



# CENTER FOR IMMIGRATION STUDIES

October 17, 2022

Sharon Hageman  
Deputy Assistant Director, Office of Regulatory Affairs and Policy  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security  
500 12<sup>th</sup> Street NW  
Washington, DC 20536

**RE: DHS Docket No. ICEB-2021-0010, Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)**

Dear Deputy Assistant Director Hageman,

The Center for Immigration Studies (“CIS”) submits the following public comment to the U.S. Department of Homeland Security (“DHS”), U.S. Citizenship and Immigration Services (USCIS) in response to the request for comments on the Notice of Proposed Rulemaking (NPRM) titled *Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)*, as published in the Federal Register on August 18, 2022.

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

## **I. Background**

Section 274A(a)(1)(B) of the Immigration and Nationality Act (“INA”) requires employers to verify the employment authorization of any individual they hire to work in the United States, primarily by completing a Form I-9 and examining documents establishing both employment authorization and the identity of the individual. The implementing regulations at 8 C.F.R. § 274a.2(b)(1)(ii)(A), require that every employer “[p]hysically examine” and then attest that the documents appear to be genuine and relate to the person presenting them. If the individual submits a document that does not reasonably appear to be genuine or to relate to him or her, the employer must reject that document and may then request that the individual present other acceptable documents to satisfy the requirements of Form I-9.

Individuals must also attest, under penalty of perjury on the Form I-9, that they are citizens or nationals of the United States, aliens lawfully admitted for permanent residence, or aliens

authorized under the INA or by DHS to be hired, recruited, or referred for employment.<sup>1</sup> Employers are required to retain the completed Form I-9 and make it available for inspection by DHS or the U.S. Department of Labor (“DOL”) for up to three years after the date of the individual’s hiring or one year after the date the individual’s employment is terminated, whichever is later.<sup>2</sup>

DHS has issued this notice of proposed rulemaking (“NPRM”) to provide the Secretary of Homeland Security regulatory authority to impose alternate work authorization verification procedures.<sup>3</sup> The Department cites the “rapid shift to telework and remote work” in response to the COVID-19 pandemic as the primary incentive for proposing this rule, stating that the Department recognizes that many employers have maintained these flexibilities with their staff “by choice rather than necessity.”<sup>4</sup> As a result, DHS reports that it is exploring “making permanent some of the COVID-19 pandemic-related flexibilities” to examine employees’ identity and employment authorization documents for the Form I-9, as well as other alternatives.<sup>5</sup>

Since March 2020, DHS has permitted many employers to defer the physical examination of identity and work authorization documents by inspecting such documents remotely (e.g., over video or email) within three days of the employee’s first day of employment.<sup>6</sup> DHS initially applied this guidance only to employers and workplaces that were operating remotely, but permitted remote document verification for any recent hire who worked exclusively in a remote setting due to COVID-19-related precautions until they undertook non-remote employment on a regular, consistent, or predictable basis, regardless of whether the workplace was operating entirely remotely.<sup>7</sup> DHS extended these leniencies repeatedly through fiscal year (“FY”) 2022. The most recent announcement expires October 31, 2022.<sup>8</sup>

DHS clarifies that the rule does not create such alternatives but rather formalizes the authority for the Secretary of Homeland Security to “extend flexibilities, provide alternative options, or

---

<sup>1</sup> INA § 274A(b)(2).

<sup>2</sup> INA § 274A(b)(3).

<sup>3</sup> 87 Fed. Reg. 50786 (Aug. 18, 2022).

<sup>4</sup> 87 Fed. Reg. 50786, 50789 (Aug. 18, 2022).

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Customs and Immigration Enforcement, *DHS announces flexibility in requirements related to Form I-9 compliance (Effective Apr. 1, 2021)*, available at <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance> (last updated Mar. 31, 2021).

<sup>7</sup> See U.S. Customs and Immigration Enforcement, *ICE announces extension, new employee guidance to I-9 compliance flexibility (Apr. 1, 2021)*, available at <https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility>; U.S. Citizenship and Immigration Services, *DHS Extends Form I-9 Flexibility (Effective Mar. 31, 2021)*, available at <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-mar-31-2021>; U.S. Immigration and Customs Enforcement, *ICE announces extension, new employee guidance to I-9 compliance flexibility (Apr. 1, 2021)*, available at <https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility> (last visited Oct. 16, 2022).

<sup>8</sup> See U.S. Citizenship and Immigration Services, *DHS Extends Form I-9 Requirement Flexibility (Effective May 1, 2022)*, available at <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-may-1-2022> (last updated Apr. 25, 2022); U.S. Customs and Immigration Enforcement, *ICE announces extension to I-9 compliance flexibility*, available at <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3> (last updated Apr. 25, 2022).

conduct a pilot program to further evaluate an alternative procedure option.” Specifically, DHS has requested comments on (1) the all relevant options with respect to the population that will be eligible to use the (undisclosed) alternative verification procedures and (2) the costs, burdens, or benefits employers may incur completing verification or fraudulent document detection training.<sup>9</sup>

## **II. Remote Document Examination**

Most employers are not trained to verify the authenticity of government issued identification or work authorization documents, and must generally accept documents as valid when presented to them by recent hires. After the initial inspection, an incredibly few completed Form I-9’s are ever revisited for audit compliance. This means that the Form I-9 verification process is vulnerable to fraud and abuse by both unauthorized workers and unscrupulous employers intending to exploit unauthorized labor.

Remote document examination increases these vulnerabilities by increasing the likelihood that an employee will present fraudulent documents to support their claim of work authorization. Equally troubling, the remote verification flexibilities will give corrupt employers additional cover to knowingly hire unauthorized workers in violation of statute.

While CIS finds DHS’s resolve to reduce administrative burdens on businesses seeking to comply with federal law commendable, CIS does not believe that updates to the work authorization verification process should be made at the interests of American workers, including work-authorized aliens, the very people whom Congress passed Section 274A to protect. Consequently, CIS opposes any extension of remote work authorization verification until reforms are put in place to:

- **Require E-Verify participation;**
- **Limit acceptable forms of identification to documents DHS can authenticate;**
- **Resume and expand worksite enforcement efforts; and**
- **Rescind DHS’s overbroad non-enforcement policies.**

Finally, although CIS supports DHS’s proposal to provide work authorization verification and fraud-detection trainings requirement to employers, CIS emphasizes that training alone will be insufficient to ensure the integrity of the work verification process.

### **a. DHS Must Require Employers to Participate in E-Verify.**

CIS strongly recommends that DHS modernize the work authorization verification process by requiring all employers to use E-Verify. E-Verify is the best means available to verify employment authorization of newly hired employees because it virtually eliminates Social Security mismatches, improves wage and tax reporting accuracy, and helps employers maintain a legal workforce, thereby protecting U.S. workers from unfair employment competition.<sup>10</sup> At a minimum, CIS urges DHS to make E-Verify participation a prerequisite for any employer

---

<sup>9</sup> 87 Fed. Reg. 50786, 50790 (Aug. 18, 2022).

<sup>10</sup> See U.S. Department of Homeland Security, *What is E-Verify* (Dec. 2020), available at <https://www.e-verify.gov/about-e-verify/what-is-e-verify>.

seeking to use an alternative work authorization procedure, such as remote document inspection, authorized by this or any future rulemaking.

The E-Verify system provides employers with an easy, quick, and simple way to verify the work authorization of new hires.<sup>11</sup> Currently, federal rules only require government employers and contractors to use E-Verify to confirm that their employees are authorized to work in the United States.<sup>12</sup> As of July 2022, at least 19 states and numerous localities require all or some employers in their jurisdictions to use E-Verify, proving the feasibility of mass-implementation.<sup>13</sup>

The process requires employers to enter information provided by applicants on Form I-9.<sup>14</sup> Regardless of whether an employer participates in E-Verify, federal law already requires all employees to complete Form I-9 within three days of beginning employment, and employers are required to retain a copy of this document.<sup>15</sup> This information is entered into the E-Verify system through DHS's free online portal. The program then validates applicant details by comparing them against millions of federal and state government identification, social security, and immigration records. The system typically provides a result within five seconds.<sup>16</sup> The result will either say "employment authorized," or "DHS/SSA Tentative Nonconfirmation ("TNC")."

If a new employee receives a TNC, the individual can contest the result with the Social Security Administration ("SSA") or contact DHS within eight federal working days.<sup>17</sup> Employers who use the system properly are generally protected from civil and criminal penalties regarding the hiring of an unauthorized worker who has been screened through E-Verify.<sup>18</sup>

### **1. E-Verify participation benefits small and large businesses alike.**

E-Verify imposes negligible burdens on participating employers, and the cost of running a new employee through the program is miniscule.<sup>19</sup> The primary costs E-Verify imposes upon businesses are associated with the inputting of an employee's Form I-9 information into the web-based system, which typically takes minutes to complete.<sup>20</sup> Extra personnel should not be

---

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Citizenship and Immigration Services, *E-Verify and Form I-9* (Jul. 2022), available at <https://www.e-verify.gov/about-e-verify/what-is-e-verify/e-verify-and-form-i-9>.

<sup>13</sup> U.S. Citizenship and Immigration Services, *E-Verify: History and Milestones* (Jul. 2022), available at [https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/HistoryMilestones/E-Verify\\_History\\_and\\_Milestones.pdf](https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/HistoryMilestones/E-Verify_History_and_Milestones.pdf).

<sup>14</sup> U.S. Citizenship and Immigration Services, *E-Verify OVERVIEW* (Apr. 2018), available at <https://www.e-verify.gov/employees/e-verify-overview>.

<sup>15</sup> INA § 247A(a)(1)(B).

<sup>16</sup> U.S. Citizenship and Immigration Services, *E-Verify OVERVIEW* (Jul. 2022), available at <https://www.e-verify.gov/employees/e-verify-overview>.

<sup>17</sup> U.S. Department of Homeland Security, *EMPLOYEE RIGHTS AND RESPONSIBILITIES* (Apr. 2018), available at <https://www.e-verify.gov/employees/employee-rights-and-responsibilities>.

<sup>18</sup> U.S. Citizenship and Immigration Services, *E-Verify User Manual for Employers* (Apr. 2018), available at [https://www.uscis.gov/sites/default/files/files/nativedocuments/E-Verify\\_Manual.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/E-Verify_Manual.pdf).

<sup>19</sup> U.S. Citizenship and Immigration Services, *E-Verify is Business Friendly* (Apr. 2018), available at <https://www.e-verify.gov/about-e-verify/what-is-e-verify/e-verify-is-business-friendly>.

<sup>20</sup> *Id.*

required to conduct this function because federal law already requires employers to conduct identity and work authorization verification regardless of participation in the program.<sup>21</sup>

By requiring employers to use E-Verify to confirm the work authorization of their new hires, employers with limited resources, like CIS, would be able to quickly and easily confirm that the documents provided by a new employee have been issued to them, have not been altered, and match government data systems. Since using the E-Verify system is free, the personnel costs associated with data-entry are the only burden it imposes on businesses. There is no risk of legal consequences for using E-Verify properly.

Importantly, E-Verify participation provides employers with a rebuttable presumption that the employer hasn't employed an unauthorized worker in violation of Section 274A of the INA.<sup>22</sup> When compared to the civil and criminal penalties an employer may face as a result of engaging in the knowing employment of unauthorized workers, document fraud, tax fraud, social security fraud, conspiracy, or other immigration and labor-related offenses, as well as operational costs businesses may incur by the sudden loss of needed employees, E-Verify provides participating employers with incomparable protection by allowing the government to verify that their workforce is authorized.

Furthermore, E-Verify is one of the federal government's highest rated programs. According to the 2020 American Customer Satisfaction Index ("ACSI"), E-Verify received a user satisfaction score of 87 out of 100.<sup>23</sup> In fact, the E-Verify approval rating far exceeds the national average ACSI score of just 74, which includes both public and private sector programs.<sup>24</sup> ACSI reports two percent of new enrollees and just 1.5% percent of existing E-Verify users contacted Technical Assistance in the past six months.<sup>25</sup> Additionally, the ACSI indicated that E-Verify received a score of 90 out of 100 for users' likelihood to recommend, 93 out of 100 for user confidence in accuracy, and 95 out of 100 for continued user participation.<sup>26</sup>

## **2. E-Verify has a strong track record. Data shows that participation will not impose a significant burden on most employers or employees.**

CIS strongly disagrees with commenters who argue that errors caused by E-Verify will harm employers or employees. Data reported by the USCIS reveals a 99.87 percent accuracy rate for the program.<sup>27</sup> Of the 42.5 million cases E-Verify processed in FY 2021, 98.48 percent of employees run through E-Verify were automatically confirmed as authorized to work either instantly or within 24 hours, requiring no further employee or employer action. E-Verify properly determined 1.39 percent of employees to not be authorized to work in the United

---

<sup>21</sup> INA § 274a.

<sup>22</sup> U.S. Citizenship and Immigration Services, *Why Should I participate in E-Verify* (Apr. 2014), available at <https://www.e-verify.gov/faq/before-you-enroll/why-should-my-company-participate-in-e-verify>.

<sup>23</sup> Annual Customer Satisfaction Survey 2019, *E-Verify, Final Report* (Jun. 2020), available at <https://www.e-verify.gov/sites/default/files/everify/data/EVerifyCustomerSatisfactionSurvey2019.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> U.S. Department of Homeland Security, *E-Verify Performance* (Jan. 2021), available at <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance>.

States.<sup>28</sup> Of the 1.39 percent determined by the system to not be authorized to work, USCIS reported just 1.08 percent of cases as “unresolved” either because the employer closed the case as “self-terminated” or because the case was awaiting further action by either the employer or employee at the end of FY 2021.

Concerns that E-Verify will erroneously report authorized workers as ineligible are unfounded. USCIS reported that in FY 2021, E-Verify flagged only 1.52 percent of cases with a TNC.<sup>29</sup> Of the 1.52 percent of cases not initially confirmed as work authorized, just 0.13 percent of these cases were determined to be inaccurately flagged and were later confirmed as work authorized after contesting the mismatch and resubmitting documentation to support their claim.<sup>30</sup>

Given the program’s remarkably high accuracy rate, CIS argues that the alleged cost and inconvenience associated with E-Verify errors are too low to be reasonably calculated. A brief period of uncertainty for a very small percentage of cases that are initially flagged as TNC is, for many businesses, a relatively small price to pay to ensure that they are complying with federal law and not subjecting the business to serious civil and criminal liability.

If DHS decides to implement an option for remote document examination conditioned on the use of E-Verify to onboard workforces, any employer who intends to employ a legal workforce would benefit from the update. This includes employers who intend to hire staff to work remotely or staff who are otherwise unable to physically report to a business location. Given the negligible administrative costs associated with E-Verify use and the benefits associated with participation, it is difficult to imagine an employer objecting to a mandate unless an employer purposefully violates or intends to violate Section 274A of the INA, or to otherwise discriminate against applicants on the basis of their citizenship or immigration status in violation of Section 274B of the INA. Mandatory E-Verify participation is a common sense method to ensure employers comply with federal law and are protected against document and identity fraud.

**b. DHS Should Only Allow Employers to Inspect Identification Documents that DHS Can Authenticate.**

In addition to requiring employers to participate in E-Verify, DHS should strengthen the work authorization verification process by only allowing employers to accept driver’s licenses and identification cards from states that provide DHS access to data sources that will allow them to validate the authenticity of the document. Making such a policy change will encourage more states to join the Records and Information from DMVs for E-Verify (“RIDE”) program or otherwise provide DHS access to their driver’s license and identification card data sources for verification purposes. RIDE helps to reduce document and employment eligibility verification

---

<sup>28</sup> *Id.*

<sup>29</sup> U.S. Department of Homeland Security, *E-Verify Performance* (Jul. 2021), available at <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance>.

<sup>30</sup> *Id.*

fraud in E-Verify.<sup>31</sup> Expanding participation would ensure DHS is able to weed out, penalize, and discourage document fraud and identity theft through E-Verify use.

### **c. DHS Must Resume and Expand Worksite Enforcement Efforts.**

CIS strongly urges DHS to resume widespread worksite enforcement audits to ensure compliance with employers' federal immigration and labor laws and to rescind its October 12, 2021 policy memorandum, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*.<sup>32</sup> Additionally, DHS should expand its collaboration with SSA and the Internal Revenue Service ("IRS") to prioritize enforcement targets on employers who are most likely to be knowingly employing unauthorized workers. Widespread E-Verify use and vigorous worksite enforcement are two of the most effective tools DHS has to execute federal law, improve labor conditions in the United States, and address the "root causes" of illegal immigration into the country.

Eradicating unauthorized employment is essential to enforcing both immigration and labor laws as a whole. As civil-rights icon Barbara Jordan — chairwoman of the Clinton administration's Commission on Immigration Reform — explained in 1994, "Employment continues to be the principal magnet attracting illegal aliens to this country. As long as U.S. businesses benefit from the hiring of unauthorized workers, control of unlawful immigration will be impossible."<sup>33</sup> For this reason, the Commission concluded "that both employer sanctions and enhanced labor standards enforcement are essential components of a strategy to reduce the job magnet."<sup>34</sup> Additionally, by reducing incentives to enter or remain in the United States illegally, effective worksite enforcement likewise allows U.S. Immigration and Customs Enforcement ("ICE") to focus its resources on its stated enforcement priorities: criminal aliens and aliens who pose threats to border or national security.<sup>35</sup>

DHS's minimal worksite enforcement, dictated by ICE's October 12, 2021 policy memorandum, however, does nothing but embolden corrupt employers to hire unauthorized workers and degrade working conditions in the United States. As many American workers understand too well, employers who hire unauthorized workers often violate other employment and labor laws, including those related to antidiscrimination, health, and safety. DHS itself acknowledged in its October 12 memorandum that, "These employers engage in illegal acts ranging from the

---

<sup>31</sup> U.S. Department of Homeland Security, *Records and Information from DMVs for E-Verify (RIDE) program*, available at [https://www.e-verify.gov/sites/default/files/everify/RIDE\\_Tips.pdf](https://www.e-verify.gov/sites/default/files/everify/RIDE_Tips.pdf).

<sup>32</sup> Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (October 12, 2021).

<sup>33</sup> Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform Before the U.S. Senate Committee on the Judiciary Subcommittee on Immigration and Refugee Affairs (Aug. 3, 1994) available at [https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan\\_1994\\_Aug.%203\\_0.pdf](https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan_1994_Aug.%203_0.pdf) (last visited Oct. 16, 2022).

<sup>34</sup> *Id.*

<sup>35</sup> Memorandum for Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021).

payment of substandard wages to imposing unsafe working conditions and facilitating human trafficking and child exploitation. Their culpability compels the intense focus of our enforcement resources.”<sup>36</sup> Equally important, unchecked unauthorized employment causes substantial economic hardship to U.S. workers who may face unfair labor competition, wage suppression, and reduced working conditions as a result of contending against an illegal and unregulated labor market.

In order to expand worksite enforcement operations, CIS recommends that, in the absence of mandatory E-Verify requirements, DHS enter into memoranda of agreements with the SSA and IRS to increase information sharing among the agencies for the purpose of enforcing immigration and employment laws. While DHS already possesses information about those aliens who are authorized to work in the United States, both the SSA and IRS possess information highlighting individuals who are likely to have committed identity theft in order to obtain a job unlawfully in the United States.

For example, the SSA has a long-held practice of sending “no-match” letters to employers that indicate possible instances of employment-related identity theft.<sup>37</sup> A no-match letter is a “written notice issued by the SSA to an employer, usually in response to an employee wage report, advising that the name or SSN reported by the employer for one or more employees does not ‘match’ a name or SSN combination reflected in SSA’s records.”<sup>38</sup> Additionally, the Treasury Department’s Inspector General for Tax Administration reported in 2020 that IRS is aware of hundreds of thousands of instances of employment-related identity fraud, where an individual has used another person’s SSN for the purpose of obtaining employment.<sup>39</sup>

DHS should obtain access to this information to effectively expand worksite enforcement. By entering into appropriate information-sharing agreements with these agencies, DHS would be able to apply common-sense priorities and focus ICE resources on employers with high rates of mismatches or known-cases of identity theft.

Worksite enforcement is essential to the investigation, charging, and prosecution of employers in the United States who have ignored the law and hired aliens who are not authorized to work in this country, to the detriment of both U.S. citizens and work-authorized aliens. Accordingly, CIS strongly advises DHS to rescind its October 12, 2021 policy, collaborate with appropriate federal agencies, and robustly expand its worksite audit efforts.

---

<sup>36</sup> *Id.*

<sup>37</sup> SSA began sending employers “no-match” letters in 1993. The practice was terminated by the Obama administration in 2012, but restarted by the Trump administration in 2019.

<sup>38</sup> U.S. Department of Justice, *FREQUENTLY ASKED QUESTIONS ABOUT NAME/SOCIAL SECURITY “NO-MATCHES”*, available at [www.justice.gov/sites/default/files/crt/legacy/2010/12/29/FAQs.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2010/12/29/FAQs.pdf) (last visited Oct. 16, 2022).

<sup>39</sup> Treasury Inspector General for Tax Administration, *Taxpayer First Act: Implementation of Identity Theft Victim Assistance Provisions, Reference Number: 2020-45-070* (Sept. 10, 2020), available at <https://www.treasury.gov/tigta/auditreports/2020reports/202045070fr.pdf>.



#### **d. DHS Must Rescind its Overbroad Non-Enforcement Policies.**

CIS urges DHS to rescind its October 27, 2021 policy memorandum, *Guidelines for Enforcement Actions in or Near Protected Areas*.<sup>40</sup> As a result of this overbroad policy, ICE officers are fundamentally barred from engaging in any enforcement action in the interior of the country in places that are located in or near locations that DHS has identified as “protected places.” Such places include recreation centers, schools, places of worship or religious study, locations that offers vaccinations (such as pharmacies), community-based organizations, any locations that host weddings (such as a civic center, hotel, or park), any locations with a school bus stop, any places “where children gather,” and many more sites that are also common places of employment.<sup>41</sup> Under this policy, officers are also prohibited from enforcing the law anywhere “near” these locations, an imprecise standard that has “no bright-line definition.”<sup>42</sup>

As explained above, robust worksite enforcement efforts are necessary to ensure the integrity of labor and immigration laws, and promote a fair and healthy domestic labor market. Any robust worksite enforcement endeavor cannot be effective so long as DHS continues to broadly prohibit ICE officers from engaging in enforcement actions. Overly narrow DHS guidelines already drastically limit which aliens can be subject to immigration enforcement,<sup>43</sup> but DHS’s October 27, 2021 policy further undermines ICE’s mission by severely limiting where officers may even conduct enforcement actions or surveillance. DHS cannot accomplish its enforcement mission when it has defined “protected areas” so broadly as to include large portions of U.S. communities, including businesses and locations that employ millions of people in the United States.

#### **e. DHS Should Offer Verification and Fraud-Detection Trainings to Employers.**

CIS generally supports providing work authorization verification and fraud-detection training to employers, and believes that such training requirement would benefit both employers and workers. Such training would likely bolster employers’ confidence in adjusting to an online verification system, increase employers’ competence in identifying fraud, and reduce discrimination, although it may also increase the administrative costs associated with the verification process. Nevertheless, the benefits to both law-abiding employers and workers far outweigh the negligible administrative costs DHS-offered training would impose.

The availability of DHS-provided training, however, should not be the primary safeguard against identity or employment authorization fraud in exchange for more lenient verification policies. CIS reiterates that expanding the E-Verify mandate is the most efficient and cost-effective way

---

<sup>40</sup> Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021).

to reduce identity and employment fraud, and must be a part of any reform intended to modernize the Form I-9 process.

### **III. DHS Must Engage in “Notice-and-Comment Rulemaking” Before Modifying Work Authorization Verification Requirements.**

DHS may not implement changes to the work authorization verification requirements simply by virtue of the regulatory changes proposed by this NPRM.<sup>44</sup> DHS must first provide the public with adequate notice and opportunity to comment prior to creating any alternative work authorization verification procedure.

The Administrative Procedures Act (“APA”) requires agencies to engage in “notice and comment rulemaking” when promulgating legislative rules, or regulations that have the “force or effect of law.”<sup>45</sup> A rule, broadly defined to include any “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy....” is considered to have the “force or effect of law” when it falls within the scope of authority delegated to the agency by Congress and imposes new duties on the public.<sup>46</sup>

Any reform to the work authorization verification process that the Secretary of Homeland Security could impose under proposed 8 C.F.R. § 274a.2(b)(1)(ix) would directly affect how U.S. employers must comply with statutory verification requirements. Such changes may require employers to alter existing procedures or extend additional resources to the hiring, verification, or reverification of its workforce. Any such change, therefore, should be considered as legislative and subject to the APA’s notice-and-comment requirements.

Within this NPRM, however, DHS has only hinted at potential changes that could be imposed, and has not provided the public a meaningful opportunity to consider any reforms. Accordingly, DHS must provide the public with adequate notice of any alternative procedure authorized by the Secretary.<sup>47</sup> DHS must also provide the public with a meaningful opportunity to comment on the proposed change, consistent with all APA requirements.<sup>48</sup> Without knowledge of the forthcoming updates to the work authorization verification process, the public is not equipped to properly assess and consider a reform to the process in which the public must participate.

### **IV. Conclusion**

CIS urges the Department of Homeland Security to mandate E-Verify use for all employers that must comply with Form I-9 work authorization requirements, or at least require E-Verify participation for those who seek to utilize any remote document examination protocols that DHS may implement as a result of this proposed regulatory change. Mandating E-Verify use and resuming widespread worksite enforcement operations will strengthen the integrity of the work

---

<sup>44</sup> See proposed 8 C.F.R. §274a.2.

<sup>45</sup> See 5 U.S.C. § 553.

<sup>46</sup> 5 U.S.C. § 551(4); See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, (D.C. Cir. 2000); *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (“Legislative rules have the ‘force and effect of law’ and may be promulgated only after public notice and comment.”).

<sup>47</sup> 5 U.S.C. § 553.

<sup>48</sup> *Id.* at § 553 (b)-(c).

verification process and eliminate the primary pull-factor for illegal immigration into the United States.

Additionally, CIS reminds DHS that it must comply with notice-and-comment-rulemaking procedures before it can amend work verification requirements. As written, the NPRM does not provide the public with adequate information to properly assess the impact of such potential changes.

Sincerely,

Elizabeth Jacobs  
Director of Regulatory Affairs and Policy  
Center for Immigration Studies