The Non-Enforcement of Employer Sanctions

BY ALEX JOHNSON

When Congress passed the Immigration Reform and Control Act of 1986 (IRCA), many observers praised the legislation and believed that it would finally solve the problem of illegal immigration. Others were more skeptical and thought that it would have little impact.

Twenty-five years later, it should be obvious to all that the skeptics were right. Illegal immigration and all of its attendant problems — wage depression, crime, stress on social services, etc. — now far surpass what the country experienced in 1986.

None of this, of course, was supposed to happen. Those who praised IRCA assured us that it would be a "one time only" amnesty and that its employer sanctions provisions would make hiring an illegal alien economic suicide. Since it was the promise of sanctions that led many sensible people to support the legislation, it's worth taking a look at what they were and why they failed.

Prior to 1986, there was no federal law barring the employment of illegal aliens. While the Immigration and Nationality Act of 1952 (INA) forbade harboring an illegal alien, a provision of the Act specified that employment did not constitute harboring.

IRCA, however, set up a new federal regulatory regime for hiring. The law requires employers to verify a person's authorization to work in the U.S. by examining certain documents and certifying on an "I-9" form to their apparent authenticity. Employers who "knowingly" hire an unauthorized worker face a range of possible penalties. It should be noted that the knowledge requirement has been interpreted to include constructive knowledge; thus, it is a violation of the law to hire a worker who presents documents that no reasonable person could believe to be genuine.

The law currently imposes a civil penalty for first-time offenders of $275–$2,200 for each illegal alien hired. These fines increase for subsequent violations, and employers convicted of a "pattern or practice" of hiring illegal aliens can face up to $3,000 in fines per illegal alien hired and six months in prison.

Yet a law, as the old adage goes, is only as good as those who enforce it, and the record of enforcement when it comes to employer sanctions has never been very good.

In 1990, Michael Fix of the Urban Institute and Paul Hill of the Rand Corporation co-authored a report on IRCA warning that low levels of enforcement would undermine employer sanctions as a deterrent. The same concerns were voiced by other experts at the time.

In the years that followed, enforcement more or less collapsed. In a 2005 paper, "The Declining Enforcement of Employer Sanctions," Berkeley Ph.D. candidate Peter Brownell surveyed government data and found that enforcement had declined dramatically since the late 1980s.

For example, Brownell found that immigration authorities were far less likely to audit employers than in the past. (During these audits, authorities inspect employers' I-9 forms for noncompliance.) Brownell found that in fiscal year (FY) 1990, almost 10,000 such audits were conducted, but by FY 2003, the number had fallen to below 2,200.

If immigration authorities discover a violation during an audit, they may (depending on its severity) let the employer off with a warning. Brownell found that the number of warnings issued to employers had also declined markedly. In FY 1990, almost 1,300 such warnings were issued, but by 2003, the number had fallen to below 500.

In the case of more serious violations, authorities will issue a Notice of Intent to Fine. If employers fail to appeal the notice or lose their appeal, then a "Final Order" is issued. Brownell's research showed that the number of Final Orders issued has dropped from almost 1,000 in FY 1991 to an astonishingly minuscule 124 in FY 2003.

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Brownell also found that the dollar amount in fines collected had also declined. In FY 1996, immigration authorities collected around $3.1 million in fines, but that number dropped to only $1.2 million in FY 1999. Of course, even $3.1 million is a microscopic amount in an $11 trillion economy. Brownell calculated that it amounts to "an average of about three cents for every paid employee in the United States."

To emphasize just how paltry the level of employer sanctions enforcement is, Brownell pointed to "California's Targeted Industries Partnership Program, a joint effort in 1997 between DOL [Department of Labor] and a number of state agencies in California," which investigated labor and tax law violations in the garment and agriculture industries. The program "collected $1.25 million in penalties in California's garment industry alone," which "amounted to an average of $8.31 for every employee in the California garment industry, in addition to a collection of $1.45 million in unpaid wages (about $9.64 per employee)."

One can imagine that if similar efforts were made in the realm of employer sanctions, they might have acted as a more effective deterrent. Instead, lax enforcement made employer sanctions a joke, and did little, if anything, to halt illegal immigration.

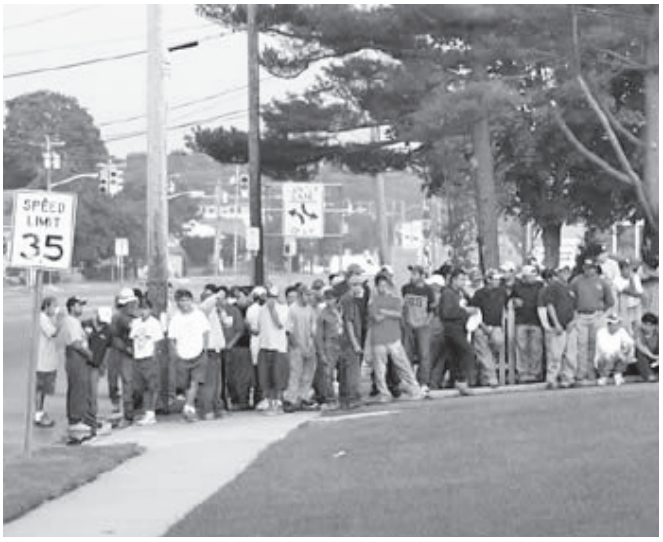
Since 2005, the politics of immigration control have changed considerably. In 2006 and again 2007, pro-immigration forces in Congress attempted to pass an amnesty for illegal aliens but failed do so. During that time, the Bush administration began stepping up employer sanctions enforcement with a few high-profile workplace raids. The success of these raids serves as a reminder that a very different enforcement regime from the one that Brownell documented is possible. The Obama administration has opted for a quieter approach, increasing the number of employer audits.

Many suspected at the time that the Bush administration's efforts were intended to make an amnesty more palatable. The same has been said of the actions of the Obama administration. The public, so the thinking goes, will not be goaded into supporting an amnesty unless it is combined with the appearance of more border security and law enforcement.

In that respect, little has changed since 1986, for it is likely that many of those who supported the legislation made the same calculation. As Michael Fix wrote in 1991, employer sanctions were intended "to create a symbol and perception…a political 'cover' for liberalizing our immigration laws."

Yet in one way things really have changed. Unlike in 1986, the public was not fooled in 2006 or 2007 and an amnesty was not passed. Not even the more modest DREAM Act (an amnesty for certain illegal aliens who entered the U.S. as minors) has managed to make it through Congress. Time and again, whenever such legislation is proposed, opponents have invoked the failures of the 1986 amnesty.

The public, it seems, is not quite as trusting as it was a quarter century ago. Polls consistently show that Americans have become deeply cynical about their government in recent years, far less likely to believe its promises. The government's failure to enforce its own laws against those who hire illegal aliens has no doubt contributed to such pervasive and alarming skepticism. ■



Since the 1990s, Latino day laborers have besieged Oyster Bay and Farmingville, two Long Island, New York communities. The Second Circuit Court of Appeals has upheld a federal judge's injunction against the enforcement of a 2009 ordinance by Oyster Bay officials that would criminalize the practice of soliciting for work on public streets.