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Immigration Reform: Status of Employer Sanctions After Second Year and Plans for Third Year

Statement of
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International Law
Committee on the Judiciary
United States House of Representatives

IMMIGRATION REFORM: STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER SECOND YEAR AND PLANS FOR THIRD YEAR

SUMMARY OF STATEMENT BY
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The Immigration Reform and Control Act of 1986 (IRCA) requires GAO to issue three annual reports on the implementation and enforcement of the employer sanctions law. The three reports seek to answer whether (1) the law has been carried out satisfactorily, (2) a pattern of discrimination has resulted against authorized workers, and (3) an unnecessary regulatory burden has been created for employers.

GAO has issued two of the reports and work on the third is underway. In each issued report, GAO concluded that INS' approach to carrying out the law had been satisfactory and that the data did not show a pattern of discrimination caused by employer sanctions against authorized workers. Both reports also concluded that information was insufficient to determine if the employer sanction provision had caused an unnecessary regulatory burden on employers.

While it believes that INS has implemented the law satisfactorily, GAO identified three areas where INS could improve its implementation of employer sanctions:

-- revise the guidance to INS investigators to require them to follow reasonable steps to insure that all required employment eligibility verification forms have been prepared, such as requesting employer payroll records;

-- measure employer compliance at the beginning of INS inspections rather than at the end; and

-- begin systematically evaluating data on the extent to which unauthorized aliens are using counterfeit or fraudulent documents to complete the employment eligibility forms, including the types of documents used.

Discrimination charges filed with federal agencies and the results of GAO's employer survey did not show a pattern of discrimination. They did, however, indicate a need for a more coordinated federal effort to educate the public about IRCA's antidiscrimination provisions. Therefore, GAO recommended that the Attorney General take actions to develop, in conjunction with other federal agencies, a coordinated strategy to educate the public about IRCA's antidiscrimination provision.

GAO's third and final report will focus on INS' enforcement strategies and will include new approaches for measuring discrimination.

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the Immigration Reform and Control Act of 1986 (IRCA). At the Chairman's request, our testimony today focuses on the employer sanctions provision of IRCA. Specifically, we will discuss the results of our recent report[1] to Congress on employer sanctions and our work in progress.

BACKGROUND

For years, the Immigration and Naturalization Service (INS) arrested aliens who were working in the country illegally. Federal law, however, did not permit INS to penalize the employers. This situation changed when Congress enacted IRCA, which (1) contains civil and criminal penalties for employers of unauthorized aliens, (2) requires employers to complete an employment eligibility verification form (I-9) for each new employee, and (3) authorizes INS and Department of Labor officials to inspect I-9s.

Because of concerns that employers--to avoid being sanctioned--would not hire "foreign-looking or sounding" U.S. citizens or legal aliens, Congress added a provision prohibiting employers with four or more employees from discriminating on the basis of a

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[1] Immigration Reform: Status of Implementing Employer Sanctions After Second Year (GAO/GGD-89-16, Nov. 15, 1988).

person's national origin or citizenship status. The Office of Special Counsel in the Department of Justice is responsible for enforcing IRCA's antidiscrimination provision.

The law requires us to issue three annual reports on the implementation and enforcement of the employer sanctions law for the purpose of determining whether (1) the law has been implemented satisfactorily, (2) a pattern of discrimination has resulted against authorized workers, and (3) an unnecessary regulatory burden has been created for employers. Congress also asked us to determine if the antidiscrimination provision creates an unreasonable burden for employers. We issued our first annual report on November 5, 1987.[2]

Our second annual report, issued on November 15, 1988, concluded that (1) INS had implemented the law satisfactorily, (2) the data on discrimination did not establish a pattern of discrimination or an unreasonable burden on employers, and (3) information was insufficient to determine if the employer sanction provision had caused an unnecessary regulatory burden on employers.

In arriving at these conclusions, we (1) reviewed federal agencies' implementation of the law, (2) reviewed discrimination complaints filed with federal agencies as well as data from state agencies and groups representing aliens, and (3) surveyed

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[2]Immigration Reform: Status of Implementing Employer Sanctions After One Year (GAO/GGD-88-14, Nov. 5, 1987).

employers to obtain their views on the law's effects. Recognizing certain limitations, we used the survey results to estimate the employer population.

INS IMPLEMENTATION

Our two reports found INS' implementation actions to be satisfactory. Specifically, we agreed with INS' overall approach of continuing to educate employers about the law's requirements while increasing enforcement actions. As of September 1, 1988, INS had contacted over 1.1 million employers, warned 530 employers, and served notices of fines to 311 employers for violating the hiring or paperwork provisions of IRCA. According to INS officials, the general enforcement policy is to give employers an opportunity to voluntarily comply with the law before imposing a fine. Exceptions are made to this policy in those cases where the employer engages in serious violations of the law, such as hiring unauthorized workers. INS has continued its implementation strategy of educating employers while increasing its enforcement efforts. As of March 31, 1989, INS had provided information about the law to more than 650,000 additional employers, warned an additional 3,486 employers, and issued fines to an additional 1,416 employers.

Our second report showed the need to continue providing employers with information on the law. On the basis of our November 1987 employer survey, about 22 percent of the employers indicated that

they were unaware the law existed, and as many as 20 percent of those aware of the law did not clearly understand the law's major provisions. Furthermore, about 50 percent of the employers surveyed had not completed all the required I-9 forms for their new employees.

While our second report concluded that INS' implementation of the law was satisfactory, our audit identified three areas where INS could improve its management of employer sanctions.

The first involved the law's employment eligibility verification system for all new employees, which was intended to screen out persons who were not authorized to work. We reviewed INS records in five cities and found that about 40 percent of the aliens apprehended at work had used or were suspected of using fraudulent or counterfeit documents to complete the I-9. INS does not systematically analyze this data to determine the extent to which unauthorized aliens are using counterfeit or fraudulent documents to obtain employment. Consequently, we recommended to the Attorney General that INS begin systematically evaluating information on aliens' use of fraudulent documents so that it will know whether any changes are needed in the law's employment eligibility system.

Our second recommendation involved INS' method for measuring employers' voluntary compliance. INS has implemented a general

administrative plan that uses random employer inspections to measure employer compliance with IRCA's I-9 requirement.

INS data from these inspections indicated that 95 percent of the inspected employers were voluntarily complying with the law. However, our employer survey indicated that the actual compliance level was closer to 50 percent. On the basis of our review of INS inspection procedures, we determined that INS measured employers' voluntary compliance at the conclusion of inspections --some of which were not concluded until the employer had been visited more than once. While this procedure gives an employer ample opportunity to comply, we do not believe that such a procedure is a valid measure of voluntary compliance. Consequently, we recommended to the Attorney General that INS measure employers' compliance with the law at the beginning of the inspection. We believe that following this procedure will allow INS to measure both the level of voluntary compliance and the additional number of employers who are brought into compliance through its efforts.

The third area where we reported INS could improve also involved employers' compliance with the I-9 form. Generally, IRCA requires employers to complete I-9s for all employees hired after November 6, 1986, and to present their I-9s to INS officials or Department of Labor inspectors upon request. INS and DOL use these inspections to determine if an employer is complying with IRCA's employment eligibility verification requirements. We

found that INS and DOL officials often did not determine how many persons the employer had hired since November 6, 1986. Without this data, INS and DOL did not know if all required I-9s had been presented for inspection. In order to make the compliance inspections more effective, we recommended to the Attorney General and the Secretary of Labor that reasonable steps be taken to determine if all required I-9 forms have been prepared. This could be done by requesting and reviewing additional employer records, such as payroll records. The Attorney General and the Secretary of Labor concurred with all of our recommendations.

NO PATTERN OF DISCRIMINATION

In our last report, we concluded that the data available on discrimination did not show that employer sanctions caused a pattern of discrimination against authorized workers.

As of September 1988, the Office of Special Counsel (OSC) in the Department of Justice had received 286 charges. Of these, 59 were closed due to lack of jurisdiction, no cause, or insufficient information; 30 have been resolved through settlements; and 8 were filed with an administrative law judge for adjudication. The remaining 189 were being processed or investigated. As of April 17, 1989, OSC had received an additional 229 charges.

As of September 1988, the Equal Employment Opportunity Commission (EEOC)--the agency that administers Title VII of the Civil Rights Act of 1964 prohibiting national origin discrimination--had received 148 charges related to the new immigration law. Of these, 48 were closed for various reasons such as lack of jurisdiction or no cause, 36 were resolved through settlement, and 64 were being processed or investigated. As of March 15, 1989, EEOC had received an additional 33 charges related to the new immigration law.

Because many people who are discriminated against may not--for various reasons--file a formal complaint with a government agency, we looked for another method to measure discrimination. We surveyed about 6,000 employers who were randomly selected from a list of over 6 million employers.

We asked various questions that we thought would measure potential discriminatory hiring practices. Our report found, when projecting the survey results to the universe of employers, that about 16 percent or 528,000 employers who were aware of the law had begun or increased unfair employment practices. Specifically, these employers said that they were only asking foreign-looking or sounding persons to present documents or that they had begun a policy to hire only U.S. citizens.

We were unable to conclude from the survey results that employer sanctions had caused a pattern of discrimination against

authorized workers because (1) survey responses did not tell us why employers may have begun or increased unfair employment practices and (2) surveying employers did not enable us to determine whether actions were taken against authorized workers. The mandate in the law says that we are to determine whether (1) employer sanctions have caused a pattern of discrimination and (2) if it was against authorized workers. Since these two factors in the mandate were not measured through our survey, we could not conclude that the law has caused a pattern of discrimination against authorized workers. However, we concluded that policy makers should be concerned about employers who may have begun unfair employment practices. We recommended that the Attorney General direct the Special Counsel to develop a coordinated strategy with other agencies to educate the public about the discrimination protections in IRCA. The Attorney General agreed and has directed the Special Counsel to set up a formal task force. The Special Counsel is in the process of doing this.

REGULATORY BURDEN

The law also requires us to determine whether employer sanctions have resulted in an unnecessary regulatory burden for employers. When Congress mandated that all of the nation's employers complete a new form for each new hire, we believe that Congress expected that levels of employment and migration of unauthorized aliens would decrease. Thus, in principle, the burden resulting

from employer sanctions may not be necessary if it could be proven conclusively that the law has not significantly decreased the levels below what they would have been without the law. Caution should be exercised because changes may be influenced by factors other than employer sanctions, such as economic or political conditions in other countries.

Although it is unlikely that we will find conclusive evidence, we have monitored various indicators of the law's effectiveness in reducing unauthorized alien employment and migration as well as the cost to employers to prepare the forms. For example, as indicators of the law's effectiveness, we tracked alien apprehensions at the border, the number of nonimmigrants from selected countries who overstay their visas, and the number of aliens issued nonwork social security numbers who are working. We also reported that a majority of employers were able to complete the I-9 form in less than 10 minutes. Our second report concluded that the data available was insufficient for us to determine the law's effects on illegal migration and employment.

METHODOLOGY FOR THE THIRD ANNUAL REPORT

In our third and final report, we will use some of the methodologies used in the second report and will be adding some new approaches.

To answer whether the law has been implemented satisfactorily, we plan to review INS' management and implementation of the education and enforcement programs and to survey employers again about their awareness, understanding, and compliance with IRCA. Most of our effort will focus on INS' enforcement of IRCA. Specifically, we plan to evaluate INS' random audit procedures used to select employers for I-9 compliance inspections, determine if INS field offices are following the employer sanction policies established by the Commissioner, determine if INS' enforcement program deters employers from hiring unauthorized workers, and assess the methods used to identify employers who are investigated for potential violations. We will have audit teams in five cities--Miami, New York, Chicago, Dallas, and Los Angeles.

To supplement our measures of discrimination, we are planning several new initiatives. For example, our audit teams in each of the five cities are going to interview persons who have recently applied for a job. We will ask them about their experiences and record how employers treat Hispanics and Asians compared with Caucasians. For example, we will determine if employers only ask Hispanics or Asians to show documents or to complete I-9s. We also plan to do a time-series analysis of EEOC national origin discrimination complaints filed from 1980 to the present. Our objective is to determine if there has been a significant change in complaints since 1986. We recognize that factors other than

employer sanctions could explain changes in the data. In addition, our next survey to employers will contain several new questions to measure discriminatory behaviors.

We will also continue to monitor the number of complaints filed with the Office of Special Counsel, EEOC, the various immigrant rights organizations that have set up "hotlines" to receive discrimination complaints, and state and local task forces set up to monitor the law's effects.

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This concludes my prepared statement. We would be pleased to answer any questions you may have.