

# Why States and Localities Should Not Require Employer Participation in the Basic Pilot Program

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## BACKGROUND

The Basic Pilot Program<sup>1</sup> is a voluntary Internet-based program that was established to allow employers to electronically verify workers' employment eligibility with the Department of Homeland Security (DHS) and the Social Security Administration (SSA). In 2006, a number of states and localities introduced proposals that would require local or state governments to use the Basic Pilot. Many of these proposals also required businesses, through licensing or contracting requirements, to use the program. While Basic Pilot often is portrayed as the magic bullet that would curb unauthorized employment, the program has been plagued by problems since its inception in 1997. Most notably, Basic Pilot, which is used by only approximately 14,000 employers, has been hindered by inaccurate and outdated information in the DHS and SSA databases, misuse of the program by employers, and lack of adequate privacy protections.

As required by Congress, two independent entities evaluated the Basic Pilot and issued a report of their findings in 2002. The evaluation report identified several critical problems with the program and concluded that it was "not ready for larger-scale implementation at this time."<sup>2</sup> Since the 2002 report, the Government Accountability Office (GAO) and DHS have issued reports that support the finding that DHS and SSA databases continue to contain inaccurate and outdated information.<sup>3</sup> The GAO report also concluded that "existing weaknesses in the program, such as the inability of the program to detect identity fraud, delays in entering data into DHS databases, and some employer noncompliance with pilot program requirements, could become more significant and additional resources could be needed if employer participation in the program greatly increased or was made mandatory."<sup>4</sup>

As states and localities consider making the Basic Pilot mandatory, they should not only consider the weaknesses of the program, but also understand that an approach that relies only on enforcement of penalties against employers that violate the law regarding employment eligibility verification will not solve the problems associated with unauthorized employment. The lesson learned from the Immigration Reform and Control Act of 1986 (the federal law that for the first time required employers to verify the work eligibility of all new hires) is that some unscrupulous

<sup>1</sup> For more information, see BASIC INFORMATION BRIEF: DHS BASIC PILOT PROGRAM (National Immigration Law Center, Jan. 2007).

<sup>2</sup> FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June 2002) at vii.

<sup>3</sup> See IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYER VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, Aug. 2005) (hereafter "GAO"), [www.gao.gov/new.items/d05813.pdf](http://www.gao.gov/new.items/d05813.pdf), and REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM (U.S. Citizenship and Immigration Services, June 2004) (hereafter "USCIS"), available at [www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C18523%7C11260](http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C18523%7C11260).

<sup>4</sup> GAO, *supra* note 3, at 14.



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employers knowingly hire undocumented workers because they assume that such workers will be reluctant to hold them accountable for labor law violations. It is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do indeed complain about deplorable working conditions. A much better proposal for states and localities is to more effectively enforce state and local labor laws and to enact stronger labor protections at the state level to hold employers accountable for labor law violations and remove the economic incentive to seek out and unfairly exploit undocumented immigrants. In addition, states and localities should call on Congress to reform our immigration system and provide a comprehensive opportunity for currently undocumented noncitizens to earn legal status.

## **SPECIFIC WEAKNESSES OF THE BASIC PILOT PROGRAM**

### **■ Inaccurate and outdated federal databases prevent employment-authorized individuals from being approved for work.**

- The SSA estimates that 17.8 million of its records contain discrepancies related to name, date of birth, or citizenship status.<sup>5</sup>
- The 2004 DHS report to Congress notes that SSA's databases currently are able to automatically verify the employment eligibility of less than 50 percent of work-authorized noncitizens (versus 99.8 percent for native-born citizens).<sup>6</sup> A 2006 SSA report notes that, of the approximately 46.5 million noncitizen records contained in SSA's database, 4.8 million contain discrepancies.<sup>7</sup>
- Only 82.6 percent of work-authorized noncitizens verified as employment-eligible by the Basic Pilot are confirmed by U.S. Citizenship and Immigration Services (USCIS) through primary electronic checks.<sup>8</sup> While most of these cases eventually are resolved favorably, the process often requires costly and time-consuming manual secondary reviews.
- Most recently, while conducting a review of practices in 14 of USCIS's busiest district offices, the GAO found that over 110,000 A-files were not where the agency's computerized tracking system said they were.<sup>9</sup> (An A-file is the central paper file kept by USCIS on noncitizens who come into contact with the agency; its contents help USCIS staff determine, among other things, the noncitizen's immigration status and employment eligibility). This most recent incident highlights the longstanding, persistent problems DHS and its predecessor agency, the Immigration and Naturalization Service, have had in managing the huge volume of data for which they have been responsible — problems that have included inaccurate databases, privacy and security lapses, and difficulty in fielding and developing information systems.<sup>10</sup>

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<sup>5</sup> CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), [www.socialsecurity.gov/oig/ADOBEPDF/auditxt/A-08-06-26100.htm](http://www.socialsecurity.gov/oig/ADOBEPDF/auditxt/A-08-06-26100.htm).

<sup>6</sup> USCIS, *supra* note 3, at 4–5.

<sup>7</sup> SSA Office of the Inspector General, *supra* note 5.

<sup>8</sup> USCIS, *supra* note 3, at 7.

<sup>9</sup> IMMIGRATION BENEFITS: ADDITIONAL EFFORTS NEEDED TO HELP ENSURE ALIEN FILES ARE LOCATED WHEN NEEDED (Government Accountability Office, Oct. 2006), [www.gao.gov/new.items/d0785.pdf](http://www.gao.gov/new.items/d0785.pdf), at 4.

<sup>10</sup> *See, for example*, HOMELAND SECURITY NEEDS TO IMPROVE ENTRY EXIT SYSTEM EXPENDITURE PLANNING (General Accounting Office, June 2003), [www.gao.gov/new.items/d03563.pdf](http://www.gao.gov/new.items/d03563.pdf), and CHALLENGES TO IMPLEMENTING THE IMMIGRATION INTERIOR ENFORCEMENT STRATEGY (General Accounting Office, Apr. 10, 2003), [www.gao.gov/new.items/d03660t.pdf](http://www.gao.gov/new.items/d03660t.pdf). More recently, DHS stated that

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■ **Employers and workers can adapt to and circumvent the Basic Pilot by misusing valid or counterfeit documents.**

- The Basic Pilot does not resolve the underlying issue of employers hiring undocumented workers, because the program can only verify whether the information that an individual presents is valid. It cannot detect if a worker presents valid documentation that belongs to another person or counterfeit documentation that contains valid information and appears authentic.<sup>11</sup>
- It also cannot detect if an employer is knowingly hiring undocumented workers and providing them with documents that will “clear” the system, or if an employer is hiring undocumented workers and simply not running their Social Security number and other information through the Basic Pilot program
- This limitation was highlighted in the December 2006 immigration raids on six Swift & Company meatpacking plants. Swift had voluntarily participated in the Basic Pilot since 1997, but some of the noncitizen workers who were arrested in the raids allegedly had borrowed or bought legitimate documents that passed Basic Pilot scrutiny.
- This response to the Basic Pilot by employers who need workers and workers who need work is analogous to migrants’ determined persistence when faced with obstacles intended to keep them out of the U.S., including fences and walls. DHS can escalate by building a longer or higher fence or designing a more expensive and secure document, but such measures have no chance of succeeding as long as our underlying immigration system remains dysfunctional and there are insufficient legal channels by which workers can enter the U.S.

■ **Employers use the program to discriminate against workers.**

- The 2002 independent evaluation of Basic Pilot discovered that employers engaged in prohibited employment practices, including preemployment screening, a practice that not only denies workers a job but also the opportunity to contest database inaccuracies; adverse employment action based on tentative nonconfirmations, which penalizes workers while they and the appropriate agency (DHS or SSA) work to resolve database errors; and failure to inform workers of their rights under the program.<sup>12</sup>
  - 45 percent of employees surveyed who contested a tentative nonconfirmation were subject to pay cuts, delayed job training, and other restrictions on working.<sup>13</sup>
  - 73 percent of employees who should have been informed of work authorization problems were not notified.<sup>14</sup>
- A 2006 report issued by SSA also found that employers did not follow program rules.
  - 42 percent of employees surveyed reported that employers used the Basic Pilot to

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it is indefinitely postponing implementation of the land border exit-tracking element of its U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program because the technology needed to make it cost-effective is not yet available. See Rachel L. Swarns and Eric Lipton, “Administration to Drop Effort to Track if Visitors Leave,” N.Y. TIMES, Dec. 15, 2006, at A1; see also US-VISIT PROGRAM FACES STRATEGIC, OPERATIONAL, AND TECHNOLOGICAL CHALLENGES AT LAND PORTS OF ENTRY (Government Accountability Office, Dec. 2006), [www.gao.gov/new.items/d07248.pdf](http://www.gao.gov/new.items/d07248.pdf).

<sup>11</sup> GAO, *supra* note 3, at 22–23.

<sup>12</sup> Temple University Institute for Survey Research and Westat, *supra* note 2, at 19–20.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.* at 20.

verify their employment authorization *before* hire.<sup>15</sup>

- 30 percent of employers used the Basic Pilot to verify the *existing* workforce.<sup>16</sup>

- Although employers are prohibited from engaging in these practices, USCIS officials told the GAO “that their efforts to review employers’ use of the pilot program have been limited by lack of staff available to oversee and examine employer use of the program.”<sup>17</sup>

■ **Workers’ privacy is compromised because information in DHS and SSA databases is not protected.**

- The 2002 independent evaluation found that some employers compromised the privacy of workers in various ways, such as by failing to safeguard access to the computer used to maintain the pilot system, leaving passwords and instructions in plain view, and potentially allowing other personnel access to the system and employees’ private information.<sup>18</sup>
- According to the Heritage Foundation, the Basic Pilot program “would run afoul of legitimate privacy concerns. Both the government and employers would have access to massive databases of information, which would surely tempt some to traffic in identity theft.”<sup>19</sup>

■ **The cost is high for the federal government, businesses and workers.**

- The Government Accountability Office reported that the best estimates are that enacting any nationwide, employment eligibility verification system will cost at least \$11.7 billion per year.<sup>20</sup>
- Employers have to expend significant resources to utilize the Basic Pilot program. They must purchase and maintain dedicated computer lines for a secure Internet connection, pay for required hardware, and absorb the cost of lost work time as staff are trained to screen new employees’ work eligibility and forced to resolve problems with databases and data errors. Employers also incur indirect costs, such as reassignment of employees, additional recruitment, and delayed production.
- Employers could face costly litigation for discriminatory use of the Basic Pilot program.
- The cost could be felt more significantly by small employers if they are required to invest in Basic Pilot–related computer equipment, staffing, and training despite having fewer new employees to screen.
- Employees also would bear substantial new costs. The 2002 independent evaluation found that resolving questions regarding their work authorization can be costly for

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<sup>15</sup> CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION’S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), [www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf](http://www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf), at 6.

<sup>16</sup> *Id.*

<sup>17</sup> Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP, COMMITTEE ON THE JUDICIARY, U.S. SENATE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, June 2006), [www.gao.gov/new.items/d06895t.pdf](http://www.gao.gov/new.items/d06895t.pdf), at 12.

<sup>18</sup> Temple University Institute for Survey Research and Westat, *supra* note 2, at 31–32.

<sup>19</sup> James Jay Carafano, Ph.D., WORKPLACE ENFORCEMENT TO COMBAT ILLEGAL MIGRATION: SENSIBLE STRATEGY AND PRACTICAL OPTIONS (The Heritage Foundation, Aug. 2006), [www.heritage.org/Research/NationalSecurity/hl957.cfm](http://www.heritage.org/Research/NationalSecurity/hl957.cfm), emphasis added.

<sup>20</sup> GAO, *supra* note 3, at 29.

employees. Nearly all (approximately 95 percent) of those who were faced with such questions used personal time or time off from work to do so, and almost half of these reported that it took about half a day to resolve their issue. Furthermore, it appears that in some cases employees had to resolve issues that would not have arisen if their employers had followed required procedures.<sup>21</sup>

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<sup>21</sup> Temple University Institute for Survey Research and Westat, *supra* note 2, at 34–35.