



# CENTER FOR IMMIGRATION STUDIES

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**RE: OMB Control Number 1653–NEW, DHS Docket No. ICEB–2023–0007, Agency Information Collection Activities; New Information Collection; Comment Request; Non-E-Verify Remote Document Examination Pilot 1**

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. Immigration and Customs Enforcement (“ICE”) in response to the request for comments on the notice titled *New Information Collection; Comment Request; Non-E-Verify Remote Document Examination Pilot 1*, as published in the Federal Register on August 3, 2023.

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 issued a final rule on July 25, 2023 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 reported 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>

The final rule takes a step in this direction by allowing employers who participate in good standing with E-Verify to use remote verification procedures similar to those DHS has permitted since March 2020 to allow 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 and finally terminated the policy on July, 31, 2023.<sup>8</sup>

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<sup>1</sup> INA § 274A(b)(2).

<sup>2</sup> INA § 274A(b)(3).

<sup>3</sup> See 88 Fed. Reg. 47990 (Jul. 25, 2023).

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

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

<sup>6</sup> See 88 Fed. Reg. 47990 (Jul. 25, 2023); 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); U.S. Customs and Immigration Enforcement, *ICE updates Form I-9 requirement flexibility to grant employers more time to comply*

In addition to creating this alternative verification procedure for E-Verify participants, the final rule also codified the Secretary of Homeland Security’s authority’ to “extend flexibilities, provide alternative options, or conduct a pilot program to further evaluate an alternative procedure option.”

On August, 3, 2023, ICE issued a separate federal register notice to inform the public of its creation of a the Non-E-Verify Remote Document Examination Pilot 1 (“Pilot 1”).<sup>9</sup> Pilot 1 will allow certain employers who are not E-Verify participants to use another optional alternate procedure that permits remote document inspection of identity and work authorization documents of new employees, suggesting that DHS may, in the near or long term, return to permitting employers to confirm the identity and work authorization status of their new hires remotely, regardless of whether they use the free E-Verify program to verify the identity and work authorization status of their new employees.

## **II. Non-E-Verify Remote Document Examination Pilot 1**

ICE’s creation of Pilot 1 is premised on flawed assumptions about U.S. employers. Accordingly, CIS believes that it should not be used as a basis to support weakening work authorization verification protections that protect opportunities for both U.S. and foreign workers, as well as U.S. employers against identity and document fraud committed by potential new hires.

ICE stated it has created Pilot 1 to gather data on non-E-Verify employers’ experience utilizing remote work authorization procedures, similar to the those permitted by DHS throughout the COVID-19 pandemic.<sup>10</sup> Specifically, ICE explained that the pilot is intended to help the agency “identify the potential effects of [the] specific Pilot procedure on the security of the employment verification system. ICE will evaluate a range of potential effects on system integrity, (such as error or fraud rates and discrimination, between physical examination of the Form I–9 documents and remote examination pursuant to the Pilot procedure ... ).”<sup>11</sup>

While Pilot 1 is available to “most” employers, participation is limited to only those who affirmatively volunteer to participate, do **not** use E-Verify, and who employ 500 or fewer employees.<sup>12</sup> Participants will be required to examine and retain electronic copies that are clear and legible of all supporting documentation provided by individuals seeking to establish identity and employment authorization for the Form I–9 process. ICE also indicated that participating employers may be required to undertake fraudulent document detection and anti-discrimination training. The agency noted that it will request feedback and data from these employers no more than twice a year and may require a subset of the volunteers to undertake fraudulent document training.

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with requirements (May 4, 2023), available at <https://www.ice.gov/news/releases/ice-updates-form-i-9-requirement-flexibility-grant-employers-more-time-comply>.

<sup>9</sup> 88 Fed. Reg. 51338 (Aug. 3, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 51339.

<sup>12</sup> *Id.*

The creation of Pilot 1 suggests that DHS may be looking for data to justify a return to allowing widespread remote inspection of identity and work authorization documents, absent emergency conditions (such as a pandemic) to justify weakening the security of the system and even for those employers who choose to not use the free and easy to use online E-Verify program to confirm the legitimacy of the documents presented to them. While Pilot 1 may allow ICE to gather data on rates of earnest employers' ability to detect fraud, DHS must be aware that no employer who intends to or currently engages in unlawful employment practices will not sign up to participate in Pilot 1. Dishonest or criminal employers would only be subjecting themselves to civil and criminal liability by allowing ICE access to their business's documents and data.

Additionally, widespread remote document verification policies will weaken the integrity of the Form I-9 process as a whole. While such procedures may alleviate certain logistical challenges for employers who have offsite workers and offer some financial benefits, most employers are not trained to verify the authenticity of government-issued identification or work authorization documents. Moreover, after the initial inspection, incredibly few completed work authorization documents are ever revisited for audit compliance. This means that even the standard 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.

In its July 25, 2023 final rule, DHS itself recognized that “physically examining identity and employment authorization documents offers important security benefits to help evaluate whether the document reasonably appears to be valid and to relate to the person who presents it.”<sup>13</sup> The agency further explained, “Employers who physically examine identity and employment authorization documents can touch and more clearly see identification security features like holograms and microprinting, as well as the card stock on which certain documents are printed. Remote document examination, by itself does not provide this level of detailed inspection.”<sup>14</sup>

As a result, Pilot 1 will be entirely unhelpful in determining whether the more lenient procedures will be easy to exploit by employers who do intend (whether recklessly or knowingly) to hire unauthorized workers, and who may have a significant financial interest to do so. Accordingly, the data collected from participants will never provide an accurate sample of reality. DHS must not ignore Pilot 1's flaws and nevertheless use the program to justify broad implementation of a less-secure procedures permanently, especially without the existence of temporary, emergency conditions to justify the unnecessarily lenient procedure.

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<sup>13</sup> 88 Fed. Reg. 47990, 47995 (Jul. 25, 2023).

<sup>14</sup> *Id.*

### **III. Public Notice Requirements and Request for More Data**

DHS may not implement a new or alternate work authorization verification procedure policy without first engaging in “notice and comment” procedures to provide the public an opportunity to evaluate such policy. DHS must also make public the results of the fraud, error, and noncompliance rates of employers who participate in Pilot 1 in advance of any potential policy change or proposal, acknowledging, however, to provide the public an opportunity to consider and analyze the government’s methods and any data it has consider to justify a proposal.

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>15</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>16</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.

Accordingly, DHS must provide the public with adequate notice of any new alternative procedure authorized by the Secretary prior to its implementation, as well as all relevant data supporting DHS’s proposal.<sup>17</sup> DHS must also provide the public with a meaningful opportunity to comment on the proposed change, consistent with all APA requirements.<sup>18</sup> Without knowledge of the forthcoming updates to the work authorization verification process and that data DHS is considering to make these decisions, the public is not equipped to properly assess and consider a reform to the process in which the public must participate.

Finally, CIS requests that DHS share with the public measures it will take to ensure the integrity of the Form I-9 process, aside from offering or requiring anti-discrimination and fraud detection training, and share data with the public on the number and types of enforcement actions the agency initiated against employers between March 2020 and July 31, 2023 related to the employment of unauthorized workers or improper Form I-9 practices.

### **IV. Stronger Alternatives DHS Should Implement**

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

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<sup>15</sup> See 5 U.S.C. § 553.

<sup>16</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>17</sup> 5 U.S.C. § 553.

<sup>18</sup> *Id.* at § 553 (b)-(c).

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;**
- **Rescind DHS's overbroad non-enforcement policies; and**
- **Strengthen the work authorization verification process with "G-Verify" reforms.**

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>19</sup> At a minimum, CIS urges DHS to make E-Verify participation a prerequisite for any employer 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>20</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

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<sup>19</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>.

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

States.<sup>21</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>22</sup>

The process requires employers to enter information provided by applicants on Form I-9.<sup>23</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>24</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>25</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>26</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>27</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>28</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>29</sup> Extra personnel should not be 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>30</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

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<sup>21</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>22</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>23</sup> U.S. Citizenship and Immigration Services, *E-Verify OVERVIEW* (Apr. 2018), available at <https://www.e-verify.gov/employees/e-verify-overview>.

<sup>24</sup> INA § 247A(a)(1)(B).

<sup>25</sup> U.S. Citizenship and Immigration Services, *E-Verify OVERVIEW* (Jul. 2022), available at <https://www.e-verify.gov/employees/e-verify-overview>.

<sup>26</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>27</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>28</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>29</sup> *Id.*

<sup>30</sup> INA § 274a.



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>31</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>32</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>33</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>34</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>35</sup>

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

There is also no data to support the notion that errors caused by E-Verify will meaningfully harm employers or employees. Data reported by the USCIS reveals a 99.87 percent accuracy rate for the program.<sup>36</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 States.<sup>37</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.

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<sup>31</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>32</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>33</sup> *Id.*

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

<sup>35</sup> *Id.*

<sup>36</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>.

<sup>37</sup> *Id.*



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>38</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>39</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 fraud in E-Verify.<sup>40</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*

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<sup>38</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>39</sup> *Id.*

<sup>40</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).

*Market, the Conditions of the American Worksite, and the Dignity of the Individual.*<sup>41</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 authorized 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>42</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>43</sup> Additionally, by reducing incentives to enter or remain in the United States illegally, effective worksite enforcement likewise allows ICE to focus its resources on its stated enforcement priorities: criminal aliens and aliens who pose threats to border or national security.<sup>44</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 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>45</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 strongly recommends that, in the absence of mandatory E-Verify requirements, DHS enter into agreements with the SSA and IRS

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<sup>41</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>42</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>43</sup> *Id.*

<sup>44</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).

<sup>45</sup> *Id.*

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>46</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>47</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>48</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.

#### **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>49</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

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<sup>46</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>47</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>48</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>.

<sup>49</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).

“where children gather,” and many more sites that are also common places of employment.<sup>50</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>51</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>52</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 to reduce identity and employment fraud, and must be a part of any reform intended to modernize the Form I-9 process.

**f. DHS Should Strengthen its Work Authorization Verification Policy to Combine the Form W-2, Form I-9, and E-Verify to One Online System.**

CIS strongly recommends that DHS enact a reform, sometimes referred to as “G-Verify” (for Government Verification), to simplify employers’ on-boarding obligations while simultaneously strengthening the integrity of the work authorization verification process.<sup>53</sup> A G-Verify-style

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

<sup>51</sup> *Id.*

<sup>52</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).

<sup>53</sup> Beck, Roy, NumbersUSA, *Will Biden pick up the 'I-9 verification' ball that Trump dropped?* (January 16, 2021), available at <https://www.numbersusa.org/blog/will-biden-pick-verification-ball-trump-wh-dropped>.

reform would impose a single online filing requirement through regulatory changes to replace employers' Form W-2, Form I-9, and E-Verify obligations.

By simply requiring employers to submit the same information already required for these forms to the government electronically, G-Verify would relieve employers of the need to store the paper copies of the forms for future audits and, like E-Verify, would provide employers with nearly instant confirmation that a new hire may lawfully be employed in the United States. G-Verify reforms could also deter identity theft and make unlawful employment schemes easier for DHS to uncover.

## **V. Conclusion**

While Pilot 1 may provide DHS with some data on earnest employers' ability to detect fraud, the program will be entirely unhelpful in determining whether remote document verification procedures will be easy to exploit by employers who *do* intend (whether recklessly or knowingly) to hire unauthorized workers, and who may have a significant financial interest to do so because no employer who intends to (knowingly or recklessly) hire unauthorized workers will sign up to participate in this Pilot. Accordingly, CIS emphasizes that the data collected from Pilot 1 participants will never provide an accurate sample of reality.

CIS also reminds DHS that it must comply with notice-and-comment-rulemaking procedures before it can amend work verification requirements if it intends to adopt Pilot 1 as an alternative optional procedure. As written, the notice does not provide the public with adequate information to properly assess the impact of such potential changes.

As an alternative to adopting Pilot 1, CIS urges DHS to mandate E-Verify use for all employers that must comply with Form I-9 work authorization requirements. Mandating E-Verify use and resuming widespread worksite enforcement operations will strengthen the integrity of the work verification process and eliminate the primary pull-factor for illegal immigration into the United States. Additionally, CIS recommends that DHS limit the forms of identification that are acceptable to produce during the Form I-9 process to only documents DHS can authenticate and modernize the verification process by implementing "G-Verify"-type reforms to combine the Form W-2, Form I-9 and E-Verify system to a single electronic system.

Sincerely,



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