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CONGRESSIONAL TESTIMONY

**Homeland Security Investigations:
Examining DHS's Efforts to Protect American
Jobs and Secure the Homeland**

**Testimony before the
House Homeland Security Committee,
Subcommittee on Oversight, Investigations and
Management
United States House of Representatives**

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Chairman McCaul, Ranking Member Keating, and Subcommittee members, thank you for this opportunity to share my thoughts on this very important topic. I should state beforehand that the views expressed in this testimony are my own and should not be construed as any official position of The Heritage Foundation.

I am currently the Senior Policy Analyst for Homeland Security at The Heritage Foundation, a position I have held for over three years. In this capacity, I research, write and speak on homeland security issues, including the issue of worksite enforcement of immigration laws. The Heritage Foundation as an institution has also consistently published on the topic of immigration and specifically worksite enforcement.¹ Heritage experts, such as Attorney General Ed Meese, Dr. Matthew Spalding, Dr. James Carafano, Mr. Cully Stimson, Mr. Robert Rector, Mr. Matt Mayer, and I have held working groups and events, and have written, researched, and testified extensively on this topic.

Today's hearing will examine the Department of Homeland Security's efforts to protect American jobs and secure the homeland. Specifically, I hope to make three points during my testimony:

- Worksite enforcement of immigration laws is vitally important to our nation's security, economic well-being, and rule of law. The Obama Administration, however, has used its tenure to rollback several key worksite enforcement measures put in place during and prior to the Bush Administration.
- The Department of Homeland Security's "employer-focused" strategy for worksite enforcement is inadequate in terms of creating a legal workforce in the United States. It fails to effectively address the problem of off-the-books and identity fraud employment and sends the message that the government does not take enforcement of our immigration laws seriously.
- An effective worksite enforcement strategy must combat both employers of illegal labor and illegal workers, deploying an extensive menu of enforcement tools, meant to combat identity theft/fraud, fake documentation, off-the-books employment, and other abuses of immigration laws in the workplace.

I feel it is important to the discussion of worksite enforcement to first delineate the primary means by which an individual might try to work illegally in the United States. Understanding these illegal methods is essential in terms of assessing the strategies that have been employed by both the Obama and Bush Administrations to enforce immigration laws in the workplace. There are three main methods by which most individuals attempt to gain illegal employment:²

1. *Working "on the books" with a fictitious Social Security number.* In this situation, the illegal worker is employed formally by a business, just as any other employee. The

¹For more Heritage research, please visit www.heritage.org

² Robert Rector, "Reducing Illegal Immigration Through Employment Verification, Enforcement, and Protection," Heritage *Backgrounder* No. 2192, October 7, 2008, at <http://www.heritage.org/Research/Reports/2008/10/Reducing-Illegal-Immigration-Through-Employment-Verification-Enforcement-and-Protection> (July 4, 2011).

employer withholds Social Security (FICA) taxes and files a W-2 tax form for the employee. The illegal employee presents identity documents to the employer showing that he is either a U.S. citizen or lawful immigrant entitled to work.

These documents will contain a name, date of birth, Social Security number, and possibly a green card number, which are either partially or completely fictitious. The employer dutifully records this fictitious information on an official form called an I-9 and stores the form in a file cabinet. If the information on the I-9 were checked, it would immediately be found to be fraudulent.

2. *Working "on the books" through identity fraud.* In this situation, the illegal worker is also employed by a business just like any other employee. The employer withholds Social Security (FICA) taxes and files a W-2 tax form for the employee. The illegal employee presents identity documents to the employer showing that he is either a U.S. citizen or lawful immigrant entitled to work.

However, in this case, the name, date of birth, Social Security number and (in some instances) green card number on the documents corresponds to the identity of a real U.S. citizen or lawful immigrant. To obtain employment, the illegal fraudulently assumes the identity of another real person. The employer records the fraudulent information on the I-9 and keeps the I-9 on file, but neither the employer nor the government checks to determine whether the employee is the person he purports to be.

3. *Working "off the books."* In this situation, the employer deliberately conceals the employment of the illegal worker from the government. There is no public record of the employee, FICA taxes are not paid, and no W-2 is sent to the government. It is very unlikely that an I-9 form is completed or kept.

An effective worksite enforcement strategy will deploy enforcement tools aimed at combating all three types of illegal employment.

Weak Enforcement History

The employment of illegal workers has been unlawful in the United States since 1986 when Congress enacted the Immigration Reform and Control Act (IRCA). IRCA set penalties for knowingly hiring illegal workers and sought, through the requirements of the paper I-9 process, to require employers to verify whether newly hired workers could legally work in the United States.

This policy was ineffective at stemming the tide of illegal labor, largely because it was never seriously enforced. While most employers dutifully checked the information given to them from newly hired employees, there was little accountability by the federal authorities to ensure that employers were following through on their obligations. Furthermore, the government failed to actually identify and deport those found illegally employed in the United States. Employers had few tools by which to know whether documents and other information provided by employees were fake, authentic or stolen from another authorized-to-work American or lawful immigrant.

Partially because of this lackadaisical worksite enforcement policy, in the years from 1986 to today, the illegal immigrant population in the United States grew from approximately 2.8 million to 12 million in 2008 and down to around 10.8 million in 2010.³ Some of this decrease can arguably be attributed to the enforcement measures carried out from 2004-2008 which I will describe below, admittedly however, most of the decrease in the past few years can be attributed to our fledging economy and high unemployment rate which has and continues to discourage many would-be illegal immigrants from choosing to come to the U.S. Without a strong enforcement strategy in place, any economic rebound will likely increase these numbers to 2008 levels or possibly higher.

Enforcement Push

From 2004-2008, the Bush Administration began an aggressive strategy to ramp-up enforcement of immigration laws in the workplace, including initiatives aimed at both employers of illegal labor and illegal workers alike.

Despite the fact that IRCA provides both civil and criminal penalties to employers that knowingly hire an individual without complying with the employment verification system (the paper I-9 process), prior to the Bush Administration, it was commonplace that employers found hiring illegal labor might only be subject to administrative hearings and at most civil penalties. The Bush Administration, however, began to perform large scale criminal and civil investigations of employers and used stiff criminal and civil penalties to prosecute those that were abusing the law, while identifying illegal workers.

Popularly referred to as “worksite raids,” the Bush Administration used unannounced immigration enforcement checks as a means to identify employers of illegal labor and illegal workers. Law enforcement and immigration authorities, pursuant to a criminal investigation would arrive unannounced at workplaces suspected of employing illegal immigrants and require proof of legal status. The employees found to be illegal would be turned over to law enforcement, while employers would be subjected to fines and other penalties for employing illegal labor. These checks were essential in terms of discovering all three types of illegal employment and served as a huge deterrent mechanism to those seeking to avoid the law.

Other efforts used by the Bush Administration included the expanded use and promotion of E-Verify—an online tool by which to check the employment status of newly hired employees. While deployed on a limited basis as a pilot program since 1996, it was extended to all 50 states in 2003. E-Verify today remains a voluntary program, and yet has more than 225,000 participating employers.⁴ As part of the Bush Administration’s push to increase participation in E-Verify, the Administration propagated a rule, in place today, which requires all federal contractors to use E-Verify for their employees.

³ Michael Hofer, Nancy Rytina, and Bryan C. Baker, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009,

http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf (July 4, 2011).

⁴ United States Citizenship and Immigration Services, What is E-Verify?

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e94888e60a405110VgnVCM1000004718190aRCRD&vgnnextchannel=e94888e60a405110VgnVCM1000004718190aRCRD> (July 4, 2011).

The Bush Administration also began an effort in 2007 to use Social Security No-Match letters as a worksite enforcement tool. The Social Security Administration (SSA) has long issued letters to workers to let them know that there were discrepancies in the use of their social security numbers. In 1994, the SSA began sending such letters to employers with 10 or more no-match W-2 forms. The Bush Administration, however, issued a new rule clarifying that receipt of such a no-match letter “may,” depending on the circumstances, constitute constructive knowledge that a worker is unauthorized. The rule then granted employers a safe harbor from immigration enforcement actions based on no-match letters when they took certain simple actions, such as double-checking their records.⁵ After a court challenge, DHS proposed a supplemental rule which would have resolved court concerns over the rule’s implementation and yet still preserve No-Match as an enforcement tool. However, the Administration was unable to follow through with full implementation before the end of its tenure, and the Obama Administration would later completely abandon the effort.

When the Bush Administration began actually enforcing immigration laws in the workplace, the frequency of worksite arrests jumped from 845 in fiscal year (FY) 2004 to 6,287 in FY 2008. These efforts were essential first steps towards effectively identifying individuals working illegally in the United States and employers that were abusing immigration laws. While certainly not the end of the road for worksite enforcement, augmented and effectively deployed, these efforts did and would have continued to have a gigantic impact on worksite enforcement.

“Change” in Strategy

The Obama Administration, upon taking office, announced a change of course in terms of its own worksite enforcement strategy. It has emphasized that it has switched to one that is “employer,” rather than “employee” focused, taking the emphasis off of identifying illegal workers, and more on punishing those who hire illegal labor. What this has meant in practice, however, seems to be significantly less worksite enforcement than the Bush Administration.

For instance, the Administration has emphasized that it no longer prefers to use “worksite raids” or unannounced worksite enforcement checks, largely abandoning criminal investigations in favor of civil actions. Instead, it has focused its efforts on paper I-9 audits where employers would be told in advance that they will be audited and are given significant lead time by which to clear out a staff of illegal labor. Even upon auditing, employers are largely left free of additional investigation as long as they are filling out the I-9 paperwork appropriately. Essentially, with plenty of notice, it is fairly easy for most employers to clean-up their payroll to pass the Obama Administration’s muster. While these audits look nice on paper, they do very little in terms of actually enforcing immigration laws.

In at least one instance where the Department of Homeland Security has performed investigations into employers, the enforcement check reportedly resulted in no identification, detention or deportations of apprehended illegal workers. In February of 2009, an investigation into Yamato Engine Specialists Company in Bellingham, Washington yielded 28 illegal workers.

⁵ Charles Stimson and Andrew Grossman, No Match Immigration Enforcement: Time for Action, *Heritage Legal Memorandum* No. 25, at <http://www.heritage.org/Research/Reports/2008/05/No-Match-Immigration-Enforcement-Time-for-Action> (July 7, 2011).

The Secretary of Homeland Security, however, apparently uninformed of the enforcement check, according to press reports, gave the apprehended workers temporary work permits.

This pattern sends a message that the Administration is not serious about enforcement. But it is also disappointing because the actual apprehension of illegal workers was often helpful to investigators during the Bush Administration as witnesses to provide testimony in a prosecution of employers for abuse of the law.

Rescission of Social Security No-Match. Instead of pushing forward with the supplementary rule propagated by the Bush Administration that would have likely met court muster and allowed for full deployment of no-match as an enforcement tool, the Obama Administration halted no-match letter issuance completely and expressly emphasized its intention to prevent the use of such letters as evidence for constructive knowledge of unauthorized workers. While the Administration has in recent months quietly begun issuing letters again, it has shown no appetite to push forward with the Bush Administration's plan to use no-match as an enforcement tool. Given that the Administration has emphasized its preference for an "employer-focused" strategy for immigration enforcement—such a policy *should* fit squarely into the Administration's agenda.

Abandonment of REAL ID. REAL ID was enacted in 2005 in direct response to the 9/11 Commission Recommendation that the federal government set secure standards for identification as a means of preventing terrorist travel, but also to combat identity theft and fraud. Given that identity theft and fraud is one of the biggest challenges facing worksite enforcement and driver's licenses are routinely used as part of the worker verification process, requiring states to meet a minimum standard for driver's licenses only makes sense. However, while many states have moved forward to meet the Act's requirements, the Administration has spent more time trying to get the Act repealed or replaced than meeting implementation deadlines. The Administration's efforts to get rid of the mandate make little sense if it is serious about combating the rampant identity theft used to obtain employment illegally.

At the same time as rolling back these measures, the Obama Administration has made E-Verify the centerpiece of its worksite enforcement strategy and has pushed aggressively to increase participation in the E-Verify program. At a conference on E-Verify in 2009, Secretary Napolitano stated that "E-Verify is at the centerpiece of our efforts to maintain a legal workforce both for large and small businesses."

Let me emphasize, E-Verify is an outstanding tool for catching the use of fake information by would-be illegal workers. It can accurately and inexpensively do so and it absolutely should be promoted. However, it is not a silver bullet solution for enforcement and should not be sold as such by the Administration. For instance, E-Verify cannot catch off-the-books employment. It also does not catch situations where an illegal worker steals a legitimate social security number and other documentation and gives that information to an employer. In essence, without other tools aimed at squeezing out other forms of illegal employment, an E-Verify focused enforcement strategy will simply further the market for identity theft and off-the-books employment, and only detect a small percentage of the illegal workforce.

An Effective Strategy

The Department of Homeland Security's so-called employer-focused strategy has resulted in less enforcement, not more. While it has in some instances exceeded the Bush Administration's levels in terms of sheer number of investigations and penalties, these efforts have largely lacked in substance, and have done very little to actual stop the employment of illegal labor. Some of the right questions to be asked should be the number of worksite arrests, what actions ICE has taken to investigate identity theft discovered in the course of an investigation, and what steps is it taking to follow-up with employers that have been investigated through a soft I-9 audit.

If DHS is serious about holding employers accountable, it must also be serious about holding illegal workers accountable. The two are not separate issues, and require a comprehensive strategy aimed at disincentivizing the use of illegal labor in the workplace.

Effective enforcement requires a menu of enforcement tools aimed at squeezing all forms of illegal labor out of the market, including off-the-books, identity theft, and fake documentation. Such a menu of enforcement tools should include:

- *Reinstatement of worksite enforcement checks.* These checks, pursuant to a criminal investigation are a valuable tool in terms of identifying those employers that are consistently hiring illegal labor. Diluting their effectiveness by alerting employers or not actually identifying, detaining and deporting identified illegal workers makes such raids useless.
- *Continued use of civil audits in conjunction with criminal enforcement.* I-9 audits can be used effectively to alert employers of potential violations of immigration law. These audits should continued to be used, in conjunction with a robust criminal investigation process. Together, these actions can provide the deterrent effect necessary to combat violations of worksite immigration laws.
- *Provide resources to limit the impact of worksite raids on families and local communities.* While worksite enforcement checks are a perfectly legitimate and effective means by which to identify illegal workers, the impact of these raids on families and local communities should not be ignored. Often the children of detainees, most of them U.S.-born citizens, suffer when their parents are detained and deported. ICE has tried to put in place several initiatives to allow families to stay together during the deportation process as well as the release of sole caregivers from detention facilities. The Obama Administration could go further to coordinate with local communities before and after raids, including working with schools, social services, and religious institutions to ensure that no children are being left behind, as well as working to ensure quick release of sole caregivers to minimize the time that children of single parents are left in the care of others.
- *Continued efforts to promote and improve upon E-Verify.* E-Verify is highly accurate at detecting false information provided by an illegal worker. It should continue to be promoted as a means for employers to check the work eligibility of their employees. Congress and the Administration should remain committed to its reauthorization and to

continually refine the accuracy of its databases. Another step may be to investigate whether employers are actually discharging the employees who receive final non-confirmations.

- *Promote IMAGE.* IMAGE is the ICE Mutual Agreement between Government and Employees. It was meant to improve internal enforcement by giving companies training on ICE on hiring procedures, detecting fraudulent documents and using E-Verify. In addition, participating companies have to undergo an I-9 audit and check the legitimacy of existing employees' Social Security numbers. IMAGE should be supported in order to give willing companies more resources by which to ensure the legality of their workplace.
- *Move forward with Social Security No-Match* as an enforcement tool. No-Match has the ability to help tackle identity theft situations and help employers identify illegal workers in their labor force. A next step would be to allow information sharing between DHS and SSA on no-match data to assist in immigration investigations.
- *Examine supplemental procedures to prevent identity fraud/theft.* One method may be for the SSA to scan its wage database to identify individuals who held two or more jobs at the same time, over an extended period, were receiving Social Security benefits, or were employed under the age of 16. These red flags could then be used by SSA to send a letter to the individual notifying them that a potential identity theft may have occurred.
- *Ramp-up support for investigations of off the books employment.* While off the books employment situations are the most difficult for investigators to tackle, additional resources for investigations of these incidents could decrease the incentive for employers to hire workers in this manner.
- *Increase penalties for unlawful hiring.* The financial penalties for hiring legal workers is too low, so low, in fact that it does not always deter illegal hiring. As a result, many employers can factor in fines as a cost of doing business. Congress should look to set fines in a way that will have an actual deterrent effect.
- *Move Forward with REAL ID.* Postponing or modifying implementation confuses the work already in process and detracts from the underlying purpose of REAL ID- to maintain security and combat identity theft.

A legal workforce is absolutely essential in terms of an effective immigration strategy that preserves national security, promotes the economy, and maintains rule of law. I urge Congress to push the Administration to better delineate how its worksite enforcement strategy will meet these goals.

Thank you for this opportunity to testify. I would be happy to answer any questions you have at this time.