

IMMIGRANTS AND CONTRACTS: STATES HAVE NO CONSTITUTIONAL POWER TO VOID CONTRACTS BETWEEN IMMIGRANTS AND CITIZENS

Many cities and states across the country, frustrated by Congress' failure to pass a comprehensive immigration bill, have taken these matters into their own hands. Many have turned to ill-conceived immigration "enforcement only" provisions at the state level. These provisions raise serious questions, from Constitutional to practical. There are alternatives that would protect all workers against the actions of unscrupulous employers.

Recent proposals in at least two states purport to make all contracts, entered into with any "illegal alien" unenforceable. Under the proposals, it is unclear how a determination that a contract is void would be made, including whether either businesses or individuals would have access to the courts to enforce any rights under the contract. These proposals run headlong into federal law, and would force all businesspeople in the state to engage in costly and error-prone verification systems. They would deny immigrants (and many U.S. citizens) basic human and Constitutional rights.

Collision with the Constitution. The contracts proposals conflict with bedrock principles of Constitutional and contractual laws that have long formed a part of our nation's jurisprudence, and of the fabric of commerce. The U.S. Constitution provides, in Article I, Section 10, that "no State shall enter into... any law impairing the obligation of contracts." The state proposals also collide with federal law, which protects all persons' rights to make contracts and to sue in U.S. courts, at 42 U.S. C. §1981.

U.S. Constitution continued: Denial of Equal Protection of the Law. The Supreme Court held in 1982, in *Plyler v. Doe*, 457 U.S. 202, at 210, that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."

U.S. Constitution continued: Due Process of Law. Similarly, over one hundred years ago the Court held in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its

National Employment Law Project, 80 Maiden Lane, Suite 509, NY, NY 10038

Rebecca Smith – rsmith@nelp.org

Catherine Ruckelshaus – cruckelshaus@nelp.org

Omar Semidey – osemidey@nelp.org

Laura Moskowitz – lmoskowitz@nelp.org



jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.” A provision that simply cancels all contracts that involve immigrants not lawfully in the country implicates these bedrock principles of our nation’s laws.

Immigration is Constitutionally a matter of federal law. Immigration is a subject wholly regulated by federal law. States that add their own provisions risk, at the least, entanglement with that system. State may also find that their provisions run afoul of the federal system, especially where they impose separate, state-level employer sanctions.

Costly for business. Such proposals would have consequences for virtually all businesspeople in the state, by forcing them to determine the immigration status of all with whom they do business. The language of the proposals may cover not only landlords, real estate agents and insurance brokers, but also purchasers of items bought under payment plans, including cars, appliances and home furnishings. They may also cover businesses that rent personal goods, issue or manage credit cards, or even vendors of general merchandise such as groceries. Since an employment agreement is also a contract, the laws would give unscrupulous employers license to hire, and then exploit undocumented workers, who would be unable to enforce their right to be paid.

The human and monetary costs of discrimination. Because determination of immigration status would be costly for businesses, and because the determination is so complex, it is likely that businesspeople will fall back on stereotypical factors, such as foreign-sounding names, race, national origin and foreign accents and selectively investigate immigration status. Such investigations are likely to result in discrimination, and a loss of human dignity for the victims of discrimination.

Such proposals may also have unintended consequences for the contracting businesses. Since these provisions would void all contracts with undocumented immigrants, those immigrants are not bound by their contracts. This could result in release from time payments on household goods bought on contract, payments on credit card debt, and other cancellations of responsibility.

Costly to implement, costly to defend. Many of the laws creating state or local level immigration enforcement against landlords, employers and others have resulted in unforeseen enforcement and litigation costs for the cities and states enacting them. In Colorado, a year after the legislature enacted tough sanctions for immigration violations, eighteen state departments reported they spent

National Employment Law Project, 80 Maiden Lane, Suite 509, NY, NY 10038

Rebecca Smith – rsmith@nelp.org

Catherine Ruckelshaus – cruckelshaus@nelp.org

Omar Semidey – osemidey@nelp.org

Laura Moskowitz – lmoskowitz@nelp.org



a total of \$2.03 million on implementation of the new laws. The number of undocumented immigrants that they have identified? — None, according to news reports. Mark P. Couch, *Pricey Immigration Law, State Agencies, \$2 million cost and no savings*, DENVER POST, January 25, 2007.

In Hazleton, Pennsylvania, the city lost its bid in court to enact such sanctions, and its insurer is refusing to pay \$2.4 million in the plaintiffs' attorney fees that the lawsuit cost, according to news reports. For these reasons, the city of Riverside, New Jersey recently rescinded its ordinance that sought to penalize immigrants from renting, residing, being employed or using property within that city.

Harsh employer sanctions won't solve our immigration crisis and will contribute to an economic crisis. States that have passed anti-immigrant bills, like Arizona and Oklahoma, are seeing immigrant families abandon their state and their economy. Labor commissioners and economists have expressed concern about the damage that such exodus might cause to states' economies, because studies show that immigrants represent a sum contribution to states' economies.¹ More importantly, immigration enforcement-only strategies do nothing to bring the some 8 million undocumented immigrants working in our country out of the shadows. All in all, legislation in this area subjects states and cities to grave risks.

Real problem, real solution. The real problem for state treasuries and immigrant and U.S. citizen workers are employers who pay workers "off the books," fail to provide workers' compensation or pay their fare share of payroll taxes, fail to offer workers a lawful wage and a safe place to work, and weak labor and employment enforcement regimes in many states. The solution is real labor standards, coupled with vigorous enforcement of those rules – a new kind of "employer sanction" against low-road employers who abuse all workers. NELP's paper on models for enforcement, called "From Anti-Immigrant to Pro-Worker," <http://www.nelp.org/docUploads/FromAnti-ImmigranttoPro-workerFinal.pdf>, offers some alternatives.

¹ See, e.g., See, Miriam Jordan, *Arizona Squeeze on Immigration Angers Business*, Wall Street Journal, Dec. 14, 2007, <http://online.wsj.com/article/SB119760108815428771.html>.

National Employment Law Project, 80 Maiden Lane, Suite 509, NY, NY 10038

Rebecca Smith – rsmith@nelp.org

Catherine Ruckelshaus – cruckelshaus@nelp.org

Omar Semidey – osemidey@nelp.org

Laura Moskowitz – lmoskowitz@nelp.org