

The National Agricultural  
Law Center



University of Arkansas · System Division of Agriculture  
NatAgLaw@uark.edu · (479) 575-7646

---

An Agricultural Law Research Article

**Coping with Illegal Immigrant Workers:  
Federal Employer Sanctions**

by

Kathleen M. Johnson

Originally published in UNIVERSITY OF ILLINOIS LAW REVIEW  
4 U. ILL. L. REV. 959 (1984)

[www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org)

# COPING WITH ILLEGAL IMMIGRANT WORKERS: FEDERAL EMPLOYER SANCTIONS

## I. INTRODUCTION

The United States Supreme Court has recognized that “[t]he exclusion of aliens is a fundamental act of sovereignty.”<sup>1</sup> Congress has excluded aliens from admission to the United States since 1875.<sup>2</sup> Despite congressional attempts to limit immigration,<sup>3</sup> the Census Bureau currently estimates that there are between 3.5 and 6 million immigrants living illegally in the United States.<sup>4</sup> Moreover, illegal immigrant apprehension records<sup>5</sup> show that the size of the illegal population is growing.<sup>6</sup>

Several forces, commonly labeled “push” and “pull” factors,<sup>7</sup> explain illegal immigration. The pull factors in the United States include employment opportunities, higher wages, improved working conditions, and a higher standard of living. The corresponding push factors in immigrants’ home countries include high unemployment, low wages, poor living conditions, and highly skewed income distribution.<sup>8</sup> These push and pull factors combine to drive immigrants from their home countries into more attractive United States labor markets. Apprehended illegal immigrants almost universally state that they entered the United States to find

---

1. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (denial of a hearing to alien excluded from the United States pursuant to regulations is lawful).

2. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. For a comprehensive study of United States immigration laws, see E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 (1981).

3. Excluding special immigrants and individuals given asylum, the Immigration and Nationality Act limits legal immigration to 270,000 individuals annually. 8 U.S.C. § 1151(a) (1982). In addition, several categories of aliens are specifically excluded from immigrating to the United States under § 1182 of the Act. *Id.* § 1182.

4. HOUSE COMM. ON THE JUDICIARY, IMMIGRATION REFORM AND CONTROL ACT OF 1983, H.R. REP. NO. 115, 98th Cong., 1st Sess. 33 (1983) [hereinafter cited as HOUSE JUDICIARY COMM.].

5. Any reference to *apprehensions* includes some multiple counting of individuals who are apprehended more than once. NATIONAL COMM’N FOR MANPOWER POLICY, MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES 121 (1978) [hereinafter cited as NATIONAL COMM’N]. For every individual apprehended, however, the Immigration and Naturalization Service (INS) estimates that three or four escape. 129 CONG. REC. S5531 (daily ed. Apr. 28, 1983) (statement of Sen. Simpson).

6. Between 1970 and 1979, apprehensions increased from approximately 230,000 to over 890,000. U.S. DEP’T OF JUSTICE, 1979 ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 15 (1980). Increases in the enforcement capacity or efficiency of the INS do not explain these figures. Thus, the apprehension rates translate into an increase in illegal immigration of more than 300% for the decade. D. North, Enforcing the Immigration Law: A Review of the Options iii, 1-2 (Sept. 1980) (available from the Center for Labor & Migration Studies, New Trans-Century Found., Washington, D.C.).

7. COMPTROLLER GENERAL, REPORT TO THE CONGRESS OF THE UNITED STATES, ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES 9 (1980).

8. *Id.*

jobs or improve their income.<sup>9</sup> Thus, American employment opportunities explain the large number of illegal immigrants living in the United States.

Congress has frequently used immigration laws to protect domestic workers from the influx of foreign labor.<sup>10</sup> Congress initially excluded unwanted labor by prohibiting the importation of contract labor in 1885.<sup>11</sup> Currently, the Immigration and Nationality Act excludes aliens who enter the United States solely to find employment. These immigrants may legally enter the United States only after the Secretary of Labor has declared that a labor shortage exists.<sup>12</sup>

The steady flow of illegal immigrants to the United States undermines legislation attempting to protect domestic workers. Despite this problem, the Immigration and Nationality Act currently does not prohibit the knowing employment of illegal immigrants.<sup>13</sup> On February 17, 1983, Senator Alan K. Simpson (Republican, Wyoming) and Representative Romano L. Mazzoli (Democrat, Kentucky) introduced the Immigration Reform and Control Act of 1983 as S. 529 and H.R. 1510.<sup>14</sup> A major provision of the Act establishes employer sanctions that prohibit the knowing employment of illegal immigrants.<sup>15</sup> On May 13, 1983, the Senate passed S. 529 by a vote of 76 to 18.<sup>16</sup> The House followed on June

9. W. Cornelius, *Illegal Mexican Migration to the United States: Recent Research Findings, Policy Implications, and Research Priorities 3* (May 1977) (paper for the Migration Dev. Study Group, Center for Int'l Studies, Mass. Inst. of Technology).

10. See E.P. HUTCHINSON, *supra* note 2, at 493-504. Federal protection of domestic workers is not limited to immigration laws. For example, Congress created the Fair Labor Standards Act's minimum wage and maximum hours provisions to maintain a "minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a) (1976). As expressed in congressional acts, national policy favors a minimum living standard over the cheap labor benefits of an unregulated market.

11. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, *repealed by* Immigration and Nationality Act, tit. IV, § 403(a)(2), 66 Stat. 279 (1952).

12. 8 U.S.C. § 1182(14) (1982).

13. Section 1324 of the Immigration and Nationality Act provides that knowingly concealing, harboring, or shielding illegal aliens is a felony. Section 1324(a), however, provides that for purposes of § 1324, employment does not constitute harboring. 8 U.S.C. § 1324-1324(a) (1976).

14. HOUSE JUDICIARY COMM., *supra* note 4, at 31. The sponsors first introduced the Simpson-Mazzoli Bill on March 17, 1982 as a modification of an immigration bill the Reagan Administration introduced, S. 2222, 128 CONG. REC. S2216-20 (daily ed. Mar. 17, 1982); H.R. 4832, 128 CONG. REC. H940-44 (daily ed. Mar. 17, 1982). H.R. 4832 was renumbered H.R. 6514 when reported out of the Subcommittee on Immigration, Refugees, and International Law. The Senate eventually passed S. 2222 on August 17, 1982 by a vote of 81 to 19. H.R. 6514, however, did not pass before the end of the 97th Congress. See Gordon, *The Fall and Future of Simpson-Mazzoli*, IMMIGRATION J., Jan.-Mar. 1983, at 27-28.

15. The Simpson-Mazzoli Bill is not the first proposal for employer sanctions. The Truman Commission on Migratory Labor first proposed employer sanctions in 1951. *The Knowing Employment of Illegal Immigrants: Hearings on Employer Sanctions Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 21 (1981) (statement of M. Lovell, Jr., Under Secretary, U.S. Dep't of Labor) [hereinafter cited as *Knowing Employment*].

The Bill also provides for: amnesty for certain illegal immigrants already living in the United States; reformation of the asylum adjudication process; expansion and modification of the temporary worker program; and increased border enforcement. HOUSE JUDICIARY COMM., *supra* note 4, at 1-30.

16. 129 CONG. REC. S6969-70 (daily ed. May 18, 1983).

20, 1984, passing H.R. 1510 by a narrow margin of 216 to 211.<sup>17</sup> A congressional conference committee attempted to reach a compromise between the House and Senate bills, but was stalled over a spending measure when the Ninety-eighth Congress adjourned on October 12, 1984.<sup>18</sup> Supporters of the legislation have promised to continue their efforts in the next Congress.<sup>19</sup> Although the legislative process will have to start over, the new proposal will probably contain many of the features of H.R. 1515 and S. 529.

If Congress eventually enacts employer sanctions, the sanctions should deter illegal immigration by giving the Immigration and Naturalization Service (INS) an additional internal<sup>20</sup> enforcement tool aimed at reducing the attractiveness of American labor markets. This note examines both the effectiveness and fairness of employer sanctions, using H.R. 1510 as a model for this type of legislation. Employer sanctions can only be effective if they are enforceable and if immigration controls that reduce employment opportunities will, in fact, discourage immigration. To operate fairly, employer sanctions must not unduly infringe on privacy interests or encourage employers to engage in discriminatory practices. This note concludes that employer sanctions are both effective and fair. If the new proposal follows H.R. 1510, Congress should amend the sanction provisions to aid enforcement and to protect civil liberties. Accordingly, after summarizing H.R. 1510's sanction provisions, this note examines amendments that may improve the fairness and effectiveness of employer sanctions.

---

17. 130 CONG. REC. H6149 (daily ed. June 20, 1984).

18. When the conference committee met, it faced the difficult task of reconciling two bills which differed in several respects. Each version contained employer sanctions, but S. 529 imposed stiffer penalties. H.R. 1510 and S. 529 contained similar provisions for document verification of job applicants. S. 529, however, employed the multi-document system as a temporary program while authorizing further study of improved verification systems. H.R. 1510 permanently adopted the multi-document system and authorized a telephone system for checking an applicant's social security number. H.R. 1510 also extended Title VII remedies for discrimination under the Act based on national origin or citizenship, while S. 529 merely required monitoring of discrimination under the Act. S. 529 and H.R. 1510 also differed on appropriations, legal immigration reform, temporary foreign workers, and amnesty. For the complete text of S. 529, see S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6150-66 (daily ed. June 20, 1984). For a summary of the differences between H.R. 1510 and S. 529, see N.Y. Times, June 22, 1984, § 1, at 15, col. 4. The conference initially stalled over H.R. 1510's employment discrimination provision, but later agreed on a measure which prohibited discrimination against a specific group of legal aliens. See N.Y. Times, Sept. 26, 1984, § A, at 16, col. 1; N.Y. Times, Oct. 10, 1984, § A, at 22, col. 3. Just before Congress adjourned, the conference was stalled over the imposition of a \$1 billion a year limit on federal spending in providing welfare benefits to aliens who would have gained legal status under the bill. See N.Y. Times, Oct. 10, 1984, § A, at 22, col. 3.

19. Pear, *Amid Changes, Immigration Bill Dies*, N.Y. Times, Oct. 12, 1984, § A, at 17, col. 4.

20. The INS enforces immigration laws through its activity at the borders and through investigations conducted in the interior of the country. See, e.g., U.S. DEPT OF JUSTICE, 1982 ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 12-13 (1983).

## II. H.R. 1510'S EMPLOYER SANCTION PROVISIONS

Title One of the Immigration Reform and Control Act of 1983,<sup>21</sup> "Control of Unlawful Employment of Aliens," would amend the Immigration and Nationality Act by adding a new section, 274A, entitled "Unlawful Employment of Aliens." Section 274A contains six basic provisions that establish: the unlawfulness of knowingly hiring an alien without work authorization; a worker verification system and documentation requirements; a system of graduated penalties for violations; a limited period for dissemination of information to employers and employees; various commissions and task forces to monitor implementation of sanctions; and provisions preempting other state and federal laws.

Subsections 274A(a)(1) and (a)(6) provide that employers of four or more individuals may not legally hire, recruit, or refer for a fee an unauthorized alien for employment in the United States.<sup>22</sup> Subsection (a)(1) also prohibits an employer of four or more employees from hiring anyone without following verification procedures<sup>23</sup> that enable an employer to determine a job applicant's immigrant status. Any employer who complies with all the verification requirements automatically establishes a complete defense against the charge of knowingly hiring an illegal alien.

Subsections 274A(a)(7), 274A(b), and 274A(c) govern the worker verification system.<sup>24</sup> Under subsection (a)(7), the Attorney General will establish a method for validating the social security numbers of individual job applicants. Subsection (b) requires employers to examine various forms of identification to confirm that an applicant is eligible for work in the United States. The applicant's United States passport, or a combination of social security card or birth certificate and alien identification card, or driver's license will satisfy the identification requirements. Verification also requires applicants to attest that they are citizens or are otherwise authorized to accept work. Finally, the verification provisions require employers to retain the completed verification form for three years and to make it available for inspection. Subsection (c) specifies that nothing in section 274A authorizes the creation or use of a national identification card or system.

Subsections (d) and (e) govern penalties.<sup>25</sup> Subsection (d) prohibits employers from requiring employees to indemnify the employer against liability under the Act. A \$1,000 fine may be imposed for each violation. Subsection (d) also establishes procedures for administrative appeal and review. Subsection (e) contains graduated penalties for other employer

---

21. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6167-69 (daily ed. June 20, 1984) (text of H.R. 1510's employer sanctions as amended and passed by the House of Representatives).

22. *Id.* at H6167. Section 101 of the Immigration Reform and Control Act of 1983 contains all the employer sanctions provisions. The section numbers in this note refer to the sequence in title II, chapter 8 of the Immigration and Nationality Act. 8 U.S.C. § 1324 (1976).

23. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6167 (daily ed. June 20, 1984).

24. *Id.*

25. *Id.* at H6167-68.

violations. For an employer's first violation, the Attorney General may issue a citation notifying the employer of the violation and warning of subsequent penalties. Following the citation, a subsequent violation subjects the violator to a penalty of \$1,000 per alien. Further violations result in a fine of \$2,000 per alien. In addition, the Attorney General may enjoin employers engaging in a pattern or practice of employment in violation of the Act. Finally, a penalty of \$500 may be imposed for each failure to verify an applicant's status.

Subsection 274A(h)(1) requires the President to monitor and report semiannually to Congress on the implementation of the sanctions.<sup>26</sup> Also, the Civil Rights Commission must monitor and report to Congress on the discriminatory impact of the legislation. A separate task force will monitor, review, and investigate complaints of discrimination due to the sanctions. In addition to these monitoring requirements, subsection (h)(1) creates a cause of action similar to that in Title VII for adjudicating discrimination claims.<sup>27</sup>

Section 274A requires the Attorney General to disseminate forms and information to employers and other organizations explaining the Act's requirements.<sup>28</sup> Subsection 274A(g) establishes the supremacy of the Act's sanctions. This subsection preempts any state or local law imposing sanctions on those who employ unauthorized aliens.<sup>29</sup> However, during the first six months following enactment, the Attorney General may not issue penalties or citations. The six month wait is intended to give affected individuals enough time to learn about the Act's requirements.

H.R. 1510's employer sanction provisions are comprehensive and detailed. To enforce the sanctions, H.R. 1510 specifically defines the regulated individuals, provides fixed penalties, and establishes a system for verifying authorized (legal) workers. To insure fair application, the sanctions prohibit possible abuses and create a cause of action against discriminatory practices under the Act. An assessment of the adequacy of these provisions, however, depends on a more detailed analysis of their effectiveness and fairness.

### III. THE EFFECTIVENESS OF EMPLOYER SANCTIONS

The effectiveness of H.R. 1510's employer sanctions depends, in part, on the conceptual validity of controlling illegal immigration by regulating employment opportunities. Although critics of immigration control by employer sanctions have raised several objections, employment regulation can, in theory, reduce illegal immigration. To reduce effectively illegal immigration, however, employer sanctions must be enfor-

---

26. *Id.* at H6168.

27. *Id.* at H6168-69.

28. *Id.* at H6169.

29. *Id.* at H6168.

cable. An examination of existing state and federal employer sanction legislation reveals several potential enforcement problems. By amending H.R. 1510's sanction provisions to avoid these enforcement difficulties, Congress can improve the sanctions' effectiveness.

### A. *Conceptual Validity of Employer Sanctions*

Opponents of employer sanctions raise three principal objections to the validity of enforcing immigration laws through employment regulations. First, because job opportunities are not the sole cause of illegal immigration, opponents argue that the current flow will continue despite employer sanctions. Debates over the labor market effect of illegal workers produce the second objection. If illegal workers take jobs that legal workers reject, sanctions might eliminate a necessary work force. Finally, opponents argue that employer sanctions are simply too costly.

#### 1. *Employer Sanctions as a Solution*

Opponents of sanctions argue that even if denied employment as a result of employer sanctions, illegal immigrants will continue to enter the United States.<sup>30</sup> This prediction is accurate insofar as illegal immigrants enter the United States to join family already here or for other noneconomic reasons.<sup>31</sup> The opponents' focus on noneconomic forces, however, ignores empirical evidence showing that employment opportunities offer the greatest attraction for illegal immigrants.<sup>32</sup> By deterring employers from hiring illegal immigrants, employer sanctions should eliminate the job opportunities presently attracting illegal immigrants. Without the prospect of employment in the United States, an unemployed individual is unlikely to leave home to seek illegal status in the United States.<sup>33</sup> Accordingly, employer sanctions should deter the majority of illegal immigrants who come to the United States for jobs or better wages.

The presence of noneconomic push and pull factors alone does not destroy the effectiveness of employer sanctions. Certainly employer sanctions are not alone an effective means of preventing illegal immigration. Without sanctions, however, existing immigration enforcement measures such as border patrols and internal investigations are inadequate.<sup>34</sup> A combination of existing enforcement measures and employer sanctions can effectively control both economically and noneconomically motivated illegal immigration. Recognizing that employer sanctions are

---

30. See, e.g., *Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 883-84* (statement of J.R. Huerta, Associate Counsel, Mexican American Legal Defense Education Fund (MALDEF)) [hereinafter cited as *Hearings*].

31. *Id.*

32. See *supra* note 9 and accompanying text.

33. See NATIONAL COMM'N, *supra* note 5, at 124.

34. See *supra* note 20 and accompanying text.

not an exclusive remedy for illegal immigration, H.R. 1510 also provides for increased border enforcement.<sup>35</sup>

## 2. *Illegal Immigrants as a Work Force*

Illegal job-seekers are typically young, male adults with little education.<sup>36</sup> They usually fill jobs in agriculture, services, and light industries.<sup>37</sup> Low wages, poor working conditions, and low status characterize many of these jobs in the secondary labor market.<sup>38</sup> Opponents of employer sanctions focus on the undesirability of these jobs and claim that illegal immigrants fill jobs that legal workers reject.<sup>39</sup> Opponents argue that illegal immigrants are necessary because without this labor supply employers in affected industries could go bankrupt, relocate abroad, or raise their prices.<sup>40</sup>

Although illegal immigrants supply labor to secondary employers, they are not the exclusive supply of labor for secondary jobs. In 1982, twenty-nine million Americans, roughly thirty percent of the labor force, held jobs in the secondary labor market.<sup>41</sup> A substantial portion of legal workers do not reject undesirable secondary market jobs. Those legal workers that do refuse to work in secondary jobs, might accept secondary jobs if employers raised wages and working conditions to minimum standards.<sup>42</sup> While illegal immigrants provide a more elastic<sup>43</sup> and larger labor force than the labor force of legal workers, the illegals' presence permits employers to maintain the status quo in the secondary labor market. With an ample supply of illegal workers who are willing to accept low wages and substandard conditions, employers have little incentive to increase wages or take other steps<sup>44</sup> that will attract legal workers.

Some marginal employers cannot make sufficient adjustments to attract legal workers without relocating or going bankrupt. The potential

---

35. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6170 (daily ed. June 20, 1984) (Part B—Improvement of Enforcement and Services).

36. The characteristics of illegal immigrants differ depending on their nationality. The non-Mexican illegal immigrants are more likely to be older, married, better educated, and speak English than their Mexican counterparts. NATIONAL COMM'N, *supra* note 5, at 123, 125, 126.

37. *Id.* at 133.

38. For a general discussion of the dual labor market theory, see G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 277-79 (9th ed. 1981). This theory distinguishes between primary and secondary labor markets. High wages and good working conditions characterize the primary labor market. For a discussion of the literature applying dual labor markets to illegal aliens, see NATIONAL COMM'N, *supra* note 5, at 8-9.

39. *E.g.*, W. Cornelius, *supra* note 9, at 8-9.

40. *Hearings, supra* note 30, at 889.

41. HOUSE JUDICIARY COMM., *supra* note 4, at 96 (statement of R.W. Searby, Deputy Under Secretary for International Labor Affairs, U.S. Dep't of Labor).

42. Legal workers do not immediately fill openings created by INS apprehensions. This does not prove, however, that legal workers will never accept such jobs, because the rejected jobs continue to pay wages below the legal minimum. See NATIONAL COMM'N, *supra* note 5, at 165.

43. Illegal immigrants are typically more willing than legal workers to accept low wages and to tolerate substandard working conditions. These characteristics make illegal workers a more elastic labor supply than legal workers. NATIONAL COMM'N, *supra* note 5, at 158-60.

44. NATIONAL COMM'N, *supra* note 5, at 160.



hardship for these employers, however, does not invalidate the enforcement of immigration restrictions through employer sanctions. The continued employment of illegal workers, often at substandard wages, is inconsistent with the long established policies of restricting immigration and of supporting a minimum living standard.<sup>45</sup> If employer sanctions eliminate the labor supply for employers offering legal wages, those employers could employ aliens legally admitted under a temporary worker program that Congress has created.<sup>46</sup>

### 3. *The Cost of Employer Sanctions*

Opponents of employer sanctions argue that sanctions will impose substantial costs on the United States government.<sup>47</sup> Enforcement will require added personnel for supervision and will create more paperwork.<sup>48</sup> The INS estimates that in addition to start-up costs, enforcement of sanctions will require six hundred investigation work-years at a cost of forty to fifty million dollars per year.<sup>49</sup> The major cost of enforcing sanctions, however, will result from the creation and implementation of an identification system that will enable employers to verify the legal status of job applicants.<sup>50</sup> If sanctions depend on a tamperproof social security card for identification, for example, reissuing social security cards may cost \$850 million initially and may eventually cost \$2 billion.<sup>51</sup>

Proponents of sanctions admit that such legislation will require substantial federal budgetary increases. By reducing displacement costs, however, employer sanctions may decrease government transfer payments and become self-supporting.<sup>52</sup> Because of the current high level of unemployment,<sup>53</sup> some displaced legal workers become beneficiaries of one or more federal income transfer programs, such as unemployment insurance, food stamps, or AFDC.<sup>54</sup> The Congressional Budget Office

---

45. See *supra* notes 2 & 10-12 and accompanying text.

46. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H) (1982). H.R. 1510 expands this program to allow some employers affected by the employer sanctions an adjustment period. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6176-78 (daily ed. June 20, 1984) (§ 211).

47. *Knowing Employment*, *supra* note 15, at 244 (paper prepared by S. Remis & D. Parker, Cost Benefit Analysis of President Reagan's Employer Sanctions Proposal); *Hearings*, *supra* note 30, at 890.

48. *Knowing Employment*, *supra* note 15, at 244-46 (paper prepared by S. Remis & D. Parker, Cost Benefit Analysis of President Reagan's Employer Sanctions Proposal).

49. HOUSE JUDICIARY COMM., *supra* note 4, at 102 (cost estimate of the Congressional Budget Office).

50. *Infra* notes 122-32 and accompanying text.

51. *Knowing Employment*, *supra* note 15, at 15 (statement of D. Meissner, Acting Commissioner, INS).

52. D. North, *supra* note 6, at 17.

53. In July 1984, unemployment in the civilian labor force equaled 7.5%, which represents more than 8,500,000 unemployed workers. JOINT ECONOMIC COMM., 98th Cong., 2d Sess., ECONOMIC INDICATORS AUGUST 1984 11-12 (Comm. Print 1984) (prepared by the Council of Economic Advisors).

54. D. North, *supra* note 6, at 17.

reports that a one point increase in the unemployment rate automatically increases transfer payment outlays by seven billion dollars.<sup>55</sup> The cost of a single unemployed worker to the federal government averages seven thousand dollars per year.<sup>56</sup> Using these cost estimates, if illegal immigrants displace fifty thousand legal workers who then seek government support payments, this displacement costs the United States \$350 million per year.<sup>57</sup> Illegal immigrants probably displace more than fifty thousand legal workers; based on an illegal population of five million, the estimated fifty thousand lost jobs represent only a one percent displacement effect.<sup>58</sup> Thus, the annual displacement cost is probably higher than \$350 million. The budgetary cost to the federal government of worker displacement considerably weakens the argument that employer sanctions are too costly.

Employment opportunities are a valid focus for immigration regulation. Although border controls are also necessary for immigration enforcement, employer sanctions focus regulation on the principal cause of illegal immigration. Sanctions will not eliminate a *necessary* work force because illegal immigrants currently displace some legal workers. Sanctions are also consistent with the established goal of protecting domestic labor. Finally, sanctions are not too costly—decreased unemployment costs will justify the costs of implementing sanctions.

### B. Enforcing Employer Sanctions

The effective enforcement of employer sanctions depends upon budget allocations and the legislation's specific provisions. Existing state and federal employer sanctions, which have unimpressive enforcement records, suggest several problems that adversely affect enforcement. By avoiding some of the weaknesses of existing legislation, Congress can improve the effectiveness of H.R. 1510.

#### I. Enforcement Measures in Existing State and Federal Legislation

Although both state<sup>59</sup> and federal<sup>60</sup> legislation currently prohibit employment of illegal immigrants, state and federal employer sanctions

---

55. *Id.*

56. *Id.* at 18.

57. *Knowing Employment*, *supra* note 15, at 54 (statement of L. Fuchs, Professor, Brandeis University).

58. *Systems to Verify Authorization to Work in the United States: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 2 (1981) (statement of Sen. Simpson) [hereinafter cited as *Systems*].

59. Several states have adopted sanctions. CAL. LAB. CODE § 2805 (West Supp. 1984); CONN. GEN. STAT. ANN. § 31-51k (West Supp. 1982); FLA. STAT. ANN. § 448.09 (West 1981); KAN. STAT. ANN. § 4409 (1974) (tit. 21); ME. REV. STAT. ANN. tit. 26, § 871 (West Supp. 1982); MASS. GEN. LAWS ANN. ch. 149, § 19c (West 1982); MONT. CODE ANN. § 2-305 (1983) (tit. 39); N.H. REV. STAT. ANN. § 275-A:4a (1981); VT. STAT. ANN. tit. 21, § 444a (1978); VA. CODE § 40.1-11.1 (1981).

60. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1816 (1982). Prior to a 1983 amendment, federal employer sanctions were included in the Farm Labor Contractor Registration Act. 7 U.S.C. §§ 2041-53 (1976).

are distinct. State sanctions are generally modeled on the California Labor Code<sup>61</sup> which prohibits employers from knowingly hiring illegal aliens. Violations of the state sanctions subject employers to low, discretionary fines.<sup>62</sup> Federal sanctions under the Farm Labor Contractor Registration Act (FLCRA)<sup>63</sup> enable the Secretary of Labor to revoke farm labor contractors' certificates of registration if they knowingly recruit an illegal alien.<sup>64</sup> Subsequent violations may result in a maximum prison sentence of three years or a maximum fine of ten thousand dollars or both.<sup>65</sup> In addition to the substantial difference in penalties, the state laws and the FLCRA differ significantly in scope of application. The state sanctions apply to all employers while the FLCRA applies only to farm labor contractors.<sup>66</sup>

The enforcement records of existing state and federal sanctions also differ significantly. Although federal officials have enforced the FLCRA, several years of effort have uncovered a relatively small number of violations. Between 1977 and 1981, officials located 10,190 undocumented workers through violations of the FLCRA.<sup>67</sup> In addition, 370 farm labor contractors paid \$1,407,650 in civil penalties for hiring or recruiting one or more illegal immigrants.<sup>68</sup> The FLCRA's limited scope partially explains this meagre enforcement record and its limited effectiveness as a means of controlling illegal immigration.

Existing state legislation has proven even less effective than the FLCRA as a means of controlling illegal immigration. In contrast to federal enforcement of the FLCRA's limited provisions, states simply do

61. The California statute provides that:

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

(b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1000) for each offense.

(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a).

CAL. LAB. CODE § 2805 (West Supp. 1984).

62. New Hampshire and Virginia impose the highest penalty among the states of \$1,000 or one-year imprisonment. N.H. REV. STAT. ANN. § 275-A:4a (1981); VA. CODE § 40.1-11.1 (1981). Vermont imposes a fine between \$100 and \$300 for the first offense and a fine ranging from \$300 to \$750 for subsequent violations. VT. STAT. ANN. tit. 21, § 444d (1978). California imposes a fine ranging between \$200 and \$1000 for each offense, while Connecticut imposes a fine ranging between \$200 and \$500. CAL. LAB. CODE § 2805(b) (West Supp. 1984); CONN. GEN. STAT. ANN. § 31-51k(b) (West Supp. 1982). Florida imposes a discretionary fine of not more than \$500. FLA. STAT. ANN. § 448.09(2) (West 1981).

63. 7 U.S.C. §§ 2041-53 (1976) (repealed 1983) (current version in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1816 (1982)).

64. *Id.* § 2044(b)(6).

65. *Id.* § 2048(c).

66. The definition of farm labor contractors further limits application of the FLCRA. Farm labor contractors do not include: any farmer, processor, canner, ginner, packing-shed operator, or nurseryman who personally engages in the regulated activity solely for his own operation; any common carrier engaged solely in transporting migrant workers; any custom combine, hay harvesting, or sheep-shearing operation, and several other smaller categories of operations. *Id.* § 2042(b)(1)-(9).

67. *Knowing Employment*, *supra* note 15, at 42 (material provided by M. Lovell, Jr., Under Secretary, U.S. Dep't of Labor).

68. *Id.*

not enforce their employer sanctions. The reported cases do not show a single successful prosecution under the various state sanctions.<sup>69</sup> A 1980 Comptroller General study revealed that only Kansas had successfully prosecuted a case. Even in the case prosecuted, the Kansas court imposed a fine of only \$250.<sup>70</sup> Thus, the enforcement records of existing state sanctions are unimpressive.

Several factors may explain the unimpressive enforcement records of existing state and federal employer sanctions. Neither state nor federal sanctions provide a comprehensive national approach to the problem of illegal immigration. In addition, the discretionary penalties that state sanctions impose are too low to aid enforcement. Employers may believe that the economic benefits of hiring illegal immigrants are greater than the threatened fines. Finally, existing state and federal sanctions penalize only *knowing* employment of illegal aliens, yet these sanctions fail to require verification procedures.<sup>71</sup> When sanctions do not require an employer to verify an applicant's status, the difficulty of proving knowledge increases substantially. The lack of verification procedures also precludes the voluntary compliance of employers seeking to establish a good faith defense.

## 2. *Enforcement of Employer Sanctions Under H.R. 1510*

H.R. 1510 avoids much of the piecemeal approach of existing state and federal employer sanctions. The bill's scope is national, but the House has carved an exception into H.R. 1510's initial regulation of all employers.<sup>72</sup> H.R. 1510 prohibits only employers of four or more individuals from knowingly hiring illegal immigrants. The House designed this exception to protect "mom and pop" operations from burdensome regulations and civil penalties.<sup>73</sup>

Although Congress has a valid interest in protecting businesses from unduly burdensome regulations, this interest does not justify completely

---

69. A few cases report unsuccessful attempts to enforce employer sanctions. *De Canas v. Bica*, 424 U.S. 351 (1976) (reversing *Dolores* and holding that state employer sanctions laws are within the police power of the state); *Marin v. Smith*, 376 F. Supp. 608 (D. Conn. 1974) (dicta noting that the unconstitutionality of sanctions seems patent); *Nozewski Polish Prods. v. Meskill*, 376 F. Supp. 610 (D. Conn. 1974) (issuing a permanent injunction against enforcement of state statute); *Dolores Canning Co. v. Howard*, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (2d Dist. 1974) (invalidating statute as preempted by federal immigration laws).

70. COMPTROLLER GENERAL, *supra* note 7, at 45.

71. Only three states have established verification procedures for employers to determine an applicant's legal status. CAL. LAB. CODE § 2805 (West Supp. 1984); VT. STAT. ANN. tit. 21, § 444a (1978); VA. CODE § 40.1-11.1 (1981). Of these three states, only California creates a presumption that the employer knowingly hired an illegal alien if the employer violates the verification requirements. CAL. ADM. CODE § 16209.4-16209.5 (1980) (tit. 8).

72. The House Judiciary Committee drafted the text of H.R. 1510 that the House considered between June 11, 1984 and June 20, 1984. This text prohibited all employers from knowingly hiring illegal immigrants. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H5594 (daily ed. June 12, 1984) (§ 274A(a)(1)).

73. 130 CONG. REC. H5645-51 (daily ed. June 12, 1984) (amend. No. 7, proposed by Rep. Sam B. Hall, D.-Tex.).

exempting small employers from the sanctions. H.R. 1510's sanctions only penalize those employers who *knowingly* hire illegal aliens. Thus, congressional concern that sanctions might unfairly impose civil penalties on small businesses is misplaced. A complete exemption from employer sanctions actually might give small employers an unfair advantage by providing them with exclusive access to an inexpensive labor force.

Before adopting employer sanctions, Congress should reconsider the necessity of a complete exemption for small employers. The Senate's version of H.R. 1510 reflects a satisfactory compromise between small business interests and the national problem of illegal immigration. S. 529 prohibits *all* employers from hiring illegal immigrants but exempts employers of three or fewer individuals from the mandatory verification procedures.<sup>74</sup> The Senate's solution addresses small business owner's concern for burdensome regulations without granting small employers an unfair exemption from civil penalties. Congress should adopt universally applicable employer sanctions, without giving unfair concessions to special interests.

High, mandatory penalties are also essential to meaningful enforcement of employer sanctions. In H.R. 1510's original text, the Judiciary Committee established a graduated system of fixed penalties. This system required a citation for the first offense and civil penalties between \$1,000 and \$3,000 per alien for the second, third, and fourth offenses.<sup>75</sup> A maximum one-year prison term also accompanied the fourth violation. The Committee on Agriculture's proposed amendment would have substituted a discretionary range of fines.<sup>76</sup> Fines ranging from \$100 to \$1,000 would have replaced the fixed \$1,000 fine, and fines ranging from \$500 to \$2,000 would have replaced the fixed \$2,000 fine. The Committee on Education and Labor also proposed an amendment containing discretionary fines.<sup>77</sup> This amendment would have changed the first offense penalty to a maximum fine of \$2,000 and up to a maximum fine of \$4,000 for the third offense.

Of the three proposed penalty schemes, the Judiciary Committee's provision setting fixed penalties best ensures meaningful enforcement. Both the Agricultural Committee's and the Education and Labor Committee's amendments allowed courts discretion to impose minor fines.

---

74. S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6150 (daily ed. June 20, 1984) (§ 274A(a)(1)(B)).

75. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H5595 (daily ed. June 12, 1984) (§ 274A(d)).

76. HOUSE COMM. ON AGRICULTURE, IMMIGRATION REFORM AND CONTROL ACT OF 1983, H.R. REP. NO. 115, 98th Cong., 1st Sess. 2 (1983) [hereinafter cited as HOUSE AGRICULTURE COMM.]. For the House debate concerning this amendment, see 130 CONG. REC. H5613-15 (daily ed. June 12, 1984) (amend. No. 3, reported by Rep. De La Garza, D.-Tex.).

77. HOUSE COMM. ON EDUCATION AND LABOR, IMMIGRATION REFORM AND CONTROL ACT OF 1983, H.R. REP. NO. 115, 98th Cong., 1st Sess. 5 (1983) [hereinafter cited as HOUSE EDUCATION AND LABOR COMM.]. For the House debates concerning this amendment, see 130 CONG. REC. H5615-33 (daily ed. June 12, 1984) (amend. No. 4, reported by Rep. Hawkins, D.-Cal.).

The Education and Labor Committee further weakened the sanctions by making any fine optional. After finding a violation, the amendment only required the United States Immigration Board to issue an order requiring the defendant to cease violating the Act.<sup>78</sup> The order *could* also impose civil penalties. Such discretionary penalties could result in a meaningless prohibition on employing illegal aliens. Employers could gamble on the likelihood of paying low fines and elect to continue using cheap, illegal workers.

After debating the committee amendments, the House decided to not adopt a discretionary penalty provision.<sup>79</sup> Concern that employers could absorb low penalties as a business expense prompted the House's decision.<sup>80</sup> This same concern, however, did not prevail when the House adopted an amendment to delete the \$3,000 fine and criminal penalties accompanying an employer's fourth violation.<sup>81</sup> The House voted to remove the last tier of the Judiciary Committee's penalty, apparently accepting the argument that criminal penalties are an unjustified burden on business owners.<sup>82</sup>

As amended, H.R. 1510's penalties resemble the penalties contained in the Senate's bill. S. 529, however, imposes a \$1,000 fine for the employer's first violation in contrast to H.R. 1510's provision for a warning citation. S. 529 imposes a \$2,000 fine for subsequent violations,<sup>83</sup> and also imposes a \$1,000 fine and a maximum six month prison term on any entity engaged in a pattern or practice of violating the Act.<sup>84</sup> Under H.R. 1510, the Attorney General may seek an injunction against such a practice.<sup>85</sup>

Congress should settle these differences in favor of S. 529's penalty provisions. Criminal penalties will not be an unjustified burden on employers who repeatedly disregard the Act's requirements. H.R. 1510's warning provision is also unnecessary. Both H.R. 1510 and S. 529 require a six month grace period that allows employers to obtain information on the Act's requirements.<sup>86</sup>

Even without the Senate's stricter penalties, however, H.R. 1510 contains meaningful civil penalties that will aid enforcement. The civil

---

78. HOUSE EDUCATION AND LABOR COMM., *supra* note 77, at 4-5; 130 CONG. REC. H5616 (daily ed. June 12, 1984) (amend. No. 4, 274A(f)).

79. 130 CONG. REC. H5613-33 (daily ed. June 12, 1984) (debate concerning amends. 3 & 4).

80. *E.g.*, 130 CONG. REC. H5614 (daily ed. June 12, 1984) (statement of Rep. Lungren, R.-Cal.).

81. 130 CONG. REC. H5684-92 (daily ed. June 13, 1984) (amend. No. 11, offered by Rep. Coleman, D.-Tex.).

82. *Id.* at H5684 (statement of Rep. Coleman, D.-Tex.).

83. S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6151-52 (daily ed. June 20, 1984) (§ 274A(d)).

84. *Id.* at H6152.

85. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6168 (daily ed. June 20, 1984) (§ 274A(e)(2)).

86. *Id.* at H6169 (§ 274A(i)(2)); S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6152 (daily ed. June 20, 1984) (§ 274A(g)(2)(B)).

finer are not discretionary, and apply for each illegal alien that the employer hires. Thus, in the case of employers who use several illegal workers, the total penalty could be very substantial.

H.R. 1510 prohibits the knowing employment of illegal aliens. Therefore, enforcement of employer sanctions requires specific procedures for defining and establishing knowledge. H.R. 1510's original text met this requirement with an interim identification system.<sup>87</sup> The interim system relied exclusively on a multi-document check that permitted employers to verify an applicant's status by inspecting the applicant's driver's license, passport, or other identification.<sup>88</sup> The original text, however, limited the use of existing identification documents to three years. During the three years, the President would have studied alternative identification systems. S. 529 creates an interim verification system similar to H.R. 1510's original provision.<sup>89</sup> Under the Senate's interim system, an employer who checks an applicant's passport, driver's license, or other identification, has an affirmative defense against the charge of knowingly hiring an illegal alien. After a three-year study, however, the Senate would enact changes to improve the system.

During its debates on H.R. 1510, the House passed three amendments changing the interim verification procedures. The most significant of these amendments directs the Attorney General to create a telephone verification system,<sup>90</sup> which will accompany rather than replace the multi-document check. With the telephone system, an employer may call a government agency to confirm that an applicant's social security number is valid. In a related amendment, the House eliminated the three-year presidential study for improving verification procedures.<sup>91</sup> As amended, H.R. 1510 will permanently rely on existing forms of identification and the telephone system. Under the third amendment, all employers of four or more employees must comply with the document and telephone verification procedures.<sup>92</sup> H.R. 1510's original text, in contrast, did not require compliance with the verification procedures until the Attorney General first cited an employer for hiring an illegal immigrant.<sup>93</sup> H.R. 1510 also enforces the verification procedures with a \$500

---

87. HOUSE JUDICIARY COMM., *supra* note 4, at 3-5; H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H5594 (daily ed. June 12, 1984).

88. See *supra* note 24 and accompanying text.

89. S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6151 (daily ed. June 20, 1984).

90. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6167 (daily ed. June 20, 1984) (§ 274A(a)(7)). For the debate concerning this amendment, see 130 CONG. REC. H5651-58 (daily ed. June 12, 1984) (amend. No. 8, offered by Rep. Sam B. Hall, D.-Tex.).

91. 130 CONG. REC. H5658-70 (daily ed. June 12, 1984) (amend. No. 9, offered by Rep. Roybal, D.-Cal.).

92. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6167 (daily ed. June 20, 1984) (§ 274A(a)(1)(B)). For the debates concerning this amendment, see 130 CONG. REC. H5634-39 (daily ed. June 12, 1984) (amend. No. 5, reported by Rep. Lungren, R.-Cal.).

93. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H5594 (daily ed. June 12, 1984) (§ 274A(a)(1)(B)).

fine for each violation.<sup>94</sup>

H.R. 1510's verification system improves on existing employer sanctions because it will help employers and officials to establish knowing violations. The bill defines procedures that an employer must follow to avoid liability under the sanction provisions. Absent fraud, the sanctions will not penalize an employer who complies with the verification procedures, even though the employer may inadvertently hire an illegal alien. Mandatory verification procedures will also aid enforcement.

Despite the strength of H.R. 1510's verification system, Congress should reconsider the problems of relying on existing identification, such as drivers' licenses, under a permanent verification system. H.R. 1510's multi-document system uses easily obtained and easily forged forms of identification.<sup>95</sup> The ease with which illegal immigrants may falsify their status will detract from enforcement of the employer sanctions. Unfortunately, H.R. 1510's telephone system will not solve the false identification problem.<sup>96</sup> The telephone system will only relieve employers of determining whether an applicant has a valid social security *number*. The government agency will not be able to certify that an applicant is presenting his *own* number.<sup>97</sup> Thus, the telephone system will not significantly aid enforcement efforts. Telephone verification, however, will add a second step and additional paperwork to the verification process. To encourage employer cooperation and minimize burdens on employers, Congress should streamline the verification process. Developing a verification system that minimizes risks of false identification while also minimizing paperwork burdens will require careful study. Therefore, Congress should adopt the Senate's provision that requires future study and improving of verification procedures.

Existing state and federal legislation shows that employer sanctions are difficult to enforce. In addition to INS efforts, enforcement requires legislative measures that encourage compliance with the sanctions. High, mandatory penalties should encourage compliance by making employment of illegal aliens expensive. An identification system that creates a presumption of knowing employment of illegal aliens will help enforcement by simplifying the government's burden of proof. Minimal paperwork requirements and an affirmative defense based on compliance

---

94. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6168 (daily ed. June 20, 1984) (§ 274A(e)(3)). For an employer's first violation, the Attorney General will only issue a warning citation. Subsequent violations carry a \$500 fine for each individual with respect to which the violation occurred.

95. D. North, *supra* note 6, at 63; *Systems*, *supra* note 58, at 54 (statement of the National Council of Agricultural Employers).

96. *See, e.g.*, 130 CONG. REC. H5653 (daily ed. June 12, 1984) (statement of Rep. Richardson, D.-N.M.).

97. *Compare* 130 CONG. REC. H5652 (daily ed. June 12, 1984) (statement of Rep. Sam B. Hall, D.-Tex., explaining that the telephone system will burden a government agency, rather than employers, with the responsibility of verifying the job applicant's eligibility to work) *with id.* at H5653 (statement of Rep. Richardson, D.-N.M., explaining the weaknesses inherent in a system relying on social security numbers).



with verification procedures will improve the identification system by encouraging the employers' cooperation. Finally, employers' compliance with employment regulations requires time. H.R. 1510 answers this requirement with a one-year period for educating the affected public and eliminating noncompliance due to ignorance.

### 3. *Private Cause of Action*

The Immigration and Nationality Act does not provide a private cause of action against employers who hire illegal aliens.<sup>98</sup> To date, federal courts have refused to create a cause of action under any of the Act's prohibitions.<sup>99</sup> In *Lopez v. Arrowhead Ranches*,<sup>100</sup> the Ninth Circuit held that the provisions on which the plaintiffs relied were solely penal and created no private right of action. After this decision, however, the Ninth Circuit recommended that legislation authorizing displaced workers to bring a civil action might "provide a worthwhile aid in curbing and discouraging illegal alien immigration."<sup>101</sup>

Congress should adopt the Ninth Circuit's recommendation and provide a private cause of action against employers who hire illegal aliens. Both the California Labor Code and the FLCRA permit private actions against employers.<sup>102</sup> Although the California Act only provides that the sanctions do not bar civil action against an employer,<sup>103</sup> displaced workers successfully brought a private action under this provision against a farm-labor contractor.<sup>104</sup> In addition, the FLCRA expressly permits any person aggrieved by violations of the Act to bring suit for damages in a federal district court.<sup>105</sup> Few private actions have been brought, however, under either the FLCRA or the California Act.

Title VII and the Fair Labor Standards Act provide better legislative examples for demonstrating the advantage of a private action for enforcing H.R. 1510's employment regulations.<sup>106</sup> The principal advan-

98. 8 U.S.C. §§ 1101-1363 (1982).

99. *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975); *Flores v. George Braun Packing Co.*, 482 F.2d 279 (5th Cir. 1973); *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890 (10th Cir. 1972), *cert. denied*, 409 U.S. 1112 (1973).

100. 523 F.2d 924, 926 (9th Cir. 1975). The court also rejected the plaintiff's claim under § 1985(3) of the Civil Rights Act (42 U.S.C. § 1985(3) (Supp. V 1981)) against the employer for discriminating against legal workers. *Lopez*, 523 F.2d at 926.

101. *Lopez*, 523 F.2d at 928 n.4.

102. CAL. LAB. CODE § 2805(c) (West Supp. 1982); 7 U.S.C. § 2050(a) (1976).

103. CAL. LAB. CODE § 2805(c) (West Supp. 1982).

104. *De Canas v. Bica*, 424 U.S. 351, 353 (1976). The Supreme Court held that § 2805 is not preempted by the Immigration and Nationality Act, but remanded for the California court to decide whether the sanctions were consistent with federal regulation. *Id.* at 365. The validity of the California statute is still undecided. Thus, in 1979, the Ninth Circuit ordered an employer to rehire with back pay the illegal immigrants who had been fired in violation of the NLRA despite the provisions of § 2805. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979).

105. 7 U.S.C. § 2050a(a)-(b) (1976) (current version at 29 U.S.C. §§ 1854(a), (b), (c)(1), (c)(3) (1982)).

106. Title VII of the Civil Rights Act of 1964 allows aggrieved individuals to intervene in any civil action brought by the Commission. Title VII also authorizes individual action within 90 days of notice that the Commission has not filed an action or reached a conciliatory agreement. 42 U.S.C.

tage of private actions under Title VII and the Fair Labor Standards Act is a back-pay remedy. Title VII creates back-pay liability for defendants who intentionally engage in unlawful employment discrimination.<sup>107</sup> The victims of hiring, promotion, or wage discrimination receive the illegally denied compensation, back pay, accruing from two years prior to the individual's complaint.<sup>108</sup> The Fair Labor Standards Act measures back-pay liability according to minimum wage requirements. Under this Act, employees receive the proper amount of unpaid wages and an equal additional amount as liquidated damages.<sup>109</sup>

Similar back-pay liability for the knowing employment of illegal workers would help protect legal workers deprived of jobs because of the employer's illegal hiring practices. Just as the back-pay award under Title VII is an effort to restore aggrieved individuals to their rightful economic position,<sup>110</sup> back pay under employer sanctions would compensate displaced legal workers. Successful claimants only would have to show that they would have been hired but for the employer's illegal practice. This essentially involves showing that the individual is qualified and applied for the job in question. Back-pay awards would also discourage employers from using illegal workers as a cheaper labor supply. Violation of the sanctions would cause the employer to pay wages twice, first to the illegal worker and again as back pay to the successful claimant. Like the Title VII provision, back-pay awards for immigration violations would encourage employers to voluntarily eliminate illegal labor practices.<sup>111</sup> Finally, back-pay liability combined with liquidated damages, as provided under the Fair Labor Standards Act, stiffens the penalties for violations of sanctions. Stiff penalties will protect businesses from competitors that use illegal workers to save labor costs.<sup>112</sup>

The Committee on Education and Labor proposed an amendment to H.R. 1510 that included a private right of action against employers who hire illegal immigrants.<sup>113</sup> The amendment was similar to Title

---

§ 2000e-5(f) (1976). The Fair Labor Standards Act allows employees to bring an action against any employer in any federal or state court. 29 U.S.C. § 216(b) (1982).

107. 42 U.S.C. § 2000e-5(g) (1976).

108. *Id.*

109. 20 U.S.C. § 216(b) (Supp. V 1981). The extent of minimum wage or overtime violations determines the amount of the award. *Id.* §§ 206, 207.

110. *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 931 (10th Cir. 1979) (involving company's discriminatory practice of refusing to transfer short haul, minority drivers to the better paying over-the-road driving line). *Accord Williams v. General Foods Corp.*, 492 F.2d 399, 407 (7th Cir. 1974) (involving sex discrimination in the company's allocation of overtime work).

111. *Russell v. American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (class action against company and union for racial discrimination in promotion and seniority practices).

112. The Third Circuit in *Hodgson v. Wheaton Glass Co.* found a similar advantage in the provision of the Fair Labor Standards Act that allows the United States Treasurer to collect sums not payable to employees. "One purpose of the Fair Labor Standards Act is the protection of competing enterprises from the unfair competition which would result from an employer using as working capital employee compensation unlawfully withheld." 446 F.2d 527, 535 (3d Cir. 1971).

113. HOUSE EDUCATION AND LABOR COMM., *supra* note 77, at 3-5.

VII's private cause of action. Any person adversely affected by an employer's illegal hiring could file a charge with the Special Counsel of the United States Immigration Board. If, within thirty days, the Special Counsel found reasonable cause to believe the charge was true, the Counsel would file a complaint with the Immigration Board. Moreover, an individual complainant could appeal the Counsel's decision not to file a complaint before the Board. The amendment allowed the Immigration Board to designate administrative judges to conduct hearings on the complaints. Although the amendment required complainants to act through the Special Counsel and the Board, individual complainants were full parties to any suit arising under the amendment. Liability for violations included an order to hire the adversely affected individuals with or without back pay. The amendment's penal provisions also imposed fines.<sup>114</sup>

The House rejected the Education and Labor Committee's amendment by 253 nos to 166 ayes.<sup>115</sup> The representatives' debate focused on the amendment's antidiscrimination and penalty provisions.<sup>116</sup> The representatives actually did not discuss the individual cause of action for enforcing sanctions, but some objected to the administrative procedures accompanying the amendment.<sup>117</sup> Unfortunately, S. 529 also fails to provide a private right of action.

By adopting an amendment similar to the Education and Labor Committee's proposal, however, Congress would strengthen the employer sanctions. Back-pay awards would compensate displaced legal workers, protect competing businesses, and encourage compliance with employer sanctions. Private actions would help enforce employer sanctions just as private actions enforce Title VII's provisions. Individual complaints also would supplement the INS's limited manpower.

Although Congress could increase the effectiveness of the employer sanctions provided in H.R. 1510 by providing a private right of action, nevertheless the sanctions provided effectively can control illegal immigration. H.R. 1510 provides mandatory penalties and an identification system that establishes employers' knowledge of job applicants' immigration status. Although employer sanctions will deter only economically motivated immigration, additional control measures such as border patrols can effectively limit noneconomically motivated immigration. Thus, H.R. 1510 could provide the INS with the means to effectively control illegal immigration.

---

114. See *supra* note 77 and accompanying text.

115. 130 CONG. REC. H5633 (daily ed. June 12, 1984). For the debate concerning this amendment, see *id.* at H5615-33.

116. *Id.* at H5615-33. See *infra* note 186 and accompanying text.

117. E.g., 130 CONG. REC. H5618 (daily ed. June 12, 1984) (statement of Rep. Lungren, R.-Cal.).

## IV. FAIRNESS AND EMPLOYER SANCTIONS

Because employer sanctions prohibit the knowing employment of illegal immigrants, enforcement of sanctions requires a system for checking a job applicant's legal status. H.R. 1510 answers this requirement with multi-document verification and telephone identification systems. The document system allows employers to check a combination of existing documents, such as the applicant's driver's license, passport, or birth certificate.<sup>118</sup> The Senate bill, S. 529, creates a similar document system, but allows for changes after three years.<sup>119</sup> By relying on existing forms of identification, the document system has the advantages of immediate implementation and low cost. Reliance on existing documents, however, has several disadvantages. Existing documents are easily forged and are not reliable. False identification will impede enforcement and may encourage employers to discriminate against ethnic job applicants. Because of these problems, S. 529 requires the President to study alternative identification systems.<sup>120</sup> Changes in the identification system, however, might interfere with privacy rights by authorizing national identification cards and government collection of personal information. The House deleted its authorization for future changes in the verification system because of concern that an alternate identification system might endanger privacy interests.<sup>121</sup> The verification system Congress ultimately adopts will have a significant impact on both privacy and equal protection rights. A brief consideration of alternative identification systems is a necessary background for evaluating the fairness of proposed systems.

## A. Proposed Verification Systems

Proposals for verification systems present four basic alternatives.<sup>122</sup> First, a new-hires reporting system requires employers to file a report with a central agency for every individual hired.<sup>123</sup> The second proposal requires employers to check multiple documents for each job applicant to

---

118. See *supra* note 24 and accompanying text.

119. S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6151 (daily ed. June 20, 1984) (§ 274A(b), (c)).

120. *Id.* S. 529 directs the President to implement, subject to congressional approval, changes in the identification system that are necessary to establish a secure system. The permanent system, however, must conform to several requirements. The permanent system must: reliably determine that an applicant is eligible for work and that the applicant is not claiming another's identity; have a tamper and counterfeit resistant identifier if the system uses an identification card; limit access to any personal information gathered for purposes of employer sanctions; protect against unauthorized use of the identifier; require that officials not withhold verification for any reason other than illegal immigrant status; and prohibit any requirement that individuals carry the identifier or any use of the identifier for unrelated law enforcement efforts.

121. 130 CONG. REC. H5658-70 (daily ed. June 12, 1984) (debate concerning amend. No. 9, offered by Rep. Roybal, D.-Cal.). See *supra* note 91 and accompanying text.

122. D. North, *supra* note 6, at 60. For a detailed description of each proposal and an evaluation of the advantages and disadvantages, see *id.* at 60-72.

123. *Id.* at 60, 63.

confirm legal status.<sup>124</sup> The third proposal would create a fraud-resistant worker identification card which job applicants would present to employers.<sup>125</sup> A final proposal involves creating a national data bank containing information on every authorized worker.<sup>126</sup> Employers could verify an applicant's status by telephone, similar to computerized credit checks.

The new-hires report and the multi-document check involve little threat to privacy because they rely on existing documents such as birth certificates and drivers' licenses. Use of existing documents avoids accumulation of new information on individuals. Although these systems would require employers to look at identification that they currently do not examine, the documents would reveal only limited information such as birthplace and immigrant status.

The new-hires and multi-document systems, however, are both undesirable.<sup>127</sup> Both systems would hamper enforcement because existing forms of identification are easily and frequently obtained in a fraudulent manner.<sup>128</sup> In addition, these two systems leave the level of document scrutiny to the employer's discretion and therefore may encourage discriminatory practices.<sup>129</sup>

The more sophisticated worker identification card or computer systems provide greater protection against fraud or falsification.<sup>130</sup> Greater security aids enforcement and discourages discrimination. With more secure documents, fewer illegal aliens could prove legal status, and employers would have less reason to discriminatorily examine identification for possible forgeries. Identification card or computer systems, however, also threaten privacy interests with increased government intrusions. Opponents of employer sanctions suggest that an identification card may become a domestic passport and increase police power to stop and question individuals.<sup>131</sup> If a government data bank complements the identification system, opponents predict that government officials will misuse the collected information. The information, for example, may be misused for criminal investigations or to facilitate discrimination against persons with medical disabilities or other unfavorable characteristics.<sup>132</sup>

H.R. 1510 and S. 529 essentially adopt the multi-document proposal

124. *Id.* at 63-64.

125. *Id.* at 64-70 (includes an analysis of methods of creating fraud-resistant identification cards).

126. *Id.* at 71-72.

127. *Id.* at 63-64.

128. *See id.* at 63-64; *Systems*, *supra* note 58, at 54 (statement of the National Council of Agricultural Employers).

129. *Hearings*, *supra* note 30, at 888.

130. D. North, *supra* note 6, at 70, 72.

131. *Final Report of the Select Commission on Immigration and Refugee Policy: Joint Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary and the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 609-12 (1981) (paper prepared by T. Hayden, Immigration Policy and Individual Privacy).

132. *Id.* at 615-17, 620.

for an identification system. Under S. 529, however, Congress may amend the system and establish procedures resembling the data-bank proposal. The bill's impact on privacy and civil rights interests depends on the final form of the verification procedures. If Congress eventually retains the multi-document system, the bill will not intrude on privacy interests, but the possibility of forgeries will encourage employers to distrust an ethnic applicant's identification. A more secure system, however, could threaten privacy interests. Thus, Congress faces a choice of protecting privacy or discouraging discrimination.

### B. Privacy

The Supreme Court has recognized a constitutional basis for the right to privacy, even though the Constitution does not expressly protect privacy, by determining that the Bill of Rights protects zones of privacy.<sup>133</sup> These zones include protections against unreasonable search and seizure,<sup>134</sup> and protection of marital activities, contraception, and family relationships.<sup>135</sup>

Verification procedures for employer sanctions impinge upon rights to privacy in two areas. Verification requires employers to check the identification of job applicants, which raises search and seizure questions under the fourth amendment. Identification systems also require record keeping and data collection, raising questions about the constitutional limits on the government's power to collect data on individuals.

The Supreme Court addressed fourth amendment limitations on search and seizure in *United States v. Brignoni-Ponce*.<sup>136</sup> *Brignoni-Ponce* involved constitutional limits on INS authority to stop and question individuals who apparently were of Mexican ancestry. The officials claimed authority to randomly stop vehicles within one hundred miles of the border under subsection 287(a)(3) of the Immigration and Nationality Act. Subsection 287(a)(3) authorizes INS officials to search vehicles for aliens within a reasonable distance of the border without a warrant.<sup>137</sup> In reviewing the officials' claim, the Court recognized that enforcement of immigration laws is an important governmental interest<sup>138</sup> and that the intrusion on individuals is modest.<sup>139</sup> The Court held, however, that

---

133. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964) (holding that a state law forbidding the use of contraceptives is an unconstitutional invasion of privacy surrounding the marriage relationship).

134. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967).

135. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

136. 422 U.S. 873, 884 (1975) (border patrol may not, under the fourth amendment, randomly stop vehicles near the Mexican border to enforce immigration laws when the only ground for suspicion is that the occupants appear to be of Mexican ancestry).

137. Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) (1982). Current regulations authorize these searches within 100 miles of the border. 8 C.F.R. § 287.1(a) (1975).

138. *Brignoni-Ponce*, 422 U.S. at 881.

139. *Id.* at 880.

these factors do not justify random stops without at least reasonable suspicion.<sup>140</sup> In addition to limiting INS authority to stop vehicles, the Court extended the reasonable suspicion requirement<sup>141</sup> to subsection 287(a)(1) of the Immigration and Nationality Act.<sup>142</sup> This subsection authorizes INS officials, without a warrant, to question individuals believed to be aliens about their right to be in the United States. Although the Court recognized Mexican physical features as a relevant consideration, the Court also held that apparent Mexican ancestry alone does not satisfy the reasonable suspicion requirement.<sup>143</sup>

The reasonable suspicion requirement should not invalidate H.R. 1510's or S. 529's document verification systems. The legislation only authorizes employers to check a job applicant's legal status. This authorization does not extend to police or INS activities. If Congress adopts the Senate's provision for a new identification system, S. 529 prohibits use of the identification as a domestic passport. The INS may not require individuals to carry or present the card. S. 529 also prohibits random questioning. Moreover, employers may only request identification when an individual is applying for a job. Although neither S. 529 or H.R. 1510 requires employers to have a reasonable suspicion before requesting identification, S. 529 and H.R. 1510 prohibit discriminatory harassment of individuals whose appearance indicates they may be foreign. Employers must request identification from *every* job applicant. Thus, either H.R. 1510's or S. 529's verification requirements should survive any fourth amendment challenges. Both systems authorize a minimal intrusion and serve an important government interest.

H.R. 1510 and S. 529 both raise privacy issues arising from government data collection or record keeping. Both bills require employers to collect and retain information on job applicants. In addition, H.R. 1510's telephone system will require centralizing social security information. Finally, S. 529 requires study of alternative identification systems, under which Congress could endanger individual privacy by increasing and centralizing government access to personal information.

The Constitution places few limits on the government's ability to collect information on individuals.<sup>144</sup> In *California Bankers Association v. Shultz*,<sup>145</sup> the Supreme Court validated record-keeping and reporting requirements under the Bank Secrecy Act of 1970<sup>146</sup> upon finding a "suffi-

---

140. *Id.* at 883. The Court specified that "reasonable suspicion" is a lesser standard than the probable cause required for an arrest. *Id.* at 880-81.

141. *Id.* at 884.

142. Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1) (1982).

143. *Brignoni-Ponce*, 422 U.S. at 886-87.

144. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 760-64 (2d ed. 1983).

145. 416 U.S. 21 (1974) (validating under the fourth amendment due process clause requirements designed to obtain financial information for criminal, tax, and regulatory proceedings).

146. 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1976); 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122 (1976).

cient connection" between the problem Congress sought to address and the requirements.<sup>147</sup> The Court should apply the same test to the data requirements of H.R. 1510. The Supreme Court has repeatedly recognized the important national interest in controlling immigration.<sup>148</sup> In addition, the Court has traditionally deferred to congressional decisions in regulating immigration.<sup>149</sup> A congressional decision to require some employers to record and report information on new employees will survive "sufficient connection" analysis. By requiring employers who have already hired illegal aliens to check the legal status of new job applicants, Congress will create enforceable employer sanctions within its traditional authority to regulate immigration.

In *Whalen v. Roe*,<sup>150</sup> the Supreme Court recognized the threat to privacy that massive government data files create.<sup>151</sup> The Court's principal concern, however, was the possibility of unwarranted disclosures and the statutory provisions preventing such disclosures.<sup>152</sup> *Whalen* suggests that a permanent verification system would require security measures limiting access to information and establishing a limited time period for retaining old records. *Whalen* also suggests that privacy interests limit the type of information usable in a permanent identification system. In *Whalen*, the records contained sensitive medical information, but the Court found no invasion of privacy because the disclosure was limited to officials regulating public health.<sup>153</sup> If Congress adopts a permanent identification system, privacy rights might prohibit government collection of sensitive information. Although personal information such as medical or criminal records might prevent fraudulent use of identification, the information would not relate closely to enforcement of immigration laws. Accordingly, any improvements to the bill's verification system should rely on identifying information that is closely related to immigrant status.

Privacy concerns are unlikely to invalidate either S. 529's or H.R. 1510's current verification provisions. The authorized intrusions are minimal, and the national interest in controlling illegal immigration is great. In any future changes, however, Congress should protect individuals from unwarranted disclosure of personal information. S. 529 recognizes this requirement and mandates privacy protections for any permanent identification system.

---

147. *California Bankers Ass'n*, 416 U.S. at 49.

148. *E.g.*, *Brignoni-Ponce*, 422 U.S. at 878-79.

149. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (distinguishing between the power of the federal government and that of state governments in a decision invalidating a state law denying public education to illegal immigrant children).

150. 429 U.S. 589 (1977) (upholding New York statute allowing the state to maintain prescription record for certain drugs in a centralized computer file).

151. *Id.* at 605.

152. *Id.*

153. *Id.* at 602.



### C. Equal Protection

Equal protection analysis of employer sanctions creates dual concerns. The first problem concerns the power of Congress to draw distinctions between aliens through employer sanctions. Second, sanctions may create a vehicle for discriminatory practices against ethnic legal workers.

#### 1. Constitutionality of the Distinction Between Legal and Illegal Aliens

In *Mathews v. Diaz*,<sup>154</sup> the Supreme Court specifically included illegal aliens among the persons entitled to the due process protections of the fifth and fourteenth amendments.<sup>155</sup> In *Plyler v. Doe*,<sup>156</sup> the Court applied the equal protection clause of the fourteenth amendment to invalidate state discrimination against illegal aliens.<sup>157</sup> Despite their undocumented status, the fifth amendment protects illegal immigrants against invidious federal governmental discrimination,<sup>158</sup> and the fourteenth amendment protects against irrational state governmental discrimination.<sup>159</sup>

In other circumstances, however, the Court has upheld government distinctions between legal and illegal aliens, and between aliens and citizens. Even though the Supreme Court has interpreted the Constitution to protect illegal aliens from discrimination, the federal government may legally refuse to employ illegal aliens.<sup>160</sup> In *Mathews v. Diaz*, the Court applied a rational basis test to uphold a congressional decision to create a residence requirement for a legal alien's Medicare eligibility.<sup>161</sup> The Court held that the due process clause requires only that Congress draw a "legitimate distinction" between citizens and aliens, or between classes of aliens.<sup>162</sup> Employer sanctions distinguish between legal and illegal aliens by denying employment to illegal aliens. This distinction is legitimate because of Congress's power to control immigration.

The Supreme Court's decision in *Plyler v. Doe* that a state may not deny education to illegal immigrant children does not affect congressional power to make similar distinctions. Congress draws its authority to classify aliens from the constitutional grant to "establish an Uniform Rule of Naturalization"<sup>163</sup> and its plenary authority over foreign relations.<sup>164</sup> The states have no similar authority to classify aliens.<sup>165</sup> State

---

154. 426 U.S. 67 (1976) (validating congressional decision to withhold Medicare benefits from some classes of legal aliens).

155. *Id.* at 77.

156. 457 U.S. 202 (1982).

157. *Id.* at 230.

158. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)).

159. *Plyler*, 457 U.S. at 210-16.

160. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89-90 (1973).

161. 426 U.S. 67, 83 (1976).

162. *Id.* at 78.

163. U.S. CONST. art. I, § 8, cl. 4.

164. *Plyler*, 457 U.S. at 225.

165. *Id.*

legislation concerning aliens is simply not entitled to the "usual deference" shown to congressional treatment of aliens.<sup>166</sup>

The legislation that the Court invalidated in *Plyler* is also distinguishable from employer sanctions because of the individuals affected. The Texas statute denied public education to children that the Court found were illegally present in the United States "through no fault of their own."<sup>167</sup> In contrast, illegal workers are adults who have decided individually to enter the United States in violation of the Immigration and Nationality Act.

Congress has the authority, as part of its power to control immigration, to deny illegal aliens employment. Aliens who have no right to remain in the country likewise have no federal right to employment within the country.<sup>168</sup> Because of the deference the Supreme Court traditionally has shown Congress in immigration matters,<sup>169</sup> the Supreme Court should find H.R. 1510's employer sanctions a constitutionally valid mechanism for enforcing immigration laws.

## 2. Potential Discriminatory Practices

Opponents of employer sanctions argue that sanctions will cause employers to engage in "safe hires," a practice of hiring only nonethnic applicants.<sup>170</sup> The verification system may create related discriminatory practices; for example, employers might examine only the identification of ethnic job applicants.<sup>171</sup> Moreover, creation of a permanent identification card system adds the possibility that government officials will discriminate in issuing identification cards.<sup>172</sup> Consequently, ethnic individuals seeking identification cards might suffer a disproportionate burden in proving their legal status. Fairness requires that any identification system must discourage employers and government officials from engaging in discriminatory practices.

Verification procedures when combined with a secure identification system offer a partial solution to the possibility of employers engaging in discriminatory practices. H.R. 1510 prohibits any employer from hiring an individual without following verification procedures. S. 529 imposes a similar requirement. By mandating verification, H.R. 1510 and S. 529 might alleviate the practice of safe hires. Unfortunately, both bills cur-

---

166. *Id.*

167. *Id.* at 226.

168. *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (holding that the Immigration and Nationality Act does not preempt California's employer sanctions statute under the supremacy clause).

169. See *supra* note 164 and accompanying text.

170. E.g., *Knowing Employment*, *supra* note 15, at 257 (paper prepared by E. Glitzenstein, A. Pandya & D. Parker, Discriminatory Effects of Employer Sanctions Programs).

171. See *Hearings*, *supra* note 30, at 888.

172. *Knowing Employment*, *supra* note 15, at 268-70 (paper prepared by E. Glitzenstein, A. Pandya & D. Parker, Discriminatory Effects of Employer Sanctions Programs).

rently rely on easily altered existing forms of identification.<sup>173</sup> The unreliability of these documents might encourage employers to carefully examine documents for forgeries and to make subjective, discriminatory determinations of status. Both the House and Senate have attempted to correct this problem by providing that an employer will meet the verification requirements by merely checking an applicant's identification if the document "reasonably appears on its face to be genuine."<sup>174</sup> This provision, however, may only encourage discriminatory verification. The creation of a secure identification system would be a better tool for eliminating discriminatory evaluations. Under a secure identification system, illegal immigrants could not falsify their status, and employers would have no discretion to evaluate identification.

S. 529 and H.R. 1510, in their original form, both failed to provide adequate protection against the discriminatory "safe hire" practice. Both proposals relied primarily on the availability of Title VII actions to discourage discriminatory practices.<sup>175</sup> Although Title VII provides several remedies for employment discrimination,<sup>176</sup> Title VII is not an adequate remedy for sanctions-related safe hires, because its scope is too narrow to provide adequate protection. Title VII does not apply, for example, to small or seasonal employers. Employers of fourteen or fewer employees are exempt from Title VII liability, as are all employers who employ individuals for less than twenty weeks per year.<sup>177</sup> In addition, the Supreme Court has interpreted Title VII's prohibition of discrimination based on "national origin"<sup>178</sup> to not include discrimination based on alienage.<sup>179</sup> The expense and delay of litigating Title VII claims further limit its effectiveness. As of 1981, the Equal Employment Opportunity Commission (EEOC) had a backlog of seventy thousand cases and received seven thousand to ten thousand new cases each month.<sup>180</sup>

As amended, H.R. 1510 contains substantial protections against discriminatory hiring practices.<sup>181</sup> H.R. 1510 currently prohibits safe hires

173. D. North, *supra* note 6, at 63-64; *Systems*, *supra* note 58, at 54 (statement of the National Council of Agricultural Employers).

174. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6167 (daily ed. June 20, 1984) (§ 274A(b)(3)(ii)); S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6151 (daily ed. June 20, 1984) (§ 274A(b)(3)).

175. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H5595 (daily ed. June 12, 1984) (§ 274A(g)).

176. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1982).

177. *Id.* at § 2000e(b).

178. *Id.* at § 2000e-2(a)(1).

179. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).

180. *Knowing Employment*, *supra* note 15, at 300 n\* (paper prepared by E. Glitzenstein, A. Pandya & D. Parker, Discriminatory Effects of Employer Sanctions Programs).

181. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6168-69 (daily ed. June 20, 1984) (§ 274A(h)(1)(A)). The amendment adding § 274A(h)(1)(A) is identical to parts of the Education and Labor Committee's proposed amendment. For the debates concerning these amendments, see 130 CONG. REC. H5615-33 (daily ed. June 12, 1984) (amend. No. 4, offered by Rep. Hawkins for the Committee on Education and Labor) and 130 CONG. REC. H5640-44 (daily ed. June 12, 1984) (amend. No. 6, offered by Rep. Frank, D.-Mass.).

as "an unfair immigration related employment practice."<sup>182</sup> Individuals adversely affected by this practice may file a charge with the Special Counsel of the United States Immigration Board.<sup>183</sup> Intentional violations of the nondiscrimination clause may subject an employer to civil penalties between \$2,000 and \$4,000 for each individual discriminated against.<sup>184</sup> The Immigration Board might also require an employer to retain documentation on all job applicants for a specified period or to hire individuals adversely affected with or without back pay.<sup>185</sup>

H.R. 1510's amended text improves upon the original version of the bill by providing a cause of action for individuals that Title VII does not cover. H.R. 1510 also avoids creating additional rights for employees already covered by Title VII.<sup>186</sup> By enforcing the safe hire prohibition through the Special Counsel, H.R. 1510 also protects employers from harassment suits.<sup>187</sup> A complainant must show direct harm from an employer's discriminatory practices before the Special Counsel will pursue a claim. Thus, Congress should adopt H.R. 1510's antidiscrimination provisions in any new proposal for employer sanctions.

H.R. 1510 does not create an immediate threat of government discrimination in the issuance of identification because the bill relies on existing identification systems. If Congress accepts the Senate's proposed study of new systems, Congress should also accept S. 529's antidiscrimination protections. S. 529 guarantees that officials may not deny identification to any individual for any reason other than unauthorized status.<sup>188</sup> Congress could establish additional protections, including a universally applied procedure for issuing worker identification and an expedited process for adjusting any claims of discriminatory practices.

Congress should also retain H.R. 1510's prohibition on employee bond requirements.<sup>189</sup> Under this provision, an employer may not discriminate against ethnic applicants by requiring them to indemnify the employer against employer sanctions liability. A \$1,000 fine enforces this

---

182. The proposed amendment provides:

It is an unfair immigration related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee or other consideration, of the individual for employment because of such individual's national origin or alienage.

H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6168 (daily ed. June 20, 1984) (§ 274A(h)(1)(A)).

183. *Id.*

184. *Id.* at H6169.

185. *Id.*

186. *Id.* at H6168.

187. See HOUSE EDUCATION AND LABOR COMM., *supra* note 77, at 18-19 (discussing an amendment identical to the amendment the House finally adopted).

188. S. 529, 98th Cong., 2d Sess., 130 CONG. REC. H6151 (daily ed. June 20, 1984) (§ 274A(c)(2)(E)).

189. H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6167 (daily ed. June 20, 1984) (§ 274A(d)(1)). For the debates concerning this amendment, see 130 CONG. REC. H5692 (daily ed. June 13, 1984) (amend. No. 12, offered by Rep. Garcia, D.-N.Y.).

prohibition. The bond prohibition lessens the threat of discriminatory practices under H.R. 1510.

Although equal protection analysis does not invalidate employer sanctions, any legislation Congress eventually adopts should protect ethnic individuals from discriminatory practices. Prohibiting safe hiring and closely regulating the use of verification systems should provide the necessary protection.

## V. CONCLUSION

Careful drafting of employer sanctions legislation can provide an enforceable tool for dealing with illegal immigrant workers. H.R. 1510 provides a good starting point for future legislative efforts by creating enforceable employer sanctions. As amended, H.R. 1510 prohibits all employers of four or more individuals from knowingly hiring illegal immigrants and requires the same employers to follow verification procedures. H.R. 1510 enforces these sanctions with high, fixed penalties. Before adopting employer sanctions, however, Congress should reconsider H.R. 1510's reliance on the telephone system and existing forms of identification to verify applicants' immigrant status. The value of streamlined, secure verification may outweigh the costs associated with developing new identification methods.

H.R. 1510 prohibits discriminatory practices under the Act. The bill creates a cause of action to enforce its prohibition against safe hires. Future legislative efforts should retain these provisions. H.R. 1510 also requires employers to verify the status of all applicants. Unfortunately, because H.R. 1510's verification procedures rely on easily forged identification documents, they encourage employers to make subjective evaluations of a job applicant's status. New proposals should improve H.R. 1510's verification system. At the same time, Congress should consider additional legislative protections for the privacy rights that a new verification system might threaten.

KATHLEEN M. JOHNSON