

**Statement of Joshua Stehlik  
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**House Committee on the Judiciary**

**Hearing on H.R. 1147, the "Legal Workforce Act"**

**March 3, 2015**

The National Immigration Law Center (NILC) is the primary national organization in the United States exclusively dedicated to defending and advancing the rights of low-income immigrants. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment and labor laws is an important resource for a wide range of audiences, including immigrant rights coalitions, faith and community-based organizations, policymakers, legal aid attorneys, labor unions, government agencies, and the media.

NILC has analyzed and advocated for improvements to the E-Verify program since it was first implemented in 1997 as the Basic Pilot program, and has extensive experience assisting advocates and attorneys in responding to problems with E-Verify as it affects workers—immigrants and U.S.-born alike.

### **Overview**

The Legal Workforce Act (H.R. 1147) would mandate the use of E-Verify, an ineffective and expensive employment eligibility verification system that will harm our economy, hurt small business, and increase unemployment. The Congressional Budget Office (CBO) found that the Legal Workforce Act, as reported in the 2013<sup>th</sup> Congress, would increase federal budget deficits by \$30 billion and cost the federal government—and U.S. taxpayers—over \$1.2 billion to implement.<sup>1</sup> In addition to increasing the deficit, the Legal Workforce Act would cost small business billions in out of pocket costs, put U.S. citizens' and work-authorized noncitizens' jobs at risk, and compound the discriminatory impacts of the current E-Verify system on Latino and foreign-born workers and on working women. The bill does nothing to create jobs, but instead will exacerbate the problems caused by our broken immigration system.

The critical starting point for any mandatory E-Verify proposal is a roadmap to citizenship for the 11 million aspiring Americans in our communities. Mandating E-Verify without creating a legal labor force will set the program up for failure. Passage of the Legal Workforce Act will cause employers to move off the books into the underground economy, resulting in staggering losses of

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<sup>1</sup> *Congressional Budget Office Cost Estimate: H.R. 1772: the Legal Workforce Act* (Congressional Budget Office, Dec. 17, 2013), <http://www.cbo.gov/sites/default/files/hr1772.pdf>, p. 1. These costs are calculated over 10 years. Although this cost estimate is for the version of the Legal Workforce Act that was reported in the 2013<sup>th</sup> Congress, the provisions of H.R. 1147, the version of the Legal Workforce Act introduced on February 27, 2015, are nearly identical.

federal, state, and local tax revenues, including drastic reductions in contributions to the Social Security trust fund. Workers will be pushed further in the underground economy, where they are more vulnerable to exploitation, giving unscrupulous employers a competitive advantage over law-abiding businesses. And given E-Verify's error rates and lack of due process protections, the Legal Workforce Act will require hundreds of thousands of U.S. citizens and work-authorized immigrants to visit a government office or lose their jobs. Instead of superimposing the E-Verify program created by the Legal Workforce Act onto a broken immigration system, we need to fix the system by creating a roadmap to citizenship for the 11 million and ensuring that all workers are protected.

**I. E-Verify will cost federal and state governments billions of dollars in lost tax revenue, and small businesses billions in out of pocket costs, but it detects undocumented workers less than half the time.**

The reality is that undocumented workers are not going to leave the workforce if the Legal Workforce Act is enacted. Instead, employers will move undocumented workers off the books, misclassifying them as independent contractors, and simply avoid running them through any employment eligibility verification system.<sup>2</sup> As workers move off the books, much-needed revenue is drained from federal and state governments' coffers. The CBO found that the Legal Workforce Act would increase federal budget deficits by \$30 billion and cost the federal government over \$1.2 billion to implement.<sup>3</sup> A significant portion of this lost revenue would be the result of the increase in the number of employers who pay workers under the table, outside of the tax system, since, as the CBO noted, under an E-Verify mandate, "[s]ome employers who currently withhold income and payroll taxes from the wages of unauthorized workers . . . would no longer withhold or report such taxes."<sup>4</sup> The experience of Arizona, which adopted a statewide E-Verify mandate in 2008, bears this out, as income tax collection dropped 13 percent in the first year the law was implemented.<sup>5</sup>

In addition to robbing federal and state governments of revenue, an E-Verify mandate would threaten the solvency of the Social Security trust fund. When employers move workers into the underground economy, the trust fund loses those workers' contributions. The chief actuary of the Social Security Administration has stated that without undocumented immigrants' contributions to the trust fund, there would have been a "shortfall of tax revenue to cover [payouts] starting [in] 2009, or six years earlier than estimated under the 2010 Trustees Report."<sup>6</sup> By driving unauthorized workers in the underground economy, an E-Verify mandate would rob the trust fund of their contributions and threaten the entire system's solvency.

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<sup>2</sup> See Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," *The Wall Street Journal Class Room Edition*, April 2005, [http://wsjclassroom.com/archive/05apr/econ\\_underground.htm](http://wsjclassroom.com/archive/05apr/econ_underground.htm).

<sup>3</sup> *Congressional Budget Office Cost Estimate*, *supra* note 1, p. 1.

<sup>4</sup> *How Changes in Immigration Policy Might Affect the Federal Budget* (Congressional Budget Office, Jan. 2015), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/49868-Immigration4.pdf>, p. 31.

<sup>5</sup> Daniel Gonzalez, "Illegal Workers Manage to Skirt Arizona Employer-Sanctions Law: Borrowed Identities, Cash Pay Fuel an Underground Economy," *The Arizona Republic*, Nov 30, 2008. Although income tax collection dropped by 13 percent, sales taxes dropped at a far smaller rate, leading state economists to conclude that workers weren't paying income taxes, but were still earning money to spend—meaning that the underground economy was growing.

<sup>6</sup> Edward Schumatcher-Matos, "How illegal immigrants are helping Social Security," *The Washington Post*, Sept. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html>.

Mandatory E-Verify would cost business billions as well. Based on 2010 data, if E-Verify was made mandatory, it would cost 2.7 billion dollars, with America's small businesses paying 2.6 billion dollars of that cost.<sup>7</sup> Small businesses have noted that mandatory E-Verify would be a "direct threat" to businesses and local economies.<sup>8</sup> Realizing that mandatory E-Verify forces small businesses "to act as immigration agents," they have urged Congress to "do better" and comprehensively reform the immigration system.<sup>9</sup>

All of these enormous costs occur even as E-Verify has faltered in detecting undocumented workers. A study commissioned by the Department of Homeland Security (DHS) found that 54 percent of unauthorized workers who were checked by E-Verify were erroneously confirmed as being work-authorized.<sup>10</sup> The Migration Policy Institute estimates that E-Verify erroneously confirmed 230,000 unauthorized workers as work-authorized in 2009.<sup>11</sup>

## **II. The Legal Workforce Act would put hundreds of thousands of U.S. citizens' and work authorized immigrants' jobs at risk.**

The Legal Workforce Act would put hundreds of thousands of currently-employed workers at risk of losing their jobs. According to the most recent DHS-commissioned study of E-Verify, the program erroneously issues a tentative nonconfirmation of work authorization (TNC) in 0.3 percent of cases.<sup>12</sup> While that may seem like a low rate of error, if the Legal Workforce Act were to pass, it would mean that a total of approximately 170,000 to 450,000 citizen, Lawful Permanent Resident, and work-authorized noncitizens would have to either contact a government agency to attempt to correct their records or face losing their jobs.<sup>13</sup> That is the numerical

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<sup>7</sup> Jason Arvello, "Free' E-Verify May Cost Small Businesses \$2.6 Billion: Insight," *Bloomberg*, Jan. 28, 2011.

<sup>8</sup> Letter to Rep. Lamar Smith, Chair, Committee on the Judiciary, U.S. House of Representatives, from Main Street Alliance, Sept. 14, 2011, <http://mainstreetalliance.org/wp-content/uploads/2011/09/MSA-letter-to-House-Judiciary-Committee-on-HR-2885-Sept-14-2011.pdf>.

<sup>9</sup> J. Kelly Conklin, "E-Verify program would be costly to small businesses," *Houston Chronicle*, July 14, 2011, <http://www.chron.com/opinion/outlook/article/E-Verify-program-would-be-costly-to-small-2078257.php>.

<sup>10</sup> *Findings of the Web-Based E-Verify Program Evaluation* (Westat Corporation, Dec. 2009), [http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf), p. 118 (hereinafter, Westat 2009).

<sup>11</sup> Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), <http://www.migrationpolicy.org/research/e-verify-strengths-weaknesses-and-proposals-reform>, p. 17, footnote 13.

<sup>12</sup> *Evaluation of the Accuracy of E-Verify Findings* (Westat Corporation, July 2012), [http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/EVerify%20Studies/Evaluation%20of%20the%20Accuracy%20of%20EVerify%20Findings.pdf](http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/EVerify%20Studies/Evaluation%20of%20the%20Accuracy%20of%20EVerify%20Findings.pdf), pp. X, 23 (hereinafter Westat 2012). Though dated July 2012, this report was not released to the public until July 2013.

<sup>13</sup> The Legal Workforce Act would require all employers to use E-Verify on newly hired employees. The Act would also allow employers to reverify their current workforce using E-Verify. Over the 12 months ending in November 2014, total U.S. hires equaled 57.6 million. See "Job Openings and Labor Turnover—November 2014," a Bureau of Labor Statistics news release, <http://www.bls.gov/news.release/jolts.nr01.htm>. 57.6 million multiplied by 0.3 percent (the tentative nonconfirmation error rate from Westat 2012) equals 172,800 (about 170,000) workers who would experience an erroneous tentative nonconfirmation. The Legal Workforce Act allows employers to reverify all workers, which could result in E-Verify being applied to the entire workforce. As of December 2014, the number of workers in the U.S. workforce was 147,190,000. See "Table A-1: Employment Status of the Civil Population" (Bureau of Labor Statistics, U.S. Dept. of Labor, Jan. 9, 2015), <http://www.bls.gov/news.release/empsit.t01.htm>. 147,190,000 multiplied by 0.3 percent is 441,570 (about 450,000) workers who would receive an erroneous tentative nonconfirmation if E-Verify were used on the entire workforce.

equivalent of the entire population of Green Bay, Wisconsin (on the low end of the estimated range), or of Tucson, Arizona (on the high end), facing job loss because of an E-Verify system error.<sup>14</sup>

More startling, the same DHS-commissioned study also examined E-Verify's final nonconfirmation of work authorization (FNC) accuracy rate—an estimate of how many of the final mismatches issued by the system are correctly issued for unauthorized workers. The study estimated that “6 percent [of FNCs] were inaccurately issued to employment authorized workers,” meaning that 6 percent of final nonconfirmations of work authorization were issued to U.S. citizens or work-authorized noncitizens.<sup>15</sup> Since employers must terminate workers who receive an FNC or risk liability under federal immigration law, these erroneously-issued TNCs likely resulted in job termination of work-authorized employees.

Moreover, workers who receive an erroneous E-Verify determination often have to take unpaid time off from work to attempt to correct their records—which may require more than one trip to a government office. A government-commissioned study found that almost half of such workers lost partial or complete days of work, and 14 percent lost more than two days of work as a result of their efforts to correct an E-Verify error.

Perhaps most disturbing about these statistics is the fact that workers who experience an erroneous E-Verify FNC currently have no formal way to contest it and the Legal Workforce Act provides no meaningful due process for workers who are victims of a program error. In fact, the Legal Workforce Act bars workers from bringing any claim under virtually any law—including laws explicitly designed to provide labor protections—for loss of their job or violations that occur as a result of an employer's use of the program.<sup>16</sup>

### **III. The Legal Workforce Act will increase discrimination against Latino and other foreign-born workers and against women—all of whom are disproportionately likely to experience an E-Verify error.**

The current E-Verify system already contributes to discrimination against Latinos and foreign-born workers, since Lawful Permanent Residents (LPRs) and other work-authorized noncitizens receive erroneous E-Verify determinations at much higher rates than U.S. citizens.<sup>17</sup> According to the most recent DHS-commissioned study, the TNC error rate for LPRs is 0.9 percent and for other noncitizens who are legally authorized to work (e.g. asylees) is 5.4 percent.<sup>18</sup> This means that an LPR is *four times* more likely to receive an erroneous TNC than a U.S. citizen. For other noncitizens, this discrepancy is even more pronounced, as a noncitizen legally authorized to work in the U.S. is over *twenty-seven times* more likely to receive a TNC than a U.S. citizen. Because workers who receive a TNC often face negative impacts such as suspension from work or reduced pay, the heightened TNC error rate for LPRs and other work-authorized noncitizens

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<sup>14</sup> See <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

<sup>15</sup> Westat 2012, *supra* note 12, p. X.

<sup>16</sup> The only avenue of redress that the bill allows workers who unjustly lose employment because of an E-Verify error is to sue the federal government under the Federal Tort Claims Act (FTCA) for lost wages. However, this is an empty remedy, given the procedural hurdles to bringing an FTCA claim, see 28 U.S.C. § 2675, the FTCA's restrictions on attorney's fees, and the limits of the “discretionary function exception” of the FTCA, see 28 U.S.C. § 2680(a).

<sup>17</sup> See Westat 2012, *supra* note 12, p. 24.

<sup>18</sup> See Westat 2012, *supra* note 12, p. 24. By comparison, the TNC error rate for U.S. citizens for the same time period is 0.2 percent.

results in discrimination.<sup>19</sup>

Similarly, working women are more vulnerable to experiencing an E-Verify error. E-Verify errors can result from name inconsistencies on various authorizing documents in the E-Verify system. These name inconsistencies can result from name changes, most commonly because of marriage or divorce, that are much more likely to affect female workers. Additionally, name inconsistencies can result from the use of compound surnames or other culturally-specific naming practices.<sup>20</sup> This can result in E-Verify's errors having a potentially disparate impact on certain cultural groups and, in particular, on women from these cultures.

The Legal Workforce Act would expand and compound the discriminatory impacts inherent in the current E-Verify system. Given that E-Verify error rates already disproportionately impact Latino and foreign-born workers and working women, the massive expansion of the use of E-Verify under the Legal Workforce Act would result in a much higher number of such workers experiencing an erroneous E-Verify determination and potentially facing a subsequent adverse employment action and job loss as a result.

Moreover, the Legal Workforce Act would exacerbate the discriminatory impacts of the current E-Verify system, particularly against Latino and other foreign-born workers, since it allows employers to condition job offers on verification through E-Verify. Current law allows use of E-Verify only after a worker is hired precisely because allowing employers to screen workers before they are actually hired opens the door to the discriminatory application of E-Verify to selectively screen job applicants and thereby to discriminate against lawfully-present workers who appear to be foreign-born.

#### **IV. Policy Recommendations**

Passing the Legal Workforce Act without legalizing the status of immigrants in the labor force who are currently undocumented will not create jobs, but will result in billions of dollars in lost tax revenue and implementation costs, the loss of jobs for American workers, and poorer working conditions. At a minimum, before expansion of E-Verify is considered, the following steps must be taken:

##### **1) *Enact immigration reform that protects workers' labor and employment rights.***

Instead of focusing on ineffective "solutions," Congress should pass commonsense legislation that overhauls our nation's immigration system and provides a roadmap to citizenship for the 11 million aspiring Americans in our communities. Unlike the Legal Workforce Act, which would decrease contributions to state and federal tax revenue, passage of immigration reform would provide an estimated \$1.5 trillion dollar benefit to the gross domestic product over 10 years in addition to \$66 billion boost in federal tax collection.<sup>21</sup>

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<sup>19</sup> See Westat 2009, *supra* note 10, pp. 205-206, which documents that nearly 40 percent of workers surveyed experienced some form of adverse action by their employer as a result of a TNC.

<sup>20</sup> *Report to the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain* (Government Accountability Office, Dec. 2010, GAO-11-146), [www.gao.gov/new.items/d11146.pdf](http://www.gao.gov/new.items/d11146.pdf), p. 20.

<sup>21</sup>The Financialist, *The Cost of Partisan Politics* (Credit Suisse, Feb. 2013), <http://www.thefinancialist.com/the-cost-of->

- 2) ***Ensure that E-Verify is not used to undermine workers' rights under labor and employment law.***

Too often, workers experience egregious violations of their most basic workplace rights. When these workers complain about the unlawful treatment, they face retaliation in the form of firing, suspension, or even physical abuse. Because E-Verify compounds workers' vulnerability and can detract from labor law enforcement, the program should explicitly prohibit the use of E-Verify to undermine workers' rights under labor and employment law. This prohibition should come with meaningful penalties.

- 3) ***Create a review process that would allow citizens and work authorized individuals to correct errors in their records and maintain their jobs.***

Under the current E-Verify system and the Legal Workforce Act, workers who experience an erroneous FNC have no formal way to resolve this error, get their job back, or get compensation for the time they were out a job due to the government's mistake. USCIS should create a process to allow U.S. citizens and work-authorized workers to correct TNCs and FNCs easily, remain on the job while they correct these government errors, and receive compensation for any time they are out of a job.

- 4) ***Prohibit employer misuse of E-Verify.***

There continues to be significant employer misuse of E-Verify—including prescreening of workers and adverse action against workers who receive TNCs. Workers who report mistreatment should be treated as whistleblowers. We should learn from the failure of employer sanctions created by the Immigration Reform and Control Act of 1986 (IRCA)<sup>22</sup> and ensure that the penalties do not result in *employee sanctions*, as has been the case under IRCA. As a result of IRCA, employees who speak up in the face of abusive treatment are often fired or detained and deported while the employer simply turns around to hire another unauthorized worker without any penalties.

- 5) ***Before any expansion of E-Verify as part of immigration reform, ensure that the program meets specified requirements regarding database accuracy, low error rates, privacy, and measurable employer compliance before implementation.***

Mandatory E-Verify would represent an enormous increase in utilization of the program, from only 24 million name checks—by only 8% of employers—in fiscal year 2013 to over 60 million name checks if applied only to new hires. Moving forward without addressing problems within the system will result in harm to all workers and businesses. Performance evaluations should address, at a minimum: wrongful terminations due to system errors, employer compliance with program rules, and the impact of the system on workers' privacy. The best way to ensure that implementation of mandatory E-Verify is accurate is to set standards for system performance upfront, clear benchmarks that need to be met, and timelines for meeting those metrics. These metrics should be met *before* any expansion of E-Verify is implemented.

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<sup>22</sup> 8 U.S.C. §§ 1324a-1324b.

## Conclusion

E-Verify is a costly, ineffective program that does not prevent employers from hiring unauthorized workers, but that instead increases our federal deficit, undermines American jobs, and imposes new burdens on our economy, businesses, and workers. It is time for Congress to stop focusing on ineffectual worksite enforcement and instead focus on passing commonsense immigration reform. It is clear that the public is ready for the 11 million Americans at heart to become Americans on paper, as diverse constituencies are expressing their support for immigration reform. For example, the AFL-CIO and the Chamber of Commerce support immigration reform,<sup>23</sup> as do faith leaders,<sup>24</sup> small business owners,<sup>25</sup> law enforcement,<sup>26</sup> and educators.<sup>27</sup> The time has come for Congress to respond to the country's growing consensus, and pass commonsense immigration reform.

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<sup>23</sup> *Joint Statement of Shared Principles by U.S. Chamber of Commerce President and CEO Thomas J. Donohue & AFL-CIO President Richard Trumka*, February 21, 2013, <http://www.aflcio.org/Press-Room/Press-Releases/Joint-Statement-of-Shared-Principles-by-U.S.-Chamber-of-Commerce-President-and-CEO-Thomas-J.-Donohue-AFL-CIO-President-Richard-Trumka>.

<sup>24</sup> *1000 Faith Leaders Call for Immigration Reform*, (New America Media, Jan. 23, 2013), <http://newamericamedia.org/2013/01/1000-faith-leaders-call-for-immigration-reform.php>

<sup>25</sup> Mark Anthony, "Commonsense Immigration Reform Will Boost the Economy," *Battle Creek Enquirer*, Feb. 22, 2013, <http://www.battlecreekenquirer.com/article/20130222/OPINION02/302220028/Mark-Anthony-Common-sense-immigration-reform-will-boost-economy>.

<sup>26</sup> Stephanie Czekalinski, "Bibles, Badges, Businesses Call for Immigration Reform," *National Journal*, Dec. 2012, <http://www.nationaljournal.com/thenextamerica/politics/bibles-badges-businesses-call-for-immigration-reform-20121204>.

<sup>27</sup> *Wisconsin Teacher Fights for His Students and Immigration Reform* (National Education Association, Feb. 19, 2013), <http://educationvotes.nea.org/2013/02/19/wisconsin-teacher-fights-for-his-students-and-immigration-reform/>.