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The Burden of Immigration Laws on Business

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Introduction

There are an estimated 10 to 20 million illegal immigrants living in the United States. Illegal immigrants fill a quarter of all agricultural jobs, 17 percent of office and house cleaning positions, 14 percent of construction jobs and 12 percent of food preparation jobs.[1] Mexicans make up about 56 percent of illegal immigrants. Of the remaining immigrants, 22 percent come from other Latin American countries, 13 percent come from Asia and Europe, and 6 percent come from Canada.

Despite enhanced efforts to secure the border, about 400,000 illegal immigrants come to the U.S. each year.[2] This is in addition to approximately 800,000 legal immigrants. Nonetheless, the current immigration rate of 3.5 per 1,000 U.S. residents is less than the average rate of 4.6 from during the 19th and 20th centuries.

Immigration has a profound impact on the workplace. Employers face numerous challenges in complying with federal, state, and local immigration laws, and these laws can make employers, as well as landlords and common carriers, civilly and criminally liable for transgressions they may not have been aware of. Additionally, there are strict limitations on bringing qualified workers to the U.S. legally and long delays in the immigration process.

This paper examines current federal, state, and local immigration policies that impact businesses. Based on this review, recommendations for revising business-related immigration policies to promote greater fairness and efficiency include:

- Limit the criminal liability of employers to situations where the defendant actually knew the employee was in the country illegally.
- Employers alleged to have hired illegal immigrants should not face racketeering lawsuits, as their actions are not comparable to the organized crime leaders who the statute was originally intended to target.
- Landlords should not be subject to criminal prosecution for failing to verify the immigration status of their tenants.
- State and local governments should refrain from enacting a patchwork of immigration laws that impose penalties on businesses that go beyond the scope of federal law.
- The operation of any guest worker program should be outsourced to private contractors in light of the federal bureaucracy's record of inefficiency in processing immigration applications.
- The cap on visas for highly skilled workers should be raised and arbitrary country caps should be repealed.

Federal Law on Hiring Illegal Immigrants

Immigration Reform and Control Act

Under the Immigration Reform and Control Act (IRCA) which amended the Immigration and Nationalization Act (INA), it is a civil violation and crime "to hire, or to recruit or refer for a fee, for employment in the United

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States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment."[3] It is also a violation of the statute for an employer to hire a person without complying with employment eligibility verification requirements.[4] Employers are required to examine identity documents and complete Form I-9 for every employee hired. Administrative court decisions have ruled that the government is not required to establish that the employer knowingly failed to complete the required documentation in order to prove a paperwork violation.[5] Prior to the passage of IRCA in 1986, employers were not penalized under federal law for hiring illegal immigrants or failing to check the documentation of employees and maintain eligibility verifying documents on file.

The Department of Homeland Security (DHS) has provided three lists (List A, B, and C) of proper documents for employment verification. List A includes documents that provide both identity and eligibility. These are: U.S. Passport, Alien Registration Receipt Card or Permanent Resident Card, Form I-551, unexpired foreign passport with temporary I-551 stamp, unexpired Employment Authorization Document issued by the U.S. Citizenship and Immigration Services (USCIS) containing a photograph, unexpired foreign passport with Form I-94. If a worker provides one of those documents, then all I-9 requirements of the employee are satisfied. If the employee does not have a document from List A, then he must provide two documents—one from each of List B and List C. List B are identity only documents and include a drivers license or state ID with photograph or with name, date of birth, sex, height, color of eyes, address; a school ID with photo; a voter's registration card; U.S. military card or draft record; military dependents ID card; U.S. Coast Guard Merchant Mariner Card; a Native American Tribal Document; or a Canadian driver's license. A driver's license issued by any governmental identity from Mexico is not valid under List B. Employment authorization only documents (List C) include a Social Security Card without a "not valid for employment purposes" statement; Certification of Birth Abroad; original or certified birth certificate; Native American tribal document; U.S. Citizens ID Card; Resident citizen ID Card; and unexpired employment authorization document by DHS.

A General Accounting Office survey of employers found 15.1 percent believed the I-9 verification form was generally unclear or very unclear.

All told, 27 different documents may be used to prove identity and work eligibility, creating a complex enforcement task for employers, particularly due to the pervasiveness of fraudulent documents. In a two-year period, there were 3,500 federal investigations in which some 78,000 fraudulent documents were used to obtain employment for 50,000 unauthorized employees.[6] In 60 percent of these cases, the employer followed the verification process and did not knowingly hire illegal immigrants. Of the falsified documents, 60 percent were USCIS documents such as permanent resident cards, 36 percent were Social Security cards, and 4 percent were other documents such as driver's licenses. In one seizure in Los Angeles, two million counterfeit documents set for distribution throughout the country were seized.[7] A joint study by the RAND Institute and Urban Institute found more than a third of employers were unable to hire applicants because of documentation problems.[8]

Employers must retain all I-9s, and, with three days advance notice, they must be made available for inspection. Ignorance of the statutory requirements does not insulate an employer from penalties, as the employer has a continuing duty under the law to prepare and make available for inspection I-9 forms. Determining whether an employee has sufficient documents is not always a simple task. A General Accounting Office survey of employers found 15.1 percent believed the I-9 verification form was generally unclear or very unclear.[9]

Discrimination may result from a lack of clarity about the law or a fear of being penalized under IRCA. A General Accounting Office survey found 10 percent of employers engaged in illegal national origin discrimination due to the sanctions, such as rejecting applicants who look or sound foreign.[10] The study determined that another 9 percent of employers engaged in illegal citizenship discrimination by only hiring U.S. born applicants. Another survey found that after employer sanctions went into effect in 1986, 14.7 percent of employers began hiring only employees born in the United States and 13 percent stopped hiring employees with temporary work eligibility, such as temporary resident aliens.[11]

The *Small Business Review* noted, "Indeed, one thing that all small business owners seem to agree on is that they should not function as the auxiliary police force of the Immigration and Naturalization Service." One reason for this is the strong possibility of being held criminally or civilly liable for paperwork mistakes or fraudulent behavior on the part of an applicant. As Gary Roden, President of Aguirre Corp. in Dallas and past president of Associated Builders and Contractors explains, "How does an employer know if the applicant has legitimate documents?"[12]

The basic maximum prison sentence under IRCA for knowingly employing an illegal immigrant is six months with up to five years of prison time possible if the employer hires at least 10 illegal immigrants in a 12 month period. Failure to verify an employee is subject to a prison term of six months and a fine of $3,000 per alien. Administrative fines currently range from $250 to $11,000 per undocumented alien, depending on the employer's prior offenses.

Significantly, IRCA reduced the state of mind (*mens rea*) requirement from "willfully or knowingly" to "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." Additionally, there is no such state of mind requirement for complying with the verification screening. Also, the knowledge requirement for hiring an illegal immigrant has not been interpreted to require actual knowledge, but merely constructive knowledge. Constructive knowledge can be inferred from the facts, such as a pattern or practice of hiring illegal immigrants. The U.S. First Circuit Court of Appeals has held even if there is no direct evidence the defendant knew the person was an illegal immigrant, their knowledge of that fact or reckless disregard of it may be based entirely on circumstantial evidence, including inferences from the surrounding circumstances.[13] According to the Federation for Immigration Reform:

> Constructive knowledge constituting a violation of federal law has been found where (1) the I-9 employment eligibility form has not been properly completed, including supporting documentation, (2) the employer has learned from other individuals, media reports, or any source of information available to the employer, that the alien is unauthorized to work, or (3) the employer acts with reckless disregard for the legal consequences of permitting a third party to provide or introduce an illegal alien into the employer's work force.[14]

Also, an employer entering into a contract for labor with an independent contractor or subcontractor, knowing that the contractor has used illegal immigrants in the past, may be held to have constructive knowledge. In this case, although the employer does not have actual knowledge that the contractor is using illegal immigrants, knowledge will be inferred from the past relationship between the parties.

Constructive knowledge has been found by a federal court simply from a newspaper article stating that ballrooms were depending on illegal immigrants for hostesses.[15] Administrative court decisions interpreting IRCA have held companies liable for the actions of their managers and supervisors, regardless of whether they are consistent with company policy. In *U.S. v. Y.E.S. Industries*, the court held the company liable for I-9 forms that were improperly completed even though the company had trained employees on completing these forms.[16] In *U.S. v. Sunshine Building Maintenance*, the administrative judge ruled that the company was liable for immigration law violations based on the knowledge of an area and office manager even though the President did not have knowledge of the employees being illegal immigrants.[17]

In addition to being subject to the portions of IRCA that prohibit hiring an illegal immigrant and require verification, a federal appeals court has held that Congress amended the statute such that employers may be charged with harboring illegal immigrants, which is punishable by up to ten years in prison and a $250,000 fine.[18]

Racketeering

Beyond IRCA, employers can also face civil damages and criminal charges under the Racketeer Influenced and Corrupt Organization (RICO) statute, which was originally aimed at organized crime. Under RICO, it is a crime to conduct or participate in, through a pattern of racketeering activity, the affairs of an enterprise affecting interstate commerce, or to conspire to do the same. A pattern is two or more violations of another specified state or federal criminal law within ten years. Thus, RICO is referred to as a derivative law, because it provides for the enhancement of penalties for certain existing crimes known as predicate offenses. Congress added employing illegal immigrants as a predicate offense in 1996. RICO carries severe penalties including a prison term of 20 years, fines up to twice the gross profits of the offense, and forfeitures of interests maintained in or acquired through the "enterprise" as well as treble damages and attorney's fees in civil suits.

Private parties have found some success in bringing RICO suits based on the hiring of illegal immigrants. For example, the 11th Court of Appeals refused to dismiss a RICO complaint brought by employees against Mohawk Industries, the nation's second largest carpet manufacturer, for hiring illegal immigrants and thereby allegedly driving down wages.[19] The court found that Mohawk's alleged hiring of thousands of illegal immigrants constituted the required pattern and predicate acts. The court also concluded that the enterprise and common goal prongs of RICO were met because the plaintiffs alleged that Mohawk was sufficiently associated with third-party recruiters and that they benefited economically from hiring illegal immigrants. Prior to this decision, the enterprise and the defendant were typically required to be separate entities. On remand, the case was granted class action status earlier this year and is pending. The Ninth Circuit Court of Appeals has also ruled that this type of RICO suit can move forward in a case filed by legally documented workers against a fruit company for hiring illegal workers.[20]

With regard to state of mind, RICO is a strict liability statute and a federal court of appeals has held no specific intent is required to engage in an unlawful pattern of racketeering.[21] The U.S. Supreme Court has upheld such impositions of strict liability.[22]

Transporting Illegal Immigrants

Public carriers like Greyhound are subject to civil and criminal penalties for transporting illegal immigrants. Individuals and companies can be charged with transporting illegal immigrants without knowledge, as the statute authorizes criminal punishment of "[a]ny person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of such law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law."[23] Reckless disregard is defined as "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully."[24]

The use of "reckless disregard" in this statute is not particularly problematic when applied to carriers that cross the border with immigrants, but carriers on the interior face greater difficulty in determining who is legal, particularly since they must account for immigrants who were once legal but had their visas expire. The possible prison sentence for transporting an illegal immigrant is up to five years, and 10 years if done for commercial advantage.

Golden State Transportation was successfully prosecuted in 2001 for transporting illegal immigrants from Mexico and forfeited a $2.5 million bus terminal.[25] Following this prosecution, Greyhound warned its employees not to sell tickets "to anyone you know or believe to be an illegal alien" and stated that a violation could result in the employee's termination and arrest.[26]

Tax Law

In addition to immigration law violations and RICO, employers are subject to Internal Revenue Service penalties for aiding and abetting in the filing of false tax returns for failing to pay income or Social Security taxes for illegal immigrant employees.[27] Such violations are punishable by up to three years in prison.

No-Match

The Social Security Administration (SSA) is statutorily charged with tracking workers' wage histories and collecting this information from the W-2 forms that employers submit each year for each employee. The SSA annually processes 8 to 11 million W-2 forms containing names and Social Security numbers that do not match the information in its records. Starting in 1994, SSA began sending no-match letters to employers who submitted 10 or more W-2 forms that could not be matched to SSA records or who have no-matches for more than one-half of 1 percent of their workforces. However, employers often do not take action in response to these letters because the law is not clear whether receiving the letter constitutes constructive knowledge of employing an illegal immigrant, particularly since there are many mismatches caused by citizens or legal residents not updating their address information with the SSA.

In 2007, the Bush administration proposed strengthening this existing system in which the government compares Social Security numbers on employees' tax forms with the Social Security database and notifies employers of discrepancies through letters. Under the Bush proposal, employers who failed to clear up any such differences within 90 days would have had to fire the worker or face possible civil fines of up to the $10,000 and criminal prosecution.

This no-match initiative was enjoined by U.S. District Judge Charles Breyer in October 2007 who, among other things, found there were so many inaccuracies in the system that numerous citizens and legal immigrants would be subject to the letters.[28]

The Bush administration submitted a revised plan to the court, but it was not approved. In July 2009, the Obama administration decided not to pursue the no-match program. The National Restaurant Association hailed the decision to abandon the no-match program, as it had expressed concerns regarding its economic impact on small business.[29]

E-Verify

In July 2009, the Obama administration announced that effective September 8, 2009 all businesses that contract with the federal government or receive stimulus funds are required to participate in the new E-Verify system. E-Verify is an online program for checking whether a prospective employee is in the United States legally. It is currently used by 134,702 employers, of which 72,946 are in the "professional, scientific, and technical arena."

The U.S. Chamber of Commerce filed a lawsuit in December 2008 challenging the E-Verify regulation in a federal court in Maryland, arguing that the 1996 law that authorized E-Verify specified that it would be voluntary and apply only to newly hired workers. The suit also alleged that DHS failed to follow the Regulatory Flexibility Act of 1980, which focuses on the economic impact of a regulation on small businesses. Among other things, the Act requires the agency to publish a "description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record." In August 2009, U.S. District Judge Alexander Williams, Jr. ruled in favor of the government, finding that Executive Order 13,465 provided sufficient authority for requiring federal contractors to use E-Verify.[30] The ruling noted, "The court does not believe that the secretary of Homeland Security is requiring any person or entity to do anything," reasoning that it is a voluntary choice to contract with the government. This suggests that a court could nonetheless require congressional approval, not merely an executive order coupled with an agency rule, to lawfully extend the E-Verify mandate to all private employers.

It is estimated that compliance with E-Verify will cost federal contractors at least $100 million in the first year and between $550 and $670 million during the next 10 years.

A concern with E-Verify is the number of submissions that cannot be confirmed for U.S. citizens and legal immigrants. The largest source of these errors is that the person being queried has not updated the Social Security Administration (SSA) with their current address.[31] A General Accounting Office report found:

> SSA updates its records to reflect changes in individuals' information, such as citizenship status or name, when individuals request that SSA make such updates. USCIS [U.S. Customs and Immigration Services] officials stated that, for example, when aliens become naturalized citizens, their citizenship status, updated in Department of Homeland Security (DHS) databases, is not automatically updated in the SSA database. When these individuals' information is queried through E-Verify, a tentative non-confirmation would be issued because under the current E-Verify process, those queries would only check against SSA's database; they would not automatically check against DHS's databases. Therefore, these individuals would have to go to an SSA field office to correct their records in SSA's database.

E-Verify users receive non-confirmation notices for 2.96 percent of their submissions due to SSA mismatches and .95 percent due to DHS mismatches. Businesses have eight federal working days to contest those notices with a local SSA office or by telephone with the DHS. An SSA report concluded that 17.8 million out of 435 million records are inaccurate, resulting in incorrect feedback when submitted through E-Verify.[32] A DHS evaluation found an error rate of .81 percent, but an error rate of 10 percent for foreign-born U.S. citizens.[33] Scott Vinson, Vice President of the National Council of Chain Restaurants, noted that some improvements have been made to E-Verify over the last couple of years but that "it is still not ready for primetime."[34]

Companies that use E-Verify must sign an agreement that allows them to be audited by a Department of Immigration and Customs Enforcement (ICE) officer with no notice while non-participating companies receive at least three days notice. It is estimated that compliance with E-Verify will cost federal contractors at least $100 million in the first year and between $550 and $670 million during the next 10 years.[35] The 324,250 small businesses registered to do business with the federal government will be impacted.

In addition to the federal E-Verify mandate applicable to contractors and stimulus recipients, Arizona, Mississippi, and South Carolina require all employers to use E-Verify.[36] Some 15 states require businesses that contract with the state and/or public employers to use the system.

If E-Verify were mandated for all employers in the nation, the General Accounting Office estimates the operational costs would be $765 million for fiscal years 2009 through 2012 if only newly hired employees are queried through the program and about $838 million over the same four-year period if both newly hired and current employees are queried.[37]

Illustrating that employers must navigate a challenging course, the DHS user manual for E-Verify states, "Employers may not use E-Verify to discriminate against any job applicant or new hire on the basis of his or her national origin, citizenship, or immigration status."[38] Critics of E-Verify argue that mandating its use by private employers would exacerbate these forms of discrimination that occur due to employers' fear of being sanctioned under IRCA.

Interestingly, employers are statutorily prohibited from running applicants through E-Verify before they are hired. The DHS manual states, "Employers may not use the system to pre-screen applicants for employment." While pre-screening for immigration status would seem to be the most efficient way for employers to comply with IRCA because the costs of hiring and training would be avoided, it would result in some legal applicants being turned away. Many of the people who receive a non-confirmation notice from the E-Verify system are qualified to work.[39] As employees, they have eight days to contest a non-confirmation notice through either SSA or DHS.

Another pitfall for employers is that some new hires present documents that E-Verify recognizes as valid but belong to another person. This is a risk for employers because DHS refers E-Verify employers with patterns of misuse and fraudulent documentation to ICE for follow up and investigation.[40]

Enforcement of Immigration Laws Against Employers

Immigration officers can subpoena employers for copies of I-9 forms and ICE is authorized to issue subpoenas for testimony. ICE refers cases for prosecution to the Attorney General, which involve knowingly accepting fraudulent documents, falsely completing forms such as I-9's, knowingly hiring illegal immigrants, and harboring illegal immigrants.

Individuals have been imprisoned on federal charges for hiring and harboring illegal immigrants. For example, Sadik Seferi and Nicole Tipton of Vinton, Iowa were convicted in May 2007 of one count of hiring illegal aliens, one count of harboring illegal aliens, and one count of conspiracy to hire illegal aliens.[41] The two owned a restaurant in which they hired six illegal immigrants. Seferi was sentenced to 30 months in prison and Tipton to 27 months in prison without the possibility of parole. In a 2007 Kentucky case, Robert Pratt, whose business provided framing services for new home construction, was sentenced to 12 months in federal prison for using illegal immigrant labor.[42] In a 2008 Virginia federal case, fishing operator Yvonne Michelle Peabody was sentenced to 90 days in prison for employing illegal immigrants.[43] Also in 2008, Carol Hill, an Arizona drywall contractor, was sentenced to two months in federal prison followed by 12 months of house arrest and 36 months of supervised release for hiring illegal immigrants.[44]

Employers also face substantial civil penalties. In one of the largest fines on record, ICE settled with Wal-Mart in 2005 for $11 million for allegedly employing illegal immigrants as janitors. In December 2008, ICE topped that with a $20.7 million non-prosecution agreement with IFCO, a maker of wood pallets and reusable plastic containers. ICE had rounded up for more than 1,100 illegal immigrants working at 26 IFCO plants.

Asset forfeitures are authorized under the Financial Institution Reform, Recovery, and Enforcement Act of 1989 and ICE has used this tool in numerous cases. In its case against Golden State Fence, the owner agreed to forfeit $4.7

million to avoid ICE's threat to prosecute managers who hired illegal immigrants. Josie Gonzalez, the immigration attorney who represented Golden State Fence, argues the government has unfair bargaining power to demand assets because it can threaten to prosecute employees and debar the company from government contracts. There is no guideline as to the amount of assets ICE may demand. The agency indicates that where applicable it will often use the difference between profits resulting from illegal labor versus legal labor, but in the Golden State Fence case Gonzalez says the government simply demanded the company's bank balance.

ICE has conducted numerous large raids of employers suspected of hiring illegal immigrants. For example, a raid of a Howard Industries facility resulted in 592 workers being taken into custody.[45] ICE agents also conducted raids of Pilgrims Pride chicken processing plants in East Texas, Arkansas, Florida, West Virginia, and Tennessee, resulting in the arrest of 290 workers.

In 2008, ICE's worksite enforcement raids led to 5,713 administrative cases and 1,101 criminal arrests. There were 135 criminal charges filed against employers and individuals in the supervisory chain or human resources. The increased enforcement in recent years has coincided with an increase in ICE's budget from $2.4 billion in 2002 to $5.6 billion in 2008.[46]

However, the Obama administration has shifted away from raids and criminal charges, focusing instead on fines and civil sanctions.[47] The administration has indicated it will reserve criminal charges for serial violators who also pay below the minimum wage. Nonetheless, ICE is not taking a hands-off approach. Earlier this year, the Department issued guidelines for immigration agents to go after employers rather than just workers. In July 2009, ICE notified more than 650 businesses nationwide of pending audits of their employment records. Completing an I-9 form for every employee does not ensure a business won't be audited. An immigration law firm advises that some triggers for an audit are:

- The recording of unacceptable documents on the I-9;
- Continued employment of individuals with expired work authorization documents;
- Failure to follow up on complaints that employees are using the valid documents of another person;
- Filing of applications such as the Department of Labor certifications for permanent residency for employees while employing them without valid work authorization;
- Allowing employees to change their identities and present new documentation without verification of the validity of new documents;
- Receipt of claims from various government entities such as labor and tax agencies that reveal an employee is using the identity of another person;
- Employee arrests by law enforcement that reveals the use of fraudulent documents;
- Consumer complaints to law enforcement that one's identity is being used by an employee at the company; and
- Discharged human resource or production managers who file complaints about the company's perceived disregard for immigration laws.[48]

Landlords and Harboring Illegal Immigrants

Landlords are at risk of criminal prosecution for renting to illegal immigrants. While Congress has not defined "harboring," two courts of appeals have interpreted it in a broad manner that could apply to landlords. A ruling of the U.S. Court of Appeals for the Fifth Circuit, which includes Texas, suggests a landlord could be held liable if they knowingly rent to an illegal immigrant, even if the landlord is not trying to help the immigrant evade authorities.[49] In another case, the Ninth Circuit Court of Appeals, which includes California, ruled "harboring need not be part of the chain of transactions in smuggling."[50] The Ninth Circuit ruling did not discuss *mens rea*. The implication is that a landlord with no role in bringing the tenant to the U.S. and no knowledge that the tenant is here illegally could be convicted of harboring.

Harboring "done for the purpose of commercial advantage or private financial gain" is subject to a maximum of 10 years imprisonment. An additional ten years can be

added if the landlord is "part of an ongoing commercial organization or enterprise." Thus, a convicted landlord could face up to 20 years in prison. There are recent cases of landlords being prosecuted for harboring, but in one 2008 case William Jerry Hadden of Lexington, Kentucky was found not guilty after a four-day trial in which he was accused by federal authorities of renting apartments to 60 illegal immigrants.[51]

Visas and Green Cards

The availability of work visas is far less than the demand. The type of visa most relevant to the employment of illegal immigrants is an H-2B visa. The fields in which these visa recipients typically work are construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services. These visas are designed for employees in temporary jobs.

Prior to filing a petition with the USCIS, an employer seeking an H-2B visa must obtain a temporary labor certification determination from the U.S. Department of Labor. The request for this determination must be filed at least 60 days but not more than 180 days before the designated need for employment. The federal government issues 66,000 of these visas, with 33,000 being available for workers hired during each half of the fiscal year. The supply of these visas is typically exhausted shortly after they begin being issued. For example, the fiscal year 2009 cap was reached on January 8, 2009.

The H-2A visa is only for temporary agricultural workers. Businesses applying for this visa must affirm that they undertook efforts to recruit American workers and were unsuccessful. There is no cap on the number issued and there are currently about 30,000 workers with this visa.

The H-1B visa is used by employers who require technical expertise and at least a bachelor's degree in a field. Recipients include architects, engineers, computer programmers, accountants, doctors, and college professors. The cap on these visas is 65,000 per year.

Green cards, which confer on the recipient lawful permanent residency in the U.S., may be issued based on family or employment status. Family connections that are eligible are spouse, child, sibling, and parent. Spouses and unmarried children can usually immigrate faster than other relatives. There are five types of employment-based green cards:

- EB-1: These visas are designed for certain multinational executives and managers; outstanding professors and researchers; and those who have extraordinary ability in the sciences, arts, education, business, or athletics.

- EB-2: This category is for foreign national professionals with advanced degrees (masters degree or higher) and with a job offer from a U.S. company; for foreign nationals with "exceptional ability" in the sciences, business, or arts and with a job offer from a U.S. company; and for foreign nationals with exceptional ability, or an advanced degree, who can show that their activities will substantially benefit the U.S. national interest.

- EB-3: This category is for professional workers with a U.S. bachelor's or foreign equivalent degree and with a job offer from a U.S. company; for skilled workers for positions that require at least two years of training or experience and with a job offer from a U.S. company; and for unskilled workers for positions that require less than two years training or experience and with a job offer from a U.S. company.

- EB-4: These visas are for special immigrants and religious workers and 10,000 visas are allocated per year. Special immigrants include ministers, religious workers, former government U.S. workers, and others.

- EB-5: This category is for "immigrant investors" and 10,000 visas are allocated per year. These are immigrants who invest between $500,000 and $3 million in a job-creating enterprise in the United States. Each investor must employ at least 10 U.S. workers

There is a 140,000 total annual cap allocated among the above employment categories. Spouses and children of foreign nationals who receive a visa count against the 140,000 visa cap, accounting for over half the allotted number of visas. Additionally, individual countries are subject to an annual cap on visas even if the total cap has not been reached, which has resulted in up to six years of additional delay for workers from China and India. Conversely, the Diversity Immigrant Visa Program administered by the U.S. Department of State makes available 50,000 green cards per year to persons from countries with low rates of immigration to the United States.

Due to paperwork, security checks implemented after the 9/11 attack, caps on the number of visas, and inefficiencies at the USCIS, foreigners seeking visas and green cards face waits of up to 23 years.[52] For example, in 2006, the bureaucracy was processing applications submitted by Phillipines' residents in 1983. Processing for workers from India, a major source of engineering and computer science applicants, is only slightly less backlogged. For example, in 2007, the application cut-off date for Indians seeking an EB-3 visa was May 2001. In all, between three and four million people are waiting for green cards at any given time.[53]

The issue of visas for specially skilled workers is particularly relevant in the high technology industry. About 8 percent of Google's employees have visas and the company recently shifted job postings for 30 employees overseas when visas could not be obtained.[54]

On average, workers without extraordinary skills or special status, such as exceptional scientists or academics, face a delay of five years before they can acquire a permanent work visa.[55] Depending on their country of origin and type of relative in the U.S., applicants for a family-related green card can wait from four to 23 years.[56]

In order to qualify as a place of work for an employment-related visa, employers must first obtain a certification from the Department of Labor that they cannot find a U.S. citizen to do the job after extensive advertising. Another complication is that workers already in the U.S. on a special temporary visa cannot leave their employers while their application for a permanent visa is pending.

Laura Reiff, an immigration lawyer and co-chair of the Essential Worker Immigrant Coalition, notes that companies like Marriott do not sponsor green cards for workers from Mexico because of the paperwork and administrative delays involved.

In addition to delays in millions of cases, the antiquated paper filing system used by the USCIS has resulted in more than 100,000 files being misplaced and $100 million a year in archiving, storage, retrieval, and shipping costs.[57] Fortunately, help is on the way from the private sector. The department has outsourced to a consortium led by IBM a five-year, $500 million effort to convert to an electronic file system. The digital records would make obsolete the 70 million manila folders stored at 200 locations. A 2007 fee increase on applicants is producing $650 million in funding for the project over five years. The new system is projected to reduce backlogs by 20 percent, and perhaps by more than 50 percent.

State and Local Immigration Laws and Employers

IRCA contained the first federal penalties on employers for hiring illegal immigrants. Prior to the passage of this law in 1986, California, Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, Virginia, and the city of Las Vegas enacted prohibitions on the employment of illegal immigrants, which typically provided for civil penalties that were not enforced. For example, the California law was passed in 1971 and specified fines of $200 to $1,000 for hiring an illegal immigrant. However, all of these laws that were enacted prior to IRCA are void because IRCA provides that any state or local law is preempted from imposing civil or criminal sanctions (other than through licensing and similar laws) on those who employ unauthorized workers or refer or recruit them for a fee.

In the last few years, state and local governments have sought to reenter the field of immigration and employment that the federal government occupied with the passage of IRCA. In 2008, some 150 bills on employment and immigration were considered in 41 legislatures.[58] A few states have recently enacted far-ranging measures. Most notably, both Oklahoma and Arizona have sought to penalize employers for hiring illegal immigrants. To the extent they go beyond the exception in IRCA for denying licenses to employers, such laws are of questionable legality. The legislative history to IRCA provides that "licensing" encompasses "lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person who has been found to have violated the sanctions provisions" of IRCA or "licensing or fitness to do business laws, such as state farm labor contractor or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented workers."[59]

The following section highlights those states that have enacted laws governing immigration and employment within the last few years:

Arizona

House Bill 2779, known as the Legal Arizona Workers Act (LAWA), passed in 2007 gives Arizona Superior Courts the power to suspend or revoke business licenses of employers who knowingly or intentionally employ unauthorized workers. Nearly all businesses are covered because licenses include required documentation for ministerial acts of registration such as articles of incorporation and certificates of limited partnership. Retailers that must maintain a license for sales tax payments to a city are also covered.[60] Under the law, any person may file a complaint alleging that a business is employing undocumented noncitizens, and the state attorney or county attorney must investigate those complaints. The investigation could include verifying the employees' status with the federal authorities. If the attorney general decides that the complaint is not frivolous, he or she must notify ICE, the local law enforcement agency, and the appropriate county attorney. The legislation also requires both public and private employers to use E-Verify.

Under LAWA, on a finding of the first violation during a three year period that the employer knowingly employed an illegal immigrant, the employer is placed on probation for three years, during which time the employer must file quarterly reports with the county attorney documenting each new employee who is hired at the location where the illegal immigrant performed work. The suspension of business licenses is at the discretion of the court. On a finding of the first violation during a five year period that the employer intentionally employed an unauthorized alien, the probationary period is five years and all business licenses are lost for a minimum of ten days.

In analyzing the LAWA, immigration law attorneys in the Phoenix office of Ballard Spahr Andrews & Ingersoll, LLP conclude that both actual and constructive knowledge and the knowledge of the managers and supervisors of the company can be imputed to the company, regardless of whether the owner and upper management have knowledge.[61] They note that the LAWA does not provide a safe harbor for situations where employers hire individuals who presented false papers. Similarly, an employer could be penalized for making a technical mistake on the I-9 form.

In an article on the law, the *Los Angeles Times* reported that Juan Carlos Ochoa, a naturalized U.S. citizen who lives in an upper-middle-class subdivision near Phoenix named Laguna Hills, couldn't find a job because a government database classifies him as a possible illegal immigrant.[62] Economist Dawn McLaren of Arizona State University cites House Bill 2779 as exacerbating problems in the construction industry by reducing the availability of labor.[63]

In February 2008, U.S. District Judge Neil Wake dismissed a lawsuit challenging the legislation filed by business groups and Arizona Employers for Immigration Reform. This decision was upheld by the U.S. Court of Appeals for the Ninth Circuit. The Plaintiffs had argued that federal law preempted the statute in several respects. First, the Arizona statute requires E-Verify for all private employers, a step that Congress has so far declined to take. Second, federal law allows prosecution before an administrative law judge if there is determined to be a violation while the Arizona law requires that the case be referred for prosecution unless the Attorney General determines it is frivolous. Additionally, the Plaintiffs argued that under the Arizona law employers would not be able to take advantage of the good faith defense because IRCA precludes the use of I-9 documents "for purpose other than enforcement of this chapter."[64]

In May 2008, House Bill 2745 became law, amending the LAWA. Under this legislation employers may be held liable for using independent contractors who hire illegal immigrants. The bill also authorizes sheriffs to investigate complaints against businesses for hiring illegal immigrants.

Arkansas

House Bill 1024 enacted in February 2007 bans state agencies from entering into contracts with businesses that knowingly employ or contract with illegal immigrants. Contractors seeking to enter into a contract with a state agency for professional services, technical services, or construction where the value of the contract is $25,000 or more must certify that they do not employ illegal immigrants.

Colorado

Enacted in 2006, House Bill 1343 prohibits state agencies from agreeing to contract with contractors who knowingly employ illegal immigrants and requires prospective contractors to verify legal work status of all employees. If a contractor's query finds that an illegal immigrant is employed, the contractor must alert the state agency within three days. The recordkeeping provision in the Colorado

law differs from federal law, creating a potential source of confusion for employers. The Colorado law requires that the I-9 form be maintained on file for the duration of employment, whereas federal law mandates that it be kept for three years after hiring or one year after termination.

Colorado also passed another law in 2006, House Bill 1017, which requires employers to verify the eligibility of all new employees and, if requested, report the results to the Department of Labor and Employment. The bill provides for civil penalties of up to $25,000.

Delaware

In 2007, the Delaware Legislature enacted Senate Bill 132, requiring employers to comply with IRCA's prohibition on hiring illegal immigrants.

Georgia

Senate Bill 529, enacted in 2006, requires employers that contract or subcontract with the state to use E-Verify. All employers must withhold 6 percent of employee compensation for those employees who fail to provide a valid taxpayer identification number.

Idaho

In 2006, Governor Jim Risch issued an executive order requiring that state agencies participate in the E-Verify system. Also, all workers employed for the state through contractors must be from companies that have been verified to have eligible employees.

Illinois

Illinois has gone in the opposite direction of most states. In 2007, lawmakers enacted House Bill 1744 prohibiting employers from enrolling in an employment eligibility program, including E-Verify, until such time as the SSA and the DHS are able to make a determination on 99 percent of the tentative non-confirmation notices issued to employers within three days. Subsequently, the legislation would regulate employer participation once DHS and SSA are able to meet the threshold performance test. However, a district court struck down this measure in March 2009 as being preempted by federal immigration law.

In the 2009 legislative session, Illinois lawmakers responded by enacting Senate Bill 1133, which imposes regulations on employers that choose to use E-Verify. The legislation requires employers using the system to maintain an original attestation form signed by the Illinois Department of Labor that they have received training materials from DHS and that all employees administering the program have completed a computer-based tutorial (CBT). A violation occurs if the employer fails to post in a prominent place notice that is visible to both current and prospective employees that it uses E-Verify along with the attestation and CBT certificates. A violation also occurs if an employee without the CBT training uses another employee's login information to access E-Verify or if E-Verify is used in any unauthorized manner. Finally, Senate Bill 1133 charges the Illinois Department of Labor with posting on its website information concerning the accuracy of E-Verify and the cost employers incur in using it. The legislation was signed by the Governor in August.

Louisiana

Enacted in 2006, Senate Bill 753 requires employers to submit an affidavit to their annual license renewal agency stating that they have on file a federal employment eligibility verification form for each employee. The attorney general and district attorney are authorized to file a cease and desist order against employers hiring illegal immigrants. Employers that fail to comply with such orders are subject to fines of up to $10,000 and revocation of their licenses.

Massachusetts

An executive order issued in February 2007 prohibits the use of illegal immigrants to work on state contracts and requires state contractors to certify that they will not knowingly use illegal immigrants in performing state contracts.

Minnesota

Governor Tim Pawlenty issued an executive order in January 2008 requiring the use of E-Verify by contractors with the state who have contracts of $50,000 or more.

Mississippi

Mississippi Senate Bill 2988 was signed into law in March 2008. It contains several provisions intended to crack down on the employment of illegal immigrants. First, it requires all employers to use E-Verify, though compliance is phased in. Employers with 250 or more employees were required to begin using it on July 1, 2008. Those with 100-250 employees had to come into compliance on July 1, 2009. Those with 30-100 employees must come into compliance by July 1, 2010, with all other employers having until July 1,

2011. Among the penalties for failing to use the system are loss of public contracts and licenses.

Additionally, the law creates a felony for unauthorized workers to knowingly accept or perform work in the state. Anyone caught "shall be subject to imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than five (5) years, a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000) or both." The legislation also states that those charged with working without proper documentation are not eligible for bail. Finally, an employee who believes he was fired while an illegal immigrant was employed may be able to file a civil suit against the employer.

Missouri

The Missouri Legislature enacted House Bill 1549 in 2008, which prohibits all businesses from employing illegal immigrants and authorizes the suspension of local licenses, permits, and exemptions of businesses that hire illegal immigrants. The Attorney General is charged with investigating businesses for violations and then directing local entities to suspend the license or permit. Under this statute, the state is also authorized to terminate the contracts of businesses contracting with the state that hire illegal workers and, upon a repeat violation, ban them from contracting with the state. The legislation mandates that public employers and contractors with the state use E-Verify.

Nebraska

In April 2009, Legislative Bill 403 was enacted, which requires public employers as well as contractors and subcontractors to use E-Verify.

Nevada

In June 2007, Assembly Bill 383 became law, imposing administrative fines on businesses with state licenses that hire illegal immigrants.

Oklahoma

House Bill 1804 went into effect in November 2007. Among its provisions is a felony offense of at least one year in prison for transporting, concealing, harboring, or sheltering an illegal immigrant. Additionally, public and private employers contracting with public entities are required to use a status verification system to determine whether employees are legally in the country. Moreover, while using such a system is optional for other private employers, a provision in the law states that they can be found liable for a discriminatory practice if they hire an illegal immigrant while firing a citizen or legal immigrant. Another provision denies illegal immigrants driver's licenses.

The Greater Oklahoma City Hispanic Chamber of Commerce estimates that as much as 20 percent of the city's construction workforce—15,000 to 20,000 workers—has left the state due to House Bill 1804.[65] Cotton gins, hotels, and home builders report losing workers.[66] The Tulsa Hispanic Chamber of Commerce estimates that, based on school enrollment, church attendance, and utilization of bus service to Mexico, 15,000 to 25,000 illegal immigrants left Tulsa County in the three months following the legislation's passage.[67]

In June 2008, a federal court struck down some provisions of the law as preempted by IRCA. First, Judge Robin Cauthron invalidated the section of the bill that requires an employer to verify a worker's eligibility for employment before the employer could be eligible for state contracts. Second, the court enjoined another part of the law requiring business to verify the work eligibility status of each independent contractor to avoid state tax penalties. The lawsuit was brought by the U.S. Chamber of Commerce and other business groups.

Oregon

Effective January 2008, Senate Bill 202 bans holders of farm labor contractor licenses from hiring illegal immigrants. Civil penalties of up to $2,000 are specified. The legislation authorizes any individual, including the Commissioner of the Bureau of Labor, to bring suit against any person to enjoin them from using the services of a farm labor contractor who employs illegal immigrants.

Pennsylvania

House Bill 2319, which became law in May 2006, prohibits knowingly employing an illegal immigrant on a publicly subsidized project. If a violation is found, federal authorities will be contacted and the state agency making the grant or loan will require full repayment.

Rhode Island

By executive order that became effective as a regulation in February 2009, all businesses that contract with the state must use E-Verify.

South Carolina

In June 2008, House Bill 4400 became law, requiring South Carolina businesses of all types to utilize E-Verify. Large employers (more than 500 employees) were required to comply by January 2009; all other employers have until July 2010. In addition to a fine of up to $1,000 for each employee not checked through the system, the statute provides that violators will be reported to federal authorities. Violators also face suspension of their business licenses and revocation for multiple violations.

Tennessee

The Tennessee Legislature has enacted a couple of bills concerning immigration and employment. First, a 2006 measure, House Bill 111, bans contractors from contracting with the state within one year of having employed an illegal immigrant. Second, House Bill 729 enacted in June 2007 provides for the suspension of the licenses of businesses found to have knowingly employed an illegal immigrant. Participation in E-Verify is a defense to a claim that the employer violated the law.

Texas

Legislation took effect in September 2007 requiring Texas businesses that benefit from taxpayer-subsidized job creation grants and tax abatements to certify that they will not knowingly employ undocumented workers. Any business convicted under federal law of a pattern and practice of employing illegal immigrants must repay the amount of the public subsidy with interest, at a specified rate and term, within 120 days of receiving notice of the violation. The bill applies to a business's subsidiary, affiliate, or franchise, or a person with whom the business contracts.

Utah

Senate Bill 81, which was signed in March 2008 but became effective in July 2009, requires all public employers and their contractors to use a verification system.

Virginia

House Bill 1298 that became effective in July 2008 requires that public entities include in all contracts a provision against hiring illegal immigrants. Also, Senate Bill 926 enacted in 2008 cancels the state registration of limited liability companies, limited partnerships, and business trusts upon a conviction for violating federal law for actions of its members or managers involving a "pattern or practice" of hiring illegal immigrants.

West Virginia

Enacted in April 2007, Senate Bill 70 prohibits an employer from knowingly employing an illegal immigrant. The legislation requires employers to verify an employee's work eligibility status and specifies penalties for hiring illegal immigrants, including fines, jail sentences, and revocation of business licenses.

Local Ordinances

More than 50 municipalities in the U.S. have passed immigration-related ordinances and another 50 have considered them. In 2006, Hazleton, Pennsylvania enacted an ordinance denying city permits to businesses that hire illegal immigrants. The law was struck down in July 2007 by a federal judge who ruled it was preempted by IRCA.[68]

In October 2006, Escondido, California, near San Diego, enacted an ordinance requiring landlords to verify the immigration status of their tenants or face civil and criminal penalties. Similarly, a Farmers Branch, Texas ordinance imposing fines on landlords who rent to illegal immigrants was passed in 2006 but struck down in federal court in 2008. U.S. District Judge Sam Lindsay ruled the ordinance was preempted by federal law and that it did not provide clear guidance on what documents were acceptable to prove citizenship. He stated, "Farmers Branch, rather than deferring to the federal government's determination of immigration status, has created its own classification scheme for determining which noncitizens may rent an apartment." Another measure targeting landlords was enacted by Cherokee County, Georgia in 2006. It requires landlords to maintain files on tenants' immigration status and subjects them to a fine if any tenant is an illegal immigrant.

In 2007, Valley Park, Missouri enacted an ordinance denying permits and licenses to businesses that fail to use E-Verfiy or hire illegal immigrants. It was upheld in June 2009 by a three judge panel of the U.S. Court of Appeals for the 8th Circuit. U.S. District Judge E. Richard Webber wrote that the Valley Park law "is not pre-empted by federal law, to the contrary, federal law specifically permits such licensing laws as the one at issue." Similarly, in 2007, Beuafort County, South Carolina passed an ordinance allowing the county to take away the permits of any business that employs an illegal immigrant.

Private Causes of Action

Employers also face the prospect of lawsuits from private parties concerning the citizenship status of their workforce. Employees of a Washington fruit company brought suit against the business, alleging the company's use of illegal immigrant labor resulted in lower wages.[69] A California temporary employment agency has sued a blueberry grower, alleging that the grower's use of illegal immigrant labor constitutes unfair competition.[70] The Immigration Reform Law Institute, a public interest law firm, spearheaded this case and it has also sued landlords in New Jersey for renting to illegal immigrants.[71]

Recent Proposals for Comprehensive Immigration Reform

In January 2004, President Bush announced plans for comprehensive immigration reform, which, in addition to enhanced border enforcement, would have allowed illegal immigrants who have a job to obtain a three-year renewable work permit. Individuals still in their home country could also obtain the permit by demonstrating they have a job offer in the U.S. Bush argued the plan was needed to pull illegal immigrant workers out of the shadows and promote border security by eliminating the need for these workers to sneak back and forth to see their families. Supporters said that this reduction in traffic would enable border control to better focus on smugglers and terrorists. Critics of the Bush plan called it an amnesty scheme that would reward people for breaking the law. The Bush plan was introduced in the United States Senate in May 2007. The bill itself was never actually voted on, but it died when a cloture vote failed.

President Obama announced in late June that he would seek to pass a comprehensive immigration plan through Congress late this year or early next year. It is assumed that, like Bush's plan, Obama's proposal will include a provision conferring some legal status short of citizenship on certain workers here illegally. On the question of those in their home countries still wishing to come here, Obama may bow to the AFL-CIO's newly adopted position that they should not be eligible for the new guest worker program. Instead, the AFL-CIO proposes the creation of a federal commission that would set the number of visas available each year based on economic conditions. However, that proposal is opposed by the U.S. Chamber of Commerce and Senator John McCain, who are also conferring with Obama.

In a National Federation of Independent Business poll, 62 percent supported a guest worker program that would grant temporary legal status to immigrant workers and 56 percent back permitting immigrants to enter the U.S. for employment where "government-certified shortages exist."[72]

Recommendations

A High Level of Culpability Should Be Required for Conviction of Laws Relating to Immigration and Employment

IRCA should be modified to require that an employer have actual knowledge of an immigration violation in order to be criminally charged and convicted. A President of a company should not face prison time for violations he was not aware of, particularly if policies were in place to check prospective employees' immigration status, but they were not followed in a particular case. Similarly, carriers like Greyhound should not be held criminally responsible for checking the citizenship status of every rider. Civil fines are more appropriate in cases where the violations were not committed with actual knowledge.

Traditionally, civil and criminal laws have been distinguished by the requirement that a criminal must have a guilty state of mind or culpable mental state, which is expressed in the Latin term *mens rea*. One court explained, "[T]he concept of *mens rea* can be traced to Plato and, since the Middle Ages, has been an integral part of the fabric of the English common law from which we have drawn our own criminal and constitutional analysis."[73] Legal scholar Henry Hart has demonstrated that America's founders were influenced by the writings of Blackstone in their belief that individual blameworthiness is a prerequisite for the application of criminal law.[74] The strongest form of *mens rea* is intentionally, followed by knowingly, recklessly, and negligently. Criminal charges based on constructive knowledge or the imputing of actions by employees to the head of the company who was not aware of them dilute the *mens rea* requirement that is central to the American legal tradition.

Additionally, a requirement to prove a culpable mental state in a criminal case should be added to the statute mandating that employers verify employees' eligibility. Currently, it is a strict liability statute, as no level of intent is required for conviction.

Clarify RICO So It Does Not Apply to Employers for Immigration Violations

RICO passed in 1970 as part of President Richard Nixon's anti-crime package with the goal of cracking down on mobsters. Upon signing the bill, Nixon declared it would "launch a total war against organized crime, and we will end this war."[75] The late Chief Justice William Rehnquist called on Congress to narrow RICO, noting that most civil suits had nothing to do with organized crime and circumvented the prosecutorial discretion that would be applied before the government brings a case.[76] Clearly, the intent of the original law was not to target legitimate business owners who are alleged to have committed violation of immigration law. The application of RICO is particularly onerous for the accused because property can be seized upon indictment, which may make it difficult to finance a defense. It is also unnecessary because IRCA already carries civil and criminal penalties.

Rebecca Hagelin, vice president of the Heritage Foundation, stated:

> America started out with three federal laws—treason, counterfeiting, and piracy. In 1998, the American Bar Association counted more than 3,300 separate federal criminal offenses on the books—more than 40 percent of which had been enacted in just the past 30 years. These new laws cover more than 50 titles of the U.S. Code and encompass more than 27,000 pages. Today, the Congressional Research Service says it no longer can even say how many federal crimes exist." She continued: "Are we that much more evil than we were 200 years ago that we need this many laws to keep us off of each other? Or has the nanny state veered completely out of control—creating crimes where no evil existed, pinning blame where no harm was intended? ... Perhaps the most conspicuous example of a derivative crime law is RICO, the Racketeering Influenced and Corrupt Organizations Act. As the definition of RICO offenses makes clear, any truly wrongful acts covered by the law are already criminalized in other statutes. Not only are RICO violations derivative offenses, but so are many of the underlying crimes the law lists, such as mail fraud and money laundering. RICO adds nothing of substance or value to the federal criminal code, except as a weapon in the hands of investigators and prosecutors. Derivative crime laws are designed to facilitate convictions, not to protect anyone.

Additionally, RICO creates unfairness for defendants because no specific state of mind is required for conviction beyond whatever culpable mental state is required for the predicate offense. The statute should be modified to include a *mens rea* requirement.

Landlords Should Not Face Criminal Prosecution for Renting to Illegal Immigrants

The treatment of illegal immigrants and landlords who rent to them is incongruous. The illegal immigrant faces only civil penalties, as being an illegal immigrant is not a criminal offense and deportation is a civil process. However, the landlord could face a long prison sentence for renting to the illegal immigrant. Yet, it is not clear who the victim is when a landlord rents to a tenant without investigating their immigration status. Theoretically, demand from illegal immigrants could drive up the cost of housing for others, but the supply of housing can be increased to account for this. The existence of an individual victim has traditionally been a prerequisite for most applications of criminal law.[77]

Additionally, it is overly burdensome for landlords to check the immigration status of every prospective renter and particularly to follow up with all renters on a regular basis to see whether a visa may have expired. Doing so would be particularly problematic since Congress has not required prospective renters to submit documentation to their landlord, but those seeking work are required by IRCA to provide the necessary documents for verification to the employer. Another complication is that a landlord who evicts or denies a tenant could be sued for national origin discrimination under the Fair Housing Act.[78]

States and Cities Should Avoid Imposing Additional Burdens on Employers

The benefit of a unified national immigration policy is apparent from the example of Arizona, Mississippi, and South Carolina requiring the use of E-Verify while Illinois sought to prohibit it. Employers operating in multiple states and localities face difficulty in complying with a patchwork of regulations. Iowa State Representative Pat Murphy said in regard to the issue, "If we leave this to the states, we're going to have 50 different laws to deal with. That creates a lot of problems."[79]

Under the preemption provision in IRCA, one of the few employer sanctions that states and local governments can impose is stripping companies of licenses. However, this

is a severe remedy that can result in such consequences as numerous citizens and legal residents at the same company that hired an illegal immigrant losing employment. Finally, at a time when budgets are stressed, many state and local law enforcement agencies may lack the resources to investigate immigration violations. It is partly for this reason that the police chiefs of major cities have indicated they do not wish to be involved in enforcing immigration laws.[80]

Increase Reliance on Private Sector to Process Immigration Applications

There are excessive delays in processing immigration applications. For example, applications for permanent work visas typically take five years to process, creating delay and uncertainty for employers. Through a contract with IBM that began in 2008, millions of USCIS paper records are being converted to electronic files. Although the projected improvement in efficiency of at least 20 percent is welcome, many visa applicants will still be waiting for years. In contrast, the issuance of the J-1 visa, a temporary visa used primarily by exchange students occurs in a matter of days because universities and other private entities are authorized to issue them.[81]

In areas other than immigration, privatizing and outsourcing have been consistently proven to result in greater efficiency and savings to taxpayers. More than 100 studies over the course of the last few decades have demonstrated cost savings from privatization in service areas from airport operation to insurance claims processing.[82] The Krieble Foundation has presented a plan would employ these principles to the issuance of visas.

Whether future policy changes or global economic developments increase or decrease the number of annual immigration applications beyond the current 7 million, there is a strong need to privatize and outsource functions to increase efficiency and harness the benefits of new technologies to address both efficiency and national security concerns with the present system.

Raise Cap on H-1B Visas

Currently, the cap on H-1B visas—those for highly skilled workers—is 65,000, which is still being reached despite the economic downturn. As late as 2001, the cap on H-1B visas was 195,000. The Foundation for American Policy conducted a survey that found 65 percent of high-tech companies employed people outside the United States because they could not obtain H-1B visas.[83] In 2008, one U.S. technology company hired 1,000 programmers in India because they couldn't obtain U.S. visas for any of them.[84]

A Heritage Foundation analysis determined that raising the cap back to 195,000 would result in an additional $2 billion in revenue due to income taxes paid by these immigrants.[85] Texas Governor Rick Perry was among 13 Governors who signed a letter in 2007 urging that the cap be raised.[86] The Heritage Foundation has noted that H-1B visas do not come at the expense of American jobs, because employers must show there are not qualified Americans available.[87]

Eliminate Country Cap on Employment Visas

The country cap on the 140,000 employment visas issued annually is arbitrary. It has caused an additional delay of up to six years for prospective Chinese and Indian immigrants who bring valuable skills to the U.S. workforce. Thousands of foreign professionals, many of whom have been in the U.S. legally for nearly a decade on student or work visas, are forced to wait up to seven years to get a green card and enjoy the rights and benefits of legal permanent residence. During this time, their spouses are not authorized to work at all, though many could be making a positive contribution to the economy. The long delay undermines U.S. competitiveness because some of these talented professionals grow tired of waiting and seek employment in other countries.

About a third of foreigners who obtain Ph.D.s in the U.S. leave the country within two years, partly because they cannot obtain a permanent visa or citizenship.[88] This brain drain has a substantial impact on the U.S. workforce, as non-citizens receive 35 percent of all doctorates, 43 percent of scientific and engineering doctorates, more than 70 percent of doctorates in electrical, civil, and industrial/mechanical engineering, and more than 50 percent of doctorates in all other engineering fields, computer sciences, math, and physics.[89]

The result is that more jobs, particularly in the high technology field, are moved overseas. To maximize the ability of business operations in the U.S. to compete internationally, it makes sense to grant visas to the most qualified applicants, regardless of country.

Conclusion

Businesses face many challenges in complying with federal, state, and local immigration laws. It is important that there be a clear line between criminal and civil violations and that a business owner or manager not be subject to prosecution for an unknowing transgression of the immigration laws. By raising the cap on H-1B visas and ensuring any guest worker program is privately operated with the best technology available, Congress can assist businesses in efficiently identifying legal workers. ✯

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