Immigration Policy:Environ

Research Brief

Immigration Policy:
Understanding the Impact of a Changing Policy Environment on Local Businesses

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The

broader geographic distribution of newly arrived immigrants, beyond the traditional gateway states, is more evident in California, New York, and Illinois than in Texas, Florida and New Jersey.

The importance of New Jersey as a gateway state is amplified when its demographic profile is considered from the standpoints of population density and percent change in population.

in New Jersey, in terms of percent changes.[9] Census data indicate that New Jersey had the 6th largest population of unauthorized immigrants in both 1990 and 2000. However, among the six gateway states, New Jersey had by far the largest percentage increase in its unauthorized immigrant population (242% from 1990 to 2000). In 2005, New Jersey displaced Illinois as the state with the fifth largest number of unauthorized immigrants; that ranking held through the recent 2010 census.

The Pew Center notes that the overall population of unauthorized immigrants peaked in the United States in 2007; at approximately 12 million and declined 6.7% by 2010.[10] This decline is also reflected in the gateway states, except for Texas which actually saw an increase of 14% in 2007-2010 in its population of unauthorized immigrants. During the same period, the number of unauthorized immigrants declined by 8.3% in New Jersey, while the adjacent state of New York

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their relationship to immigration policy rather narrowly in terms of employment law and personnel procedures, i.e., compliance with I-9 requirements and voluntary participation in employee verification programs (e.g., E-Verify). However, the post-9/11 changes in immigration policy suggest that a broader frame of reference is essential if local businesses endeavor to avoid civil and criminal penalties, maintain workforce and wage stability, and mitigate the derivative effects of immigration policies from other states.

This broader perspective is particularly relevant to states with substantial numbers of unauthorized immigrants in their labor force. In N

overlapping areas of jurisdiction existed wherein state and local governments exercised their police power incriminal law enforcement. These areas of cooperative federalism were circumscribed by the Supremacy Clause of the Constitution in two important respects - i.e., federal law superseded contravening regulations by states and their political subdivisions, and

In 1996 the IIRIRA established the E-Verify federal (web-based) database to centralize collection of I-9 data and provide employers a mechanism for checking the work-eligibility of prospective and current employees. Though utilization of the database is not mandatory, potentially serious consequences occur if employers do not respond in a timely manner to receipt of a TNC (tentative non-confirmation) notice regarding specific employees for whom work eligibility cannot be verified.[17] While participation in E-Verify is voluntary for most employers, except for certain classes of federal contractors,[18] members of the U.S. Congress have introduced legislation to mandate universal application to all public and private sector employers. The number of states that have adopted some variation of E-Verify requirements in 2011 alone attests to the increasing political salience of immigration in the broader polity. At the beginning of the year only four states mandated participation in the program; 8, 1 5.66-ii(t)-2(e)4(d opt)-2(e)4(d)4(r)3(t)n t 9

2010 would have been $2.7 billion.[22] Notwithstanding these drawbacks, E-Verify provides employers an important incentive to participate, i.e., a favorable presumption of making a good faith effort to not knowingly employ ineligible workers.[23]

IRCA. Congress was especially concerned that unintended violations of employment discrimination on the basis of national origin or language would in fact be authorized immigrants and citizens who are work-eligible. Under IRCA, employers therefore face the daunting legal conundrum of avoiding both employer sanctions, on the one hand, and employment discrimination lawsuits, on the other.

Post-9/11 Immigration Policy:

Although IRCA and IIRIRA were enacted 1986 and 1996, respectively, their implications for intergovernmental spheres of authority over immigration policy were not fully apparent until after the terrorist attacks of 9/11. In the immediate aftermath of September 11, 2001, the primary objective of the federal government was to preempt further attacks by Al Qaeda. The Department of Justice (DOJ) invoked its authority to enforce immigration laws, through its supervision of the Immigration and Naturalization Service (INS), to conduct warrantless detention and interrogation of hundreds of (predominantly Muslim) non-citizens residing in the United States.[27] The rationale for integrating immigration policy into the broader anti-terrorism response to 9/11 was that individuals who posed a potential security risk could be held for putative violations of immigration laws. Immigration law therefore became the linchpin for expansive (anti-terrorist) governmental authority because due process guarantees for citizens in immigration investigations (as matters of civil law) are considerably less stringent than is the case for citizens and non-citizens in the context of criminal law enforcement.[28]

The response of the national government to the terrorist attacks of 9/11 generated three important developments at the intersection of immigration and national security policy.

Moreover, all three developments have serious policy implications for businesses that employ unauthorized workers. The first is that the United States prosecuted its Global War on Terrorism (GWOT) by vastly expanding and consolidating the national security apparatus of the national government. This process entailed authorizing broad-ranging (war) emergency powers for the President; enactment of the USA Patriot Act, establishment of the Department of Homeland Security (DHS), incorporation of INS into DHS (as the Bureau of Citizenship and Immigration Services, USCIS); and, the deployment of an array of database and technological platforms (including E-Verify, U. S. Visitor and Immigrant Status Indicator Technology, or US-VISIT; Real ID, Public Law 109-13, 119 Stat. 302, 2005; SBI*net*, and the National Security Entry-Exit Registration System, NSEERS).[29] Consequently, the federal government now commands an immensely broadened capacity to identify and monitor individuals who enter the United States and may pose a security threat.

The incorporation of E-Verify into the broader (national security) infrastructure of data collection and mining augurs well for improving data accuracy, but it also suggests that E-Verify program is evolving into a dual-purpose system, i.e., to verify employment eligibility through I-9 data, and to utilize those data to help identify legal and unauthorized employees who represent potential security risks. The status quo prior to 9/11 no longer holds, i.e., the I-9 Forms and E-Verify are no longer used exclusively for purposes of employee eligibility. They have acquired the additional value of enhancing the national security infrastructure of the United States. Employers must therefore recognize the possibility that the data they submit to E-Verify system may also be used in national security investigations, which may include not only the employee eligibility status of individuals under investigation, but also their circumstances of employment.

[29] Supra note 25, at pp: 78-88.

The second (post-9/11) major development in immigration policy is predicated on the significantly enhanced capacity of the federal government to integrate data-sharing among executive branch departments, federal and local law enforcement agencies, and the intelligence community. As a result, the quality and accuracy of data gathering systems, across various governmental agencies, have improved markedly since 9/11. The underlying benefit of these processes for immigration policy is that the federal government can more effectively ameliorate the data inaccuracy that characterized the initial years of the E-Verify program. This development is facilitating an important shift in immigration policy the Obama Administration initiated in September 2009, i.e. a shift from often highly publicized and controversial workplace raids to immigration audits. A February 2009 workplace raid in Bellingham, Washington, in which 28 non-legal workers were arrested, drew particular ire against the Obama Administration from Hispanic and immigrant advocacy groups.[30]

Immigration audits involve Immigration & Customs Enforcement notices to employers that their employment-eligibility data must be forfeited to ICE agents. If the eligibility status of certain workers is questioned additional documents must be submitted. Typically, however, employees are summarily dismissed and employers are levied a substantial fine. Businesses also assume the additional costs associated with hiring and training replacement employees, managing disruption to the normal flow of business, and retaining legal and consulting services.[31] In the first year of immigration audits a major clothing manufacturer in Los Angeles

[30] Feds shift gears on illegal immigration: Less focus on workplace raids, more probes into hiring records, USA Today, July 21, 2009, p. 3A.

[31] Miriam Jordan and Cam Simpson, "More Employers Face Immigration Audits," 11/20/09, (http://online.wsj.com/article/SB125866577819456287.html (Accessed 12/16/11).

was compelled to fire 1,800 employees (about one-fourth of its workforce) because of discrepancies in the worker eligibility documents of many of its employees.[32]

Despite criticisms from immigration advocates that audits constitute "silent raids," the federal government has substantially increased its reliance on immigration audits to weaken the job-magnet effect in certain sectors of the labor market. In the first year of the program (2009), the Obama Administration conducted approximately 1,000 immigration audits; by the end of 2011 that figure was almost 2,400, with approximately 200 criminal proceedings against employers.[33] Immigration audits have been conducted in all 50 states, but certain sectors of the economy attract particular scrutiny from ICE officials. These include financial services, defense, critical infrastructure, agriculture, construction, and hospitality.[34] The last three industries are of particular importance to southern New Jersey. By July of 2010 approximately 25 New Jersey businesses were notified as a result of immigration audits that they were not in compliance with federal work-eligibility requirements.[35]

The nominal level of attention immigration audits receive in the popular press, trade journals, and government press releases means that too often employers first learn about immigration audits once they are notified by ICE officials that their businesses are being audited. At that point, businesses have little recourse but to secure legal counsel and cooperate fully (a)4(uI7bq)2(uM

officials. For employers to be fully proactive, it is insufficient to simply ensure that I-9 forms are properly completed and submitted. Businesses can benefit from understanding immigration audits within the broader policy environment that has undergone substantial changes since 9/11. In that context, the incorporation of immigration policy into the Department of Homeland Security suggests that the federal government has a vastly enhanced administrative and technological capacity to pursue its objective of discouraging unauthorized employment with greater rigor and accuracy. Moreover, small and large businesses should also be fully cognizant that a key development in post-9/11 immigration policy is a shift in emphasis from apprehending authorized workers at employment sites to administrative scrutiny of the hiring records of employers. The consequence of this shift is that the burdens of civil and criminal liabilities, for engaging in non-legal employment, are increasingly redirected from employees to employers.

The third critical development in (post-9/11) immigration policy relates directly to the intergovernmental spheres of overlapping authority among the federal government and the various states and localities. Despite the unprecedented expansion of the national security infrastructure, the federal government lacked the personnel to adequately provide border security against future terrorist attacks. The George W. Bush Administration substantially increased the human resources dedicated to its anti-terrorism campaign by essentially federalizing local law enforcement officials through an expansive re-interpretation of a key provision of the (1996) IIRIRA, i.e., Section 287 (g).

In its original formulation, Section 287 (g) of the IIRIRA was interpreted by the Clinton Administration to allow the federal government to enter into cooperative arrangements (through a Memorandum of Understanding, a MOU, or a Memorandum of Agreement, a MOA) with state

and local police to enforce criminal immigration laws.[36] The MOUs/MOAs precluded state and local officials from enforcing immigration laws that were expressly preempted by federal government. After 9/11, however, the Office of Legal Counsel (OLC) in the Bush Administration interpreted Section 287 (g) as recognizing the inherent authority of states to enforce immigration law.[37] The practical effect of the OLC interpretation is that states and localities are now afforded broader latitude to also enforce certain dimensions of civil immigration law. Although the Bush Administration adopted a more expansive interpretation of Section 287 (g) than its predecessor, the proposition that states are not categorically precluded from regulating the non-criminal activity of unauthorized immigrants is not without legal precedent.[38]

The approach of the Bush Administration to Section 287 (g) prefigured a shift in the (legislative) center of gravity in immigration policy. In the decade since Section 287 (g) was interpreted more expansively, hundreds of statutes and ordinances have been enacted to assert more control over unauthorized immigrant workers by states and their political subdivisions.[39] Many of these enactments impose even more stringent employer sanctions than federal law, as the recent legislative enactments in Arizona and Alabama suggest. In May 2011, the Supreme Court affirmed the constitutionality of the Arizona employer sanctions, including mandatory participation in the federal E-Verify program, as well as the suspension or revocation of business licenses for hiring unauthorized workers.[40] The Court has also agreed to rule on constitutional challenges to other provisions of the Legal Arizona Workers Act, on grounds of federal

[36] Supra note 25, at pp: 134-139.
[37] Ibid.
[38] DeCanas v. Bica, 424 U.S. 351 (1976)
[39] Broder, Tanya, "State and Local Policies on Immigrant Access to Services: Pro Integration of Isolation?" National Immigration Law Center, May 2007.
[40] Chamber of Commerce v. Whiting, 563 U.S. ___ (2011)

preemption. The scope of the Alabama statute was temporarily limited, pending a full hearing, by the 11th Circuit Court of Appeals for requiring school districts to check the residency status of school children, and mandating that immigrants carry proper documentation to verify their legal status.[41] However, the trend among states and localities to assert authority in regulating immigration, beyond violations of state criminal statutes, is not uni-directional. At least four states and approximately 50 localities expressly prohibit law enforcement officers from investigating the immigrant status of suspects, or generally limit the role of police in enforcing federal immigration laws.[42]

At least in the cases of Arizona and Alabama, the federal judiciary has demonstrated a willingness to accommodate the imposition of employer sanctions to discourage the hiring of unauthorized workers. What remains unclear is whether the courts will ultimately invoke the preemption doctrine to prevent these and other federal governments from adopting policies that essentially create serious disincentives for citizens to remain in their communities. Enforcement of the recently enacted anti-immigrant legislation in Alabama, widely perceived to the most restrictive in the country, demonstrates that beyond a certain threshold, unauthorized immigrants will not endure the burdens, costs, and insecurities of raising their families in unwelcoming and punitive communities. However, instead of returning to their country of birth, the displaced immigrants move to other states or localities with less stringent policies on the unauthorized immigrants. One of the unintended consequences of increased border security after 9/11 is that many unauthorized immigrants do not visit their home countries for fear of being

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[41] Stacy Teicher Khadaroo, "Appeals court curtails Alabama immigration law, for now" (http://www.csmonitor.com/USA/Justice/2011/1014/Appeals-court-curtails-Alabama-immigration-law-for-now), October 14, 2011.

[42] Keith Cunningham-Parmeter. Forced Federalism: States as Laboratories of Immigration Reform, U.C. Hastings College of the Law Hastings Law Journal, July 2011, p.20

barred from reentering the United States.[43] Consequently, when states and localities implement policies to remove unauthorized immigrants, other communities are then faced with an influx of displaced immigrants. States with large populations of foreign-born immigrants and less restrictive environments for immigrants, i.e., gateway states like New Jersey, may become points of destination for immigrants seeking brighter economic futures for their families. It is therefore incumbent upon local businesses to anticipate how changes in the immigration policies of other states may have derivative effects on their own labor market. For instance, an unexpected influx of unauthorized immigrants into a local economy may place businesses at a severe competitive

lawsuit[47]

8) require that certain agencies of state government include contract provisions to terminate contractual relationships with vendors if the latter fail to comply with federal immigration laws.[57]

These legislature initiatives indicate that despite the experience of Riverside, New Jersey, a significant level of interest persists in granting state and local governments broader authority to regulate or restrict illegal immigration.

The broadening of immigration into a national security priority, and its increasing politicization in recent years, suggest that an ostensibly permanent alteration in the domestic

Recommendation: The information and analysis provided herein suggest that the William J. Hughes Center for Public Policy can advance its mission of public service by promoting discussion and deliberation on a range of important public policy issues, such as the impact of immigration on the business community in New Jersey. This report recommends that the Hughes Center explore opportunities to assist local businesses and other institutions of civil society, gain a broader understanding of how national policy issues, like immigration, can directly affect the broader environment in which they operate. The policy and demographic dimensions