

WORKSITE ENFORCEMENT OF U.S. IMMIGRATION LAWS

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The Bush administration claims an aggressive policy of worksite enforcement of immigration laws, directed equally at illegal workers and those who employ them. Workplace raids, administrative and criminal arrests of undocumented workers, and still-rare-but-double-what-they-used-to-be criminal prosecutions of company decision-makers are increasing, to much fanfare. The Immigration and Customs Enforcement (ICE) agency advances two purposes for its enforcement approach: to mitigate the risk of terrorist attacks posed by unauthorized workers employed in secure areas of our nation's critical infrastructure such as airports, seaports, nuclear plants, chemical plants and defense facilities; and to prohibit employers from taking advantage of illegal workers, who either cannot or will not attempt to secure their legal workplace rights. Despite the publicity, this paper looks at the actual enforcement record. Data is difficult to discover, since the agency publishes no breakdown between employee and employer arrests. Moreover, federal Justice Department statistics do not distinguish between workplace and other criminal immigration violations of the US Code. Accounting for huge regional differences, there appears to be little actual increase overall in employer sanctions. Among 7.4 million US employers, 42 were raided by ICE during 2008. Among those "bosses" most likely to be arrested and convicted (16 total) 14 have "minority" surnames. The job holder most-likely to serve time worked in human resources. During the period of study, 5668 employees were arrested versus 70 company representatives. In about 25 % of these cases, not a single company official was arrested. For whatever reasons, ICE enforcement, especially against companies, is minimal. ICE efforts to improve employer compliance have been additionally burdened by a federal court injunction against its primary record-keeping rule, the limited resources of the agency, and its global and wide-ranging responsibilities.

DEFINING THE SCOPE OF THE PROBLEM

The illegal alien population in the United States and the number of unauthorized workers employed in the United States are both substantial.¹ Certain industries have high concentrations of immigrant workers, for example construction and agriculture. According to the Current Population Survey (CPS) Annual Social and Economic Supplement, as of March 2006 almost twenty four percent of all construction workers in the country were foreign born. Most of the immigrant construction workers are Hispanic, although not all Hispanic construction workers are immigrants, of course. In March 2006 a little over twenty-four percent of the construction workforce was Hispanic, compared to approximately six percent in 1980. Seventy percent of the 1.4 million Hispanic construction workers in the U.S. in 2000 were born outside the United States, and fifty-seven percent were not U.S. citizens.² Farmers likewise stress that access to migrant labor is critical for agriculture. There are about 1.6 million full-time farm workers in the US. About 80 per cent of those workers are foreign born and nearly seven out of 10 are working illegally.³

Illegal immigrants often take some of the country's least attractive jobs;⁴ indeed, many employers make claims that "Americans(sic) won't take these jobs." The civil and criminal cases following raids have been at less-than-desirable workplaces. The 2008 worksite enforcement cases reflect this fact: RCI (janitorial services); Koch Foods and Tyson Foods (poultry processing); QSI (sanitation services at a pork processing plant); Zhu and Partners (employment agency for Chinese Restaurants). Most immigrants come from Mexico. More than 11 percent of the Mexican population now lives in the United States, and more than half say they would come if they could. The Mexican economy in the United States is now, by some estimates, as large as the Mexican economy in Mexico. The amount of cash Mexicans in the United States send home each year has grown from \$3.5 billion in 1996 to \$23 billion in 2006.⁵

The estimated unauthorized immigrant population from Mexico increased from 4.7 million in 2000 to 6.6 million in January 2006. Research shows that a fortified border doesn't dent migrants' 98 percent success rate but rather makes them hire smugglers, or coyotes. In fact, 821 would-be migrants from the Mexican state of Oaxaca told researchers their biggest fear--cited by 43 percent--is the desert, which kills more than 500 crossers a year. The National Guard was

¹ See, e.g., J. Passel, Pew Hispanic Center, *The Size and Characteristics of the unauthorized Migrant Population in the U.S.* (March 2006), found at <http://pewhispanic.org/files/factsheets/17.pdf> (approximately 11.2 million illegal aliens in the United States; approximately 7.2 million illegal aliens in the workforce); with M. Hofer, N. Rytina & C. Campbell, Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006* (August 2007) found at http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf (estimating unauthorized population of 11,550,000 as of January 2006). <http://edocket.access.gpo.gov/2008/E8-6168.htm>

² Id.

³ Lack of farm workers called "emergency" Ontario Farmer (Canada) January 1, 2008 Tuesday.

⁴ Q&A: Illegal Immigrants and the U.S. Economy. Adam Davidson NPR.org, March 30, 2006, <http://www.npr.org/templates/story/story.php?storyId=5312900>

⁵ Jorge Castañeda, *Mexico's 33rd State* (2008).

feared by only 5.3 percent, ranking between the border fence (5.8 percent) and the Minutemen or vigilantes (2.4 percent).⁶

HISTORY OF WORKSITE ENFORCEMENT

U.S. immigration laws historically illegalize working without authorization, but prior to 1986 there were no prohibitions against *hiring* an undocumented worker.⁷ In 1986, Congress amended the immigration laws to require an employer to take certain affirmative acts to verify work authorization and to make it illegal to hire, recruit, or refer for employment an alien knowing the alien is unauthorized. The law defines several distinct offenses related to aliens: smuggling, domestic transportation of unauthorized aliens, concealing or harboring unauthorized aliens, encouraging or inducing unauthorized aliens to enter the United States, and engaging in a conspiracy or aiding and abetting any of the preceding acts. 8 U.S.C. § 1324(a). Criminal enforcement is tedious and proving a “knowing” violation of the law is difficult. Making a case against an employer requires time and significant investments of investigative resources.⁸

The Model Penal Code, which provides a template for most criminal laws, concludes that a “person acts knowingly ...when he(sic) is aware that it is practically certain that his(sic) conduct will cause such a result. MPC 2.02(2)(b) (1962). Some few courts have found or agreed that “constructive knowledge” is sufficiently culpable.⁹ There are few reported cases where an employer or its agent knowingly violated the law.¹⁰ Two of the most public cases involving thousands of undocumented workers at Wal-Mart and Tyson Foods resulted in acquittals or dismissal of all criminal charges.¹¹

⁶ Michael Martinez, **As Guard wraps up, debate revs up on border**, Jun 21, 2008 *Chicago Tribune* Statement of Wayne Cornelius, director of the Center for Comparative Immigration Studies at the University of California-San Diego, <http://www.voteforbusiness.net/vfb?action=viewNewsArticle&documentId=2c9e4f691aa9b639011aac8a9f69031a>.

⁷ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-893 (U.S. 1984); Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952).

⁸ IMMIGRATION RAID SNARES 166; CARTED OFF: Workers from 4 countries were arrested near the Ship Channel; TIPPED OFF: Federal agents say a former employee told them about the factory *The Houston Chronicle* June 26, 2008 Statement of Demetrios Papademetriou, president of the Migration Policy Institute.

⁹ *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *Collins Foods Int'l, Inc. v. U.S. INS*, 948 F.2d 549, 554 (9th Cir. 1991); *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842, 853 (E.D. Tenn. 2008).

¹⁰ *United States v. Shiu Sun Shum*, 496 F.3d 390 (5th Cir. Tex. 2007); *Quality Services, Inc (QSI 2007)*.

¹¹ WAL-MART STORES, INC. AGREES TO PAY A RECORD \$11 MILLION TO ICE TO SETTLE NATIONWIDE WORKSITE ENFORCEMENT INVESTIGATION -- *12 Other Companies Agree to Enter Criminal Guilty Pleas and Forfeit \$4 Million to the U.S. – (March 2005)* @ <http://www.ice.gov/pi/news/newsreleases/articles/walmart031805.htm>; . *United States v. Tyson Foods, Inc.*, No. CR-4-01-61 (E.D. Tenn. filed Dec. 11, 2001); Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking* (Three of the indicted managers were caught on tape and fired by Tyson. One of them committed suicide four months after the indictment; the other two pled guilty and received one-year probation

The Department of Homeland Security (“DHS”), the federal umbrella agency that includes ICE, issued a rule intended to simplify its burden of proof. The Social Security Administration, since 1994, sends employers “no-match” letters, indicating social security number and name irregularities. Receipt of a “no-match” letter is not unequivocal proof of illegal status, since letters might be generated by clerical or mechanical mistakes; unregistered surname changes; or agency error, for example. DHS’s rule would make disregard of a “no-match” letter “constructive knowledge, unless the employer undertook a series of steps to either verify work authorization or discharge the employees.”¹² The rule was enjoined upon the motion of a consortium of unions and business groups after a court found the rule would subject employers to greater compliance costs and employees to an increased risk of termination, significantly more onerous than any burden on the government in delaying the rule.¹³ There now is a voluntary compliance program. The “E-verify” method allows employers to verify work authorization on-line. But even that more modest plan suffers shortcomings. A congressionally-mandated study by the Government Accountability Office found that significant financial and staffing demands of a mandatory E-Verify program would be essential to accommodate the estimated 7.4 million employers in the United States. According to USCIS, as of April 2008, just above 61,000 employers have registered for E-Verify, and only half are active users. GAO estimates a price of \$765 million for 2009 - 2012 if only new hires are run through the program and about \$75 million more if both newly hired and current employees are verified.¹⁴ It’s problematic that E-verify cannot detect document fraud (use of counterfeit documents) or identity fraud (fraudulent use of valid documents or information belonging to others). This makes it difficult for employers who want to comply with the employment verification process to hire only authorized workers and easier for unscrupulous employers to knowingly hire unauthorized workers. The large number and variety of documents acceptable for proving work eligibility have also hindered verification efforts.¹⁵

and fines of \$ 2,100 and \$ 3,100, respectively. 8 The other three indicted managers and the company itself were ultimately acquitted by a jury on March 26, 2003), 9 Harv. Latino L. Rev. 59, 60 (2006).

¹² "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." See [72 Fed. Reg. 45611 \(Aug. 15, 2007\)](#).

¹³ [AFL v. Chertoff, 2007 U.S. Dist. LEXIS 75233 \(N.D. Cal. Oct. 10, 2007\)](#).

¹⁴ **Employment Verification:** Challenges Exist in Implementing a Mandatory Electronic Employment Verification System [GAO-08-729T](#), May 6, 2008.

<http://www.gao.gov/docdb/lite/summary.php?rptno=GAO-08-729T&accno=A81969>.

¹⁵ **Immigration Enforcement:** Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts [GAO-05-813](#), August 31, 2005.

A PUBLIC POLICY OF STRONG WORKPLACE ENFORCEMENT

The U.S. Department of Immigration Enforcement (“ICE”) is responsible for enforcing the nation’s immigration laws. It has recently announced a new strategy of aggressive worksite enforcement, to reduce “the pull of the “jobs magnet” that draws illegal workers across the border in search of employment.”¹⁶ It maintains a strong policy against illegal employment. “Employers who exploit illegal alien labor to reap greater profits for themselves can expect to pay a high price for their greed. Whether the violator is a multinational corporation or a small business, ICE is aggressively targeting employers who use illegal alien workers to gain an unfair business advantage and take jobs away from legal workers.”¹⁷ Both employees and their workers are worried about raids; many, especially Mexican-Americans, have protested loudly. Right now, Illinois Congressman Luis Gutierrez sits on a committee hearing about a possibly illegal, and arguably discriminatory raid of a plant in Postville, Iowa, where 389 employees were arrested, with most sentenced to prison and deportation. Obvious legal concerns focus on the likelihood that an unauthorized workforce will lead to under-enforcement of labor and employment laws, since illegal workers are less inclined to participate in proceedings that involve confrontation with their employer (or former employer) and exposure to immigration authorities.¹⁸ While it seems clear that many companies hire undocumented workers out of sheer need, there are unscrupulous firms who, opportunistically or by design, threaten or even fire workers involved in organizing campaigns or who otherwise assert employment rights.¹⁹ Some

¹⁶ U.S. Immigration and Customs Enforcement • ICE Fiscal Year 2007 Annual Report at iv http://www.ice.gov/doclib/about/ice07ar_final.pdf .

¹⁷ Statement of Julie L. Myers, Assistant Secretary of U.S., April 16, 2008 @ www.usdoj.gov/usao/nyw.

¹⁸ NOAH ZATZ, WORKING BEYOND THE REACH OR GRASP OF EMPLOYMENT LAW @ <http://ssrn.com/abstract=1075828> (visited June 6, 2008). See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 879, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975) (“The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.”); see also Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676-79 (2003) (arguing that undocumented workers are reluctant to report a variety of labor and employment law violations). Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported? *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. Cal. 2004).

¹⁹ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (U.S. 1984); *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (U.S. 2002) See also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. Cal. 2004) The protective order at issue bars discovery into each plaintiff's immigration status on the basis that allowing NIBCO to use the discovery process to obtain such information would chill the plaintiffs' willingness and ability to bring civil rights claims. *Rivera*, 204 F.R.D. at 651. By revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation. Although NIBCO has promised not to disclose the plaintiffs' immigration status to any outside party, the district court found that requiring the plaintiffs to

research suggests that employers believe that recently-arrived workers are less likely to resist employer demands, display ‘attitude,’ or complain about illegal or unfair treatment.²⁰ Obviously, there is no measure of the average wage for undocumented workers, but it is plausible they earn less than their legally-employed counterparts. Some critics cite a discriminatory preference for Latinos over African-American hires.

In 2002, ICE made 25 criminal and 485 administrative arrests; in 2003, 72 and 445, respectively; in 2004, 165 and 685; in 2005, 176 and 1116; in 2006, 716 and 3667; and in 2007, 863 and 4077. Administrative arrest typically arise from technical violations of immigration laws; criminal actions are brought against employees and employers who knowingly use or accept false documents, hire and harbor undocumented workers; or commit identity theft, for example.²¹ Dramatic increases belie the fact that the overall number of enforcement actions is low. Excluding South Texas, referrals for prosecution went up only 8%, prosecutions went up 16% and convictions actually fell, down by 4%. The median sentence for these cases dropped from 15 months in 2003 to one month in 2004. Similarly, the median time spent on each case dropped from 131 days in 2003 to only 38 days in 2004.²² An overwhelming number of convictions are of illegal aliens, rather than of their employers. Some critics call the program “enforcement by propaganda.”²³ A broad range of critics charge that ICE is politically motivated to focus on employee arrests and minimize employer sanctions.²⁴ ICE denies arbitrary enforcement: “We don’t racially profile....”²⁵ While the ICE website maintains that its agents prioritize workforce enforcement to areas involving critical infrastructure and national security, their raids and audits seem to include facilities requiring the employment of relatively modestly paid workers in all types of manufacturing, agricultural, and food production businesses.²⁶

METHODOLOGY

This research is based on analysis of 42 cases discovered on the ICE website. There is no running list of “enforcement actions” on the site. Most of the cases were discovered at ice.gov, under the headings of “public information:” “news releases” or “speeches and testimony.” No cases were identified by name in the 2007 ICE Annual Report. Some enforcement actions were described without being named. All cases were reported in 2008, although some were begun earlier. Other cases were found within the LEXIS data bases as indicated.

The U.S. Bureau of Justice Statistics maintains a Federal Justice Statistics Program, but total arrests and convictions are identified only by Section of the US Code under which charges

answer such questions in the discovery process would likely deter them, and future plaintiffs, from bringing meritorious claims.

²⁰ Chirag Mehta, Nik Theodore, and Marielena Hincapié. Public Law & Legal Theory Research Paper Series, Research Paper No. 07-36 (2003).

²¹ U.S. Immigration and Customs Enforcement • ICE Fiscal Year 2007 Annual Report at 8 http://www.ice.gov/doclib/about/ice07ar_final.pdf.

²² Id.

²³ The top twenty stories of 2007 Inside Counsel December 2007.

²⁴ Cecelia Espinoza, The Illusory Provisions of Sanctions, 8 Geo. L. Rev 343 (1994).

²⁵ Milford Prewitt, The Raid in Postville, The Forward (May 30, 2008).

²⁶ Jennifer G. Parser, Ward and Smith, P.A. @<http://hr.blr.com/whitepapers.aspx?id=78505> (visited 6/24/08).

were brought.²⁷ The primary violations charged are under 8 USC 1324(a). Although that section of the Act prohibits the knowing “hire” of an alien, it also includes harboring, transporting, and other proscriptions typically directed against human traffickers, money launderers, or makers and providers of fraudulent documents. Similarly, ICE,²⁸ the GAO and TRAC immigration,²⁹ a service maintained at Syracuse University, provide data for total cases and outcomes generally brought under the aegis of “worksite enforcement” without parsing out those directly involving employers and undocumented workers. Moreover, there is no separate data for the latter two groups.

CHARTING RECENT ENFORCEMENT ACTION

Analyzing 42 cases involving worksites reported in 2008 shows sparse and possibly discriminatory enforcement. Most of the arrestees were employees. Sixteen officers or company managers were arrested. Fourteen of them had minority surnames; six of the companies were government contractors. Two of the companies involved were subcontractors working on-site at larger, multinational corporations. Their host companies and their officers were not charged. The most common company agents to be arrested were human resource managers. Ten of the raids were at restaurants. So far, there have been seven cases involving guilty pleas and four resulting in convictions. None of the major companies at which hundreds or thousands of aliens were arrested have been found guilty of any crime. Cooperating with ICE has proved helpful.

LIMITED RESOURCES PRECLUDE ROBUST ENFORCEMENT

ICE investigates a wide range of national security, financial and smuggling violations including drug smuggling, human trafficking, illegal arms exports, financial crimes, commercial fraud, human smuggling, document fraud, money laundering, child pornography/exploitation and immigration fraud.³⁰ With more than 16,500 employees and an annual budget of nearly \$5 billion, ICE has broad law enforcement powers and authorities, with responsibility for enforcing more than 400 federal statutes within the United States.³¹ This alone could account for limited worksite enforcement.

The Immigration and Naturalization Service (part of the Department of Justice) was divided into three distinct divisions: U.S. Customs and Border Protection perform inspection functions and control the U.S. Border Patrol. The United States Customs and Immigration Service adjudicates civil immigration cases and manages benefits programs. The U.S. Immigration and Customs Enforcement is the agency responsible for all immigration law enforcement: detention and removal,

²⁷ <http://fjsrc.urban.org>.

²⁸ Worksite enforcement 2/6/08 at <http://www.ice.gov/pi/worksite/index.htm>.

²⁹ TracImmigration @<http://trac.syr.edu/immigration/> (visited 6/24/08) For example, TRAC reports: DHS-Immigration Ranks First in Terms of Share of All Federal Criminal Convictions, giving data that shows a significant increase in ICE criminal referrals and convictions, but not identifying the defendants or the particular.

³⁰ <http://www.ice.gov/about/faq.htm>.

³¹ U.S. Immigration and Customs Enforcement • ICE Fiscal Year 2007 Annual Report at 8 http://www.ice.gov/doclib/about/ice07ar_final.pdf.

intelligence, and investigations.³² Worksite enforcement is only one of various immigration enforcement programs that compete for resources and, under the former INS and now under ICE, worksite enforcement has been a relatively low priority. ICE has not yet developed outcome goals and measures for its worksite enforcement program, which, given limited resources and competing priorities for those resources, may hinder ICE's efforts to determine resources needed for the program.³³

CONCLUSIONS

There is far less ICE worksite enforcement than there is discussion of it. ICE has few resources to devote to these cases, and most of the raids were at restaurants or government contractors. Primarily, the arrestees were undocumented workers. Those company officers or managers who were charged were primarily of minority-surname. It appears that few employees and even fewer employers will need expert legal advice on these matters.

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³² PUBLIC LAW 107-296—NOV. 25, 2002, 116 STAT. 2135, 8 USCS 1253 et. seq.

³³ <http://www.gao.gov/highlights/d05813high.pdf>.