INTRODUCTION TO EMPLOYMENT IMMIGRATION ISSUES

GENICE A.G. RABE
4308 Orchard Heights Rd., N.W.
Salem, Oregon 97302
503-371-6347
rabelaw@prodigy.net

State Bar of Texas
17th ANNUAL ADVANCED EMPLOYMENT LAW COURSE
January 22-23, 2009
San Antonio

CHAPTER 6.1
TABLE OF CONTENTS

I. DEMOGRAPHICS ................................................................................................................................................. 1

II. OVERVIEW OF IMMIGRATION LAW AND UNDOCUMENTED IMMIGRANTS................................. 1
   A. Background ................................................................................................................................................. 1
      1. The Immigration Reform and Control Act (IRCA) ................................................................. 1
      2. Heightened Enforcement of Immigration Laws ............................................................................. 2
      3. The North Atlantic Free Trade Association (NAFTA) and Commerce .................................................. 2
      4. Texas and Immigrants ..................................................................................................................... 2
   B. The Result – The Present Situation ................................................................................................................. 2
      1. Unauthorized Immigrants ........................................................................................................ 2
      2. Employers ............................................................................................................................ 3
      3. The Courts and by Extension Everyone .................................................................................. 3
   C. The Future ....................................................................................................................................................... 3

III. CONCLUSION ....................................................................................................................................................... 3
INTRODUCTION TO EMPLOYMENT IMMIGRATION ISSUES

I. DEMOGRAPHICS

The population of the United States numbers about 300 million people. The foreign born population is approximately 39 million. Unauthorized immigrants comprise about 30 percent of the foreign born population. They numbered about 12 million in 2008 and over 8 million of them worked. The estimate of the number of unauthorized immigrants declined slightly from the high reached in 2007 of 12.4 million to 11.9 million in 2008.

The U.S. civilian workforce population in 2007 was about 153 million. The foreign born workforce was approximately 24 million. About 80 percent of undocumented immigrants come from Latin American countries. Almost 60 percent, 7 million people, are from Mexico.

The population of Texas was approximately 23.5 million in 2006. The foreign born Texas population was about 3.6 million. The unauthorized immigrant population in Texas was estimated variously from 2005 to 2007 at 1.4 million to 1.6 million. Thus, Texas has a higher percentage of both foreign born and unauthorized immigrants than the nation.

Foreign born workers earn less money, are younger, and participate in the work force at higher rates than native born workers. In 2007 the median weekly income of the native born civilian population was $772. The weekly wage of foreign born workers was $554 and $448 for foreign born Hispanics. Foreign born workers were also younger. 77.4 percent of 25-54 year-old foreign workers were employed, while 66.6% of native born persons in the same age group worked. Foreign born workers also included more males. Males comprised 60.3% of the foreign born workforce and 52.4% of the native born workers. And a higher percentage of the foreign born were in the civilian labor force. Foreign born males participated in the work force at the rate of 81.9%, while the participation rate for native born males was 71.6%.

Foreign born workers are increasing as a percentage of the U.S. civilian workforce. They comprised approximately 11% of the workforce in 2000 and 15.7% in 2007. From 2005-2050, population growth is estimated to be about 82%. 117 million of that increase may be due to immigrants and their children and grandchildren. Immigrants are estimated to comprise 67 million of the increase and their children and grandchildren approximately 50 million. From 2000-2007, the foreign born accounted for a little less that one-half of the net increase in the civilian labor force.

Foreign born workers will constitute a high percentage of U.S. labor in the future.

II. OVERVIEW OF IMMIGRATION LAW AND UNDOCUMENTED IMMIGRANTS

A. Background

1. The Immigration Reform and Control Act (IRCA)

Before 1986 it was not illegal to hire unauthorized immigrants, for unauthorized immigrants to work, or for unauthorized immigrants to accept work. In 1986, Congress passed the Immigration Reform and Control Act (IRCA). IRCA, in 1986, mandated employer verification of status and imposed sanctions for employers who knowingly employed undocumented workers.


Passel and Cohn, supra note 3.

U.S. Census Bureau


9 U.S. Census Bureau
of fraudulent documents to work. It has been and remains unlawful for an employer to make a report to immigration officials in retaliation for workplace complaints.

2. **Heightened Enforcement of Immigration Laws**
   The last Bush Administration heightened enforcement efforts aimed at illegal immigration. The “zero tolerance” or “Operation Streamline II” program began as a pilot program in 2005 in Del Rio, Texas, and then spread along the southwestern border. Undocumented immigrants now regularly face jail time of up to six months. Over half of all federal criminal prosecutions are immigration cases. Since 1995, the border patrol has tripled in size, from 6000 to 18,000. And a tall fence is being built along the Mexican border.

3. **The North Atlantic Free Trade Association (NAFTA) and Commerce**
   The North Atlantic Free Trade Association (NAFTA) increased commerce between the United States and Mexico. Eighty percent of that trade passes through Texas borders cities. In addition, Mexicans from sister cities of the Texas border cities enter legally and buy goods in Texas. Commerce is reciprocal, but because the Mexican sister cities are generally many times larger than their Texas counterparts, the balance favors Texas merchants. NAFTA and the increase in commerce has resulted in higher employment in border counties. For instance the economy is booming in Laredo and unemployment has fallen steeply in McAllen.

4. **Texas and Immigrants**
   The Texas border counties and cities have a special relationship with their Mexican counterparts. The border has long been porous for commercial, cultural, and family reasons. Texas border counties are more heavily Hispanic than some other southwestern states. While 25 percent of the population in the border areas in California is Hispanic, in Texas it is 85 percent. This shared cultural and commercial history has contributed in Texas to a relative tolerance to legal and illegal border crossings. The new wall is not welcomed by many.

B. **The Result – The Present Situation**
   1. **Unauthorized Immigrants**
      Under the “zero tolerance” policy, entrance into the U.S. is more difficult for undocumented immigrants. Instead of facing deportation, they now face jail time. Higher immigration control has also increased the cost and danger to entering foreign nationals without papers. Increasingly, drug cartels are serving as human smugglers or “coyotes.” They charge several times the previous going rate.

      Deaths of entering undocumented immigrants have increased dramatically in the last ten years. From 1998 to 2004, 1954 people died trying to enter the U.S. In 2005, the deaths exceeded 500. Most of these deaths were due to exposure, drowning, traffic accidents, and homicide. In comparison, about 5 percent of U.S. residents in the same geographic area die from these causes. Approximately 300 people died attempting to cross the Berlin Wall during its 28 year history.

      With greater enforcement, cost, danger, the cyclical migration of undocumented workers has ended. Where before many unauthorized workers returned to their homes and communities, they cannot do so now. Their chances of reentering the United States are severely diminished. The typical unauthorized immigrant now remains in the United States. Nearly 40 percent of undocumented immigrants have been here since at least 2000.

      The present enforcement policy has caused disruption to families, resulted in lost income, and deportation. The increasing and high profile Immigration and Customs Enforcement (ICE) raids have brought these circumstances to widespread attention. The family break ups are heart wrenching. Children born in the United States to undocumented immigrants are U.S. citizens. Thus, when one or two of their parents are arrested, face deportation, or are deported, the children have lost their parents and their support.

16 See, Sure-Tan Inc. v. NLRB, 467 U.S. 883 (1984) (Employer violated the NLRA by reporting its illegal-immigrant employees to the INS in retaliation for union activities.).
18 Good neighbours make fences, The Economist, October 2, 2008. The article can also be found at http://economist.com/world/americans/PrinterFreindly.cfm?story_id=12332971.
All immigrants including unauthorized immigrants face workplace challenges. The undocumented particularly are afraid to complain of discrimination or wage violations and thus tolerate them. Despite the illegality of retaliation, undocumented workers are not entitled to all the remedies of legal immigrants and the native born.\textsuperscript{21} They also face questions about their immigrant status and the accompanying threats to their presence in the U.S.\textsuperscript{22}

2. Employers

Employers of unauthorized workers face more review and requirements as well as criminal liability. The immigration raids also disrupt their businesses. In Pottsville, Iowa, the major employer in a small town fell into bankruptcy after an ICE raid. The Agriprocessors plant in Pottsville faced 10 million dollars in wage violation fines and 9300 criminal charges of child labor violations.\textsuperscript{23}

3. The Courts and by Extension Everyone

The federal courts in the border counties, including South Texas and West Texas have experienced dramatic increases in their case loads due to immigration prosecution. For instance, while the average felony caseload per authorized federal judgesship nationwide is 87, the two federal judges in Laredo (S.D. Texas) have 2800 felony cases or 1400 each. The U.S. Attorneys prosecuting these cases and the Public Defenders defending them have experienced similar increased workloads.\textsuperscript{24}

The federal judges, magistrate judges, prosecutors, and public defenders in border cities have had to adapt to these huge caseloads. The results for defendants include facing arraignments, pleas, and other court appearances en masse. In this atmosphere and without the background of U.S. citizens, likely little education, and through an interpreter, these individuals are asked to waive constitutional rights.\textsuperscript{25} The short cuts taken to handle this exploding case load could eventually apply to everyone. If such measures are acceptable for any one in federal court, they apply to all.

C. The Future

Immigration reform will not likely be one of the first issues tackled by the new administration. The recession and economy will be the first priority. But the economy may result in some amelioration. With fewer jobs in the U.S., the draw to immigrants may decline. Native born may be more likely to take the available jobs. The increased enforcement, danger of crossing, and decline in the Mexican birth rate may also lessen the pressure to emigrate.

III. CONCLUSION

The panel of an employee attorney, employer attorney, and Federal Judge, all of whom have extensive experience in the immigrant employment area, will address some of the issues faced by immigrants, employers, and the Courts.

\textsuperscript{21} The Supreme Court held in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d71 (2002), that under the National Labor Relations Act, undocumented workers may not be entitled to back pay (for time not actually worked) and/or reinstatement that substitutes for or continues employment that is illegal.

\textsuperscript{22} Keith Cunningham-Parmeter, Fear of Discovery: Immigrant Workers and the Fifth Amendment, 41 Cornell Int’l L.J. 27 (2008).

\textsuperscript{23} Steven Greenhouse, Shuttered Meat Plant Edges Back into Business, but Its Town Is Still Struggling, N.Y. Times, December 5, 2008. In addition to the company’s bankruptcy, the jailed former chief executive faces criminal felony charges including harboring unauthorized immigrants for profit and abetting document fraud and identity fraud. The May 2008 ICE raid resulted in the arrest of 389 undocumented workers, the stranding of 160 documented immigrant workers, unemployment for hundreds of native born, unpaid wages, and pressures on the local food pantry and churches who are feeding and housing undocumented workers facing deportation and their legal children


\textsuperscript{25} Id.