

# CRS Report for Congress

## Unauthorized Employment in the United States: Issues and Options

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# Unauthorized Employment in the United States: Issues and Options

## Summary

As Congress considers immigration reform and ways to address the unauthorized alien population, the issue of unauthorized employment is the focus of much discussion. The unauthorized alien working population, like the unauthorized alien population generally, has been growing steadily. There were an estimated 7.2 million unauthorized workers in the U.S. civilian labor force in March 2005. It is widely accepted that most unauthorized aliens enter and remain in the United States in order to work. Thus, eliminating employment opportunities for these aliens has been seen as an approach to curtailing unauthorized immigration.

Provisions enacted by the Immigration Reform and Control Act (IRCA) of 1986, which are sometimes referred to as *employer sanctions*, made it unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to work. It also established a paper-based employment eligibility verification system, known as the I-9 system, which requires that employers examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms. There is general agreement that the I-9 process has been undermined by fraud. Employers violating prohibitions on unauthorized employment in the Immigration and Nationality Act (INA) may be subject to civil or criminal penalties. The Department of Homeland Security's Immigration and Customs Enforcement (DHS/ICE) is responsible for enforcing the INA prohibitions on unauthorized employment.

Building on the employment verification system established by IRCA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) directed the Attorney General to conduct three pilot programs for employment eligibility confirmation that were to be largely voluntary. Under the Basic Pilot program, the only one of the three pilots still in operation, participating employers verify new hires' employment eligibility by accessing Social Security Administration (SSA) and, if applicable, DHS databases.

A variety of options has been put forth to curtail unauthorized employment and related practices, a selection of which is discussed in this report. Some of these options would build on the current employment eligibility verification system; these include making electronic verification mandatory, increasing existing penalties, or increasing resources for worksite enforcement. Others represent new approaches to address unauthorized employment, such as shifting responsibility for employment eligibility verification from employers to the federal government.

This report will be updated if developments warrant.

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# Unauthorized Employment in the United States: Issues and Options

## Introduction

In the past several years, as increasing public and congressional attention has been focused on the unauthorized alien population in the United States, the issue of unauthorized employment has come to the fore. *Unauthorized employment*, as used in this report, refers to the employment of aliens who lack authorization to be employed in the United States. The term includes both those who are in the country in violation of the law, as well as those in the country legally who nevertheless are not authorized to work.<sup>1</sup> Despite the prohibitions against unauthorized employment in the Immigration and Nationality Act (INA), an estimated 7.2 million unauthorized workers were in the U.S. civilian labor force in March 2005, representing about 5% of the labor force.<sup>2</sup>

For many years, it has been widely accepted that most unauthorized aliens enter and remain in the United States in order to work. Thus, eliminating employment opportunities for these aliens has been seen as a key to curtailing unauthorized immigration. In the 109<sup>th</sup> Congress, both the House and Senate passed major immigration bills that included significant provisions aimed at preventing unauthorized employment. Legislation on unauthorized employment may be considered in the 110<sup>th</sup> Congress.

## Estimates of Unauthorized Workers

Based on data from the Current Population Survey (CPS) and other sources, the Pew Hispanic Center has estimated that the unauthorized resident alien population totaled 11.5 to 12 million in March 2006, and that since 2000, this population has grown at an average annual rate of more than 500,000 per year.<sup>3</sup> Estimates by the

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<sup>1</sup> For example, a number of categories of temporary visitors to the United States, known as nonimmigrants, are not authorized to work. See CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem and Chad C. Haddal.

<sup>2</sup> Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.; Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center, Mar. 7, 2006, at [<http://pewhispanic.org/reports/report.php?ReportID=61>], visited Apr. 18, 2007 (hereafter cited as Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Mar. 7, 2006).

<sup>3</sup> Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented* (continued...)

Department of Homeland Security (DHS) of the unauthorized alien population and its growth are somewhat lower. Based on data from the 2004 American Community Survey and other sources, DHS has estimated that there were 10.5 million unauthorized aliens residing in the United States in January 2005 and that the unauthorized resident population grew at an average annual rate of 408,000 during the 2000-2004 period.<sup>4</sup>

Unauthorized workers are a subpopulation of the total unauthorized alien population. According to the Pew Hispanic Center, there were an estimated 7.2 million unauthorized workers in the U.S. civilian labor force in March 2005.<sup>5</sup> These workers represented about 5% of the labor force. In some occupations and industries, however, their share of the labor force was considerably higher. **Table 1** presents data from the Pew Hispanic Center on industries with high concentrations of unauthorized workers. Unauthorized aliens accounted for about one in five workers in private households and between 10% and 15% in the other industries shown.

**Table 1. Estimates of Unauthorized Employment in Selected Industries, 2005**

Industry Group	Unauthorized Workers (in Industry)
Private Households	21%
Food Manufacturing	14%
Agriculture	13%
Furniture Manufacturing	13%
Construction	12%
Textile, Apparel, and Leather Manufacturing	12%
Food Services	12%
Administrative and Support Services	11%
Accommodation	10%

**Source:** Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Pew Hispanic Center, Mar. 7, 2006.

<sup>3</sup> (...continued)

*Population*, Pew Hispanic Center, Mar. 21, 2005; Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Mar. 7, 2006. These reports are available at [<http://pewhispanic.org/topics/index.php?TopicID=16>], visited Apr. 18, 2007. Also see CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

<sup>4</sup> U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005*, by Michael Hofer, Nancy Rytina, and Christopher Campbell, Aug. 2006, at [[http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf)], visited Apr. 19, 2007.

<sup>5</sup> Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Mar. 7, 2006.

## Prohibitions on Unauthorized Employment

Prior to 1986, it was not against the law for an employer to employ an individual who was not authorized to work. This changed with the enactment of the Immigration Reform and Control Act of 1986 (IRCA), which amended the Immigration and Nationality Act to add a new §274A.<sup>6</sup> The §274A provisions are sometimes referred to collectively as *employer sanctions*. Under INA §274A, it is unlawful for an employer<sup>7</sup> to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are required to participate in a paper-based employment eligibility verification system, commonly known as the I-9 system, in which they examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms.

With respect to the document examination requirement, INA §274A states that an employer is in compliance “if the document reasonably appears on its face to be genuine.”<sup>8</sup> There is general agreement that the I-9 process has been undermined by fraud — both *document fraud*, in which employees present counterfeit or invalid documents, and *identity fraud*, in which employees present valid documents issued to other individuals.<sup>9</sup>

Employers violating INA prohibitions on unauthorized employment may be subject to civil and/or criminal penalties. INA §274A establishes separate and escalating ranges of penalties for the following: failure to comply with the I-9 requirements (\$110 - \$1,100 per employee); violations of prohibitions on knowingly hiring, recruiting, referring, or continuing to employ unauthorized aliens (\$275 - \$11,000 per alien); and a pattern or practice of violations of knowingly hiring, recruiting, referring, or continuing to employ unauthorized aliens (up to \$3,000 per alien or up to six months imprisonment or both).<sup>10</sup> As discussed below, DHS’s Immigration and Customs Enforcement (ICE) is responsible for enforcing the INA prohibitions on unauthorized employment.

During the congressional debates preceding the passage of IRCA, major concerns were expressed that the verification and penalty provisions would result in employment discrimination based on national origin as employers opted not to hire

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<sup>6</sup> P.L. 99-603, §101(a), Nov. 6, 1986.

<sup>7</sup> “Employer” is used as a shorthand in this section for “person or entity,” the phrase used in INA §§274A and 274B.

<sup>8</sup> INA §274A(b)(1)(A).

<sup>9</sup> See, for example, U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813, Aug. 2005, pp. 15-16, at [<http://www.gao.gov/new.items/d05813.pdf>], visited Apr. 19, 2007.

<sup>10</sup> These penalty levels reflect a 1999 increase of the civil penalties in INA §274A, as enacted, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (P.L. 101-410, Oct. 5, 1990; 28 U.S.C. 2461 note). For further breakdowns of the penalty ranges, see CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by Alison M. Smith (hereafter cited as CRS Report RS22180).

eligible workers who looked or sounded “foreign,” out of fear that they lacked work authorization. To directly address these concerns, IRCA added a new §274B to the INA, which makes it an unfair immigration-related employment practice for employers with four or more employees to discriminate against U.S. citizens or work-authorized aliens in hiring, recruiting or referring for a fee, or firing based on national origin or on citizenship or lawful immigration status. INA §274B also provided for the establishment of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the U.S. Department of Justice to enforce these provisions.<sup>11</sup> Under INA §274B, employers found to have engaged in an unfair immigration-related employment practice shall be required to cease and desist from such practice and may be subject to other requirements, including civil penalties.

IRCA also required the then-General Accounting Office (GAO) to issue three annual reports on the implementation and enforcement of the INA §274A provisions. In each of the reports, GAO was directed to make a determination as to whether the implementation of INA §274A “has resulted in a pattern of discrimination in employment (against other than unauthorized aliens) on the basis of national origin.”<sup>12</sup> GAO’s third report included the following summary of its findings:

GAO found that the law has apparently reduced illegal immigration and is not an unnecessary burden on employers, has generally been carried out satisfactorily by INS [the former Immigration and Naturalization Service] and Labor, and has not been used as a vehicle to launch frivolous complaints against employers. GAO also found that there was widespread discrimination. But was there discrimination as a result of IRCA? That is the key question Congress directed GAO to answer. GAO’S answer is yes.<sup>13</sup>

## Basic Pilot Program

Building on the employment verification system established by IRCA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) directed the Attorney General to conduct three pilot programs for employment eligibility confirmation that were to be largely voluntary — the Basic Pilot program, the Machine-Readable Document Pilot program, and the Citizen Attestation Pilot.<sup>14</sup>

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<sup>11</sup> For further information about INA §274B, see CRS Report RS22180.

<sup>12</sup> IRCA §101(a).

<sup>13</sup> U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, Mar. 1990, p. 3, at [<http://archive.gao.gov/d24t8/140974.pdf>], visited Apr. 19, 2007.

<sup>14</sup> IIRIRA is Division C of P.L. 104-208. The pilot programs were established under Title IV, Subtitle A. Independent evaluations of the three pilot programs were conducted by the Institute for Survey Research at Temple University and Westat for INS/USCIS. These evaluations are: *INS Basic Pilot Summary Report* (Jan. 29, 2002); *Findings of the Basic Pilot Program Evaluation* (June 2002); *Findings of the Citizen Attestation Verification Pilot (CAVP) Program Evaluation* (April 2003), and *Findings of the Machine-Readable Document Pilot (MRDP) Program Evaluation* (May 2003).

Under the Basic Pilot program, the only one of the three pilots still in operation, participating employers verify new hires' employment eligibility by accessing Social Security Administration (SSA) and, if applicable, DHS databases.<sup>15</sup> The program is administered by DHS's U.S. Citizenship and Immigration Services (USCIS). The Basic Pilot program began in 1997 in the five states with the largest unauthorized alien populations.<sup>16</sup> Initially scheduled to terminate in 2001, it has been extended twice, most recently by P.L. 108-156.<sup>17</sup> It is currently scheduled to terminate in 2008.

In addition to extending the life of the Basic Pilot program, P.L. 108-156 directed the Secretary of DHS to expand the operation of the program to all 50 states not later than December 1, 2004. In connection with this expansion, it further directed the Secretary to submit a report to Congress assessing whether the problems identified in earlier pilot program evaluations had been resolved and describing actions that the Secretary would take prior to the nationwide expansion to resolve any outstanding problems.

In the resulting June 2004 report, USCIS described its efforts to resolve the three main problems identified in the pilot program evaluations. The chief problem, which the report described as "the most serious pilot deficiency noted by the evaluation," was that work-authorized employees, especially foreign-born work-authorized employees, too frequently received *tentative nonconfirmations*, or initial responses by the system that employment eligibility could not be immediately confirmed. The report described this erroneous tentative nonconfirmation rate as "a source of unintentional discrimination against foreign-born employees," and detailed efforts to address it by improving the accuracy of the verification databases and reducing data entry errors by employers and immigration status verifiers. The other problems identified in the pilot program evaluations were employer noncompliance with pilot program requirements and low levels of employer interest in participating in a pilot program.<sup>18</sup> In December 2004, USCIS announced the expansion of the Basic Pilot program to all 50 states and the District of Columbia.<sup>19</sup>

The Basic Pilot program, which remains largely voluntary, has been growing in recent years. On January 31, 2006, there were 5,272 employers registered for the program, representing 22,710 hiring sites. As of March 28, 2007, 15,663 employers were registered, representing 78,163 hiring sites.<sup>20</sup>

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<sup>15</sup> For a brief description of the Basic Pilot verification process, see U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Report to Congress on the Basic Pilot Program*, June 2004, pp. 2-3 (hereafter cited at *Report to Congress on the Basic Pilot Program*, June 2004).

<sup>16</sup> The states were California, Florida, Illinois, New York, and Texas.

<sup>17</sup> P.L. 107-128, Jan. 16, 2002; P.L. 108-156, Dec. 3, 2003.

<sup>18</sup> *Report to Congress on the Basic Pilot Program*, June 2004.

<sup>19</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "Expansion of the Basic Pilot Program to All 50 States and the District of Columbia; Providing Web-Based Access," 69 *Federal Register* 75997-75999, Dec. 20, 2004.

<sup>20</sup> Data provided by USCIS, Systematic Alien Verification for Entitlements (SAVE)  
(continued...)



In July 2006 testimony before a House Government Reform subcommittee on the Basic Pilot program, a USCIS official discussed some of the program's limitations. As stated in her written testimony: "The current Basic Pilot is not fraud-proof and was not designed to detect identity fraud."<sup>21</sup> Worksite enforcement actions by ICE in late 2006 and early 2007 focused national attention on these limitations. Among these actions, in December 2006, ICE raided six meatpacking plants operated by Swift & Company as part of an identity theft investigation and arrested more than 1,200 workers; Swift participates in the Basic Pilot program.<sup>22</sup>

## Worksite Enforcement

Since March 2003, ICE has had responsibility for enforcing the INA prohibitions against unauthorized employment (known as *worksite enforcement*) as part of its larger responsibility to enforce federal immigration laws within the United States.<sup>23</sup> The ICE worksite enforcement strategy gives top priority to investigations at worksites related to critical infrastructure and national security, such as nuclear power plants, defense facilities, and airports. Its strategy also involves "targeting unscrupulous employers of illegal aliens [and] seeking to initiate criminal prosecutions and cause asset forfeitures." According to ICE, its worksite investigations "often uncover egregious criminal violations [such as, money laundering, alien smuggling, or document fraud] and widespread abuses [such as, worker exploitation]."<sup>24</sup>

In July 2006, ICE announced another part of its worksite enforcement strategy — a new initiative called the ICE Mutual Agreement between Government and Employers (IMAGE) program. IMAGE is a voluntary program, which ICE describes, as follows:

[T]he program is designed to build cooperative relationships between government and businesses to strengthen hiring practices and reduce the

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<sup>20</sup> (...continued)  
program.

<sup>21</sup> Statement of Janis Sposato, Associate Director, USCIS National Security and Records Verification Directorate, at U.S. Congress, House Committee on the Government Reform, Subcommittee on Regulatory Affairs, *Is the Federal Government Doing All It Can To Stem the Tide of Illegal Immigration?*, hearing, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 25, 2006.

<sup>22</sup> U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, "U.S. Uncovers Large-Scale Identity Theft Scheme Used By Illegal Aliens to Gain Employment at Nationwide Meat Processor," news release, Dec. 13, 2006, at [<http://www.ice.gov/pi/news/newsreleases/articles/061213dc.htm>], visited Apr. 18, 2007.

<sup>23</sup> Immigration enforcement responsibility formerly rested with the Immigration and Naturalization Service (INS). The Homeland Security Act of 2002 (P.L. 107-296, Nov. 25, 2002) abolished INS and transferred most of its functions to DHS as of Mar. 1, 2003.

<sup>24</sup> U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, "Worksite Enforcement," fact sheet, Feb. 22, 2007, at [<http://www.ice.gov/pi/news/factsheets/worksite070222.htm>], visited Apr. 18, 2007.

unlawful employment of illegal aliens. The initiative also seeks to accomplish greater industry compliance and corporate due diligence through enhanced federal training and education of employers.<sup>25</sup>

To enroll in IMAGE, an employer must agree to submit to an I-9 audit by ICE and to verify the Social Security numbers of its current employees through an SSA database. IMAGE participants also are required to adhere to a set of “best hiring practices.” These practices include participating in the Basic Pilot program, arranging for annual I-9 audits, and establishing a process for reporting any violations to ICE.<sup>26</sup>

## Options for Addressing Unauthorized Employment

A variety of options has been put forth to curtail unauthorized employment and related practices, a selection of which is discussed below. Some of these options would build on the current employment eligibility verification system, while others represent new approaches to address unauthorized employment. The options presented here are not necessarily mutually exclusive, and some could be pursued in concert.

### Mandatory Electronic Employment Eligibility Verification

One set of options would make the Basic Pilot program or a similar electronic employment eligibility verification system mandatory for all employers in the United States. Under this general approach, all employers would be required to query the system to verify the identity and employment eligibility of all *new hires*. Related questions concern what other, if any, required uses of the system there would be. For example, one key question would likely be whether employers would be required to verify the identity and employment eligibility of *previously hired workers* in addition to new hires.<sup>27</sup>

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<sup>25</sup> U.S. Department of Homeland Security, “DHS Highlights Best Practices For Maintaining Legal Workforces,” press release, July 26, 2006, at [[http://www.dhs.gov/xnews/releases/press\\_release\\_0966.shtm](http://www.dhs.gov/xnews/releases/press_release_0966.shtm)], visited Apr. 18, 2007.

<sup>26</sup> See U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Partners; IMAGE,” at [<http://www.ice.gov/partners/opaimage/index.htm>], visited Apr. 18, 2007.

<sup>27</sup> This question arose in the major immigration bills passed by the House (H.R. 4437) and Senate (S. 2611) in the 109<sup>th</sup> Congress. While both bills would have required employers to verify the identity and employment eligibility of all new hires, they differed with respect to electronic verification requirements for previously hired workers. Under H.R. 4437, employers would have been required to query the system to verify the identity and employment eligibility of previously hired workers by six years after enactment. Under S. 2611, DHS could have required certain employers or classes of employers to conduct verification of previously hired workers, but this verification would not have been an across-the-board requirement. For further discussion of the employment eligibility verification provisions in H.R. 4437 and S. 2611, as well as in other bills introduced in the 109<sup>th</sup>

(continued...)

The Bush Administration has endorsed making the Basic Pilot program mandatory for all employers. Although President Bush did not mention the Basic Pilot program by name during his 2007 State of the Union address, the White House's online *2007 State of the Union Policy Initiatives* states the following: "We will also work with Congress to expand 'Basic Pilot' — an electronic employment eligibility verification system — and mandate that all employers use this system."<sup>28</sup> In testimony before the Senate Judiciary Committee in February 2007, DHS Secretary Michael Chertoff similarly called for mandatory electronic employment verification.<sup>29</sup>

While there is considerable support for making electronic employment eligibility verification mandatory, concerns have been expressed about discrimination and employer noncompliance based on the experience of the Basic Pilot program, as discussed above. The inability of the Basic Pilot program to detect identity fraud has also been raised. In addition, there have been questions about implementation, such as whether a Basic Pilot-like system could handle the large volume of inquiries that would be generated under a mandatory program.

## Increased Penalties

Another set of options would increase existing monetary or other penalties under the INA for prohibited behavior or establish new penalties. Although there seems to be broad support for enhancing penalties, proposals differ with regard to which penalties to increase or establish and by how much.

**Unauthorized Employment.** One option would be to increase some or all existing penalties on employers who violate INA §274A prohibitions on unauthorized employment, as discussed above. Along these lines, DHS Secretary Chertoff, in his February 2007 testimony before the Senate Judiciary Committee, urged Congress:

to increase penalties for repeat offenders and establish substantial criminal penalties and injunction procedures that punish employers who engage in a pattern of knowing violations of the laws and effectively prohibit the employment of unauthorized aliens.<sup>30</sup>

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<sup>27</sup> (...continued)

Congress, see CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno.

<sup>28</sup> Available at [<http://www.whitehouse.gov/stateoftheunion/2007/initiatives/index.html>], visited Apr. 18, 2007.

<sup>29</sup> See Statement of DHS Secretary Michael Chertoff, at U.S. Congress, Senate Committee on the Judiciary, *Comprehensive Immigration Reform*, hearing, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Feb. 28, 2007, at [[http://judiciary.senate.gov/testimony.cfm?id=2555&wit\\_id=66](http://judiciary.senate.gov/testimony.cfm?id=2555&wit_id=66)], visited Apr. 18, 2007 (hereafter cited as Chertoff Testimony).

<sup>30</sup> Ibid.

**Unfair Immigration-Related Employment Practice.** Another option would be to increase fines under INA §274B for engaging in unfair immigration-related employment practices, as discussed above.

**New Penalty for Unauthorized Employees.** Current penalties for unauthorized employment, as discussed above, apply to employers that hire, recruit or refer for a fee, or employ individuals. Another penalty-related option would be to establish a new penalty on unauthorized employees.<sup>31</sup> For example, one proposal of this type would make an individual who falsely represents on the I-9 or comparable verification form that he or she is authorized to work in the United States, subject to a fine and/or imprisonment.<sup>32</sup>

## Increased Worksite Enforcement-Related Resources

Another set of options would make additional resources available to ICE for worksite enforcement. These resources could be in the form of additional personnel to work on worksite enforcement cases or additional funding. Historically, interior enforcement resources devoted to worksite enforcement have been limited.<sup>33</sup> Related questions concern how any additional worksite enforcement resources would best be used. For example, should ICE's current strategy of focusing primarily on criminal employer cases continue, or should any changes be made to that strategy?

A related resource option would make additional resources available to ICE to investigate cases of document and identity fraud.<sup>34</sup>

## Data Sharing

Data sharing among SSA, DHS, and employers represents another possible approach to reduce unauthorized employment and related identity fraud. There have been various proposals to increase the sharing of information for these purposes. Among these are proposals to require SSA to inform DHS of cases in which a single social security number is used with multiple names.<sup>35</sup> DHS Secretary Chertoff expressed his support for this type of data sharing at the February 2007 Senate Judiciary Committee hearing:

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<sup>31</sup> While not subject to a penalty under INA §274A, unauthorized workers, like unauthorized aliens generally, are subject to being removed from the United States under the INA.

<sup>32</sup> S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress, included such a penalty provision.

<sup>33</sup> See CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated, by Alison Siskin (hereafter cited as CRS Report RL33351).

<sup>34</sup> See, for example, Statement of Carl W. Hampe, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Lack of Worksite Enforcement and Employer Sanctions*, hearing, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 2005. For a discussion of immigration fraud, see CRS Report RL33351.

<sup>35</sup> See S. 699 (110<sup>th</sup> Congress).

[W]e need legal authority to assure that the Social Security Administration can share with us and with employers data concerning stolen identities being misused to obtain work illegally.<sup>36</sup>

Such data sharing would likely raise privacy concerns and would require SSA to assume an additional role.

## Changes to Issuance and Acceptance of Documents

Another set of possible options to address unauthorized employment and related identity fraud revolves around the issuance and acceptance of documents establishing identity and employment eligibility. INA §274A establishes categories of acceptable documents. Implementing regulations list more than 20 documents that employees can present to establish their identity and/or employment eligibility for I-9 purposes.<sup>37</sup> Reducing the number of acceptable documents has long been under discussion as an option for making the I-9 verification process more secure and less confusing for employers.<sup>38</sup>

Other options in this category would combine a reduction in the number of acceptable documents with requirements to improve the security of documents, particularly the widely counterfeited Social Security card. For example, there have been proposals to require Social Security cards to include an encrypted machine-readable electronic identification strip unique to the bearer and a digitized photograph.<sup>39</sup> Under some such proposals, new hires would be required to show a card of this type to the employer, who would then use it to verify the worker's identity and work authorization. Biometrics<sup>40</sup> could also be incorporated into new Social Security cards or other documents. As discussed in the next section, a verification system based on more secure documents could replace the existing requirement under the I-9 process that employers examine employee-provided documents.

In his February 2007 testimony before the Senate Judiciary Committee, Commerce Secretary Carlos Gutierrez called for the issuance of secure documents to assist businesses in verifying the legal status of their employees, but he limited his

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<sup>36</sup> Chertoff Testimony. Current law (Internal Revenue Code §6103; 26 U.S.C. §6103) restricts SSA from sharing certain information that it receives from the Internal Revenue Service.

<sup>37</sup> 8 C.F.R. §274a.2(b)(1)(v). Both Senate-passed S. 2611 and House-passed H.R. 4437 in the 109<sup>th</sup> Congress would have made changes to the INA provisions on acceptable documents.

<sup>38</sup> See, for example, U.S. Government Accountability Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Employment Exist*, GAO/GGD-99-33, Apr. 1999, pp. 13-15, at [<http://www.gao.gov/archive/1999/gg99033.pdf>], visited Apr. 19, 2007.

<sup>39</sup> See H.R. 98 (109th, 110<sup>th</sup> Congresses).

<sup>40</sup> Biometrics are physical or behavioral characteristics of a person that can be measured and used for identification. For further discussion, see CRS Report RS21916, *Biometric Identifiers and Border Security: 9/11 Commission Recommendations and Related Issues*, by Daniel Morgan and William Krouse.

recommendation to foreign workers. According to Secretary Gutierrez: “Tamper-proof biometric identity cards should be established for foreign workers so that employers have no excuse for violating the law.”<sup>41</sup>

Reducing the number of documents for evidencing identity and employment eligibility could raise concerns that some work-authorized individuals might not be able to meet the requirements easily.<sup>42</sup> Proposals to require all new hires to show one particular document containing various pieces of information about the bearer have been further criticized by some as undermining privacy, facilitating identity theft, and creating a de facto national identification card.<sup>43</sup> The costs of issuing more secure Social Security cards or other documents would likely be another issue.<sup>44</sup> In addition, SSA has long cautioned that the Social Security card is not a personal identification document, maintaining that its primary purpose is to provide a record of the number that has been assigned to an individual so the individual’s employer can properly report earnings in covered jobs.

## Government Responsibility for Employment Eligibility Verification

All of the options discussed, thus far, would build on the existing employer-based employment eligibility verification system. An alternative system could make the government responsible for verifying employment eligibility. In a November 2005 paper, Marc R. Rosenblum offered one such alternative, which he termed a *centralized screening* system.<sup>45</sup> He described the centralized screening system, as follows:

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<sup>41</sup> See Statement of Commerce Secretary Carlos M. Gutierrez, at U.S. Congress, Senate Committee on the Judiciary, *Comprehensive Immigration Reform*, hearing, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Feb. 28, 2007, at [[http://judiciary.senate.gov/testimony.cfm?id=2555&wit\\_id=5531](http://judiciary.senate.gov/testimony.cfm?id=2555&wit_id=5531)], visited Apr. 18, 2007. Secretary Gutierrez did not discuss document requirements for citizens or for legal permanent residents or other aliens.

<sup>42</sup> In the supplementary information accompanying a 1998 proposed rule to reduce the number of acceptable documents for I-9 purposes, the former INS stated the following: “When [IRCA] was new, a consensus emerged that a long, inclusive list of documents would ensure that all persons who are eligible to work could easily meet the requirements.” U.S. Department of Justice, Immigration and Naturalization Service, 63 *Federal Register* 5289, Feb. 2, 1998.

<sup>43</sup> For a discussion of these types of concerns, see Statement of Marc Rotenberg, Electronic Privacy Information Center, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Illegal Immigration Enforcement and Social Security Protection Act of 2005*, hearing, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., May 12, 2005.

<sup>44</sup> For a discussion of cost estimates for issuing more secure Social Security cards, see Statement of SSA Commissioner Jo Anne B. Barnhart, at U.S. Congress, House Committee on Ways and Means, *Impacts of Border Security and Immigration on Ways and Means Programs*, hearing, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 26, 2006.

<sup>45</sup> Marc R. Rosenblum, *Immigration Enforcement at the Worksite: Making it Work*, Migration Policy Institute, Policy Brief, no. 6, Nov. 2005, at [[http://www.migrationpolicy.org/ITFIAF/TF6\\_Rosenblum.pdf](http://www.migrationpolicy.org/ITFIAF/TF6_Rosenblum.pdf)], visited Apr. 19, 2007.

Under a centralized system, the responsibility for verifying work eligibility would rest with professional screeners at the point of document issuance, and proof of eligibility would be embodied in a worker's identity card itself. Employers could thus assume cardholders are work-authorized, and employer responsibility would be reduced to keeping a record of new hires.

As outlined by Rosenblum, employers would be responsible for registering new hires in a new job holder database; he envisions that eventually this would be done by swiping a machine-readable card. Under such a system, employers would only be subject to penalties for failing to fulfill the registration requirements.

The effectiveness of such a system at preventing unauthorized employment would rely largely on the security of the underlying documents. According to Rosenblum:

Enforcement agents would be responsible for insuring the integrity of work authorization documents, and for analyzing employer records to search for evidence that employees are using borrowed or stolen documents.

If such a system were to receive serious consideration, there would likely be questions about whether enforcement agents could perform these functions. In addition, to the extent that it relied on one or a small number of verification documents, such a system would likely raise concerns about privacy, identity theft, and the establishment of a national identification card, as discussed in the prior section.

## **Shift Focus to Enforcement of Workplace Protections**

Another option would be to shift the focus of enforcement from ICE worksite enforcement to enforcement of minimum wage and health and safety laws by the Department of Labor (DOL). This option is premised on an assumption that increased DOL enforcement would be more effective than ICE enforcement at protecting the jobs, wages, and working conditions of U.S. workers, and that employers who employ unauthorized aliens are likely the same employers who violate wage, hour, and safety laws.

Another version of this option, which represents a complete departure from the current employment eligibility verification system, would couple increased DOL enforcement with the repeal of the current INA prohibitions on unauthorized employment. Jennifer Gordon, a law professor, advocated a version of this option at a hearing of the House Immigration subcommittee in June 2005. In her testimony, Gordon contended that the current system had "contributed significantly to undermining [the working conditions of U.S. citizens and legal immigrants] and that "effective enforcement of basic workplace rights for all employees is the lynchpin in any strategy to protect the wages and working conditions of U.S. workers." She recommended replacing the current system with a two-pronged approach. The first prong would be a statement from Congress that workplace protections apply equally to all workers regardless of their immigration status. The second part, as she characterized it, would be "a new commitment to intensive and strategically targeted

government enforcement of minimum wage and health and safety laws in industries and geographic areas with high concentrations of undocumented workers.”<sup>46</sup>

This option is highly controversial. While Gordon argued at the hearing that it held greater promise for protecting workers than the current system, others soundly reject the idea of repealing employer sanctions. Among the opponents is Carl W. Hampe, a partner in a law firm and a former Justice Department official and congressional staffer, who also testified at the June 2005 House hearing. According to Hampe’s testimony:

I believe [repealing employer sanctions] would be very unwise, as it would send a message to the world’s potential unauthorized immigrants that the United States no longer will discourage illegal immigration... However large the unauthorized immigration problem is now, repeal of employer sanctions at this point would certainly make the problem far worse.<sup>47</sup>

## Conclusion

Significant legislation on employment eligibility verification and worksite enforcement was enacted in 1986 and 1996, and many seem to believe the time may be ripe once again to address these issues. As Congress decides if, and or, to reform the current system, it may consider the options presented in this report. Members of Congress may decide on one or more options that build on the existing employer-based system of employment eligibility verification and the existing ICE worksite enforcement program, or may consider a different approach in one or both of these areas. While presumably options would be assessed, in large part, on their potential for reducing unauthorized employment, this report has also attempted to identify accompanying concerns, such as discrimination, privacy, and identify theft, which Congress may also want to weigh as part of the policymaking process.

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<sup>46</sup> Statement of Jennifer Gordon, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Lack of Worksite Enforcement and Employer Sanctions*, hearing, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 2005.

<sup>47</sup> Statement of Carl W. Hampe, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Lack of Worksite Enforcement and Employer Sanctions*, hearing, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 2005.