

# THE NEW BATTLEGROUND

## IMMIGRATION IN THE STATES — THE OUTLOOK FOR BUSINESS



**I**N the wake of Congress's 2007 failure to pass comprehensive immigration reform, state authorities have rushed to fill the vacuum. Nothing they do can fix the broken immigration system – only Congress can do that. So they have done the one thing in their power: crack down harder – with more aggressive enforcement, new restrictions, new more punitive penalties. The consequences are being felt across the nation, in workplaces and immigrant neighborhoods. But nearly a year later, there are signs that some state lawmakers are questioning this approach – starting to see that while enforcement is a critical piece of the answer that's needed, enforcement alone will not solve the problem.

State lawmakers started this year's legislative sessions much the way they started last year's: with a flood of bills targeting illegal immigration and businesses found to have hired unauthorized workers.

During the first quarter of 2008, according to the National Conference of State Legislatures, more than 1,100 immigration-related bills were introduced in 44 states. The number of measures is comparable to the number introduced last year, when anti-immigration sentiment surged and states across the country competed to produce the toughest and most sweeping legislation. And it was widely expected that the momentum of new laws and new sanctions would only grow in 2008. But the results of this spring's legislative sessions have been more tempered than anticipated.

With most state sessions winding down, only six states have passed immigration laws that directly affect businesses. And many of the most severe proposals were defeated or scaled back after employer groups lobbied lawmakers to reconsider the economic effects of harsh penalties and burdensome regulations.

Still, the battle is far from over.

## STEPPING BACK FROM THE BRINK

Lawmakers around the country campaigned last year on a promise to crack down on employers who hire illegal immigrants, and many began the session determined to pass something they could take back to their constituents. But in several states, pragmatic legislators worked with immigrant advocates and business groups to craft legislation that would target egregious offenders without undermining the prosperity of the state.

In Virginia, a coalition of trade groups was able to block legislation that would have required all employers in the state to use the federal E-Verify system to confirm workers' immigration status. The business groups worked successfully with legislators to develop an alternative measure that did not impose additional burdens on companies making a good-faith effort to comply with the law but still allowed lawmakers to show constituents they were taking steps to fight illegal immigration.

Business also made progress in Arizona, where lawmakers produced new legislation amending the tough employer sanctions bill passed in the state last year, one of the nation's most punitive immigration laws. This year's changes, signed into law in May by Democratic Gov. Janet Napolitano, provide some clarification and relief for businesses facing new restrictions and penalties.

Contrary to expectations that many states would move this year to enact their own versions of the tough statutes passed last year in Arizona and Oklahoma, in fact few legislatures did. Business coalitions emerged in several states to fight back against proposed enforcement measures, and though they didn't always win, they showed it is possible to find legislative allies and craft compromises that employers can live with.

In Indiana and Kentucky, legislation was proposed and debated, but then defeated, thanks in part to efforts by business groups to demonstrate the economic consequences for the state. Employment-related bills were also discussed in Iowa, Idaho, Kansas, Tennessee and Wisconsin but then ran into obstacles or simply ran out of steam, and lawmakers in all five states went home without passing anything.

In Missouri and South Carolina, hardliners determined to mandate E-Verify for all employers battled for months with more pragmatic lawmakers. Both states passed measures in the final days of their legislative sessions. But neither new statute requires all businesses to enroll in E-Verify – and in South Carolina, checking an employee's driver's license will be enough to comply with the law.

## State Immigration Laws That Target Employers

Outlaws knowingly hiring unauthorized immigrants	AZ, CO, MO, MS, NH, SC, TN, WV
Revokes business licenses of employers who knowingly hire unauthorized workers	AZ, MO, MS, SC, TN, VA, WV
Requires all employers in the state to use E-Verify	AZ, MS
Requires businesses contracting with the state to use E-Verify	AZ, CO, GA, MN <sup>†</sup> , MO, MS, OK, RI <sup>†</sup> , UT
Shelters employers who use E-Verify from prosecution for knowingly hiring unauthorized immigrants	AZ, MO, MS, OK, SC, TN
Threatens employers who violate state immigration law with fines and jail	CO, MO, MS <sup>‡</sup> , OK, SC, WV
Outlaws harboring or transporting illegal immigrants, with potential implications for employers	MO, OK, SC, UT
Prohibits employers from deducting wages paid to unauthorized immigrants on their state income tax returns	GA, CO, MO, SC, WV
Makes it a felony to work illegally	MS
Allows terminated employees to sue if they are replaced by illegal immigrants	OK, MS, SC, UT

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<sup>†</sup> In MN and RI, E-Verify is mandated by executive order, not legislation

<sup>‡</sup> MS law opens unauthorized workers to felony charges, which may in turn implicate employers

## SOME BAD NEWS FOR BUSINESS

But while employer groups were able to hold off the worst in several states, the news was not all good for business this spring.

Mississippi legislators passed one of the nation's harshest employment-related immigration laws. Under the new measure, signed by Republican Gov. Haley Barbour in March, all employers in the state are required to use E-Verify. Businesses can have their licenses revoked for violating immigration laws and – for the first time in any state – unauthorized workers can be charged with a felony for accepting work in Mississippi. Some believe the law could also impose felony penalties against employers who hire illegal workers.

Mississippi was also at the forefront of one of the year's most troubling trends: laws giving authorized employees a "private right of action" – allowing U.S. citizens and permanent residents to sue their employers if they are fired and replaced by unauthorized workers. Oklahoma pioneered this idea in 2007, Utah and South Carolina enacted similar provisions this year, and other states are expected to follow suit in 2009.

In another new trend of concern to business, governors are stepping out ahead of their legislatures, issuing executive orders that crack down on illegal immigration. Orders signed this spring by Rhode Island Gov. Donald Carcieri (R) and Minnesota Gov. Tim Pawlenty (R) require state contractors to enroll in E-Verify, and the order in Minnesota mandates that state employees also be screened.

Meanwhile, lawmakers in states that proved unable to pass employment-related immigration bills vowed to continue the fight next year.

"We'll stay at it," Virginia legislator Paul F. Nichols (D) told the Washington Post. "We're not going to give up."

Lawmakers and employers, those in favor of the new laws and those against, all share a common prediction for the year or two ahead. Until Congress passes immigration reform, states will continue to take

matters into their own hands. While federal law says that the hiring of unauthorized workers is a matter for Congress, not the states, to regulate, political pressure at the state level is forcing lawmakers to push for cracking down. And with Congress unlikely to pass a broad overhaul in the year or two ahead – and a new White House expected to focus attention on other issues – states will continue to lead the legislative effort to make it harder for businesses to hire unauthorized workers.

## BYPASSING CONGRESS – A LEGAL GRAY AREA

Many legal experts say the bills being passed in state capitals are not constitutional, and many of the new laws are being challenged in court.

The U.S. Constitution gives federal law "supremacy" over state statutes. The 1986 Immigration Reform and Control Act (IRCA) explicitly prohibits states from imposing sanctions on businesses that hire unauthorized workers. But one phrase in the 1986 law – a seven-word parenthesis allowing states some leeway in the matter of "licenses and similar laws" – has created a contested gray area.

Many states have taken the IRCA parenthesis to mean they have the authority to suspend or revoke the business licenses of employers who hire unauthorized workers. Businesses and many constitutional lawyers disagree.

"You have this complex overlay of statutes and regulations and court cases, and you've got this federalism question of what has traditionally been federal power and what the states can do," Jan Ting, a Temple University law professor, told the Washington Post. "There could not be an area of law that is less clear than this."

Because states have until recently stayed away from imposing sanctions for immigration violations, federal preemption has rarely been tested and few court precedents exist.

But that is changing. As more and more states enact employment-related immigration laws, many are expected to end up in court.

**"There could not be an area of law that is less clear than this."**

~ Jan Ting, Temple University Law Professor

## REGULATING BUSINESS

**E-Verify.** The most common regulation states have imposed on businesses in recent years is requiring employers to use the federal E-Verify system to confirm workers' immigration status. Last year Arizona and this year Mississippi mandated that all employers – public and private – enroll in the program. This year, the governors of Rhode Island and Minnesota signed executive orders requiring state contractors to do so. Colorado, Georgia, Oklahoma and Utah also mandate it for contractors doing business with the state.

Georgia, Minnesota, North Carolina and Oklahoma require public employers to use it. Minnesota's executive order mandates that all state employees be screened. Minnesota also provides state subsidies and other economic incentives to businesses that enroll in the program.

When Illinois went in the other direction last year, it was a stark exception to the national trend. The state enacted legislation that prohibits employers from using E-Verify on the grounds that it is riddled with errors and likely to impose burdens on U.S. citizens. The Department of Homeland Security has sued the state to overturn the law, and Illinois has agreed not to enforce it until the case is decided.

But this year, lawmakers in several states are hesitating to mandate use of the federal screening system. Though both Missouri and South Carolina considered making it obligatory for all employers, in the end Missouri will require it only of state agencies and state contractors, while South Carolina will give businesses a choice: using E-Verify or checking employees' drivers' licenses. And Virginia lawmakers flatly rejected demands that they mandate enrollment for any employers.

Another growing trend: more and more states are passing measures that shelter employers who use E-Verify and other employment verification from prosecution if they are found to be employing unauthorized workers.



## LAWSUITS

Two lawsuits now making their way through the federal court system could restrict states' ability to continue to crack down on businesses that hire unauthorized workers.

One is a court challenge to the 2007 Arizona employer sanctions law filed by a coalition of Arizona trade groups. In February, a federal judge denied the coalition's request to delay implementation of the law with a temporary restraining order, and the plaintiffs took their case to the U.S. Ninth Circuit Court of Appeals. Oral arguments are scheduled for this summer and a decision is expected in the fall.

Another lawsuit making its way through the federal courts originated last year in Hazleton, PA, where a local ordinance enacted in 2006 denies business permits to employers who hire illegal immigrants and fines landlords who rent to them. In a ruling issued last summer, a federal judge struck down the Hazleton ordinance, saying it treads on federal terrain and violates illegal immigrants' constitutional right to due process. The town is appealing the decision, and the case will be heard in the U.S. Third Circuit Court of Appeals this summer. A decision in this case is also expected in the fall.

If the two appellate courts hand down similar rulings – either both upholding the local laws, or both asserting federal authority – the battle over federal preemption could end there.

But if the courts hand down opposing decisions – one supporting state authority and the other backing federal preemption – the debate will likely go to the Supreme Court. The consequence: no clear direction for state lawmakers for at least a year or two.

In the meantime, with the cases winding their way through the courts and Congress steering clear of the issue, states continue to press ahead.

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Arizona, for example, offers some protection to companies that use E-Verify for new hires and the federal Social Security Number Verification System for those employed before 2008.

**Executive orders.** Developments in Rhode Island and Minnesota, where governors have enacted executive orders requiring E-Verify, have left many businesses fearful that other state executives will begin imposing regulations without the input or approval of their legislatures. Republican Gov. Mark Sanford of South Carolina tried to take matters into his own hands in May, urging voters to come down to the statehouse and lobby legislators he disagreed with. And Republican Gov. Matt Blunt of Missouri threatened to call the state legislature back into session if lawmakers went home without passing an employer sanctions bill.

**Private right of action.** While E-Verify requirements have so far proven the most popular method to deter the hiring of illegal immigrants, some states are beginning to make use of another tool: giving employees a “private right of action.” Oklahoma was the first state to pass such legislation, in 2007, allowing fired U.S. workers to sue their employers if unauthorized workers were subsequently found to be working in their place.

Mississippi, Utah and South Carolina followed with similar provisions this year, allowing fired workers to sue if they are then replaced by illegal immigrants. Some say the laws could open businesses to lawsuits if they employ any unauthorized workers, whether or not they have hired them to replace fired legal workers. Other states are expected to adopt this approach next year.

**Felony laws.** Businesses are also worried about the precedent set this spring in Mississippi: a measure – the first ever in any state – that makes it a felony for illegal immigrants to accept unauthorized employment. Violators are subject to imprisonment from one to five years and fines of between \$1,000 and \$10,000. And while the measure seemingly applies only to unauthorized workers, many fear that the businesses that hire them could also be prosecuted for aiding and abetting a felony.

Oklahoma also imposed felony penalties, in 2007 – in that case, against anyone caught transporting, concealing, harboring or sheltering illegal immigrants in any location, including any building or means of transportation. Utah, Missouri and South Carolina passed similar measures this year, and many fear the provisions could be used against employers who knowingly hire unauthorized workers.

## “FIXING” ARIZONA

After a flood of complaints from business, Arizona lawmakers passed a bill this spring that clarifies the tough employer sanctions law passed in the state last year. The goal of the new measure: to tighten the 2007 law but also provide some protections for well-intentioned employers. Most importantly, the new measure makes clear that the employment provision in last year’s bill applies only to workers hired after Jan. 1, 2008. Under the original language, businesses faced tough new sanctions for unauthorized workers hired before the law went into effect.

Those penalties remain in place in cases of workers hired since Jan. 1, 2008: a 10-day suspension of business licenses for a first offense and a permanent revocation of licenses on a second offense.



### CASE STUDY

## ARIZONA EMPLOYERS STRUGGLE WITH LABOR SHORTAGES

Nothing frightens a small business owner more than uncertainty – and it would be hard to imagine a more uncertain business climate than Arizona in the last twelve months.

The employer sanctions law passed in July 2007 was alarming enough, but then came the confusion. Would the court challenge filed by a coalition of trade groups succeed in overturning the new law? Would a federal judge issue a restraining order to delay its implementation? Would the legislature amend the statute – and if so, how exactly? And would that push anti-immigrant groups to put a still more punitive employer sanctions measure on the ballot in November?

Also still in place: provisions mandating that all businesses in Arizona enroll in E-Verify and allowing prosecutors to investigate anonymous tips made against businesses alleged to be employing unauthorized workers.

The 2008 law provides some new legal protections for businesses that check the immigration status of workers hired before Jan. 1 through the Social Security Number Verification Service. And employers were relieved by the way the new measure limits the liability of companies with multiple work sites: as long as each site holds its own business license, a violation at one site applies only to that location and does not affect the other workplaces.

But employers were disappointed that the new law did not eliminate last year's provision permitting prosecutions on the basis of anonymous complaints and by the provision on independent contractors. Businesses remain liable if their contractors employ unauthorized workers.

Employers are also concerned that this year's changes may not prevent an anti-immigration voter initiative from appearing on the ballot in November, as lawmakers had hoped.

Still, Arizona employers were encouraged by the tone of the 2008 debate – less punitive and less one-sided than it was in 2007. Legislators on both sides of the aisle seem increasingly aware of the likelihood that an enforcement-only approach will create labor shortages in Arizona. And lawmakers are now considering legislation that would ask Congress's permission for an Arizona-only temporary worker program. The proposal would not apply to unauthorized workers already in Arizona. But it would allow qualifying companies to recruit workers in Mexico for a two-year term of employment. Many doubt that

Employers stopped trying to predict and prepared for the worst. Jason LeVecke, owner of more than 65 fast-food restaurants, said he would not open any new stores in Arizona until the law was clarified.

Richard Melman, a Chicago-based restaurateur with 75 businesses across the country, pulled the plug on an Asian-themed restaurant in Scottsdale, although he had already invested nearly \$100,000 in architects and designers.

"You put in \$3 million or \$4 million, and you can be shut down for a mistake." Melman told the Arizona Republic. "Why take a chance? I want to see how [the law] plays out."

The new employer sanctions were not the only threat. Unlike in other states – Massachusetts, Texas, Iowa – there have been no high-profile federal raids in Arizona, yet. But like employers everywhere, Arizona business owners are anxiously awaiting the outcome of the federal court battle over the Department of Homeland Security's proposed Social Security No-Match rule, which would create new legal liabilities for employers who fail to make sure that their employees are in the country legally.

## The consequences of an 'attrition' strategy

Meanwhile, the state legislative battle has played out against a backdrop of rising fear. The new employment-related law is just one piece of a larger strategy known among anti-immigrant activists as "attrition." The next best thing in hardliners' minds to deporting the state's half million undocumented residents, this approach sets out to make their lives so miserable that they leave the country voluntarily. The other two pillars of the strategy: laws depriving unauthorized immigrants of government benefits and a campaign of draconian street sweeps.

Maricopa County Sheriff Joe Arpaio has led the charge in the streets. A typical operation – and they have become commonplace in Latino neighborhoods – involve a squad of officers, marked and unmarked cars and a hovering helicopter. Officers stop drivers for small infractions – a broken tail light is enough – to inquire about their immigration status. Then they arrest and deport those who cannot prove they are in the state legally.

The result: over the past year, some 7000 unauthorized immigrants have been detained in Maricopa County. And now anti-immigrant vigilantes are getting in on the act: photographing license plates at day labor centers and turning them over to Arpaio.

In this climate, some employers are eager to enroll in the federal E-Verify system now mandated by state law for all employees hired after Jan. 1, 2008 – at least it offers a measure of certainty.



Washington would grant approval for a stand-alone program in a single state. Still, Arizona employers are encouraged by the strong support the proposal has received from both Democrats and Republicans. And business groups hope that passage of the measure will send a signal to Washington, prompting faster federal action on comprehensive immigration reform – especially if similar temporary worker programs are enacted next year in other states.

## BUSINESS PUSHES BACK

As states increasingly target employers, business coalitions are forming to fight back. In state after state, the threat of legislation has prompted trade groups from an array of sectors to form a united front to make their case to legislators and the local media. Some of these coalitions are ad hoc and transient, others digging in for a longer haul. Some are focused solely on state matters, others also looking ahead to the Congressional immigration debate. And as proponents of punitive enforcement policies have been communicating and sharing ideas from state to state, so now business coalitions too are starting to learn from each other.

### Enforcement employers can live with

Rather than simply say no – rather than trying to block any and all legislation – several coalitions cooperated with lawmakers this spring to craft enforcement measures that business could live with. The result: compromise bills that allow elected officials to show constituents that they are cracking down on illegal immigration but do

Fifteen percent of state's 150,000 employers have signed up for the program so far.

One Phoenix restaurant owner, who asked that his name not be used, explained his reasoning. "My hands shake whenever I fill out an I-9 form," he said. "I haven't been this upset about legislation since I started doing business here two decades ago."

"The real zinger," he explained, "is the anonymous complaints. Allowing complaints to be made anonymously just opens up a Pandora's Box."

The restaurateur grumbled about the E-Verify enrollment procedure: a three- to four-hour training session, followed by a test. Still, he said he will use the system as long as it protects him against "the INS crashing down my door."

Others are less happy with the program: Ken Nagel, co-owner of the Aunt Chilada's and the Rustler's Rooste restaurants in Phoenix, recently hired one of his own daughters – who was born in the United States – to work for him. But when he ran her information through E-Verify, she flunked the eligibility check.

Between October 2006 and March 2007, according to the Los Angeles Times, more than 3,200 foreign-born U.S. citizens nationwide were erroneously flagged by E-Verify and temporarily disqualified from working.

Meanwhile, with frightened migrants said to be leaving Arizona in large numbers, the main problem for many businesses is finding workers. Lettuce growers in Yuma are paying employees between \$10 and \$19 an hour and are still having trouble harvesting their crops. Steel contractor Sheridan Bailey estimates that he has lost "four to five million bucks over a year's time" in potential business he could not bid on because of difficulty recruiting a legal labor force.

"In a state with 3 to 5 percent unemployment," said the Phoenix restaurant owner, "you're getting rid of 12 percent of the workforce. There are a lot fewer people applying for these jobs. By the end of the year, it could get ugly."

No wonder, for many employers, the Arizona temporary worker program moving through the legislature seems almost too good to be true.

not burden employers trying to comply with federal law.

An ad hoc coalition pioneered this approach in Georgia in 2006, and a group in Virginia picked up on it in preparation for this legislative session.

"We felt it was very important to have alternative bills," said Hobe Bauhan, president of the Virginia Poultry Federation and a leading member of his state's coalition, Virginia Employers

for Sensible Immigration Policy. "We repeatedly heard from the legislators we met before the session began that they had campaigned on the issue of immigration and they had to have something they could take back to their constituents."

The Virginia coalition worked with lawmakers to develop a compromise measure that goes after CEOs and other top executives who are

convicted under federal law of deliberately and repeatedly hiring unauthorized workers. The new Virginia statute punishes what Bauhan calls the “worst of the worst” but does not threaten employers who are making a good-faith effort to comply with the law. It also protects businesses where rogue managers

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**In state after state, the threat of legislation has prompted trade groups to come together in a united front to make their case to legislators.**

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at lower levels have gone out on their own and hired unauthorized workers.

Virginia business groups also worked with lawmakers to craft a compromise for businesses that contract with the state. Rather than

requiring such companies to enroll in E-Verify, as many states do and Virginia lawmakers considered, the new law mandates language in state contracts affirming that the contractor will not knowingly hire unauthorized workers.

**Templates for other states**

A similar business coalition in South Carolina worked with legislators to beat back a measure mandating that all employers in the state enroll in E-Verify. One of the compromises they considered: allowing employers to choose among several methods of screening workers – the E-Verify system, I-9 forms, drivers’ licenses or a new paper-based state program called SC-Verify. The idea behind this more tempered proposal: lawmakers could feel secure that businesses were taking action to weed out unauthorized workers, while employers would have options,

allowing them to choose the verification system that worked best for their business situation. In the end, the new statute limits the choice to E-Verify or drivers’ licenses. Still, the provision sets a precedent – a potential template for legislators in other states.

Employers in Arizona came up with yet a third concept. The compromise worked out there and enacted as part of the bill amending Arizona’s 2007 law is also intended to target “bad actor” employers but protect those who try to play by the rules. The gist of the provision: instead of cracking down further on all employers in the state, to target those who intentionally violate immigration law by paying employees in cash and making a pattern and practice of avoiding a paper trail for foreign workers. This measure too creates a template that can be used in the future by other states.

**WHAT STATES REQUIRE E-VERIFY**

	STATE	MEASURES	YEAR	APPLIES TO
1	Arizona	HB 2779	2007	all employers, public and private
2	Colorado	HB 1343	2006	state contractors
3	Georgia	SB 529	2006	state agencies, contractors, and subcontractors
4	Idaho	Executive order	2006	state agencies
5	Minnesota	Executive order	2008	state agencies, state contracts
6	Mississippi	SB 2988	2008	all employers, public and private
7	Missouri	HB 1549	2008	public employers, some contractors
8	North Carolina	SB 1523	2006	state agencies
9	Oklahoma	HB 1804	2007	public employers, contractors, subcontractors
10	Rhode Island	Executive order	2008	state agencies, contractors
11	South Carolina	H 4400	2008	public employers
12	Utah	SB 81	2008	public employers



## Changing the climate

In still other states, business coalitions working to educate lawmakers about the potential downsides of employment-related immigration measures succeeded in creating a climate in which restraint could prevail.

Business groups explained to lawmakers that a patchwork of contradicting state regulations would make it difficult for companies to operate nationwide. They underscored the burdens that mandating E-Verify could impose on U.S. workers, whose Social Security records are often inaccurate and who could be wrongfully rejected by the system. And they pointed out the consequences of the laws passed last year in Arizona and Oklahoma: large numbers of workers, legal and illegal, fleeing both states and, in Oklahoma, according to the Oklahoma Bankers Association, an estimated price tag of \$1.8 billion a year in lost productivity and wages.

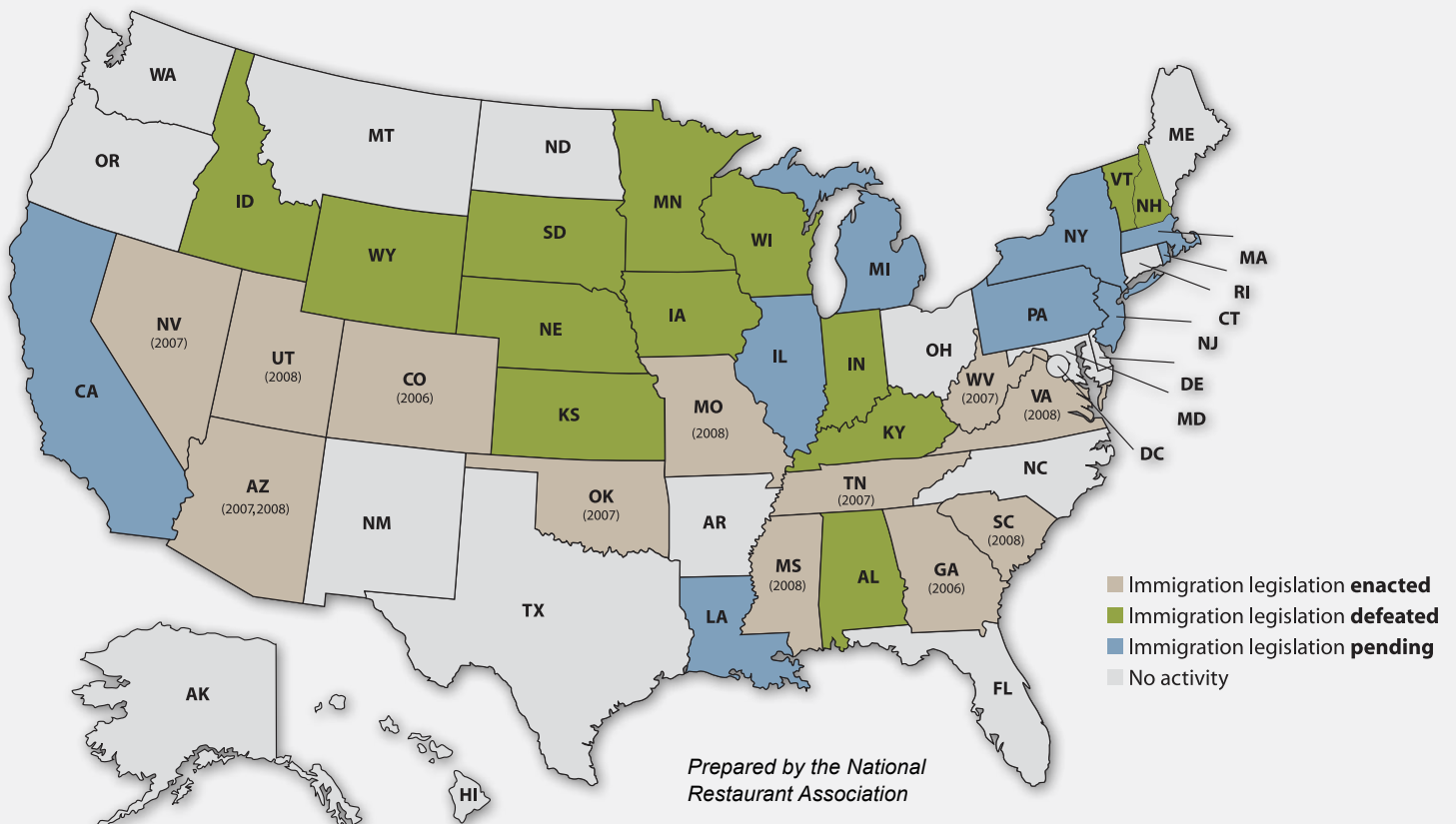
Some lawmakers shrugged off these arguments, saying that was exactly what they wanted – illegal immigrants fleeing their state in droves. But in other states, lawmakers had second thoughts.

Indiana was well on its way to passing a version of Arizona's tough 2007 law – requiring all employers to use E-Verify and revoking the business licenses of those found to be hiring unauthorized workers. But an ad hoc business coalition managed to sow enough doubt about the unintended consequences of the measure that when a chief sponsor started making tactical mistakes, fellow lawmakers backed away from the legislation.

So too in Kentucky, business groups were not directly responsible for defeating a measure modeled on Arizona's. But they and immigrant advocates raised enough questions about the bill that the chair of the House Judiciary committee killed it single-handedly before it could come up for a vote.

## STATE IMMIGRATION LEGISLATION

### MEASURES REQUIRING EMPLOYMENT VERIFICATION OR IMPOSING PENALTIES ON EMPLOYERS



## OUTLOOK

While businesses have won a number of battles against new immigration regulations this year, and legal action against state laws is moving forward, state legislative efforts to impose strict penalties and stop businesses from hiring unauthorized workers are far from over.

### Autumn surprises – and next year

Several state legislatures still have weeks left in their sessions and are continuing to consider immigration proposals. And in many states, even the end of the session will not spell certain relief. With the economic

slowdown cramping business and cutting into tax revenues, legislatures in several states are expected to reconvene for special sessions in the fall. And the must-pass budget bills likely to move in such sessions will make appealing targets for lawmakers seeking to attach immigration enforcement provisions.

Meanwhile, lawmakers in other states are already looking ahead to next year.

In Texas, which had no legislative session this winter, Republicans are busy preparing for January 2009. Among the measures they are considering: penalties for businesses that knowingly hire illegal immigrants,

ending public assistance for those in the state illegally, empowering state and local police to enforce federal immigration law, making English the official language of Texas, barring illegal immigrants from filing lawsuits, challenging the Constitutional right of birthright citizenship for immigrant children born in the U.S. and taxing the estimated \$6 billion in remittances that immigrants send every year from Texas to Mexico.

Illegal immigration is also expected to be high on the agenda next year in Alabama, Florida, New Jersey, North Carolina and Missouri, among other states.

## CASE STUDY

### A SEAT AT THE TABLE IN VIRGINIA

At the start of 2008, lawmakers in the Virginia state legislature introduced more than 100 bills aimed at cracking down on illegal immigration. Among the measures directly targeting employers, some threatened to close down businesses found to be hiring illegal immigrants. Others would have mandated use of the federal E-Verify system.



But while many Virginia lawmakers campaigned last year promising to do something about illegal immigration, only a handful of immigration-related proposals were approved by the legislature. Only two

of the new laws affect employers, and they were crafted in cooperation with state business leaders who fully supported their passage. One prohibits state contractors from knowingly hiring unauthorized workers – as part of their contract with the state, they agree not to. The other revokes the business licenses of firms whose top officials have been convicted under federal law for knowingly hiring illegal immigrants.

Hobey Bauhan, president of the Virginia Poultry Federation, is a member of a coalition of business leaders that lobbied the state legislature and worked closely with lawmakers to craft the two bills – laws that target deliberate lawbreaking but not employers trying to comply with federal law.

#### **IW:** What happened this year in Virginia? How did you avoid the anti-business crackdown that many expected?

**HB:** I credit two things. First, the fact that we were able to develop a broad-based business coalition – a coalition formed last summer before the legislative session even started. We pooled our resources and energy, and the business community has spoken with one, unified voice.

I also credit the common sense of Virginia legislators. It's no accident that Forbes magazine has ranked Virginia the Number One state for business. Our state legislative officials try to avoid policies they know are going to be bad for business. When it came to immigration, they took very seriously the issue of federal preemption. Anything that violated federal preemption was off the table.

#### **IW:** How did you organize the business coalition?

**HB:** Even before the state legislature convened, we knew immigration was going to be a big issue. Immigration bills were debated in the 2007 legislative session. The U.S. Congress was considering the comprehensive package. We knew this was an issue that was not going to go away.

We also knew we would benefit by working together rather than having individual trade groups working on their own. So we formed the coalition in the summer of 2007.

The Virginia Agribusiness Council was the catalyst. They sent an email to all the relevant employer groups inviting them to a meeting: the Chamber of Commerce, the Virginia Manufacturers Association, the NFIB, the Home Builders Association – everyone. At that meeting, we formed an informal coalition: a loose bipartisan group that worked well together through the session. We called ourselves Virginia Employers for Sensible Immigration Policy.

### **IW: What did the coalition do in the months before the legislative session began?**

**HB:** We started by developing a set of four core principles. First, that federal preemption prohibits states from enacting immigration laws. Second, that we as employers support federal immigration reform that secures our borders. Third, that businesses need policies that ensure they have access to an adequate, legal workforce. And finally that the federal employment verification system needs to be fixed – needs to be improved. We also opposed state policies that placed burdens on employers who were trying to comply with federal law.

Second, we put together an educational package that provided information about federal preemption, the I-9 process and other immigration issues we cared about. We sent the educational package to all Virginia legislators.

Then in fall 2007, we set up meetings with key lawmakers, including the chairmen and ranking members of the committees that deal with immigration. We asked for the opportunity to have a seat at the table. And we paved a good bit of ground before the legislature even began.

Virginia has a state Commission on Immigration and a state Crime Commission task force on immigration. Both were having meetings in the months before the legislative session, and we attended those meetings. In early January, on the eve of the session, the Commission on Immigration invited our coalition to testify at a meeting.

### **IW: How did you work with lawmakers once the legislative session convened?**

**HB:** We knew there would be dozens and dozens of bills introduced and that the heavy lifting would occur during the session.

So we went to the leadership on the key committees and asked for the opportunity to be part of the negotiations.

We started by making a list of all the pending legislation. There were bills that mandated E-Verify, bills to penalize employers, bills requiring certification of state contractors. We had developed issue papers on all of this, including the most difficult issue of federal preemption. And we used these papers as the basis for our conversations with legislators.

### **IW: How did you help craft legislation?**

**HB:** Because we had prepared the ground in the preceding months, we were able to get a seat at the table to help craft legislation that was acceptable to us.

We felt it was very important to have alternative bills. We repeatedly heard from the legislators we met before the session began that they had campaigned on the issue of immigration and they had to have something they could take back to their constituents.

So we watched what was introduced. We took the pulse of the session to see what legislative vehicles could move forward. And we came up with legislative language that targeted “the worst of the worst” employers – those who deliberately hire undocumented workers – but without burdening those who are trying not to violate federal law.

It was really a back-and-forth kind of thing, ongoing communication between the coalition and the legislators to develop language that served their need to pass something, but did not threaten employers who are trying to play by the rules.

Bottom line: it was much better to sit at the table and craft something we could live with rather than just saying no and fighting anything and everything.

Because even if we had succeeded, immigration would just fester as an issue and would come back to haunt us again next year.



### **IW: Are you already preparing for next year?**

**HB:** We're following the Commission on Immigration and what they're doing.

I've also been an advocate for ramping up our coalition on the federal level. The issue is not going to go away until Congress adopts meaningful reforms. We employers in Virginia have got to put together a grassroots coalition to work on the federal level.

### **IW: What advice do you have for businesses in other states?**

**HB:** The basic advice is that coalitions work. They work well.

Every state is different. Every legislative climate is different. But businesses in each state need to get as organized as they can and get a read on the political dynamics and respond in a proactive manner.

Individual businesses also need to get involved in these coalitions, not just employer associations. It will take individual businesspeople communicating with Congress and state legislators to educate lawmakers about employers' concerns. Lawmakers get thousand of calls from people who don't understand how critical foreign workers are to our economy – people influenced by talk show hosts who don't seem to understand the economic ramifications of what they are advocating. Employers need to counter that. They need to tell their elected representatives that rational federal reform is essential – essential to them as employers and essential to economic growth in their legislative districts.

# STATE IMMIGRATION LAWS ENACTED IN 2008

Employment laws are subject to legal interpretation and review. Please contact the appropriate state agency for full details and guidance on compliance.

## ARIZONA

### New legislation amending the state's 2007 immigration law

- Clarifies that the 2007 law mandating that all employers use E-Verify applies only to employees hired after Jan. 1, 2008.
- Provides some legal protections for employers if they screen workers hired before Jan. 1 through the Social Security Number Verification Service.
- For businesses with multiple work sites, stipulates that a violation at one site applies only to that location and does not affect other workplaces.
- Clarifies that independent contractors are among the employers subject to penalties for knowingly hiring unauthorized workers.
- Extends the reach of state sanctions to employers who pay workers in cash. Requires employers to comply with the state's tax-withholding laws, worker-compensation laws and other reporting requirements or face fines as high as \$5,000.
- Mandates that local governments verify an individual is lawfully present in the U.S. before issuing any type of license.

## MISSISSIPPI

- Requires all employers to use E-Verify.
  - State agencies and employers with at least 250 employees must comply by July 1, 2008.
  - Employers with 100 to 249 employees must comply by July 1, 2009.
  - Employers with 30 to 99 employees must comply by July 1, 2010.
  - All other employers must comply by July 1, 2011.
- Makes it a felony for unauthorized workers to knowingly accept or perform work in the state.
- Creates private cause of action for legal U.S. residents fired and replaced by unauthorized workers.

## MISSOURI<sup>†</sup>

- Requires public employers and businesses bidding on state contracts to use E-Verify. Other businesses are not required to enroll, but those that do are sheltered from penalties.
- Suspends licenses of businesses found to employ illegal immigrants: 14 days for a first violation, one year for a second, permanent revocation for a third offense.
- Prohibits employers from knowingly "misclassifying" workers as independent contractors.
- Creates a system for prosecuting employers on the basis of citizen complaints, but includes protections against frivolous charges.
- Only the federal government can determine that a worker is unauthorized, and the state can take no punitive action without federal confirmation of an infraction.

<sup>†</sup> Bill not yet signed by governor.

## **SOUTH CAROLINA**

- Requires public employers to use E-Verify.
- Gives private employers two options for verifying workers' immigration status: either E-verify or by checking workers' drivers' licenses.
- Shelters businesses that use E-verify from prosecution.
- Suspends business licenses of employers knowingly hiring illegal immigrants: up to 30 days for a first violation, up to 60 days for a second, permanent revocation for a third offense.
- Allows US residents to sue employers if they have been fired and replaced by illegal immigrants, but high standards of proof must be met for a plaintiff to prevail.

## **UTAH**

- Requires all businesses contracting with the state to use E-Verify.
- Creates private cause of action for legal U.S. residents fired and replaced by unauthorized workers.
- Makes it a Class A misdemeanor to transport, conceal or harbor an illegal immigrant.

## **VIRGINIA**

- Suspends the ability to do business in the state of companies whose officers or directors are convicted of breaking federal law by knowingly hiring illegal immigrants.
- Requires employers signing state contracts to state that they will not knowingly employ unauthorized workers.



ImmigrationWorks USA is a national organization advancing immigration reform that works for all Americans – employers, workers and citizens. Its twin goals: to educate the public about the benefits of immigration and build a mainstream grassroots constituency in favor of an overhaul – business owners and others from across America willing to speak out and demand that it gets done. The organization links some 20 state-based business coalitions: employers and trade associations from Florida to Oregon and from every sector of the economy that relies on immigrant workers. For more information, visit [www.ImmigrationWorksUSA.org](http://www.ImmigrationWorksUSA.org) or contact us at [info@immigrationworksusa.org](mailto:info@immigrationworksusa.org).

[ImmigrationWorksUSA.org](http://ImmigrationWorksUSA.org)