

**SECTION 304.
ILLEGAL ALIENS; CRIMINAL COMMERCIAL SOLICITATION.¹**

IRLI Comment: Section 304 is designed to provide a criminal sanction for day labor solicitation by illegal aliens, one of the more difficult problems in U.S. immigration law. The First Amendment right of association prohibits governments from restricting the right of U.S. citizens to freely solicit for employment in public areas. Some jurisdictions, hoping to “avoid” the controversy often associated with immigration enforcement programs, have mistakenly attempted to regulate day labor under municipal police powers to regulate public safety on public roadways, or less frequently, abate public nuisances like littering, public urination, or sexual harassment of pedestrians.

However, attempts to “avoid” the issue of immigration status have frequently created municipal liability for racial profiling or other civil rights violations, if enforcement results in a statistically significant pattern of enforcement actions against members of the same ethnic group, e.g. Hispanics or Mexicans.

Section 304 relies on Supreme Court case law allowing the regulation of commercial solicitation. Subsection (C) provides a series of exceptions designed to prevent First Amendment violations.

(A) It shall be unlawful for any person in this state to engage in commercial solicitation, as defined herein, while operating a motor vehicle on, or standing or remaining on

(1) Any public highway, public street or adjacent public property, or

(2) Any adjacent private property operated in whole or part with public or tax-exempt funds or otherwise under public control; or

(3) Any other adjacent private property, but only after a reasonable request to leave has been made to the person by the owner or any other person having lawful control over such property, or such person has otherwise been provided reasonable notice prohibiting entry thereon.

(B) For purposes of this section, commercial solicitation is defined as

(1) Solicitation to provide personal labor or services, in exchange for money or other things of value, by means of a written communication, an audible verbal communication, or a combination

¹ Source: IRLI/AZ.

of a verbal communication and nonverbal gesture or nod, that would indicate to a reasonable law enforcement officer that the person sought employment or engagement as an independent contractor.

(C) Constitutional limitation. -- — individual shall be detained for a violation of this section, if the individual that engaged in such conduct

(1) Affirms to a law enforcement officer that he or she is a citizen or national of the U.S., or

(2) Presents to a law enforcement officer documentation of lawful presence in the U.S. issued to an alien by the federal government, and affirms that such documentation is valid and contains the alien's true legal name.

(3) No individual shall be convicted of criminal commercial solicitation under this section if, within 21 days after arrest, the individual complies with the requirement of subparagraph (1) or

(2), or otherwise verifies or confirms his or her lawful presence in the United States.

(4) Nothing in this section shall be construed to restrict a protected right to speech or association of any person lawfully present in the United States.

(D) Penalty.-- —criminal commercial solicitation is a [first class misdemeanor]. A second or subsequent conviction is a [class six felony].