

U.S. Federal Government and Employers

Enforcing Immigration Law

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Introduction

The objective of this paper is to give a detailed account of the human resource (HR) hiring and screening process of alien employees and the potential problems which HR departments may face in the process. There are underlying federal policies which dictate the HR hiring process. Illegal immigrants have been a controversial component of the American labor force, especially illegal immigrants from Mexico. Today, aliens are becoming a permanent fixture in America. The federal government, federal agencies, and employers are working together to ensure aliens are authorized with proper and legitimate documentation. The federal government's past and current involvement in the issue is necessary in addressing illegal worker status. The duty of Congress or an independent regulatory body is to ensure policy is in place to address and alleviate the social and economic problems associated with immigration. More importantly, the employment policies of America evolve in political and economic contexts, and many repercussions have to be considered in creating this type of social and foreign policy. Illegal immigrant employment issues have fueled policy changes in the past, a series of policies have developed overtime as American circumstances and values have changed.

The American workforce, employers, as well as, government faces the dynamic challenge of adapting in a context of globalization and diminishing borders.

List C: the Visa for Immigrants and Nonimmigrants

Verification requirements were set by the Immigration Reform and Control Act of 1986 (Kirkpatrick, 2001). In the initial hiring process, an immigrant or foreign worker will most likely provide a form of documentation from List C which requires verification of citizen or work status. The United States Embassies provide the visa as an official document to gain entry into the states; visas can fall into two broad categories of “temporary (or nonimmigrant) and permanent (or immigrant)” (Fisher, 2007). Permanent visas allow individuals to relocate into America and have access to employment indefinitely. Temporary visas do not allow individuals the liberty to extend their stay in America beyond what is “reflected on the arrival/departure (I-94) card the alien receives upon entry to the United States” (Fisher, 2007). There are quotas for the number of immigrant and nonimmigrant visas which can be issued in a one year period; quotas attempt to regulate the flow and documentation of legal foreign workers into the America.

Mexico is and has been a constant source of legal and illegal workers. America is an attractive place to find work and make decent money to self-sustain. Mexico’s

close proximity to the states allow aliens to work for a period of time and easily transfer funds to or travel back to family in Mexico. Mexican's can come as immigrants, illegal immigrants, or temporary workers (nonimmigrants). Those who come as temporary workers can and do exceed their departure date and disappear into the American population. This is why the human resource employee verification process is imperative in upholding U.S. policy. The employer is an important actor in law enforcement and must develop a discerning eye in the hiring process to avoid the risk of future sanction for overlooking the illegal worker status of an employee.

Employee Verification: Title VII Concerns

The human resource department will review the combination of documentation which the employee chooses to provide and can not ask for additional documentation or proof of employment eligibility. One of the major problems in the initial stage of the hiring process is falsified documents from employees. In the case of suspicion, the HR department has to remain aware of the repercussions of violating Equal Employment Opportunity as stated under Title VII of the Civil Rights Act of 1964. Title VII "prohibits employment discrimination on the basis of race, color, religion, sex, [and] national origin" (DeNisi, 2007, 1) and HR discernment can be mistaken for discrimination. The following

actions can be qualified as discrimination: “refusal or failure to hire, discharge of any individual, or discrimination ...with respect to compensation, terms, conditions or privileges of employment” (DeNisi, 2007, 2).

Guest Worker Programs Reduce Illegal Worker Status

The larger context of the American government, as well as, social and democratic values should be considered in order to understand the nature of alien employment issues affecting HR. In the past, the government has put temporary “guest worker” programs into place to alleviate the illegal status of needed labor. These types of programs were started out of necessity during WWI and WWII. During WWII, the Bracero program “brought several million Mexican agricultural workers into the United States” (Congressional, 2005, 164) as a result of a shortage of male labor in the existing labor force and it “lasted until 1964” (Congressional, 2005, 164). “At its peak in the late 1950s, the Bracero program employed 400,000 Mexican workers annually” (Congressional, 2005, 164) illustrating the comprehensive nature of the policy and its practicality during wartime. The American government is trying to find equilibrium between politics and economy. The potential balance needed for government and business is in a guest worker program which fits the 21st century labor market needs.

Current Temporary Worker Programs

Today, the “two main programs for importing temporary low skilled workers” (Congressional, 2005, 164) are the H-2A and H-2B programs, and each are named after “the sections of the [Immigration and Nationality Act of 1952] INA that established them” (Congressional, 2005, 164). The H2 programs allow varying degrees of temporary labor into the states on a legal basis. These “programs are administered by the Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security (DHS)” (Congressional, 2005, 164) and these federal agencies are far removed from the public administrators in HR departments trying to cope with the complexities of the H2 programs and requirements. The stipulation for the employer is that “there are not sufficient U.S. workers who are qualified and available to perform the work,” and “the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed” (Congressional, 2005, 164). However, these types of impacts are not noticed on the immediate hiring of individuals from the H2 programs, but the employer is still required to provide proof to the DOL that these conditions are met. Arguably, this type of proof would be considered the social,

economic, and environmental impacts of federal policy. Reasonably, the evidence required may take a professional policy evaluator or private consultant to investigate the intricacies of wage and working conditions, and the ability and availability of the domestic workforce. To alleviate the pressure of evidence from the employer needing to show an insufficient domestic workforce, the “DOL [uses] funded state employment agencies in local, intrastate, and interstate recruitment efforts” (Congressional, 2005, 164) in conjunction with the employer. The other stipulations are difficult to discern over a short period of time. Even with an implemented guest worker program, government and business find abundant obstacles in enforcing policy.

Unauthorized Immigration and Unauthorized Workers

In the midst of a continuous and abundant flow of legal, temporary workers into the United States there are also millions of “unauthorized aliens residing in the United States” (Congressional, 2005, 166). The statistics are overwhelming and illustrate the failure of past and current temporary worker programs in the U.S. Aliens come to the U.S. to work and exceed the allotted time stay. The Immigration and Naturalization Service (INS) and the U.S. Census Bureau estimated in 1996, 5.8 million unauthorized aliens were living in the U.S.; 7 million in 2000; 9.3 million in 2002; and 10.3

million in 2004 (Congressional, 2005, 166). In comparison with the cap put on legal H-2B visas at 66,000 per fiscal year (Congressional, 2005, 165), the number of unauthorized illegal aliens willing to work have severe negative impacts for the current employers and broader policy goals set by the U.S. government. With a vast applicant pool of aliens, both legal and illegal, the numbers may imply that the chance of hiring an illegal worker with falsified documents exceeds the chance of hiring a legitimate, legal worker. "Mexico was the largest source country for unauthorized immigration" (Congressional, 2005, 166) which has created underlying policy implications for the U.S because a large number of these unauthorized immigrants are also unauthorized workers. Both domestic and foreign policy are affected by the political and economic relationship between the U.S. and Mexico. Enforcement proves to be an impossible effort. HR's responsibility for employee verification is an extremely risky business.

The article entitled "Basic Pilot Adds Pics; HR Groups Unite on Policy" by Mark Schoeff Jr. was published in March 2007. It briefly states the technological advance in the hiring process. "An electronic verification program" will be implemented "that the U.S. government is encouraging companies to adopt [and] will be enhanced with a photo identification tool" (Schoeff, 2007) to supplement the existing employee verification

process. “The Department of Homeland Security will upgrade the Basic Pilot system to allow employers to access a database of green card and employment authorization document photos” (Scheoff, 2007) in order to match written documentation with the federally register likeness of the hired employee. This data base would potentially allow businesses to know almost immediately if the employee is presenting legitimate documents and is who s/he says; this would serve a dual purpose and save business and government time and money over the long term.

This system is ideal, but it is also new and with new technologies the trial period will be hit or miss. The system could be successful and prove to be invaluable for human resource departments. If this should be the case, the system will be a cost burden for some businesses to buy into. The size and the profitability of a company may dictate if the new technology will be implemented. “But [the Society for Human Resource Management] SHRM and other interest groups assert that Basic Pilot is not powerful enough to cover all 7 million employers” (Scheoff, 2007) and this aspect may create a disparity in the national hiring process. This may give some businesses an advantage over others in expedited verification.

The system may fail in identifying fraudulent employees, as some critics expect will happen stating, “photo identification may be a partial antidote to identity fraud,” (Scheoff, 2007) then the nation’s businesses can go back to the original method. Although the original method of verifying identification is not efficient, at the very least, it is effective in sifting out falsified social security numbers.

Employer Motives for Antagonizing Immigration Policies

There are also potential benefits for employers who knowingly hire illegal aliens with falsified documents. These unauthorized workers can provide cheap labor for business, cut costs, and increase profits. On speaking with the Human Resource assistant director at the Marriott Louisville Downtown, she immediately steered the conversation to the topic of immigration. She felt as though there were plenty of topics to explore in this area. Then, I went to an intermediate kitchen manger. He spoke frankly about the unwritten policy which he had to hire under. He disclosed that the management above him in the corporate hierarchy made it mandatory that he hire the kitchen staff from a local temporary agency. The temp agency had a large pool of Hispanic workers employed in the kitchen area of the hotel. It was insinuated in our conversation that these workers may not be authorized.

Unauthorized workers can serve employers in two beneficial ways. The labor is cheap and the employer is not obligated to offer health insurance or other benefits to temporary workers. The temp agency is the entity which would be held accountable for employing the immigrants without the proper documents. The hotel can cut costs and not be held directly accountable for hiring out unauthorized temporary labor through a third party agency.

A large corporation like the Marriott can save millions of dollars by hiring cheap labor through a temp agency in all its establishments across the nation. If profit is assumed to be the motivating factor in the private sector, then this strategy is a means to cut costs and increase the bottom line. However, in a larger context, businesses which knowingly participate in this type of hiring practice are perpetuating the problem. These employers make ample opportunities for illegal immigrants to work, live, and evade the law. This makes the DOL and INS inspections necessary, but also can prove them to be ineffective. When businesses across the nation are using these types of hiring practices, all parties are benefiting including the temp agency, the employer, and the workers. Those who suffer the consequences are the local workforce who could

possibly fill those positions and the federal tax payers who support these unproductive government policies and agencies.

In the context of knowingly employing illegal immigrants there are examples of practices which serve to directly benefit a company and blatantly undermine domestic workers. The case, *Williams v. Mohawk Industries*, illustrates this point in an article by Benson and Kitces, "New Wave or Flash Flood: 11th Circuit Allows RICO Immigration Lawsuit to Proceed." The "new test cases claim that it is not just coincidence when a large pool of illegal immigrants migrate to an area" (2005, P1) due to the fact there maybe an underlying reason why the heavy concentration is in the proximity of a large employer. The "employer, without fear of liability, blithely accepts a bogus a series of bogus documents from workers" (2005, P1) in an alleged conspiracy "composed of employers, recruiters, and staffing companies [who] are together benefiting from the increased illegal population brought to the area by through the criminal acts of some members" (2005, P1). The immigrants were allegedly brought into Georgia to serve as cheap labor "suppress[ing] the wages of the legal workers" (2005, P1). The Racketeer Influenced Corrupt Organization Act (RICO) statute addresses the intentional illegal hiring practices of employers and holds them accountable under law. This particular

case was brought to court under RICO and several other cases have been brought in other circuits with varying levels of success. Intentional illegal hiring practices can be difficult to detect and prove in court. The burden of proof falls on the plaintiff who must show “conduct, of an enterprise through a pattern of racketeering activity” (2005, P2) to have a case against an employer. Shady employers make the implementation and regulation of immigration policy difficult. Also, this makes other employers and HR departments more susceptible to allegations of illegal hiring practices. Although they may be following legitimate hiring practices, honest practices may superficially seem to follow the characteristics listed above.

Current Ineffective U.S. Policy

The U.S. federal government is the primary entity dictating the processes which HR departments use to screen employees in the initial hiring stage. Congress sets law by which immigrants are allowed to enter, work, and reside in the U.S. In this respect, the federal government implements policy and works in cooperation with HR departments. In lieu of 9/11, the federal government has yet another layer of consideration in immigration legislation, national security. Homeland security is a broad label placed on the responsibility of the U.S. to know and track information regarding

those entering and exiting the states, as well as, all activities potentially causing a security breach. The U.S. immigration and Homeland Security agents cannot possibly track all aliens. The possibility of successful alien tracking systems offers “security-related benefits of knowing the identities of currently unknown individuals” (Congressional, 2005, 192). HR representatives are public administrators, the frontline bureaucrats who are expected to uphold the law and act as stewards of public interest.

Since the brunt of federal immigration laws fall on potential employers during the hiring process, proponents of “legalization of alien workers...” suggest integrating “special screening of participants, monitoring..., and issuance of fraud-resistant documents” (Congressional, 2005, 192) into a tracking system. As a result, the hiring process would become more secure. One system currently in place is the “US-VISIT program [which] began to digitally collect biometric identifiers to record the entry and exit of aliens who travel into the United States on a visa” (Congressional, 2005, 192). Although, are federal attempts to alleviate the problem of unauthorized workers, no comprehensive plans have been legislated by Congress which would address the problem completely. This is a social problem; it is complex; it is viewed differently from

every angle by proponents and opponents. No single law would solve such a vast and relentless social phenomenon.

Two Approaches: Addressing or Solving the Problem

This perceived problem will have to be addressed in conjunction with the respective country government representatives and public administrative support.

Addressing the problem is one approach, but alleviating the problem completely would mean going directly to the source. The source of the problem would start with answering the question: why are overwhelming numbers of immigrants compelled to move and find work in the U.S.? The most obvious answer is decent work opportunity isn't available in the immigrant's home country. For example, in understanding the Mexican migration into America, social scientists, economists, and political entities must have a complete understanding of the forces driving mass numbers of Mexicans out of Mexico. In this understanding, a solution might be feasible in conjunction with Mexico, but still extremely unlikely. Effective U.S. policy would be dependent on the cooperative actions of the Mexican government. Considering Mexico's sovereignty, unique culture, and societal values, the US could initiate a hostile international relation. International relations are abstract and difficult to define, and two countries collaborating on a mutual law is a

controversial and politically motivated action. Given America's sovereignty and benefit from Mexico's cheap labor and Mexico's dependent nature on America's substantive work opportunities, a mutually beneficial relationship exists. In an American perspective, mutual policy agreements could give way to political and economic weaknesses. No mutual agreement is likely in the near future.

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