

IMMIGRATION LAW PROSECUTIONS SOAR! EMPLOYERS BEWARE!

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In 2008, federal prosecutions of immigration law violators reached an all-time high according to a Syracuse University TRAC study.¹ In industries such as horticulture, food-service, and janitorial service, where the hiring of foreign-born workers is particularly prevalent, it is critical that employers be familiar with the full panoply of federal immigration laws. In this particular article, we will provide an overview of the federal law prohibiting the harboring of illegal aliens.

The illegal harboring statute is found at 8 U.S.C. § 1324. This statute makes it a federal crime for anyone who:

knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation[.]

To prove the offense of harboring an illegal alien the Government must establish that (1) an alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law, and (4) the defendant's conduct tended to substantially facilitate the alien remaining in the United States illegally. Convictions for harboring an illegal alien under § 1324 generally involve defendants who provide illegal aliens with affirmative assistance, such as shelter, transportation (including to and from employment), money for necessities, direction about how to obtain false documentation, and/or warnings about impending investigations or raids. Similar evidence (including failing to properly verify new employees) has been held sufficient to establish that the defendant knew or was in reckless disregard of an individual's illegal immigration status.

It is important to note that at least one court has held that merely giving an alien advice to "lay low" and to stay away from the address on file with authorities was not conduct that tended to "substantially facilitate" an alien remaining in the United States illegally, and therefore not illegal harboring. Moreover, courts have held uniformly that merely hiring unauthorized aliens does NOT constitute harboring.

However, if an employer later learns of the unauthorized status of aliens and continues to employ them, the business can be subject to the harboring statute. In a recent case this Firm handled, an employer relied on a broker who told the employer that

¹ See "Surge in Immigration Prosecutions Continue," <http://trac.syr.edu/immigration/reports/188/>. The Transactional Records Access Clearinghouse ("TRAC") is a data gathering, data research and data distribution organization at Syracuse University.

he was licensed to provide documented, foreign workers to businesses. At the time the aliens were hired, the employer was presented documentation for each alien indicating that they were authorized to work in the United States. Later, after the aliens were hired, the employer learned that several of the social security numbers provided by the aliens were false.² The employer's continued employment of the aliens resulted, in part, in a charge of harboring.

The penalties for a conviction of illegal harboring can be particularly severe. Illegal harboring is a felony, unlike the mere hiring of unauthorized aliens which generally amounts to only a misdemeanor. The statutory maximum penalty for a general violation of the harboring statute is a fine and up to 5 years incarceration. In the very unfortunate case where a person causes serious bodily injury to, or places in jeopardy the life of, or causes the death of any person during or in relation to a violation of the harboring statute, the statutory maximum could be up to life in prison or even the death penalty.

Businesses (or individuals who own or run businesses) traditionally face harsher sentences for illegal harboring. If the offense was committed for "commercial advantage or private financial gain" the statutory maximum jumps to 10 years incarceration. Courts have applied the term "commercial advantage" quite broadly, such as where a business hires or conceals aliens for use in a business, rather than out of any feelings of charity or affection.

The federal sentencing guidelines can also increase the sentencing range of a convicted business (or individual) where the number of illegal aliens involved exceeds 5 persons. The guidelines also increase the sentencing range if the offense was committed "for profit." This is different than the offense being committed "for commercial advantage," in that it requires the business or individual to be profiting from the act of harboring itself. For instance, a landlord may be found to have committed the offense "for profit" where he knowingly charges a local business for housing and concealing illegal aliens that are working for the business, and an "importer" would also be committing an offense "for profit" where he receives a fee for bringing aliens into the US and transporting or delivering them.

Perhaps most importantly, the harboring statute contains a forfeiture provision that can be an attractive tool for prosecutors wishing to seize assets of businesses that harbor illegal aliens. The harboring statute, as well as the general federal forfeiture statute, allows the Government to seize and forfeit any vessel or vehicle used in violation of the harboring statute, any proceeds arising out of a violation of the harboring statute, and most significantly, any real or personal property that was used to facilitate or intended to be used to facilitate a violation of the harboring statute. In the recent case mentioned above which this Firm handled, this forfeiture provision exposed an entire

² The client is now utilizing the E-Verify system. E-Verify is an Internet based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

multi-million dollar corporation's assets to forfeiture for violating the harboring statute. While the end result was far less injurious to the client corporation, the threat was very real and could have been avoided with some forethought in the hiring process.

Businesses in industries in which foreign-born workers are prevalent must be familiar with the immigration laws and regulations. For employers, the best defense against being charged with harboring illegal aliens is first to abide by the statutes and regulations governing the hiring of aliens.

The White Collar Crime Section of Rosenberg | Martin | Greenberg, LLP can help businesses come into compliance with the immigration laws. We have represented individuals and corporations in federal investigations of immigration law violations. If you or your company has been charged with or come under investigation for violating any immigration laws, please contact Gerard P. Martin, Steven F. Wrobel, or Paul M. Flannery immediately at 410-727-6600.