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Testimony for the House Health and Government Operations Committee
March 16, 2011

HB 761 - State Government - E-Verify Program
OPPOSE

HB 760 - State Procurement - Employment of Unauthorized Aliens and the Federal E-Verify Program
OPPOSE

HB 753 – Procurement – Use of Federal Work Authorization Programs
OPPOSE

The American Civil Liberties Union of Maryland opposes these attempts to require all contractors working with any Maryland local or state entity to use the "E-Verify" program.[1] While HB 753 does not specify that an employer must use E-Verify, it does specify that a contractor may only enter into a contract with a state or local entity if that employer is registered with a "Federal Work Authorization Program." By definition

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[1] The E-verify verification system functions as follows:

> After registering for E-Verify, signing a Memorandum of Understanding (MOU) with USCIS, and completing required online training, participating employers are supposed to perform electronic verification of every newly hired employee. To verify a newly hired employee, the employer submits information (Social Security number (SSN), name, date of birth, citizenship or alien status, and, if relevant, alien number (A-number) or I-94 number), from the Form I-9 over a secure Internet connection to be matched against government data. The information is first matched against SSA data and then, for noncitizens and some naturalized citizens, against Department of Homeland Security (DHS) data.
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> If the worker attests to being a U.S. citizen and the information submitted matches SSA information, the employer is instantly notified by the system that the worker is employment authorized. If information from the SSA database does not match the worker information entered, E-Verify instantly requests the employer to check for possible input errors and, if no changes are made, E-Verify issues a Tentative Non-confirmation (TNC) finding.

Findings of the E-Verify Program Evaluation (Westat, Dec. 2009), http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (last viewed Feb. 28, 2010).

under the bill, a "Federal Work Authorization Program" is "an electronic verification of a work authorization program operated by the United Stated Department of Homeland Security (DHS)." E-Verify is the only such existing program.

As discussed below, the most recent Government Accountability Office (GAO) report from December 2010 states that "federal agencies have taken steps to improve E- Verify, but significant challenges remain."[2]

I. E-Verify Relies on Flawed Databases

While the United States Citizen and Immigration Service (USCIS) has taken several steps to improve the accuracy of the E-Verify system, the latest GAO report finds that "E-Verify errors persist."[3] The USCIS did reduce the tentative non-confirmation (TNC) findings from 8% to almost 2.6% in fiscal year 2009. This still means that in fiscal year 2009 over 211,000 newly hired people received a TNC, about .3% of whom were be determined to be work eligible after they contested a TNC and resolved errors in their record and about 2.3%, or 189,000 people who received a final nonconfirmation (FNC) because their employment eligibility status remained unresolved. USCIS was not able to determine how many of these people received FNCs in error.[4]

Erroneous TNCs are often the result of inaccuracies or inconsistencies in the recording of personal information on employee documents or in government databases. This has an unfairly disproportionate negative impact on certain cultural groups, such as those of Hispanic or Arabic origin, because they often have multiple surnames that are recorded differently on their naturalization documents than on their Social Security cards. The USCIS found that 76% of the name mismatches for fiscal year 2009 were errors effecting U.S. citizens; this means 17,098 or our citizens erroneously received TNCs. While this is bad enough, the GAO estimates that if the E-Verify program were made mandatory for all employees nationwide, about 164,000 citizens and noncitizens would receive a name-related TNC each year. And this number would greatly increase if E-Verify were made mandatory for all employees nationwide and not just new hires[5]

II. The Lack of Protections for Employees Wrongfully Identified by E-Verify.

These problems are further exacerbated by the lack of any meaningful due process for workers wrongfully denied. In many cases employees are not even aware that they are being denied employment on the basis of their immigration status. A December 2009 report commissioned by DHS found that while 98 percent of employers claimed that they always informed workers of a tentative non-confirmation, "interviews of workers

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[2] United States Government Accountability Office, Report to the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, *Employment Verification: Federal Agencies have taken Steps to Improve E-Verify, but Significant Challenges Remain,* http://www.gao.gov/new.items/d11146.pdf (December 2010).
[3] Id. at "Highlights."
[4] Id. at 16.
[5] Id. at 19.

(conducted for the 2009 report) indicated that employers significantly overestimated the frequency with which they notified workers of TNCs." Even when they did, most "did not always explain the meaning of the TNC or the workers' options."[6]

Furthermore, in many cases, employers failed to provide employees the proper materials to contest the determination against them. Fourteen percent admitted to failing to provide employees a written TNC-notice, which "provides workers with critical information about their right to contest the finding and the implications of not contesting." Among the 87 employers surveyed on-site for the 2009 report that should have included SSA referral letters in their files, 39 were missing referral forms for *half or more* of their workers that had been referred to SSA.[7]

Once they do find out about the TNC, it is then extremely difficult to correct. The E-Verify program has no process in place for employees to access their personal information and find the source of the erroneous TNC. The only way employees can do this is through a Privacy act request and this can involve having to make separate Privacy Act requests to several DHS components that may have been the source of the misinformation because each DHS component maintains its own data and its own office to respond to Privacy Act requests. As the GAO reports:

> According to senior officials in DHS's Privacy Office, if there is an error in a DHS database, individuals face formidable challenges in getting the inaccuracy or inconsistency corrected because, among other things, they have little information about what database led to the decision. DHS processes Privacy Act and Freedom of Information Act requests in the same manner, and the average response time for these requests in fiscal year 2009 was approximately 104 days.[8]

Not only is it difficult for employees to access their personal information, but employees have also expressed difficulty in understanding this complex process involved in contesting erroneous TNCs. The process clearly needs to be greatly simplified. Even if an employee is able to go through the arduous task involved in correcting an erroneous TNC, they could find themselves in the same situation job after job because the USCIS has not established any mechanism to correct the errors in employees' personal information obtained from other components once its discovered.

Finally, there is no formal appeals process for employees who receive FNCs in error, and no mechanism for compensating employees who are laid off or terminated as a result of receiving an erroneous FNC. These citizens are at the mercy of a system that provides no adequate due process for challenging and correcting erroneous data.

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[6] Findings of the E-Verify Program Evaluation (Westat, Dec. 2009), http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf , p. 154 (last viewed Feb. 28, 2010).
[7] *Id*. at 156.
[8] Id. at 34 (footnoting Department of Homeland Security, 2009 Annual Freedom of Information Act Report to the Attorney General of the United States, October 1, 2008-September 30, 2009 (Washington, D.C., February 2010)).

The 2009 DHS report additionally highlighted the high rate of instances in which employers took discriminatory action against those employees who did choose to contest a tentative non-confirmation. According to the report, "17 percent reported restricting work assignments until employment authorization was confirmed, 15 percent reported delaying training until employment authorization was confirmed, and 2 percent reported reducing pay during the verification process." *Id*. at 202. The report additionally found that employers in states that had mandated E-verify usage were *more likely* to take such actions against workers. *Id*. at 163. The current legislation is silent as to any protections for persons who are tentatively non-confirmed, but then choose to contest the decision.

Workers injured by data errors must be informed they have been identified by the E-verify system as unauthorized to work, be provided with all proper and available materials allowing them to challenge the determination in a streamlined manner, and also be provided the opportunity to challenge such determination before an adverse employment decision is made. The pending legislation includes no due process of any kind for persons wrongly denied the right to start their next job.

For the foregoing reasons, we urge the legislature refrain from requiring contractors to use the E-Verify system.