



Statement of the U.S. Chamber of Commerce

ON: "HOW E-VERIFY WORKS AND HOW IT BENEFITS
AMERICAN EMPLOYERS AND WORKERS"

TO: HOUSE SUBCOMMITTEE ON IMMIGRATION AND BORDER
SECURITY OF THE COMMITTEE ON THE JUDICIARY

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The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Testimony before
House Subcommittee on Immigration and Border Security
United States House of Representatives Committee on the Judiciary
Wednesday, February 27, 2013

Hearing on
How E-Verify Works and How it Benefits American Employers and Workers

Statement of
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U.S. Chamber of Commerce

Good afternoon, Chairman Gowdy, Ranking Member Lofgren, and distinguished members of the Subcommittee. Thank you for inviting the U.S. Chamber of Commerce to testify on the subject of E-Verify and the nation's employment verification system, a key component of immigration reform. My name is Randy Johnson, and I am the Chamber's Senior Vice President for Labor, Immigration and Employee Benefits policy.

The Chamber has been asked to testify before House Subcommittees concerning the expansion of E-Verify on at least five prior occasions, during the period 2006 to 2009, once before your Subcommittee and also before Subcommittees of the Ways & Means Committee, Small Business Committee, and Government Oversight Committee. On each occasion, the Chamber, while supporting broad reforms to our legal immigration system, expressed opposition to the mandatory expansion of E-Verify without extensive improvements to the workability and reliability of what we saw as a burdensome system.

Today, however, after input from our members, the U.S. Chamber supports E-Verify and the primary purpose of my testimony today is to explain why and under what conditions.

WHY DOES THE CHAMBER SUPPORT E-VERIFY?

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region in the United States. There are currently about 6.05 million active businesses across the country.¹ Of these, about 1% employ more than 10,000 employees, yet these employers account for more than 27% of the American workforce.² On the other hand, about 60% of all businesses in America employ less than five workers, although these employers account for just 5% of employed persons in our economy.³ In total, about 98% of all U.S. businesses employ less than 100 staff, comprising nearly 50% of the workforce.⁴ The Chamber membership follows similar contours. Thus, the Chamber takes

¹ U.S. Economic Census.

² Id.

³ Id.

⁴ Id.

seriously its responsibility to represent the interests of both large and small employers and can only support an E-Verify mandate that addresses the concerns of both.

The U.S. Chamber created an E-Verify Task Force in January 2011 to assess the Chamber's position on whether or how E-Verify should be expanded. What we learned from our members was that the E-Verify system is greatly improved and, while not perfect, could be workable with continued technical improvements accompanied by specific, important legislative changes.

In particular, we learned the following in our assessment of E-Verify:

Technical Improvements and Costs

First and foremost, many of the technical issues underlying E-Verify have been or are in the process of being addressed. For example, Intel famously experienced Tentative Non Confirmation (TNC) rates in excess of 12%⁵, even though TNCs were eventually cleared. It is cumbersome for employers, as well as employees, when employees are incorrectly issued TNCs despite being authorized for employment. In the E-Verify system, the employer must notify the employee of the TNC but it is the employee who must take action to contest the TNC. It turned out that Intel had such a high rate of TNCs because E-Verify did not link to SEVIS (the Student and Exchange Visitor Information System) and Intel hires many trainees and interns including foreign students and exchange visitors. Once E-Verify was linked with SEVIS, this problem virtually disappeared and Intel's annual TNC rate is now between 2% and 3%.

Another example of responsive technical fixes within E-Verify relates to name mismatches, some of which can result in issuance of TNCs to authorized workers, a particular concern for American citizens and especially naturalized citizens. The Government Accountability Office has reported that about 10% of TNCs are for name mismatches and that nearly 76% of these name mismatches relate to American citizens.⁶ To begin to address this concern, E-Verify has now been linked to the Department of State's Passport Agency so that any American citizen with a passport can be verified even if there are name mismatches in other government records.

Some have claimed that expanding E-Verify nationwide would cost in excess of \$2.7 billion, most of which would be costs borne by small businesses,⁷ but our in-house economist has advised that economic commonsense suggests otherwise. The cost estimates appear to be based solely on the cost information in the 2008 Westat data.⁸ This information is dated, however, and with technical improvements to E-Verify and statutory changes, average costs would be expected to decline as the system improved and provided employers certainty. Significantly, the 2008 Westat study reveals that 76% of responding employers stated that the cost of using E-Verify was zero (\$0).⁹ Extrapolating to the full economy the costs that 24% of respondents identified

⁵ See Intel's April 2008 comments <http://www.weareoneamerica.org/sites/weareoneamerica.org/files/intel-ltr-re-e-verify.pdf> as part the FAR rulemaking imposing E-Verify on federal government contractors, consistent with the December 2009 Westat study evaluating E-Verify, "Findings of the E-Verify Program Evaluation," based on a review of April to June 2008 data.

⁶ December 2010, GAO study evaluating E-Verify, "Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain."

⁷ Bloomberg Government, Jason Arvelo, "Assessing E-Verify Costs for Employers and Taxpayers," (January 2011 Brief) and "Free E-Verify Hits Small Business Hardest" (January 27, 2011 article).

⁸ December 2009 Westat study evaluating E-Verify, "Findings of the E-Verify Program Evaluation," based on a review of April to June 2008 data

⁹ Id. at p. 184.

has limited value. Lastly, the \$2.7 billion estimate incorrectly applies data from the Bureau of Labor Statistics' Job Opening and Labor Turnover Survey (JOLTS) to calculate the expected annual number of new hires, leading to overstatement of costs. It has been variously estimated by economists that JOLTS amplifies hire numbers by at least 25% because it includes internal promotions and transfers between establishments that are part of the same employing business.

Preemption

The patchwork of state laws and policies that relate to employment verification and E-Verify is a hindrance to the business community, which always places a premium on the certainty of governing rules. This concern was not only from large multistate employers but also expressed by small employers in part because many small employers do business in more than one jurisdiction. In fact, the number one concern expressed by Chamber members regarding expansion of E-Verify was to ensure there was a uniform national policy and that no states or localities had companion laws or their own enforcement. As part of the Task Force conversations in 2011, the Chamber reviewed state laws relating to employment verification and E-Verify and found at that time: 14 states mandated the use of E-Verify for private employers, 2 states made E-Verify optional, 21 states required E-Verify be used by state government contractors, 4 states imposed separate obligations on independent contractors, 13 states imposed sanctions relating to the employment verification obligation, and 11 states had business licensing sanctions.¹⁰

Reverification

Chamber members were adamant that any expansion of E-Verify could not include running E-Verify queries on each employer's current workforce – since each E-Verify query requires updated I-9 data. In addition to being burdensome, such “reverification” seems unnecessary since employers have already gone through a process required under law (Form I-9) to verify employment authorization, and such reverification presents particular burdens for federal contractors, who have already completed a process under the Federal Acquisition Regulation relating to some but not all current workers. Reverification of the 143 million Americans currently working is a stumbling block to every employer in America, except those that work solely without permanent staff like temporary staffing agencies and seasonal businesses, among others.

Reverification of current workforce will largely be unnecessary because over time most workers will be verified in E-Verify at some point as new hires. There are approximately 60 million new hires annually in the U.S. economy and while that does not capture all workers, and many of the new hires annually are the same workers turning over to new jobs, there is a relatively small percentage of workers that ultimately won't be verified through E-Verify after several years, so after a few years a large majority of the workforce being confirmed through E-Verify.

Safe Harbors

¹⁰ For current and updated information about state action regarding E-Verify, the National Conference of State Legislators <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> follows the issue closely.

Much of the conversation of our members in assessing E-Verify related to the need for safe harbors. It was and remains very important to our members that businesses using subcontractors are not liable for their subcontractors, as under current law, unless the employer knew about the subcontractors' actions. A general contractor is often precluded from taking steps to obtain more knowledge about subcontractors in order to ensure joint employer status is not created. Employers were also concerned about the creation of any new private rights of action, which our members strongly oppose. Some of our members reported that they have avoided E-Verify because they did not see any added protections against enforcement, even when the employer has not knowingly hired an unauthorized alien. All agreed that for employers using E-Verify, there should be a good faith standard to establish employment verification compliance, with the burden of proof shifting to the government. It was a top priority of our members to exempt any employer using E-Verify in good faith from any liability, civil or criminal.

Integrating I-9 With E-Verify

Importantly, almost all Task Force members spoke about the value in eliminating the I-9 employment verification form as a separate requirement, and suggested that there be one, single employer obligation regarding employment eligibility verification.¹¹ The key component of the I-9 process is the employer attestation that an employer representative has reviewed original identity and work authorization document(s); this is the attestation that should be integrated into E-Verify. Presently, employers who use E-Verify have to separately complete the I-9 form and then transfer data from the I-9 into E-Verify. Congress would have to amend the governing statute in order to integrate the I-9 into E-Verify. Significantly, in order to accommodate all sizes and types of employers, E-Verify would need to be provided in a fully electronic version, integrating the I-9, and also be available by phone for small employers who don't have separate human resources functions and for those employers making hires remotely. Ensuring the ability to run E-Verify queries after an offer of employment but before the first day of work was also mentioned by some Task Force members, who weren't clear if E-Verify permitted this even though I-9 forms can be completed after an offer but prior to the first day of work.

Phase-in

Our Task Force discussed various options for rolling out an expansion of E-Verify across the country, and the key area of agreement is that there should be a phased process over several years so that not all companies begin using the program at the same time. Critical infrastructure, carefully defined, should go first, and small businesses last.

Agriculture

Because of the impact to and importance of national food supply and distribution, it is important to ensure agricultural production employers have meaningful access to a program to sponsor lawful workers before being subject to E-Verify.

CHAMBER RECOMMENDATIONS CONCERNING E-VERIFY

¹¹ Interestingly, this position mirrored a finding from the December 2010 Westat study on why employers do not use E-Verify, "The Practices and Opinions of Employers who do Not Participate in E-Verify," where 77% of respondents not using E-Verify said using E-Verify would be beneficial if the I-9 was eliminated.

The U.S. Chamber recognizes that an enhanced employment verification system with obligations by employers must be part of any immigration reform package. We accept that there must be adequate penalties for an employer's failure to complete the employment verification process, but we insist that there be one, single national policy and uniform enforcement with safe harbors for good faith employers and an integrated, single employment verification system.

The Chamber's top tier concerns around expansion of E-Verify, and the issues we think need to be addressed prior to any mandatory expansion of E-Verify, are:

1. **Preemption** – Statutory expansion of E-Verify should immediately bar the effect of any state and local laws mandating the use of E-Verify or establishing state or local employment verification schemes. The Chamber understands that federal legislation mandating the use of E-Verify will allow states to pass laws focused solely on state licensing authority that can be a penalty for employers who do not use the electronic verification system when mandated to do so by federal law.
2. **Reverification** – Employers have already verified their current workforce through the I-9 employment verification process and, therefore, “reverification” should be unnecessary. The E-Verify mandate should be prospective on new hires. The U.S. Chamber will oppose an obligation for private sector employers to be subject to mandatory reverification of their entire current workforce. Mandatory use of E-Verify on current workforce should apply to staff assigned to critical infrastructure sites. With respect to federal contractors, any mandatory E-Verify legislation should establish that current workforce assigned to such contracts be verified in E-Verify, except that individuals exempted by the FAR provisions must likewise be exempted under any proposed legislation. Provisions may allow the voluntary use of E-Verify on current workforce but, in order to provide clarity to employers and to better protect from inadvertent discrimination or the appearance of discrimination, any employer that voluntarily chooses to use E-Verify must do so on its full workforce and it must be clear that no government agency can use the employer's choice on whether or not to use E-Verify voluntarily on previously hired staff to either target companies for investigation or as part of any enforcement matter.
3. **Safe harbor** – It is critical that there be new, very strong safe harbor language, protecting employers who act in good faith, starting with a presumption that those that use E-Verify are good faith actors. As under current law, employers must continue to be obligated for compliance relating solely to their own direct employees. There are two good faith defenses: employers who act in good faith cannot be liable under any state or federal civil or criminal law for any employment-related action taken in reliance on information provided through E-Verify, and, in addition, the burden of proof shifts when employers act in good faith such that DHS may not proceed in any enforcement matter unless it shows by clear and convincing evidence that the employer had knowledge that an employee is an unauthorized alien. Further, employers who act in good faith may have penalties waived or reduced and good faith employers may not be penalized for *de minimus* violations. It would be ideal for there also to be recognition of business disruption avoidance during the transition period to a new mandatory E-Verify system.

4. **Integrated single employment verification system, integrating I-9 requirements into E-Verify** – Such integration should be required before any mandatory use by employers, so that both a fully electronic option and telephonic option will be available to employers. Current law requires employers to both complete the I-9 employment verification process and, where the employer uses E-Verify, to separately input data from the I-9 into E-Verify. The key component of the I-9 employment verification process, an employer attestation regarding review of original documents
5. **Phase-in** – Employers should be phased-in to any E-Verify mandate and once phased-in obligated to use E-Verify on all new hires. The phase-in should take at least three years after the establishment of an integrated employment verification system. E-Verify queries should be permitted as of the date of job offer, and must be done no later than the third day of employment, for each new hire.
6. **Agriculture** – We have made it clear that we believe production agriculture should be treated differently in that a new, workable agricultural worker visa program should be established before that industry is mandated to use E-Verify.

CONCLUSION

In the past, the U.S. Chamber has opposed the expansion of E-Verify. However, in light of improvements in E-Verify, its use by federal contractors, and the focus on a more reliable employment verification system as a necessity, as well as a logical prerequisite to further immigration reform, the U.S. Chamber reassessed its position. Consulting with our members as to whether or how E-Verify should be expanded, we have concluded that the time has come to establish a single, national policy regarding employment verification and the use of E-Verify.

If Congress wants the business community to “turn off the jobs magnet,” however, it is vital Congress make the employment verification system and E-Verify work for employers. The Chamber conditions support of E-Verify expansion upon making the system workable for the businesses obligated to verify employment authorization of hires, to include the above six issues.

The U.S. Chamber remains committed to advocating for reform to fix our broken immigration system, and believes that a workable and reliable employment verification system is only one part of necessary immigration reforms.

In the immigration realm, we have attempted to work with groups that are not our natural allies, such as the AFL-CIO,¹² to show we are serious about putting politics aside and finding solutions regarding immigration reform. We stand ready to work with this Subcommittee in the same vein.

Thank you for this opportunity to share the views of the Chamber, and I look forward to your questions.

¹² On February 21, 2013 the U.S. Chamber of Commerce and AFL-CIO issued a joint statement of principles regarding reforms for a visa program for lesser-skilled workers.