

## CONSTRUCTION LAW

# Seeing Both Sides

WHEN IT COMES TO THE WORK FORCE SHORTAGE, IS IMMIGRATION REFORM A VIABLE SOLUTION? By Matthew Spivey & Kevin Hudson

**T**he construction industry has a long and true history of promoting minorities in the workplace. Despite troubled economic times, many areas of the construction industry continue to expand rapidly and some estimates suggest that construction constitutes 10 percent of the gross national product.

Construction is one of the top employers in the country, and there is a critical need for skilled and qualified labors, regardless of skin color. Efforts to obtain workers through high school and college job fairs and through public advertising have not addressed the dramatic shortfall in workers. The question becomes whether there is a viable solution that can be had through immigration reform measures. The answer is "No" and we will outline some of the impediments.

Federal and state governments have not fashioned a solution that allows both work force immigration and secures borders. Instead of targeting underground operations, — which are dedicated to providing illegal aliens with documentation necessary to give the false appearance of residency or citizenship — governments are shifting the burden to the private sector to take responsibility for verifying the status of a worker and to bear a heavy cost for workers with false documentation. The government's action, in turn, becomes a vehicle of opportunity for the long-term union/non-union debate.

## Unfair Standards?

The construction unions are quick to claim that illegal immigration is a leading cause of unfair labor standards. Thus, the unions divide their political representatives by arguing for stringent employment of penalties and processes that are virtually impossible to meet.

For example, a recent reform in Georgia and other states imposes a vast civil tax penalty on any private employer who is employing any illegal alien. Contractors or subcontractors can-

not enter into a contract or subcontract with a public employer for the performance of services within the state of Georgia unless they register and participate in the federal work authorization program to verify all new employees.

Under Georgia's Section 48-7-21.1, as of Jan. 1, wages of \$600 or more per year for labor services (meaning the physical performance of labor services in the state of Georgia) provided by an individual cannot be claimed and allowed as a deductible business expense for state income tax purposes unless the individual is an authorized employee (meaning that the individual is authorized for employment in the United States). Under Section 48-7-21.1, a withholding agent is required to withhold state income tax at a rate of 6 percent of the amount of compensation reported on Form 1099 when the individual filling out Form 1099 has (1) failed to provide a taxpayer ID number, (2) failed to provide a correct taxpayer ID number, or (3) provided an IRS taxpayer ID number issued to non-resident aliens.

As for the implications of Georgia's law, consider the general contractor, who is responsible for a multitude of subcontractors and suppliers on any given project. Under the law, the totality of the work force is the responsibility of the general contractor. The general contractor becomes charged with providing a correct taxpayer identification or facing audits and tax penalties. The traditional method of obtaining a copy of materials and/or sworn statements from the employee as to his or her status are not sufficient if the documentation turns out to be wrong and the statements turn out to be false. There is no credit given for intent to comply.

## Facilitating Compliance

Despite the drastic penalties imposed by the government's framework, the same government has failed to take efficient and complete action to allow compliance. The National Identification Program was enacted by the federal government to standardize

identification and provide greater assurances. It sounds great on paper. In practice, however, it appears untenable and the federal government failed to provide sufficient funding for the program.

As a result, several states have rebelled against the program, and even those states that have signed on to the program acknowledge that it may not be financially possible to comply with the program. The risk to contractors to comply with the law remains. The likely result will be a dramatic increase in contract provisions to shift the risk and construction costs to address risks that cannot be changed. Unions understand this point and are quick to seize the competitive advantage by marketing themselves as fully vetted and better able to prevent the employment of illegal aliens. Contractors become conflicted with the historical low-bid approach weighed against the costs of compliance.

The dilemma created appears to be based on fuzzy research that draws no lines between the intentional employment of an illegal alien and the good faith employment of an illegal alien with falsified paperwork.

The ability to evaluate the issue fairly is further complicated by pundits of hate, who play to audiences that embody racist attitudes and stereotypes. Although the matter should be particularly economic in its discussion, the opportunity to garner support for an agenda is fueled by direct and indirect efforts to appeal to emotion.

Examples of misconduct by an illegal alien are easily cited as justification for the magnitude of the problem. These types of arguments confuse the real issue and make fundamental and important change less possible. Politicians can become frozen by the threat of an angry constituency.

## Advancing Immigration Reform

Nonetheless, the Associated General Contractors (AGC) of America and other prominent construction agencies continue to advance proposals for comprehensive immigration reform. According to the AGC, "it is important to approach this issue rationally and to develop a fair system that does go after the bad actors, but does not seek to harm all businesses in the process."



Like all difficult tasks, the first step is a correct understanding of the issues and an objective assessment of the causes of the real problems. Despite a historic presidential campaign season, there has been little to no effort to address the immigration issue. A continued collective voice is necessary to bring about real change in this area, and this article seeks to draw attention to the need for the ongoing effort. ■

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