Employer Sanctions Can Help Halt the Tide of Illegal Immigration

The Dynamics of Illegal Immigration

Much like it is with the flow of illicit drugs into the United States, the demand side appears to be the chief culprit of the present illegal immigration crisis. The willingness of employers to violate immigration and labor laws has negative ramifications for the body politic even if the American economy benefits from illegal immigration. Rather than rewarding lawbreakers through blanket amnesty and encouraging American isolation through wall-building and deportation, workplace enforcement and/or employer sanctions should be a primary focus of state lawmakers. That is an appropriate means to depress demand for illegal immigration.

A report by the Center for Immigration Studies highlights the dynamics of the process that sees so many people enter the United States illegally from Mexico each year:

“The typical Mexican worker earns one-tenth his American counterpart, and numerous American businesses are willing to hire cheap, compliant labor from abroad; such businesses are seldom punished because our country lacks a viable system to verify new hires’ work eligibility.”

As to the matter of why Mexicans come to the United States, the World Bank reports that although Mexico’s economic situation has greatly improved over the last decade, the real-life situation confronting most Mexicans is horrific:

“According to The World Bank, 48 percent of the Mexican population was living in poverty in 2004, compared to 64 percent following the 1995 crisis.”

The crushing weight of Mexico’s poor economic health is horribly clear when the situation is considered improved because just 50 percent of its population lives in poverty. The root of American unease with perceived job losses due to illegal immigration begins with the poverty faced by Mexicans who are now part of the U.S. workforce. The costs to that nation, through drain of its human capital, probably cannot be calculated but it is of great benefit to the U.S. economy in general and American corporations specifically.

However, the backlash over the increasing presence of illegal immigrants in the U.S. economy has not led to increased employer sanctions. Instead, it has led to greater calls for more border security—or a closed border—which is ancillary to the central problem of the willingness of corporations to flout federal law. If illegal immigrants did not have access to jobs, either at major U.S. corporations or at day laborer centers (often funded by taxpayers), illegal immigration would not have reached the magnitude it is today. The vast network of migrants now living and working in the United States clearly signals to others that crossing the border in search of a job is an acceptable risk because the likelihood of securing employment is high. Indeed, corporate interest groups have lauded the Senate “compromise” bill on illegal immigration.

Rather than focus on workplace enforcement or employer sanctions, policymakers,
particularly on the political right, have instead searched for new ways to secure the border. As noted by the Center for Immigration Studies, “the standard response to illegal immigration has been increased border enforcement. And, in fact, such tightening of the border was long overdue. But there has been almost no attention paid to enforcement at worksites within the United States.” The fact that there is little or no workplace enforcement, and that Mexicans are perceived to violate American immigration laws at will in search of jobs, helps to explain why public opinion runs so strongly on the issue.

**An Economic Benefit to America?**

An extensive analysis of the impact of illegal immigrant labor by *Business Week* magazine underscores why the U.S. Chamber of Commerce and other business organizations generally oppose efforts to increase border and workplace enforcement. The Chamber puts the blame for the problem of illegal immigration clearly on the shoulders of the federal government.

“Experts estimate there may be as many as 10 million undocumented workers throughout the country who are working hard and performing tasks that most Americans take for granted but won’t do themselves, in such industries as construction, landscaping, health care, restaurants and hotels and others. The combination of a need for workers and an inadequate immigration system has caused an unacceptable status quo. By not creating adequate legal avenues for hiring foreign workers and not addressing the status of workers already here,

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4Center for Immigration Studies, “Illegal Immigration.”

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Congress and this administration are not fully safeguarding the economy for the future.”

The Chamber’s claim that business bears no culpability is hollow. Procedures already exist for hiring of foreign labor (even if those procedures are needlessly bureaucratic), and the “status of workers” is affected most by those who knowingly hire individuals who have not legally entered the United States.

**Exploring Employer Sanctions**

It is no great leap of logic to deduce that if the employment incentive for illegal immigrants is removed, the rate of illegal immigration will fall. It is a simple supply and demand equation, which can be likened to the problem of illegal drugs in American society. No matter how many poppy fields or drug cartels are destroyed by law enforcement officials, as long as the demand for illegal drugs remains high, so the supply of these drugs will continue. (The problems faced by coalition forces in Afghanistan are a
strong rejoinder to skeptics of the demand side of the drug problem.) Similarly, no matter how many illegal immigrants are caught crossing the border, or detained and deported once they get here, as long as the supply of jobs exists, people will continue to attempt (and probably succeed) to enter the U.S. illegally in search of work, especially since economic conditions in Mexico are so deplorable compared to those in the United States.

Among the most effective ways to cut the supply of jobs would be to impose strict sanctions on American businesses that are found to be employing undocumented workers. A provision for sanctioning employers in this way was introduced at the federal level with the Immigration Reform and Control Act of 1986. However, enforcement of this legislation has been generally weak.

The Washington Post reported on June 19, 2006, that work-site enforcement operations by the Immigration and Naturalization Service (INS) were scaled back by 95 percent between 1999 and 2003. In 1999, there were 182 prosecutions of employers who had employed illegal immigrants; in 2003, there were just four. Total fines imposed declined from $3.6 million to just $212,000 over the same period. The INS was succeeded by U.S. Immigration and Customs Enforcement in 2004, which led to a slight increase in convictions—46 in 2004 and 127 in 2005.

In order to ensure that this increase in convictions continues, the most sensible and needed measure to be introduced in Congress is the Comprehensive Enforcement and Immigration Reform Act (S. 1438, 109th Congress) by Texas’ junior senator, John Cornyn. Among its primary recommendations is to authorize hiring 10,000 additional agents over five years to investigate employers who hire illegal immigrants. Workplace enforcement is crucial because it places the burden where it most justifiably belongs. Furthermore, workplace enforcement recognizes the sufficiency of federal law in matters relating to immigration and labor: It is already illegal to come to the United States to work without having secured a work visa or having achieved “resident alien” status, and it is already illegal to hire an undocumented worker. New federal laws are not necessary; it is simply the enforcement of existing laws that must be improved.

Despite the recent increase in convictions, and putting to one side the enforcement of employer sanctions by the federal government, there is still a role that individual states must play by drafting legislation and enforcing sanctions themselves. According to the National Conference of State Legislatures, over the past year as many as 30 states have considered a total of 75 bills targeting employers of undocumented workers. States considered almost 500 bills on immigration in 2006 alone. As far as imposing and enforcing stricter employer sanctions is concerned, the onus rests with the states.

**Recommendations**

In Texas, House Bill 3(79S3) in May 2006 created the gross margins business tax. The business tax excludes “any compensation paid to an undocumented worker” from the amount that an employer may deduct from his tax liability (Texas Tax Code, §171.1012). This is but one small example of an employer sanction. There are many other ways in
which the employment of illegal immigrants could be penalized by any state:

**Public Subsidies and Tax Penalties**

1. Require that all public agencies, state or local taxing jurisdictions, and economic development corporations give public subsidies to businesses only on the condition that a business will not hire undocumented workers. If a business is convicted of hiring undocumented workers, it should pay back the entirety of its public subsidies, with interest. Public subsidies should include: grants, loans, loan guarantees, fee waivers, land price subsidies, infrastructure development and improvements designed to principally benefit a single business or defined group of businesses, matching funds, tax exemptions, tax refunds, tax rebates, or tax abatements. (See Appendix 3 for model legislation to this effect.)

2. Similarly, business taxes could be amended to include an additional tax penalty equal to 10 percent of tax liability for each undocumented employee a company is found to be employing.

3. State business taxes could be amended so that each taxable entity is required to declare that it employed no “unauthorized aliens” when submitting its reports or returns to the state each tax year. Employer actions contrary to this declaration could constitute perjury.

**Monetary Penalties**

1. Detail a monetary penalty (perhaps equal to the amount that was paid by the employer to illegal immigrants during the financial year) to be paid to the state by any business found to be employing one or more illegal immigrants. The revenue resulting from such fines could be credited to further enforcement efforts in order to increase their scope and effectiveness.

**Business Formation and Affidavits**

1. Make the act of paying wages or any other compensation constitute an admission by the employer that he has confirmed that the employee is authorized to work in the U.S. Any employer found to be paying wages or compensation to an unauthorized employee will be considered to have committed perjury.

2. Certificates of formation for all businesses filing with a state should be accompanied by an affidavit stating that the company will not hire “unauthorized aliens.” Employer actions contrary to this affidavit could constitute perjury.

3. To further penalize repeat offenders, any business that is found to have employed “unauthorized aliens” for three out of any five years could be prohibited from conducting business in the state for a period of two years.

If passed, these laws could be enforced by attorneys general, state comptrollers, and/or the state workforce agencies.
Ban the use of public funds for day labor centers.

Day labor centers are areas where illegal aliens are known to congregate to wait for employment. When a city finances the construction or operation of a day labor center, it is providing a benefit to the illegal aliens who use that center to find employment. Similarly, the city is providing a benefit to employers who hire those illegal aliens in violation of federal law. States should prohibit cities from financing the construction, maintenance, or operation of day laborer facilities.

**Conclusion**

Millions of people are compelled to leave Mexico because they live in abject poverty. The chronic problems of poverty and unemployment there, as well as the availability of jobs here, are the proximate, if not ultimate, causes of the mass migration from Mexico (even Central America) to the United States. Unless and until employers believe that they cannot escape sanction for their illegal activity, the problem of illegal immigration will remain unabated and the illegal immigration debate will oscillate between the two extremes of deportation and wall-building on the one hand, and blanket amnesty and complete access to social services on the other. Neither extreme is tenable, but neither is any policy on illegal immigration that does not address the root cause of a long-simmering crisis.

Despite the central role of employer sanctions in the Immigration Reform and Control Act of 1986, enforcement of sanctions has been woefully poor at the federal level. For conservatives, the knowledge that we live in a world governed by the incentives of demand and supply leads us to a firm conclusion in the quest to halt illegal immigration. Removing the demand for illegal labor by creating significant disincentives for employers to break the law will cause a decline in the supply of jobs and employment potential for illegal immigrants. With no guarantee of finding a job, the incentive to come to the U.S. illegally will be dramatically reduced, and a decline in illegal immigration is likely to follow.
BACKGROUND

The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers in the United States to knowingly hire workers who are not eligible to be employed in the U.S., and it imposed civil and criminal penalties (known as “employer sanctions”) on employers who do so. IRCA also prohibited states and localities from imposing their own employer sanctions schemes, stating that federal law preempts state and local law in this area. IRCA’s intent was to make it more difficult for undocumented workers to find employment in the U.S. and thus to discourage them from immigrating here. One of IRCA’s unintended consequences is that it actually created a new economic incentive for “bad-apple” employers to hire and exploit undocumented workers. Such employers knowingly seek out undocumented workers, who they know will be reluctant to hold them accountable if they fail to pay fair wages and provide safe working conditions. When undocumented workers do attempt to assert their labor rights, such employers may report them to immigration authorities or simply refuse to comply with labor and employment laws. These law-breaking employers use threats of deportation, or of dismissal and being replaced by other undocumented workers, to intimidate workers out of asserting their rights — all the while suffering no negative consequences for violating the law.

Despite these bad effects and IRCA’s prohibition against states and localities imposing employer sanctions, a number of states and localities have introduced proposals that would either impose state sanctions on employers that hire undocumented workers or require employers, through a licensing or contracting process, to verify that their workforce is employment-eligible. These proposals are not only preempted by federal law; they also would exacerbate the failed federal approach that has led to the weakening of all workers’ ability to fight for better conditions. A much better strategy is for states and localities to more effectively enforce state and local labor laws and to enact stronger labor protections to hold employers accountable for labor law violations. This, in turn, would remove the economic incentive to seek out and exploit undocumented workers. In addition, states and localities should call on Congress to reform our immigration system and provide a comprehensive opportunity for currently undocumented people to earn legal status.

SPECIFIC PROBLEMS WITH STATE AND LOCAL EMPLOYER SANCTIONS PROPOSALS

- Most state and local employer sanctions proposals are preempted by federal law.¹
  - Federal immigration law expressly preempts any state or local government from imposing employer sanctions on those “who employ, recruit, or refer for a fee unauthorized [non–U.S.

¹ For more information about federal plenary and express power over immigration law, see forthcoming (from NILC) “Fact Sheet on Federal Preemption: How to Analyze Whether State and Local Initiatives Are an Unlawful Attempt to Enforce or Regulate Federal Immigration Law.”
Thus, any state or local legislation that prohibits the hiring of unauthorized workers or attempts to impose penalties on employers for hiring unauthorized workers is not legally enforceable.

- The federal preemption statute contains a limited exception for “licensing” laws, but state and local governments cannot make employer sanctions laws they pass lawful simply by labeling them “licensing” laws. The licensing exception simply allows governments to suspend or revoke a business license of an employer based on a federal finding that the employer violated the federal employer sanctions law.\(^3\) State or local efforts to go beyond this limited exception and regulate the hiring of unauthorized workers or impose employer sanctions conflict with the federal law and are preempted.

- Enactment of proposals that are preempted by federal law will subject states and localities to unnecessary litigation that will waste taxpayers’ money, as some localities have already discovered.

- For example, when the city council of Escondido, California, passed an ordinance that prohibited landlords from renting to undocumented people, a federal judge stopped it from being implemented, and the city council agreed to kill the proposal and pay $90,000 in attorneys’ fees. In Pennsylvania, a federal judge issued a temporary restraining order against an ordinance passed by the Hazelton city council that, among other things, penalizes employers for hiring undocumented workers. The case is still pending, but in issuing the order the judge found that there was a “reasonable probability” that the ordinance would be ruled unconstitutional.

- **Congress is currently working to fix our broken immigration system.**

  - Many states and localities have introduced employer sanctions proposals because they are frustrated by the federal government’s inability to fix our broken immigration system.

  - Congress is working on reforming the immigration system. In 2005 and 2006, both the U.S. House of Representatives and the U.S. Senate passed immigration reform bills that would have created a new electronic employment eligibility verification system for all workers in the U.S. and increased penalties on employers that hire undocumented workers. It is expected that new, more comprehensive bills will be introduced in 2007.

  - The immigration reform bills passed by the House and Senate in 2006 both reaffirm current law prohibiting states and localities from imposing employer sanctions different from those imposed by federal law. Thus, state and local proposals to create employer sanctions would remain unenforceable.

- **State and local employer sanctions proposals will create confusion in the business community and will result in discrimination against those who look or sound foreign.**

  - The creation of new criminal penalties against employers will likely result in confusion and fear in the business community. Employers cannot tell by looking at people whether or not they are authorized to work in the U.S. As a result, employers will feel compelled to require

\(2\) See 8 USC § 1324a(h)(2).

\(3\) See the legislative history of the Immigration Reform and Control Act of 1986, explaining that the exception is intended to allow state or local governments to suspend, revoke, or refuse to reissue licenses to “any person who has been found to have violated the sanctions provisions in this legislation” (emphasis added). H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662.
those individuals who look or sound “foreign” to provide additional documentation proving they are eligible to work, in order to safeguard against criminal prosecution.

- This practice will deny many documented workers and other people of color access to jobs that will, in turn, hurt the state’s economy and the greater community’s well being. It also could expose employers to liability under state and federal antidiscrimination laws.4

- The concern over increased discrimination is well founded given certain findings of the General Accounting Office (GAO) after IRCA was enacted. In three consecutive reports mandated by IRCA, the GAO found that employer sanctions had indeed resulted in widespread discrimination. One in five employers reported some form of employment discrimination against those workers they perceived to be undocumented because they were “foreign sounding” or “foreign looking.”5

### Employer sanctions do not solve the problem of employers hiring undocumented workers, but they do worsen labor conditions for all workers.

- As the AFL-CIO recognized in its historic shift on employer sanctions in 2000, “[C]urrent efforts to improve immigration enforcement, while failing to stop the flow of undocumented people into the United States, have resulted in a system that causes discrimination and leaves unpunished unscrupulous employers who exploit undocumented workers, thus denying labor rights for all workers.” Moreover, “unscrupulous employers have systematically used the I-9 (employment eligibility verification) process in their efforts to retaliate against workers who seek to join unions, improve their working conditions, and otherwise assert their rights.”6 For example, in a case before the National Labor Relations Board involving an unfair labor practice, an employer that knowingly violated IRCA when it first hired undocumented workers demanded that they present proof of work authorization only after the workers had begun organizing and demanding their unpaid wages.7

- Employers also use IRCA’s employment eligibility verification requirements to boost their profits while driving down wages and working conditions. To save money on wages and benefits, some unscrupulous employers turn a blind eye when initially hiring undocumented workers. Not until the workers file a labor complaint or join a union campaign does the employer decide to verify their employment authorization. The employer then fires the workers without suffering any repercussions for violating labor laws. Moreover, such an employer does not have any incentive to abide by the law in the future. In a California case, for example, the employer had not cared whether a worker was documented or not until she filed a claim for unpaid wages. In retaliation, and as a means of circumventing its labor law responsibilities, the employer reported her to federal immigration authorities.8

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4 Because of the concern that the employer sanctions created by IRCA would result in widespread employment discrimination, Congress enacted antidiscrimination provisions that prohibit immigration-related employment discrimination against potential employees based on their national origin or citizenship status. The antidiscrimination provisions of the Immigration and Nationality Act also make it unlawful for employers to require workers to present specific documents or more documents than are legally required by the Form I-9 employment eligibility verification process. See 8 USC § 1324b.


7 See Mezonos Maven Bakery and Nat’l Labor Relations Bd., Case No. 29-CA-25476.

States and localities should support reform that includes strong worker protections as the real solution to the problem created by employers hiring undocumented workers.

- Unscrupulous employers will continue to have an economic incentive to recruit, hire, and exploit undocumented workers as long as employers know they will not be liable for violating state and federal labor and employment laws.
- Rather than wasting taxpayers’ money on legislation that is flawed, states and localities should support efforts aimed at improving the lives of all workers by holding unscrupulous employers accountable for violating employment laws, including but not limited to enacting and enforcing minimum wage, overtime, health and safety, workers’ compensation, and antidiscrimination laws.\(^9\)
- Because most federal and state employment laws allow workers a private right of action, workers have an interest in ensuring these laws are enforced. This is a more efficient means of holding culpable employers accountable and helps to do away with the sense of impunity these companies have. This decreases the economic incentive to hire and exploit undocumented workers more effectively than any employer sanctions law will ever do.
- Stronger enforcement of labor laws will prevent unscrupulous employers from gaining an unfair economic advantage over those employers who play by the rules.

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