

Why States and Localities Should Not Require Employers to Participate in the Basic Pilot/E-Verify Program

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The Basic Pilot/E-Verify Program¹ is a voluntary Internet-based program that was established to allow employers to electronically verify workers' employment eligibility with the Department of Homeland Security (DHS) and the Social Security Administration (SSA). In 2007, a number of states and localities introduced proposals that would require local or state governments to use Basic Pilot/E-Verify. Many of these proposals also would require, through new licensing or contracting requirements, that businesses within the state or locality's jurisdiction use the program. While Basic Pilot/E-Verify often is portrayed as the magic bullet that would curb unauthorized employment, the program has been plagued by serious problems since its inception in 1997.

Virtually every entity that has reviewed the program carefully — including those that researched and wrote two independent evaluations commissioned by the former Immigration and Naturalization Service in 2002 and by DHS in 2007, the Government Accountability Office (GAO), and the SSA's Office of the Inspector General (SSA-OIG) — has found that Basic Pilot/E-Verify has significant weaknesses, which include (1) its reliance on government databases that have unacceptably high error rates and (2) employer misuse of the program to take adverse action against workers.² The most recent independent evaluation commissioned by DHS found that “the database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification.”³

As states and localities consider making Basic Pilot/E-Verify mandatory, they should not only consider the weaknesses of the program, but also understand (1) that an approach that relies only on enforcement of penalties against employers who violate the law regarding employment eligibility verification will not solve the problems associated with unauthorized employment and (2) that such an approach may be preempted by federal law. The lesson learned from the Immigration Reform and Control Act of 1986 (the federal law that for the first time required employers to verify the employment eligibility of all new hires) is that unscrupulous employers knowingly hire undocumented workers because they assume that such workers will be reluctant to hold them accountable for labor law violations. It is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do indeed complain about deplorable working conditions. A much better proposal for states and localities is to more effectively enforce state and local labor laws and to enact stronger labor protections at the state level to hold employers accountable for labor law violations and remove the economic incentive to seek out and unfairly exploit undocumented immigrants. In addition, states and localities should call on Congress to reform our immigration system and provide a comprehensive opportunity for currently undocumented noncitizens to earn legal status.



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☑ State and local proposals that require employers to use Basic Pilot/E-Verify may be preempted by federal law.

- Federal immigration law expressly preempts any state or local government from imposing employer sanctions on those “who employ, recruit, or refer for a fee unauthorized aliens.”⁴ Thus, any state or local legislation that prohibits the hiring of unauthorized workers, attempts to impose penalties on employers for hiring unauthorized workers, or attempts to regulate the hiring of unauthorized workers by requiring employers within the state or locality to use Basic Pilot/E-Verify may not be legally enforceable.
- The federal preemption statute contains a limited exception for “licensing and similar laws,” but state and local governments cannot make employment eligibility verification laws they pass lawful simply by labeling them “licensing” laws. The licensing exception simply allows governments to suspend or revoke a business license of an employer based on a federal finding that the employer violated the *federal* employer sanctions law.⁵ State or local efforts to go beyond this limited exception and regulate the hiring of unauthorized workers or impose penalties on employers conflict with the federal law and may be federally preempted.
- For example, in July 2007 a federal judge struck down an anti-immigrant ordinance passed by the Hazleton, Pennsylvania, city council that created local penalties for businesses that employ unauthorized immigrants, largely based on a conclusion that the law was federally preempted.⁶ The judge specifically cited the federal prohibition on states and localities passing laws regarding the employment of undocumented workers and also found that “[a]llowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives.”⁷
- Enactment of proposals that are preempted by federal law will subject states and localities to unnecessary litigation that will waste taxpayers’ money, as some localities have already discovered. For example, the cost to the city of Hazleton for defending its ordinance has already totaled more than \$200,000, and the potential plaintiffs’ legal fees could be as high as \$2.4 million.⁸ Similarly, after the township of Riverside, New Jersey, passed an ordinance in 2006 that, among other things, punished businesses for hiring undocumented immigrants, it faced a legal challenge.⁹ After incurring \$82,000 in legal costs to defend the ordinance and facing the risk of having to pay the plaintiffs’ legal fees if the township lost in court, Riverside rescinded the ordinance in September 2007.¹⁰

☑ Basic Pilot/E-Verify’s inaccurate and outdated federal databases prevent employment-authorized individuals from being approved for work.

- The SSA estimates that 17.8 million of its records contain discrepancies related to name, date of birth, or citizenship status, with 12.7 million of those records pertaining to U.S. citizens.¹¹
- If Basic Pilot/E-Verify were to become mandatory and the databases were not improved, SSA database errors alone could result in 2.5 million people a year being misidentified as not authorized for employment. This figure does not take into account errors in the DHS database.¹²
- Due to database errors, foreign-born workers (including those who have become U.S. citizens) are 30 times more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment.¹³

☑ Employers use Basic Pilot/E-Verify to discriminate against workers.

- A 2007 evaluation of Basic Pilot/E-Verify found that “the rate of employer noncompliance [with the program rules] is still substantial.”¹⁴ Specifically, employers engaged in

prohibited employment practices, including preemployment screening, adverse employment action based on tentative nonconfirmation notices,¹⁵ and failure to inform workers of their rights under the program.¹⁶

- Against program rules, 47 percent of employers put workers through Basic Pilot/E-Verify *before* the employees' first day at work.¹⁷
- 9.4 percent of employers did not notify workers of a tentative nonconfirmation notice, and 7 percent who gave workers the notice did not encourage them to contest it because, they said, the process of contesting the notice takes too much time.¹⁸
- 22 percent of employers restricted work assignments, 16 percent delayed job training, and 2 percent reduced pay based on tentative nonconfirmation notices.¹⁹
- A 2006 report issued by SSA also found that employers did not follow program rules.
 - 42 percent of employees surveyed reported that employers used Basic Pilot/E-Verify to verify their employment authorization *before* hire.²⁰
 - 30 percent of employers used Basic Pilot/E-Verify to verify their *existing* workforce.²¹
- According to a 2007 interim evaluation, "Employees reported that the supervisors assumed that all employees who received tentative nonconfirmation findings were unauthorized workers and therefore required them to work longer hours and in poorer conditions."²²

☑ Workers' privacy could potentially be compromised because DHS databases do not comply with government and industry-based standards for protecting information.

- In 2006, the U.S. House of Representatives Oversight and Government Reform Committee gave DHS a "D" in computer security (up from an "F" for the previous 3 years).²³ DHS's failure to comply with Federal Information Security and Management Act (FISMA) standards since its inception demonstrates that it cannot be definitively relied upon to make significant improvements in this area, which translates down the road into workers' private information being left vulnerable to hackers and other cyber-threats.
- Anyone posing as an employer can access Basic Pilot/E-Verify and all its data. DHS does not screen those who enroll in the program to verify that they are bona fide employers.²⁴
- According to The Heritage Foundation, Basic Pilot/E-Verify "would run afoul of legitimate privacy concerns. Both the government and employers would have access to massive databases of information, which would surely tempt some to traffic in identity theft."²⁵

☑ The cost is high for businesses.

- Employers have to expend significant resources to utilize Basic Pilot/E-Verify. They must purchase and maintain dedicated computer lines for a secure Internet connection, pay for required hardware, and absorb the cost of lost work time as staff are trained to screen new employees' work eligibility and forced to resolve problems with databases and data errors. Employers also incur indirect costs, such as reassignment of employees, additional recruitment, and delayed production.
- Employers could face costly litigation for discriminatory use of Basic Pilot/E-Verify.
- The cost could be felt more significantly by small employers if they are required to invest in Basic Pilot/E-Verify-related computer equipment, staffing, and training despite having fewer new employees to screen.

☑ States and localities should support reform that includes strong worker protections as the real solution to the problem created by employers hiring undocumented workers.

- Unscrupulous employers will continue to have an economic incentive to recruit, hire, and exploit undocumented workers as long as employers know they will not be liable for violating state and federal labor and employment laws.
- Rather than wasting taxpayers' money on legislation that is flawed, states and localities should support efforts aimed at improving the lives of all workers by holding unscrupulous employers accountable for violating employment laws, including but not limited to enacting and enforcing minimum wage, overtime, health and safety, workers' compensation, and antidiscrimination laws.
- Because most federal and state employment laws allow workers a private right of action, workers have an interest in ensuring that these laws are enforced. Making it possible for workers to bring and win claims against employers that violate employment and labor laws is a more efficient means of holding employers accountable for violations and deters them from ignoring such laws with impunity. This, in turn, substantially decreases employers' economic incentive to hire and exploit undocumented workers, and it is a much more effective means of limiting employment of unauthorized workers than any employer sanctions law ever will be.
- Stronger enforcement of labor laws will prevent unscrupulous employers from gaining an unfair economic advantage over those employers who play by the rules.

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NOTES

¹ DHS rebranded Basic Pilot as "E-Verify" in August 2007. For more information, *see* BASIC INFORMATION BRIEF: DHS E-VERIFY/BASIC PILOT PROGRAM (National Immigration Law Center, expected publication date: Jan. 2008).

² *See* FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June, 2002), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD; FINDINGS OF THE WEB BASIC PILOT EVALUATION (Westat, Sept. 2007) (hereafter "Westat 2007"), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD; CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), www.socialsecurity.gov/oig/ADOBEPDF/auditxt/A-08-06-26100.htm; CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf; CONGRESSIONAL RESPONSE REPORT: MONITORING THE USE OF EMPLOYEE VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Sept. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-36122.pdf.

³ See Westat 2007, *supra* note 2, at xxi. Section 404g of the Illegal Immigration Reform and Immigrant Responsibility Act states that “The Commissioners of Social Security and the Immigration and Naturalization Service shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process”

⁴ See 8 USC § 1324a(h)(2).

⁵ See the legislative history of the Immigration Reform and Control Act of 1986, explaining that the exception is intended to allow state or local governments to suspend, revoke, or refuse to reissue licenses to “any person *who has been found to have violated the sanctions provisions in this legislation*” (emphasis added). H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662.

⁶ For more information about the Hazleton, PA, decision, see “Hazleton, Penn., Anti-Immigrant Ordinances Preempted and Unconstitutional, Federal Court Finds,” IMMIGRANTS’ RIGHTS UPDATE, Oct. 5, 2007, www.nilc.org/immlawpolicy/LocalLaw/locallaw005.htm.

⁷ Lozano et al. v. City of Hazleton, 2007 U.S. DIST. LEXIS 54320 (M.D. Pa. July 26, 2007).

⁸ Wade Malcom, “Hazleton Slapped with \$2.4 M Bill,” SMALL TOWN DEFENDERS, Sept. 1, 2007, www.smalltowndefenders.com/public/node/234.

⁹ Riverside Coalition of Business Persons v. City of Riverside (D.N.J., complaint filed Oct. 18, 2006).

¹⁰ Adam Karczewski, “Coming to America: How States and Municipalities Deal with Undocumented Immigrants,” NEW JERSEY LAWYER, Nov. 21, 2007, www.njlnews.com/articles/2007/11/30/in_re_magazine/f3-karczewski.txt.

¹¹ ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION’S NUMIDENT FILE, *supra* note 2.

¹² Transcript from Hearing on Employment Eligibility Verification Systems (Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007).

¹³ *Id.* at xii-xiii.

¹⁴ See Westat 2007, *supra* note 2, at xxii.

¹⁵ Employers receive a “tentative nonconfirmation” notice from either SSA or DHS when the agencies are unable to automatically confirm a worker’s employment authorization. A tentative nonconfirmation notice is not an indication of an immigration violation, and workers have the right to contest the finding with the appropriate agency.

¹⁶ See Westat 2007, *supra* note 2, at xxiii.

¹⁷ *Id.* at 71.

¹⁸ *Id.* at 76–77.

¹⁹ *Id.* at 77.

²⁰ EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION’S VERIFICATION, *supra* note 2, at 6.

²¹ *Id.*

²² Westat 2007, *supra* note 2, at 77.

²³ SEVENTH REPORT CARD ON COMPUTER SECURITY AT FEDERAL DEPARTMENTS AND AGENCIES (Ranking Member Tom Davis, House Oversight and Government Reform Committee, Apr. 12, 2007), <http://republicans.oversight.house.gov/FISMA/>.

²⁴ Westat 2007, *supra* note 2, at xxvi.

²⁵ James Jay Carafano, WORKPLACE ENFORCEMENT TO COMBAT ILLEGAL MIGRATION: SENSIBLE STRATEGY AND PRACTICAL OPTIONS (The Heritage Foundation, Aug. 2006), www.heritage.org/Research/NationalSecurity/hl957.cfm, emphasis added.