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EXHIBIT 15
DATE 2/15/2011
HB 440

February 15, 2011 Testimony in Opposition to HB 440

Chairwoman Arntzen, and Members of the House Business and Labor Committee,

On behalf of the American Civil Liberties Union of Montana- a membership based organization with nearly 2,000 household members in Montana, dedicated to defending the Constitution and the Bill of Rights- I express our opposition to HB 440.

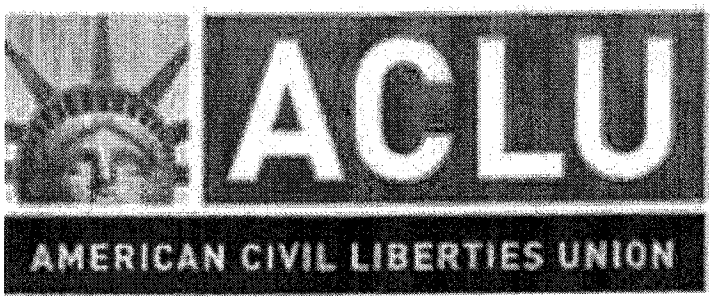
I am providing you with a copy of testimony presented February 10, 2011 by Laura Murphy, Director of ACLU's Washington Legislative Office, before the U.S. House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement. Ms. Murphy was addressing E-Verify – Preserving Jobs for American Workers.

E-Verify is a flawed and burdensome electronic employment eligibility verification screening system for America's workforce. The E-Verify system imposes unacceptable burdens on American workers, businesses and society at large. The cost to legal workers, business and taxpayers associated with a mandatory program are significant while the benefits are speculative

The ACLU opposes a mandatory Electronic Employment Verification System (EEVS) for five reasons:

1. It poses unacceptable threats to American workers' privacy rights by increasing the risk of data surveillance and identity theft;
2. Data errors in Social Security Administration ("SSA") and Department of Homeland Security ("DHS") files will wrongly delay or block the start of employment for lawful American workers and may lead to discrimination;
3. It lacks sufficient due process procedures to protect workers injured by such data errors;
4. Neither SSA or DHS are able to implement such a system and SSA's ability to continue to fulfill its primary obligations to the nation's retirees and disabled individuals would deteriorate; and
5. It will lead to rampant employer misuse in both accidental and calculated ways.

If you really want to understand the implications of what all is involved with E-Verify, you owe it to yourself and your constituents to take the time to read Ms. Murphy's thoughtful and detailed testimony. Once you have done so, I trust you will concur that HB 440 deserves a "do not pass" recommendation. Thank you for your time and consideration.



Written Statement of the
American Civil Liberties Union

Laura W. Murphy
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Before U.S. House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

February 10, 2011

E-Verify- Preserving Jobs for American Workers

Chairman Gallegly, ranking member Lofgren and members of the Committee - On behalf of the American Civil Liberties Union ("ACLU"), America's oldest and largest civil liberties organization, and its more than half a million members, countless addition supporters and activists, and 53 affiliates across the country, we write to oppose any legislative proposal that would expand E-Verify, a flawed and burdensome electronic employment eligibility verification screening system for America's workforce. The E-Verify system imposes unacceptable burdens on America's workers, businesses and society at large. The costs to legal workers, business and taxpayers associated with a mandatory program are significant while the benefits are speculative.

Electronic Employment Verification

The ACLU opposes a mandatory Electronic Employment Verification System (EEVS) for five reasons:

(i) **it poses unacceptable threats to American workers' privacy rights by increasing the risk of data surveillance and identity theft;**

(ii) **data errors in Social Security Administration ("SSA") and Department of Homeland Security ("DHS") files will wrongly delay or block the start of employment for lawful American workers and may lead to discrimination;**

(iii) **it lacks sufficient due process procedures to protect workers injured by such data errors;**

(iv) **neither SSA or DHS are able to implement such a system and SSA's ability to continue to fulfill its primary obligations to the nation's retirees and disabled individuals would deteriorate; and**

(v) **it will lead to rampant employer misuse in both accidental and calculated ways.**

I. Mandating Electronic Employment Eligibility Verification Poses Unacceptable Threats to American Workers' Privacy Rights

A nationwide mandatory EEVS would be one of the largest and most widely accessible databases ever created in the U.S. Its size and openness would be an irresistible target for identity theft. Additionally, because the system would cover everyone (and be stored in a searchable format), it could lead to even greater surveillance of Americans by the intelligence community, law enforcement and private parties.

The current E-Verify system, implemented in a small fraction of the country's workplaces, contains an enormous amount of personal information including names, photos (in some cases), social security numbers, phone numbers, email addresses, workers' employer and

industry, and immigration information like country of birth. It contains links to other databases such as the Customs and Border Patrol TECS database (a vast repository of Americans' travel history) and the Citizen and Immigration Service BSS database (all immigration fingerprint information from US VISIT and other sources).[1]

The data in E-Verify, especially if combined with other databases, would be a gold mine for intelligence agencies, law enforcement, licensing boards, and anyone who wanted to spy on American workers. Because of its scope, it could form the backbone for surveillance profiles of every American. It could be easily combined with other data such as travel, financial, or communication information. 'Undesirable' behaviors – from unpopular speech to gun ownership to paying for items with cash – could be tracked and investigated by the government. Some of these databases linked to E-Verify are already mined for data. For example, the TECS database uses the Automated Targeting System (ATS) to search for suspicious travel patterns. Such data mining would be even further enhanced by the inclusion of E-Verify information

Without proper restrictions, American workers would be involuntarily signing up for never-ending digital surveillance every time they apply for a job. In order to protect Americans' privacy, we recommend that Congress must limit the retention period for queries to the E-Verify system to three to six months, unless it is retained as part of an ongoing compliance investigation or as part of an effort to cure a non-confirmation. This is a reasonable retention limitation for information necessary to verify employment. By comparison, information in the National Directory of New Hires, which is used on an ongoing basis to allow states to enforce child support obligations, is deleted after either 12 or 24 months.[2] The current retention period for E-Verify (set by regulation) is an astonishing 10 years. In other words, deadbeat dads have greater privacy protections than American workers.

We also recommend that the use of information in any employment verification system be strictly curtailed. It should only be used to verify employment or to monitor for employment-related fraud. There should be no other federal, state, or private purpose. However, as a recent Westat report commissioned by the USCIS points out, any employer who signs on to a memorandum of understanding (MOU) can access E-Verify and therefore the data in the system could be used for other purposes. For example, such data could provide information into whether a mortgage or credit applicant is likely to be a poor credit risk.[3] Data should be bound by strict privacy rules, such as those that protect census data, which sharply limit both the disclosure and use of that information.[4]

Additionally, the system must guard against data breaches and attacks by identity thieves. Since the first data breach notification law went into effect in California at the beginning of 2004, more than 510 million records have been hacked, lost or disclosed improperly.[5] In 2007, it was reported that the FBI investigated a technology firm with a $1.7 billion DHS contract after it

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[1] 73 Fed. Reg. 75449.
[2] The data retention limitation for the National Directory of New Hires is governed by 42 U.S.C. §653 (i).
[3] Westat Report, p 201
[4] Protections for census data can be found at 13 U.S.C. §9.
[5] Privacy Rights Clearinghouse Chronology of Data Breaches, http://www.privacyrights.org/ar/ChronDataBreaches.htm.

failed to detect "cyber break-ins".[6] The December 2010 GAO Report on E-Verify repeatedly discusses the risk of identity theft associated with the system. In one example ICE found that 1,340 employees of a meat processing plant were not authorized to work even though each had been processed through E-Verify. Of the 1,340 unauthorized workers, 274 were charged with identity theft, including using valid Social Security numbers of others in order to work[7]. The loss of this information contributes to identity theft and a constant erosion of Americans' privacy and sense of security. An E-Verify database must not be subject to such threats.

II. Data Errors Will Injure Lawful Workers by Delaying Start Dates or Denying Employment Altogether and May Lead to Discrimination

Recent government reports acknowledge that huge numbers of SSA and DHS files contain erroneous data that would cause "tentative non-confirmation" of otherwise work-eligible employees and, in some cases, denial of their right to work altogether. The United States Customs and Immigration Service (USCIS) reported that 2.6% or over 211,000 workers received a tentative non-confirmation (TNC) and, according to the Westate report, about 0.8% of these TNCs are erroneous.[8] Since only 0.3% of those mistaken TNCs were resolved that means that approximately 0.5% or **80,000 legal workers** were improperly denied the right to work due to faults in the system.[9] In many of these cases workers simply don't have the time or don't know they have the right to contest their determinations and seek different employment. Finding another job is a difficult option for many unemployed Americans in this economy and certainly means countless hours of red tape and frustration.

In American cities and states where E-Verify has been implemented, the results have been disastrous. A survey of 376 immigrant workers in Arizona (where use of E-Verify is required) found that 33.5% were fired immediately after receiving a TNC and never given chance to correct errors in the system. Furthermore, not one of those workers was notified by the employer, as required in the MOU, that they had the right to appeal the E-Verify finding. When Los Angeles County audited its use of E-Verify for 2008-09 it found that 87% of its E-Verify findings were erroneous. Implementing a system this flawed nationwide would be a train wreck for American workers.

These error rates are caused by a variety of factors. First, women or men who changed their names at marriage, divorce or re-marriage may have inconsistent files or may never have informed either SSA or DHS of name changes. Second, simple key stroke or misspelling errors contribute to the volume of erroneous data. Third, individuals with naming conventions that differ from those in the Western world may have had their names anglicized, transcribed improperly or inverted. The GAO predicted that if E-Verify were made mandatory for new hires nationwide, approximately 164,000 citizens per year would receive a TNC just for name change

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[6] Ellen Nakashima and Brian Krebs, *Contractor Blamed in DHS Data Breaches*, WASHINGTON POST, Sept. 24, 2007.

[7] GAO, *Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain,* p. 24

[8] Westat Report, *Findings of the E-Verify Program Evaluation*, can be found at: http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf

[9] GAO, *Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain,* p.19.

related issues.[10] It would be even more damaging if applied to existing workers not just new hires.

The high number of error rates occurring among certain cultural groups can lead to an appearance of discrimination in the employment process. The GAO reported that 5 out of 25 employers in their site visits acknowledged that TNCs were more likely to occur where Hispanic employees have hyphenated or multiple surnames.[11] Additionally the TNC rate of employees who were eventually authorized to work was approximately 20 times higher for foreign-born employees than for U.S. born employees from April through June of 2008.[12] These factors lead to striking disparities and could easily lead employees to believe they were being judged on more than just their credentials. Moreover, employers may shy away from hiring non-native born individuals or those with foreign names because of a fear they would be harder to clear through the system.

III. Pending Legislative Proposals Lack Meaningful Due Process Protections for Lawful Workers Injured by Data Errors

Workers injured by data errors will need a means of quickly and permanently resolving data errors so they do not become presumptively unemployable. Workers face two distinct challenges. The first is to learn that there are errors in their record and the second is the lack of fundamental due process protections in resolving those errors.

Self-Check

We commend the USCIS for beginning the process of creating a self-check system that allows workers to check on their E-Verify data. It is a fundamental privacy principle that individuals should have access to information about them in order to assure that information is complete and correct. However it is important to note that this self-check process is still in its infancy and not currently accessible to workers.

We also have some specific concerns about how the self-check program will be implemented. First of all, self check cannot be used as a pre-screening tool. If employers were to impose a self-check requirement – effectively serving as an E-Verify pre-screening tool – they would shift the cost from the employer to the employee. This would undermine the anti-discrimination provisions built into the system to ensure that authorized workers are able to contest TNCs and document their eligibility to work.

Second, it is essential to protect the privacy of both employers and employees. Considering high rates of identity fraud associated with the E-Verify system, it is no surprise that individuals are very concerned about their personal information being kept in a database to which more and more people are gaining access. There must be clearly defined limits in regard to potential sharing of personal information. Third, there must be an option for self-check access to people without credit histories. If self-check relies on background check information, then it

[10] *Id.* p. 19.
[11] *Id.* p. 20.
[12] *Id.* p. 40

will be unavailable to populations of foreign nationals who have only recently arrived in the U.S. and have not yet developed a credit history. This would include some of those with the most complicated immigration situations such as refugees, asylum seekers, and people with temporary protected status.[13]

Due Process Protections

Senior officials in the DHS Privacy Office have said that individuals face formidable challenges in correcting inaccurate or inconsistent information. The Office of Special Counsel for Immigration-Related Unfair Employment Practices and DHS Office of Civil Rights and Civil Liberties have both said that employees have expressed difficulty in understanding the TNC notification letters and the process by which they have to correct errors. Moreover, as of 2009 the average response time for these Privacy Act requests was a staggering 104 days.[14] This is time that an employee would be unable to work if E-Verify were made mandatory. Congress must prevent the creation of a new employment blacklist – a "No-Work List" – that will consist of would-be employees who are blocked from working because of data errors and government red tape.

Under current law there are no due process protections for those who lose their jobs due to government or employer errors. The best current model for substantive due process protections can be found in Title II of the "Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, H.R. 4321 from the 111th Congress. This provision creates worker protections for both tentative and final non-confirmations, allows workers to recover lost wages when a government error costs them their job, limits retention of personal information, and creates accuracy requirements for the system.

IV. Government Agencies are Unprepared to Implement a Mandatory Employment Eligibility Prescreening System

As government reports evaluating E-Verify have repeatedly made clear, both SSA and DHS are woefully unprepared to implement a mandatory employment eligibility pre-screening system. The most recent GAO report expresses concerns over how USCIS has estimated the cost of E-Verify. They found that their estimates do not reliably depict current E-Verify cost and resource needs for mandatory implementation and that they fail to fully assess the extent to which their workload costs could increase in the future.[15] In order to implement such a system, both agencies would need to hire hundreds of new, full-time employees and train staff at every SSA field office. DHS has an enormous backlog of unanswered Freedom of Information Act (FOIA) requests from lawful immigrants seeking their immigration files. Those files, many of which are decades old, are the original source of numerous data errors. If DHS cannot respond to pending information requests in a timely fashion now, how much worse will the problem be when lawful immigrants, including naturalized citizens, lawful permanent residents, and visa

[13] The American Immigration Lawyers Association, *E-Verify Self Check Program*, November 29, 2010

[14] Department of Homeland Security, 2009 Annual Freedom of Information Act Report to the Attorney General of the United States

[15] Peck, Amy, *Latest Report on E-Verify: the Good, the Bad, and the Unresolved*, January 20, 2011

holders need the documents immediately to start their next jobs? Consequently, DHS must hire hundreds more employees to respond to these FOIAs.

Businesses seeking to comply with any newly imposed system will also put additional strain on these government agencies. Problems can be anticipated in attempting to respond to employers' requests and in establishing connectivity for businesses located in remote regions or that do not have ready access to phones or the internet. These agency deficiencies will surely wreak havoc on independent contractors and the spot labor market for short-term employment.

If history is our guide, agency officials will be unable to scale up the existing software platform for E-Verify to respond to the enormous task of verifying the entire national workforce and all the nation's employers. It makes little sense to adopt a system that is pre-destined to cause chaos within these agencies, not to mention the lives of the thousands of Americans wrongfully impacted.

V. USCIS has Not Been Able to Achieve a Sufficient Degree of Employer Compliance in Order to Protect Worker's Rights

Despite the fact that USCIS has more than doubled the number of staff tasked with monitoring employer's use of E-Verify since 2008 they still do not have the means to effectively identify and address employer misuse or abuse of the system. In fact a recent report from the SSA Office of the Inspector General found that the Social Security Administration itself had failed to comply with many of regulations that are put in place to protect employees. They failed to confirm the employment of 19% of the 9,311 new employees hired for fiscal year 2008 through March 31, 2009 and, of those that were processed, they did not comply with the 3-day time requirement for verifying eligibility. The OIG also found that SSA verified the employment eligibility of 26 employees who were not new hires but had sought new positions within the agency, 31 volunteers who were not federal employees and 18 job applicants who SSA did not hire.[16] If the government is unable to maintain compliance within its own agencies, we cannot expect private businesses to follow the regulations put in place to protect workers.

Employers misuse has resulted in discrimination and anti-worker behavior in the past and there is no reason to suggest that pattern will change with a new verification system in place. From the inception of E-Verify, the U.S. Government Accountability Office and DHS studies have repeatedly documented various types of misuse. The USCIS's Westat report also confirmed the fact that many employers were engaging in prohibited activity. Of the employers they contacted they found that 17.1% admitted to restricting work assignments until authorization was confirmed; 15.4% reported delaying training until employment authorization was confirmed; and 2.4% reported reducing pay during the verification process.

If Congress imposes a mandatory system, it will need to create effective enforcement mechanisms that prevent the system from being a tool for discrimination in hiring. Such discriminatory actions will be difficult to prevent and even more difficult to correct. Congress

[16] Social Security Administration, Office of the Inspector General, *The Social Security Administration's Implementation of the E-Verify Program for New Hires*, A-03-09-29154, January 6, 2010.

should ask: how will the government educate employers and prevent misuse of E-Verify or any similar system?

VI. Conclusion: Congress Must Not Enact a Mandatory Employment Eligibility Pre-Screening System

The goal of E-Verify is to reduce the number of unauthorized workers in the United States. Unfortunately, its success rate is extremely low. According to the USCIS's Westat report the inaccuracy rate for unauthorized workers is approximately 54 percent.[17] According to the government's own reports, **E-Verify is fulfilling its intended purpose less than half the time**. In addition, experience in Arizona shows that many employers are failing to comply in spite of it being a state mandate. Therefore, while E-Verify continues to burden employers, cost the government billions of taxpayer dollars, and deny Americans' their right to work—all the while potentially subjecting them to discrimination—it is not even adequately performing its core function.

The ACLU urges the Subcommittee on Immigration, Refugees, and Border Security to reject imposition of a mandatory electronic employment eligibility pre-screening system. Such a system would cause great harm to employers across the country and to lawful workers and their families while doing little to dissuade undocumented workers. The likelihood for harm is great and the prospect for gain has so far proved illusory.

[17] 2009 Westat Report at 118.