

PORTMAN AMENDMENT TO STRENGTHEN E-VERIFY

Effective employment verification is essential to the success of comprehensive reform in preventing future illegal immigration. Most illegal immigration is a response to economic incentives. Policy efforts to eliminate this “jobs magnet” have been a mainstay in immigration debates for decades. Yet our current employment verification system has failed to stem the tide of unauthorized workers.

An effective electronic verification system must (1) verify work authorization by connecting the worker’s name and biographical data to a legal status and (2) authenticate a worker’s identity by connecting the individual to a specific name and identity record, preventing others from fraudulently claiming that identity. The goal of E-Verify is to provide a simple, reliable way for employers to confirm a new employee’s work eligibility and identity.

The Portman amendment seeks to strengthen the employment verification provisions in S.744 in five basic areas to help curtail the widespread unauthorized employment that fuels most illegal immigration.

I. ENHANCE PROTECTIONS AGAINST IDENTIFY THEFT AND FRAUD

E-Verify can reliably verify authorization to work, but it is less successful in authenticating a worker’s identity because it lacks a universal and secure system of identity verification. A critical challenge in implementing any mandatory E-Verify system is combating identify theft and fraud. One recent study estimated that *54 percent* of all unauthorized workers are found to be eligible for employment through E-Verify—largely because “many unauthorized workers obtain employment by committing identity fraud that cannot be detected by E-Verify.”¹ S.744 seeks to address this challenge by allowing individuals to lock their SSNs for purposes of E-Verify and requiring DHS audits of suspicious E-Verify activities. But more must be done.

The Portman amendment:

- Requires the Social Security Administration (SSA) to include in each individual’s annual SSA statement information about all E-Verify queries placed during that year for the associated Social Security Number. Each annual SSA statement must include a toll-free telephone number for inquiries and a link to E-Verify self-check.
- Requires the Department of Homeland Security (DHS) to notify the holder of a Social Security Number (SSN) when DHS identifies suspected fraudulent SSN use for purposes of E-Verify. Allows DHS to request from the Internal Revenue Service the mailing address of any SSN holder entitled to such notification.
- Allows DHS to build on successful pilot programs in Florida and Mississippi to allow E-Verify to validate driver’s licenses and state-issued ID cards with information provided by state motor vehicle administrations. DHS may not maintain the information in a federal database and may not transmit the information except for purposes of E-Verify.

¹ Westat, *Findings of the E-Verify Program Evaluation*, Report Submitted to the U.S. Department of Homeland Security (December 2009), at xxxi.

- Requires reports from U.S. Citizenship and Immigration Services (USCIS) to Immigration and Customs Enforcement (ICE) identifying fraudulent SSN use in the E-Verify process for investigation and appropriate enforcement action.
- Requires referral from USCIS to ICE of each instance where employees present fake documents during the Further Action Notice resolution process.
- Provides for DHS outreach and training to assist employers in preventing identity fraud and strengthening hiring practices.

II. STRENGTHEN PHOTO TOOL EFFECTIVENESS AND DATA PRIVACY PROTECTIONS

To improve the accuracy of E-Verify and reduce identity fraud, S.744 expands use of a photo-matching process known as Photo Tool, which enables employers to match a new employee’s photo identification with a digital E-Verify image. But photo matching is limited to documents for which there is a verified photo in the E-Verify system. For the more than 60% of Americans who do not have a U.S. passport or qualifying immigration documents, the bill relies on states to give DHS access to drivers’ license records. Based on experience with the REAL ID Act of 2005 (with which few states have fully complied), there is no assurance that all or even most states will voluntarily participate in E-Verify. S.744 provides \$250 million in grants to ease state compliance, but that figure may understate the full cost to the states. Many also worry that the bill’s Photo Tool provisions will lead to establishment of a federal database containing additional personal information and photographs of individual Americans.

The Portman amendment:

- Doubles available grant monies (from \$250 million to \$500 million) for states that share DMV information and photos to ensure that those states do not bear the costs of participation and compliance. Pegs state grants to actual participation costs.
- Clarifies that Photo Tool must be integrated into the E-Verify system and that the timing of its implementation is tied to rollout of mandatory E-Verify.
- Provides robust data privacy protections by:
 - (1) clarifying that Photo Tool will be implemented so that E-Verify “pings” state DMV databases with individual queries rather than storing such state-provided information;
 - (2) providing that state DMV information and images may not be collected or stored, may not be used for any purpose other than an E-Verify photo match, any may not be disseminated in any way beyond a response to an individual photo-tool query; and
 - (3) providing for periodic DHS audits to ensure that the Photo Tool data is not being collected, stored, or improperly disseminated.

III. ENHANCE THE “ADDITIONAL SECURITY MEASURES” FOR IDENTITY VERIFICATION

For new employees whose identity cannot be verified using Photo Tool, S.744 provides for the DHS Secretary to develop “additional security measures” designed to authenticate identity. But there is no specified timeframe for implementation and little guidance in the way of standards for the additional security measures.

The Portman amendment:

- Clarifies that the additional security measures must be integrated into the E-Verify system for workers who present a document without a corresponding Photo Tool image, that the timing of their implementation is tied to rollout of mandatory E-Verify, and that failure to verify an identity with the additional security measures results in a Further Action Notice, fully protecting employee appellate rights.
- Specifies standards for DHS design and operation of the additional security measures to include state-of-the-art technology structured to provide prompt determinations and minimize employer and employee burdens. Specifications are based on advice from sophisticated providers of knowledge-based authentication technology and are shaped to safeguard employee privacy and maximize the accuracy and efficiency of identity determinations.
- Permits employers to choose, with advance notice to DHS, to use the additional knowledge-based authentication measure on all new hires. Employers voluntarily electing to do so would implement this measure in addition to Photo Tool, rather than only in cases where no digital image is available for a Photo Tool match.
- Provides a safe harbor—for the period between the date of enactment and the date on which E-Verify is mandated for an employer—allowing employers to make nondiscriminatory use of private sector identity proofing technology (as many do now) without fear of liability under §274B as amended by S.744.

IV. PROTECT EMPLOYERS WHO SEEK TO COMPLY IN GOOD FAITH

S. 744 mandates nationwide rollout of E-Verify and also enhances penalties for employers who do not comply with the mandated employment verification process. The bill's provisions seek to ensure that employers will not engage in unfair immigration-related employment practices, expanding both the grounds and penalties for such practices. Employers will face the often challenging task of ensuring compliance with new employment verification obligations while simultaneously avoiding an expanded set of unfair immigration-related employment practices.

The Portman amendment:

- Provides safe harbor protection to employers who comply in good faith with the requirements of the mandatory employment verification system. The government must demonstrate “by clear and convincing evidence” that an employer has knowingly hired an unauthorized worker. Employers that take “reasonable steps in good faith” to avoid unfair immigration-related employment practices may not be subject to civil liability.
- Clarifies that the four methods of input for verifying employees—paper, telephonic, electronic, and integrated electronic—must all be provided as options for employers and that the “all electronic” option must integrate access to Photo Tool and additional security measures along with current E-Verify checks of the SSA and DHS databases.

V. EXPEDITE E-VERIFY ROLLOUT AND ENSURE FULL IMPLEMENTATION

- Expedites the E-Verify mandatory rollout—while preserving the full timeline for small businesses—according to the following parameters:
 - Year one includes critical infrastructure and employers with more than 10,000 employees;
 - Year two includes employers with more than 500 employees;
 - Year three includes employers with more than 20 employees; and
 - Year four includes agricultural and all other employers.
- Trigger for timely and full implementation of mandatory E-Verify to all employers—including integrated Photo Tool and “additional security measures” systems.

Contact Rob Porter (rob_porter@portman.senate.gov) with any questions.