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 in the United States to knowingly hire workers who are not eligible to be employed 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 simply refuse to comply with labor and employment laws. 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 the law.

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 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, recruit, or refer for a fee unauthorized [non–U.S.

[1] For more information about federal plenary and express power over immigration law, *see* forthcoming (from NILC) "Fact Sheet on Federal Preemption: How to Analyze Whether State and Local Initiatives Are an Unlawful Attempt to Enforce or Regulate Federal Immigration Law."

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citizens].”[2] Thus, any state or local legislation that prohibits the hiring of unauthorized workers or attempts to impose penalties on employers for hiring unauthorized workers is not legally enforceable.

- The federal preemption statute contains a limited exception for “licensing” laws, but state and local governments cannot make employer sanctions 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 employer sanctions conflict with the federal law and are preempted.
- 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, when the city council of Escondido, California, passed an ordinance that prohibited landlords from renting to undocumented people, a federal judge stopped it from being implemented, and the city council agreed to kill the proposal and pay $90,000 in attorneys’ fees. In Pennsylvania, a federal judge issued a temporary restraining order against an ordinance passed by the Hazelton city council that, among other things, penalizes employers for hiring undocumented workers. The case is still pending, but in issuing the order the judge found that there was a “reasonable probability” that the ordinance would be ruled unconstitutional.

■ **Congress is currently working to fix our broken immigration system.**

- Many states and localities have introduced employer sanctions proposals because they are frustrated by the federal government’s inability to fix our broken immigration system.
- Congress is working on reforming the immigration system. In 2005 and 2006, both the U.S. House of Representatives and the U.S. Senate passed immigration reform bills that would have created a new electronic employment eligibility verification system for all workers in the U.S. and increased penalties on employers that hire undocumented workers. It is expected that new, more comprehensive bills will be introduced in 2007.
- The immigration reform bills passed by the House and Senate in 2006 both reaffirm current law prohibiting states and localities from imposing employer sanctions different from those imposed by federal law. Thus, state and local proposals to create employer sanctions would remain unenforceable.

■ **State and local employer sanctions proposals will create confusion in the business community and will result in discrimination against those who look or sound foreign.**

- The creation of new criminal penalties against employers will likely result in confusion 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 feel compelled to require

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[2] *See* 8 USC § 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.

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 that 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.[4]
- 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 reported some form of employment discrimination against those workers they perceived to be undocumented because they were "foreign sounding" or "foreign looking."[5]

■ **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." Moreover, "unscrupulous employers have systematically used the I-9 (employment eligibility verification) process in their efforts to retaliate against workers who seek to join unions, improve their working conditions, and otherwise assert their rights."[6] For example, in a case before the National Labor Relations Board 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.[7]
- Employers also use IRCA's employment eligibility verification requirements to boost their profits while driving down wages and working conditions. 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 authorization. The employer then fires the workers without suffering any repercussions for violating labor laws. Moreover, such an employer does not have any incentive to abide by the law in the future. In a California case, for example, 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 labor law responsibilities, the employer reported her to federal immigration authorities.[8]

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[4] 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 USC § 1324b.

[5] 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.

[6] *See* "Immigration," a statement by the AFL-CIO Executive Council, Feb. 16, 2000, available at www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec0216200b.cfm.

[7] *See* Mezonos Maven Bakery and Nat'l Labor Relations Bd., Case No. 29-CA-25476.

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

- **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 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, including but not limited to enacting and enforcing minimum wage, overtime, health and safety, workers' compensation, and antidiscrimination laws.[9]
  - Because most federal and state employment laws allow workers a private right of action, workers have an interest in ensuring these laws are enforced. This is a more efficient means of holding culpable employers accountable and helps to do away with the sense of impunity these companies have. This decreases the economic incentive to hire and exploit undocumented workers more effectively than any employer sanctions law will ever do.
  - Stronger enforcement of labor laws will prevent unscrupulous employers from gaining an unfair economic advantage over those employers who play by the rules.

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[9] *See, e.g.,* HOLDING THE WAGE FLOOR: ENFORCEMENT OF WAGE AND HOUR STANDARDS FOR LOW-WAGE WORKERS IN AN ERA OF GOVERNMENT INACTION AND EMPLOYER UNACCOUNTABILITY (National Employment Law Project, Oct. 2006), www.nelp.org/docUploads/Holding the Wage Floor2.pdf, and MORE HARM THAN GOOD: RESPONDING TO STATES' MISGUIDED EFFORTS TO REGULATE IMMIGRATION (National Employment Law Project, Feb. 2007), www.nelp.org/docUploads/More Harm than Good final 020807.pdf.