

# The Law Against Hiring or Harboring Illegal Aliens

## Summary

A person (including a group of persons, business, organization or local government) commits a federal felony when he:

- assists an alien whom he should reasonably know is illegally in the U.S. or who lacks employment authorization, by transporting, sheltering, or assisting him to obtain employment,
- encourages that alien to remain in the U.S., by referring him to an employer, by acting as employer or agent for an employer in any way, or
- knowingly assists illegal aliens due to personal convictions.

Penalties upon conviction include criminal fines, imprisonment, and forfeiture of vehicles and real property used to commit the crime.

Anyone employing or contracting with an illegal alien without verifying his work authorization status is guilty of a misdemeanor. Aliens and employers violating immigration laws are subject to arrest, detention, and seizure of their vehicles or property. In addition, individuals or entities who engage in racketeering enterprises that commit (or conspire to commit) immigration-related felonies are subject to private civil suits for treble damages and injunctive relief.

## Recruitment and Employment of Illegal Aliens

It is unlawful to hire an alien, to recruit an alien, or to refer an alien for a fee, knowing the alien is unauthorized to work in the United States.<sup>1</sup> It is equally unlawful to continue to employ an alien knowing that the alien is unauthorized to work.<sup>2</sup> Employers may give preference in recruitment and hiring to a U.S. citizen over an alien with work authorization only where the U.S. citizen is equally or better qualified.<sup>3</sup>

It is unlawful to hire an individual for employment in the United States without complying with employment eligibility verification requirements.<sup>4</sup> Requirements include examination of identity documents and completion of Form I-9 for every employee hired. Employers must retain all I-9s, and, with 3 days advance notice, they must be made available for inspection.

Employment includes any service or labor performed for any type of remuneration within the United States, with the exception of sporadic domestic service by an individual in a private home.<sup>5</sup> Day laborers or other casual workers engaged in any compensated activity (with the above exception) are employees for purposes of immigration law.<sup>6</sup>

An employer includes an agent or anyone acting directly or indirectly in the interest of the employer. For purposes of verification of authorization to work, employer also means an independent contractor, or a contractor other than the person using the alien labor.<sup>7</sup> The use of temporary or short-term contracts cannot be used to circumvent the employment authorization verification requirements.<sup>8</sup>

If employment is to be for less than the usual three days allowed for completing the I-9 Form requirement, the form must be completed immediately at the time of hire.<sup>9</sup>

An employer has constructive knowledge that an employee is an illegal unauthorized worker if a reasonable person would infer it from the facts.<sup>10</sup> Constructive knowledge constituting a violation of federal law has been found where (1) the I-9 employment eligibility form has not been properly completed, including supporting documentation, (2) the employer has learned from other individuals, media reports, or any source of information available to the employer, that the alien is unauthorized to work, or (3) the employer acts with reckless disregard for the legal consequences of permitting a third party to provide or introduce an illegal alien into the employer's work force.<sup>11</sup> Knowledge cannot be inferred solely on the basis of an individual's accent or foreign appearance. Actual specific knowledge is not required. For example, a newspaper article stating that ballrooms depend on an illegal alien workforce of dance hostesses was held by the courts to be a reasonable ground for suspicion that unlawful conduct had occurred.<sup>12</sup>

It is illegal for non-profit and religious organizations to knowingly assist an employer to violate employment sanctions, regardless of claims that their convictions require them to assist aliens.<sup>13</sup> Harboring or aiding illegal aliens is not protected by the First Amendment.<sup>14</sup>

It is a felony to establish a commercial enterprise for the purpose of evading any provision of federal immigration law. Violators may be fined or imprisoned for up to 5 years.<sup>15</sup>

## Encouraging and Harboring Illegal Aliens

It is a violation of law for any person to conceal, harbor, or shield from detection in any place, including any building or means of transportation, any alien who is in the United States in violation of law.<sup>16</sup> Harboring means any conduct that tends to substantially facilitate an alien to remain in the U.S. illegally.<sup>17</sup> The sheltering need not be clandestine, and harboring covers aliens arrested outdoors, as well as in a building. This provision includes harboring an alien who entered the U.S. legally, but has since lost his legal status.

An employer can be convicted of the felony of harboring illegal aliens who are his employees if he takes actions in reckless disregard of their illegal status, such as ordering them to obtain false documents, altering records, obstructing INS inspections, or taking other actions that facilitate the alien's illegal employment.<sup>18</sup> Any person who within any 12-month period hires ten or more individuals with actual knowledge that they illegal aliens or unauthorized workers is guilty of felony harboring.<sup>19</sup>

It is also a felony to encourage or induce an alien to come to or reside in the U.S. knowing or recklessly disregarding the fact that the alien's entry or residence is in violation of the law.<sup>20</sup> This crime applies to any person, rather than just employers of illegal aliens. Courts have ruled that "encouraging" includes counseling illegal aliens to continue working in the U.S. or assisting them to complete applications with false statements or obvious "errors".<sup>21</sup> The fact that the alien is a refugee fleeing persecution is not a defense to this felony, since U.S. law and the UN Protocol on Refugees both require that a refugee must report to immigration authorities "without delay" upon entry to the U.S.

The penalty for felony harboring is a fine and imprisonment for up to five years. The penalty for felony alien smuggling is a fine and up to ten years imprisonment. Where the crime causes serious bodily injury or places the life of any person in jeopardy, the penalty is a fine and up to 20 years imprisonment. If the criminal smuggling or harboring results in the death "of any person," the penalty can include life imprisonment. Convictions for aiding, abetting, or conspiracy to commit alien smuggling or harboring, carry the same penalties.<sup>22</sup> Courts can impose consecutive prison sentences for each alien smuggled or harbored.<sup>23</sup> A court may order a convicted smuggler to pay restitution if the alien smuggled qualifies as a "victim" under the Victim and Witness Protection Act.<sup>24</sup>

Conspiracy to commit the crimes of sheltering, harboring, or employing illegal aliens is a separate federal offense punishable by a fine of up to \$10,000 or five years imprisonment.<sup>25</sup>

## Enforcement

A person or entity having knowledge of a violation or potential violation of employer sanctions provisions may submit a signed written complaint to the INS office with jurisdiction over the business or residence of the potential violator, whether an employer, employee, or agent. The complaint must include the names and addresses of both the complainant and the violator, and detailed factual allegations, including date, time and place of the potential violation, and the specific conduct alleged to be a violation of employer sanctions. By regulation, the INS will only investigate third party complaints that have "a reasonable probability of validity."<sup>26</sup>

Designated INS officers and employees, and all other officers whose duty it is to enforce criminal laws, may make an arrest for violation of smuggling or harboring illegal aliens.<sup>27</sup>

State and local law enforcement officials have the general power to investigate and arrest violators of federal immigration statutes without prior INS knowledge or approval, as long as they are authorized to do so by state law. There is "no extant federal limitation" on this authority. The 1996 immigration control legislation passed by Congress was intended to encourage states and local agencies to participate in the process of enforcing federal immigration laws.<sup>28</sup>

Immigration officers and local law enforcement officers may detain an individual for a brief warrantless interrogation where circumstances create a reasonable suspicion that the individual is illegally present in the U.S. Specific facts constituting a reasonable suspicion include evasive, nervous or erratic behavior, dress or speech indicating foreign citizenship, and presence in an area known to contain a concentration of illegal aliens. Hispanic appearance alone is not sufficient.<sup>29</sup> Immigration officers and police must have a valid warrant or valid employer's consent to enter work places or residences.<sup>30</sup>

Any vehicle used to transport or harbor illegal aliens, or as a substantial part of an activity that encourages illegal aliens to come to or reside in the U.S. may be seized by an immigration officer and is subject to forfeiture. The forfeiture power covers any conveyances used within the U.S.<sup>31</sup>

Private persons and entities may initiate civil suits to obtain injunctions and treble damages against enterprises that conspire or actually violate federal alien smuggling, harboring, or document fraud statutes under the Racketeer-Influenced and Corrupt Organizations Act (RICO).<sup>32</sup> The "pattern of racketeering" activity is defined as commission of two or more of the listed crimes. A RICO "enterprise" can be any individual legal entity, or a group of individuals who are not a legal entity but are associated in fact, and can include non-profit associations.

Employers who aid or abet the preparation of false tax returns by failing to pay income or social security taxes for illegal alien employees, or who knowingly make payments using false names or social security numbers, are subject to IRS criminal and civil sanctions.<sup>33</sup>

U.S. nationals who have suffered intentional discrimination because of citizenship or national origin by an employer with more than 3 employees may file a complaint within 180 days of the discriminatory act with the Special Counsel for Immigration-Related Unfair Employment Practices, U.S. Department of Justice.<sup>34</sup>

In addition to the federal statutes summarized above, state laws and local ordinances controlling fair labor practices, workers compensation, zoning, safe housing and rental property, nuisance, licensing, street vending, and solicitations by contractors may also apply to activities that involve illegal aliens.

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| 1. INA 274A(a)(1)(A).   | Peace and Justice v. INS, 910 F.2d 42 (2nd Cir. 1990).                             | 24. U.S. v. Sanga, 967 F.2d 1332 (9th Cir. 1992).   |
| 2. INA 274A (a)(2).   |  | 25. 18 USCS 371.  |
| 3. INA 274B(a)(4).  | 14. U.S. v. Merkt 794 F.2d 950 (5th Cir. 1986), cert. denied 480 US 946.           | 26. 8 CFR 274a.9(b).  |
| 4. INA 274A(a)(1)(B)(i).  |  | 27. INA 274(c).   |
| 5. 46 USC 8704, 8 CFR 274a.1(f), (h).   | 15. INA 275(d).  | 28. U.S. v. Ontoniel Vasquez-Alvarez, 176 F.3d 1294 (10th Cir.1999), cert. denied, SC 99-5643 (Oct. 4, 1999). |
| 6. Jenkins v. INS, 108 F.3d 195, (9th Cir.1997).                                | 16. INA 274(a)(1)(A)(iii).   | 29. U.S. v. Brignoni-Ponce, 422 U.S. 873, 884-887 (1975).   |
| 7. 8 CFR 274a.1(g).   | 17. U.S. v. Lopez, 521 F.2d 437 (2nd Cir 1975), cert. denied 423 US 995.           | 30. 63 ALR Fed.180.   |
| 8. 52 Fed. Reg. 16219 (May 1, 1987).  | 18. U.S. v. Kim, F.3d ---, 1999 WL 803256 (2nd Cir. Oct. 8, 1999).                 | 31. INA 274(a), (b)(1).   |
| 9. 8 CFR 274a.2(b)(1)(iii).   |  | 32. 18 USC 1961-1968.   |
| 10. 8 CFR 274a.1(l).  | 19. INA 274(a)(3).   | 33. 26 USCS 7206.   |
| 11. 8 CFR 274a.1(l)(1).   | 20. INA 274(a)(1)(A)(iv).  | 34. INA 274B(d).  |
| 12. Seven Star Inc. v. U.S., 933 F. 2d 791 (9th Cir., 1991).                    | 21. U.S. v. Oloyede, 982 F.2d 133 (4th Cir. 1992).                                 |   |
| 13. AFSC v. Thornburgh 961 F.2d 1405 (9th Cir. 1992), Intercommunity Center for | 22. 274(a)(1)(B).  |   |
|   | 23. Vega-Murillo v. U.S., 247 F.2d 735 (9th Cir. 1957), cert. denied 357 U.S. 910. |   |

Prepared by:  
**Americans for Legal Immigration**  
 PO Box 33387  
 Indianapolis, IN 46203-0837

Distributed by:  
**CT Citizens for Immigration Control**  
 PO Box 2360, Darien, CT 06820  
 www.ctimmigration.com  
 cticc@optonline.net