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Employer Sanctions and Immigration Reform

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Employer Sanctions and Immigration Reform

Abstract

Public testimony by Prof. Briggs given before U.S. Senate Subcommittee on Immigration and Refugee Policy, September 30, 1981.

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**THE KNOWING EMPLOYMENT OF
ILLEGAL IMMIGRANTS**

HEARING
BEFORE THE
SUBCOMMITTEE ON
IMMIGRATION AND REFUGEE POLICY,
OF THE
COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE,
NINETY-SEVENTH CONGRESS,
FIRST SESSION
ON
EMPLOYER SANCTIONS

SEPTEMBER 30, 1981

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ware; Mr. David North, New TransCentury Foundation director; and Mr. Douglas Parker, Institute for Public Representation.

It is nice to see you, gentlemen. Shall we proceed with Professor Briggs? Why don't we do that in that order?

**STATEMENT OF VERNON BRIGGS, PROFESSOR, CORNELL
UNIVERSITY**

Mr. BRIGGS. Thank you, Senator. I am just going to skim this testimony.

Senator SIMPSON. This is rigged to an electrode in your chair.

Mr. BRIGGS. It is my understanding that you are interested primarily in the employer sanctions at this hearing, and I just want to make it clear that I support employer sanctions but only as part of a comprehensive immigration reform package.

Employer sanctions alone is not going to stop the problem of illegal immigration or have much impact on it. But in my view, it is the crucial element of any type of immigration reform package, that without it nothing else makes sense. It is the linchpin, as I say in my testimony. It is what holds the whole package together. A linchpin does not look like very much in a machine, but the linchpin is crucial to the element of the whole program operating. And that is the way I see employer sanctions.

In my view, it sets the moral tone for what the reform measures seek to do; that is, they try to set the tone that it is an illegal act for an employer to hire an illegal alien. And in that sense, I support very strongly this concept.

I see it similar to the issue with the antidiscrimination efforts of the past decade; that is, antidiscrimination laws have not made it particularly easy to stop individual acts of discrimination, but they have set the moral tone.

In that sense, because they set the moral tone and because the penalties are at least plausible, there has been some voluntary compliance with the law. Employment patterns have changed markedly in the past 20 years from what they were before those laws were in place. I see the same thing occurring here. Employer sanctions are designed to set the moral tone and they will achieve some element of voluntary compliance if the associated penalties are plausible for those who abuse them.

I also believe that the potential effectiveness of employer sanctions hinges on the issue of identification. There must be some form of identification or otherwise employer sanctions makes no sense. So I strongly support the concept of either the use of the social security card—not the one currently in use but a counterfeit-proof card or some other type of work permit system. I outline some of the alternatives in my testimony, citing the work of David North extensively, who has looked into various means of doing this.

But I think you must have a system of universal identification because, without it, you do have the possibility of discrimination. I believe that the issue of discrimination is much less of an issue to be concerned with when employer sanctions are tied to a universal identification system. Then you do not have to worry much about the idea that any particular group of people will be discriminated

against because of their race or language or something else along this line.

Although I am grateful that the Reagan administration has at least recognized that immigration is an issue that needs reform, the package they have proposed grossly underestimates the importance of this issue by not coupling employer sanctions proposals with the identification question.

In my view, there is not much sense in going through with the employer sanctions if you are not going to have some kind of credible identification system linked with it. The proposals put forth in the July 30 package that I saw coming from the administration would not be satisfactory. All of the indicated identification items are clearly counterfeitable and are available in every border town and every major city in this country. Such items will not suffice as appropriate forms of identification.

I also think that there should be sufficient penalties against employers in terms of financial penalties.

I am also concerned about the word "knowingly" in the employer sanctions provisions. I think that is a weasel word. I think we should make it very emphatic: people who hire illegal immigrants have violated the law. Whether you know it or not, you have violated the law and you are subject to the penalties.

We do not ask people in terms of the Fair Labor Standards Act whether they knew the law or not. If they do not pay the minimum wage or if they do not meet occupational safety provisions, whatever the law might be, they have violated the law. And I think that is the same way here. The law ought to be emphatic. I think this is the only way that the legal system is ever going to take this topic seriously.

My greatest concern with employer sanctions is that the penalties will not be strong enough and that if there is not a serious identification system linked with it that the courts will simply ignore it and that the whole process will be for naught. There is no sense getting into this whole issue if it is not going to have some impact on reducing illegal immigration.

So I would like to see it emphatically stated that people who hire illegal immigrants have violated the law. I think if you couple that with a system of identification, a proper system of identification, I think that employer sanctions could be meaningful.

Just in conclusion, I would say that this issue of employer sanctions has been debated one way or the other for over a decade in Congress. In my view, it is time to act. After all is said and done, more is said than done. I think this topic is certainly a clear example of that principle.

It is time to invoke employer sanctions and to include it as part of a comprehensive package of immigration reform measures. I will stop there.

[The prepared statement of Mr. Briggs follows:]

PREPARED STATEMENT OF VERNON M. BRIGGS, JR.*

As the Select Commission on Immigration and Refugee Policy stated in its 1981 report, our nation's "immigration policy is out of control." I presume that it is unnecessary to make the case to the Committee that illegal immigration is a serious domestic problem. Or, to warn that it only promises to worsen severely unless action is taken. It is my understanding that the purpose of this particular hearing is to examine only one part of the comprehensive package of reform measures that are to be required if illegal entry into the United States is to be reduced significantly. The subject is the question of the need for sanction against employers who hire illegal immigrants. I strongly support such a proposal but I wish to make it clear from the outset that employer sanctions alone are no panacea. Without the companion reforms needed to reduce both "the push" and "the pull" forces that cause and perpetuate illegal immigration, employer sanctions can accomplish little. It is only as a key part of a comprehensive reform package that sanctions make any sense at all.

The Need

The primary reason for the need for a law to make the act of employing illegal immigrants an illegal act is that it sets the moral tone for the reform drive. As long as the current immigration law permits employers to hire illegal immigrants, no one--either inside or outside this country--can seriously believe that there is any serious desire to stop illegal entry into this country. Employer sanctions are needed to place the stigma of lawbreaker upon those employers who conscientiously or indifferently hire illegal immigrants. It is also intended to discourage through penalties those who might be tempted to hire the illegal immigrant workers.

In my mind, the need for employer sanctions is similar to the need for anti-discrimination laws in employment. Anti-discrimination laws have not made it easier for individuals to prove that they have been discriminated against. Yet these laws have, I believe, contributed greatly to the general enhancement of employment opportunities for minorities and women from the exclusionary employment patterns of just a few decades ago. Much remains to be done but that does not eclipse the fact that significant progress has been made. Much of the progress in the anti-discrimination area has come from voluntary compliance that is reinforced by a plausible penalty system. Whether employers agreed or disagreed with the anti-discrimination laws, many have complied both because it is the law and because they believed that it was within the realm of possibility that they might be prosecuted if they did not. Many employers have searched for minorities and women to be their employees who would not have otherwise made such efforts. Also, because of voluntary compliance, it has been possible for enforcement officials to concentrate their efforts on the worst offenders rather than to dissipate their limited funds in monitoring compliance by all employers. Many employers have done what the law asked--or more--because of the moral indictment that the law imposes on those who do not.

I think the same case can be made with respect to employer sanctions. I believe that many employers of illegal immigrants are simply making a pragmatic response to the reality that faces them. Namely, public policy in this country today implicitly condones illegal entry. As a result, there is an available pool of illegal immigrants in a number of the nation's labor markets who are looking for jobs. Employers are aware that illegal immigrants are less likely to complain about arbitrary wages and work standards than are citizen workers. Moreover, these workers are often grateful for the chance to work--given the alternatives in their homeland. Hence many employers are tempted to tap into this labor pool because it is available and it is profitable to do so. This does not mean that they would go out of business if illegal immigrants ceased to be accessible to them. It is simply a matter of "why not do it?" In some marginal business enterprises, the prod to hire illegal immigrants is often provided by the fear that if they do not take advantage of the availability of cheap and docile illegal immigrants, their competitors will.

*Professor of Labor Economics and Human Resource Studies, Cornell University

It is these employers who I am convinced would--perhaps grudgingly--but, nonetheless, voluntarily comply with an employer sanctions law. They would do so simply because it is the law and, because there is some prospect for punishment if they do not. The moral weight of the law would be on the side of those who comply. This is exactly what has happened with equal employment opportunity law.

Moreover, with the voluntary compliance by some employers, compliance enforcement could be targeted against the remainder who defy or are indifferent to the vital importance of stopping illegal immigration. Included in this group would undoubtedly be the worst employers--those in the minority of the business community who seek illegal immigrants for the specific purpose of exploitation. This is, of course, precisely the group where there is the greatest need to act both to protect the aliens themselves and to protect the existing work standards of citizen workers from being unfairly undermined.

Limitations On Effectiveness

I must concede in this discussion that I am not optimistic that the legal system of the nation will give significant support to the enforcement of employer sanctions if they are enacted. With already crowded court dockets and with defense attorneys who will have a field day with juries over the issue that the only crime their defendant has committed was "to provide a job for someone," there will be a tendency to simply ignore this law. I fear this will be the case unless the law is written in emphatic terms; is without "weasel words" (like the employer must have "knowingly" hired illegal entrants); and has strong penalties for offenders. If these conditions are met, they may serve as a signal to the judicial system that the Congress is serious in its actions.

There is absolutely no reason to pass an employer sanction law if there is no intention to make it as effective as possible. This means that the law must be simple and to the point: employers who hire illegal aliens, have broken the law. It also means that Congress must also provide ample funds and manpower for adequate enforcement.

Identification Issue

Obviously, if an employer sanctions law is enacted, it is necessary to specify exactly what an employer must do to be in compliance. A mere query is hardly sufficient. With fraudulent documents readily available both inside and outside the country, existing forms of identification (i.e., birth certificates, social security cards, driver's licenses, etc.) are absolutely insufficient. Without the establishment of some sort of universal identification system, the result of a strong law could be that employers might act in a discriminatory way against people "who look like" or whose language "sounds like" a group that might be composed of illegal immigrants. This concern is real. Hence, the required identification must be something that is required of all work-seekers.

It has been my view that a new form of the social security card should be used. This card must be both non-counterfeitable and unalterable. Through the use of special codes already developed by cryptographers and computer experts it would be easy to verify the citizenship status of any would-be employee. The card would be similar to those currently being issued by the Immigration and Naturalization Service to resident aliens (i.e., the ADIT card or Alien Documentation, Identification, and Telecommunications system). The Social Security card, is already required as a condition of employment in the private sector for virtually everyone. The same is true for most public employees. Like it or not, the Social Security number has already become a national identification identifier. The Social Security number is used as a student number on many campuses; it is used as the driver's license number in many states; it is used by the Internal Revenue Service to identify taxpayers; and it is the serial number of all people in the military. The point is: It is absurd to worry about whether something will happen if it has already happened! The only questions that remain are, should Social Security cards be made noncounterfeitable, and should checks be made of these cards to ensure that those who are using them to seek employment are legally entitled to have them? Certainly no one can seriously disagree with such objectives.

Others who have given close study to the identification issue have recommended a work permit system similar to that used in many other industrialized nations as being better "than any other proposed system."¹ The details of a workable proposal were spelled out in a later study by North.² The system would involve the establishment of a nationwide data base. Workers entering the labor force or changing jobs would be required to acquire a work authorization number that would be on file at the federal data bank. The number would be issued only after the individual offered some proof that he or she was a citizen or resident alien. Employers would only have to call-in to a toll free data bank after they had hired someone to check the citizenship eligibility of the newly hired person. In return, they would receive a transactions number from the data bank that would suffice to be in compliance with the employer sanction provisions. The advantage of this system would be that it would not involve any type of card nor require employers to make any type of judgment themselves about the eligibility of a job applicant. A would-be worker would have to make application for a work permit at the nearest office of the public employment service. Several options would be available to the applicant to prove his or her eligibility through reliance on some sort of historic data (e.g., among these would be proof of payment of income taxes for a number of past years; proof of paid social security taxes for a set number of past years; service in the military; government employment; naturalized citizenship status; etc.) An applicant would have to provide at least two different proofs. Only information provided by the applicant would be on file. A check of the provided information could be made with existing data already on file in various government data banks. If the computers confirmed the individuals legal presence in the nation, the work permit would be issued.

There may be other means available. The point is, a new identification method must be included in any employer sanction program if it has any hope for success.

Penalties

To be credible, employer sanctions must be severe enough to be taken seriously. I think that civil penalties that are set at a minimum of \$1,000 per illegal alien should be set with injunction relief that involves criminal contempt and possible imprisonment for repeat violators are called for. Priority should be given to those employers who engage in a "pattern of practice" as determined by the Department of Justice setting.

I realize that cost considerations would become involved in the determination of which cases to prosecute. I would hope that attention would focus on those employers of large numbers of illegal aliens and those who consistently engage in this practice.

The Reagan Proposals

The Reagan Administrations proposals do not meet the standard outlined above. While grateful that the Administration recognizes the need for reform, I feel that the proposals outlined in the President's message of July 30, 1981 are simply inadequate to the problem. It attempts to do something but not too much. Unfortunately, resolving the problem of illegal immigration allows no middle ground. The only hope for a successful program is a total commitment to the alleviation of the problem. Anything less than that will, in my mind, have no impact. The problem will only get worse. Just as it makes no sense to build a dam only half way across a river, it makes no sense to try to construct a part-way illegal immigration program. It is all the way or nothing.

The most obvious deficiency is with the identification issue. All of the suggested documents are easily and readily available for sale inside and outside the country. Most employers are not trained to discern the authenticity of such documents. If all they have to say is that they "examined" two of these

¹David S. North and Marion F. Houston, The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study, Washington, D.C., Linton & Company, 1976, p. 179.

²David North, "Keeping Undocumented Workers Out of the Workforce: Costs of Alternative Work Permit Systems", Washington, D.C., New Transcentury Foundation, 1979.

documents, nothing is going to be accomplished--even where the employers are honestly trying to comply. For those other employers who are not sympathetic to the reform drive, the loophole is so large that few, if any, of them could ever be prosecuted.

It is not surprising--given the lack of an effective identification program--that the proposal says that only employers who "knowingly" hire illegal immigrants will be in violation. This phrasing will certainly, negate any of the remaining substance of the proposed employer sanctions provisions. Ignorance has never been a successful excuse for failure to comply with other laws. It should not be tolerated in this instance either. Accordingly, the signals that the Administration's proposals give to the court system are entirely the wrong ones. Prosecutions will be difficult and, given other seemingly more pressing matters, prosecuting attorneys can be expected to ignore the sanctions or give them only cursory attention. Without the fear of prosecution, many of the worst offenders will simply take the calculated risk under the belief that the potential benefits will exceed the potential risks. And they will be right.

Conclusion

For over a decade, Congress has been debating the topic of employer sanctions. If ever there is an issue that illustrates the old saying that "after all is said and done, more is said than done," it is this one. It is time to bite the bullet and respond to the reality that a ban of the hiring of illegal immigrants is a necessary fact of life in the industrialized society in which we live. It is time that we fall in line behind the other nations of the Western industrialized world who have already acted in a manner similar to what is proposed here.

Employers sanctions are the linchpin of an effective immigration reform strategy. They are what holds the entire package together. Reform will only be as effective as the linchpin. I hope Congress will recognize this basic fact.

Senator SIMPSON. Thank you very much. We will hear from all the members of the panel, and then come back for questioning. So please, Prof. Mark Miller.

STATEMENT OF MARK MILLER, PROFESSOR, UNIVERSITY OF DELAWARE

Mr. MILLER. Mr. Chairman, employer sanctions are the key component in Western European efforts to curb illegal alien employment and residency. With a few notable exceptions, all Western European governments now have laws which punish employers of illegal aliens with fines and/or prison. Once captured and convicted, the employers also may be obliged to pay back wages and social security taxes that ordinarily would have to be paid if an alien worker had been legally employed.

Further, European employers often are obliged to pay the repatriation costs for illegal aliens in their employ. Recurrent violation of laws governing the employment of aliens may result in employers losing the right to hire aliens altogether.

Although the specific nature of employer sanctions and the administrative processes behind their enforcement vary considerably between Western European countries, the fact that Western European democracies have emphasized this particular policy option in their broader efforts to stem flows of illegal immigrants into their countries is of considerable interest to the United States.

Reference to Western European practices and experience, in light of the present debate in the United States over the advisability of imposing employer sanctions, helps put the issues being debated here in perspective.