

Planning for State Immigration Enforcement Legislation

I. Permissible Scope of State and Local Legislative Authority over Immigration:

State and local governments have more extensive authority than is generally recognized to enforce federal immigration law and to enact statutes and ordinances that sanction immigration-related activities which are also unlawful under federal immigration law.

The two key constitutional limits to state and local legislative authority are:

(1) State legislation cannot contradict or contravene the terms under which a non-citizen has been admitted to the United States by the federal government, and

(2) State government agencies and courts cannot directly admit, remove or deport a noncitizen to or from the United States, a power which is exclusively the function of the federal government.

Any deviation from these principles, either direct or indirect, can be interpreted by the judiciary as either a “regulation of immigration,” a violation of the Supremacy Clause of the U.S. Constitution, or a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

II. Practical Considerations:

The primary incentive for illegal immigration is economic – access to employment and, to a lesser extent public benefits and services. **The primary goal for successful state or local immigration control legislation is to remove or reduce the economic incentives for unlawful presence**, by use of (1) the states’ inherent police powers to protect the health, safety and welfare of its citizens and legal residents, and (2) specific powers delegated by Congress to the states and local governments.

Insure that each draft bill includes a definitional and a construction provision requiring that the terms, requirements, and obligations of the bill be construed so as to be consistent with federal immigration law.

III. Recommended Measures:

Following are general IRLI recommendations on various legislative measures that -in combination- will have a powerful and practical deterrent effect on the entry and continued presence of legal aliens at the local, regional, or state levels. This list is meant to be illustrative, and not comprehensive.

A. Unauthorized Employment:

Note: *Current federal law (8 USC 1324a(h)(2)) expressly preempts any non-federal 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.”

In practice, this means that draft legislation should usually avoid (a) direct fines or (b) criminal convictions against *employers* for recruiting or hiring illegal aliens as a principal enforcement mechanism.

1. Prohibition of performance of unauthorized employment by aliens.

Make the performance in the jurisdiction for more 80 hours in any 12-month period of work of any type for compensation, whether in cash, benefits or other valuable consideration, by any person who is an unauthorized alien as defined in federal law (8 USC 1324a(h)(3), a felony punishable by at least one year imprisonment and a fine equivalent to the value of any compensation received by the alien. Note that this criminal sanction is applied to the alien, not the employer, and thus is not preempted.

2. Unfair discharge of a United States worker.

Make the discharge of any United States worker (as defined in federal law) by an employer, if the employer on the date of discharge retained as an employee any unauthorized worker, an unlawful discharge. Aggrieved discharged US workers may initiate a civil action in state court for recovery and damages. Provide employers who have used the electronic verification system (e.g. Basic Pilot) to verify the worker's employment eligibility (even if later found to be in error) immunity/safe harbor from suit.

3. Disallowance of business expenses deductions from state taxes.

Disallow the deduction from state income, corporate, or other business taxes of the expense of compensation provided to an unauthorized worker within the fiscal year in question. Disallowance of a tax deduction is not a civil fine.

4. Restriction of payment of invoices for government contracts.

Require government contracts to contain a clause allowing the government to disallow payment of any portion of an invoice submitted to a government agency for contracted services of any nature, where the services were performed by unauthorized workers. Provide employers who have used the electronic verification system (e.g. Basic Pilot) to verify the worker's employment eligibility (even if later found to be in error) immunity/safe harbor from enforcement of this contract clause.

5. Private cause of action to revoke corporate charter.

Permit a private cause of action by any aggrieved corporate entity or legal resident of the state to compel the state agency regulating corporations to revoke the corporate charter of any for-profit or non-profit corporation registered in the state which violates the alien smuggling provisions of 8 USC 1324 or employs an unauthorized worker in violation of 8 USC 1324a. Statutes creating private causes of action are not preempted civil sanctions.

6. Workers Compensation Reform.

Require employers to pay workers compensation claims approved for claims filed by employees regardless of unauthorized worker status. Require payment of claims only to a bank in the alien's country of nationality, or another foreign country where the alien has been lawfully admitted. Note: This requires the disable illegal alien to depart the US before receiving compensation payments. Waive the immunity from suit for employers in such cases, allowing the Workers Compensation Commission to recover the amount of claims actually paid, if the employer is found to have failed to comply with federal employment authorization verification (I-9) procedures. This ensures that the employer, not the injured alien or the taxpayer, is responsible for the financial injuries incurred caused by failure to comply with federal law.

7. License suspension.

Upon confirmation of the validity a written complaint, filed by any state or local government agency or by an aggrieved legal resident of the jurisdiction, of the employment of an unauthorized alien by any entity holding a business, professional, or occupational license issued by the jurisdiction, require the issuance by the state department of labor of a cease and desist order to the license-holder, suspending the license(s) at issue until lawful presence of all employees or independent contractors of the license holder is confirmed. Require the extended suspension of the license in case of continued non-compliance pursuant to regulations. Note: Fines would be preempted by federal law, but not a temporary closure of the business due to failure to maintain a business license.

B. Citizen Identification and Citizenship Status Protection

1. Lawful presence test.

Require the state motor vehicle department, after consultation with the US Department of Homeland Security, to issue a list of documents which may be presented to a state or local government agency to establish legal presence in the United States. Require public notice and hearings on development of the list. Require other government

agencies to adopt the approved list. Allow US citizens (only) without documents (e.g. homeless or disaster victims) to sign an affidavit of US citizenship under perjury, which may be accepted by the agency for immediate use, but must be verified within a reasonable time (30-60days) by the agency. Provide criminal and civil penalties for false statements or use of forged or misappropriated documents to meet the lawful presence test.

2. Limitation on use of insecure foreign identification documents.

Prohibit use of documents issued by foreign governments to establish identity for any official purpose, or for any private transaction whose value is greater than \$100, unless the alien also presents a US government-issued document from the approved list establishing lawful presence in the United States.

3. Lawful presence test for drivers licenses.

Add the lawful presence test to the requirements for eligibility for a driver's license or state or local government identification cards.

4. Criminalize false claims of US citizenship or legal permanent residence.

Make a false claim of US citizenship or legal permanent resident alien status to obtain any official public service or valuable consideration of \$100 or greater from a business a felony (parallel to the federal statute).

5. Define domicile or legal residence in the state.

By statute, restrict the right to establish legal domicile in the state to U.S. citizens and nationals, legal permanent resident aliens, and other aliens admitted or paroled into the U.S. for an indefinite or limited period whose terms of admission under federal immigration law permit establishment of residence in the United States. Allow for exceptions for limited purposes (e.g. marriage or standing to maintain a civil suit) where expressly authorized by statute.

C. Local Law Enforcement of Immigration Law

1. Criminalize willful violation of alien registration laws.

Enact the federal misdemeanors of willful failure to complete alien registration or to carry an alien registration document or notarized copy on the person as parallel state misdemeanors. Note: All legally present aliens, whether in permanent or temporary status, possess this document. Enforcement of registration laws, as opposed to federal "illegal presence" laws, is entirely document-based, and thus less vulnerable to impermissible profiling and related civil rights abuses.

2. Clarify peace officer arrest authority for immigration crimes.

Amend and clarify the state statute regulating peace officer arrest power to include misdemeanor violations of US Code Title 8 (INA).

3. Allow temporary detention of illegal aliens charged with misdemeanors or infractions.

Allow state and local law enforcement agencies to temporarily detain aliens charged with a misdemeanor or traffic violation, or similar infractions, for whom probable cause to believe the alien is inadmissible under federal immigration law (8 USC 1182) been confirmed with US DHS, until US ICE personnel are available to take transfer of the alien into federal custody. Also permit state and local police agencies to transport detained aliens across state lines to facilitate transfer into federal custody.

4. Federal-local cooperation agreement.

Require an appropriate state official or agency (e.g. state police) to negotiate and execute a cooperative agreement with US DHS, as authorized by 8 USC 1357(g), to train and designate state or local law enforcement officers as immigration enforcement officers, to perform specified immigration enforcement functions, which could include all of the functions in #1-3 above. Note: State must pay for the cost of training, which can be limited version of federal officer training, but officers obtain federal qualified immunity while performing enforcement functions per the agreement.

5. Private right of action to challenge local government restriction on immigration law compliance.

Grant any aggrieved legal resident of a local jurisdiction a private right of action to file a civil suit for injunctive relief and legal costs to restrain the municipality from implementing or enforcing any restriction on the authority of any official or personnel to cooperate with federal immigration enforcement authorities as provided by 8 USC 1373 and 1644 (anti-“sanctuary” measure).

5. State alien smuggling conspiracy statute.

Make alien smuggling (as defined by 8 USC 1324(a)(1), including conspiracy) within the state for financial gain a state statutory felony, with penalties equivalent to the federal statute. Note: Builds on successful Arizona model of charging illegal alien border crossers (nearly all currently use the services of a smuggler) as well as their smugglers under state law.

6. Collect and report data on illegal alien arrests.

Require local and state law enforcement agencies to verify the lawful presence of any person arrested by the agency on a criminal charge. Agencies must report the presence of a verified illegal alien to the federal immigration enforcement agency, and to a state police database that state and local agencies can query. Note: will help identify and facilitate the removal of illegal alien recidivists.

7. Add alien-smuggling crimes to state racketeering statutes.

In states with companion racketeering statutes to the federal RICO laws, add the alien smuggling felonies described in 8 USC 1324 as predicate crimes under the state statute, allowing private lawsuits against alien smugglers and large-scale employers.

D. Public Benefits.

1. SAVE System.

Require all state and local government agencies to use the SAVE online system to verify eligibility for all State and Local Public Benefits, as defined in 8 USC 1621. Note: All States are currently required to use the SAVE system to verify federal public benefits administered by the states.

2. Access to Higher Education.

Bar enrollment or eligibility for financial aid at any public or private institute of higher education chartered or licensed by the state to an illegal alien.

E. Control of Financial Transactions Involving Illegal Aliens.

1. Withholding on certain remittance payments.

Require the withholding of income tax at 10 per cent for any electronic funds wire transfer to an overseas party or the purchase of any negotiable bank draft or international money order for any person who does not provide a valid social security number.

2. Campaign Contributions.

Make it unlawful for any person who is not a citizen of the United States to contribute funding, goods or services to any candidate for elected office, political party or political action committee.

3. Civil and criminal penalties for accommodating illegal aliens in rental or hotel facilities.

Make it unlawful to rent, lease, or sublease residential property or hotel rooms to any person for use as accommodation for an illegal alien. Allow landlords to request documentation of lawful presence before renting or leasing accommodation to any person. Grant a private right of action to an aggrieved legal resident of the state to file a civil suit for injunctive relief and legal costs to restrain landlords from renting or leasing property to an illegal alien. Make it a felony to engage in a pattern or practice of providing rental accommodation to 24 or more illegal aliens for more than two weeks within any 12-month period.

4. Restrict use of ITINs by illegal aliens.

Make it unlawful for any person or entity to accept from any person an individual taxpayer identification number (ITIN) for identification or any other purpose not authorized by the US Internal Revenue Service, without concurrent presentment of a document establishing lawful presence in the United States.

IV. IRLI Technical Support:

IRLI staff attorneys and legislative specialists are available to assist legislators, attorneys, government officials and civic or advocacy organizations in developing the concepts outlined in this memorandum into legislative language appropriate to the jurisdiction in question. These services are provided without cost to qualified parties, as resources permit. For further information, please see our website, www.iri.org, or contact us at info@iri.org, 202-232-5590, or via facsimile at 202-464-3590.