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Homeland Security Department Guts Workplace Enforcement

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This week, the Department of Homeland Security (DHS) announced it plans to kill some responsible, reasonable workplace verification rules. As a result, the department will perform less—not more—workplace checks.

This announcement undercuts the claim that the department is interested in "smart and tough" immigration enforcement. Effective workplace enforcement is vital, as employment is the principal draw for illegal immigrants to come to the United States. They come here for the jobs. Enforcing workplace laws is a vital component to create disincentives to unlawful immigration. Congress should not authorize or fund efforts to scale back workplace enforcement.

What DHS Did: Giving the Green Light to Employers to Hire Unauthorized Aliens. Homeland Secretary Janet Napolitano announced today that the department intends to rescind the 2007 Social Security No-Match Rule, a rule designed to clarify the obligations employers had with respect to knowingly hiring unauthorized aliens.

No-match letters are not new and are a tested component of the Social Security system, in use for nearly 30 years. The Social Security Administration (SSA) is required to track workers' wage histories and collects this information from the W-2 forms that employers submit each year for each employee. Each year, the SSA receives 8–11 million W-2 forms containing names and Social Security numbers that do not match the information in its records. In 1994, SSA started sending no-match letters to employers who submitted 10 or more W-2 forms that could not be matched to SSA records or who have no-matches for more than one-half of 1 percent of their workforces. The majority of the individuals named in the no-match letters sent to employers are aliens unauthorized to work in the United States.

Under the Immigration Reform and Control Act of 1986 (IRCA), it is illegal to "knowingly" employ an alien unauthorized to work in the United States. However, some employers were uncertain as to whether receiving a no-match letter amounted to constructive knowledge that an employee was unauthorized to work. Many employers took advantage of this uncertain state of affairs and did little or nothing upon receipt of a no-match letter.

Therefore, in August 2007, the Immigration and Naturalization Service (INS) promulgated a formal rule on no-match letters to ensure greater uniformity of enforcement and to clarify the definition of "constructive knowledge." The rule carved out a safe harbor for employers who receive no-match letters and spelled out what employers must do upon receipt of a no-match letter.

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The new rule and guidance were an attempt to inform employers of their obligations under IRCA and of the risk they run by turning a blind eye to their employees' false or forged credentials. Anti-enforcement groups were quick to protest, admitting that this new approach would actually have an impact on illegal employment. They sued, and in October 2007 a federal court issued a preliminary injunction against enforcement of the rule on the grounds that DHS did not sufficiently justify its change in policy among other things.

Subsequently, DHS provided its justification for the change in policy and amended the proposed rule in compliance with the court's order. There is every reason to believe that the Administration would ultimately succeed in court if it pressed forward with this lawsuit. The amended proposed rule would become law, and employers would have the specific guidance they need to be in compliance with IRCA.

What DHS Did Wrong. Instead, the department said it will no longer seek to issue revised no-match letters and rely solely on a "more modern and effective E-Verify system." Through E-Verify, participating employers can instantly check the work eligibility status of new hires through a secure online service that compares information from an employee's I-9 form against SSA and DHS databases. This service is provided free to employers (though the individual companies must bear the cost of providing the infrastructure and people to enter the data). The system has proven to be quite effective, and SSA and DHS continue to work to improve service, reliability, and privacy protections.

The department also announced "the Administration's support for a regulation that will award federal contracts only to employers who use E-Verify to check employee work authorization." This is unobjectionable and in fact merely a continuance of the previous Administration's plans and not a new initiative.

E-Verify is an excellent program. It is, however, not mandatory for all employers. Thus, the first consequence of not issuing no-match letters—and failing to allow DHS to check the no-match data compiled by SSA to identify employers who habitually scoff workplace at immigration laws—is that DHS will be doing less workplace enforcement, not more. In addition, it is not fully clear whether this Administration will fully comply with the intent of the previous Administration to apply E-Verify to all federal contract employees.

If, for example, E-Verify were applied only to new employees hired specifically for the contract work, then for instance, if a construction firm hires an unlawfully present individual and then one week later assigns him to work on a federal contract project, this unlawful individual would be considered an "existing employee" not subject to E-Verify. This Administration must craft the E-Verify rules to apply to all existing employees working for the federal government (a rule in place in the Bush Administration) *and* under federal government contracts; otherwise the result would be less work place enforcement, not more. That is unacceptable.

Legalese. The DHS press release stated that the department was abandoning "no-match" because it had been challenged in the courts and an injunction was issued by District Judge Charles Breyer. This statement is at odds with an announcement last year by the department when it proposed a revised rule on issuing no-match letters. Then, the department argued "additional detail provided in the proposal is enough to have the injunction lifted." In fact, the Bush Administration amended the proposed rule consistent with Judge Breyer's ruling, and there is every reason to believe that he would be forced to lift the stay if this Administration pushed the issue in court with him. Conversely, the press announcement did not note that the department's efforts to have E-Verify apply to federal contractors has also been challenged in court. Indeed, any efforts at real workplace enforcement are likely to be challenged in the courts. Offering court challenges as an excuse to make bad public policy is unacceptable as well.

Moving Forward. One hundred percent verification of workplace enforcement is already a requirement by law. In order to curtail illegal immigration, this statute should finally be enforced by moving toward requiring all employers to use E-Verify to confirm the employment eligibility of all new hires and current employees.

Government policy should be based on the principles of *empowerment*, *deterrence*, and *information*.

It should empower honest employers by giving them the tools to determine quickly and accurately whether a new hire is an authorized worker. It should hold employers free from penalty if they inadvertently hire an illegal worker after following the prescribed procedures.

Government should perform this verification in the most efficacious manner possible, one that is cost-effective; protects individual data and privacy; minimizes the burden on employers; and addresses concerns over security, public safety, and enforcement of workplace and immigration laws. Nothing less is acceptable. E-Verify is an important component of this effort and must be authorized as a permanent program and fully funded by the Congress and its use expanded by the government as practicable. Unitl E-Verify is more broadly adopted throughout the U.S. workforce, E-Verify must be complemented by a robust no-match letter process that assists employers by specifically spelling out their obligations. By rescinding the 2007 no-match letter amended rule, the Administration is effectively saying that it will not enforce the law against employing illegal immigrants for the overwhelming bulk of U.S. employers. It is giving employers of unauthorized aliens legal cover and an excuse not to follow IRCA. The new policy is an "open door" to hiring illegal immigration at a time of near record-high unemployment among American workers.

Rather than kill 2007 amended rule on "no-match" letters, a far better policy would be to retain the letter option and, in addition, for the SSA to routinely share no-match data directly with DHS. This can be done in a manner that does not risk individual employees' sensitive information or civil liberties. With this data, DHS could more efficiently target employers who willfully hire unlawfully present labor.

Congress Must Act. The right approach to immigration enforcement is to combine "no-match" letters and greater data sharing between DHS and SSA with a reasonable and robust E-Verify program. The outline of the plan announced by DHS today may in the not too distant future leave America with neither. Consequently, Congress should:

- Reject the plan announced by DHS to abandon the 2007 amended "no-match" letter rule;
- Establish in law the authority for SSA and DHS to routinely and appropriately share SSA data in a manner that respects and safeguards personal information and the right to privacy;
- Permanently authorize E-Verify and fund DHS to continue to expand and improve the program;
- Require the department to issue a report explaining what is meant by "smart and tough enforcement" and each component of its workplace and immigration enforcement strategy;
- Direct the General Accountability Office to evaluate the department's workplace enforcement strategy; and
- Defer major immigration or border security enforcement reform legislation until the Administration implements a comprehensive, suitable, feasible, and acceptable policy for workplace and immigration enforcement.

It is the responsibility of Homeland Security to enforce the law in a manner that is both reasonable and effective. This week's announcement fails that test. Congress should not let it stand.

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