



**MALDEF**

Mexican American Legal Defense and Educational Fund

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**United States House of Representatives Committee on Ways and Means**  
**Subcommittee on Social Security**  
**Hearing on Employment Eligibility Verification Systems and the Potential Impacts**  
**on SSA's Ability to Serve Retirees, People with Disabilities, and Workers**

**Statement of John Trasviña**  
**President and General Counsel**

Chairman McNulty, Members of the Subcommittee, I am John Trasviña, President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF). Thank you for this opportunity to testify on Employment Eligibility Verification Systems (EEVS or E-Verify) and the Potential Impacts on American Workers.

For forty years, MALDEF has served as the law firm for the Latino community. Today, immigration affects every family, business and community across the nation. Immigration policy and enforcement practices are uppermost in MALDEF's litigation and policy agendas as they affect both newcomer and native-born Latinos.

There are a number of bills addressing EEVS currently under consideration in Congress. The "SAVE Act of 2007," H.R. 4088, and the "New EEVS Act of 2008," H.R. 5515, are among them. At the core of these two bills is the expanded application of EEVS, a deeply flawed system which would threaten the jobs of nearly 13 million native-born U.S. citizens and increase discrimination against Latinos and other national origin minorities.

According to U.S. Citizenship and Immigration Services (USCIS) the E-Verify program goals are as follows: 1. Reduce unauthorized employment; 2. Minimize verification-related discrimination; 3. Be quick and non-burdensome to employers; and 4. Protect civil liberties and employee privacy. In fact, none of these program goals can be met, regardless of the vehicle used, under EEVS as currently constructed.

Worksite enforcement is a necessary component of comprehensive immigration reform, but it must be done with accurate records and through a better process. The notion that we can simply, cheaply, or easily turn over verification to computers without adequately managing or safeguarding the data weakens both the effectiveness of the verification system and jeopardizes the mission of the Social Security Administration relied upon by all Americans.

## I. EEVS Creates a Flawed No-work List

Applying a flawed EEVS system will harm American workers creating an official “no-work list” requiring millions of U.S. citizens and other authorized workers to bear the burden of proving their legal status and seek an unseen government computer’s permission to work. Moreover, EEVS will create a new market for fraudulent documentation and drive unauthorized workers further into an underground labor market.

### A. EEVS Creates a No-work List

Mandatory EEVS will adversely affect American workers at an economically fragile time for our country. The Social Security Administration (SSA) Office of Inspector General estimates that 17.8 million (or 4.1 percent) of its records contain errors, and that 12.7 million (about 70 percent) of those records with errors belong to native-born U.S. citizens.<sup>1</sup> According to the Cato Institute, a mandatory EEVS would result in 11,000 workers per day, or just over 25 people per congressional district per working day, who would receive a tentative non-confirmation (TNC) throughout a given year (based on an average of 55 million new hires per year).<sup>2</sup>

It is a bedrock principle of employee rights in this country to be free from discrimination based on race, color, religion, sex, or national origin. But EEVS database errors have a disproportionate impact on foreign-born U.S. citizens, with almost 10 percent initially being told that they are not authorized to work (versus 0.1 percent for native-born U.S. citizens).<sup>3</sup> From October 2006 to March 2007, about 3,200 foreign-born U.S. citizens were initially erroneously disqualified from working by EEVS.<sup>4</sup> This is a major concern because disparate impacts on certain U.S. workers may violate Title VII of the Civil Rights Act of 1964 (Title VII).

Myriad reasons account for errors in the SSA database, including clerical errors made by agency employees unbeknownst to employers or workers, and an employer’s or a worker’s own errors when completing government forms. Errors are more likely for a worker who has a hyphenated name or different surname when applying for a Social Security card than when he or she did when applying for a job. Moreover, an error may

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<sup>1</sup> See Office of Inspector Gen., Soc. Sec. Admin, *Congressional Response Report: Accuracy of the Social Security Administration's Numident File, A-08-06-26100*, Appendix D (Dec. 18, 2006) [“Inspector General Report on SSA Database”], available at <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf>.

<sup>2</sup> Jim Harper, *Electronic Employment Eligibility Verification: Frank Kafka’s Solution to Illegal Immigration*, Cato Institute, March 5, 2008, available at <http://www.cato.org/pubs/pas/pa-612.pdf>.

<sup>3</sup> See FINDINGS OF THE WEB BASIC PILOT EVALUATION (hereinafter “FINDINGS”) (Westat, Sept. 2007),

[www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf](http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf), at xxi, emphasis added. U.S. Citizenship and Immigration Services’ webpage, “Findings of the Web-Based Basic Pilot Evaluation,” which links to related files, is at

[www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aR CRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aR CRD).

<sup>4</sup> *Id.* at 50.

stem from a name change due to marriage, divorce, or naturalization. Finally, an error may come from the misuse of an SSN by an unauthorized worker.

In December of last year, Abel Pacheco of Arizona, a naturalized U.S. citizen for eight years, lost his job as a truck driver in a troubled economy. He applied with eight different companies, but not one called him back. Finally, he found work but his new employer notified him that it had received a tentative non-confirmation of his employment eligibility. This turned out to be due to an error in the SSA database. However, by the time Pacheco cleared up the problem by presenting his citizenship certificate at his local SSA office, the few weeks without an income had forced his family into financial trouble.<sup>5</sup>

Juan Carlos Ochoa, also a naturalized U.S. citizen from Arizona, is a car salesman who quit his job at the end of last year and took another at a Dodge dealership two months later. Unfortunately for Ochoa, a father of two, days after starting his new job his employer informed him that E-Verify classified him as a possible illegal immigrant. Having only days to convince SSA that he was a U.S. citizen, he took his U.S. passport, Social Security card, drivers license and Arizona voter identification card to the local SSA office. He was then informed he would have to request new paperwork from DHS, which may take 10 months.<sup>6</sup> In the meantime, Mr. Ochoa, a U.S. citizen will be unable to find legitimate work and support his family.

## **B. EEVS Increases a Market For Fraudulent Documents**

In 1986, when Congress adopted employer sanctions as a means to keep unauthorized workers from being hired, MALDEF predicted that document fraud would render sanctions ineffective. We were correct. Fraudulent use of valid documents will similarly undermine the EEVS system contemplated by the pending legislation.

Even if EEVS may appear effective at ending the employment of individuals who receive final non-confirmations, it may simply drive many employers and workers to rely upon fraudulent documents when SSN combinations do match in order to achieve the appearance of a valid authorized worker status. The foreseeable consequence is a significant increase in the demand for valid identities, which can only be met by an expanded market for identity theft. The social cost of this effect will be hardest upon citizens, work-authorized immigrants and their minor children.

The cost of a fraudulent document market goes beyond the financial cost. A victim of identity theft, in a mandatory EEVS scenario, would stand falsely accused of violating immigration law and committing identity fraud each time a worker seeks employment.

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<sup>5</sup> Christina Boomer, "Some Valley Workers Having Trouble with E-Verify," KPNX-TV, Phoenix, Mar. 24, 2008, [http://www.abc15.com/news/local/story.aspx?content\\_id=07E5D455-D95B-4FBB-BE43-2D1EE7318972&gsa=true](http://www.abc15.com/news/local/story.aspx?content_id=07E5D455-D95B-4FBB-BE43-2D1EE7318972&gsa=true)

<sup>6</sup>Nicholas Riccardi, "Arizona slams door on illegal immigrants: Some citizens have been bruised, too, as the state cracks down." Los Angeles Times, April 5, 2008, <http://www.latimes.com/news/nationworld/nation/la-na-arizimmig5apr05.0.6857522.story?page=1>

While this will have overwhelming financial obstacles for those U.S. citizens unable to work, the results could be even more devastating for work authorized immigrants. To remain in the United States and be eligible for various immigration related benefits, immigrants must comply with a number of document requirements under the Immigration and Nationality Act (INA).<sup>7</sup> Under the INA,<sup>8</sup> a person who uses, acquires, or produces fraudulent documents for immigration-related purposes may be subjected to civil penalties and denied certain immigration benefits, including the ability to enter or remain in the United States. Further, certain fraudulent actions may carry criminal penalties under both the INA and the United States Criminal Code. Thus, if a work-authorized immigrant becomes a victim of identity theft, he or she may be wrongly subject to civil penalties and deportation, irrespective of any involvement or culpability in the misuse and theft of his or her valid documents by another person far away.

U.S. citizens and work-authorized immigrants will bear the burden of proving their identities to the government's satisfaction and it is they, not unauthorized workers, who will suffer the most. The financial impact will be on their ability to receive income through work and they could face threats of eviction, repossession, or default.

### **C. EEVS Unintentionally Endorses the Underground Economy**

The real beneficiaries of EEVS are unscrupulous employers. Under EEVS employers are intended to be deprived of significant numbers of unauthorized individuals currently in their employ or in the workforce. Employment verification, properly done, must be combined with a process to adjust the status of existing workers in order to ameliorate the economic impact costs of verification. This impact will not be felt by unscrupulous employers. They will continue to employ unauthorized workers knowing they are more susceptible than ever before to exploitation and intimidation, and they are effectively bereft of labor organizing rights or the ability to complain about illegally dangerous worksite conditions. Their authorized co-workers and companies facing unfair competition of unscrupulous employers are also harmed in this situation.

Unscrupulous employers will also be free to avoid payroll taxes, unemployment and workers compensation and other withholding requirements. The Congressional Budget Office and the Joint Committee on Taxation recently estimated that a bill requiring employers to use the government's E-Verify system would reduce tax collections by about \$770 million per year once fully implemented, because unauthorized workers would enter the underground economy.<sup>9</sup>

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<sup>7</sup> 8 C.F.R. §§ 270.1, 1270.1.

<sup>8</sup> 8 U.S.C. 1324c.

<sup>9</sup> The total revenue loss of \$17.3 billion is estimated over the FY 2009-18 period, and losses during the start-up phase are considerably lower. "Th[is] decrease largely reflects the judgment that mandatory verification of employment eligibility through the E-Verify system would result in an increase in the number of undocumented workers being paid outside the tax system." See Congressional Budget Office, *H.R. 4088, Secure America Through Verification and Enforcement Act of 2007; Cost Estimate for the Bill as Introduced on November 6, 2007* (April 4, 2008). The CBO/JCT cost estimate accounts only for federal revenue losses; private sector costs and costs to workers are not included.

## II. EEVS Increases Verification-Related Discrimination

EEVS fails to prevent discrimination or address the increased levels of discrimination it causes. Moreover, it lacks provisions to safeguard employees from employer abuse of the system. There is a significant risk that more employers will opt to play it “safe” and fire workers who may look or sound “illegal” regardless of citizenship or work-authorization status.

A 2007 assessment of Basic Pilot/E-Verify concluded that the rate of noncompliance with the system is “substantial”<sup>10</sup> and that employers engaged in prohibited employment practices including pre-employment screening, adverse employment action based on a tentative non-confirmation, and failure to inform workers of their rights under the program.<sup>11</sup> Abel Pacheco, the Arizona truck driver, is a prime example of someone who was prescreened and never informed of the adverse results from E-verify.

Mandatory EEVS without protection for workers is a disastrous proposition. Currently, the U.S. Department of Justice Office of Special Counsel (OSC) for Immigration Related Unfair Employment Practices does not have the necessary resources to make the public aware of what is and what is not permissible under EEVS. During fiscal year 2006, OSC received 346 charges of alleged discrimination, handling approximately 7,500 calls, and resolving 85 investigations. For OSC, the prospect of a mandatory EEVS, educating the more than 7.5 million American businesses and their workers of their rights and obligations, will be overwhelming without the necessary resources. If only 1 percent of these employers call OSC about just one hiring question during the year, it will mean a ten-fold increase in OSC work.

In 1997, a month after I was confirmed by the Senate to a four-year term as Special Counsel for Immigration Related Unfair Employment Practices, Immigration and Naturalization Service officials took me to Chicago to observe newly trained employers using one of the Basic Pilot systems. As you know, the OSC is the federal government's only office devoted solely to immigrant workplace rights. OSC has the dual role of educating employers about their responsibilities under IRCA not to discriminate against qualified U.S. workers and enforcing the anti-discrimination provisions.

Each recently trained employer whose premises I visited with INS got it wrong. In different but critical ways, their application of the computer verification system failed to follow the training or the law. One employer used it only for foreign-born workers. Another employer failed to tell employees who received a tentative non-conformation that they could address discrepancies with SSA or INS. The third employer told us that

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<sup>10</sup> FINDINGS OF THE WEB BASIC PILOT EVALUATION (hereinafter “FINDINGS”) (Westat, Sept. 2007), [www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf](http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf), at xxi, emphasis added. U.S. Citizenship and Immigration Services’ webpage, “Findings of the Web-Based Basic Pilot Evaluation,” which links to related files, is at [www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD).

<sup>11</sup> See *id.* at xxiii.

they used it only on those employees who "needed" it. When I inquired how he made that determination, the employer stated that it was for employees who had an accent or looked "illegal."

Simply stated, even if the training is understandable and actually understood, the federal government is hard pressed to ensure that millions of employers -- even those who want to do the right thing -- will do it correctly. Similarly, employers will have difficulty when there is a turn over in their human resources staff to an individual who is not trained. And there is very little done to ensure that an employee may not utilize the system selectively or overuse it to check other people's status. Expanding EEVS prematurely, without proper training and monitoring of employers, educating the working public, or strengthening the federal government's capacity to respond to problems and enforce anti-discrimination protections will cause undue hardship on U.S. citizens and legally authorized workers and do nothing to reduce unauthorized hiring.

### **III. EEVS Will Burden Employers**

Because EEVS is not well understood by the nation's employers, it will significantly disrupt our nation economy. Where it has been mandated it has been controversial and disastrous. In Arizona, where E-Verify is mandatory under state law, only 15 percent of the 145,000 state employers (or 25,000) had registered for the program as of April 2008.<sup>12</sup> Factors driving the slow enrollment rates range from employer uncertainty of the legal requirements, the confusion of how to register for the program, the lack of resources such as high-speed internet, and the fact that there has been little need to hire new workers, and a slow-down in the economy and new hiring.<sup>13</sup>

Businesses and workers that have used the system have been openly critical. Ken Nagel, a restaurant owner in Phoenix, recently hired one of his daughters, processed her information with E-Verify and received a tentative non confirmation of her eligibility to work in the United States.<sup>14</sup> Mr. Nagel, whose 19-year-old daughter is a native-born U.S. citizen, "scoffs at the E-Verify system."<sup>15</sup>

American businesses, currently struggling in this economy, are faced with unforeseen burdens and problems because of the new law. Typical situations include lack of human resource personnel to navigate a program which is not user-friendly; upgrading operating costs to subscribe to high-speed internet; purchasing or upgrading computers suitable for

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<sup>12</sup> Lee Hockstader, "Arizona's Immigration Two-Step," THE WASHINGTON POST, Apr. 21, 2008, [www.washingtonpost.com/wpdyn/content/article/2008/04/20/AR2008042001755.html](http://www.washingtonpost.com/wpdyn/content/article/2008/04/20/AR2008042001755.html).

<sup>13</sup> Suzanne Manneh, "Immigration Laws Hit Business Hardest," NEW AMERICA MEDIA, Apr. 17, 2008, [http://news.ncmonline.com/news/view\\_article.html?article\\_id=7194bb75c4ba443895404378af87d028](http://news.ncmonline.com/news/view_article.html?article_id=7194bb75c4ba443895404378af87d028).

<sup>14</sup> Ronald J. Hansen, "Economy Serves Up Unhappy Meal: Worst Lull in 2 Decades is Hurting Valley Restaurateurs," ARIZONA REPUBLIC, Mar. 3, 2008, [www.azcentral.com/business/articles/0303biz-econrestaurants0303.html](http://www.azcentral.com/business/articles/0303biz-econrestaurants0303.html).

<sup>15</sup> *Id.*

the program; and being targeted by companies alleging to facilitate the process as their “designated agents” at high costs.<sup>16</sup>

#### **IV. Protecting Civil Liberties**

Both H.R. 4088 and H.R. 5515, require that DHS and SSA exchange confidential information, including social security numbers (SSN). It is alarming that the information-sharing provisions in H.R. 4088 are broad and do not require independent review, privacy protections, or notice to workers that their private information has been disclosed. H.R. 5515 is equally troubling as it would give DHS primary authority to determine whether SSA can credit work history to non-U.S. citizens. This however would require that SSA share its data with DHS regarding all persons who have been identified as non-citizens. H.R. 5515 would also create a privately run ID verification system to collect biometrics such as fingerprints and retinal scans.

Given the error rates previously mentioned, nearly 13 million U.S. citizens, and according to the SSA Office of Inspector General, at least 3.3 million persons whose data records contains incorrect citizenship status codes, would become vulnerable to this information sharing between DHS and SSA. Increasing the number of times data, including names, SSNs, date and place of birth, are exchanged will increase the opportunity for error and for opportunistic individuals seeking to steal valid identification by hacking into a system without adequate privacy protections.

#### **V. EEVS Will Harm SSA**

EEVS stands to cripple an SSA already overburdened under its current workload trying to carry out the purpose for which the agency was created. Last year, the president of the National Council of Social Security Management Associations, Inc. stated that a mandatory EEVS could not only “cripple SSA’s service capabilities,” it could also negate progress in addressing the backlog of applications for disability benefits.<sup>17</sup> SSA estimates that the average wait time for more than 750,000 cases awaiting a hearing decision on just disability cases is 499 days.<sup>18</sup> SSA field offices receive over 60 million phone calls each year, over half of the callers receive busy signals.<sup>19</sup> Mara Mayor, member of the Board of Directors for AARP, recently told this committee that SSA’s workload is about to increase with the “long-anticipated” retirement of the Baby Boom

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<sup>16</sup> “Digital Age Immigration,” QSRMagazine.com, Jan. 2008, [www.qsrmagazine.com/articles/tools/111/immigration-1.phtml](http://www.qsrmagazine.com/articles/tools/111/immigration-1.phtml); Michelle V. Rafter, “A Business Sparked by the Online I-9,” Workforce Management Online, April 2008, [www.workforce.com/section/10/feature/25/48/46/index.html](http://www.workforce.com/section/10/feature/25/48/46/index.html); “Contractors & Builders Takes the Hassle Out of E-Verify Legislation,” PRWeb, Apr. 8, 2008, [www.prweb.com/releases/2008/04/prweb840024.htm](http://www.prweb.com/releases/2008/04/prweb840024.htm).

<sup>17</sup> Richard Warsinsky, Testimony before the U.S. Senate Committee on Finance: Funding Social Security’s Administrative Costs, “Will the Budget Meet the Mission?” National Council of Social Security Management Associations, Inc., May 23, 2007, available at <http://finance.senate.gov/hearings/testimony/2007test/052307testrw.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

generation.<sup>20</sup> Director Mayor explained that that this “challenge...will add nearly 80 million new beneficiaries to the Social Security rolls – nearly 13 million in the next 10 years alone, and upwards of 16,000 per working day.”<sup>21</sup> And this does not even account for the backlog of disability cases. As of early 2008, there are 1.4 million people waiting for a decision on their initial claim or appeal for Social Security or Supplemental Security Income (SSI).<sup>22</sup>

A mandatory EEVS will have a devastating impact on the Social Security Administration, authorized U.S. workers, and SSA beneficiaries. Without SSA hiring new employees to take on the EEVS fallout and addressing the system errors, existing services will continue to deteriorate. As our nation finds itself in a recession and Americans are struggling to make ends meet, U.S. workers and SSA beneficiaries will have a difficult time understanding the government’s decision to further exacerbate their situation with a mandatory EEVS.

## **VI. Conclusion**

MALDEF strongly supports fixing this nation’s broken immigration system, but forcing a deeply flawed system upon an unstable economy is not the answer. A mandatory EEVS will not only impose unnecessary financial burdens upon U.S. businesses, it will lead to unnecessary and unlawful terminations when employers receive tentative non-confirmation reports from the government and they or their employees do not complete the process. Further, EEVS will result in discrimination by employers who choose to not comply with the program. Additionally, a mandatory EEVS will drive the undocumented into an underground labor force without legal protections which will affect all U.S. workers and harm businesses that comply with the law. Recognizing the dangers that come with a mandatory EEVS which will increase discrimination against Latinos and other national origin minorities, present burdensome costs to businesses, and threaten the jobs of nearly 13 million native-born U.S. citizens, Congress should reject the pending legislation.

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<sup>20</sup> Mara Mayor, Testimony before the U.S. House Committee on Ways and Means: The Social Security Administration’s Service to the Public, AARP, April 23, 2008, available at <http://waysandmeans.house.gov/media/pdf/110/MaraMayor.pdf>

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*