

UP FOR A FIGHT

State Laws Challenged in Court as Lawmakers Take on Immigration

As states seek to fill the void in immigration policy left by the federal government, statewide immigration laws in Oklahoma, Arizona and Illinois face lawsuits and costly court battles.

By Mikel Chavers

Oklahoma Rep. Randy Terrill received death threats at home because of his involvement in a contentious state immigration law that is now being challenged in court. And although he believes Oklahoma's law—known as House Bill 1804—will be upheld in the most recent string of lawsuits, he and his family still had to unplug their home phone and rely solely on cell phones to avoid the menacing calls.

Perhaps controversial is a bit of an understatement.

"I had to have security posted outside my office on two to three occasions," Terrill said.

He's been called every name in the book—racist, bigot, hater—others he prefers not to repeat, and still others he can't repeat because they were in Spanish.

"It's tough," he said.

State lawmakers like Terrill are increasingly active in immigration policy. Altogether, states introduced more than 1,500 bills and resolutions concerning immigration, and 46 states enacted 194 new immigration-related laws last year, according to the National Conference of State Legislatures.

Immigration lawyers and state legislators say the absence of comprehensive immigration reform at the federal level has prompted state governments to take action.

But some states face court battles over the new laws. Lawsuits filed in state and federal district courts are challenging immigration laws and trying to bring them down.

States Fill Policy Void

Immigration was an issue that mostly concerned border states until now. In recent years, states all over the country are experiencing growth in foreign-born populations, according to the U.S. Census Bureau.

"All states are becoming what used to be called border states," said Ron Woodard, director of NC Listen, an immigration reform nonprofit organization based in Cary, N.C. Eleven bills concerning immigration were introduced in North Carolina last year, but only one passed out of committee, Woodard said.

North Carolina—although not a border state—was among the states with the largest growth in foreign-born population in the U.S., growing by nearly 43 percent from 2000 to 2006, according to the Mi-

gration Policy Institute's analysis of U.S. Census Bureau data.

While states have seen an increase in immigrants—some illegal, many officials believe the federal government has done little to solve the problem.

"The federal government has absolutely fallen down on their responsibility to protect our nation's borders," Terrill said. "There was a huge policy void. It's always been the states that have stepped in to fill policy voids."

Put bluntly: "It was the states that were picking up the tab as a result of the federal government's inaction," Terrill said.

In fact, significant state laws addressing employment of undocumented workers are surfacing not just in border states like Arizona and Texas. Louisiana, Illinois, Arkansas, Colorado, Georgia and Oklahoma are tackling the very same issue.

And Oklahoma's law, like other states, is the source of multiple court battles.

Ripe for Litigation

Terrill's H.B. 1804, which created the Oklahoma Taxpayer and Citizen Protection Act of 2007, went into effect in November 2007. So far, four lawsuits have been filed challenging the law, according to Terrill.

The law basically creates state barriers to hiring illegal immigrants and requires employers doing business with the state to check and verify the eligibility status of all new workers.

By the summer, the law will require all state contractors and subcontractors to verify the eligibility status of workers to ensure they aren't hiring illegal immigrants. On top of that, the law allows employees who have been fired and replaced to sue their employer if they are able to show an undocumented worker replaced them.

Two of the lawsuits against H.B. 1804 have already been dismissed—upholding Oklahoma's law. The National Coalition of Latino Clergy and other businesses filed a lawsuit against Oklahoma Gov. Brad Henry, Oklahoma Attorney General Drew Edmondson and others challenging the law in federal district court in Tulsa. The suit also included undocumented immigrants as plaintiffs listed as "John Doe" or "Jane Doe."

The federal district judge initially dismissed the lawsuit in October on the grounds that the plaintiffs could not show they suffered damage from the law before it took effect. The judge dismissed the sec-

ond version of the lawsuit in December after the party re-filed, according to court documents.

Two other lawsuits are still pending as of March 10—the latest of which was filed in federal court Feb. 1 by the U.S. Chamber of Commerce and others arguing that the Oklahoma law is unconstitutional. The other lawsuit was filed in January in Tulsa County court against the governor and the Tulsa County Board of Commissioners. It also challenges H.B. 1804's constitutionality.

Terrill said simply that the two pending lawsuits "won't be successful."

Aside from the earlier decisions that upheld Oklahoma's law, Terrill cites public opinion surveys used by the legislature to show the public's support for the state's action on illegal immigration and the employment of undocumented workers.

Terrill said illegal immigration showed up on the public opinion survey in 2005 as the fifth top issue for Oklahomans. Illegal immigration moved to number three in March 2006, and then to number two in June 2006, behind only education reform, according to the survey. In April 2007, 78 percent of Oklahomans said illegal immigration was a big problem, according to Terrill.

He said the earlier court decisions have clearly upheld the state law and he doesn't expect the outcome of the pending suits to be any different.

"We got the green light on the bill," he said.

Checking for Undocumented Workers

Other states with similar laws have faced similar court battles. Those state laws—including Oklahoma's—typically deal with e-Verify, a federal database that allows employers to determine if employees are legally allowed to work in the U.S. and to check the validity of their Social Security numbers. The Internet-based system, previously known as the Basic Pilot Program, is operated by the Department of Homeland Security in partnership with the Social Security Administration.

The Legal Arizona Workers Act gives the state authority to suspend or revoke the business license of any employer that "knowingly" or "intentionally" hires an illegal immigrant. Under the law, Arizona businesses are required to check the eligibility status of all new workers using e-Ver

Check The Council of State Governments' blog, Capitol Comments, for a special Web extra on Oklahoma Rep. Randy Terrill's plans for a follow-up bill on immigration, building on the controversial House Bill 1804. You'll also find resources to get more information about the various laws discussed in this article. Go to www.csg.org and click on the Capitol Comments link.

“I've had protests at the Capitol and boot stepping on my head and calling me names—it's been pretty extreme at times. I've been called everything and it's OK and I will not shy away from this fight.”

—Arizona Rep. Russell K. Pearce,
Author of the Legal Arizona Workers Act

ify to make sure they are legally allowed to work in the U.S.

That law, originally set to take effect Jan. 1, has been plagued by several lawsuits since it was enacted in July 2007. After a federal judge upheld the law in February, Arizona officials were able to begin enforcing it on March 1.

In February, U.S. District Court Judge Neil Wake upheld the Arizona law and dismissed the arguments brought by several parties who had filed several lawsuits—including the Arizona Contractors Association Inc., Arizona Employers for Immigration Reform, Valle Del Sol Inc., Chicanos Por la Causa Inc. and Wake Up Arizona! Inc., according to court documents. Those parties had consolidated their arguments into one lawsuit challenging the Legal Arizona Workers Act.

Although Wake upheld the Arizona law, the coalition of businesses and Latino civil rights groups appealed to the U.S. Court of Appeals for the Ninth Circuit Feb. 28. The case is pending in the appellate court, but the law is still in effect, according to recent court documents.

“We wrote this very carefully knowing we'd be sued and we came through,” said Arizona Rep. Russell K. Pearce, the main author of the Legal Arizona Workers Act. He is a firm believer that the law is simply exercising the state's inherent authority on the issue.

“Courts are siding with us with strong, strong decisions,” Pearce said.

The American Civil Liberties Union, one organization supporting the group in its appeal, asserts that the new Arizona law conflicts with federal law and also violates the constitution, according to a February ACLU press release.

“Arizona is shooting itself in the foot by aggressively pursuing this drastic and unprecedented sanctions regime that will harm innocent workers, close down businesses and increase discrimination against people of color,” said ACLU Immigrants'

Rights Project attorney Omar Jadwat in the press release.

But Pearce tells a different story—one that's been supported by the courts so far.

Pearce worked on the law for five years before it became the Legal Arizona Workers Act. Although it may be the toughest work site enforcement law in the country, Pearce said, the states have always had the inherent authority to enforce a law like this.

“We fight that battle all the time,” he said. “And we won and will continue to win.”

Battling a Database in Court

In Illinois, state immigration law has taken a decidedly opposite approach from Oklahoma and Arizona. House Bill 1744, passed in August 2007, prohibited employers from using the federal e-Verify database to check for undocumented workers until the database could reach the state's specific quality control benchmarks.

Some lawmakers in Illinois believe e-Verify has an unacceptable error rate. H.B. 1744 did not allow employers to use the database until the Social Security Administration or the Department of Homeland Security are able determine a worker's eligibility status within three days in 99 percent of the cases—a benchmark that so far is unmet.

“The problem with e-Verify is that it was sending people that were legally allowed to work here and considering them a ‘no match,’” Illinois Sen. Iris Martinez said of the idea behind H.B. 1744. Therefore, people who were legally allowed to work in the U.S. were getting caught up in the system, she said. “How can you trust a system that has so many flaws?”

The federal government sued the state on the grounds that the law “conflicts with federal law and/or that it otherwise presents an obstacle to accomplishment and execution of the full purposes and objectives of federal law,” according to the court document filed in September.

A federal judge put a hold on the lawsuit because bills in the Illinois legislature might just take care of the problem. One of those pending bills, Senate Bill 1878, aims to amend the language of H.B. 1744 by allowing employers to use e-Verify if they choose.

Martinez, the main author of the bill, said basically the new bill “will make the lawsuit go away.”

In addition to cleaning up the language found objectionable by the Department of Homeland Security, the new bill allows workers who believe they were deemed ineligible to work in the U.S. by mistake to bypass the bureaucracy of the Department of Labor and file a complaint directly with the state in circuit court, according to Martinez.

“The workers have a little bit more leeway in filing a complaint,” Martinez said.

As of early March, the bill was well on its way through the state Senate. But Martinez offers a strong promise: “I intend to pass this bill,” she said.

“It will avoid the costly court battle and everything else.”

But sometimes the costly court battle is well worth the pain—especially in immigration issues, according to state legislators like Oklahoma's Terrill and Arizona's Pearce.

Like Terrill, Pearce has been called a plethora of dirty names because of his efforts on controversial state immigration laws and measures.

“I've had protests at the Capitol and boot stepping on my head and calling me names—it's been pretty extreme at times,” Pearce said. “I've been called everything and it's OK and I will not shy away from this fight.”

And amidst the threats, Pearce isn't backing down in Arizona for one simple reason.

“The citizens are on our side.”
—Mikel Chavers is associate editor of State News magazine.