Mandatory Verification in the States: A Policy Research Agenda

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I. BACKGOUND AND CONTEXT

E-Verify is an internet-based program operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). The program gives employers a means to electronically verify the work eligibility of newly-hired employees. Employer participation in E-Verify is voluntary in most states, and the program is available to all employers across the country.

Some states have enacted legislation mandating the use of E-Verify by certain types of employers such as public contractors, state and local government agencies, public entities, or by all employers in the state, both public and private. Mandatory verification is one among the many types of new state laws that have been enacted in reaction to the failure of immigration reform legislation in Congress in 2006 and again in 2007. Mandatory verification measures devolve to states the enforcement of employer verification laws—a role that traditionally has been left the federal government.

A. Why is devolution important?

The devolution of immigration enforcement to state governments in recent years is arguably the most important development in immigration policy since the enactment of the Immigration Reform and Control Act in 1986 (IRCA). As some states enact stringent enforcement legislation and others choose not to, differences among state policies offer the opportunity to greatly expand our knowledge of the consequences of different enforcement approaches—knowledge that could be extremely useful to both state and federal policymakers considering next steps in immigration control and reform.

As with prior studies of devolution in other social policy areas, particularly welfare reform, early research is crucial in order to understand whether and how mandatory verification laws have been implemented, and with what consequences, both intended and unintended. States that require E-Verify for all employers present an opportunity to learn about how mandatory verification might work as a national policy, should legislation with such a requirement pass in the next round of immigration reform legislation.

The ideas advanced in this paper give DHS a framework for supporting research at a critical time in Arizona, the state with the most significant of the recently enacted employer enforcement laws. The Legal Arizona Workers Act (LAWA), which makes the use of E-Verify mandatory for all new hires in the state, went into effect on January 1, 2008 and was amended by the legislature on May 1, 2008.[1] Other provisions severely restrict access of unauthorized immigrants to government services, criminalize transportation and harboring of unauthorized immigrants, and require state and local police to enter into agreements with DHS to enforce other federal immigration laws.

The Arizona law and other factors led to an expansion in the total number of number of firms nationwide using E-Verify, or memoranda of understanding (MOUs) with

[1] Arizona Attorney General's Office, "Legal Arizona Workers Act: June 1, 2008," http://www.azag.gov/LegalAZWorkersAct/index.html, accessed September 30, 2008.

employers, from approximately 27,000 at the end of fiscal year (FY) 2007 to almost 88,000 at the end of FY 2008.[2] The Arizona legislation was signed by a prominent Democratic governor, Janet Napolitano, who was once a United States Attorney and has been selected for nomination as Secretary of Homeland Security by the incoming Administration. As the Southwest border state with the most illegal crossings and a state in which recent rapid economic growth has depended heavily on unauthorized workers, Arizona is at the center of national trends in, and debates over unauthorized immigration. It provides an excellent laboratory for policy research.

Two other states, South Carolina and Mississippi, have also adopted mandatory employer verification measures, but implementation has barely or not yet begun. However, sponsoring research in Arizona and then expanding it to these or other states would offer additionally important, policy-rich comparisons among differing enforcement strategies, as South Carolina and Mississippi are farther from the Southwestern border and hence more typical of fast-growing immigrant destinations across the country. The potential lessons gained from studying mandatory verification regimes hold powerful implications for the study states themselves, for other states considering entry into the immigration enforcement sweepstakes, and, importantly, for a new Congress and Administration, when they take up the next round of immigration reform.

B. Why does mandatory verification matter?

In 1986, Congress attempted to address the growing problem of illegal immigration by passing IRCA. For the first time, it became illegal for employers to hire those not authorized to work in the United States. Combined with border control and legalization of the unauthorized population, the goal was to "wipe the slate clean" for effective immigration control.

The enforcement philosophy underlying IRCA's employer provisions was to establish the legal status of workers as a new labor standard, so that enforcement would occur primarily through compliance. The idea that the majority of employers will comply with labor regulations if they have the means to do so has already been demonstrated in many domains, including payroll tax withholding, child labor bans, and minimum wage laws, among others. Once compliance becomes a business norm, habitually scarce enforcement resources can be focused on the outliers. Such a strategy has been shown to be the most effective for maintaining a level playing field.

In the IRCA case, however, the labor standards model of compliance has notoriously failed. The legislation did not mandate a reliable way for employers to verify the legal status of those they were hiring, and fraudulent documents became readily available in response. Without a verification requirement and mechanism, employers comply with the letter of the law merely by keeping paper documents on file; unauthorized workers procure the fraudulent documents they need to be hired; and it is difficult for the federal government to prove that employers are "knowingly" hiring unauthorized workers. The result is compliance on paper alongside rampant levels of unauthorized immigrant employment.

[2] The federal fiscal year begins on October 1 of the preceding year.

Because of these weaknesses in the current paper-based system, a more reliable system of mandatory employer verification is the linchpin of effective immigration enforcement. Without it, other measures—including border enforcement and sporadic worksite raids—cannot succeed in substantially reducing illegal immigration. In order to be effective, compliance in hiring only authorized workers must become a new workplace norm that replaces the widespread violations that have become acceptable business practices in many industries today.

C. Is E-Verify the answer?

The origins of E-Verify reside in recommendations made by the Select Commission on Immigration Reform (SCIRP) and legislation enacted in 1996 (The Illegal Immigration Reform and Immigrant Responsibility Act) that led to a prototype system known as the Basic Pilot. In operation since 1997, the Basic Pilot was renamed E-Verify in 2007. The Basic Pilot program was originally funded modestly by Congressional appropriations as one of three pilot programs. The Basic Pilot was the only pilot program to continue and was supported by general agency funds during its years at INS. After the establishment of DHS, Basic Pilot was funded entirely out of fees until FY 2007 when, due to increased interest and growth, Congress suddenly poured $100 million into the program. Although some funds were held back for FY 2008 since the funds exceeded those required to run the program, substantial additional appropriations were added in FY 2008 and the most recent FY 2009 appropriations bill.

This pivot toward greater Congressional support was due to a combination of factors, primarily the failure of reform legislation in the face of mounting public pressure to "do something". But among the reasons has also been that US Citizenship and Immigration Services (USCIS) incorporated rigorous independent evaluations, carried out by Westat, a Rockville, MD, social science research firm, into the implementation of the Basic Pilot. The result has been growing expertise, program improvements based on the evaluations, and extensive planning for the eventuality of mandatory verification. Thus, when the Administration and Congress were searching for positive actions that could be taken after reform legislation failed to address unauthorized immigration, E-Verify represented a potential policy solution. E-Verify has also become a new tool in the toolkit for advocates of stricter enforcement at the state level.

Ambitious research and evaluation at this time are particularly prudent given the scope of the scale-up that would be required if mandatory verification occurs. Mandatory verification would have to reach more than 8 million employers and 144 million workers, processing more than 50 million hiring decisions each year. This would require a major scale-up as E-Verify is currently used for about 5 million new hires, or 10 percent of the national total. Moreover, under a mandatory regime, far more employers would be required to register for the program. Scaling-up effectively would also require intensive public education and adoption of new habits by employers and workers in every occupation and location across the country.

To the extent that there are database deficiencies, they are likely to affect non-citizens and foreign-born workers disproportionately. At the same time, mandatory verification potentially touches every worker—citizen and non-citizen—and employer in the country. Thus, mandatory verification potentially constitutes the most sweeping change of all of the measures contemplated in immigration reform and in workplace standards since the enactment of occupational health and safety mandates in 1970.

Major policy debates that surround E-Verify tend to center on the program's "error rate" or accuracy; its costs for the government, employers, and employees; issues of discrimination; and its effect on productivity and businesses. These are key issues to pursue in evaluating the program's impacts, and, if warranted, to improve and assure the program's operational effectiveness.

However, policymakers also need to address whether E-Verify is the best approach for mandatory verification. E-Verify searches both SSA and DHS immigration databases. The program's advantages are that these databases have been in use for verification for more than 10 years, during which time their accuracy and responsiveness have been improving markedly. Many other adaptations have and continue to be made toward the goal of effective and smooth verification processing.

At the same time, E-Verify is serving as a relatively new tool that some state governments have unexpectedly seized to address a host of knotty political problems, just as it is a target for antagonists who raise both politically-motivated and substantively legitimate objections. Taken together, these positions foreshadow policy debates to come for which DHS should be prepared.

The core issue is the choice of database(s) to use, because of the absence of a single, high-quality database that contains a unique record for each work-authorized individual. Rather, existing databases contain errors that can lead to false negatives and positives, and data are spread among diverse databases with differential error rates, leading to higher error rates for some groups than others.

Alternatives to the Existing E-Verify System. E-Verify offers one answer to the problem of multiple data sources by combining SSA and immigration databases. Two others are winning a degree of serious consideration. One is the National Database of New Hires (NDNH) and the other, still in the conceptual state, is a self-populating, new database designed for immigration verification purposes only. A careful review of the implementation of E-Verify as it exists in Arizona and other states could yield insights into whether it might be desirable to consider replacing the current system with one of these other databases.

The National database of New Hires. Data are collected from the 50 State Directories of New Hires and accumulated into the NDNH by the Office of Child Support Enforcement (OCSE) within the US Department of Health and Human Services (HHS). The NDNH was created as part of the 1996 Personal Responsibility and Work Opportunity

Reconciliation Act (PRWORA) and has been proposed as an alternative to E-Verify in HR5515, the New Employee Verification Act (NEVA) of 2008.

The purpose of NDNH is to assist state child support agencies in locating parents and enforcing child support orders. Employers must report new hires on the IRS W4 form to a state agency charged with managing the new hire data. NEVA proponents suggest that the NDNH offers an advantage over E-Verify because it offers an existing method by which employers already transmit hiring data, as 90 percent of employers already use it.[3] The NDNH may be more accurate than the E-Verify databases because it has been populated only since 1997, so it does not contain errors attendant to loading paper records.

However, the NDNH does not collect data on employees' work authorization or other data relevant to immigration status. Adding these fields would require substantial and costly changes to 50 different state systems. Moreover, NEVA would require interfaces with SSA and DHS data to verify work authorization. Thus, replacing E-Verify with the NDNH seems to offer limited benefits at great cost.

Self-populating, new database. A self-populating database is gaining consideration within labor unions and among worker advocates, because it reduces to a single, simple step the role employers would play in worker verification. US citizens and work-authorized non-citizens would be required, over a period of time, to register with DHS or other designated agencies to populate a new employment eligibility database. Registered workers would receive new identification numbers, and employers would electronically submit these numbers for verification.

Registration could occur on a pre-determined timeline, e.g., periods based on last name or last digit of the Social Security Number (SSN), or prior to beginning or changing a job. Enrollment in the new database would rely on the same data and documents as E-Verify. However individuals could correct errors at the time of registration, rather than at the point of hire. Ultimately, such a newly-populated database would be almost perfectly clean and non-discriminatory, because error rates would not vary as a function of citizenship or birthplace.

A self-populating database probably promises the greatest accuracy, least discrimination, and greatest privacy protections, because it would not contain data useful for any purpose other than employment verification. As a result, it would be of low value to identity thieves. On the other hand, constructing such a database would have high up-front costs—far higher than those of cleaning existing E-Verify data. In short, a self-populating database would require all workers seeking employment to confirm their data, rather than just the small percentage currently subject to E-Verify database errors.

Compared with the alternatives, an important advantage of E-Verify is that USCIS and INS have spent 12 years cleaning the data and improving the interface between

[3] Gabrielle Giffords and Sam Johnson, "Guest Opinion: A Better Way to Verify Workers' Identities." *Tucson Citizen* 7/10/2008.

employers and the database. As a general proposition, data management experts predict significant unforeseen problems any time a database is scaled up by a factor of 10 or more. Nevertheless, there can be a greater degree of confidence about scale-up effects with E-Verify than with an untested option. USCIS will surely be called upon to defend this proposition in continuing and future immigration debates, so it is important to be aware of the alternatives and analyze their advantages and disadvantages. (See Appendix II for a full discussion of verification alternatives.)

D. What is the case for more research at this time?

The state of play regarding electronic verification has produced a moment in which there are great opportunities for greater in-depth study of the system's strengths and weaknesses.

First and foremost, the enactment of the first mandatory verification laws by states—after years of paralysis at the federal level in addressing the dramatic deficiencies of IRCA's employer sanctions—illustrates a venerable tenet of our federal system, the states-as-laboratories phenomenon in policy development. As with universal health care or climate-change induced auto emissions standards, states may be leading the way for national policymaking.

Next, albeit only recently, Congress has generously funded E-Verify as a voluntary pilot program, and the program apparently has been able to accommodate new demand spurred by state mandatory verification laws without major disruptions. Such an alignment of state actions and federal capacity is unusual and opportune.

In addition, throughout its more than 10-year history, even when it was an unpopular, struggling, and largely unknown program, E-Verify/Basic Pilot has fostered and been guided by rigorous independent program evaluation and sustained support for funding evaluation research. So a body of knowledge and proven methodologies exist to build on in assessing the experience and lessons that can be gleaned from states as they implement their new laws.

Finally, E-Verify research involves issues of vital importance in immigration policymaking and, indeed, in the life of the nation, given the sweeping changes and implications that nationwide mandatory verification would be likely to bring. Most public policy research is destined to take place after-the-fact, once policy changes have been fashioned. Here, vital research can take place at a time when policy thinking and planning for future mandates are still germinating. Thus, policymakers have an opportunity to use research to inform and shape those mandates, with the expectation that the underlying public policy goals of mandatory verification would be significantly more likely to be realized.

Given this convergence of positive circumstances, USCIS should fully embrace the new, broader research opportunities that the emergence of state mandatory verification laws provides.

II. CRITICAL ISSUES

The research agenda laid out in this document is intended to address the major design issues and policy debates that surround implementation of E-Verify. These include the program's "error rate" or accuracy; its costs for the government, employers, and employees; potential issues discrimination issues; and impacts on productivity and businesses across the United States.

A. Errors

A major criticism of the E-Verify program is the inaccuracy of the databases on which it is based, and the subsequent errors that result. Current statistics from DHS show that 96.1 percent of workers run through the system are verified instantly or automatically within 24-hours without any need for further action by the worker or employer. However, some of the remaining 3.9 percent of workers who receive an initial non-match may receive this in error. Most of the discussion has focused on "false negatives"—those who are determined ineligible to work by E-Verify but are in fact truly authorized to work. "False positives," those workers who determined to be *eligible* but are not actually authorized to work are less frequently discussed. These false positives may represent an important and potentially large group to quantify should the system become mandatory. Research to identify both false positives and false negatives should be at the center of any analysis regarding improving the accuracy of the system.

It is also important to differentiate false positives and negatives from tentative non-confirmations (TNCs), or initial non-matches, that occur during the initial verification process, and final non-confirmations (FNCs) which results in a new hire being unauthorized to work.

Of the total number of new hires run through the system, 3.9 percent generate non-matches, or tentative non-confirmations (TNCs). One in ten applicants who receive a TNC goes on to successfully contest the TNC and is hired. The remaining pool of applicants who generate a non-match is composed of unauthorized immigrants who abandon the application or job and authorized workers who do not contest the finding or are rejected by the employer.[4]

B. Costs

Costs of the E-Verify program to the government, employers, and workers are important considerations for any evaluation of mandatory participation, either nationally or at the state level. Although E-Verify itself is free, employers may have to assume costs such as staff time to mount and query the program on the internet, use of other resources to access the system, and strategies to inform applicants of TNCs and help them update and/or correct their records when necessary. Many employers may choose to hire a contractor to handle verification of employees, and this would represent a new and quantifiable cost of doing business.

[4] Department of Homeland Security. "E-Verify Program Highlights: Statistics." www.dhs.gov/e-verify Data from April 2008- June 2008

Compliance costs likely vary across industries and by firm size and other characteristics. For instance some larger employers might have sufficient resources in-house for accessing E-Verify, while smaller businesses might choose to use verification contractors. Businesses in sectors such as agriculture or construction which often lack on-site offices with computers and internet access might find compliance more expensive than businesses that are largely office-based.

Public expenditures represent the other major quantifiable cost of making E-Verify mandatory. As the program expands, so will the costs to the federal government to maintain and further develop the program. States may incur additional administrative costs for compliance monitoring, enforcement, and other elements of their approach to making E-Verify mandatory.

C. Effects on workers

A thorough research design would also need to consider impacts on workers and potential workers, especially those who are authorized. The key question here is whether E-Verify significantly changes the landscape of employment authorization from the current requirement to complete the Form I-9 and collect paper documents from job seekers. The degree to which this landscape changes, potentially becoming more complex and problematic for workers, could be measured, but not quantified as easily as some of the "hard costs" described above.

Another key related question concerns the groups of *authorized* workers that would be most affected by the program (e.g. US-born vs. naturalized citizens, different race/ethnic groups), and how the impact on them could be ameliorated. Of course, the purpose of the program is to identify the unauthorized workers, and so one would anticipate they would be most affected by its implementation; if they are *not* the most affected group, then this could raise concerns about the reliability of the program in its current form.

Should the system become mandatory, a number of issues could arise around discrimination such as ensuring that applicants are given the opportunity to contest a mismatch, and advising workers of their rights regarding continuing to work, receive training, and wages. The use of auditing to test for compliance with verification requirements and the employer survey described below would highlight some of these issues and answer questions such as what type of outreach and employer/worker education are needed to ensure system compliance.

D. Impacts on communities and local economies

Mandatory use of E-Verify may have impacts that extend beyond the government, businesses and workers. Unauthorized immigrants and other potentially affected populations (such as legal permanent residents and naturalized citizens) are not evenly distributed across the country, and communities with high shares of these groups—in particular communities in Arizona and other border states—may have larger shares of their workforces potentially affected by E-Verify implementation. If large numbers of workers in a community receive FNCs and are unable to find employment, they may become unemployed or move to other locations. Immigrant communities—particularly

Latino communities—may shift out of employment in certain sectors where verification is intensive and complete, and into other formal sectors or informal jobs where verification does not prevent their employment. This could create distortions of labor markets and change wages, working conditions, and local or even state economic output. Assessing these broader economic costs would be an important component of any research design, though measuring them and disentangling them from general economic trends would be a complex undertaking.

Immigrant communities and the institutions that work with them could also feel the pinch if E-Verify were fully implemented and many unauthorized or other workers were unable to find work. Immigrants could "get the message" and leave the state or local community altogether, leading to a decline in purchasing power, overall economic activity, falling school enrollments, and declines in use of public services. These could be considered unintended costs or consequences by some critics of E-Verify, but some of these impacts would be considered signs of success by proponents. Immigrant families might also feel the consequences if breadwinners lost jobs or were unable to find them, and non-working spouses and US citizen children were left behind with fewer economic resources.

These issues, in addition to others such as who is responsible for administering the program and questions surrounding enforcement, should be addressed in any data analysis and qualitative research done on the program. The states that currently have legislation requiring all employers register for and use E-Verify can serve as case studies regarding these different issues as well as places to search for best and worst practices.

III. ANIMATING ISSUES AND POTENTIAL RESEARCH AGENDA

A number of issues drive the core implementation and impact research agenda that we present below. We have:

- sought to minimize the time needed to generate initial results;
- tried to identify approaches that would be cost effective and yield a comparatively high return on research investment; and
- suggested tasks that might draw on data collected by Westat but would not duplicate the results of their work.

The analyses face a number of inherent challenges. One is to disentangle the effects of the impacts of changes in the economic environment from those that result from the implementation of E-Verify in the subject states: Arizona, Mississippi, and South Carolina. Our proposed strategy for doing so would be to construct the closest possible comparisons across sectors and regions in states that are similar in many economic and demographic respects, while differing in their state regulatory framework. Critical comparison criteria include:

- The regional location of the state and its political environment;

- The size and composition of the states' unauthorized population; the share it represents of the total foreign born population and of the total workforce;
- The industrial/sectoral make up of the state's economy, including the distribution of total jobs that are unskilled (less than a high school degree), require mid-range skills (a credential beyond high school) and higher skills (more than college);
- The strength of the state's economy (unemployment rate, foreclosure rate, growth/decline in key sectors); and
- The *dissimilarity* of the regulatory structure of the state from the study states in terms of the verification legislation. This dissimilarity will complicate the selection process, as 11 states have enacted some version of verification measures that lie between the current national system and a full mandate for use of E-Verify (see Appendix I).

A second challenge will be to identify the effects of E-Verify independent of the potentially far-reaching impacts of the extension of federal verification requirements to all federal contractors. Drawing distinctions will be critical in conducting the longitudinal employer surveys we propose.

A third challenge is instability within a state regulatory regime *per se*. As the legal analysis by David Martin explains (See Appendix I), South Carolina's requirement that employees present a valid South Carolina drivers' license to their employers is "at best in severe tension with the federal scheme underlying E-Verify, and more likely is flatly in conflict." This instability might argue for a go-slow approach to inclusion of South Carolina in the larger study, and consideration of a back-up state such as Oklahoma, if mandatory E-verify were implemented there.

Below we sketch seven studies that we believe constitute the core of a potential DHS research agenda focusing on states with mandatory employer verification programs (Arizona, Mississippi and South Carolina) and drawing comparisons with a set of control states. The list is not exhaustive of potential implementation and impact studies. Rather, this list represents a multiple, sometimes overlapping approach to the core, critical policy and economic questions that are raised, and the empirical opportunities that are presented by state-enacted mandatory verification laws. The list includes:

A. A longitudinal survey of employers in mandatory verification and control states (i.e., states where E-Verify is still entirely or mostly voluntary);
B. Analyses of multiple aggregate data sets to "model" compliance with verification and hiring mandates in mandatory and control states;
C. Auditing studies to examine employer compliance with procedural requirements (timing, notice of appeal, etc.) that attach to use of E-Verify in mandatory verification states only; auditing studies using paired tests to examine the discrimination against foreign-sounding and looking applicants;
D. Case studies involving key informant and focus groups of employers and community organizations that work with immigrants within both mandatory and control states;

E. Demographic analyses of administrative and Census data to determine patterns of population movement across mandatory and control states;
F. Polling to determine changes in political attitudes towards unauthorized immigrants, immigration enforcement, and regularization in mandatory and control states over time; and
G. Selected explorations of operational research questions that bear on the implementation of E-Verify in the mandatory verification states.

The table below summarizes the principle policy questions each project addresses, the data sets that would be used, and the research method applied.

PROJECT 1: LONGITUDINAL EMPLOYER SURVEY

Key Research Questions	Data Sources	Method
• Are employers aware of E-Verify and complying? • How well does it work, and how much does it cost? • Do perceived costs change if the economy rebounds? • Do employers' behaviors change? • What do they recommend? • Do employers who conduct extensive background checks benefit from E-Verify or choose to use it at all?	• Three to five year longitudinal employer survey in mandatory and comparison states	• Analysis of survey data by state, sub-state region, firm size and other characteristics • Focus on industries with high- and low-shares of un-authorized workers • Disaggregation of minority-owned businesses and contractors • Analysis of changes over time

PROJECT 2: COMPLIANCE MODELING

Key Research Questions	Data Sources	Methods
• What is the level of compliance with the mandatory regime? • How does compliance vary across states and economic sectors? • What is the impact of mandatory verification on the number of unauthorized workers? • How many new hires would have gone to unauthorized workers absent mandatory	• VIS data • IRS/SSA new hire reporting • CPS estimates of new hires, disaggregated by legal status • CPS and ACS estimates of unauthorized workers	• Comparison between E-Verify queries and new hires across databases • Measurement of impact on size of unauthorized population using CPS and ACS data • Disaggregation by state, sub-state region, industry,

verification?		firm size and other characteristics • Analysis of changes over time • Development of a tool to assess ongoing compliance

PROJECT 3: AUDITING STUDIES

Key Research Questions	Data Sources	Methods
• Are registered employers and workforce development agencies verifying job applicants? • How strictly do employers and agencies comply with E-Verify procedural requirements? • How do they handle applicants who receive a TNC and need follow up? • What discrimination towards job applicants, if any, occurs as a result of E-Verify?	• Data compiled through paired testing of the hiring and E-Verify process	• Documentation of employers' and workforce agencies' use of E-Verify and responses to TNCs during hiring process • Comparison of the experiences of testers by their race, ethnicity, origin and foreign-language accent

PROJECT 4: CASE STUDIES

Key Research Questions	Data Sources	Methods
• What has been employers' experience with E-Verify in a mandatory environment and voluntary environment? • What are employers' opinions on how to improve the system? Do they already use background check systems? • What broad impacts does E-Verify have on communities and families? • What impacts does E-Verify have on community institutions such as schools, health and social service providers?	• Employer focus groups • Key informant interviews with employer associations, chambers of commerce • Immigrant worker/ parent focus groups • Key informant interviews/focus groups with officials, community leaders, and education, health, and social	• Qualitative data analysis using semi-structured interview guides and database software to compare results • Comparisons between mandatory and voluntary states • Analysis across dimensions of sub-state regions, industries, immigrant origins, and other features

	service providers	

PROJECT 5: DEMOGRAPHIC DATA ANALYSIS

Key Research Questions	Data Sources	Methods
• Are people leaving mandatory states, and if so where are they going? • Are mandatory states experiencing declines in births, school enrollment, and social service use? • Are immigrant populations changing—e.g., losing employment and becoming poorer? • How much of changes are due to verification versus economic conditions?	• ACS • Administrative data (births, school enrollments, counts of service use by nativity, ethnicity, and/or language)	• Comparisons between mandatory and voluntary states • Analysis across dimensions of sub-state regions, industries, immigrant origins, and other features • Analysis of changes over time • Regression analysis to parse impacts of economic changes from verification

PROJECT 6: POLLING ON ATTITUDE CHANGES AS A RESULT OF E-VERIFY

Key Research Questions	Data Sources	Methods
• How have public attitudes changed towards unauthorized immigrants? • How have attitudes changed towards enforcement, reform, and other immigration policies? • Do attitudes to legalization change over time?	• Opinion polls of general public across study states	• Analysis of poll data • Analysis of changes over time • Comparisons between mandatory and voluntary states

PROJECT 7: KEY EXPLORATIONS OF OPERATIONAL RESEARCH QUESTIONS

Key Research Questions	Data Sources	Methods
• What are the impacts of mandatory E-Verify on other institutional players such as ICE and SSA? • How accurate is the database? • Are employers using it? • How well is the database	• VIS • Employer survey • Westat data • Key informant interviews with federal agencies (DHS, ICE, SSA)	• Documentation of E-Verify process and comparison to authorizing regulations • Analysis of employer

performing (e.g., in terms of response times and complaint resolutions)? • How effective is E-Verify as an enforcement tool? • What lessons do state programs hold for a mandatory national verification regime?	• Key informant interviews with state and local officials, agencies, lawyers • Data on system costs, complaints and complaint resolutions	enrollment and compliance • Analyze of VIS program statistics • Comparisons between mandatory and voluntary states

A. Longitudinal employer survey

It is our belief that the highest yield investment that DHS can make would be in a three-to-five year longitudinal survey of employers in three mandatory verification states (Arizona, Mississippi, and South Carolina), as well as in three control states. Such a survey would quickly and cost-effectively get at one set of core questions:

- *Are employers aware of the new verification requirement?*
- *Are they complying with it?*
- *How are they complying with it? Are they using contractors?*
- *How well does the system appear to be performing from their vantage point?*
- *What additional costs does compliance impose? What are the differences in costs if verification is conducted in-house versus contracted?*
- *What changes do we see in employer hiring behavior over time?*
- *How do these factors vary by industrial sector, firm size, and other characteristics?*
- *Does verification appear to affect the employment of unauthorized immigrants, particularly in sectors and regions with high historical levels of unauthorized employment, and those with very low levels of unauthorized hiring?*
- *What recommendations would employers have for improving the system? Are they "ahead" of the E-Verify system—do they already use background and credit checks that are more sophisticated than what E-Verify could offer?*

Since employer compliance is the central purpose of E-Verify, a thorough understanding of employer behavior is critical to any assessment. A longitudinal employer survey would allow for the comparison of impacts on businesses overall between mandatory and voluntary states, as well as among different industry and employer types. One critical dimension would be differences in compliance between industries with high shares of unauthorized workers, versus those industries with lower shares of unauthorized workers—where employers might feel that verification is unnecessary. An employer survey would yield new and valuable data not available from the Westat survey (e.g., detail on costs and changes in employer behavior), or from other business and population surveys that do not include key questions about the E-Verify program. Moreover, the employer survey would allow DHS to obtain greater feedback from employers.

The employer survey could be administered, and results reported, annually. It could be shorter than the Westat survey (20 or 30 minutes to administer), and emphasize the use of

closed, readily coded versus open-ended questions. In this sense the survey would build not just on Westat's experience but that of other firms with deep experience surveying employers of low-wage immigrant workers.

When developing the survey and defining the sample population, it would be important to create a population that includes representation across firm type, industry (NAICS code), dollar volume, and numbers of workers. It would also be important to draw firms from places with differing demographic and economic profiles such as: urban and rural location, unemployment and average household income, and sizes and characteristics of nearby immigrant communities. The survey should also attempt to capture variation in the share of unauthorized workers across industries, as those industries with low shares of unauthorized workers might be less likely to participate in E-Verify than those with higher unauthorized shares.

The employer survey might also include significant subsamples drawn from minority-(especially Latino) owned businesses and federal contractors that are required by the recently amended Federal Acquisition Regulation (FAR) to use E-Verify[5]. Following the experience of Westat, firms surveyed should be grouped into those that could be classified as stand-alone companies; those that employ central approval (i.e., use of a corporate administrator or program administrator); those using decentralized approval (i.e., where hiring sites conduct verification separately); and those that use an intermediary (i.e., a designated agent or software developer).

The approach would be a standard one, drawing firms from Dunn and Bradstreet, the most comprehensive source of businesses available. The target interviews would be human resource executives in larger firms and business managers or owners in smaller firms without established HR offices. One drawback of conducting these interviews is the comparative difficulty of set up—taking roughly three to four times the amount of time that a standard interview conducted using random digit-dial techniques requires. To test and help develop the questionnaire, focus groups would need to be administered with employers in at least one of the study states.

We discuss the criteria that should be used to identify comparison sites above (essentially economic similarity and regulatory dissimilarity). Key candidate states for comparisons appear to us to be Texas (for Arizona) and Alabama (for Mississippi).

Critical issues that the survey will need to explore include:

- *Awareness* of the verification requirement, its source in federal or state mandates, and the sanctions and consequences of noncompliance;

[5] All federal contractors and subcontractors nationally will be required to begin using E-Verify starting Jan. 15, 2009. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council amended the FAR to reflect this change. The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008, directing federal agencies to require that federal contractors electronically verify the employment authorization of all their newly hired employees during the period of the contract and existing employees working on the contract. www.dhs.gov/e-verify

- *Enrollment* in the program and the motives for doing so;
- *Actual use of E-Verify* (i.e., running queries to verify work authorization) versus mere registration in the system;
- *Employer access* to the internet and use of designated agents;
- *Frequency of use;*
- *System response*: immediate employment authorizations, employment authorizations within 24 hours, TNCs, and FNCs;
- *Timing of verification queries:* pre or post hire;
- *Scope of use:* all new hires (including pre-screening), some new hires, all current employees, and/or selected employees;
- *Employer response to TNCs:* provision of notice and opportunity to contest, refusal to hire, termination, and reduction in training, pay, and hours;
- *Employer perceptions of employee experiences with TNC:* time to correct records, missing work;
- *Employer burden:* costs of accessing the system, costs of intermediaries, management time, diminished available labor pool, higher wages, and lower profits;
- *Changes in business practices:* new labor pools; higher wage structures; relocation of operations; outsourcing, and substitution of capital for labor.

Data produced by the survey would initially be generated in three forms:

- ***Cross-tabs:*** The data would be summarized in three banners of cross-tabulations. Data would be weighted to the universe of Dunn and Bradstreet counts of the overall business population and stratified by firm size, industry and other characteristics.
- ***Top-line reports:*** The survey would also be provided in an annotated questionnaire format.
- ***Data files:*** An SPSS data file would be provided.

B. Compliance and impact modeling

Beyond the employer survey, statistical analyses of data could be used to assess the level of compliance with the mandatory enforcement regime, and how compliance varies across a state by geography and by economic sectors. For purposes of long-term policy assessments, it would be useful to compare compliance effort with the overall number of new hires as well as the size of the unauthorized population—in order to get a sense of the cost-effectiveness of the program.

To accomplish these goals a statistical model could be developed that draws data from three different sources:

- **DHS' Verification Information System (VIS) data** on the number of E-Verify queries and breakdowns of how those queries were resolved.
- **Internal Revenue Service (IRS)/SSA data** on new hires reported by employers to federal authorities.

- **U.S. Current Population Survey (CPS) data** estimating the number of new hires, including an imputation of unauthorized migrants.

The data would be compiled both for mandatory verification states and for comparison states.

With data for statewide totals, by county and by industry groups, these three data sources should provide three different estimates on the number of new hires. If there were complete compliance with E-Verify (and no sampling error in the CPS), one would expect to see complete agreement across all three sources over a given period of time, i.e. the number of E-Verify queries resolved positively (in the VIS data) would be the same as the number of new hires reported to the IRS and SSA, and the number of new hires estimated in the CPS.

Develop pre-implementation baseline. The first task would be to build a robust baseline by compiling data from all three sources for the three to five years prior to the start of mandatory verification. Developing this baseline would allow for the estimation of business cycle effects. It would also give an opportunity to learn how comparable the data are across the three data sources.

Assemble post-implementation time series. The next task would be to create a time series of data from the start of mandatory verification. Comparing the time series to the baseline would then allow for analysis along several dimensions:

- The data from the VIS alone would allow a measurement of the extent of E-Verify use prompted by the mandate and an analysis of how E-Verify use differs by county or region of the state and across industry groups, as described above in the discussion of a longitudinal survey.
- Comparison of VIS with the IRS/SSA data would allow comparison of use of E-Verify, when mandated, with compliance with much more basic mandates to report new hires to IRS and SSA.
- Comparisons with CPS data, once adjusted for sampling error, could allow comparison of the number of new hires run through E-Verify versus new jobs reported by the working population.
- Analysis of differences between new hires reported in the VIS versus IRS/SSA/CPS data could also allow for comparisons across industries, especially those with higher shares of unauthorized versus lower shares of unauthorized workers.
- Utilizing all three data sources, it should be possible to develop a statistical tool for ongoing compliance assessment on a statewide basis as well as by sub-state geographies and by industry groups.

At the simplest level, the data sets specified above could be used to develop estimates of the total numbers of new hires and compare those estimates to the VIS data to develop a calculation of how many new hires were the subject of E-Verify queries and positive matches. This would yield a raw measure of compliance.

Comparisons across industry groups would be an important tool in this evaluation program. For example, we hypothesize that the results from IRS/SSA data, CPS data, and VIS data should be closely in line with each other for industry groups with relatively few foreign-born workers and relatively high skill requirements, e.g. finance, insurance, and real estate. Previous studies have shown that the unauthorized are a very small share of the workforce in such industries. We would also assume that that this will be the case both in the baseline and after the implementation of mandatory verification and that the DHS data will show both a close correlation between the number of new hires and the number of queries and a high proportion of matches to queries in these industries.

By contrast, industries with large shares of low-skilled, foreign-born workers, e.g. home construction or agriculture, would show greater contrasts between the new hires reported in the IRS/SSA data and the estimates of new hires from the CPS data which includes an imputation of unauthorized workers, comparing both sets to E-Verify system data. These are the industries with larger shares of unauthorized workers. Comparing the number of E-Verify queries (in VIS) to the estimated number of new hires would yield a measure of compliance. The proportion of matches to queries would offer a measure of the extent to which verification was inhibiting the hiring of unauthorized workers.

However, it is possible that compliance would in fact be lower in those industry groups that rely less on foreign-born workers and have high skill requirements. This would be due to the fact that employers feel they do not have the need to verify their workers through E-Verify. This alternate hypothesis should also be considered and explored.

Scale impacts on the hiring of unauthorized workers. In addition, a model could be created to predict how many new hires would have gone to unauthorized workers absent the mandatory verification requirement. The first step in constructing that model would be to develop profiles of the unauthorized population in each of the examined states utilizing the "residual" methodology which DHS has used to produce its estimates of the unauthorized population since 2005.

This methodology, first developed by academic researchers in the late 1990s, subtracts estimates of the legal immigrant population from estimates of the total foreign-born population and then manipulates the residual to develop estimates of the unauthorized population. In its most recent estimates (Hoefer et al, 2008), DHS published calculations on country of origin, state of residence, age, and gender for the unauthorized population based on DHS administrative data and the 2006 American Community Survey (ACS). With a more robust accumulation of data, the same methodology can be utilized to develop estimates of employment by industry.

In order to develop baseline estimates of the employment of unauthorized workers by industry in the target states, the residual methodology would be applied to separate concatenations of data from three years of the ACS (2004-2006) and four years of the CPS (2002-2005). Three years of the ACS should allow for identification of some geographic sub-regions within the study states. Additionally, it is possible to identify

rural areas using the ACS and routines developed by the U.S. Department of Agriculture, Economic Research Service (ERS). Four years of CPS data are probably necessary in order to develop robust estimates of immigrant workers' characteristics at the state level, as the CPS sample is much smaller than the ACS. The first step would be to establish a benchmark ratio of unauthorized workers to total workers in a given economic sector and given geography prior to the implementation of mandatory verification. The next step would be to apply this methodology to current data. Other steps could be to widen the number of states and further refining the estimates with both additional benchmarks and additional contemporary data.

This analysis would permit the construction of a simple model that predicts the level of unauthorized employment in a given industry in a given state based on the total employment in that industry in that state. While far from precise initially, we expect that this model would permit a rough determination of whether unauthorized employment in a given industry is higher or lower than expected, given the overall level of employment in that industry. The results of this kind of modeling would provide a valuable supplement to the other kinds of compliance monitoring suggested here, and could, at the very least, serve as a kind of early warning system that suggests targets for more careful examination by other methods.

C. Auditing to test for compliance with verification requirements

The other studies of employer compliance under mandatory verification regimes described here rely on (1) self-reported data from telephone surveys and in-person interviews (in the case studies); or (2) statistical evidence of compliance derived from transmittal data or analyses of aggregate databases.

Here we propose a third approach that would provide *direct* evidence of compliance with verification requirements and safeguards that are extended to job applicants. Such direct evidence would be generated by audits or employment tests.

In the past, testing has proven to be a uniquely valuable tool for measuring rigorously the extent and forms of discrimination in housing and employment markets. In a typical test, two individuals—typically, one white and the other minority—pose as equally qualified job applicants or home seekers. Both testers are carefully trained to make the same inquiries, express the same preferences, and offer the same qualifications and needs. From the perspective of the housing provider or employer they visit, the only difference between the two is their race or ethnicity. Systematic differences in treatment —telling the minority customer that an apartment is no longer available when the white is told he could move in next month, for example—provide direct evidence of discrimination on the basis of race or ethnicity.

This methodology originated as a tool for fair housing enforcement, especially detecting and documenting individual instances of discrimination. Since the late 1970s, paired testing has also been used to measure rigorously the prevalence of discrimination across the housing market as a whole. More recently the methodology has been adapted to measure discrimination in hiring, mortgage lending, home insurance, automobile sales,

and other market transactions. When a large number of consistent and comparable tests are conducted for a representative sample of housing providers or employers, the results control for differences between white and minority customers, and directly measure patterns of adverse treatment based on race or ethnicity.[6]

The use of mandatory verification raises two important issues that are susceptible to testing. One is whether registered employers are in fact verifying job applicants and whether they are complying with procedural requirements spelled out in the memorandum of understanding they sign with the government. That is, do they:

- Screen workers after the hire date and within three days of the start date (or do they engage in pre-screening);
- Run all newly hired workers through E-Verify (as opposed to some and not others);
- Provide workers notice of TNCs and give them the opportunity to contest them;
- Provide workers the requisite period of time to correct their records should they contest the TNCs;
- Not withhold training, pay, hours or other opportunities as a result of the worker receiving a TNC.

A second issue—which is much more complex and difficult to examine—is whether mandatory verification requirements induce higher or lower levels of discrimination in hiring of foreign-looking and sounding applicants.

Compliance auditing. Building on the experience with testing conducted by researchers and fair housing organizations, we believe that tests of registered employers could be undertaken to examine the use, timing, and extension of notice and other safeguards to applicants receiving TNCs.

One approach might be to send foreign-appearing testers to apply for advertised jobs with registered employers in the three mandatory states. The testers would be "given" credentials that meet or slightly exceed the requirements of posted positions. They would however be assigned an SSN that would trigger a TNC. We expect that in many instances researchers would be in a position to know if the applicant were considered for the available job and whether or not the employer attempted to use E-Verify to check their work authorization. In other words, employers might use E-Verify selectively for some job applicants and not others—and this selectivity could depend on race, ethnicity, foreign-sounding accent, etc. Where employers did use E-Verify, researchers would also be in a position to observe their behaviors following receipt of a TNC and perhaps later an FNC. Here we would be testing whether employers differentially provide job seekers who receive TNCs with information about their options and sufficient time to follow up.

[6] See Fix and Struyk (1992) for extensive discussion of the use of paired testing to measure discrimination. In 2002, a methodological workshop convened by the National Research Council confirmed the potential of rigorous paired testing research, reviewed issues of statistical significance and generalizability, and identified ways in which paired testing studies could be strengthened (NRC 2002).

Tests could be administered on a longitudinal basis in the study states to determine if patterns of compliance shift—and shift in ways that are consistent with those reported by survey and statistical data. This concept would need to be fully conceptualized and carefully piloted before it could be implemented at scale.

Pilot testing phase. Testing strategies in the past have often begun with an exploratory design phase, when a few tests of different types are conducted to assess feasibility. Based on findings from this initial phase, pilot studies are often conducted that frequently yield statistically valid results for a small number of metropolitan markets. In some cases, these pilot study results can have a substantial impact on public awareness and debate about the incidence and forms of discrimination.

Given the importance and complexity of immigration issues today, a well-designed pilot could also lead to federal funding for a nationwide testing study, similar to the national tests of housing discrimination funded by the Department of Housing and Urban Development (HUD) in 1977, 1989, and 2000.

Testing for discrimination against foreign-appearing job candidates. The method described above could be adapted to examine whether foreign-appearing job applicants experience worse outcomes than their counterparts who do not appear foreign, i.e., whether they advance less in the job application process and/or are treated differently. The latter might involve verifying one candidate's identity but not the other, terminating the application of one candidate who receives a TNC but not his or her counterpart, etc.

The costs and methodological challenges here are far greater than in the compliance study sketched above. Such work requires the matching of testers and their close coordination. The absence of a baseline before mandatory verification was implemented makes it difficult to assess the increment of new discrimination ascribable to mandatory verification versus other factors. However, additional testing in non-mandatory states could impose more controls on the experiment.

D. Case studies of employers and immigrant communities

Most of the potential research projects described thus far have been primarily quantitative or based on process analysis. There is also a strong role for qualitative data to inform an early assessment of mandatory employer verification at the state level. Rich case studies of participating employers and affected immigrant communities could add substantial depth to the research, and provide the kinds of detailed stories and examples that policymakers would find useful when deliberating program expansions.

Employer case studies. Understanding the behavior of employers, compliance costs, and potential unintended consequences in the labor market is central to assessing the viability of mandatory verification. The employer survey described earlier would provide systematic quantitative data on compliance rates, employer costs, error rates, and other key variables of interest. Some data on the motivations of employers, their experiences with the system, and their thoughts on improving it, would also be obtained through the employer survey.

However, case studies of affected employers would provide far richer information on employer experiences with the systems and any unintended consequences they might face. Such studies would provide the opportunity for answers to open-ended questions otherwise not available through surveys or databases, and could be used to validate and provide detailed examples for findings from the implementation study, employer survey, and paired-testing audit methodologies described above. Qualitative research could also be used to disentangle the impacts of E-Verify implementation from other concurrent trends, such as downturns in the economy and slower immigration flows. Finally, qualitative data collection from employers would allow them to voice their concerns and opinions about the verification process, and potentially obtain greater support from the business community, which is ultimately the key to the success of the program.

The key questions that the case studies of employers would address are related to employer experiences with E-Verify and any impacts mandatory verification might be having on their business and hiring practices. These key questions include:

- How often do employers use E-Verify if they are registered for it? Why do they use it more or less frequently? Because of the level of hiring or for other reasons?
- What have been their experiences using E-Verify? Do they have internet access, and do they find the system to be operating smoothly? What is their overall rating of the system's performance?
- Have employers found E-Verify costly or time consuming? What are the pros and cons of using a contractor to conduct the verification?
- How often do they encounter TNCs? How do they handle them when they encounter them? Do workers usually manage to overcome TNCs, or do they usually wind up not getting the job? Is there anything that employers can do to help workers in this situation?
- Has the use of E-Verify changed the way employers do business? Have they slowed down hiring or expansion in the state? Do they anticipate any long term changes in the way they do business?
- What improvements would employers suggest to the E-Verify system as it currently exists? To the mandatory verification law in their state?
- Are there any good alternatives to the current E-Verify system that would still verify employees' work authorization? How could an overall system be designed differently or better?

Focus Groups. These questions would be addressed primarily through focus groups of employers that are registered to use E-Verify. Focus groups are useful to obtain qualitative information from open-ended questions because they allow for group discussion and back-and-forth on different topics. Allowing participants to discuss issues helps answer the more complex "why", "how" and "how might you do things differently" types of questions that surveys and other large-scale quantitative data collection efforts have difficulty addressing. Thus the focus groups help add depth and detail to explain patterns and trends brought out in quantitative analysis.

The focus groups are generally held for one and a half to two hours (enough time to ask about 10 to 12 questions) in a familiar setting, and include between six to ten participants—who in this case would be business owners, managers, and/or human resource officers. All participants are guaranteed confidentiality and, with a good moderator, encouraged to participate in a candid discussion of issues and free flow of ideas. Such sessions are also generally useful for obtaining feedback on programs (one important goal of the proposed research agenda), as well as recommendations for program improvement.

Selection of Groups. A number of focus groups would be required to answer the most important study questions, and these focus groups would need to be stratified on some important key employer characteristics.

- There would need to be some focus groups in mandatory verification states to assess how the program is being implemented there, while in control states employers would be asked questions about their awareness of the program and its use, if they are voluntarily participating.
- Within each state, the case studies should be conducted in rural versus urban settings, as well as in cities with different industrial compositions.
- Across the states, groups should be stratified on firm size, with groups of large, medium and small employers held separately. Separate groups for minority-owned businesses should be held, with an emphasis on Latino-owned firms (as these firms are likely to be disproportionately affected by E-Verify implementation) across all sites, and African American firms in Southeastern states, especially Mississippi (because of potential African American versus Latino job competition there). Separate groups could also be held for public contractors. Some diversification of focus groups by industry—with an emphasis on agriculture, construction, manufacturing, and other services with high rates of unauthorized employment—would also be warranted.
- The study team might also consider conducting separate groups with employers who had participated in voluntary use of E-Verify vs. those who only started participating after state-level mandates were enacted.

Number, Geographic Distribution of Focus Groups. It would be important both to ensure regional geographic diversity within each state, and to ensure diversity on the other characteristics across the full sample of focus groups. It would be prohibitive, however, to stratify the groups on all these criteria in each study state. Given the broad range of characteristics of participating firms, we would recommend conducting at least six focus groups in each of the mandatory and control states. Each of the six groups could be scheduled easily within a one week time frame and conducted by a professional facilitator and one or two members of the research team.

The main drawbacks of focus groups lie with the difficulty in obtaining random sampling of the population of interest. It is difficult to draw a random sample from a frame for focus groups, because recruitment is often done through trusted intermediaries (e.g. business associations, chambers of commerce, and similar organizations). Participation

is voluntary, and often those who are least threatened by the questions asked—in this case, businesses who are most likely to be in compliance—are the most likely to participate, yielding bias in the sample. Moreover, the total number of individuals involved in the groups is small, yielding samples too small for quantitative analysis.

Thus the major goal of focus groups is to obtain qualitative data and in-depth information and stories to undergird findings from quantitative work. Focus groups are generally *not* useful to draw statistical conclusions, such as proportions engaging in an activity (i.e., in this study to deduce compliance rates).

In addition to the focus groups, it would be important to hold key informant interviews with business and economic leaders about the same topics. These key informants could offer a "bird's eye" view of state and local-level impacts on businesses and the economy and would include:

- Employer associations and chambers of commerce (by industry and ethnicity, as appropriate);
- Temporary and permanent hiring agencies;
- Local workforce boards and workforce development agencies;
- E-Verify contractors;
- State and local elected officials;
- State and local economic development, commerce, labor and regulatory agencies;
- Employment lawyers; and
- Union representatives.

The focus groups and key informant interviews could be conducted annually over time to monitor changes in implementation of E-Verify (and in fact could offer some critical pre-post- data for states like Mississippi that have yet to implement their mandates). Each phase would consist of six or more employer focus groups and in the range of 15-30 key informant interviews per site.

Immigrant family and community case studies. The research projects described thus far mostly concentrate on implementation issues and measurable impacts on employers, workers, and the general economy. But E-Verify implementation could have substantial broad impacts on communities and families as well. If would-be immigrant employees were to lose jobs, get rejected during hiring, begin working more informally, or leave the labor market altogether, these developments could have substantial effects on their families and communities.

These broad sociological and economic questions are best answered with qualitative research, which can help differentiate the impacts of E-Verify versus economic trends and other factors. Case studies of immigrant families and communities could also be useful for answering some basic compliance questions. And they would embed the findings from other study components in the realities of immigrants' day-to-day existence, and provide their perspectives in the research.

Some questions that could be addressed through focus groups of unauthorized and legal immigrant workers and parents include:

- Have immigrants recently been fired or had difficulty finding work? Is this because of E-Verify implementation, other forms of immigration enforcement, race/ethnicity, language, the general economic downturn, and/or other factors?
- Are there immigrant workers who have been checked by E-Verify and did not match? What if anything, could they do if they did not match? Did employers provide assistance to immigrants who did not match in the system?
- Are immigrants deterred from seeking employment in the formal economy and turning to the underground or informal economy? If so, what kinds of work are they taking and what conditions are they facing?
- Are immigrants leaving the local area or the state? Where are they going and why? How much if this is due to implementation of E-Verify versus economic conditions and other enforcement activities?
- For those families who choose to stay in areas with E-Verify, how are they able to make ends meet? Do some adults take informal work? Are families using more public assistance?
- How are the stresses potentially related to losing employment or failure to find employment because of E-Verify affecting parents' and children's health and mental health?
- How are immigrant communities faring where E-Verify has been implemented? Have community incomes dropped due to loss of employment and/or people leaving the area? Is this affecting the types of activities that immigrant families engage in and/or resulted in any loss of general business revenue?
- What are the effects on schools, health and social service providers, and other institutions? For instance, are schools seeing a change in enrollment and/or characteristics of immigrant studies (e.g., an increase in the share that are eligible for free and reduced price lunch)? Are hospitals and other health providers seeing an uptick in the uninsured presenting at free clinics and emergency rooms?

The community and family studies would be based primarily on a set of focus groups with similar parameters to those in the employer case studies: professional moderating, one and a half to two hours length, 10 to 12 questions, and held in a familiar setting. The participants in these groups would be immigrants who are either currently working or unemployed.

The groups could be stratified on location (i.e., rural, urban, different business climates within each state); on citizenship or legal status; and on presence of children in the home. Ideally there would be separate groups for unauthorized and legal immigrants; however, screening on this criterion could be difficult and so groups might be a mix of legal and unauthorized populations. These focus groups could be held in either English or Spanish, and moderators would be chosen accordingly. With groups of potentially unauthorized immigrants, maintaining confidentiality of identity and content would be of utmost importance, and strong Human Subjects Protection guidelines would need to be developed.

The same drawbacks that apply to employer focus groups apply to community-level focus groups. They would not represent a random sample of the community, and it is likely that more "connected" immigrants (i.e. those that researchers could find through churches, service providers, and other community-based institutions) would participate, potentially preventing data collection from those immigrants experiencing the most difficult economic conditions. However, if service providers have seen an uptick in demand for economic and social services recently, they could help the study team recruit individuals who need assistance and therefore might be *more likely* than the general population to have experienced job difficulties due to E-Verify.

As in the employer case studies, the community and family case studies would involve a substantial number of key informant interviews in each state. For instance, interviewees should include:

- State and local elected officials;
- Staff at state and local employment and temporary agencies (e.g. workforce boards);
- Staff with state and local immigrant serving and mainstream social service providers and community-based organizations;
- Staff with state and local health and human service providers, for instance hospitals, community health centers, and public health clinics;
- Principals and teachers at schools with large immigrant student populations;
- Immigrant advocacy groups;
- Church and other faith-based leaders; and
- Formal and informal immigrant community leaders.

The key informant interviews could also be conducted in focus-group format. For instance, groups of health providers could be arranged to discuss any changes in utilization of health services and the number of uninsured immigrants. Groups of educators—principals and/or teachers—could be held to discuss enrollment changes; changes in student composition (e.g., changes in shares of students with limited English skills or low incomes); and changes in students' performance and behavior (e.g., grades, attendance, and disciplinary actions).

E. Demographic data analysis

Another component that would be important to help measure the general social and economic effects would be an analysis of demographic trends across the mandatory verification and comparison states. Key questions that could be answered using demographic data from population surveys and administrative data include:

- Is there evidence that immigrants—especially the unauthorized—are leaving any of the mandatory verification states, or that population growth has slowed down? If so, can the data tell us where people are moving?
- How much of changes in immigrant populations could be attributed to economic conditions versus the timing of E-Verify implementation? (Here it would be

difficult to establish cause and effect, but the use of multivariate modeling and control state analyses could be instructive).

- Are immigrants' employment numbers and rates declining? If so, are they declining disproportionately in some industries?
- How are economic and social conditions changing in immigrant families? Is there any evidence of family separation (e.g., changes in the two-parent household rate), increases in poverty, or declines in homeownership or housing conditions?
- How are any potential declines or slowdowns in immigration affecting schools, hospitals, and other community institutions?

Analysis of ACS data. The ACS data are of great use to address many of these questions. ACS data are available annually since 2005—well before the implementation of E-Verify in any of the states and the current economic downturn. The annual ACS data are available for states and for areas with more than 65,000 populations—which would cover the major cities in the study states; three year averages should support analysis for geographic areas with smaller populations (over 20,000). Rural areas can be imputed in the ACS (based on metropolitan versus non-metro counties as grouped in the ACS's public use micro-data area) using routines developed by ERS. The ACS data offer a rich array of appropriate variables, including immigrants' origins and citizenship (with the possibility of assigning legal status to non-citizens); other demographic variables; education, English language ability, work status, occupation and industry; and their residential location during the previous year.

The ACS data offer the possibility of analyzing trends in overall immigration to study states; immigrants' movements across states; their employment characteristics; and their income, poverty and other social characteristics—over time using annual cross-sections. The ACS is not a longitudinal survey, however, and so it is not possible to track individual immigrants or groups over time. Comparisons between mandatory verification and other states are possible, as there are a wide range of variables that can be used to control for common characteristics across the states. The wide range of data elements in the ACS and that can be added to data files at the state level (e.g. state-specific income levels and unemployment rates) also make it possible to use multivariate data to control for economic conditions when analyzing changes in immigration flows and characteristics of immigrants over time.

Analysis of Administrative Data. Administrative data from state and local sources would also be useful to help track immigration trends and social conditions over time in the study states, although these data are generally suitable to answer narrower questions than the wide range of possibilities using the ACS. School district data—on enrollment in public schools—could be useful to track changes in the numbers of children in immigrant families. Some schools may also have data on the number of children transferring out of the district or the state—and where they moved. These data could help track trends in immigrant populations down to the very local level (as many districts are as small or smaller than counties), and with more timeliness and accuracy than population surveys like the ACS—as school data include *all* students during any given year, and are generally available within a year.

Data from health and social service providers—e.g., hospital birth records by parental birthplace or records of immigrant inquires or use of social assistance—could also be useful in tracking rapid fluctuations in immigrant populations. Records from schools and births are often considered "leading indicators" because they track the presence of children, a population that often changes more rapidly than the population of adult immigrants.

Of course , the administrative data generally only reveal counts of different populations—births to immigrant mothers, the foreign born, English as a Second Language students, Latino students, e.g.—and do not capture the entire population of interest: unauthorized immigrants. But combined with the more sophisticated analysis made possible by the ACS and with thorough case studies of immigrant families and communities, these data offer the opportunity to map trends in immigrant populations and social conditions that could help inform the analysis of the overall impact of E-Verify implementation.

F. Tracking public opinion

Public understanding and support are essential aspects of any enforcement strategy. Periodic surveys of attitudes in the populations of both mandatory and control states would offer valuable measures of the extent to which employer verification is viewed as a worthy form of immigration control, the public's familiarity with E-Verify, assessments of its effectiveness, and, potentially, respondents' opinions on a legalization program.

In order to develop a baseline of data, telephone surveys would be run simultaneously in the three mandatory and three control states at the start of the project. In order to produce accurate statewide samples with acceptable margins of error each state survey would involve 1,000 respondents selected in a probability sample with standard random-digit dialing methodologies. A brief (10 minute) questionnaire would extract basic demographic information as well as general attitudes towards immigrants and immigration policy with questions routinely used on large publicly available national polls in order to provide comparability. In addition, a battery of specially-designed questions would focus on attitudes towards the employment of unauthorized workers, knowledge of employer sanctions and the E-Verify program, and evaluations of the merits of employer verification versus other enforcement strategies such as border control and worksite raids. In the mandatory states additional questions would probe perceptions of the program's effectiveness and the means by which it is being implemented. Respondents' attitudes towards immigration reform provisions in general and a legalization program in particular would be probed.

The surveys would be repeated every two years with modifications to gauge the impact of intervening events on key points of knowledge and attitudes. In addition to time series data this would permit the development of hypotheses as to the factors influencing perceptions of E-Verify and other immigration control programs.

G. Operational issues research: federal, state, and sub-state

As the preceding sections should make clear, Arizona, Mississippi and/or South Carolina, where mandatory verification has been implemented, should offer opportunities to assess key operational fundamentals of employer verification and compliance. Such an assessment should allow those who implement the program to "get it right" at the most basic level. And unless the operational foundation of the program is sound and resilient, the goals of verification—limiting unauthorized immigrants' access to the labor market while minimizing associated costs—cannot be realized.

We sketch here a broader study of E-Verify's implementation at the federal, state, and sub-state levels that would involve multiple research methods—e.g., field studies, key informant interviews at all levels of government, and analysis of administrative and aggregate data—that in a fashion, bring together strands of the other research described in this document.

Thus, the complex study proposed here under Section G should be viewed as a single coherent project. It is modeled after the multi-year, multi-site, multi-method study of the implementation of IRCA that begun in the late 1980s by The Urban Institute and the RAND Corporation, with funding from the Ford Foundation. The scope and cost of the project would be less broad and the costs lower than the Urban Institute/Rand study, which encompassed not one set of major policy changes but four: employer sanctions, legalization, Systematic Alien Verification for Entitlement (SAVE), and the creation of a new impact aid program.

The project proposed here would be driven by an attempt to answer four overarching questions:

- What implementation issues does mandatory verification raise at all levels of government?
- Does the introduction of mandatory verification appear to slow the hiring of unauthorized immigrants—especially if the economy rebounds?
- What costs does the mandatory verification system impose on government, employers, workers, and the communities where they reside?
- What lessons does the experience of states adopting mandatory verification hold for adopting a national verification system?

The proposed project would produce bi-annual reports that would provide integrated results of analysis at three levels of activity: federal, state, and sub-state.

Federal

State laws call for employers to sign up for E-Verify. Thus, the state laws provide a new lens through which to assess this federal program in operation. Information that is already being collected at the national level by E-Verify program administrators through its Westat evaluations provide a perspective on individual firms that enroll voluntarily. Parallel information should now be collected and/or disaggregated for specific states. Decision-makers could then understand the similarities and differences, if any, between how the program runs and is used in a voluntary versus a mandatory environment. In addition, state-level research provides an opportunity to assess rapid scale-up issues in

real-time circumstances. Several categories of information would be required to assess implementation.

Core operational information—numbers of users, response times, training efforts, employer costs, government costs, workload measures, scale-up demands, and performance indicators. The Arizona law and other factors led to an expansion in the total number of MOUs with employers using E-Verify, from approximately 27,000 at the end of FY 2007 to almost 88,000 at the end of FY 2008 and over 96,000 as of December 6, 2008. Has E-Verify been able to respond effectively to the scale-up? Have response times kept pace? Have training and employer outreach requests and goals been met? Have costs to the government and to employers varied from the experience of the voluntary program?

It would also be important to learn the number, share, and characteristics of businesses that actually enrolled. Did employers enroll quickly after requirements went into effect? Are there gaps between actual enrollment and the numbers that should be enrolled? If there are gaps, what are the numbers of firms, geographic distribution, and types of businesses that are under-enrolled? Can gaps be explained by the likelihood that un-enrolled employers have not made new hires? Are firms in industries with higher shares of unauthorized immigrants more or less likely to be enrolled than those in industries with low unauthorized shares? Do enrollments take place in a sudden rush, or is the trend gradual? How does publicity and training affect enrollment?

Database accuracy and response statistics—match/non-match rates and incidence of TNCs and FNCs. Accuracy rates for verifying queries instantly or automatically upon submission in the voluntary program are reported as 96.1 percent based on the latest data from the third quarter of FY 2008 (April 2008- June 2008). This is a meaningful gain from the 79 percent rate of the original Basic Pilot program. The most recent increase from 94.2 percent to 96.1 percent itself reflects improvements that have been achieved during the past two years, since Congress began providing substantial funds for building the program.

For Arizona and other mandatory verification states, it would be important to know if the national norms (and gains) hold in a mandatory verification setting. If the first-time match rates in Arizona are lower, it may suggest a degree of self-selection in the voluntary program by employers outside of Arizona, who choose to use the program because they are already relatively "clean" in their hiring practices and the sectors of the labor market they represent. Or, if the Arizona rates are higher than the national norm, it may suggest that the existence of mandatory verification has a deterrent effect that discourages unauthorized workers from applying for jobs for which they might earlier have been hired.

Impacts on other institutional players—Immigration and Customs Enforcement (ICE) and SSA. E-Verify requires high degrees of cooperation and collaboration between DHS and SSA, which has been institutionally reluctant to take on the partnership that the program requires. A mandatory program is likely to place still more workload pressures

on SSA, especially if a substantial number of new hires cannot be verified with an electronic query, yet are legally authorized to work and required, therefore, to visit local SSA offices to update or validate their records. Because of continuing operational improvements and innovations, the burdens verification places upon SSA's infrastructure and resources may be lessening and the foot traffic to its offices should continue to decline.

However, SSA is a *sine qua non* of verification, voluntary or mandatory. Thus, research on how a mandatory environment affects SSA institutionally would be invaluable for future planning purposes when political and policy officials return to immigration reform legislation.

Another key institutional player is ICE, with its responsibilities for enforcing employer sanctions laws. Since compliance must become a new norm for mandatory verification to achieve its goals, enforcement carried out by ICE is essential for such a norm to take root. As with all the other operational elements of E-Verify that are outlined here, research that includes ICE enforcement information would be instructive. Such research should assess the role that ICE enforcement plays, enumerate the levels and kinds of resource allocations that are optimal, and evaluate the types of ICE enforcement that are successful in enabling compliance to become an employer norm. One potential line of inquiry, then, might be to probe if stepped up enforcement leads to increased registration, queries, and workload as well as changes in compliance.

Compliance research. The importance of compliance as both an enforcement policy principle and as an operational necessity is a theme that arises repeatedly in this study design document. There are two core questions to answer: Are E-Verify queries on all new hires actually made? Are employers using E-Verify correctly?

The value and policy importance of E-Verify operational research in Arizona and the other mandatory verification states ultimately rests on the ability of investigators to provide evidence-based answers to those questions. If employers query the system selectively, or if employers who have relatively few new hires (or believe they never hire unauthorized immigrants) simply do not use the system, the promise of verification and compliance will not be realized

A parallel uncertainty is that although E-Verify provides the machinery to verify new hires, and does so increasingly well, the system is generating some unknown number of false positive verifications. In the past it has not been possible to overcome that flaw because the system verified the documents that would-be workers present, not the identity of those presenting the documents. Such false positives will likely continue to be possible as long as the nation does not have secure document requirements for every potential worker. Without secure documents, the system is vulnerable to identity fraud and can generate positive, albeit false, verifications for employers. In other words, the database is only as good as the quality of the underlying documents. Thus one important implementation issue to be raised is whether DHS' introduction of the Photo Screening

Tool can be broadly and cost-effectively expanded to include additional documents and whether it has a significant impact on reducing false positives.

In the end, the question continues to be whether mandatory verification will really work to check hiring of unauthorized workers or becomes a new form of what we have now: seeming compliance alongside the employment of sizeable levels of unauthorized workers. Solid operational research can help answer that overarching question.

State and sub-state

Presently, Arizona is the only state law ripe for operational research at the level of state and sub-state implementation. In selecting another state to provide a potentially different operational, economic, social and political picture; the likely candidate is Mississippi, which has also enacted a mandatory verification statute. However, the Mississippi measure does not apply to all its employers until July 2011. Operational comparisons between these two states could yield insights into differences in implementation, compliance, and impacts between a state where E-Verify use was mandated all at once (Arizona) versus a phased-in approach (Mississippi). Should the trend toward mandatory verification state laws continue, research should build on current studies to explore the implementation of new enforcement laws as implementation regimes mature and penalties are, in theory, increasingly broadly applied to employers in more states.

IV. LEGAL ISSUES AND RESEARCH

This section summarizes the relevant legal framework and background for state-law mandates, highlights ongoing legal issues that may have a significant bearing on E-Verify research, and identifies other issues whose resolution might profit from explicit attention in the research. (See Appendix I for a fuller discussion of the legal framework for E-Verify.) The discussion assumes stability in the federal statutory framework for E-Verify. Obviously, however, at any point statutory changes could take certain ongoing legal issues off the table or could generate others that may affect the research program. Congress could, for example, resolve most federal preemption questions by explicitly authorizing specified state-level practices or forbidding them.

A. Legal Framework

In recent years, state and local governments have adopted a variety of initiatives aimed at discouraging or sanctioning unauthorized migration. These have included local ordinances meant to bar employers from hiring unauthorized aliens or to bar landlords from renting to persons unlawfully in the United States. They use a variety of means for proving or testing immigration status (usually some connection to E-Verify or to the SAVE system, a separate DHS system used by government entities to check the legal status of prospective beneficiaries of government services).

Most early court challenges to these local ordinances succeeded in winning injunctions against their implementation. See, e.g., *Lozano v. City of Hazleton,* 496 F.Supp.2d 477 (M.D.Pa. 2007); *Villas at Parkside Partners v. City of Farmers Branch,* 496 F.Supp.2d 757 (N.D.Tex.2007); *Garrett v. City of Escondido,* 465 F.Supp.2d 1043 (S.D.Cal. 2006).

Appeals or further litigation are pending in several of these cases.

Each case presents specific legal questions, but prominent themes in the (at least initially) successful challenges included:

- the local ordinance is preempted by federal law, either expressly or because of hindrances the local action poses to a comprehensive federal regulatory scheme;
- the ordinance does not provide due process to the persons affected by the regulatory schemes; or
- the ordinance violates other specific federal statutes.

These early rulings prompted many opponents of such ordinances to believe that measures of this sort would be struck down by the courts. cf. *Equal Access Education v. Merten,* 305 F.Supp.2d 585 (E.D.Va. 2004) (upholding against preemption and other challenges a Virginia administrative ruling that would deny admission of undocumented aliens to public colleges).

But the picture has become more mixed. Some of the ordinances have been modified in response to the litigation or to preliminary court rulings. More pertinent for E-Verify, the drafters of later similar legislation have paid more attention to correcting the flaws identified by the earlier rulings, and have generally tried to design their regulations to conform as closely as possible to existing federal immigration control systems or standards. In particular, the failure of comprehensive federal immigration reform legislation in the Senate in 2007 gave an impetus to several *state-level* efforts focused much more on the workplace than on the rental housing market, as most of the housing-oriented provisions were struck down by the courts.

A prominent feature has been a requirement that some or all of the employers in the state must use E-Verify to check the work authorization of new hires. These statutes or other mandates have also drawn litigation, but a lengthy district court ruling in February 2008 upheld the Arizona legislation against initial preemption and due process challenges. *Arizona Contractors Assn., Inc. v. Candelaria,* 534 F.Supp.2d 1036 (D.Ariz.2008). On September 17, 2008, the Court of Appeals for the Ninth Circuit affirmed the district court's judgment. *Chicanos Por La Causa, Inc. v. Napolitano,*__ F.3d ___, 2008 WL 4225536 (9th Cir.2008). (The decision leaves open the possibility of later challenges against the statute as implemented, but it rejected the claim that the statute is invalid on its face.)

These rulings are notable because the Arizona law is one of the broadest of the recent enactments. It requires all employers in the state, as a condition of retaining various permissions to do business there, to verify all new employees through the E-Verify system. See also *Gray v. City of Valley Park,* 2008 WL 294294 (E.D.Mo. 2008) (upholding local ordinance requiring employers not to hire unauthorized aliens, on pain of losing business license, against challenges based on federal preemption, equal protection, and due process claims). Several other states have also adopted E-Verify mandates in various forms, with or without additional enforcement or procedural

provisions. (There continue to be some local-level enactments as well, but the focus here will be on state government actions.)

The variations in the details are substantial, but three criteria are most significant for the purposes of this research design: range of coverage of the state law (some or all employers in the state); mode of enactment (statute or executive order); and effective date (giving a sense of how quickly employers are likely to sign up for E-Verify; many states have phased implementation, covering larger employers first).

Appendix I includes a table showing the pertinent information on these features with regard to the eleven states that currently have relevant E-Verify mandates.[7]

B. Issues deriving from the legal framework

Preemption issues. Although the Arizona law is more carefully drafted than many of the local ordinances struck down in the early litigation mentioned above, federal preemption doctrine is sufficiently amorphous that plausible arguments can be offered both in support of the validity of the state E-Verify laws and against them. As a sign of these ongoing controversies over state laws that mandate use of E-Verify, in June a federal district court issued a preliminary injunction against implementation of the new Oklahoma E-Verify law, largely on preemption grounds, pending a full hearing on the merits of the plaintiffs' challenges to the legislation. *Chamber of Commerce v. Henry,* 2008 WL 2329164 (W.D.Okla. 2008).

Overview. Under our constitutional system, federal law (assuming it is constitutionally valid in its own right) is supreme, and state law that conflicts must yield to federal authority. State laws can be expressly preempted by Congress, or they may be ruled preempted by implication, either because a court finds that federal law occupies the field, or because some feature of the state regulation conflicts with or impairs the operation of the federal scheme.

Though immigration regulation is an exclusively federal power, the Supreme Court ruled in 1976 that a California law forbidding the knowing employment of unauthorized aliens was not preempted. The Court deemed that the California law was primarily a regulation of employment relationships, which is traditionally a state function, rather than an immigration regulation, and it found California's scheme to be sufficiently harmonious with the Immigration and Nationality Act (INA) and other federal law to be constitutionally valid. *DeCanas v. Bica,* 424 U.S. 351 (1976).

[7] The text of most of these statutes or executive orders, along with other pertinent documents, are available at: http://www.verificationsinc.com/compliance-corner.html (last visited September 13, 2008). The website lists two additional states not included on the Table. Tennessee has an employer mandate, but it can be met either by participation in E-Verify or by using the ordinary I-9 document check required by IRCA; no one is required to sign up for E-Verify. At the opposite pole, Illinois passed a statute forbidding Illinois employers from participating in E-Verify until the system achieved certain performance measures. Implementation of that law has been effectively delayed pending resolution of a lawsuit filed against the state by DHS.

The *DeCanas* case served as backdrop when Congress adopted its comprehensive employer sanctions and document review scheme in IRCA in 1986. In order to subject employers to only a single such verification scheme, Congress provided in IRCA for express preemption of state laws, but with an important parenthetical exception that has figured prominently in the defense of the states' recent E-Verify mandates. The IRCA preemption provision, INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2), provides:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

The legislative history gives little help in understanding the scope of the parenthetical clause or the precise meaning of "licensing and similar laws." The *Arizona Contractors* case found that the Arizona statute was valid under this § 274A(h)(2) exception clause as a licensing law; the principal consequence of an employer's noncompliance would be the loss or suspension of its Arizona business license.

But even if a state law is not expressly preempted by a federal statute, it can be invalidated if it hampers the kind of policy balancing that the federal government is meant to accomplish—that is, the state law could be preempted by implication. The *Hazleton* decision, for example, found that a local ordinance sometimes mandating use of the Basic Pilot system was invalid because it served to change the character of what Congress intended to be a purely voluntary and experimental program. 496 F.Supp.2d, at 526-27.

Research will not be able to disclose a definitive answer to the question whether state laws mandating the use of E-Verify are preempted. That will require the litigation to take its full course (or else a clear and explicit statement by Congress in new legislation on the subject). And even a Supreme Court decision sustaining, say, the Arizona statute against preemption challenges would not necessarily dictate that other state statutes would survive. Such a ruling would presumably interpret § 274A(h)(2) as *not* expressly preempting such state E-Verify statutes. But the implied preemption question would remain, and it quite often turns on specific details of the state statute allegedly in conflict with the overall federal scheme.

Possible DHS steps to consider. Nonetheless, DHS, if it wishes, *may* be able to take some administrative steps to affect decisions on the preemption question—either to improve the odds that the state E-Verify laws will survive preemption challenges or to attempt to signal that they are incompatible with the federal scheme. And of course, because preemption questions are almost entirely questions about the intent of Congress, the cleanest way to help resolve preemption issues would be to persuade Congress to adopt an amendment more clearly spelling out its will on these issues.

Chevron deference on interpreting the licensing exception to state law preemption. Administrative rulings interpreting an ambiguous statute that the agency administers are

usually entitled to strong deference from reviewing courts, under the so-called *Chevron* doctrine. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). DHS might therefore choose to issue a ruling (in an appropriate form capable of claiming this sort of deference) that formally states the Department's views on the proper interpretation of the "licensing and similar laws" parenthetical in INA § 274A(h)(2). That is it could state its views on whether the exception permits or forbids state laws of the types listed in Table I.

Strong controversy persists over whether federal administrative rulings on preemption of state law are entitled to *Chevron* deference. See, e.g., *Watters v. Wachovia Bank*, 127 S.Ct. 1559, 1584 (2007) (Stevens, J., dissenting); Nina Mendelson, Chevron *and Preemption*, 102 Mich.L.Rev. 737 (2004). But if deference on this sort of interpretive issue is ultimately ruled inappropriate, the court would simply ignore what DHS says. The DHS statement thus might not help, but it certainly could not hurt the chances for the court to rule in the way favored by DHS.

DHS assessment of the impact of state E-Verify laws on federal policy choices. Probably of greater significance, DHS could issue a ruling or pronouncement on some of the issues that are posed by the "implied preemption" component of the analysis. Under this component, the courts try to determine, among other things, whether the state enactment upsets a delicate policy balance or carefully designed timetable deemed essential for effective realization of the complex goals of a federal regulatory statute. See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-75 (2000). The *Geier* court, in finding federal preemption, explicitly relied in part on statements by the federal regulatory agency indicating that, in its judgment, the state-law rule at issue would impair the operation of the federal scheme. Id. at 883.

Therefore, DHS could indicate, if this is its judgment, that state-law E-Verify mandates hamper the realization of the complex objectives of the federal scheme, for example by requiring employer participation even though, under federal law, employer participation is almost always voluntary. Such a statement would apparently enhance the odds of a court ruling that state laws in this realm are preempted.

But the opposite course is also open to DHS. That is, the *Geier* rule also would seem to give weight to an agency statement disfavoring preemption. For example, DHS could state, if this is its view, that the gradual introduction of state-law mandates for employer use of E-Verify does not overburden the federal system DHS administers, and is moreover consistent with Congress's vision for gradual expansion of the use of electronic verification as experience is gained. Again, there is no guarantee that such DHS pronouncements (in either direction) would carry the day, but they might be influential.

Guidance on best practices. Finally, if DHS does not want to take the position that state laws are wholly preempted, it could profitably provide guidance or recommendations that would help minimize tensions or potential conflicts with the federal system and also improve the chances that courts will sustain state laws that are properly designed and implemented. Such guidance could also help those states that have or are contemplating

an E-Verify mandate but have yet to take the question before their legislatures. A single overly harsh or problematic element in a state law may not only make harmonious operations more difficult from DHS's point of view, but it may also draw the reviewing court into a negative judgment on the whole statute, not just on the particular problematic component.

For example, there have been reports that the South Carolina law is being implemented in a way that requires new employees to present to the employer a valid South Carolina driver's license. If this is the practice (the text of the statute seems to call for presentation of a South Carolina driver's license as an *alternative* to the employer's signing up for E-Verify), then the practice is at best in severe tension with the federal scheme underlying E-Verify, and more likely is flatly in conflict.

IRCA permits employees to select which documents they will choose to present, from among those on the regulatory list, to their employer as part of the verification process. Driver's licenses are among those documents, but employees can choose instead to present other documents or combinations of documents to establish both identity and work authorization. In fact, a regulation makes it an unfair immigration-related employment practice for an employer to demand specific or different documents from those the employee tenders. 28 C.F.R. § 44.200(a)(3) (2008). (A statutory amendment incorporated a very similar provision into IRCA's antidiscrimination provision, but with an intent requirement that gives it a narrower reach than the regulation. INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6).)

Because it is clear that valid federal regulations themselves preempt contrary state statutes, see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), this particular provision of the South Carolina law (if administered as reported) is probably invalid. Rather than waiting for the courts to rule upon this practice, it would appear far preferable for DHS to work with the states to help eliminate problematic provisions or practices of this sort, particularly if DHS decides as a policy matter that it wishes to help states adopt E-Verify mandates and to have them survive preemption challenges.

Termination guidelines or regulations. Some courts have found that certain state or local laws bearing on the employment of unauthorized aliens cannot take shelter under the "licensing" exception in INA § 274A(h)(2) (reprinted in part IB above) because they threaten the imposition of de facto "civil or criminal sanctions." See, e.g., *Lozano v. City of Hazleton*, 496 F.Supp.2d, at 519-20. Part of the reasoning is that even minor employer defaults could result in the loss of a business license—a kind of "ultimate sanction" more severe than what the employer would suffer under the normal, graduated IRCA penalties.

A similar concern could arise under state E-Verify mandates. Under the current E-Verify MOU, DHS sensibly reserves the right, if an employer does not live up to its commitments, to terminate its participation in the system. This is normally not an "ultimate sanction," because as a matter of federal law, participation is voluntary. An

employer in this situation can remain in business after termination, reverting to the use of the normal IRCA document-checking process with its new hires. But if the employer operates in a state where employers who are not participating in E-Verify lose their state business license (or, in some cases, simply their right to be a state contractor or supplier), then the consequences of a DHS decision to terminate the employer from the system are potentially much more drastic.

In this new environment, for operational reasons and reasons of fairness, DHS may wish to adopt a more detailed set of standards or guidelines spelling out the kinds, or quantity, of employer defaults that could result in termination. Termination should remain available as a consequence for employers with serious or repeated violations, but it should not be resorted to for minor defaults or single errors. This would simply give written form to what is apparently current administrative practice.

For the latter cases, the guidelines might also seek to spell out other and less serious disciplinary consequences for noncompliant employers, if such can be applied within existing statutory authority. If not, experience under the guidelines may help build the case for well-designed statutory amendments. At some point, DHS may wish to promulgate the guidelines as formal regulations.

The primary reason to adopt such guidelines would be operational: as an increasingly mature system, E-Verify would probably benefit from clearer notice to employers on these questions and from having available a richer and more appropriately calibrated array of responses to employer mistakes or defaults. But assurance that termination from E-Verify would ensue only for truly serious employer misbehavior could also assist in defending state-law mandates from challenge based on reasoning like that used by the *Hazleton* court.

Regulations vs. memoranda of understanding. As the previous section suggests, DHS may find it useful to package more of the E-Verify requirements in regulations adopted through notice-and-comment rulemaking, rather than leaving such matters to be governed only through stipulations in the MOUs—particularly as E-Verify undergoes fairly rapid expansion. In the long term, this approach may also provide an easier and more transparent method for adjusting terms of the E-Verify arrangements as experience is gained. At present, DHS does not attempt to go back and revise old MOUs when it adopts changes to the standard form in light of experience. Instead the new form is simply used for employers who sign up after the effective date of the revision.

Notice and comment can also provide for greater transparency and public input. But any proposal to change to greater use of regulations must be balanced against the costs of the far more cumbersome procedures needed to promulgate and then amend substantive regulations under the Administrative Procedure Act. If and when E-Verify becomes mandatory as a matter of federal law, such formality, with its attendant costs, will probably become a practical necessity.

Two-way sharing with the states. The long-term research plan should perhaps include

attention to the types of cooperation that can be achieved with state officials in obtaining state information that can help improve E-Verify. One important example relates to DHS's current efforts to improve the use of photo tools that can help deter and detect identity theft.

DHS is already using a photo tool that allows for the onscreen display to the employer at the time of electronic verification of certain photos of the individual now housed in the relevant DHS database. The employer can then check for photo substitution on the tendered DHS document, because the onscreen photo should be the same as that on the document. Because DHS maintains such files only on non-citizens, and some naturalized citizens, Westat and others have suggested the development of equivalent photo tools that would apply to all new hires, citizens and non-citizens alike.

The most likely candidate for such use is the driver's license photo. Ready access to those photos from a central data bank requires working out specific cooperative agreements with the issuing states. There have apparently been discussions with some states about such sharing, but no agreement to date. The ongoing study could perhaps find ways to examine whether state-law E-Verify mandates—or mandates of a particular type—facilitate or hamper the development of wider cooperation of this type, leading to important system improvements.

Appendix I

MEMORANDUM
September 21, 2008

To: Doris Meissner

From: David Martin

Subject: **E-Verify and State Law Mandates:**
Legal Framework and Questions Relevant to Ongoing Research

The Department of Homeland Security (DHS) is interested in investigating a wide range of impacts deriving from state-law mandates requiring that some or all employers in the state use the E-Verify system to test the work authorization of their employees. To contribute to the process of research design (being carried out by the Migration Policy Institute (MPI)), this memorandum summarizes the relevant legal framework and background, highlights ongoing legal issues that may have a significant bearing on the study, and identifies others whose resolution might profit from explicit attention in the ongoing research.

Two preliminary observations are in order. First, the focus here is on legal questions rather narrowly understood, largely steering clear of operational questions, though many of the latter can be framed in legal terms or implicate legal issues. For example, some employer defaults identified in the Westat reports may indicate employer violations of various antidiscrimination laws. Nonetheless, it appears to be more productive as a systems matter to address them through operational changes, such as better training for human resources personnel or the development of more user-friendly materials or notices—and DHS has taken several steps of the latter character, with some apparent success. No effort is made here to assess whether past practices of this sort amount to legal violations. Second, the memo generally proceeds on the assumption of stability in the federal statutory framework for the E-Verify program. Though the legal authority for the system is now scheduled to sunset as of November 1, 2008, it appears likely that Congress will reauthorize without major changes in the basic legal requirements. Obviously, however, at any point statutory changes could take certain ongoing legal issues off the table or could generate others that may affect the research program. Congress could, for example, resolve most federal preemption questions (discussed below) by explicitly legislating to authorize specified state-level practices or to forbid them.

I. Legal Framework

A. Federal level

E-Verify came into being as the Basic Pilot, a pilot project meant to test means of improving the employee verification system initially mandated in the Immigration Reform and Control Act of 1986 (IRCA). IRCA's document review procedures, though widely used, are ineffective in preventing the employment of unauthorized aliens, because they are readily defeated by false documents or false identity claims. Congress called for the Basic Pilot in §§ 401-405 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1374a note. The Pilot was initially mandated to run in a select few states (including at least five states with high populations of unauthorized aliens), but Congress later amended the statute to require that the system be available to cooperating employers in all 50 states no later than December 1, 2004. DHS renamed the Basic Pilot as E-Verify in August 2007. Employers who use E-Verify need not rely simply on inspecting documents on their own. Instead they transmit over the internet limited identifying information regarding newly hired employees, including the social security number, and receive a response, usually within a few seconds, indicating whether the person is authorized to work in the United States. The response is based on a check of the employee information against databases maintained by the Social Security Administration (SSA) and by DHS.

As a matter of federal law, E-Verify is a voluntary program, covering only those employers who choose to participate. IIRIRA § 402(a). There are a few limited circumstances in which participation in E-Verify is mandated by federal authority, IIRIRA § 402(e), including a participation mandate for federal government agencies or employers, and under a stipulation sometimes included in an order issued to an employer found guilty of a previous violation of the employer sanctions or antidiscrimination provisions of IRCA, §§ 274A or 274B of the INA, 8 U.S.C. §§ 1324a, 1324b. Recently adopted or proposed federal regulations have also required certain employers to use E-Verify if they wish to make use of new opportunities to hire or extend the employment of particular classes of nonimmigrant aliens. See 73 Fed. Reg. 18944 (April 8, 2008) (interim regulations providing for possible 17-month extension of "optional practical training" for certain nonimmigrant students); Id. at 8230 (Feb. 13, 2008) (proposed regulation that would allow temporary agricultural workers in H-2A status to begin work with a new employer before DHS approval is received, provided that the new employer participates in E-Verify). President Bush also recently directed changes to federal procurement practices so that nearly all federal contractors will be required to use E-Verify if they wish to obtain or retain federal contracts. Executive Order 13,465, amending Executive Order 12,989, 73 Fed. Reg. 33285 (June 6, 2008). The executive order was implemented by The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council whom amended the FAR to reflect this change. Federal contractors and subcontractors will be required to begin using E-Verify starting January 15, 2009.

Because of the fundamentally voluntary nature of the program, DHS and its

predecessor agencies have set forth the detailed requirements for participation not in the form of regulations but instead by means of stipulations included in standard memoranda of understanding (MOU). All employers who choose to participate must enter into an MOU, and so are contractually bound to follow the requirements set forth. They agree, for example, to initiate verification for all new employees within three business days of hiring, to follow prescribed procedures for the later stages of the process, to adopt safeguards covering the information received, not to use E-Verify for prescreening of applicants or for any purpose other than those specifically permitted by DHS, and not to fire or adversely affect employees who receive a TNC. Adverse action against an employee can come only upon a FNC (or the employee's decision not to contest). In the MOU, both DHS and SSA also undertake specified responsibilities. The primary sanction for noncompliance by an employer with these E-Verify undertakings is termination of its participation in the system. Some kinds of defaults may also amount to violations of the basic IRCA provisions and thus could result in civil fines or (in extreme cases) criminal liability, as set forth in INA §§ 274a and 274b.

B. State level

Recent years have brought a variety of initiatives adopted at the state and local government level in order to discourage or sanction illegal migration. These have included local ordinances meant to bar employers from hiring unauthorized aliens or to bar landlords from renting to persons unlawfully in the United States. They use a variety of means for proving or testing immigration status (usually some connection to E-Verify or to the SAVE system (Systematic Alien Verification for Entitlements), a separate DHS system used by government entities to check the legal status of prospective beneficiaries of government services). Most early court challenges to these local ordinances succeeded in winning injunctions against their implementation. See, e.g., *Lozano v. City of Hazleton,* 496 F.Supp.2d 477 (M.D.Pa. 2007); *Villas at Parkside Partners v. City of Farmers Branch,* 496 F.Supp.2d 757 (N.D.Tex.2007); *Garrett v. City of Escondido,* 465 F.Supp.2d 1043 (S.D.Cal. 2006). Appeals or further litigation are pending in several of these cases. Each case presents specific legal questions, but prominent themes in the (at least initially) successful challenges included: the local ordinance is preempted by federal law, either expressly or because of hindrances the local action poses to a comprehensive federal regulatory scheme; the ordinance does not provide due process to the persons affected by the regulatory schemes; or the ordinance violates other specific federal statutes. These early rulings prompted many opponents of such ordinances to believe that measures of this sort would be struck down by the courts. But cf. *Equal Access Education v. Merten,* 305 F.Supp.2d 585 (E.D.Va. 2004) (upholding against preemption and other challenges a Virginia administrative ruling that would deny admission of undocumented aliens to public colleges).

But the picture has become more mixed. Some of the ordinances have been modified in response to the litigation or to preliminary court rulings. More pertinent for E-Verify, the drafters of later similar legislation have paid more attention to correcting the flaws identified by the earlier rulings, and have generally tried to design their regulations to conform as closely as possible to existing federal immigration control

systems or standards. In particular, the failure of comprehensive federal immigration reform legislation in the Senate in 2007 gave an impetus to several *state-level* efforts focused much more on the workplace than on the rental housing market. A prominent feature has been a requirement that some or all of the employers in the state must use E-Verify to check the work authorization of new hires. These statutes or other mandates have also drawn litigation, but a lengthy district court ruling in February 2008 upheld the Arizona legislation against initial preemption and due process challenges. *Arizona Contractors Assn., Inc. v. Candelaria*, 534 F.Supp.2d 1036 (D.Ariz.2008). On September 17, 2008, the Court of Appeals for the Ninth Circuit affirmed the district court's judgment. *Chicanos Por La Causa, Inc. v. Napolitano*,__ F.3d ___, 2008 WL 4225536 (9th Cir.2008). (The decision leaves open the possibility of later challenges against the statute as implemented, but it rejected the claim that the statute is invalid on its face.) These rulings are notable because the Arizona law is one of the broadest of the recent enactments. It requires all employers in the state, as a condition of retaining various permissions to do business there, to verify all new employees through the E-Verify system. See also *Gray v. City of Valley Park*, 2008 WL 294294 (E.D.Mo. 2008) (upholding local ordinance requiring employers not to hire unauthorized aliens, on pain of losing business license, against challenges based on federal preemption, equal protection, and due process claims).

Several other states have also adopted E-Verify mandates in various forms, with or without additional enforcement or procedural provisions. (There continue to be some local-level enactments as well, but the focus in the remainder of this memorandum will be on what state governments have done.) The variations in the details are substantial, but three criteria are most significant for the purposes of this research design project: range of coverage of the state law (some or all employers in the state); mode of enactment (statute or executive order); and effective date (giving a sense of how quickly employers are likely to sign up for E-Verify; many states have phased implementation, covering larger employers first). The attached Table I contains the pertinent information on these features with regard to the eleven states that currently have relevant E-Verify mandates. The text of most of these statutes or executive orders, along with other pertinent documents, can be easily accessed through the following website: http://www.verificationsinc.com/compliance-corner.html (last visited September 13, 2008).[8]

II. Potential Issues Deriving from the Legal Framework

A. States to include in research project

The purpose of the long-term DHS research project is to evaluate the impacts of

[8] That website lists two additional states not included on the Table. Tennessee has an employer mandate, but it can be met either by participation in E-Verify or by using the ordinary I-9 document check required by IRCA; no one is required to sign up for E-Verify. At the opposite poled, Illinois passed a statute forbidding Illinois employers from participating in E-Verify until the system achieved certain performance measures. Implementation of that law has been effectively delayed pending resolution of a lawsuit filed against the state by DHS.

mandates to participate in E-Verify, so as to gather information before the possible implementation of a nationwide mandatory E-Verify system, if someday adopted under a future federal statute. The contractual statement of work covering the current design phase undertaken by MPI specifically mentions including Arizona and Mississippi, as the only states (as of that writing) having mandates applicable to all employers. Arizona certainly merits inclusion, because it was the first out of the starting blocks in generating relevant experience, and it is doing so on a wide scale, because its mandate covered all employers beginning in early 2008. The Arizona law has also survived the first round of litigation, giving some higher assurance (though no guarantee) of uninterrupted implementation, as compared with states whose laws have not yet faced even the first round of court challenges.

If only two states are to be studied in detail, a choice should probably be made between Mississippi and South Carolina. The phased implementation of South Carolina's all-employer mandate, enacted in June 2008, will proceed on a pace very close to Mississippi's, and will actually reach full coverage (barring court delays) sooner than Mississippi's. But there is one further complication with regard to the South Carolina law. It requires all employers (on the prescribed phase-in schedule) either to use E-Verify or to hire only employees who possess a valid South Carolina driver's license or ID card or a license or card from another state with issuance standards "at least as strict as" South Carolina's, or who show that they are eligible to receive a South Carolina driver's license or ID card. South Carolina Code, § 41-8-20(B), as enacted by Act No. 280, § 19 (signed June 4, 2008). The alternative procedure based on driver's licenses appears sufficiently complex that employers will have strong incentives to sign up for E-Verify, but the real-world impact is as yet unclear. In any event, thought should be given to the number of all-employer states whose practices will be studied and to the criteria for selection, because there would appear to be a good chance that other states will join these ranks in their next legislative sessions.

Furthermore, it may be advisable to include in the study selected additional states whose laws have other features—namely, more limited coverage of employers in the state, or adoption by executive order rather than by statute. Those states that require E-Verify of all businesses contracting with the state, or all those whose state contracts exceed a low dollar threshold, will probably cover a high percentage of employment within the state. It might be worth seeing whether, for example, the E-Verify requirement reduces the number of willing contractors, and to gather information from employers who drop out as a result (if any). Expanding the possible study sites may also permit diversifying the types of industries whose practices will be covered—that is, because certain types of employers are underrepresented in Arizona or Mississippi but more highly concentrated in another state with a more limited E-Verify mandate. Finally, it may be worth looking at one or both of the states where the mandate has been implemented via executive order, to compare impacts and outcomes—for example, to see whether state rules, criteria, or practices are more easily adjusted in light of experience in such states. The findings could have a bearing on the type of federal legislation that DHS might one day wish to propose—with detailed statutory requirements or with a more general framework, leaving the details to be filled in by regulation.

B. Preemption issues

Though the Arizona law was upheld by the district court, appeals are pending and it is possible that the court of appeals will reach a different result. Although that law is more carefully drafted than many of the local ordinances struck down in the early litigation mentioned in Part IB above, federal preemption doctrine is sufficiently amorphous that plausible arguments can be offered both in support of the validity of the state E-Verify laws and against them. As a sign of these ongoing controversies over state laws that mandate use of E-Verify, in June a federal district court issued a preliminary injunction against implementation of the new Oklahoma E-Verify law, largely on preemption grounds, pending a full hearing on the merits of the plaintiffs' challenges to the legislation. *Chamber of Commerce v. Henry,* 2008 WL 2329164 (W.D.Okla. 2008).

Overview. A quick (and simplified) sketch of the primary preemption issues may be useful. Under our constitutional system, federal law (assuming it is constitutionally valid in its own right) is supreme, and state law that conflicts must yield to federal authority. State laws can be expressly preempted by Congress, or they may be ruled preempted by implication, either because a court finds that federal law occupies the field, or because some feature of the state regulation conflicts with or impairs the operation of the federal scheme. Though immigration regulation is an exclusively federal power, the Supreme Court ruled in 1976 that a California law forbidding the knowing employment of unauthorized aliens was not preempted. The Court deemed that law primarily a regulation of employment relationships, which is traditionally a state function, rather than an immigration regulation, and it found California's scheme to be sufficiently harmonious with the INA and other federal law to be constitutionally valid. *DeCanas v. Bica,* 424 U.S. 351 (1976).

The *DeCanas* case served as backdrop when Congress adopted its comprehensive employer sanctions and document review scheme in IRCA in 1986. In order to subject employers to only a single such verification scheme, Congress provided in IRCA for express preemption of state laws, but with an important parenthetical exception that has figured prominently in the defense of the states' recent E-Verify mandates. The IRCA preemption provision, INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2), provides:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

The legislative history gives little help in understanding the scope of the parenthetical clause or the precise meaning of "licensing and similar laws." The *Arizona Contractors* case found that the Arizona statute was valid under this § 274A(h)(2) exception clause as a licensing law; the principal consequence of an employer's noncompliance would be the loss or suspension of its Arizona business license.

But even if a state law is not expressly preempted by a federal statute, it can be invalidated if it hampers the kind of policy balancing that the federal government is meant to accomplish—that is, the state law could be preempted by implication. The *Hazleton* decision, for example, found that a local ordinance sometimes mandating use of the Basic Pilot system was invalid because it served to change the character of what Congress intended to be a purely voluntary and experimental program. 496 F.Supp.2d, at 526-27.

Research will not be able to disclose a definitive answer to the question whether state laws mandating the use of E-Verify are preempted. That will require the litigation to take its full course (or else a clear and explicit statement by Congress in new legislation on the subject). And even a Supreme Court decision sustaining, say, the Arizona statute against preemption challenges would not necessarily dictate that other state statutes would survive. Such a ruling would presumably interpret § 274A(h)(2) as *not* expressly preempting such state E-Verify statutes. But the implied preemption question would remain, and it quite often turns on specific details of the state statute allegedly in conflict with the overall federal scheme.

Possible DHS steps to consider. Nonetheless, DHS, if it wishes, *may* be able to take some administrative steps to affect decisions on the preemption question—either to improve the odds that the state E-Verify laws will survive preemption challenges or to attempt to signal that they are incompatible with the federal scheme. And of course, because preemption questions are almost entirely questions about the intent of Congress, the cleanest way to help resolve preemption issues would be to persuade Congress to adopt an amendment more clearly spelling out its will on these issues.

i.* Chevron *deference on interpreting the licensing exception to state-law preemption. Administrative rulings interpreting an ambiguous statute that the agency administers are usually entitled to strong deference from reviewing courts, under the so-called *Chevron* doctrine. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). DHS might therefore choose to issue a ruling (in an appropriate form capable of claiming this sort of deference) that formally states the Department's views on the proper interpretation of the "licensing and similar laws" parenthetical in INA § 274A(h)(2). That is it could state its views on whether the exception permits or forbids state laws of the types listed in Table I. It should be noted that strong controversy persists over whether federal administrative rulings on preemption of state law are entitled to *Chevron* deference. See, e.g., *Watters v. Wachovia Bank,* 127 S.Ct. 1559, 1584 (2007) (Stevens, J., dissenting); Nina Mendelson, Chevron *and Preemption,* 102 Mich.L.Rev. 737 (2004). But if deference on this sort of interpretive issue is ultimately ruled inappropriate, the court would simply ignore what DHS says. The DHS statement thus might not help, but it certainly could not hurt the chances for the court to rule in the way favored by DHS.

ii. DHS assessment of the impact of state E-Verify laws on federal policy choices. Probably of greater significance, DHS could issue a ruling or pronouncement on some of the issues that are posed by the "implied preemption" component of the analysis.

Under this component, the courts try to determine, among other things, whether the state enactment upsets a delicate policy balance or carefully designed timetable deemed essential for effective realization of the complex goals of a federal regulatory statute. See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-75 (2000). The *Geier* court, in finding federal preemption, explicitly relied in part on statements by the federal regulatory agency indicating that, in its judgment, the state-law rule at issue would impair the operation of the federal scheme. Id. at 883.

Therefore, DHS could indicate, if this is its judgment, that state-law E-Verify mandates hamper the realization of the complex objectives of the federal scheme, for example by requiring employer participation even though, under federal law, employer participation is almost always voluntary. Such a statement would apparently enhance the odds of a court ruling that state laws in this realm are preempted. But the opposite course is also open to DHS. That is, the *Geier* rule also would seem to give weight to an agency statement disfavoring preemption. For example, DHS could state, if this is its view, that the gradual introduction of state-law mandates for employer use of E-Verify does not overburden the federal system DHS administers, and is moreover consistent with Congress's vision for gradual expansion of the use of electronic verification as experience is gained. Again, there is no guarantee that such DHS pronouncements (in either direction) would carry the day, but they might be influential.

iii. Guidance on best practices. Finally, if DHS does not want to take the position that state laws are wholly preempted, it could profitably provide guidance or recommendations that would help minimize tensions or potential conflicts with the federal system and also improve the chances that courts will sustain state laws that are properly designed and implemented. Such guidance could also help those states that have are contemplating an E-Verify mandate but have yet to take the question before their legislatures. A single overly harsh or problematic element in a state law may not only make harmonious operation more difficult from DHS's point of view, but it may also draw the reviewing court into a negative judgment on the whole statute and not just on the particular problematic component.

For example, there have been reports that the South Carolina law is being implemented in a way that requires new employees to present to the employer a valid South Carolina driver's license. If this is the practice (the text of the statute seems to call for presentation of a South Carolina driver's license as an *alternative* to the employer's signing up for E-Verify), then the practice is at best in severe tension with the federal scheme underlying E-Verify, and more likely is flatly in conflict. IRCA permits employees to select which documents they will choose to present, from among those on the regulatory list, to their employer as part of the verification process. Driver's licenses are among those documents, but employees can choose instead to present other documents or combinations of documents to establish both identity and work authorization. In fact, a regulation makes it an unfair immigration-related employment practice for an employer to demand specific or different documents from those the employee tenders. 28 C.F.R. § 44.200(a)(3) (2008). (A statutory amendment incorporated a very similar provision into IRCA's antidiscrimination provision, but with

an intent requirement that gives it a narrower reach than the regulation. INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6).) Because it is clear that valid federal regulations themselves preempt contrary state statutes, see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), this particular provision of the South Carolina law (if administered as reported) is probably invalid. Rather than waiting for the courts to rule upon this practice, it would appear far preferable for DHS to work with the states to help eliminate problematic provisions or practices of this sort, particularly if DHS decides as a policy matter that it wishes to help states adopt E-Verify mandates and to have them survive preemption challenges.

C. Termination guidelines or regulations

Some courts have found that certain state or local laws bearing on the employment of unauthorized aliens cannot take shelter under the "licensing" exception in INA § 274A(h)(2) (reprinted in part IB above) because they threaten the imposition of de facto "civil or criminal sanctions." See, e.g., *Lozano v. City of Hazleton*, 496 F.Supp.2d, at 519-20. Part of the reasoning is that even minor employer defaults could result in the loss of a business license—a kind of "ultimate sanction" more severe than what the employer would suffer under the normal, graduated IRCA penalties. A similar concern could arise under state E-Verify mandates. Under the current E-Verify MOU, DHS sensibly reserves the right, if an employer does not live up to its commitments, to terminate its participation in the system. This is normally not an "ultimate sanction," because as a matter of federal law, participation is voluntary. An employer in this situation can remain in business after termination, reverting to the use of the normal IRCA document-checking process with its new hires. But if the employer operates in a state where employers who are not participating in E-Verify lose their state business license (or, in some cases, simply their right to be a state contractor or supplier), then the consequences of a DHS decision to terminate the employer from the system are potentially much more drastic.

In this new environment, for operational reasons and reasons of fairness, therefore, DHS may wish to adopt a more detailed set of standards or guidelines spelling out the kinds (or quantity) or employer defaults that could result in termination. Termination should remain available as a consequence for employers with serious or repeated violations, but it should not be resorted to for minor defaults or single errors. (This would simply give written form to what is apparently current administrative practice.) For the latter cases, the guidelines might also seek to spell out other and less serious disciplinary consequences for noncompliant employers, if such can be applied within existing statutory authority. (If not, experience under the guidelines may help build the case for well-designed statutory amendments.) At some point, DHS may wish to promulgate the guidelines as formal regulations.

The primary reason to adopt such guidelines would be operational; as an increasingly mature system, E-Verify would probably benefit from clearer notice to employers on these questions and from having available a richer and more appropriately calibrated array of responses to employer mistakes or defaults. But assurance that

termination from E-Verify would ensue only for truly serious employer misbehavior could also assist in defending state-law mandates from challenge based on reasoning like that used by the *Hazleton* court.

D. Regulations vs. memoranda of understanding

As the previous section suggests, DHS may find it useful to package more of the E-Verify requirements in regulations adopted through notice-and-comment rulemaking, rather than leaving such matters to be governed only through stipulations in the MOUs—particularly as E-Verify undergoes fairly rapid expansion. In the long term, this approach may also provide an easier and more transparent method for adjusting terms of the E-Verify arrangements as experience is gained. (At present, DHS does not attempt to go back and revise old MOUs when it adopts changes to the standard form in light of experience. Instead the new form is simply used for employers who sign up after the effective date of the revision.) Notice and comment can also provide for greater transparency and public input. But any proposal to change to greater use of regulations must be balanced against the costs of the far more cumbersome procedures needed to promulgate and then amend substantive regulations under the Administrative Procedure Act. If and when E-Verify becomes mandatory as a matter of federal law, such formality, with its attendant costs, will probably become a practical necessity.

E. Two-way sharing with the states

The long-term research plan should perhaps include attention to the types of cooperation that can be achieved with state officials in obtaining state information that can help improve E-Verify. One important example relates to DHS's current efforts to improve the use of "photo tools" that can help deter and detect identity theft. DHS is already using a photo tool that allows for the onscreen display to the employer at the time of electronic verification of certain photos of the individual now housed in the relevant DHS database. The employer can then check for photo substitution on the tendered DHS document, because the onscreen photo should be the same as that on the document. Because DHS maintains such files only on non-citizens (and some naturalized citizens), Westat and others have suggested the development of equivalent photo tools that would apply to all new hires, citizen and noncitizen alike. The most likely candidate for such use is the driver's license photo. Ready access to those photos from a central data bank requires working out specific cooperative agreements with the issuing states. There have apparently been discussions with some states about such sharing, but no agreement to date. The ongoing study could perhaps find ways to examine whether state-law E-Verify mandates (or mandates of a particular type) facilitate or hamper the development of wider cooperation of this type, leading to important system improvements.

F. Privacy issues

Many criticisms of E-Verify are stated as privacy concerns. These are quite genuine, but they appear to implicate operations more than legal design. For example, some critics are concerned that anyone who wants to check the immigration status of a

person could pretend to be an employer, sign up for E-Verify, and then send queries. The current design of E-Verify already minimizes the range of information such a false employer could obtain from the system (he or she would already have to have obtained the social security number for the individual, for example, in order to lodge a successful query). Further, critics are concerned that TNCs are often communicated to the new employee within the hearing of others, raising improper, unnecessary, or unwarranted questions about the person's legal status in the minds of those who hear of this initial system response—questions that may be hard to erase upon resolution of the problem in a way that results in final confirmation of status.

These are genuine and worthwhile concerns, but they call primarily for operational changes in order to minimize the potential for privacy infringement. Once decisions are made about how best to counter such misuse, it is quite possible that amendments to statute or regulation would be useful in implementing the responsive measures. For example, a statute could provide for civil fines for improper notification to a new employee in a non-private setting, or perhaps specific criminal sanctions for fraudulently posing as an employer in order to use the system. But the first order of inquiry would be to figure out the scope and types of potential privacy impairments and then to design operational changes in response. Legal changes will become pertinent only after such decisions have been made.

Table I. Current State Provisions Mandating Use of E-Verify by Some or All Employers (Sept. 2008).

Table I. Current State Provisions Mandating Use of E-Verify by Some or All Employers (Sept. 2008)

State	Coverage of E-Verify requirement	Executive order or statute	Effective date
Arizona	all employers	statute (signed 7/2/07)	1/1/08
Colorado	employers holding public contract for services with state or political subdivision	statute (signed 6/6/06; amended in 2007 and 2008)	Aug-06
Georgia	public employers and contractors	statute (signed 4/17/06)	employers w/ 500 + employees, 1/1/07; w/ 100+, 1/1/08; all public employers by 1/1/09
Minnesota	state executive branch agencies and state contractors seeking contracts > $50K	executive order (signed 1/7/08)	1/7/08
Mississippi	all employers	statute (signed 3/17/08)	employers w/ 250+ employees, 7/1/08; w/ 100+, 7/1/09; w/ 30+, 7/1/10; all by 7/1/11

Missouri	public employers, contractors w/ contract > $5K, and businesses receiving certain state benefits	statute (signed 7/7/08)	1/1/09
North Carolina	state agencies and universities	statute (signed 8/23/06)	1/1/07
Oklahoma	state and local agencies; government contractors	statute (signed 5/15/07)	11/1/07 for public employers; 7/1/08 for contractors [all stayed by federal court preliminary injunction]
Rhode Island	executive branch agencies and all state contractors and vendors	executive order (signed 3/27/08)	to take effect through Dept of Admin directives
South Carolina	all employers (unless they hire only persons with S.C. driver's licenses or equivalent)	statute (signed 6/4/08)	public employers, and contractors w/ 500+ employees, 1/1/09; private employers w/ 100+ employees, 7/1/09; all employers, 7/1/10
Utah	public employers and contractors	statute (signed 3/13/08)	7/1/09

Appendix II

DRAFT MEMORANDUM
September 9, 2008[9]

To: Doris Meissner

From: Marc Rosenblum

Subject: Other models or approaches to explore—if any—to employer verification

I Introduction: the policymaking challenge

The goal of an electronic eligibility verification system (EEVS) is to allow employers definitively to confirm the work authorization of new employees. In this way, existing laws prohibiting the knowing employment of undocumented immigrants may more effectively be enforced.

As states and the federal government take or consider steps to expand employer participation in E-Verify, policymakers must consider a pair of opposing concerns: 1) that increased participation in the system will produce an unacceptably high number of "false negatives," or incorrect non-confirmations of work-authorized individuals, and 2) that in spite of increased participation, the system will continue to allow an unacceptably high number of "false positives," or cases in which undocumented immigrants are incorrectly confirmed by the system. In general, efforts to address these two problems are in tension with each other.

At the same time, as policymakers weigh increased participation in E-Verify against other options, they must consider a range of additional possible costs associated with an expanded version of the program. These costs fall into four categories:

- direct fiscal costs of managing the verification database(s) and the interface between the system and its users;
- direct and indirect costs to employers and workers of interfacing with the verification system, including opportunity costs associated with verification delays and correction of erroneous records;
- actual or potential privacy costs associated with vulnerabilities in the protection of verification data and the possibility that a verification system will contribute to identity theft; and
- social costs associated with discriminatory outcomes, including the likelihood that the problem of false negatives will fall disproportionately on already-disadvantaged groups. In general, many of the steps which would minimize false

[9] Updated December 2008.

negatives and false positives increase the likelihood or scope of these other program costs.

Thus, the policymaking challenge is to minimize false positives and false negatives while controlling costs to state and federal agencies, employers, and workers, including potential breaches of private data and discriminatory outcomes. The remainder of this section analyzes projected trade-offs associated with four separate decisions which must be made about a future EEVS: the database(s) employed, the identification requirements, the interface between employer, workers, and the system, and due process protections for system users.

II Choice of database(s)

Any system of eligibility verification ultimately depends on comparing data attached to a particular worker to a database describing the eligibility of different individuals. In general, workers may be positively identified as work-eligible ignore their personal identifying data matches a record in the verification database which is coded as work eligible. One of the central challenges confronting policymakers concerns the absence of a single, high quality database which contains a unique record for each work-authorized individual. Rather, existing databases are relatively error-prone, leading inevitably to false negatives (wrongful non-confirmation of work-authorized individuals); and data are spread among diverse databases with differential error rates, leading to higher error rates for some groups than others.

Status quo: E-Verify

Summary: Under the E-Verify system, all worker data are checked against the Social Security Administration's (SSA) primary database, the Numident file. Non-citizens' data are also checked against the US Citizenship and Immigration Service's Verification Information System (VIS), a database containing DHS immigration data. In cases in which non-citizen eligibility cannot be confirmed automatically by VIS, a secondary manual investigation is conducted by an immigration status verifier (ISV), who checks the data against as many as a half-dozen additional DHS databases that are currently not included in VIS. Additionally, DHS is working to expand the types of data accessed by E-Verify to include Department of State passport and visa records.

Advantages: An important advantage of the status quo system is that USCIS (and before that INS) has spent the last 12 years gradually cleaning the data and perfecting the interface between employers and the database. Undoubtedly, this is the system about which we can be most confident in our predictions about the effects of scaling up an EEVS. In addition, the Numident database, while far from perfect, is relatively accurate, especially for native-born US citizens, whose data are usually submitted along with the registration of their birth certificates. As a result, over 99 percent of native-born US citizens are automatically confirmed by E-Verify.[10]

[10] Institute for Survey Research, Temple University, and Westat. 2006. *Interim Findings of the Web-Based Basic Pilot Evaluation*. Washington, DC: Institute for Survey Research.

Disadvantages: For a variety of reasons, database errors are much higher for naturalized US citizens and for non-citizens. Based on 2006 data, E-Verify error rates are *at least* 3 percent for non-US citizens and 10.9 percent for naturalized citizens; best estimates suggest that actual error rates may be one-and-a-half times higher than these figures.[11]

Error rates may also increase for native born US citizens as E-Verify is expanded to include a broader group of employees.[12] More generally, data management experts predict major unforeseen problems any time a database is scaled up by a factor of 10; so it is safe to assume the E-Verify databases will encounter new challenges as it is scaled up as part of a national program.[13]

Alternative 1: National Database of New Hires (NDNH).

Summary: The New Employee Verification Act (NEVA) of 2008 proposes to incorporate the National Database of New Hires (NDNH) into the EEVS. The NDNH is collected by the 50 State Directories of New Hires and accumulated into the NDNH by the Federal Office of Child Support Enforcement (OCSE) within the US Department of Health and Human Services. The NDNH was created as part of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and its primary purpose is to assist state child support agencies in locating parents and enforcing child support orders. The PRWORA requires that all employers report data from the IRS W4 form relating to new employees to a state agency charged with managing state level new hire data within 20 days of hiring a new employee. Data to be submitted include employee name, Social Security Number (SSN), and address; employer name, Federal Employer Identification Number (FEIN), and address; and (optional fields) the date and state of hire.

Advantages: Sponsors of the NEVA have suggested that the NDNH offers an advantage over the existing E-Verify system because it provides an existing method for employers to transmit data to database managers, as 90 percent of employers already submit data on their new hires under the existing NDNH system.[14] The NDNH database also may be

[11] These figures are based on the TNC rates for ever-confirmed participants in the Basic Pilot system surveyed by the 2006 ISR/Westat analysis. As of May 2008 the E-Verify system began including naturalization data, which helps to confirm instantly the citizenship of naturalized U.S. citizens hired by E-Verify employers. Naturalized citizens who have not yet updated their records with SSA were the largest category of work-authorized persons who initially face an SSA mismatch in E-Verify. A naturalized citizen who receives a citizenship mismatch with SSA can call USCIS directly to resolve the issue (in addition to the option of resolving the mismatch in person at any SSA field office.) USCIS reports that this enhancement has significantly reduced the number of initial mismatches for naturalized citizens, though precise data have not been made available.

[12] A 2006 analysis of the SSA's NUMIDENT database found that 4.1 percent of cases analyzed contain discrepancies which would lead to incorrect responses in a Basic Pilot query. This error rate would correspond to 17.8 million potential false negatives in a universal EEVS. See Office of the Inspector General, Social Security Administration, "Congressional Response Report: Accuracy of the Social Security Administration's Numident File," A-08-06-26100.

[13] Testimony of Peter G. Neuman, SRI International before the Subcommittee on Social Security, House of Representatives Committee on Ways and Means, June 7, 2007.

[14] Gabrielle Giffords and Sam Johnson, "Guest Opinion: A Better Way to Verify Workers' Identities." *Tucson Citizen* 7/10/2008.

more accurate than the E-Verify databases given that it has been populated beginning in 1997, and so lacks any errors associated with loading paper records.

Disadvantages: As currently configured, the NDNH does not collect data on employee's work authorization, nor does it collect A-numbers or other data relevant to immigration status. Adding these fields to existing NDNH data collection would require costly changes to 50 different state systems. For the same reason, descriptions of an EEVS based on the NDNH do not really treat the NDNH as a database per se. (The NEVA would require NDNH administrators to interface with the SSA and DHS to verify work authorization; see below.)

Expanding the NDNH to provide EEVS services may carry at least two additional disadvantages.

- Certain employers and workers (i.e., those who may have dubious immigration histories) may be reluctant to participate in the NDNH. By expanding the NDNH mission in this way, the NEVA may limit the program's ability to perform its core function related to monitoring child support compliance.
- In general, privacy experts warn that bundling multiple programs or processes into a single database increases the risk of accidental exposure or intentional data theft. In short, as more programs and individuals are exposed to a single database for diverse reasons, the data become both more exposed and more valuable. Best practices require that different programs (e.g., identifying non-compliant parents and verifying work eligibility) should make use of separate databases and processes whenever possible.

Alternative 2: Self-populating database

Summary: Under this system, all US citizens and work-authorized aliens would be required, over a period of time, to register with DHS (or some other agency overseeing the proposed process) to populate a new employment eligibility database. Registration could occur through a number of different agencies, including by stationing database officials at DMV's and/or post-offices. Individuals could be required to register on a pre-determined timeline (e.g., assigned a registration period based on last name or last digit of SSN), or they could be required to register with the database prior to the first time they take a new job or change employment.

Advantages: By populating a new database specifically for the purpose of EEVS, this system could minimize data vulnerability (i.e., by separating EEVS from SSN's and other multi-use data, consistent with best practice recommendations of data security experts). In addition, while enrollment in the new database would rely on the same data and documents as the existing E-Verify, individuals would have the opportunity to correct these errors at the time of registration, rather than at the point of hire. Ultimately, a newly-populated database in which individuals have the opportunity to correct any errors at the time of enrollment would be perfectly (or almost perfectly) clean and non-discriminatory (i.e., error rates would not vary as a function of citizenship or birthplace).

Disadvantages: Even if the enrollment process makes use of some existing infrastructure (e.g., DMV's, post offices, etc.), this process would be expensive at the agency level (staffing to enroll 150 million-member workforce) and in the opportunity costs associated with 150 million or so registrations. The process would be especially costly for individuals with errors in the current databases, who would be required to track down necessary documents to correct their records, though *it bears emphasis* that these costs are inherent in the construction of any accurate database; they are simply front-loaded under this scenario.

Discussion

The most important issue in selection of a database is how to maximize database accuracy and so minimize false non-confirmations. Most secondary problems associated with the expansion of an EEVS (discriminatory outcomes, lost productivity, etc.) are ultimately a function of database errors.

Because database errors are a function of the match between users' current identification information and their database records, database managers cannot realistically "clean" the existing DHS and SSA databases without contacting every worker in the United States. Put another way, the only way to clean an EEVS database is to mandate a universal EEVS.

This observation is, perhaps, the most powerful argument in favor of creating a new self-populating database. A self-populating database also promises the greatest accuracy, least discrimination, and greatest privacy protections (since it would not contain data useful for any purpose other than employment verification, so would be of low value to identity thieves). On the other hand, constructing such a database would have very high up-front costs—far higher than the costs of cleaning the existing E-Verify data. In short, a self-populating database would require all workers to confirm their data, rather than just the small percentage currently subject to E-Verify database errors.

Replacing the E-Verify databases with the NDNH seems to offer limited benefits at great cost; it is difficult to justify this proposal.

III Interface

A second set of policy decisions concerns the interface between system users and the database. In short: who submits worker data for review and who receives a tentative and/or final response from system administrators? In a system with high stakes and at least some propensity for error, interface design has important implications for who bears the costs of system errors as well as for the protection of private data.

E-Verify system (employer interface)

Summary: Under the E-Verify system, the interface between system users and database managers runs strictly through employers via the internet. After collecting a new worker's identification and eligibility data (see below), the employer submits the data via a secure website. If an employee's data match information in the SSA and/or DHS

database(s) and the record is coded as employment authorized, then the system issues an instant confirmation that the employee is work-authorized. If the data are not instantly confirmed, the employer will receive a response within 24 hours that either confirms work authorization or indicates a tentative non-confirmation (TNC). In all cases, the response goes to the employer via the internet. When he or she receives a TNC response, the employer is required by regulation to inform the worker of the response, and to provide the worker with instructions for contesting the finding; the employer is prohibited by regulation from taking adverse action against the worker while an appeal is pending. If the worker fails to contest the TNC, or if the worker contests but the system is unable to confirm the worker's eligibility, the employer receives a final non-confirmation (FNC) and is required by law to terminate the worker; if the worker successfully appeals the TNC the employer receives a notice that the worker is employment authorized.

Advantages: E-Verify was designed specifically to give teeth to existing legislation which makes it a crime for employers to knowingly employ undocumented immigrants—a standard which has made it notoriously difficult to prosecute employers who may be unable to recognize fraudulent ID's.[15] By communicating directly with employers, the system gives employers a powerful tool to recognize a traditional fake ID (i.e., one with invented name and identification data) because such an ID will be not be confirmed by the E-Verify program. At the same time, the system generates a record of how the employer chooses to close each case, enabling DHS to hold employers accountable if they fail to terminate employment following an FNC. A final advantage of making employers the point of interface with the system is that most employers—and certainly most medium and large employers—have access to an internet connection. Large employers may further take advantage of economies of scale by bundling data for multiple hires in a single transmission to the E-Verify database or creating their own system to interface with E-Verify and run queries (an alternative method known as the Web Services access method).

Disadvantages: Employers participating in alternative access methods to the E-Verify system, such as Web Services, are required to develop their own system and code to interface with the E-Verify database, pay for any required hardware, and pay to train staff to run their own system and verify new workers. However, the regular web-based system is free for all employers and comes with a tutorial on its use. These can be significant expenses for a small business, and especially burdensome for businesses without existing computer networks. Employers must also bear the cost of employing workers pending the resolution of a TNC response—a process which takes longer than 24 hours 29 percent of the time for non-citizens—even though the worker may subsequently be found to be unauthorized.

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[15] See e.g., US General Accounting Office, 2007, "Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System" GAO-07-924T. Washington, DC: GAO; ; Marc R. Rosenblum, "Problems in Current Employment Verification and Worksite Enforcement." Testimony before the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. Washington DC; April 24, 2007. Available at http://judiciary.house.gov/Oversight.aspx?ID=302.
2005.

A more fundamental problem with the E-Verify system—or any system in which the employer is the point of interface—is that the system gives the employer responsibility for managing workers' data; but the consequences of employer mistakes overwhelmingly are borne by the worker:

- Employers may make mistakes when entering employee data, resulting in a tentative non-confirmation which must be corrected by the employee.[16]
- Employers, rather than workers, are notified of a TNC response; and at least 16 percent of employers admit to failing consistently to provide workers with the necessary information to appeal a TNC response, resulting in a final non-confirmation, which may be erroneous in a significant proportion of cases.[17]
- Employers, rather than workers, are responsible for protecting workers' private data. A 2002 study found that half of all computers on which queries were submitted were kept in unlocked rooms and that data in the system was generally vulnerable to being stolen by any "moderately competent computer user." In addition, 39 percent of employees were informed of problems with their Basic Pilot approval process in public settings, a further violation of privacy.[18]

In addition, making employers the point of interface with the verification system also requires employers to make judgment calls about the authenticity of a worker's identification (i.e., whether or not an employee's driver's license or other ID really belongs to the worker, or whether the card has been borrowed, stolen, or altered. EEVS cannot answer such questions). Once again, employer errors are mainly borne by the terminated worker. While the vulnerability of worker data is a problem which affects all workers equally, the other problems identified above disproportionately affect foreign-born workers and workers of foreign descent, leading to discriminatory outcomes.

Alternative 1: Worker interface

Summary: In a hypothetical worker interface system, a separate stage would be added at the beginning of the verification process in which workers submit their own data to the verification system and receive a confirmation or TNC. In the case of a TNC they would have the opportunity to appeal as under the current system. (Presumably, few unauthorized workers would submit their own data under this system, unless they did not realize their visa had expired, for example.)

Upon receipt of a confirmation, the individual would receive a unique single-use code that could be presented to an employer as proof of legal status. Employers would submit this code to the system, rather than I-9 data, and would always receive a confirmation (because the worker does not get a code until they are confirmed). The system could be designed so that upon entering an accurate code the employer receives a confirmation

[16] A recent enhancement to the E-Verify system was the addition of a "pre-TNC page" that appears before the system issues a TNC and asks the employer to double-check the data they have inputted. By prompting employers to re-check their data entry, this feature has reduced input errors significantly and thus reduced the number of TNCs.
[17] ISR/Westat 2006.
[18] ISR/Westat 2002.

which contains identifying data which is matched to the worker's driver's license or other ID card.

Advantages: The advantages of this system are that it would address all of the disadvantages inherent to an employer interface system identified above. Workers have the most direct interest in resolving their own TNC's, and would be responsible for doing so independent of employers. Employers would have no responsibility for safeguarding private data because they would not be required to manage employee data, other than entering a code which would expire after use. This system would even be less vulnerable to data entry errors because they could easily be distinguished from status-based TNC's; employers would immediately receive a "code not valid" response in the case of a data entry error and would be given an opportunity to re-enter the code.

Disadvantages: This system would require workers to take additional responsibility for verifying their own status prior to starting a new job, which would seem burdensome to US citizens and others accustomed to simply filling out an I-9 form. For workers without an internet connection—roughly a third of all US households—this would require a trip to some government agency equipped to query the system, perhaps passport offices, DMV's or post offices (with USCIS staffing).

On the surface, this system may appear more prone to false positives than the status quo, since making workers responsible for self-verifying would seem to create opportunities for use of fraudulent data. This perception is incorrect. A system based on worker interface would still detect traditional ID fraud (i.e., the worker would have to submit accurate name and identification data in order to be given a code), and the chief vulnerability would therefore be with respect to identity fraud (the use of borrowed or stolen data pertaining to a legitimately work-authorized individual). Yet a system based on employer interface, including the existing E-Verify system is *equally* vulnerable to identity fraud (see below). Indeed, a worker interface system which returns specific ID information to the employer, as described above, would be less vulnerable to identity fraud because the employer could be given specific identification information to confirm as part of the verification response, replacing the complex I-9 form with a one-card-per-confirmation system.

Alternative 2: National Directory of New Hires (NDNH)

Summary: The NEVA (HR5515) would require the Department of Health and Human Services to expand existing infrastructure for reporting hiring data to the NDNH to encompass the exchange of information necessary for an EEVS.

Advantages: Data related to 90 percent of new hires are already reported to the NDNH, so that using this system would limit the costs of scaling up the system for transmitting data to the system.

Disadvantages: The NDNH is not designed to a) transmit information quickly (most states allow a 20-day lag in reporting), or b) transmit any information back to employers;

two critical features in an EEVS. (A speedy response is important so that employers can realistically be expected to treat a worker as work-authorized while a TNC is being resolved.) These shortcomings mean that the NDNH would have to be reconfigured from scratch.

Alternative 3: State employment agency interface

Summary: Another hypothetical alternative is to match workers and employers through state employment security agencies, as envisioned (not in the context of an EEVS) by several proposals for a new agricultural guest-worker program in recent years (e.g., S.237, AgJOBS Act of 2007). In this case, state workforce agencies would match "willing workers with willing employers," and would be charged with confirming workers' legal status prior to doing so.

Advantages: In general, placing a government agency between workers and employers should cut down on error rates and discriminatory enforcement. Employers would be responsible for operating within the system, but would not manage employee data, make status determinations, etc. Workers would apply for jobs through the state workforce agencies, and would still be required, in effect, to self-verify as in the previous scenario.

Disadvantages: This is a relatively "big government" solution to managing labor markets. State workforce agencies would replace private recruiters as "match-makers" between employers and employees. In all likelihood, only a minority of immigrant employment would operate through such a system, so it would need to be paired with an additional EEVS for hiring that occurs outside the state workforce agency system.

This system would represent a substantial break with the present private sector approach to placement of temporary workers (especially if it were expanded to a broader class of immigrant and possibly native-born workers); a full explication is beyond the scope of this section.

Alternative 4: Private sector verification agency

Summary: The 2008 version of NEVA proposes to create a "Secure Employment Eligibility Verification System" (SEEVS) to be managed by private contractors on a fee for service basis. Presumably, the private agency would contract with SSA and USCIS for access to E-Verify databases, and would then sell its services to employers seeking a more full service verification experience in which the contractor would resolve TNC's and/or combine verification and placement services as part of a single package.

Advantages: Depending on how it is structured, this system could offer important improvements over E-Verify in its ability to provide quick turn-around on verification. By acting as a centralized verification agent, the private SEEVS actor would also limit the degree to which individual employers would be required to manage private worker data, invest in new infrastructure or training, etc.

Disadvantages: Providing a private commercial enterprise access to the E-Verify databases raises substantial privacy concerns. In addition, depending on how private contracts are structured, it is not clear what incentives private verification contractors would have to protect the rights of workers in receipt of a TNC response. (That is, because the private contractors would be agents of employers, this system would replicate many of the same tendencies toward false non-confirmation observed under E-Verify.)

Discussion

The most important question about the interface concerns whether employers or workers should be responsible for submitting identification data to the system and receiving a response. E-Verify, which gives this responsibility to employers, is arguably the most appropriate way to hold employers accountable, but clearly complicates the effort to ensure that an EEVS does not produce discriminatory outcomes, threaten private data, or lead to excessive false non-confirmations. If policymakers want to balance employer accountability with these other goals, a worker interface appears to be a promising approach to consider. The most powerful counter-argument mainly concerns the "sunk costs" of developing the current system—not a trivial issue.

Whether employers or workers communicate directly with the system or go through an intermediary (the NNDH, state employment agencies, or private sector actors) is a secondary question. It is likely that almost any universal or nearly universal system will require at least some third-party intermediary to serve employers or workers who lack convenient internet access. Regardless of which of these potential intermediaries plays such a role, policymakers will confront important questions about how to structure the intermediary's incentives to protect privacy, guard against high error rates, etc All of these questions could be addressed through careful regulations (or contracts) governing the intermediary's role.

IV Identification

The E-Verify databases essentially make it impossible for an undocumented worker to use a traditional fake ID (i.e., one consisting of fabricated name and identification data) because the fabricated data will not be confirmed by the system. But it bears emphasis that *E-Verify does little, with the exception of the photo screening tool, to prevent identity fraud*, or the use by unauthorized workers of borrowed or stolen identity data pertaining to work-authorized individuals. In short, an EEVS can determine whether or not a name and other identifying data are present in its database, but cannot (as currently configured) make any determination about whether or not an individual job applicant is really associated with that name and other identifying data.

Status quo: I-9 documents

Summary: Under existing law, the identification problem is addressed through the I-9 document review process. Under this system, every time a new worker is hired, workers and employers are required to jointly complete a federal I-9 form which attests to the worker's immigration status and work eligibility. The I-9 form enumerates a diverse set

of documents which can be used to prove the worker's identity, including a small number of dual purpose forms (i.e., forms which prove both identity and work eligibility), such as passports and green cards; and a larger number of strictly identity documents, such as driver's licenses and school ID's, which must be combined with separate documents proving eligibility, such as social security cards. Employers are required to record which identity documents have been reviewed on the I-9 form, and keep it as a record of their compliance with laws against the knowing employment of undocumented workers.

Advantages: The broad identification documents of the I-9 system were designed to minimize the costs to workers of complying with the law and the likelihood of discrimination. Under the system, in theory, most workers already possess the documents they need to prove their work eligibility.

Disadvantages: The diversity of I-9 documents which may be used to prove work eligibility and the low security associated with many of the documents, have long been recognized as two of the most significant weaknesses of the current worksite enforcement system.[19] In short, it is relatively easy for undocumented workers to obtain realistic documentation "proving" their work eligibility, so that even well-intentioned employers may find it impossible to screen out undocumented workers. "Bad apple" employers may exploit this system to knowingly hire undocumented workers and then plead ignorance. While E-Verify eliminates the most naïve forms of document fraud (fabricated data), it does nothing to prevent the use of borrowed or stolen identity data, which may consist of actual borrowed or stolen documents (presumably where the actual card holder bears a physical resemblance to the fraudulent user) or traditional fake ID's using borrowed or stolen data.

Alternative 1: Shorter list of existing documents

Summary: Several recent legislative proposals have called for placing limits on the I-9 document list. For example, the Comprehensive Immigration Reform Act (CIRA) of 2006 (S.2611), passed by the Senate, would have required US citizens to present a passport or REAL ID-compliant driver's license, and non-citizens to present a green card or newly-designed secure biometric temporary work identification. The STRIVE Act introduced in the House in 2007 would have adopted the same list, along with a new hardened social security card, available to citizens and LPR's. The CIRA of 2007 (S.1348/S.1639) would have imposed similar substantive limits, but kept the current three-list format.

Advantages: Any restrictions on the current list of I-9 documents will strengthen enforcement compared to the status quo. To the extent that REAL ID licenses and passports are, indeed, tamper-proof and contain prohibitively expensive-to-duplicate security measures, the enforcement gains from these changes would be significant.

Disadvantages: Most security experts are skeptical that any ID card is truly fraud proof. It is likely that a market for fake REAL ID licenses and fake hardened social security cards would emerge over time. There is also a direct relationship between the security of

[19] Eg, US GAO 2007, "Employment Verification."

new cards and the costs to the state or individuals of producing and obtaining the cards. A requirement that all Americans obtain a passport would represent a burdensome cost on low-wage workers in fees ($20 - $100) and lost wages associated with obtaining the document. New security requirements in the REAL ID Act, among other legislation, make the burden of obtaining identity documents substantial in some cases as applicants must present original birth certificates and/or social security cards which may be difficult to obtain, especially for certain segments of the population (those born abroad or outside of hospitals, for example).

Such burdens will fall disproportionately on low-wage workers, who will face greater obstacles to assembling necessary background documents, greater difficulty securing the time to obtain new secure documents, and are more likely to be victims of crime necessitating going through the process over again. A final disadvantage of this system is that it uses a common identifying number (SSN) for multiple purposes (eligibility verification and the various other purposes for which SSN's are employed), violating best practices for privacy protection.

Alternative 2: New national ID card (secure social security card)
Summary: Several recent legislative proposals, including the 2007 CIRA in the Senate, would mandate the creation of a hardened social security card, possibly to include biometric data. Once such a card is fully on-line, it could be used to create a one-card eligibility verification system, eliminating the role of other I-9 documents.

Advantages: Similar to discussion of "short list."

Disadvantages: Similar to discussion of "short list." Cost estimates for issuing secure social security cards to all working Americans range from $20 billion to $100 billion, not including lost productivity.

Alternative 3: Data mining
Summary: The 2006 CIRA and the 2007 STRIVE Act would have addressed the identification problem through analysis of suspicious system usage. Under this system, ICE investigators would analyze EEVS usage patterns to look for cases in which the same number appears "too often." Initially, this will require expanded data sharing between DHS, SSA, and IRS, but eventually a universal EEVS would accumulate a large enough usage pattern of its own data sharing among these agencies may no longer be necessary.[20]

Advantages: This system imposes the fewest up-front costs on most employers and employees.

[20] It could take several decades to develop a comprehensive database of newly hired workers since thirty percent of workers over the age of 25 have been with their current employer for 10 years or more (http://stats.bls.gov/news.release/tenure.t02.htm). Even assuming universal coverage of new hires and current workers, information sharing may still be necessary to identify employers who file W-2s, but fail to participate in an EVS.

Disadvantages: This system would offer limited protection against identity fraud, which would only be detected on a probabilistic basis through post-employment data analysis. Many employers who comply with the law will continue to unwittingly hire undocumented immigrants, and unscrupulous employers will continue to do so intentionally and then plead ignorance. Moreover, while egregious cases of identity theft will be relatively easy to identify through data analysis, many cases of shared identity will slip through the cracks.[21] Identity fraud investigations will require ICE agents to visit the different worksites where a particular SSN is being used to see which firm or firms actually employ the worker who owns the number. As the Swift case demonstrates, the post-employment strategy of countering identity fraud is enormously costly to employers who comply with the law but still find themselves without a reliable workforce.

Alternative 4: Photo screening tool

Summary: This system would require all US citizens and other legal workers eventually to obtain a photo ID card with a digital image, which could consist of existing driver's licenses and passports, or new hardened social security cards, REAL ID licenses, or some other federally-regulated ID. Once such a card is in place, the EEVS could be modified so that, in addition to a confirmation of a worker's eligibility, employers also receive through the system a digital image of the worker obtained from the identification document. In September 2007, E-Verify introduced the Photo Screening Tool which allows employers to check the photos on Employment Authorization Documents (EAD) or Permanent Resident Cards (green cards) against images stored in USCIS databases.[22]

Advantages: The addition of a photo screen shot gives conscientious employers a new tool to prevent most cases of identity fraud: undocumented workers could no longer simply track down a name and social security number on the internet to beat the system, because the picture associated with that name and number would not match the individual job applicant.

Disadvantages: The current photo screening pilot program is based on a database of 15 million identification images taken from recently-issued green cards and employment authorization cards, just 3 percent of the 485 million records in the E-Verify databases.[23] For such a system to be effective, digital images would have to be added to most or all of the other 470 million records in the E-Verify database, a process as costly and complex as the creation of a new universal ID card, discussed above. Given that the I-9 process relies on comparing physical appearance to an identification document, it still requires regular renewal of an identification document and upgrades of identification data in the system to

[21] Thirty percent of employed Americans work more than one job either concurrently or consecutively during any given year.

[22] Through use of the tool, several cases of document and identity fraud have been identified, and unauthorized workers have been prevented from illegally obtaining employment. DHS is currently working on expanding the types of images included in the Photo Screening Tool, and intends to include passport and visa photos from the Department of State in the future.

[23] See Jonathan R. Scharfen, testimony before the Immigration Subcommittee, US House of Representatives Committee on the Judiciary, April 24, 2007. (http://www.judiciary.house.gov/hearings/April2007/Scharfen070424.pdf) and USCIS News Release 9/25/2007 (http://www.uscis.gov/files/pressrelease/EVerifyRelease25Sep07.pdf).

keep up with the aging process. However, the current Photo Screening Tool does not compare physical appearance to an image in the system; instead it compares the photo on the accepted document itself to what should be the exact same photo in the database.

The Photo Screening Tool requires changes to many employers' hiring practices.[24] Even with the digital image, the E-Verify photo tool or another photo screening system would still be vulnerable to identity fraud (false positives) in the case of employees who bear a passing resemblance to a legal worker (and are able to obtain that worker's identity data). And employers would still be required to make a judgment call about whether or not the person presenting the document is the actual owner of the document during the initial I-9 process and whether or not the image on their screen matches the identity document, also making this system vulnerable to false negatives, discrimination, etc.

Alternative 5: Biometric capture

Summary: All U.S. citizens and legal workers would be required to enroll in a national biometric database providing images, fingerprints, retinal scans, or some other digital data. At the point of hire, rather than presenting an ID card or identity information through an I-9 process, workers would be required to provide the same biometric data, i.e., by posing for a digital photograph, providing a fingerprint or retinal scan, etc. Data captured by the biometric scan at the worksite would be checked directly against the existing national biometric database.

Advantages: In principle, this system would provide a definitive confirmation or disconfirmation with no employer judgment. Faulty identity documents would be replaced by the individual's actual biometric data (i.e., their face or their fingerprints). The period of enrollment in the biometric database would also represent an opportunity to clean the EEVS database; individuals would have the opportunity to correct any errors in their record at the point of biometric enrollment (i.e., this system mandates a self-populating database, discussed above).

Disadvantages: This system would require an exponentially larger investment in infrastructure at American worksites as every employer would be required to purchase (or be given) biometric capture technology at a cost of at least several hundred dollars per worksite. Even with this investment, technology experts warn that a system like this would still be somewhat error prone, and vulnerable to different types of fraud. For example, the market in fake ID's might be replaced by a market in fake fingerprints (though combining this system with the digital photo verification system discussed above would largely guard against such fraud, at least in the case of conscientious employers).

Alternative 6: Personal data blocking

Summary: Under this system, workers' personal data would, by default, be "blocked" and ineligible for confirmation as work eligible. Prior to accepting a new job, workers would be required to "unblock," or activate, their own SSN or other identifying data by

[24] Alternatively, this system could be combined with a "federal hiring hall" model, in which employees would go to a post office or SSA field office to be verified, and receive a one-day photo receipt which could be taken to their employer as proof of verification.

contacting (via phone, internet, or in person) the EEVS. Security measures would be developed to insure that only the individual associated with the record has the ability to activate it.

This can be accomplished through document-based verification at a post office, DHS, or SSA field office for individuals activating their numbers in person, or by requiring the individual to provide additional private data for the purpose of verification by phone or internet (e.g., data from the individual's previous year's tax return, information maintained by a credit bureau, or perhaps a PIN number issued during a prior enrollment period). The system will only confirm an employee who is authorized to work and has unblocked their data. Once the number has been checked by the employer, it would automatically re-block. The employee must un-block the number each time she or he accepts a new job.

Advantages: This system would largely eliminate opportunities for identity theft since an individual in possession of a stolen name and SSN would be unable to use that information in the EEVS (unless the legal worker has conspired with the unauthorized worker, or sold his or her personal data). The system offers some of the advantages of a worker interface system discussed above, since workers would have the opportunity to confirm the accuracy of their records when they unblock them. (The system should be set up to warn a worker trying to unblock a record which is not work authorized or does not match the workers' identity.) This system would not require substantial investment in new infrastructure or the collection of biometric data.

Disadvantages: As with the worker interface systems discussed above, this system would impose new requirements on U.S. citizens and legal workers compared to the status quo. To be effective, the system should require additional contact with the system every time a worker changes jobs. The construction of a PIN system for unblocking personal data—or the requirement that workers go in person to an unblocking facility for confirmation of their identity—would be an additional burden.

Discussion

The alternatives discussed in this section are not mutually exclusive, and it is likely that a new EEVS will combine several of them (a shorter list of identification documents, a photo screening tool, and data mining, for example.) Many of the systems described in this section, including self-blocking/unblocking and photo screening, could also be implemented on a non-universal basis. Conscientious workers may elect to block their own ID data to protect themselves from identity theft without making blocking and unblocking a universal requirement; and conscientious employers may elect to enroll in a photo screening tool to protect themselves from being victimized by identity fraud on the other end of the process.

Two of the alternatives merit additional comment. The fifth alternative discussed above, in which employers capture biometric data to match against a biometric database, should be ruled out as excessively expensive on a variety of levels, and ultimately unlikely to

live up to its promise. (The tendency to view biometrics as a silver bullet should be avoided; the technology is far from full-proof at the present time.[25]) The sixth alternative in which a worker blocks and unblocks his or her own personal data appears to be especially promising as a way to give workers and employers shared responsibility for eligibility confirmation. As noted above, by requiring workers to unblock their own data this system has the potential to essentially eliminate erroneous TNC's at the point of employer screening, since workers will have the opportunity to resolve them at the point of unblocking.

V Due process

Any EEVS will produce both false positives and false negatives. False positives are inevitable because human ingenuity ensures that undocumented workers will discover ways to game the system; and false negatives are inevitable as a function of human and system error. In light of these observations, the rules governing the system take on great importance. Liberal due process rules ensure that the system avoids most false negatives, or minimize the instances in which work-authorized individuals are wrongly denied employment; restrictionist due process rules ensure that the system avoids most false positives, or minimizes the instances in which undocumented immigrants game the system. It bears emphasis that any adjustment to the rules designed to pursue one of these goals inherently undermines the other.

E-Verify system

Summary: Under the E-Verify system, a worker whose data cannot be confirmed by the system receives (through his or her employer) a tentative non-confirmation (TNC) response. A worker in receipt of a TNC response has eight federal workdays to visit an SSA field office or call DHS to resolve the TNC. If the worker fails to resolve his or her work eligibility or begin the process of resolving the mismatch within ten days, the system sends the employer an FNC. The employer is prohibited by law from taking adverse action against the employee while a TNC is pending.

Advantages: The system intends to strike a balance by giving workers enough time to resolve their TNC, while also giving employers a relatively quick resolution of the eligibility question.

Disadvantages: The overwhelming majority of workers who receive TNC responses fail to appeal the TNC, including 88% of self-identified citizens who receive a TNC (four percent of all US citizens queried in the 2006 Westat study) and 92% of self-identified non-citizens (26 percent of all non-citizens in the study). While some of those who fail to appeal do so because they are, in fact, unauthorized, it appears that many fail to do so because they are uninformed about the process or encounter some other barrier to a successful appeal.

[25] Stephen T. Kent and Lyneter Millets, eds., *ID's—Not That Easy: Questions About Nationwide Identity Systems* (Washongton, DC: Copmputer Science nnd Telecommunications Board, National Research Council, National Academic of Sciences, National Academic Press, 2002).

In general, system rules designed to protect workers from false negatives and from the adverse effects of false negatives are routinely violated.[26] Screening of job applicants before they begin work (rather than on the first day as required by law) is a common and particularly problematic violation of required procedures because, presumably, workers receiving a false TNC are never notified, never offered a job, and also therefore not counted in our effort to estimate system errors.

A second set of disadvantages concerns the relatively short windows of opportunity workers have to respond to TNC's. By law, workers must respond within eight working days after the employer notifies them of the TNC and they decide to contest the finding. In addition, workers may encounter difficulty tracking down original documents needed to appeal a TNC, a process which has become more burdensome since the change in I-9 regulations and accepted documents. Anecdotal evidence suggests many workers may be required to make up to three or four separate trips to an SSA field office to resolve a TNC, a process which also imposes burdens on SSA staff. All of these problems may increase exponentially as E-Verify is scaled up to a national level.

Alternative 1: Longer/shorter timelines for resolving a TNC

Discussion: A sure way to cut down on false non-confirmations is to lengthen the timeline for appealing a TNC. But both business and immigrant/labor advocates recognize that longer appeals are problematic because they impose a burden on employers (who are reluctant to train new workers, etc. while an appeal is pending), and so create incentives for employers to simply treat TNCs as FNCs and move on to a different job applicant.

Alternative 2: Default confirmation

Summary: The 2002 CIRA (S.2611) and the STRIVE Act offered in the House in 2007 provided that in cases in which a TNC could not be resolved in a timely manner the system would provide a default response. Initially, that default response was to be a default confirmation; over time (and once the system demonstrated a high level of accuracy) the default responses in cases in which a TNC could not be resolved in a timely manner would become a default non-confirmation. Even under this system, however, some ambiguous cases would be ruled non-confirmations to prevent a worker from successfully appealing a purely contrived record.

Advantages: The EEVS is likely to have a high error rate during the initial period of expansion; by setting the system to issue default confirmations when errors cannot be resolved in a timely manner this system would encourage employers and workers to use the system, and would minimize the number of workers harmed by false non-

[26] According to employer self-reporting: 47% of employers screened job applicants or new hires before they begin work (rather than on first day as required by law), 16% of employers failed to provide workers with consistent written notice of TNC's, 19% restricted work assignments while TNC's were pending, 14% delayed training while TNC's were pending, and 2% reduced pay while TNC's were pending. See ISR/Westat 2007.

confirmations. Later, when most of the challenges associated with expansion have been resolved, by setting the system to issue default non-confirmations when cases cannot be resolved the system would be re-calibrated to minimize the number of false positives.

Disadvantages: By construction, this system would err on the side of permitting false positives in its early period, and err on the side of permitting false negatives in its later stages.

Alternative 3: Phased implementation

Summary: A number of legislative proposals, including the Sensenbrenner bill (H.R.4437) passed by the House in 2005, would phase in universal participation in an EEVS, typically beginning with the largest firms and including progressively smaller firms over time. The schedule for requiring new categories of firms to participate may be linked to a calendar or to a demonstrated success rate by the system.

Advantages: Phasing in mandatory participation over time would mitigate the strains associated with scaling up the system. Requiring participation by larger employers first would minimize the strain on small employers, who are likely to face the greatest difficult in meeting the expenses required by the system. Linking the phase-in to system performance, rather than to a calendar, would ensure that unintended consequences from system expansion are minimized.

Disadvantages: Phased implementation, especially on a schedule linked to performance, runs the risk of extensive delays in establishing a universal EEVS. Many of the challenges associated with a large EEVS will not be revealed until system expansion occurs, so that delayed expansion does not create the opportunity to trouble-shoot.

Alternative 4: Redress for false non-confirmation

Summary: The 2002 CIRA (S.2611), the STRIVE Act offered in the House in 2007, and the NEVA offered in the House in 2008 all established procedures for workers to demand compensation for lost wages if they are wrongly non-confirmed by the system through no fault of their own. This can be accomplished through at least three mechanisms: establishing a private right of action against system administrators, referring workers to the existing Federal Tort Claims Act (FTCA), or establishing by statute a procedure for automatically awarding workers lost wages if an administrative process confirms that they were victims of false non-confirmation.

Discussion

Labor and immigrant advocates consider this a high priority given the near certainty that some workers will be wrongly non-confirmed by the system and lose wages as a consequence. DHS officials have promoted the use of the FTCA as the appropriate mechanism for redress, but labor and immigrant advocates argue that FTCA is unwieldy, establishes too high a burden of proof, and would not offer a realistic opportunity for redress in most cases.

Enforcement advocates worry that a private right of action, or any mechanism for redress that has a negative impact on enforcement agents, would force system administrators to err too far on the side of avoiding false negatives, undermining the system's ability to prevent false positives. Conversely, a case can be made that the mechanism for redress *should* create incentives for system administrators, as well as employers, to carefully guard against false non-confirmations in the interest of protecting workers, the most vulnerable users of the system.

Given the certainty that an EEVS will wrongly non-confirm a certain number of citizens and work-eligible non-citizens, it is essential that procedures are established to minimize these unintended consequences *and* to offer redress when they occur. Longer timelines for appealing a TNC would minimize false non-confirmations, but are not a good option for the reasons identified above.

As we seek to expand an EEVS into a universal system, it will be vitally important that both employers and workers willingly participate, and have faith that doing so will not threaten their businesses and their livelihoods, respectively. This consideration makes a strong case for the default confirmation described above as alternative two.