



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Analysis of Recent Anti-Immigrant Legislation in Oklahoma*

The Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804) was signed into law by Governor Brad Henry on May 7, 2007.¹ Among its many provisions, the Act requires public employers to electronically verify employees' immigration status, restricts government IDs to those who are lawfully present, and requires the state to enter into an agreement with the U.S. Department of Homeland Security to enforce immigration law. Although there is a lawsuit pending against the Act,² most of its provisions came into effect on November 1, 2007 (the employment provisions will come into effect on July 1, 2008). This article summarizes and provides a legal analysis of the main provisions of the Act.

I. Introduction: The Act begins with the following list of purported “findings”:

- a. Illegal immigration is causing economic hardship and lawlessness;
- b. Public agencies are encouraging illegal immigration by not verifying status;
- c. Issuance of ID cards has led to the harboring of undocumented immigrants.

Analysis: It is unclear how these findings were made as they contradict research carried out in other states. For example:

- The Texas Comptroller of Public Accounts found that undocumented immigrants produced \$1.58 billion in state revenue;³
- Research demonstrating that immigrants—documented and undocumented—contribute far more to the economy than they take has been undertaken in Arizona,⁴ New Mexico,⁵ Washington, DC,⁶ California,⁷ and in Florida;⁸

* The information contained in this document is for general informational purposes only. It is not intended to serve as legal advice and it does not substitute for legal counsel.

¹ The entire Act is available on-line at: www.sos.state.ok.us/documents/Legislation/51st/2007/1R/HB/1804.pdf

² *National Coalition of Latino Clergy, Inc., et al., v. Henry, et al.*, No. CIV-07-613-GKF-FHM (N.D. Okla. filed Oct. 25, 2007).

³ See Texas Comptroller of Public Accounts, Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy, at www.window.state.tx.us/specialrpt/undocumented

⁴ See Udall Center for Studies in Public Policy, The University of Arizona, Immigrants in Arizona: Fiscal and Economic Impacts, at http://udallcenter.arizona.edu/programs/immigration/publications/impact_judy.pdf

⁵ See New Mexico Voices for Children, Undocumented Immigrants in New Mexico: State Tax Contributions and Fiscal Concerns, at www.nmvoices.org/attachments/immigrant_tax_report.pdf

⁶ See The Urban Institute, Civic Contributions: Taxes Paid by Immigrants in the Washington, DC, Metropolitan Area, at www.urban.org/UploadedPDF/411338_civic_contributions.pdf

⁷ See www.ppic.org/main/policyarea.asp?i=8

⁸ See Research Institute on Social and Economic Policy, Florida International University, Immigrants in Florida: Characteristics and Contributions, at www.risep-fiu.org/reports/immigrants_spring_2007.pdf

- A 2006 study shows a lower level of criminality for immigrants than for native-born Americans;⁹
- There is no proof that issuing ID cards to undocumented immigrants hurts citizens; in fact, many police officers are in favor of providing ID to all immigrants.¹⁰

II. Transporting and Harboring

The Act prohibits the transporting or harboring of undocumented immigrants when one knows or recklessly disregards their undocumented status, if such actions are taken “in furtherance of the illegal presence of the alien in the United States.” The penalty for violating this provision is one year in prison and/or a fine of not less than \$1000. The Act does (in compliance with federal law) expressly exempt emergency health care from this provision.

Analysis: This section may be preempted by federal law. The Immigration and Nationality Act (INA) is a comprehensive law that regulates immigration matters.¹¹ The INA prohibits the transporting and harboring of undocumented immigrants.¹² While the INA does not expressly preempt state laws regarding transporting and harboring, a strong argument could be made that (through the INA) the federal government occupies the field in this area.¹³

III. Issuance of Identification Cards

The Act allows the following organizations to create specific identity cards:

- A. Businesses, government agencies and service organizations may create employee ID cards;
- B. Businesses and service organizations may create customer ID cards;
- C. Various government agencies may issue the following: voter cards, driver’s and nondriver’s licenses, passports, birth certificates, and Social Security cards;
- D. Schools may issue ID cards to faculty, administration, staff and students;
- E. Professional organizations and labor unions may create member ID cards; and
- F. Businesses may create medic alert ID cards.

Additional requirements

Government and school-issued ID cards can only be issued to U.S. citizens, U.S. nationals, and Lawful Permanent Residents. However, a school-issued ID card that clearly states that it is only good for use on campus may be issued to any student, regardless of immigration status.

⁹ See Migration Information Source, Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men, at <http://www.migrationinformation.org/Feature/display.cfm?id=403>

¹⁰ See National Immigration Law Center, Driver’s Licenses for All Immigrants: Quotes from Law Enforcement, at www.nilc.org/immisps/DLs/DL_law_enfrcmnt_quotes_101404.pdf

¹¹ 8 U.S.C § 1101 *et seq.*

¹² 8 U.S.C § 1324.

¹³ For a detailed analysis of preemption, please see “State and Local Initiatives Targeting the Undocumented: Can They Withstand Legal Scrutiny?” at <http://cliniclegal.org/StateandLocal/PreemptionAnalysisFinal.pdf>

The Act also allows government agencies and schools to issue ID cards to immigrants who are able to provide the following documentation:

1. Valid, unexpired immigrant or nonimmigrant visa;
2. Pending or approved asylum application;
3. Refugee status;
4. Pending or approved application for Temporary Protected Status (TPS);
5. Approved deferred action status; or
6. Pending application for Lawful Permanent Residency.

ID cards that are provided to these groups must expire at the same time that the immigrant's authorized stay ends or in one year from date of issue (if the immigration document does not provide a definite expiration date).

Analysis: This section of the act may be preempted by federal law. A state that attempts to define who is lawfully present must be consistent with the federal standards that define lawful immigrant.¹⁴ A state that does not adopt federal standards is considered to be regulating immigration, a function solely of the federal government. In this section the Act provides a list of immigrants who are qualified to receive ID cards. The list excludes several categories of lawful immigrants (as defined by federal immigration law), including individuals paroled into the United States in the public interest, individuals granted voluntary departure or deferred enforced departure, and certain individuals who have applied for protection under the Violence Against Women Act. Therefore, this section may be preempted by federal law.

IV. Immigrants and the Police

The Act requires police to make a reasonable effort to determine the citizenship status of those charged with a felony or DUI. If the suspect is a foreign national, then the police must attempt to determine if he was lawfully admitted to the United States and if his status is still valid. If the police are unable to determine a suspect's immigration status, they must notify the U.S. Department of Homeland Security. The Act also creates a rebuttable presumption that an undocumented immigration is a flight risk and therefore should be denied bond.

Analysis: While this policy does not appear to conflict with federal law, a number of state and local law enforcement agencies have decided not to enforce federal civil immigration laws. In a policy brief, the Chiefs of Police of several major cities with large immigrant populations outlined the consequences associated with the local enforcement of federal immigration laws.¹⁵ Among other concerns, the police chiefs feared that the enforcement of federal immigration law would undermine immigrant communities' trust of local police. As a result, immigrant crime victims and witnesses might be afraid to speak up, making it more difficult for local police to carry out their core function of enforcing local laws.

¹⁴ See De Canas, et al., v. Bica, et. al., 424 U.S. 351, 355 (1976), and League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 772 (C.D. Cal. 1995).

¹⁵ See "Major Cities' Chiefs' Immigration Committee Recommendation for Enforcement of Immigration Laws by Local Police," at www.majorcitieschiefs.org/pdfpublic/mcc_position_statement_revised_cef.pdf

V. Employment

E-Verify is a voluntary program created by the U.S. Department of Homeland Security (DHS) to allow employers to electronically verify workers' employment eligibility by accessing DHS and Social Security Administration databases.

The Act requires all government agencies to participate in E-Verify (or a similar federal program). Any company that contracts with the state must also participate in E-Verify, unless it had a contract with the state prior to July 1, 2008.

The Act also creates a new cause of action. A U.S. citizen or Lawful Permanent Resident who is dismissed by an employer who continues to employ undocumented workers can file a claim of discrimination against that employer. However, the employer is not liable if it participates in E-Verify.

Analysis: The Immigration Reform and Control Act (IRCA) is a federal law that created a comprehensive system regulating immigrant employment.¹⁶ IRCA contains the following clause which expressly prohibits states from legislating in this area: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."¹⁷ The Act may be preempted by federal law for two reasons:

1. Federal law does not require employers to use E-Verify—it is a voluntary program. A state law requiring use of E-Verify is attempting to regulate immigrant employment and therefore may be preempted.
2. The Act creates a new cause of action against those who employ undocumented workers. The Act would impose strict liability against employers, who would be liable whether or not they knew the employee was undocumented. As IRCA expressly preempts state and local sanctions against those who employ undocumented immigrants, this part of the Act would likely be found to be preempted by IRCA.¹⁸

In terms of practical public policy, U.S. government studies have shown that E-Verify is riddled with errors and therefore cannot currently ensure that only authorized workers are hired.¹⁹ The studies found:

1. 17.8 million Social Security Administration records contain discrepancies, more than half of which pertain to U.S. citizens;²⁰

¹⁶ 8 USC § 1101 *et. seq.*

¹⁷ 8 USC § 1324a(h)(2).

¹⁸ See also Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. July 26, 2007) (striking down a similar new cause of action).

¹⁹ For a detailed listing of government findings on this issue, see the National Immigration Law Center's "Basic Pilot/E-Verify: Not a Magic Bullet," at http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_nomagicbullet_2007-09-17.pdf

²⁰ Congressional Response Report: Accuracy of the Social Security Administration's Numident File (Office of the Inspector General, Social Security Administration, Dec. 2006), www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf

2. Immigrant workers seeking to correct an inaccurate E-Verify report would need to file a Freedom of Information Act (FOIA) request with U.S. Citizenship and Immigration Services (USCIS). USCIS processing times for FOIA requests exceed one year;²¹
3. E-Verify has serious security vulnerabilities, leading to fears of identity theft.²²

VI. Public Benefits

The Act requires applicants for public benefits to show documentation that they are U.S. citizens or lawfully present. The Act (in compliance with federal law) exempts emergency services from this provision.

Analysis: This section of the Act appears to comply with federal law, which clearly prohibits undocumented immigrants from receiving public benefits, except in certain, specified emergency situations. However, studies have shown that lawful immigrants and their U.S. citizen children are frequently deterred from applying for public benefits due to caseworkers' inadequate training on immigration issues.²³

Several years ago, the U.S. Department of Health and Human Services faced a similar problem: they received numerous reports that immigrants and U.S. citizen children of immigrants were deterred from applying for emergency benefits such as Medicaid and Food Stamps due to inaccurate statements made by social service agency caseworkers. In response, three federal agencies developed a policy guidance on this issue.²⁴ The guidance explained the eligibility criteria for specific federal benefits, and it also pointed out that denying benefits to eligible applicants not only contradicts the core values of public benefits agencies (providing assistance to those in need), but it also may violate federal civil rights laws. Therefore Oklahoma might consider mandating adequate training for caseworkers to ensure that all eligible low-income individuals receive the health and food benefits to which they are entitled.

²¹ Freedom of Information Act Operational Review and Improvement Plan Report (Department of Homeland Security, 2006).

²² Committee Report 110-181, Department of Homeland Security Appropriations Bill 2008, U.S. House of Representatives, at 116. Anyone posing as an employer can access E-Verify. See Interim Findings of the Web-Based Basic Pilot Evaluation (Westat, Dec. 2006), <http://www.uscis.gov/files/native/documents/WestatInterimReport.pdf>

²³ See Karen Cunningham, "Food Stamp Program Participation Rates: 2003" (Mathematica Policy Research Inc, July 2005), and Marc L. Berk and Claudia L. Schur, "The Effect of Fear on Access to Care Among Undocumented Latino Immigrants," *Journal of Immigrant Health* 3 (3) July 2001, 15.

²⁴ The Policy Guidance (usually referred to as the Tri-Agency Letter) can be found at www.fns.usda.gov/fsp/rules/Memo/00/JointGuidanceonCitizenship.htm

VII. Independent Contractors

The Act requires independent contractors to prove that they are authorized to work in the United States. If an independent contractor is unable to prove that they are work-authorized, their employer must withhold state income tax at the top marginal income tax rate.

Analysis: This provision appears to attempt to regulate the employment of immigrants. As explained above, IRCA comprehensively regulates the employment of immigrants. Therefore, this provision may be found to be preempted by IRCA.

VIII. Local Cooperation with Federal Law Enforcement

The Act requires Oklahoma's Attorney General to negotiate a Memorandum of Agreement with the U.S. Department of Homeland Security that would allow local police to enforce civil immigration law. The Act also prohibits municipal governments and other public bodies from enacting any ordinance that limits public employees from "communicating with" the Department of Homeland Security, referring to reporting suspected undocumented immigrants.

Analysis: In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). A provision of that Act (commonly called 287(g)), authorizes DHS to enter into agreements with state and local law enforcement agencies that would permit certain officers to perform immigration law enforcement, after receiving training from DHS.

While a number of localities have entered into 287(g) agreements,²⁵ as mentioned above many law enforcement agencies have decided not to enforce federal civil immigration law. These agencies are concerned that immigrants who are crime victims or witnesses will be afraid to come forward if they fear that local police will check their immigration status. Therefore, these agencies believe that it is in the best interest of local citizens to leave immigration matters to federal authorities.

While the prohibition on limiting public employees from contacting DHS does not appear to conflict with federal law, it is important to examine the public policy implications involved in such a policy. For example, how will this policy affect persons interacting with state and local agencies, such as schools, hospitals, libraries, and social services offices? Will the policy deter people from seeking help? Will the policy primarily affect one race or ethnic group? In the interest of public safety, states should ensure that everyone can access basic health and welfare services and not create additional barriers to essential services.

²⁵ For a current list of 287(g) participants, see www.ice.gov/partners/287g/Section287_g.htm

IX. Fraudulent Documents

The Act requires the state's Department of Public Safety to create (subject to the availability of funding) a Fraudulent Documents Identification Unit that would focus on false documents used for identification purposes.

Analysis: This provision does not appear to conflict with federal law.

X. Immigrants and Higher Education

The Act amends an Oklahoma statute that governs undocumented immigrants' eligibility for in-state tuition, financial aid, and scholarships in postsecondary education.

Under the Act, any student (regardless of immigration status) is eligible for in-state tuition if she meets the following requirements:

- A. Graduates from an Oklahoma high school;
- B. Resides in Oklahoma for at least two years prior to high school graduation; and
- C. Meets admission standards.

If the student is undocumented, she must also provide one of the following:

1. A copy of an application to legalize status that has been filed with USCIS; or
2. An affidavit stating that the student will legalize status as soon as she is eligible to do so, which must be either within one year of enrolling or within one year after USCIS creates a legalization process that she is eligible for.

Under the Act, a student is eligible for state-funded financial aid and scholarships if she meets the three requirements (A-C) stated above. If she is undocumented, she must also provide a copy of an application to legalize status that has been filed with USCIS. Undocumented students who do not have a pending application to legalize status are not eligible for financial aid or scholarships.

Analysis: This provision appears to comply with federal law. Under section 505 of IIRAIRA, states that offer in-state tuition to undocumented state residents based on their residency in the state must offer the same tuition rate to U.S. citizens even if they are not state residents.²⁶ The eligibility criteria in the Act do not require current state residency. As a result, the state does not appear to be required to provide in-state tuition rates to out of state U.S. citizens as required by section 505 of IIRAIRA.²⁷

²⁶ 8 U.S.C. § 1623.

²⁷ Nine other states have similar laws. The other states are Texas, California, Utah, Washington, New York, Illinois, Kansas, New Mexico, and Nebraska. For more information and analysis on this issue, see the National Immigration Law Center's "Basic Facts about In-State Tuition for Undocumented Immigrant Students," at www.nilc.org/immigrationpolicy/DREAM/in-state_tuition_basicfacts_041706.pdf. The only state that has litigated this issue is California. The provision was upheld. See Martinez v. Regents, No. CV 05-2064 (Cal. Super. Ct. Oct. 6, 2006).