

ROUND FOUR

THE IMMIGRATION BATTLE AHEAD IN THE STATES

As state legislatures convene across the country this month, businesses are facing another round of bills that would crack down on illegal immigrants and the companies that hire them.

With no action in Congress last year to pass immigration reform, state legislatures are once again poised to fill the void. For the fourth year running, angry battles threaten from coast to coast, some on the border and some far from it. For the most part, lawmakers introducing enforcement measures are building on laws enacted in recent years – in Arizona, Oklahoma and other states. And employer groups across the country are girding for tough fights, also drawing on lessons learned last year and the year before.

One of the first battles of this year's legislative session is brewing in Wyoming, where a wide-ranging bill would require all employers to use E-Verify. Nebraska's proposal would suspend the business licenses of employers who hire unauthorized workers. And the Indiana legislature is contemplating several bills, including one that zeroes in on those who trade in fraudulent documents.

What's not clear yet is what impact the recession will have on state legislatures considering immigration bills. Will high unemployment rates make lawmakers more receptive to these measures as a means of protecting American workers? Or will the sour economy and escalating deficits overshadow all other issues, pushing immigration to a back burner?

Key battles in the weeks ahead

In **Wyoming**, a bill patterned after the harsh law passed in Oklahoma in 2007 would require public employers and any business that contracts with a public employer to enroll in E-Verify. The bill would give smaller employers time to start using the verification system. But within three years all employers would have to comply. Firms found to have hired unauthorized workers would be fined up to \$3,200 per employee for a first offense and up to \$16,000 per employee for a third offense. The bill would make it a crime to harbor or transport an illegal immigrant – an offense punishable by jail time of up to two years and fines up to \$5,000. The measure would also bar illegal immigrants from using certain government services.

Business owners in Wyoming are concerned because the sponsor of the bill is the powerful Republican chairman of the House Corporations Committee and because the state's short legislative session – it lasts for less than two months - gives them little time to mobilize to fight the measure.

In **Nebraska**, a bill introduced on behalf of the governor would require all employers in the state to use E-Verify. A company found to have hired an unauthorized worker could have its business license suspended or revoked – suspended initially and then revoked if the violations continue after a business has been on probation.

In **Texas**, more than 40 immigration-related bills are expected to be introduced this session. One measure would require government entities to use E-Verify. Another would create an incentive for all employers to use the system by prohibiting them from knowingly hiring illegal immigrants and making enrollment in E-Verify a defense against that charge. Still another measure would require all contractors who do business with the state to sign up for the federal program.

The political climate in Texas is murky this year because the House has a new Speaker, Republican Joe Straus, and employers are uncertain how he will handle the immigration agenda. Straus isn't thought to be hostile to immigrants, but he believes leadership should let lawmakers work out their own fights and is expected to run his chamber with a light hand. So it isn't clear if he will step forward to block the kind of immigration legislation that business owners are concerned about.

In **Arkansas**, a sweeping bill introduced by a rural legislator would make it a felony to provide transportation for an illegal immigrant and would create an enforcement unit to investigate the sale and distribution of identification documents. The measure would also require contractors and subcontractors who do business with the state to verify the work status of their employees. Perhaps of greatest concern to employers, the bill would create a private right of action for aggrieved U.S. workers, allowing them to sue contractors who violate the verification requirement.

Some business leaders hope that Democratic Gov. Mike Beebe, who is known to view immigration as a federal issue, would repel such a package. But the governor has yet to take a stand on the proposed legislation.

In **Indiana**, lawmakers are raising the specter of lost jobs to push several tough immigration enforcement measures. The state needs "every job we can find for Hoosiers," claims the Democratic author of one bill that would crack down on illegal immigrants in the workplace.

The harshest proposal comes from Republican Senator Mike Delph, author of the measure, ultimately defeated in the legislature, that put Indiana at the forefront of last year's state debates on immigration. His 2009 bill, taking off from Arizona's draconian 2007 law, would put businesses that hire illegal immigrants on probation for three years. After a second violation, the company's business license would be suspended, and after a third violation, the license would be revoked. The bill also seeks to expand E-Verify by creating a "safe harbor" for companies that use the program.

But Indiana insiders doubt Delph's new bill will gain much traction in the legislature. More likely to move, they say, is an alternative enforcement provision targeting those who produce and sell the fraudulent identity documents carried by many unauthorized immigrants.

Among other states where business leaders are girding for possible immigration battles: **Hawaii, New Jersey, Pennsylvania** and **Rhode Island**.

Business hopes and fears

Business leaders in some states where harsh immigration bills are threatening hope that the economic climate will deter lawmakers – that legislatures will have more pressing matters to deal with and balancing their budgets will take precedence over issues like immigration.

In other states, employers are drawing on the experience of the last year's legislative session, when business coalitions in several states endorsed employment-related immigration bills that targeted egregious offenders but spared business owners making a good-faith effort to comply with federal immigration law.

In yet other states, business groups take hope from what happened last year in Indiana, Kentucky, Kansas, Tennessee and Wisconsin, where tough immigration bills were debated but lawmakers went home without passing anything.

Still, employers in many states are concerned about the likely effect of a decision last September by the Ninth U.S. Circuit Court of Appeals: a ruling that upheld the 2007 Arizona law mandating E-Verify for all employers in the state.

The Ninth Circuit's decision will not be the last word on the subject. Similar cases are under consideration in the Third and Tenth Circuits, with the question of who – the state or the feds – is responsible for immigration law expected to come eventually before the U.S. Supreme Court. The Ninth Circuit left the door open to revisiting the issue if it were presented with a factual case – a dispute involving a real employer, as opposed to a theoretical challenge to a law – out of Arizona or another state. But that hasn't happened yet. And meanwhile, the Ninth Circuit ruling could embolden other lawmakers around the country eager to mandate E-Verify.

From defense to offense

In some states, businesses are taking a two-pronged approach: beat back bad legislation but also counter with proposals that attack the problem in a positive way.

This strategy picks up where business advocates left off last year in Arizona and Colorado. With the federal government loathe to tackle immigration and many employers unable to find workers, lawmakers in both states introduced bills to create stand-alone state temporary worker programs. The Arizona legislature adjourned without passing the measure, but lawmakers in Denver mandated a state-run guest worker program for Colorado's seasonal agriculture industry. And this year, despite the recession, employers groups are poised to introduce similar bills in several states.

Despite high unemployment rates, employers in some sectors – especially agriculture – still face tight labor markets. Many continue to rely on immigrant workers, and they are clamoring for a legal supply.

In response, legislators in Washington and Texas have proposed state guest worker programs – the label in both states is "essential worker pilot programs" – that would help businesses hire workers from other countries if Americans could not be found for the positions. The Utah Chamber of Commerce has proposed a similar bill that would also provide temporary legal status to unauthorized immigrants already in the state. And advocates in Arizona are circulating a petition calling on either the state or federal government to create channels for foreign workers to enter the country legally.

The federal government would have to grant waivers before any of these programs could go into effect, and many consider that unlikely. Still, business leaders believe, passage of these bills would send a clear message to Congress: enforcement-only legislation won't solve the problem, federal action is urgently needed – and, even in a recession, many employers across the country still need foreign workers to staff their businesses and sustain the local economy.