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Corporate Amnesty in S.744 Immigration Bill



S.744 Border Security, Economic Opportunity, and
Immigration Modernization Act

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Executive Summary

A little-discussed provision buried in the immigration bill which passed out of the Senate on June 27, 2013 (S. 744) would let employers off the hook for previously hiring illegal immigrants—a “Get Out of Jail Free” card that could help companies dodge millions of dollars in fines and penalties, legal fees, and evade prosecution or imprisonment for guilty executives.

The Competitive Advantage of Hiring Illegal Immigrants

The political rancor surrounding America’s immigration debate has followed predictable patterns. Critics on the right have called the Senate immigration bill *de facto* amnesty and the usurpation of the rule of law. Supporters on the left have argued that America’s 11 million immigrants must be brought out of the shadows, embraced, and put on a path that leads to citizenship.

Scant attention, however, has been paid to what passage of the Senate bill would mean for the myriad corporate interests that have previously or are currently employing undocumented workers in violation of federal law.

Indeed, the stakes are high. Under Section 274a.10 of the Code of Federal Regulations, employers who knowingly employ illegal immigrants can be subject to



criminal fines up to \$3,000 per employee and imprisonment up to six months. In addition to the criminal penalties, employers may be subject to civil fines as high as \$16,000 per employee.ⁱ

Still, for companies willing to take the legal risks, the payoffs can create sizable financial advantages over competitors. A Federal Reserve Bank of Atlanta study found that companies that hire illegal immigrants have a 23 percent chance of failing, whereas those who follow the law experience a 28 percent failure rate.ⁱⁱ Small business owners say the unfair advantages are real. A 2013 survey by the Small Business Majority advocacy group found that 68 percent of business owners say too many companies gain an unfair advantage by hiring illegal immigrants.ⁱⁱⁱ

Small businesses are not the only ones willing to violate laws in an effort to bend otherwise free markets in their favor; large, powerful companies do too. In 2009, for example, the nation's largest clothing manufacturer was found to have 1,800 illegal workers—roughly one-third of its entire Los Angeles manufacturing operation—on the payroll.^{iv}

In recent years, numerous industries, from agriculture to manufacturing, have faced increased federal scrutiny by immigration and law enforcement officials concerning their possible hiring of illegal immigrants. Enforcement of the prohibitions on unauthorized employment, found in §274A of the Immigration and Nationality Act (“INA”), commonly called *worksite enforcement*, has been the job of the Department of Homeland Security, U.S. Immigration and Customs Enforcement (“ICE”), since 2003. Audits by ICE have skyrocketed from 250 in 2007 to over 3,000 in 2012.^v During the



same time period civil fines administered by for unlawful employment increased from \$26,560 to \$10,463,988.^{vi} Criminal fines and forfeitures for worksite enforcement went from \$31,426,443 in 2007 to \$36,611,320 in 2010, but dropped to \$7,189,631 in 2011.^{vii} During recent years, there has also been an increase in the civil and criminal arrests of managerial employees (position titles include owner, manager, and corporate official). In 2009 these arrests totalled 155 and in 2010 they increased to 272.^{viii}

Clearly, a wide array of corporations and businesses facing this scrutiny have added incentive to see the provisions in the Senate bill passed.

The Senate Bill's "Get Out of Jail Free" Provision

So how does the Senate immigration bill address employers who have knowingly hired illegal workers? In short, the bill offers law-breaking employers a form of corporate amnesty that forgives past illegal hiring practices and insulates them from future prosecutions.

The Senate immigration bill (Section 2101 of the bill which creates new section 245B of the INA) allows current illegal immigrants to apply for "provisional immigrant status." As part of that process, immigrants may produce employment records to prove they have been in the U.S. since December 31, 2011 as proscribed by the bill. Section 2104 of the bill, which creates new section 245E of the INA, makes it clear that information provided in a 245B application cannot be used to prosecute an employer



under 274A of the Act, or the Internal Revenue Code of 1986, for prior unlawful employment.

The Senate immigration bill contains the following language:

(b) EMPLOYER PROTECTIONS.—

(1) USE OF EMPLOYMENT RECORDS.— “Copies of employment records or other evidence of employment provided by an alien or by an alien’s employer in support of an alien’s application for registered provisional immigrant status under section 245B **may not be used in a civil or criminal prosecution or investigation of that employer under section 274A or the Internal Revenue Code of 1986 for the prior unlawful employment of that alien** regardless of the adjudication of such application or reconsideration by the Secretary of such alien’s prima facie eligibility determination. Employers that provide unauthorized aliens with copies of employment records or other evidence of employment pursuant to an application for registered provisional immigrant status **shall not be subject to civil and criminal liability pursuant to section 274A** for employing such unauthorized aliens.”^{ix}

According to ICE:

Section 274A(b) of the Immigration and Nationality Act (INA), codified in 8 U.S.C. § 1324a (b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6,



1986. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification. Employers are required by law to maintain for inspection original Forms I-9 for all current employees.^x

The employer protection provisions discussed above also appeared in a leaked draft of the White House's version of the bill.^{xi}

If a final immigration bill passes with language similar to that found in S. 744, employers would not be held liable for many past or current violations of Section 274A, or the Internal Revenue Code of 1986, for their unlawful employment of illegal aliens.

Conclusion

The lack of transparency surrounding the Senate bill's corporate amnesty provision and its failure to address the inequities created by illegally gained competitive advantage are alarming and worthy of robust public debate. Given the substantial rewards and protections that companies hiring illegal aliens stand to gain from the Senate bill's passage, it is not surprising that numerous employers and corporations have aggressively supported the bill's passage.

These provisions raise serious questions about whether employers who have accrued unduly earned competitive advantage by breaking the law should be held legally



accountable, rather than be provided with a corporate amnesty regime that inoculates them from fines, penalties, legal fees, and prosecution.

ⁱ Title 8 of Code of Federal Regulation, Sec 274a.10.

ⁱⁱ The Associated Press, "Small businesses: Rule-breakers get an edge," *Daily Herald*, April 22, 2013; Brown, J. David; Julie L. Hotchkiss; and Myriam Quispe-Agnoli. "Does Employing Undocumented Workers Give Firms a Competitive Advantage?" *Journal of Regional Science* 53(1) (February 2013): 158–70.

ⁱⁱⁱ "Opinion Poll: Small Business Support for Comprehensive Immigration Reform," Small Business Majority, March 27, 2013. <http://www.smallbusinessmajority.org/small-business-research/downloads/032713-immigration-reform-poll-report.pdf>.

^{iv} "1,800 American Apparel workers may be ineligible," *USA Today*, July 1, 2009.

^v Anya Susarina and Jackson Lewis LP, "Staggering 2012 statistics for ICE workplace audits and fines," Lexology, January 8, 2013, <http://www.lexology.com/library/detail.aspx?g=c92d7411-4bd2-4146-bc0d-c3de1ffcfdc6>.

^{vi} U.S. Library of Congress, Congressional Research Service, *Intelligence Issues for Congress*, by Andorra Bruno, CRS Report R40002, Table 2 (Washington, DC: Office of Congressional Information and Publishing, May 10, 2012).

^{vii} *Intelligence Issues for Congress*, Table 5.

^{viii} *Intelligence Issues for Congress*, 7-8.

^{ix} Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013).

^x "Fact Sheet: Form I-9 Inspection Overview," ICE.gov, August 1, 2012, <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>.

^{xi} "TITLE II – LEGALIZATION OF UNDOCUMENTED INDIVIDUALS," *The Miami Herald*, February 28, 2013, <http://media.miamiherald.com/smedia/2013/02/18/19/57/2CfDr.So.56.pdf>.

