

Knowingly Employing Sanctions: Arizona's Regulation of Migration Through Employer Sanctions

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Arizona's Challenges

In the summer of 2007, Arizona's Legislature passed the Fair and Legal Employment Act, a bold measure aimed at regulating the employment of informally authorized (i.e., "undocumented") migrants in the state. The Republican majority garnered the support of four out of five legislators and forwarded the bill to the Governor. After noting the "flaws" in the bill, Democratic Governor Janet Napolitano enacted the law on July 2, 2007. The Fair and Legal Employment Act, later renamed the Legal Arizona Workers Act (LAWA), was set to take effect on January 1, 2008. However, suits filed by business interests and migrant- and civil-rights groups challenging the Act delayed its implementation. On February 7, 2008, Federal District Court Judge Neil V. Wake dismissed the challenges to the law; the plaintiffs plan to appeal the ruling. It is now due to be implemented in March. Although empirically not much can yet be said about the effects of its implementation, the process and issues of the case are indexical of salient political and public policy debates regarding migrants and migration in Arizona and beyond.

U.S. Migration Policies and the Impact on Arizona

Arizona's effort to regulate migration is a common strategy that has over the past two-decades resurfaced across states and municipal governments. According to the National Conference of State Legislatures, in 2007 there were over 1,500 proposed laws related to migrants and migration among the 50 state legislatures. Of these proposals,

244 were enacted in 46 states. This number does not include the large number of local ordinances that have been enacted or are being considered across the nation—the Hazleton, Pennsylvania ordinance is one that has received considerable attention.

Migration, particularly Mexican migration, emerged as a major political concern in Arizona in the aftermath of President Clinton’s implementation of Operation Gatekeeper on the Tijuana-San Ysidro border. The border measure had the aim of ‘regaining control of our border’ (a phrase often used by President Reagan) through a policy of “prevention through deterrence.” The goal was to deter migrants from entering the United States without formal authorization by placing a high number of Border Patrol agents in what was at the time the busiest border crossing point, and shift the migration flow to areas so difficult to traverse that migrants would stop trying. Migrants, however, had a different assessment: they were willing to take great risks to enter the United States. The annual number of death among those choosing this option has ranged from about 90 in 1996, to a peak of close to 500 in 2005, and then to about 230 in 2007.

Arizona’s Response

In the aftermath of Operation Gatekeeper, a significant number of migrants shifted their migration route to the Sonoran desert and sought to enter through Arizona. The year 1995 would mark the beginning of Arizona’s “problem” or “crisis.” Since 1995, Arizona’s elected and law enforcement officials, as well as voters through voting initiatives, have sought to regulate migrants and migration through multiple legislative and regulatory practices. Some of the actions taken include the 1996 restriction of driver’s licenses to formally authorized migrants and U.S. citizens; the 1997 “Chandler Roundup,” a local police and immigration officials effort that led to the questioning and/or arrest of Latino/Mexican U.S. citizens, permanent residents and Latino informally authorized migrants; the 2004 passage of Proposition 200, which added requirements for voting and

began a process for restricting public benefits; a 2006 English-Only measure; and the 2006 passage of Proposition 300 that excluded informally authorized students from in-state tuition in public higher education institutions. The current 2008 session of the Legislature is considering several bills to correct the “illegal immigration crisis,” as well as measures to alleviate the “labor shortage” faced by Arizona employers in agriculture, construction, hotels, landscaping, and other sectors, through a state-based temporary worker program to bring in Mexican workers.

Arizona’s employer sanctions law contains the following four provisions. One, it makes it a felony to use the identification of an actual or fictitious person - a provision intended to reduce document fraud in obtaining employment. Two, it mandates that all employers use the federal E-Verify electronic system in the hiring process. Three, it provides that the business “license” of employers be suspended for ten days or longer for a first offense when the employer “intentionally” or “knowingly” employs an “unauthorized alien.” Four, a second offense on the part of an employer leads to the revocation of the employer’s license in the specific site, or multiple sites if the employer operates multiple sites with a single license.

Arizona in Court

Shortly after its enactment, state and national business interest, and a small number of pro-migrant groups brought independent suits to prevent the law’s implementation; the two suits were later consolidated into one. The business interests named in the suit not only include the Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Arizona Employers for Immigration Reform, Wake Up Arizona!, and those representing roofing, landscape, and restaurant firms, but also the U.S. Chamber of Commerce and the National Roofing Contractor’s Association. Three Latino/Mexican American groups also sued state officials: *Chicanos Po La Causa*,

Somos America, and *Valle del Sol*. The principal challenge to the law centered on whether the state was taking action preserved for the federal government under its preemptive powers over “immigration,” particularly under the 1986 Immigration Reform and Control Act (IRCA).

The core of the juridical debate between plaintiffs and defendants, and the one that Judge Wake needed to rule on, was the meaning of the IRCA provision regarding “Preemption.” The plaintiffs argued that the law contradicted the federal preemptive power over migration; that it was engaging in actions reserved for the federal government and so was in violation of the Constitution. The state argued that the provision authorized the state to formulate a law that could punish employers who hired “unauthorized aliens” if it did it through “licensing and similar laws.” Judge Wake adopted a broad interpretation, took into account a pre-IRCA case regarding California’s employer sanctions law (*De Canas et al. v. Bica et al.*, 424 U.S. 351), and interpreted the law as standing separate from state intentions to regulate migration. In his final order he ruled in favor of the defendants.

Potential Impacts of the Arizona Law

While not much can yet be concretely asserted about the law’s impact, multiple anecdotal accounts by local organizations, businesses, and media have been reported. Some of the accounts report that Latino/Mexican workers have left the state and moved to places such as Utah and Texas, and some have returned to Mexico. Other accounts assert that some small businesses also have left, or plan to leave, the state. A recent news article reported a rise in the apartment vacancy rate for the Phoenix metropolitan area: from 9% in the fourth quarter of 2006, to 11.2% in the same quarter in 2007. In neighborhoods with greater numbers of Latinos, it was reported that the rate may be 15% or higher. Some property owners have noted that families have moved out with very little

notice, or none. School districts also have reported declines in student enrollments, when compared with previous years.

It has become clear that the timing of the law in conjunction with the deepening housing problems, the apparent recession, budget deficits, lower than expected retail revenues in the last quarter of 2007, and related problems in the state economy, has created a difficult economic and political scenario. What is less clear is how the acrimonious debate on the impact of migrants will be negotiated between the contradictory positions. A war of position between those who assert that “unauthorized aliens” are ‘taking our jobs’ and are a net-drain on the economy and negatively impacting the social fabric, and those who argue that there is a serious “labor shortage” and thus we need to encourage the migration of individuals to fill the ‘vacant’ jobs that “Americans” are not willing to do.