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Can States Regulate Immigration? Part 8 Arizona's HB 2779

19 Dec 2007 in [Regulatory Economics](#), [Regulatory Policy](#)

On [July 2](#), Arizona Governor Janet Napolitano [signed into law](#) a bill that tightens an existing statutory definition for felonious "aggravated taking identity of another person" and establishes a new statutory regime that will sanction employers who violate federal immigration law after January 1, 2008. The bill passed the State House of Representatives 47-11 and the State Senate 20-4.

PROVISIONS OF NEW ARIZONA LAW

HB 2779 creates a "two strikes" penalty for employers who knowingly employ illegal aliens using the standard for violation under federal immigration law. A first violation results in a temporary loss of licenses needed to do business in the State. A second violation results in the permanent loss of those licenses. The bill requires employers to use the federal government's voluntary Basic Employment Verification Pilot Program ("Basic Pilot Program") and creates an affirmative defense for those employers who do.

The Arizona State Attorney General and County Attorneys are required to receive tips about unauthorized aliens. The AG must refer tips he receives to the appropriate County Attorney, who then has a nondiscretionary duty to investigate by inquiry to the federal Department of Homeland Security. Federal authorities are required by [8 U.S.C. 1373\(c\)](#) to respond to inquiries from State and local governments regarding citizenship and immigration status. Upon receipt of information that an employee lacks legal U.S. presence, the County Attorney must prosecute the employer for violation of Arizona labor law.

The law also establishes prescribed sanctions State courts must impose for first violations, including:

- Order the employer to terminate all employees who are unauthorized aliens
- Order the employer to provide a sworn statement to the County Attorney that all unauthorized aliens have been terminated and that the employer will henceforth comply with federal immigration law, and suspend the State licenses of employers who do not provide such sworn statements
- Subject the employer to a three- or five-year probationary period (depending on whether the violation was "knowing" or "intentional") during which quarterly reports must be filed with the County Attorney documenting compliance with federal immigration law with respect to all new hires
- Require the courts to transmit court orders to the Attorney General, who is required to maintain a database of violations and post them on its website

The law requires the courts to apply the same criteria for proving violation as apply under federal immigration law. Employers who use the Basic Pilot Program earn a rebuttable presumption of compliance. Determinations of immigration status made by DHS also are rebuttable. Employers who demonstrate good faith compliance with federal law enjoy an affirmative defense.

Second violations result in the permanent revocation of all State licenses.

ANALYSIS

Federal immigration law makes it illegal to knowingly hire a person who is neither a citizen of the United States or an authorized alien. There appears to be no dispute that this provision of law, though it has been in place since 1986, has not been consistently enforced. Consequently, there are a large (but unknown) number of illegal aliens residing in the U.S. who are gainfully employed, many accompanied by family members. Because U.S. citizenship is conferred automatically upon birth in the U.S., many children whose parents are illegal aliens are themselves American citizens.

HB 2779 links the framework and requirements of federal immigration law with the State's framework for business licensing and permitting. Violations of federal immigration law, whether or not prosecuted by federal authorities, are now violations of Arizona labor law. In many (and perhaps most) cases, a business cannot legally operate without one or more State licenses. Through this linkage, Arizona can sanction violations of federal immigration law through police powers that are constitutionally reserved to the States. Although Arizona is preempted by federal immigration law from taking action against illegal aliens or employers under federal immigration law, it is not preempted from taking action against employers who violate laws that the States choose to link to federal immigration law.

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[Richard Belzer](#)

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HB 2779 appears likely to have a significant direct effect on labor supply and demand in Arizona, and a significant indirect effect on labor supply and demand in other (especially) neighboring States. The law also may have the unintended consequence of causing a large increase in the number of workers identified as independent contractors.

Direct effects

HB 2779 significantly increases the risks associated with hiring illegal aliens, or alternatively, failing to verify the legal U.S. presence of new hires. For many firms, the most significant penalty associated with a first violation is public disclosure of statutory violation. Employers who place a high value on reputation are virtually certain to comply just to avoid the opprobrium that likely would accompany publicity. The odds are low that they will ever commit a first violation.

In the [press release](#) announcing her signature, Governor Napolitano raised concerns that vital public services, such as "hospitals, nursing homes, and power plants could be shut down for days because of a single wrongful employment decision." While certainly plausible, her scenario seems unlikely because these employers would gain an affirmative defense simply by demonstrating good faith compliance with federal immigration law. In short, the threat of public identification as a presumptive violator of federal immigration law is by itself a powerful incentive that seems very likely to motivate a high level of compliance among employers who value reputation. (It is also conceivable that some public service providers will choose not to comply and "dare" County Attorneys to shut them down. It is not possible to predict the likelihood of that scenario or how it would play out.)

First violations will be concentrated among those employers who don't place a high value on reputation. For these firms, the major cost of a first violation is the paperwork burden of quarterly reporting to County Attorneys, and possibly the threat of subsequent sanctions if they falsely swear a commitment to comply only to stay in business. If false swearing is not prosecuted, however, then this latter cost is minor. HB 2779 presumes that employers would be seriously disadvantaged, if not closed down, if various operating permits and licenses were suspended (or, after a second violation, revoked). This presumption may not be valid for firms that already operate in the financial margin or the legal shadows. Some will respond by joining the underground economy. Another compliance strategy for some firms will be to reorganize as new establishments and obtain new permits and licenses. HB 2799 includes no mechanism for identifying such evasion, and it also does not penalize it if it is discovered.

Employers in industries who are concerned about reputation and rely on unskilled labor (where illegal aliens congregate) will more actively search for employees who are citizens and aliens authorized to work in the U.S. Wage rates will rise to maintain the same employment level. As long as the law is enforced consistently, wage rates will rise industry-wide, leading to higher output prices and a reduction in market demand. To be concrete, if landscaping or housekeeping services in Arizona are predominantly supplied by illegal aliens, firms will pay higher wages to attract legal workers, resulting in higher costs and higher prices for landscaping and housekeeping services. Higher prices, in turn, will reduce the market demand for landscaping services. We can predict the direction of all these effects based on economic theory; what's uncertain is the magnitude of these effects.

Where will illegal alien workers go? Some will stay in Arizona and work "under the table" for cash wages. Some will return to their home countries, but only if they conclude that the expected net financial benefits of remaining in the U.S. are negative. Others will move to other states, especially California, Nevada and New Mexico. To the extent that this is the law's policy goal, it seems likely to be effective.

Indirect effects

As illegal aliens exit Arizona to find work they will increase the supply of illegal labor in other States. Greater labor supply can be expected to exert downward pressure on wage rates, both for illegal aliens (for whom new entrants are direct competitors) and for citizens and authorized aliens in the unskilled labor market. To the extent that competition between legal and illegal labor has [racial or ethnic overtones](#), these conflicts may diminish in Arizona and intensify in neighboring States.

Firms and persons who hire independent contractors are largely exempt from federal immigration law. That is, they may without penalty hire independent contractors whom they know are illegal aliens. The responsibility to comply with federal law is the responsibility of the contractor, not the firm or person who hires the contractor. Thus, it can be predicted that some illegal aliens will assert that they are independent contractors (or alternatively, employers will try to change the status of their employees to independent contractors). The Internal Revenue Service has [regulations](#) governing independent contractor status, and employers who abuse or violate these rules are subject to potentially significant penalties. A more promising tactic would be to redesign jobs so as to convert them into bona fide independent contractor relationships.

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HB 2779 is subject to [legal challenge](#) by the American Civil Liberties Union and allied advocacy groups who [allege](#) that the law is preempted by federal immigration law and violates the 14th Amendment. (A lawsuit filed by business groups has been [dismissed](#).)

The federal preemption argument appears to be based on the claim that the suspension or revocation of State business licenses interferes with the exercise of federal authority to regulate immigration *if the State action is taken because of federal immigration law violations*. That is, plaintiffs do not contest Arizona's authority to exercise bona fide police powers, but say the State cannot do so if it is motivated by concerns about illegal immigration.

The Constitutional argument appears to be based on the claim that federal notice provided to State and local governments, as required by [8 U.S.C. 1373\(c\)](#), lacks due process. We're not familiar with the nature of these federal notices, but we infer that they consist only of a statement that the subject of such an inquiry cannot be confirmed to be either a citizen or an authorized alien. HB 2779 makes a statutory inference that this federal notice constitutes a rebuttable presumption of illegal U.S. presence. If prosecuted by a County Attorney, the employer would bear the burden of proving either that the federal notice was factually erroneous or that it had acted in good faith by utilizing the Basic Pilot Program, which yielded an erroneous report.

The [plaintiffs' are on record](#) opposing the policy embodied in federal immigration law that illegal aliens are not entitled to work in the United States, and they advocate policies that would allow illegal aliens minimally restricted access to U.S. labor markets. Leading plaintiff American Civil Liberties Union has also supported the enforcement of federal laws unrelated to immigration that, if complied with by employers, would reinforce the federal sanction against hiring illegal aliens. One [example](#) is the ACLU's support for the award of back pay to an illegal alien who, in the opinion of the National Labor Relations Board, was unlawfully terminated. Thus, although plaintiffs argue that HB 2799 interferes with the federal government's enforcement of federal immigration law, HB 2799 plainly reinforces the purpose and effect of federal immigration law by enhancing employers' incentive to comply.

REFERENCES

[Arizona HB 2779 \(text\)](#)

[Arizona HB 2779 \(fact sheet\)](#)

Federal Immigration Law [8 U.S.C. 1373(c)]

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

[Internal Revenue Service Rules on Independent Contractors](#) (excerpts from web page advice, emphasis supplied in original)

Who is an Independent Contractor?

A general rule is that you, the payer, have the ***right to control or direct only the result of the work*** done by an independent contractor, and ***not the means and methods of accomplishing the result***.

...

Who is a Common-Law Employee (Employee)?

Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

American Civil Liberties Union position statements on immigration policy, the 1986 Immigration Reform and Control Act, and the enforcement of non-immigration related federal laws affecting illegal aliens:

[Web Page](#)

Immigrants' Rights:

The ACLU has been one of the nation's leading advocates for the rights of immigrants, refugees and non-citizens, challenging unconstitutional laws and practices, countering the myths upon which many of these laws are based. Learn more about our [Immigrants' Rights Project](#) and take

action to protect the rights guaranteed by the Bill of Rights.

Congressional Testimony

The Immigration Reform and Control Act of 1986 required employers to verify the identity of potential employees and their eligibility to work in the United States. The Act also established sanctions for failing to comply with the verification requirements. As a result, there has been widespread discrimination based on citizenship status against foreign-looking American workers, especially Asians and Hispanics.

ACLU *Amicus Curiae* in Hoffman Plastic Compounds, Inc., v. National Labor Relations Board (emphasis added)

Congress enacted [the Immigration Reform and Control Act, "IRCA"] principally to curtail illegal immigration into the United States and to protect domestic workers from the perceived adverse effects of that immigration. IRCA's approach is to make undocumented workers less attractive to U.S. employers by reducing the economic incentives to hire them. As this Court noted in *Sure-Tan*, "[i]f an employer realizes that there will be no advantage under the [National Labor Relations Act] in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." 467 U.S. at 893. IRCA thus focuses on changing employers' behavior. The Board's award of backpay in this case furthers IRCA's aims, and Petitioner's argument to the contrary represents a fundamental misunderstanding of the statute.

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