Should Business Hire Undocumented Workers?\* After many months of negotiations in 2007, the U.S. Senate’s compromise on a comprehensive immigration bill failed to pass. The ill-fated legislation contained provisions that would have hired new border patrol agents, imposed a new system forcing employers to electronically verify the legal status of applicants and employees, established a guest worker program, and provided an avenue for legalization for the estimated 11–20 million illegal immigrants in the country at the time. 1 Politicians on both sides of the issue held strong positions regarding the proposed legislation. One group called it an“amnesty”bill and another group feared it would cost Americans jobs. Politicians of various stripes supported it because either they approved of the idea or they wanted to be sure that this burgeoning group would someday vote for them. According to USA Today, the“ghost of the 1986 failure”haunted the proposal for immigration reform in 2007. 2 As background, it is useful to know that an immigration law was passed in 1986 that was supposed to deal with the then 3 million illegal immigrants who were offered legal status in exchange for tough new enforcements that were to stop the flow of undocumented workers. The 1986 plan turned out to be a sham. A system was set up in which employers had to accept just about any document a job applicant submitted to prove his or her legal status. The by-product of that system was a booming industry in phony documents and at least 12 million more illegal immigrants. 3 To many, the 1986 amnesty sparked the larger influx of unlawful immigration and showed would-be migrants that the United States was weak willed and would eventually cave in and give citizenship to illegals, thus encouraging many to breach the U.S. borders with renewed energy. 4 OVER 20 YEARS OF UNCONTROLLED IMMIGRATION Between 1986 and 2007, the number of illegal immigrants in the United States exploded to somewhere between 11 and 20 million. Estimates vary widely because a valid count is not possible. Using the figure of 11 million, which is the conservative guess, estimates have been made about the magnitude of this booming population. Of that population, it has been reckoned that 56 percent are from Mexico, 22 percent are from other Latin American countries, 13 percent are from Asia, and the remainder are from Europe, Canada, Africa, and elsewhere. 5 It is little wonder how the number of illegal immigrants grew to such a huge size in the intervening 20 years. The federal government took no action to stem the tide of illegal immigrants, and many businesses discovered that the workers were willing to take almost any job at low pay. In most cases, the workers worked hard and made very few demands. As a result, it became useful to business to fill many jobs that they have said were not being filled by anyone else. Of course, that statement has been disputed. Some observers have noted that if businesses had made working conditions better and raised the wages for some of these jobs, there would have been plenty of workers. But a black market of cheap labor suppressed any wage increases. From a societal perspective, the influx of illegal immigrants has posed many issues for tax-paying Americans who suspect the immigrants are getting a free ride. They have put pressures on local communities’social service agencies, school systems, health-care facilities, welfare systems, and, in many places, increased the crime rate. At the same time, the number of illegal immigrants has grown so large (11–20 million) that the thought of rounding them up and deporting them has not been seen as a feasible solution. Many of the illegal immigrants have now had children, and some are already third-generation illegals. Two groups have favored amnesty for the illegal immigrants more than anyone else—the business community, who sees in them a source of cheap labor, and some politicians who are looking down the road and speculating that someday these individuals will be their supporters if they are treated favorably. The business position is of interest to us here. THE BUSINESS STAKE Business has one of the largest stakes in the issue of what happens to illegal immigrants. Industries ranging from agriculture to construction now depend heavily on immigrant labor—legal and illegal. Business wants a reliable stream of inexpensive workers and has seemed willing to hire them even if they are undocumented. Business’s preference, of course, is immigration reform whereby they may hire the workers legally. It has been clearly seen, however, that in the absence of enforcement, many businesses disregard the law and hire the illegal immigrants anyway. 6 The business community has had a number of different groups pushing for immigration reform, but they represent a few different umbrella groups with no one clearly in charge. One lobbyist observed that there are“coalitions of coalitions.”Some want to allow more uneducated, entry-level-type workers who are willing to take jobs others won’t take. Others want reform allowing more educated and high-tech workers into the United States. One reason the business groups cannot come together is that most of them have some issue with different parts of proposed legislation. 7 A CASE WITH MAJOR IMPLICATIONS A different kind of case in Georgia may be signaling a turning point for business’s experience with hiring illegal aliens. A company that has depended heavily on illegal immigrants is Mohawk Industries, Inc., the $6.6 billion carpet maker in the small town of Calhoun, Georgia. Mohawk employs 32,000 workers and 4,000 of them are in and around Calhoun. This small town has been reshaped over the past decade by an enormous influx of Latinos. At one time, the company was primarily staffed by whites, but today the workforce comes mostly from Mexico and other Latin American countries. With wage rates at $7 an hour and higher, Hispanics came to make up an estimated 12 percent of the population. In 1990, the percentage was less than 1 percent. 8 Calhoun became the center of one of the most heated debates over the hiring of illegal immigrants. In 2004, tensions between immigrants and local workers turned into a legal case that may have significant implications for companies and communities all over the United States. Four current and former workers filed a class action lawsuit against Mohawk for allegedly conspiring to depress wages by hiring illegal immigrants. 9 The workers claimed they received lower wages because of the depression on wages caused by Mohawk’s actions. The federal lawsuit claimed that the company, with the help of local hiring agencies, knowingly accepted false documents, recruited illegals at the U.S.–Mexican border, and rehired undocumented workers under different names. Mohawk denied all the allegations. 10 The company claimed that its contracts with outside employment agencies did not cause direct harm by the conduct alleged. 11 Businesses have been watching this case closely because it was filed under the Racketeer Influenced and Corrupt Organizations Act (RICO). This 1970 law, which was originally intended to fight the Mafia, assesses triple damages against those companies found guilty of violations. RICO was amended in 1996 to allow workers to sue corporations that knowingly hire illegal workers. It turns out there are at least three similar lawsuits making their way through the legal system. 12 Mohawk appealed the case all the way to the U.S. Supreme Court. In February 2007, the Supreme Court declined to consider an appeal by Mohawk. The court’s decision allowed the case to move forward in federal court. 13 At the time, some lawyers had suggested that other potential plaintiffs around the country were considering taking action against their employers. In April 2010, Mohawk finally settled the lawsuit with its employees, who claimed the company had depressed wages by hiring illegal aliens. The company agreed to pay $18 million to about 50,000 former and current hourly-paid employees. This was said to be the largest payout ever in this type of litigation. 14 ENFORCEMENT STARTS TO TOUGHEN UP Prior to the Mohawk settlement, over the past several years, states, cities, and local municipalities have started engaging in their own fights against illegal immigration because the federal government would never take action. 15 In 2007, 18 states passed 57 immigration laws. More than 25 cities and counties passed measures. Under a Green Bay, Wisconsin, ordinance, a firm could lose its business license if it hires illegal workers. In Beaufort County, South Carolina, the county passed an ordinance that says a business could have its license suspended for hiring illegal workers. 16 Because of the defeat of the comprehensive immigration bill and the outpouring of citizen criticism against the federal government for doing nothing, a renewed initiative began taking place. In Portland, Oregon, federal agents raided a food processing plant over suspicions that the company hired and employed hundreds of illegal aliens. It also was reported that in a check of employee records at a Fresh Del Monte Produce Company vegetable and fruit processing plant in Florida, it was found that only 48 out of 600 workers had valid Social Security numbers. 17 In Ohio, the owner of a Fairview restaurant drew a prison sentence of one year for hiring illegal aliens. He pleaded guilty to inducing, transporting, and harboring illegal aliens. He not only employed them but also provided them with housing and drove them to work at the restaurant each day. It turns out the business owner himself was in the United States illegally, and he faces deportation after serving his sentence. 18 In August 2007, the Bush Administration said it would increase its scrutiny of and impose heftier fines on U.S. businesses that employed illegal immigrants and that it would step up enforcement despite Congress’s failure to pass immigration reform legislation. According to then-Homeland Security Secretary Michael Chertoff, employers who ignored immigration laws would face an increased likelihood of criminal charges and higher financial penalties. Currently, employers are supposed to verify that their workers are in the United States legally by collecting their Social Security numbers and immigration documents. These numbers are then checked against the government’s database, and employers are notified of those that do not match. Under the new rule, employers notified of a mismatch would have 90 days to confirm that the employee is in the country legally, or fire them if they were not. 19 In fiscal year 2006, the government stepped up raids of companies that used illegal labor and deported a record 185,421 individuals. The new initiative drew praises from many who have long advocated using existing laws to crack down on undocumented workers, but criticisms arose from illegal immigrant advocates and business groups. 20 Throughout 2008 and most of 2009, increased immigration raids continued and put pressure on companies that had hired illegal workers. In a number of instances these jobs were immediately filled by American workers. 21 As the recession worsened in 2009, the depressed economy along with tougher enforcement put unprecedented stress on illegal immigrants. 22 But when President Obama took office in January 2009, he presented a different posture toward illegal immigrants. He was more inclined to support a program that gave some form of amnesty to the undocumented workers, but nothing was forthcoming. Most enforcement initiatives were continuing from the momentum started earlier or were occurring at the state and city levels. Under the Obama Administration, illegal workers are not being rounded up via raids at factories and farms as was the case under the Bush Administration before it. The immigration raids have been replaced with a quieter enforcement strategy—auditing of employers’books. These“silent raids”involve federal agents going to employers and scouring their employment records for evidence of illegal hires. The investigations of the past used to result in the deportation of the illegal hires. The current system requires the employer to discharge illegal workers. During 2009–2010, Immigration and Customs Enforcement (ICE) conducted audits at more than 2,900 companies and levied a record $3 million in civil fines. Employers believe that the audits reached more companies than were reached in the work-site raids. In another change, ICE no longer brings criminal charges against the undocumented workers who lack legal status but otherwise have clean records. Critics of this system point out that once discovered and fired, the illegal immigrants are free to seek employment elsewhere. Thus, there is no way for this approach to purge the workers from the employment system as long as they keep moving. 23 In spite of a lack of comprehensive immigration reform, the federal government does require that employers fill out Form I-9 for each employee, verifying that the workers are U.S. citizens. The government has even created a special program called E-Verify, which is an Internet-based, free program run by the U.S. government that compares information from an employee’s Employment Eligibility Verification Form I-9 to data from U.S. government records. If the information matches, that employee is eligible to work in the United States. If there’s a mismatch, E-Verify alerts the employer and the employee is allowed to work while he or she resolves the problem. The program is operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration. 24 Because the E-Verify program is free and easy to use, it makes the verification process straightforward. Employers now have fewer excuses than ever not to fulfill their obligations. CITIES AND STATES CREATE THEIR OWN LEGISLATION In 2010, various cities and states continued their tough enforcement against employing illegal immigrants. Under new legislation in the State of Utah, employers could be among the first in the country to face criminal charges for failing to verify their workers’immigration status. 25 In Pennsylvania, new bills would stop the hiring of illegal immigrants. Under legislation proposed by Reps. John Galloway and Daryl Metcalfe, companies that hired foreign workers who had entered the country illegally to work for lower pay and no benefits would be punished. 26 Galloway stated at a news conference:“These bills are important because they are about protecting Pennsylvania jobs.”Metcalfe chimed in by saying that undocumented workers from other countries“take away the jobs of unemployed Pennsylvania construction workers”and often use state-funded health-care benefits, unemployment benefits, and public schools for which they pay no taxes to support. 27 The most dramatic action taken by a state occurred in April 2010 in Arizona. The state of Arizona passed a sweeping law that made the failure to carry immigration documents a crime and gave the police broad power to detain anyone suspected of being in the country illegally. 28 In a Pew Research Center poll of American citizens taken in May 2010, 73 percent of those polled approved of the measure requiring people to produce documents verifying their citizenship status. 29 The Obama Administration was not happy with the new Arizona law and indicated it would urge the courts to review the law. With 11–20 million illegal immigrants in the United States today, the resolution of this issue will not come easily. With each passing month and year, the consequences and implications of the issue accumulate and grow more urgent. The resolution will have significant implications for all sides, not only for business, but for communities, tax payers, and others waiting to enter the country legally.