawed verification system discussed above. In short, as long as employers have completed an I-9 form for every employee on the payroll, it is difficult for investigators to prove intentional non-compliance. Investigations are further undermined by a statutory and regulatory framework designed to protect employers from over-zealous enforcement:

- 1996 Immigration and Nationality Act (INA) amendments give employers an extra defense to a technical violation or procedural violation if they made a "good faith attempt" to comply with verification procedures;
- 1998 regulations require warnings (rather than workplace inspections) where investigators suspect that non-compliance was unintentional; and
- 1998 and 2003 regulations require inspectors to obtain detailed written approval from their supervisors prior to visiting worksites.

Finally, many non-compliant employers view sanctions as an acceptable business expense, reducing their deterrent effect. Fines range from \$100 to \$1,000 per unauthorized immigrant for paperwork errors and from \$250 to

\$10,000 for substantive violations—a statutory range that has not changed since 1986 and which may be well below the cost savings from employing unauthorized labor. Moreover, many migrant-employing businesses are small and informal, and firms frequently rely on labor contractors to recruit their migrant workforce. As a result, collection of fines is impeded by relocation or restructuring of non-compliant businesses, and INS/ICE lawyers often offer firms reduced penalties in an effort to increase actual payment rates.

Figure 1 illustrates the limits of employer sanctions enforcement. Between 1991 and 2003, an average of fewer than 5,000 employer investigations was completed per year (the solid line

in Figure 1), targeting less than one-tenth of 1 percent of US worksites. Only 10 percent of these cases led to final orders to fine (the broken line), and an average of just \$2.2 million in fines were collected (1991-1999).

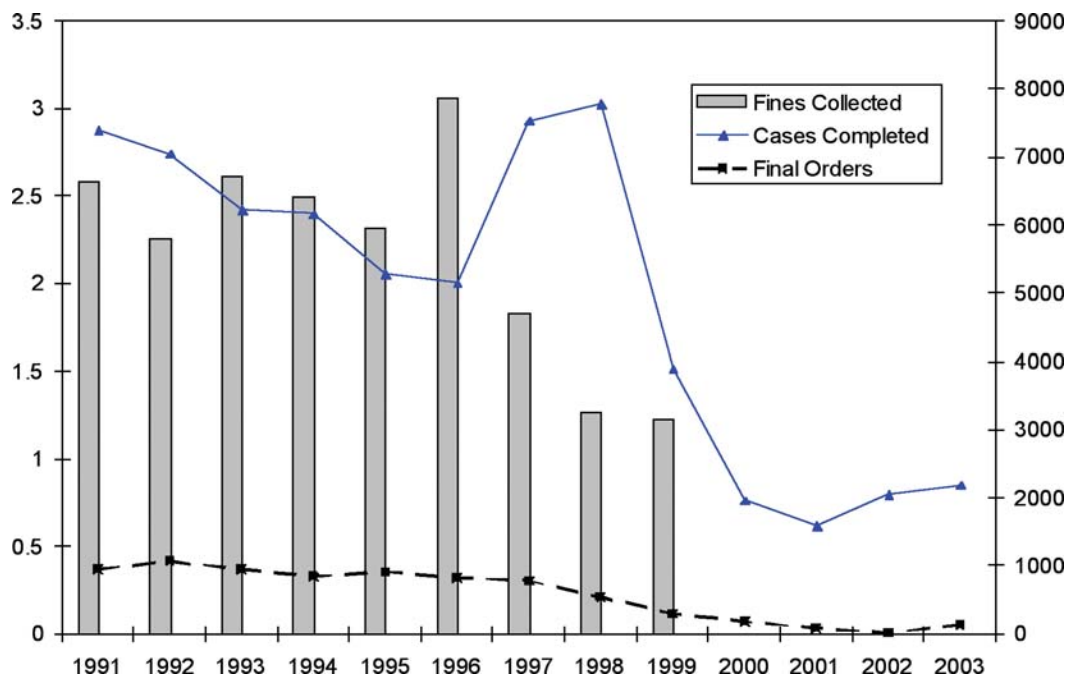
## IV. Potential Reforms

Major migration proposals under consideration by the 109<sup>th</sup> Congress include a number of measures that would strengthen the existing employer sanctions regime. These proposed changes fall within six categories.

### 1. Improve Document Security

Identification and eligibility verification are undermined by document and identity fraud,

Figure 1: Employer Sanctions Enforcement Outcomes



Sources: INS Statistical Yearbook, various years; Peter Brownell, "The Declining Enforcement of Employer Sanctions," Migration Information Source, Sept 1, 2005.

compromising the integrity of today’s employer sanctions regime at every stage. Recent advances in document design hold out the promise of producing tamper-resistant, fraud-proof identity and eligibility cards with biometric data linking them to their owners. In theory, secure I-9 documents could allow employers to become effective eligibility screeners and allow enforcement agents to hold non-compliant employers accountable.

For these reasons, the four omnibus immigration proposals under consideration in the 109<sup>th</sup> Congress would seek to improve document security in the following ways:

- Add anti-fraud measures and biometric information to visas and immigration documents (Cornyn-Kyl and McCain-Kennedy proposals)
- Add anti-fraud measures to Social Security Cards and improve security of birth certificates (Cornyn-Kyl and Tancredo proposals)
- Increase penalties associated with document fraud (Cornyn-Kyl and Tancredo proposals)
- Assemble a database on the production and distribution of fraudulent documents (Jackson-Lee proposal)

Although the technology of “fraud-proof” identity cards is far from perfect—well-funded terror networks and other high-end consumers would likely remain one step ahead of anti-fraud efforts, for example—high-tech I-9 documents could succeed at pricing phony documents beyond the reach of most unauthorized immigrants. Higher penalties on counterfeiters and anti-fraud law enforcement efforts are a natural and relatively low-cost compliment to fraud-proof cards and should further reduce their availability.

Technological solutions to the problem of immigrants using borrowed or stolen documents are less promising, however, because placing biometric scanning devices at a large number of worksites would be prohibitively expensive, employers lack the necessary expertise to use biometric equipment, and no biometric database exists against which prospective employees—i.e., every resident of the United States—could be checked. Indeed, in light of the problems that the far less ambitious US-VISIT program has encountered as it seeks to confirm the identity of foreign nationals entering the United States, the obstacles to biometric screening at worksites would appear insurmountable. More promising policy responses to this type of identity fraud involve better use of employment databases, discussed below.

What would be the costs of improving I-9 document security? Cost estimates for issuing secure drivers’ licenses under the REAL ID Act range from \$125 million to \$750 million for 200 million new licenses. These estimates only cover the cost of anti-fraud measures, however, and fail to account for processing expenses.

*With the passage of the REAL ID Act, some move to enhance document security is now inevitable, and the most important questions regard the scope of documents affected.*

A 1998 GAO study estimated the cost of issuing secure Social Security cards to all 270 million number-holders at roughly \$4 billion, with processing costs accounting for 90 percent of the expense. This estimate does not include the cost to individuals of lost work time associated with obtaining new cards.

Yet with the passage of the REAL ID Act, some move to enhance document security is now inevitable, and the most important ques-

tions regard the scope of documents affected. Enhanced security must extend to US citizens' documents, especially given that recently issued green cards and immigrants' work authorization cards already include biometrics and anti-fraud technology, while most citizens' documents do not. Yet in the interest of efficiency and effectiveness, anti-fraud measures should not encompass twenty-five or more separate documents, but rather should be combined with steps to limit the number of documents acceptable for verification.

## 2. Document Consolidation

The limits of anti-fraud measures point naturally to document consolidation. In short, the fewer documents involved in eligibility verification, the less costly it would be to improve their security, and the more feasible it would be for employers to become reliable screeners. Current congressional proposals contemplate the following steps in this direction:

- Restrict identification and verification documents to enhanced Social Security cards and a biometrically-equipped US government ID Card or REAL-ID compliant driver's license (Cornyn-Kyl proposal)
- Restrict identification and verification documents for non-citizens to enhanced visa and immigration documents (McCain-Kennedy proposal)

Numerous additional document consolidation schemes could be described. In general, with every document struck from the list, the integrity of the system is enhanced and the burden of verification shifts from employers (in the form of complexity) to workers (in the form of reduced flexibility). Thus, the Cornyn-Kyl proposal imposes an additional burden on US citizens by prohibiting the use of a school ID as proof of identity, for example. The McCain-Kennedy bill would leave this privilege intact, but in so doing would also leave in place an additional opportunity for document

fraud and an additional barrier to effective employer compliance. Document consolidation and document enhancement are two sides of the same coin.

**A One-Card System?** Pursuing document consolidation to its logical end would lead to the creation of a new type of document: a universal "work authorization" card. A one-card system would discard existing documents (for purposes of eligibility verification) and implement a uniform, fraud-resistant, machine-readable card to which all work-eligible individuals would be entitled. Cards would include prominent expiration dates (marked "none" for US citizens and legal permanent residents) reflecting the holder's specific eligibility status. Cards could also include biometric data, though most employers would be unable to take immediate advantage of this information.

Moving to a one-card system has been resisted because of widely held worries about creating a "national ID card." This phrase marks a widely voiced concern, and it has led some drafters of reform proposals to go to excessive lengths to insure that employees can use several cards to demonstrate work authorization. In contrast to proposals which focus on visas and migration documents, movement toward a national ID card would inherently affect all Americans. While universal reforms of this nature are clearly desirable from a migration control standpoint, requiring citizens to share the costs of document reform in this way would be politically costly.

Yet analysts should avoid allowing opposition to a "national ID card" overwhelm a discussion of document consolidation, because ultimate consolidation, if done with careful safeguards to minimize the privacy and civil liberties concerns that underlie this opposition, would carry significant advantages. The most obvious

advantage of a one-card system would be its simplicity: rather than being responsible for reviewing twenty-five, fourteen, or two types of documents (including over fifty different varieties of driver's licenses), employers would only be required to familiarize themselves with one universal card. In this way, a one-card system would make employer compliance far less burdensome. Creating a new work authorization card would also eliminate the logistical problem of how to "grandfather out" existing documents as their secure successors come on line.

What would be the costs and limitations of moving to a one-card system? The primary economic cost of a one-card system would be card issuance, and with processing costs would approximate the Social Security card estimate of \$4 billion. Some cost savings could be accomplished by consolidating the diverse secure documents under consideration (i.e., Social Security, driver's license) into a single ID card usable for multiple purposes.

Yet this observation raises a more fundamental question: what is the broader cost of requiring individuals to possess a de facto national ID card in order to obtain employment? Many security experts believe such cards would provide a false sense of security and divert attention from other law enforcement efforts while providing few actual security benefits. (As noted above, terrorists and professional criminals would almost certainly remain a step ahead of anti-fraud technology.)

Moreover, the existence of a national database linking personal information to employment records (and possibly to driving and other records) is an inherent threat to privacy. While security safeguards would be employed to minimize the misuse of these data, outsiders could possibly gain access and exploit the information in any number of ways. These privacy costs are difficult to quantify, and they certainly

would increase to the extent that diverse secure cards are bundled together, or to the extent that a single card would come to be used for multiple ID and access purposes, as efficiency would suggest. But there are many possible variations, and it is certainly feasible to design a card that would be restricted to certain specific and carefully chosen uses, and to combine a new card with enforcement efforts targeting misuse of identity data.

### **3. Mandatory Electronic Screening**

Currently, employers have the option of submitting applicants' identification data to the Basic Pilot verification system, but only a small minority—one-twentieth of one percent—choose to do so. Increasing the proportion of employers who participate in such screening would strengthen the employer sanctions system by improving the reliability of verification procedures and by creating new methods for targeting non-compliant employers. Yet a number of difficult obstacles to a universal eligibility screening system must be overcome.

There is widespread support for a mandatory system of electronic verification, and bills in the 109<sup>th</sup> Congress would:

- Require mandatory employer participation in an electronic eligibility verification system (Cornyn-Kyl, McCain-Kennedy, and Tancredo proposals; bills differ in details of how mandatory participation is phased in over time)
- Require SSA (with DHS cooperation) to construct a new database specifically designed for eligibility verification (McCain-Kennedy proposal)
- Require SSA to purge expired and incorrect social security numbers from the NUMIDENT database (Cornyn-Kyl proposal)
- Require SSA to search employer records for Social Security numbers which do not



match employee names or are otherwise incorrect and to identify Social Security numbers associated with more than one place of employment (Tancredo proposal)

Simply put, if employers are to be charged with determining worker eligibility, they must be given—and required to use—the best available tools for doing so. Mandatory electronic verification would allow compliant employers to detect applicants’ use of counterfeit documents; and it would also prevent other employers from going through the motions of compliance to prevent prosecution. Yet requiring universal participation in the existing Basic Pilot system would be costly given the high level of tentative non-confirmations, which are now returned in a quarter of all cases (while less than 1 percent of queries result in final non-confirmations). Resolving the status of these cases costs at least six dollars per case, and it would cost \$10 million per year to conduct manual investigations in a universal system at the current error rate. More importantly, investigating non-confirmations requires from twenty-four hours to two weeks, and these delays in a universal system would substantially slow the hiring process and reduce economic growth.

In addition, as noted above, the Basic Pilot produces a high level of false negatives, and these non-confirmations disproportionately affect foreign-born citizens and legal residents whose status is unlikely to be confirmed by the more reliable SSA database. Moving to a universal system would substantially exacerbate this problem, creating a de facto system of discrimination against the foreign-born.

Finally, the Basic Pilot is not designed to detect the use of borrowed or stolen documents, so that even universal participation would fail to reliably detect applications by unauthorized immigrants.

**Reforming the Basic Pilot** For these reasons, any move toward a universal electronic verification system must be preceded by significant reform to the existing Basic Pilot. One alternative would be to retain the existing two-database structure, but update SSA and DHS databases and procedures to reduce false negatives and speed response time. Yet such an effort has been underway for five years, and holds limited additional promise given the structure of the existing SSA database, which is not designed to search for identity fraud, and does not distinguish among migration categories. De facto discrimination will also persist as long as foreign-born applicants are more dependent on the DHS database for their confirmation.

Thus, the McCain-Kennedy proposal for a new eligibility database is a more promising, though more expensive, solution. A new database could be designed to accommodate regular updating of SSA and immigration fields, and to search both sets of data simultaneously. Most importantly, a new database could be designed to detect identity fraud by automatically flagging over-used identification numbers for follow-up investigation. Yet it should be emphasized that any data entry errors, alternative spellings, and delayed updates would continue to be problematic in any verification system, and some mechanism would be required to respond to the resulting errors.

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**Electronic Verification as a Tool for Targeting Employers** In addition to improving the verification process, an improved

mandatory verification system could provide an important tool for targeting employers. In short, just as data analysis should be used to flag potential cases of identity fraud, so should analysts look for employers with suspicious hiring or query patterns (e.g., too many or too few queries, too many or too few tentative non-confirmations, too many workers suspected of identity fraud, etc.). The McCain-Kennedy bill contemplates this type of oversight and would require DOL to monitor a new verification system in this manner. Ultimately, the promise of data mining as a tool for targeting non-compliant employers depends on the quality and structure of mandatory databases, but the ability of investigators to replace tip-based searches with “smart auditing” of non-compliant employers represents an important potential efficiency gain.

#### **4. Increase Staffing Devoted to Employer Sanctions**

Institutional inattention to employer sanctions clearly undermines all aspects of sanctions enforcement, and two proposals in the 109<sup>th</sup> Congress would increase enforcement resources:

- Add 2,000 ICE investigators annually for a period of five years (Cornyn-Kyl proposal)
- Require a greater role for state and local law enforcement agents in immigration control in general (Cornyn-Kyl and Tancredo proposals)
- Add 300 ICE attorneys over a period of two years (Tancredo proposal)

Each reform discussed in this brief would become more effective to the extent that it is backed up by additional enforcement personnel. Yet deploying more agents without these additional reforms to strengthen the verification and enforcement systems would be a waste of resources. Ultimately, the number of agents required to reduce unauthorized employment depends on these other features: the easier it is

for employers to reliably verify applicants’ eligibility and the easier it is for enforcement agents to identify and successfully prosecute non-compliant employers, the fewer agents would be required to deter illegal employment.

The issue of adding agents raises the question of where responsibility for worksite enforcement should lie. Three main possibilities exist. First, sanctions enforcement could remain the responsibility of ICE, taking advantage of that division’s enforcement infrastructure and institutional culture. Yet few unauthorized immigrants—including those at critical infrastructure locations—represent a significant security threat, and ICE agents view worksite enforcement as a lower priority than other, security-oriented efforts. Requiring more worksite enforcement of ICE would divert resources from its security mission.

Second, primary responsibility for worksite enforcement could be shifted to the Department of Labor’s Employment Standards Administration. DOL is a logical choice for worksite enforcement because its existing duties include tens of thousands of worksite inspections each year and because working conditions would generally improve as unauthorized immigrants are removed from the workforce. Yet sanctions enforcement also conflicts with DOL’s mission of protecting workers’ rights regardless of their immigration status. The agency also resists a sanctions enforcement role for fear of discouraging workers from approaching DOL about other types of worksite violations.

A third option would be to create a new division, inter-agency taskforce, or some other entity uniquely responsible for worksite enforcement. Such an employer sanctions taskforce would avoid the problems of conflicting institutional cultures—a cost associated with DOL and ICE options that is diffi-

cult to quantify. Yet building a new agency or taskforce from scratch would certainly be the most expensive option, and such a ground-up operation would be unable to take advantage of existing infrastructure and economies of scale within DOL or ICE. Thus, a new ICE division or unit with structural and budgetary protections against diverting resources to other investigations may be an attractive intermediate alternative.

## 5. Increase Penalties Associated with Illegal Employment

Fines for employing unauthorized immigrants—especially in the case of first offenses—are almost certainly less than the cost savings to many employers of hiring unauthorized workers. Bills in the 109<sup>th</sup> Congress would address this by increasing the level of existing fines:

- Maintain a range of possible fines for paperwork, substantive, and criminal violations and double the upper and lower values defining this range (Cornyn-Kyl and McCain-Kennedy proposals)
- Eliminate the range of possible fines, establishing flat rates of roughly double the existing maximum fines (Tancredo proposal)

Any increase in the penalty structure—in combination with other changes discussed above—would be a low-cost way to increase the deterrent effect of employer sanctions. By eliminating the option to apply small fines to first-time offenders, Tancredo’s proposal in particular could eliminate the view that fines are an acceptable cost of doing business. Legislators could also consider steps to increase the threat of jail time for non-compliant employers. (The Cornyn-Kyl and Tancredo proposals would both penalize workers for lying on I-9 forms, including potentially with jail time.) In addition, employers’ use of labor contractors to avoid sanctions could

be addressed by legislation to hold on-site employers and off-site contractors jointly liable for employing unauthorized immigrants.

Yet imposing excessive minimum fines or increasing the likelihood of jail time may have the perverse effect of deterring investigators and judges from imposing penalties.

Employers prefer to avoid the inconvenience of the sanctions process, and regular enforcement of relatively low fines may be a more effective deterrent than sporadic enforcement of higher ones. Another possibility would be to impose enhanced penalties on employers who hire unauthorized immigrants while also violating other labor codes.

The deterrent effect of stiffer penalties must be balanced against the problem of unintentional non-compliance. As long as compliance is difficult, the presumption of innocence requires modest fines and employer-friendly rules of evidence. Conversely, to the extent that compliance can be simplified, including perhaps through a centralized screening system, any failure by an employer to comply fully could be treated as a substantive violation. Thus, a direct relationship exists between the ease of employer compliance and the appropriate penalty for non-compliance.

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## 6. Increase Worksite Access

Finally, a number of steps could be taken to streamline and strengthen the enforcement process. Regulatory hurdles identified above which prohibit or delay worksite inspections could be eliminated (by statute or regulatory change). A more aggressive step would be to permit no-warrant worksite searches for immigration violations. Access could be limited to a particular class of worksites (as was considered during IRCA negotiations) or be based

on a probable cause finding following an audit of verification records.

The promise of more worksite access could significantly strengthen the cases investigators make against non-compliant employers, but a trade-off exists between this increased enforcement capacity and employers' civil liberties. No-warrant searches would conflict with employers' Fourth Amendment protection from undue search and seizure, and steps in this direction would be politically difficult and subject to legal challenges. Still, there may be room for increasing worksite access without overstepping these bounds, for example, through eliminating the requirement that agents obtain written supervisor approval prior to worksite inspections.

## V. Centralized Screening and a Job Holder Database

Each of the reforms discussed above has the potential to strengthen the existing employer sanctions system, and taken together these changes could substantially increase compliance. Yet the viability of the strategy outlined above depends on the success of technological responses to document fraud and on the successful implementation of a fast and reliable employer verification system.

Document reforms face an uncertain future. Data entry errors, alternative spellings, and update delays guarantee that even a reformed verification database will remain imperfect—especially in combination with a universal employer interface. Thus, eligibility verification is likely to remain deeply flawed, undermining the ability of employers with good intentions to comply effectively and undermining the ability of enforcement agents to hold remaining employers accountable.

Two more fundamental reforms to the employer sanctions system should also

therefore be considered: the creation of a centralized screening system and of a job holder database.

**Centralized Screening** The current system makes employers responsible for confirming the work eligibility of job applicants, a system that is analogous to requiring police to administer driving tests on traffic stops rather than relying on information contained in the driver's license, or requiring hospitals to administer an anatomy quiz to prospective surgeons rather than trusting their board certification. Under a centralized system, the responsibility for verifying work eligibility would rest with professional screeners at the point of document issuance, and proof of eligibility would be embodied in a worker's identity card itself.

Employers could thus assume cardholders are work-authorized, and employer responsibility would be reduced to keeping a record of new hires. Enforcement agents would be responsible for

insuring the integrity of work authorization documents, and for analyzing employer records to search for evidence that employees are using borrowed or stolen documents. Employers would be sanctioned for failure to maintain accurate personnel records, but not for having unauthorized workers on their payroll per se.

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“Front-loading” verification in a centralized screening system would benefit workers, including, in particular, victims of Basic Pilot false negative screening errors. On one hand, conducting eligibility screening at the point of document issuance rather than the worksite would reduce the error rate by eliminating a weak link in the chain (employer data

entry) and by maximizing the use of machine-readable documents. On the other hand, a centralized system would also allow the inevitable false negatives remaining to be resolved at this early stage and in a durable fashion. Thus, workers would establish eligibility on a regular schedule at the point of card-issuance or renewal, rather than with every change of employment; and eligible applicants would not be denied work as a result of database errors.

Employers would also benefit from the elimination of delays in the hiring process. More generally, employer compliance would be streamlined to the point of entering an employee's unique work authorization number—eventually via low-cost magnetic scanning using credit card technology—and the problem of unintentional non-compliance would be virtually eliminated. As noted above, by radically reducing the burden of compliance, a centralized screening system could be associated with stricter enforcement of these reduced responsibilities.

To the extent that the REAL ID Act and Cornyn-Kyl's proposed Social Security reforms are fully implemented (or that a secure one-card system is established), the document-issuance process would become a de facto centralized screen. Thus, establishing a formal centralized screening system would mainly require changes in the liability structure of employer sanctions, and the elimination of a redundant eligibility check by employers. In addition, with employers absolved of the responsibility for checking applicant eligibility, the I-9 record-keeping process would be replaced by the establishment of a job holder database.

### ***Creation of a Job Holder Database***

Mandatory electronic registration by employers should still play a role in a centralized

screening system. In this case, rather than query an eligibility database, employers would be required to submit a worker's ID number to a job holder database. This registration process would be a minimal burden since employers would not await a response. REAL ID or other machine-readable cards will eventually allow registration to consist of a card swipe similar to that now employed to convey credit card information.

The creation of a job holder database would improve sanctions enforcement in two important ways, and also strengthen the overall immigration system:

- Employers' registration of new hires would replace completed I-9 forms as proof of employer compliance. Electronic registry would greatly simplify the process of auditing employer records and thus raise conviction rates among non-compliant employers.
- A job holder database would outperform an eligibility verification database as a tool for detecting identity fraud because it would more easily detect cases in which the same individual appears to hold multiple jobs simultaneously. A job holder database would be a particularly valuable tool in this regard if employers were also required to notify the database when a worker's employment ends.
- A job holder database would also be an asset in the management of non-immigrant workers such as current H-2A or H-1B workers or future participants in a larger temporary worker program. Indeed, if temporary worker rights and responsibilities were tied to their employment, as would likely be the case, a job holder database would be almost indispensable to ensure compliance.

These benefits would have to be balanced by economic and privacy costs. The economic

costs of establishing and maintaining the database would be modest compared to those associated with building a universal employer eligibility verification database (i.e., because a job holder database would not respond to user queries). However, it would still need to accommodate hiring (and perhaps termination) data for over 50 million annual employment changes in the United States and to search for and report on duplicate ID information. Developing and maintaining such a database would cost about \$20 million per year (based on a comparison with the FTC's National Do Not Call Registry). In addition, while a database of job holders would be a valuable tool for the enforcement of employer sanctions, it would create an additional point of vulnerability which might be exploited by cyber criminals, exacerbating the privacy issues raised above.

## VI. Timeline for Potential Reforms

Many of the potential reforms discussed here could be implemented readily, including reforms to the penalty structure and steps to increase agents' access to worksites. Other changes, like hiring additional ICE agents or requiring additional DOL collaboration, could be phased in over time without substantially disrupting the enforcement process. Others would require additional time to implement and could be disruptive during the transition period.

- ***Issue secure identification and verification documents.*** The Cornyn-Kyl bill would mandate secure immigration and visa documents by late 2007, while McCain-Kennedy calls for quicker implementation of secure immigration and visa documents over a six-month period. Cornyn-Kyl would also mandate that SSA exclusively issue secure cards within a year of its passage. These one-year time-

lines seem optimistic, however, and the three-year timeline for implementation of REAL ID driver's license provisions may be a more realistic assumption about when secure documents could be made universally available.

The timeline for a transition to new identity and verification documents also depends on how to handle out-of-date cards. If existing cards are "grandfathered out," then the system of eligibility verification would remain insecure throughout the period in which old cards may still be used. In this regard, a one-card system may allow a quicker and smoother transition than one which seeks to update existing forms of identification and verification.

- ***Create a database to handle mandatory screening.*** The most difficult obstacle to effective employer sanctions (beyond, perhaps, lack of political will) is the problem of eligibility verification. While verification infrastructure exists in the form of the Basic Pilot, whether the program can be enhanced enough to manage a 2,500-fold increase in its query rate and whether it can be restructured to detect identity fraud are highly uncertain. Even if these issues are addressed by the McCain-Kennedy proposal for constructing a new SSA/DHS database, it would likely take several years before the new system could be readied for universal use. Updating the verification database for use in a centralized screening system would speed this process significantly by allowing for a greater level of operator expertise and tolerance for a slightly higher error rate (since errors would be resolved during document issuance, and a single correction process should produce a durable fix).

- **Create a job holder database.** By definition, a job holder database would be created gradually as a function of employer participation in a mandatory registration program. Nonetheless, a database infrastructure would need to be established and equipped to handle phone-in and internet-based registrations. One model is the National Do Not Call Registry, which was formally established in December 2002 and launched six months later. As of April 2005, the registry had accepted 92 million phone numbers, accommodating an input rate similar to that required of a job holder database. Magnetic scanners linking employers to the database could be phased in over time as machine-readable identification cards become widespread.
- **Create a new worksite enforcement division or task force.** One model for the creation of a new entity devoted exclusively to worksite enforcement is the establishment of the Occupational Safety and Health Administration (OSHA) by the December 1970 Occupational Safety and Health Act. Within two years of the Act's signing, OSHA had assembled a staff de novo, developed a set of safety standards, and established its own training institute for OSHA investigators.

## VII. Recommendations and Conclusions

In sum, the current system based on employer screening of diverse and non-secure I-9 documents, the voluntary Basic Pilot program, limited institutional commitment to worksite enforcement, and employer-friendly enforcement and penalty rules utterly fails to deter employers who prefer to hire unauthorized migrants, and provides limited tools to those employers attempting substantive compliance with IRCA rules.

This brief has discussed six sets of changes which could strengthen the existing sanctions system: improved document integrity, document consolidation, mandatory electronic eligibility verification, increased enforcement staffing and institutional commitment, a stronger penalty structure, and increased worksite access by enforcement agents. In addition, this brief recommends two more fundamental changes:

- **Centralized screening.** A centralized screening system would redefine the division of responsibility between employers and enforcement agents. Professional screeners would establish work eligibility at the point of document issuance, and employers would be responsible simply for keeping a record of employees hired, ideally by swiping a machine-readable document. Such a system would be more consistent with other regulatory areas and would limit the impact of inevitable verification errors. Minimizing the burden of compliance means employer responsibilities could be more strictly enforced.
- **Job holder database.** A centralized screening system would eliminate the need for an employer query of an eligibility database, but registration of new hires should be recorded in a job holder database. Such a database would provide a targeting tool to identify both non-compliant employers and migrants submitting borrowed or stolen documents. A job holder database would also strengthen the auditing process during investigations and could play an important role in the governance of a new temporary worker program if it is enacted.

Finally, this discussion raises a pair of additional issues that deserve careful attention prior to considering sanctions reforms:

- ***The problem of successful employer sanctions.*** Roughly 11 million unauthorized immigrants now reside in the United States, and the majority of them are regularly employed in a wide range of economic sectors and geographic regions. Any effort to eliminate this workforce without creating a legal substitute would wreak havoc on the US economy, at least in the short run. In addition, eliminating employment opportunities would cause hardship for millions of individuals and their families living within the United States. Thus, any meaningful reforms to the employer sanctions system should be preceded by reforms to address this population and ongoing employer needs. Care should also be taken to ensure that employers do not “spread the risk” associated with a more effective sanctions regime by cutting workers’ wages, a tendency observed following IRCA’s passage.
- ***Three fundamental trade-offs.*** The American political system has identified preventing unauthorized migration as a priority. Yet accomplishing this goal, including through employer sanctions, conflicts with three other social goods: citizens’ and legal residents’ freedoms and their right to privacy, a pro-growth regulatory environment, and relatively strict limits on legal immigration. In short, the only way to achieve greater control over unauthorized immigration is to give ground in one or more of these other areas. While the post-9/11 period has been characterized by unusual tolerance for limits on civil rights, in the long run, resolving legal migration supply and demand tensions would facilitate effective control of unauthorized flows at a far lower cost.

## Author’s Note

Several additional bills were introduced in the 109th Congress after the September 21 Task Force meeting for which this brief was prepared; they are not discussed here. Additional relevant legislation includes: the Enforcement First Immigration Reform Act of 2005 (HR. 3938), introduced by Representative J.D. Hayworth (R-AZ); and the Employment Verification Act of 2005 (S. 1917), introduced by Senator Chuck Hagel (R-NE).

At the time this brief went to press, the Senate Judiciary Committee was preparing to mark up a comprehensive reform bill which includes elements drawn from the Cornyn-Kyl, McCain-Kennedy, and Hagel proposals.

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## Additional Readings

Brownell, Peter, “The Declining Enforcement of Employer Sanctions,” *Migration Information Source*. September 1, 2005. See [www.migrationinformation.org/Feature/display.cfm?ID=332](http://www.migrationinformation.org/Feature/display.cfm?ID=332).

Commission on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility*. Washington, DC: US Government Printing Office. 1994.

Government Accountability Office, “Social Security: Mass Issuance of Counterfeit-Resistant Cards Expensive, but Alternatives Exist” (GAO/HEHS-98-170). Washington, DC: US Government Accountability Office. 1998.

Government Accountability Office, “Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist” (GAO/GGD-99-33). Washington, DC: US Government Accountability Office. 1999.

Government Accountability Office, “Telemarketing: Implementation of the National Do Not Call Registry” (GAO-05-113). Washington, DC: US Government Accountability Office. 2005.

Government Accountability Office, “Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts” (GAO-05-813). Washington, DC: US Government Accountability Office. 2005.

Jernegan, Kevin, “Verifying Employment Eligibility.” Background paper prepared for the Independent Task Force on Immigration and America’s Future, Migration Policy Institute. September 2005.

Martin, Philip and Mark Miller, “Employer Sanctions: French, German, and US Experiences,” *International Migration Papers #36*. Geneva: International Labour Office. 2000.

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## Additional Publications Prepared for the Task Force

### **Independent Task Force on Immigration and America's Future: The Roadmap**

Policy Brief by Michael Fix, Doris Meissner, and Demetrios G. Papademetriou

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The Migration Policy Institute (MPI) is an independent, non-partisan, non-profit think tank dedicated to the study of the movement of people worldwide. The institute provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that migration presents in an ever more integrated world. MPI produces the Migration Information Source web site, at [www.migrationinformation.org](http://www.migrationinformation.org).

This report was commissioned as part of MPI's Independent Task Force on Immigration and America's Future. The task force is a bipartisan panel of prominent leaders from key sectors concerned with immigration, which aims to generate sound information and workable policy ideas.

The task force's work focuses on four major policy challenges:

- The growing unauthorized immigrant population
- Immigration enforcement and security requirements
- Labor markets and the legal immigration system
- Integrating immigrants into American society

The panel's series of reports and policy briefs will lead to a comprehensive set of recommendations in 2006.

Former Senator Spencer Abraham (R-MI) and former Congressman Lee Hamilton (D-IN) serve as co-chairs, and the task force's work is directed by MPI Senior Fellow Doris Meissner, the former Commissioner of the Immigration and Naturalization Service.

The approximately 25 task force members include high-ranking members of Congress who are involved in shaping legislation; leaders from key business, labor and immigrant groups; and public policy and immigration experts. MPI, a nonpartisan think tank dedicated to the analysis of the movement of people worldwide, is partnering with Manhattan Institute and the Woodrow Wilson International Center for Scholars for this project.

For more information on the Independent Task Force on Immigration and America's Future, please visit:

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