

# *State Workplace Requirements Affecting Illegal Immigration*

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In 2009, the 81st Legislature may consider several bills designed to affect illegal immigration, including some focused on employer and workplace regulations. Some of these proposals seek to discourage illegal immigration by authorizing state sanctions on employers who hire unauthorized immigrants as workers or by establishing other workplace requirements.

Texas, like most states, has been debating the role of the state in illegal immigration for several years. During the 2007 regular session, several bills dealing with illegal immigration were filed, but the only one enacted, HB 1196 by Kolkhorst, authorized a sanction on a narrow set of employers. The bill requires certain businesses receiving public subsidies for economic development to certify that they do not employ illegal workers.

In 2007 and 2008, laws dealing with immigrants and the workplace were one of the top three areas of state immigration laws and resolutions, according to the National Conference of State Legislatures (NCSL). Laws enacted in 2007 and 2008 in Oklahoma and Arizona have prompted much of the debate in Texas because of the proximity of these states to Texas and the possible movement of unauthorized immigrants into Texas in response to these laws.

*This report examines state laws establishing employer and workplace requirements that could affect illegal immigration — including imposing state sanctions on employers who hire unauthorized workers and requiring verification of eligibility to work.*

In August 2008, Rep. Frank Corte and Sen. Dan Patrick requested an opinion from Atty. Gen. Greg Abbott on whether the Legislature has the legal authority to enact certain workplace requirements in Texas. They asked if a Texas law would be permissible under the U.S. Constitution if it allowed the suspension or revocation of the business licenses of employers who hire illegal aliens, relied upon a federal determination of immigration status, and did

not impose any civil or criminal sanctions. A response from the attorney general is expected early this year.

## Statistics on illegal immigration

In March 2008, about 11.9 million unauthorized immigrants lived in the United States, making up about 4 percent of the U.S. population, according to estimates by the Pew Hispanic Center published in an October 2008 report. This number is up 40 percent from 2000, when the estimated unauthorized population was 8.4 million.

The Pew Center estimated in April 2006 that about 1.4 to 1.6 million Texans were “unauthorized migrants,” which the Center defines as including some people with temporary permission to reside in the United States and some whose immigration status was unresolved.

Unauthorized workers make up about 5 percent of the U.S. labor force, according to an April 2006 Pew Center report. About one-third of these workers have service sector jobs, which includes food preparation and serving, as well as building and grounds cleaning and maintenance. About 14 percent of unauthorized workers have jobs in the construction and extractive industries.

The annual inflow of unauthorized immigrants has fallen in recent years, according to the Pew Center. From 2000 to 2004, about 800,000 unauthorized immigrants came to the United States annually. From 2005 to 2008, this number fell to 500,000 unauthorized immigrants annually.

The center reports that about 80 percent of undocumented immigrants come from Latin America, with about 59 percent of the total from Latin America coming from Mexico. Growth in the population of undocumented immigrants from Mexico appeared to level off in recent years, with a population of 7.1 million in 2007 and 7.0 million in 2008, according to the center. This is up from a population of 4.8 million in 2000.

## Current workplace requirements

### *Federal law*

Under federal law, employers may not knowingly hire or continue to employ aliens not authorized to work in the United States. Employers are required to examine certain documents to verify the identity and employment eligibility of new workers and must complete and retain the employment eligibility verification form known as an I-9.

U.S. Immigration and Customs Enforcement, part of the federal Department of Homeland Security, enforces the law. Employers who do not comply may be subject to civil and criminal penalties, including fines, some levied on a per-worker basis, and for some violations, potential imprisonment.

The federal government has developed an electronic system, called E-Verify, to verify potential employees’ work eligibility. It is a free, Internet-based system that lets employers verify employees’ I-9 information against federal Social Security Administration and Department of Homeland Security databases to determine if the employee is authorized to work.

Under an executive order issued by President Bush, federal contractors and subcontractors will be required to start using E-Verify as of January 15, 2009. In late December 2008, the U.S. Chamber of Commerce and other groups filed a lawsuit challenging the executive order, arguing that federal law explicitly prohibits making E-Verify mandatory.

One section of the federal Immigration Reform and Control Act, 8 U.S.C. sec. 1324a(h)(2), addresses state law on workplace sanctions, stating that its provisions “preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”

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### State law

While other states increasingly have sought to discourage illegal immigration through workplace requirements, Texas has not enacted major laws in this area. Two recent Texas laws in this category apply in relatively narrow circumstances.

In 2007, the Legislature enacted HB 1196 by Kolkhorst, now Government Code, ch. 2264, which requires certain businesses receiving public subsidies from public agencies, state or local taxing jurisdictions, or economic development corporations to certify that they do not and will not knowingly employ undocumented workers. Public subsidies under the bill include programs, benefits, or assistance related to economic development. Businesses convicted of violating the federal prohibition against hiring illegal immigrants are required to repay the public subsidy, with interest.

In HB 3 by J. Keffer, the revised franchise tax bill enacted during the third called session in 2006, the Legislature prohibited the compensation paid to undocumented workers for the production of goods from being deducted as either compensation or the cost of goods sold when calculating the business margins tax. A business found violating this provision would have the deductions against their tax liability reduced, resulting in higher taxes. The state has not yet begun auditing this information, according to the Comptroller's Office.

### Laws in other states

In the first 11 months of 2008, 19 laws dealing with immigrant workers and employers were enacted in other states, according to NCSL. In 2007, 29 laws relating to immigrant employment were enacted in 20 states. Several of these laws impose workplace sanctions against employers who hire unauthorized workers or relate to employment eligibility verification. However, some laws have taken other approaches, including a 2008 Colorado law that created a pilot program to help expedite the federal process to bring in guest workers for the state's agricultural industry.

One of the frequent actions taken by other states has been to require employers to use the federal E-Verify system. Ten states require certain employers to use E-Verify, according to a May 2008 NCSL report. Some states impose the requirement only on public employers or employers with public contracts, while other states require all employers to use the system. Seven states — Arizona, Colorado, Georgia, Mississippi, North Carolina, Oklahoma, and Utah — used legislation to set the requirement, and three — Idaho, Minnesota, and Rhode Island — used executive orders. Going against the tide was Illinois, which enacted a law to limit the use of E-Verify until the accuracy of the database is improved.

Laws enacted in 2007 and 2008 in Arizona and Oklahoma have received attention for their approach to workplace requirements related to unauthorized workers.

**Arizona.** In 2007, Arizona enacted a law allowing the suspension of employers' business licenses when those employers hire people who are not legally authorized to work in the United States. The law, as amended in 2008, prohibits employers from knowingly or intentionally hiring an unauthorized alien and applies to those hired after December 31, 2007.

Complaints under the law are investigated by the state attorney general and local county attorneys. If they find the complaint is not false and frivolous, the case must be turned over to the county attorney to pursue sanctions against the employer. In these cases, the attorney general or the county attorney also must notify U.S. Immigration and Customs Enforcement and local law enforcement authorities of the unauthorized alien.

A first offense requires a business to terminate the employment of unauthorized aliens and be subject to a probationary period during which the employer must file quarterly reports about new employees. The probationary period includes the possibility of license suspension if certain requirements are not met. With second violations, courts are required to revoke the employer's licenses.

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The Arizona law also requires all employers to use E-Verify, the federal Internet-based program, to determine whether employees are legally authorized to work, although there currently is no penalty for violating this requirement. The law includes an affirmative defense for employers if they have complied in good faith with the federal requirements for employee verification.

The Arizona law was challenged by numerous businesses and other groups, but ultimately upheld, first by a federal district court and then by the 9th U.S. Circuit Court of Appeals. In September 2008, in *Chicanos Por La Causa v. Napolitano*, the 9th Circuit court wrote that the district court had correctly determined that the Arizona law was a “licensing” law within the meaning of federal immigration law and therefore not preempted by federal law, as had been alleged by the challengers. The 9th Circuit also addressed a challenge to the Arizona provision requiring the use of the E-Verify system by ruling that a state requirement to use E-Verify is not expressly or impliedly preempted by federal law.

**Oklahoma.** In June 2008, a federal judge temporarily blocked portions of a 2007 Oklahoma law on immigration, including provisions establishing workplace requirements. The law requires all public employers and contractors with public employers to use the federal E-Verify system and requires public employers to use only those contractors who use the system. Individual independent contractors who do not comply with the law’s requirements to provide employers with documents verifying the contractor’s work authorization may face state tax penalties.

The law also makes it a discriminatory practice under the state’s human rights law for an employer to fire an employee who is a U.S. citizen or permanent resident alien if the employer retains a worker who does not have legal work authorization. Under this provision, the unauthorized alien must have been hired after July 1, 2008, and have a job with equal skill, effort, and responsibility as the fired employee. Employers who use the federal electronic system to verify work authorization

## Other aspects of the Oklahoma law on illegal immigration

The 2007 Oklahoma law requiring public employers and contractors with public employers to use E-Verify to check that employees are legally authorized to work in the United States also deals with driver’s licenses, higher education, law enforcement, and public benefits for illegal immigrants. It also:

- requires the state to enter into an agreement with the federal government to allow state and local law enforcement officers to perform some immigration law enforcement duties;
- prohibits local governments from enacting policies or ordinances that prohibit law enforcement officers or other local officials or employees from cooperating with federal officials who enforce immigration law;
- restricts the issuing of driver’s licenses to U.S. citizens and others in the country legally and establishes requirements for licenses issued to those in the country for temporary stays;
- requires jails to make efforts to determine the citizenship status of individuals charged with felonies and driving while intoxicated crimes and allows illegal status to be considered in determining bail;
- requires state agencies to verify lawful presence for public benefits, with some exceptions outlined in the law;
- prohibits students who are not lawfully in the country from receiving certain higher-education benefits, such as scholarships or financial aid, and allows, but does not require, the state’s higher education regents to permit payment of in-state tuition by students who are illegal immigrants if certain residency, graduation, and other requirements are met; and
- criminalizes, with some exceptions found in federal law, the transporting, concealing, harboring, or sheltering of aliens who are in the United States illegally.

are exempt from liability, investigation, or lawsuits under this provision.

In *Chamber of Commerce v. Henry*, national and local chambers of commerce and business associations brought suit to challenge the law. U.S. District Judge Robin J. Cauthron of the Western District of Oklahoma granted a preliminary injunction to halt from taking effect provisions of the law establishing requirements and penalties for contractors working with public employers, the section imposing tax penalties on individual independent contractors, and the section dealing with discriminatory employment practices. She noted that the provisions were being enjoined only until a final determination can be made on the extent to which states may regulate without interfering in areas reserved exclusively for congressional action. The challenge argued that these portions of the law cannot be enforced because they improperly conflict with federal law that preempts state law. The Oklahoma state officials defending the law responded that it was within the matters left to the states. The state has appealed the temporary injunction, but a date for arguments has not been set.

## Debate about employer sanctions

Proposals to directly sanction employers include those that would suspend or revoke the business licenses of employers who hire workers in violation of federal immigration law or that would impose fines on or prohibit the receipt of state contracts by employers who hire illegal workers.

**Supporters of state-imposed sanctions on employers say** these laws are needed because federal law has proven ineffective and the problems resulting from illegal immigration are so serious that Texas should take all possible steps to stem the flow of illegal immigration into the state. The problems include the high cost of providing services to illegal aliens and the appropriateness of allowing them to enjoy rights and privileges that should be reserved for citizens and legal residents. One estimate by the Lone Star Foundation published in 2006 puts the net cost to the state of Texas for illegal immigrants at \$3.5 billion annually. In a December 2006 report, then-Comptroller Carole Keeton Strayhorn said that local governments bore the burden of some costs for illegal immigrants, such as

uncompensated health care and local law enforcement costs, with the net expenditures by local governments for illegal immigrants in 2005 being \$928.9 million. The Texas Health and Human Services Commission estimates that the state spent \$81.2 million on services and benefits to undocumented immigrants in fiscal 2007 and that public hospital districts spent \$597.8 million in fiscal 2006 on uncompensated care for this population.

State sanctions would bring more resources and more aggressive and consistent enforcement to the problem and allow for enforcement by officials who are closer to the work site. Employers often ignore federal law, feeling there is little risk that they will be sanctioned for employing illegal workers, and see fines as a cost of doing business. These employers depress wages for legal workers, have an unfair advantage over employers who follow the law, often exploit undocumented workers, and create an incentive for other illegal aliens to come to Texas. It is appropriate to use state resources to enforce employer sanctions because the problems resulting from illegal workers adversely affect the state, as well as local taxpayers, employers, and legal workers.

Experiences in Oklahoma and Arizona, where tough immigration laws have been enacted and illegal immigrants have moved from those states, show that state sanctions on employers can be successful in influencing illegal aliens to leave a state. The need for Texas to act has increased since the laws in Oklahoma and Arizona have resulted in illegal aliens moving from those states into Texas.

Industries and the Texas economy should not be built on illegal labor. While some reports may show illegal immigrants contribute to the state's economy, the cost to local governments of additional services — including uncompensated health care, law enforcement, and education — cannot be ignored. It is only fair to address the problem of illegal immigration on the demand side as well as the supply side.

**Opponents of state-imposed sanctions on employers say** it is unnecessary for states to impose sanctions on employers that hire undocumented workers because federal law already prohibits and penalizes such hiring. State sanctions would shift the burden of immigration law enforcement to Texas businesses and the state government. The federal government should enforce immigration laws, and Texas should not spend its finite

resources duplicating federal efforts when the state has other pressing needs.

Perceived problems with illegal immigration should be dealt with by changing federal law or beefing up federal enforcement efforts. Other facts about illegal immigration also should be considered. In 2006 then-Comptroller Carole Keeton Strayhorn estimated that in 2005 undocumented immigrants produced \$1.58 billion in state revenue, exceeding the \$1.16 billion in state services that they received. A recent estimate of the costs of services to undocumented immigrants provided by the Texas Health and Human Services Commission and local hospital districts failed to account for the taxes paid by this population, which offset some of the costs.

State-imposed requirements and sanctions on employers could damage the Texas economy by driving employers and workers from the state. Certain sectors, such as construction or agriculture, might experience particular harm if the labor pool dried up in response to overly stringent workplace requirements. Hundreds, perhaps thousands of workers have left Oklahoma and Arizona since their employer sanction laws took effect, according to press reports. A 2008 report by The Perryman Group analyzed the national economic impact of undocumented workers on businesses and concluded that without undocumented workers, notable labor shortages, especially in certain industries, and significant economic dislocations would occur. Before the state imposes sanctions on employers, the labor problem in specific industries needs to be addressed through a federal guest worker program or similar initiative.

Imposing state sanctions on top of existing federal sanctions could lead to confusion and a patchwork of requirements for employers and to uneven or unfair enforcement of federal law. For example, state sanctions could hurt law-abiding employees and their families if the laws led to discriminatory employment practices based on ethnic or other profiling. State sanctions also could harm well-meaning employers who receive counterfeit documents from workers or are forced to use a faulty federal database to check out new hires.

## Debate about requiring E-Verify

Under another proposal, the state would require employers to participate in a specified federal work

## Other immigration issues

The 81st Legislature also could debate other proposals dealing with illegal immigration, including access to public benefits, driver's license and identification card requirements, voter registration and voting place requirements, college tuition standards, and law enforcement issues. Many of these policy issues are discussed in a 2006 HRO report, *The Role of States in Immigration Enforcement*, February 24, 2006, Number 79-12.

authorization program, currently the E-verify program, to determine whether potential employees are legally authorized to work in the United States. This requirement could be imposed on public employers, such as states and political subdivisions, on contractors and subcontractors who do business with public employers, or on all employers. The requirement could be coupled with sanctions on employers who fail to use the system.

**Supporters of mandating the use of E-Verify say** that it would make immigration laws more effective because employers would be forced to verify information presented by new hires and undocumented employees could no longer seek out employers who do not use the system. All employers would be held to the same standard, and none would have an advantage from taking just a cursory look at potential hires' documents or from looking the other way when presented with false documents. Using E-Verify reduces verification-related discrimination and unauthorized employment.

Requiring the use of E-Verify would not burden employers. It is free, quick, and simple to use. In the third quarter of 2008, 96 percent of employees checked through the system were confirmed instantly or within 24 hours as authorized to work, according to federal statistics. Employers who have verified a person's work status with E-Verify establish a rebuttable presumption that they have not knowingly hired an unauthorized alien.

Improvements in the system have reduced errors, and lingering concerns about the accuracy of the federal database could be addressed with a provision to shield

employers who verify new employees' eligibility through the E-verify system from state penalties imposed for hiring illegal aliens. Most employers who have used the system have said its benefits outweigh any disadvantages, according to a 2007 evaluation of the program for the Department of Homeland Security.

**Opponents of mandating the use of E-verify say** employers should be able to decide how they follow federal immigration law without micromanagement from the state. The state should not require employers to enforce federal immigration laws through a system that can be inaccurate and difficult to use and that relies on databases that are fraught with errors. The 2007 evaluation of the program for the Department of Homeland Security found that further improvements are needed in the system, especially if it is a mandated

national program. The report also found that the database used for verification is still not sufficiently up to date to meet the requirement under federal law for accurate verification, especially for naturalized citizens. A state requirement to use E-Verify could be confusing for companies with offices in multiple states and could result in companies avoiding doing business in Texas.

Mandated use of E-Verify could lead to employment discrimination if an employer refused to hire a worker based on ethnic profiling or on what the employer anticipated the results of an E-Verify check to be or because the employer received tentative non-confirmation of a legal worker's status. Using the system also could be burdensome for employers, who would be required to follow certain procedures and would bear the costs of setting up and running the computerized system.

— *by Kellie Dworczyk*

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