

State and Local Proposals That Punish Employers for Hiring Undocumented Workers Are Unenforceable, Unnecessary, and Bad Public Policy

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BACKGROUND

The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to knowingly hire workers who are not authorized to work 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 use the existence of the employer sanctions law to ask them to prove they are authorized to work as a pretext for firing them. 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 immigration and employment laws. On the other hand, there is over 20 years of evidence that IRCA’s employer sanctions provisions have failed at reducing the number of undocumented workers or at reducing the incentive employers have to hire them.

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 likely 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, or recruit or refer for a fee for employment, unauthorized aliens.”² Thus, any state or local legislation that prohibits the hiring of



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unauthorized workers or attempts to impose penalties on employers for hiring unauthorized workers may not be legally enforceable.

- The employer sanctions preemption provision contains a limited exception for “licensing and similar laws,” but state and local governments cannot make employment eligibility verification 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 penalties on employers conflict with the federal law and may be federally preempted.
- For example, in July 2007 a federal judge struck down an anti-immigrant ordinance passed by the Hazleton, Pennsylvania, city council that created local penalties for businesses that employ unauthorized immigrants, largely based on a conclusion that the law was federally preempted.⁴ The judge specifically cited the federal prohibition on states and localities passing laws regarding the employment of undocumented workers and also found that “[a]llowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives.”⁵
- 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, the cost to the city of Hazleton for defending its ordinance has already totaled more than \$200,000, and the potential plaintiffs’ legal fees could be as high as \$2.4 million.⁶ Similarly, after the township of Riverside, New Jersey, passed an ordinance in 2006 that, among other things, punished businesses for hiring undocumented immigrants, it faced a legal challenge.⁷ After incurring \$82,000 in legal costs to defend the ordinance and facing the risk of having to pay the plaintiffs’ legal fees if the township lost in court, Riverside rescinded the ordinance in September 2007.⁸

State and local employer sanctions proposals will result in discrimination against those who look or sound “foreign.”

- The creation of new criminal penalties against employers will likely result in uncertainty 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 engage in defensive hiring and feel compelled to require 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, which 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.⁹
- 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 self-reported some form of employment discrimination against those workers they perceived to be undocumented because they were “foreign sounding” or “foreign looking.”¹⁰
- Shortly after an Arizona employer sanctions law was enacted in 2007, immigration lawyers, industry groups and employers reported that they noticed “an increase in hostility toward Hispanic workers.”¹¹ One employer specifically reported that the law led to a “marked increase” in reports from his Latino workers about “vulgar, vile, vicious, verbal abuse by persons accusing them of not being in the country legally.”¹²

☑ Enforcement of employer sanctions laws will result in racial profiling and retaliatory complaints.

- Enforcement of any state or local employer sanctions law could lead to racial profiling. In Arizona, for example, enforcement of the new employer sanctions law depends on complaints from the public. Because most people filing complaints about particular workers will not have actual knowledge about a worker's immigration status, their accusations will largely be based on whether the worker regularly speaks a language other than English and their assumption that the worker is of a certain race. Shortly after the law was enacted, an official from the Greater Phoenix Chamber of Commerce reported that his office received calls from people saying they would make complaints against businesses based on employees "speaking Spanish and being minorities."¹³
- An enforcement scheme that relies on complaints from the public also is likely to encourage disgruntled customers to file complaints in order to retaliate against a business or business competitors to file complaints in order to gain a competitive advantage. Although Arizona's law includes a penalty for filing frivolous complaints, some county attorneys have reported that they will accept and investigate complaints that are anonymous.¹⁴ In reflecting on the enforcement process, the speaker of the Arizona House acknowledged that "a competitor could cause mischief by filing anonymous and vague complaints."¹⁵

☑ 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."¹⁶
- Employers also use IRCA's employment eligibility verification requirements to boost their profits while driving down wages and working conditions for all workers. 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 eligibility. The employer then fires the workers without suffering any repercussions for violating state and federal employment laws. All workers see wages decline as a result of such retaliation.¹⁷
 - In a National Labor Relations Board case 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.¹⁸
 - In a California case, 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 employment law responsibilities, the employer reported her to federal immigration authorities.¹⁹

☑ Enforcement of employer sanctions will divert scarce law enforcement resources away from protecting public safety.

- Enforcement of any state or local employer sanctions law will not solve the problem of employers hiring undocumented workers, but it will clog courts and divert scarce law enforcement resources away from catching real criminals and protecting the community.

- In Arizona, for example, prosecutors are required to review every complaint, courts are required to put employer sanctions cases on a “fast-track,” and the state attorney general must create a public database of employers that violate the sanctions law, yet law enforcement officials have stated that the law includes “little budget support” for the new obligations.²⁰

☑ 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 held 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. This includes, but is not limited to, enforcing and strengthening existing minimum wage, overtime, health and safety, workers’ compensation, and antidiscrimination laws, and enacting new state and local employment laws that remove the economic incentive from those bad actors by providing stiffer penalties for employers who seek out undocumented workers and retaliate against them when they assert their workplace rights.
- Because most federal and state employment laws allow workers a private right of action, workers have an interest in ensuring that these laws are enforced. Making it possible for workers to bring and win claims against employers that violate employment and labor laws is a more efficient means of holding employers accountable for violations and deters them from ignoring such laws with impunity. This, in turn, substantially decreases employers’ economic incentive to hire and exploit undocumented workers, and it is a much more effective means of limiting employment of unauthorized workers than any employer sanctions law ever will be.
- Stronger enforcement of labor laws will prevent unscrupulous employers from gaining an unfair economic advantage over those employers who play by the rules. Companies that do comply with labor and employment laws should have an interest in seeing that these bad actors are held accountable so that they don’t depress wages and labor costs.

☑ Congress must fix our failing immigration system.

- Many states and localities have introduced employer sanctions proposals because they are frustrated by the federal government’s inability to fix our failing immigration system.
- That does not, however, give states the power to take matters into their own hands. It is Congress, with its express power over immigration law, that must create a national, comprehensive immigration reform solution.
- Because most states need immigrant workers, state policymakers should put pressure on Congress to find a solution for the 8 million undocumented workers who are living in our communities and contributing to our state and local economies.

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¹ For more information about federal plenary and express power over immigration law, see “Fact Sheet on Federal Preemption: How to Analyze Whether State and Local Initiatives Are an Unlawful Attempt to Enforce or Regulate Federal Immigration Law,”

www.nilc.org/immlawpolicy/LocalLaw/federalpreemptionfacts_2007-06-28.pdf.

² See 8 U.S.C. § 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.

⁴ For more information about the Hazleton, PA, decision, see “Hazleton, Penn., Anti-Immigrant Ordinances Preempted and Unconstitutional, Federal Court Finds,” IMMIGRANTS’ RIGHTS UPDATE, Oct. 5, 2007, www.nilc.org/immlawpolicy/LocalLaw/locallaw005.htm.

⁵ Lozano et al. v. City of Hazleton, 496 F. Supp. 2d 477, 523-24 (M.D. Pa. 2007).

⁶ Wade Malcom, “Hazleton Slapped with \$2.4 M Bill,” SMALL TOWN DEFENDERS, Sept. 1, 2007, www.smalltowndefenders.com/public/node/234.

⁷ Riverside Coalition of Business Persons v. City of Riverside (D.N.J., complaint filed Oct. 18, 2006).

⁸ Adam Karczewski, “Coming to America: How States and Municipalities Deal with Undocumented Immigrants,” NEW JERSEY LAWYER, Nov. 21, 2007,

www.njnews.com/articles/2007/11/30/in_re_magazine/f3-karczewski.txt.

⁹ 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 U.S.C. § 1324b.

¹⁰ Charles A. Bowsher, TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (General Accounting Office, Mar. 1990), <http://archive.gao.gov/d38t12/141005.pdf>, at 7.

¹¹ Daniel González, “Taunts, Threats as Employer-Sanctions Law Nears,” THE ARIZONA REPUBLIC, Sept. 30, 2007, www.azcentral.com/arizonarepublic/news/articles/0930backlash0930.html.

¹² “Let’s Get Smart,” THE ARIZONA REPUBLIC, Jan. 31, 2008, www.azcentral.com/arizonarepublic/opinions/articles/0131thur1-31.html.

¹³ “Group Members Worried about Complaint Process in Sanctions Law,” ASSOCIATED PRESS, Oct. 10, 2007, www.azfamily.com/news/local/stories/KTVKLNews20071010_employer-sanctions.15a4b468d.html.

¹⁴ See, e.g., “County to Enforce Employer Sanctions,” THE WICKENBURG SUN, Sept. 26, 2007, www.wickenburgsun.com/articles/2007/09/28/news/news17.txt.

¹⁵ Mary Jo Pitzl, “Execs Offer Fixes to New Immigration Law,” THE ARIZONA REPUBLIC, Oct. 11, 2007, www.tucsoncitizen.com/ss/local/65585.php.

¹⁶ See “Immigration,” a statement by the AFL-CIO Executive Council, Feb. 16, 2000, available at www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec0216200b.cfm.

¹⁷ See, e.g., Douglas S. Massey, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES: WHEN LESS IS MORE: BORDER ENFORCEMENT AND UNDOCUMENTED MIGRATION, Apr. 20, 2007, <http://judiciary.house.gov/media/pdfs/Massey070420.pdf>, and Muzaffar Chishti, “Employer Sanctions Against Immigrant Workers,” WORKINGUSA: THE JOURNAL OF LABOR AND SOCIETY, March - April 2000, <https://www.ilw.com/articles/2001,0615-Chishti.shtm>.

¹⁸ See Mezonos Maven Bakery and Nat’l Labor Relations Bd., Case No. 29-CA-25476.

¹⁹ See Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F.Supp.2d 1053 (N.D., Cal., 1998).

²⁰ Ronald J. Hansen, “Legal Arizona Workers Act 101...or Everything You Need to Know about the New Employer-Sanctions Law,” THE ARIZONA REPUBLIC, Nov. 28, 2007, www.azcentral.com/specials/special46/articles/1128biz-sanctions101.html.