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Cost Saving Or Cost-Prohibitive? The Push To Expel Undocumented Aliens From Receiving Workers' Compensation Benefits Could Have A Harmful Impact On Employers

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In reading the proposed language of S.B. 176, which is currently being sponsored by Senator Bill Seitz, a Republican out of the 8th District, I become particularly troubled by the word “knowing”. This proposed legislation is not the first attempt that Mr. Seitz has made at passing such a bill, and likely, depending upon the outcome of this current rendition of his attempt at preventing a significant portion of the Ohio labor force from participating in the state workers’ compensation fund for what are often some of the most horrific work-related injuries, it will not be his last attempt; his last, before this current version, having come in the form of S.B. 323, which never advanced beyond Committee last fall. Mr. Seitz does have his supporters out there, American citizens that are concerned that only those who are legally in this country should be permitted to partake of the safety net available to injured workers, the Ohio state workers’ compensation fund, one of the few remaining monopolistic state insurance funds, and that somehow by preventing illegal or unauthorized aliens from participating in the fund, may make it more likely that American citizens are provided this work for these employers which are paying into the fund, and will lead to cost-savings for these employers. However, many legitimate concerns arise in the face of this newly proposed legislation, and employers that want a fair and level playing field deserve an explanation as to how this legislation will benefit them financially, and why this legislation is needed at this time.

Now, getting back to the first sentence, the actual proposed language of Sec. 2307.82(C) reads, in relevant part, as follows:

A court in this state has jurisdiction over a claim brought by an illegal alien or unauthorized alien against an employer for damages suffered by reason of personal injury sustained or occupational disease contracted in the course of employment caused by the wrongful act or omission or neglect of the employer if the employer employed the illegal alien or unauthorized alien *knowing* that the illegal or unauthorized alien was not authorized to work under section 101(a) of the “Immigration Reform and Control Act of 1986,” 100 Stat. 3360, 8 U.S.C. 1324a. (emphasis added).

What exactly does the word knowing mean in the context of this proposed law change? Is it analogous to the definition of “knowingly” in the context of other statutes? Or is more likely that as long as the involved employer attempted to comply with the Immigration Reform and Control Act of 1986, then he or she cannot be pursued through a negligence cause of action and therefore

is provided immunity afforded other complying employers through R.C. 4123.74¹? It is more likely the latter, and if this is the case, it basically means that as long as a social security account number card is provided pursuant to 8 U.S.C. 1324a(b)(1)(C) then, therefore, the employer is immune to any negligence cause of action brought by the illegal or unauthorized alien. The concern arises when it comes to how searching of a probe is required in determining whether a social security number is actually associated with the individual that is claiming to be the person seeking work, and ultimately, whether there is any disincentive for unscrupulous employers, or employers otherwise looking for a competitive advantage to turn a blind eye to likely invalid or duplicate social security numbers.

The concern of many honest purveyors may be that dishonest employers can take advantage of these hard-working individuals likely from Latino countries and then rather than pay either into the state workers' compensation fund or pay these individuals through some other form of insurance as a result of work-related injuries, instead claim that there was compliance with this proposed law in the sense that there was knowing compliance with the Immigration Reform and Control Act of 1986. This would inevitably leave those employers that did perform a searching investigation at a competitive disadvantage. From an entirely different perspective, there are also concerns that employers may be exposed to unlimited liability in the form of a negligence cause of action.

Other concerns arise as it relates to the existence of the necessary resources to verify the attestations being provided to the administrator for the Bureau of Workers' Compensation in compliance with newly proposed Sec. 4123.511(A), which requires that in order for an injured worker to be eligible for benefits, a signed attestation must be presented to the administrator that the claimant is an employee pursuant to R.C. 4123.01. This proposed section would apply to all injured workers, regardless of how American sounding is the name of the injured worker. This creates an entirely new layer of bureaucracy and an entirely new possibility for error. This will be costly and time-consuming. This will also likely lead to data being gathered and stored in the Bureau's database on documented citizens, which gave rise to many of the complaints from Innovation Ohio and other related organizations during the previous incarnation of this bill, S.B. 323. Without even discussing the very real impact on the hard-working Hispanic community or the employer community dependent upon this labor, it is baffling to this writer as to the motives of the interest groups pushing this legislation and the rationale or need for such legislation as there is no real evidence that the cost of workers' compensation premiums paid by state-funded employers is any way whatsoever driven by undocumented aliens participating in the state fund for injuries received in the course of employment². Further, if this was a real concern, these employers could very easily run a background check on applicants in order to verify one's

¹ Injured workers, no matter whether documented or undocumented, would still be permitted to bring an intentional tort action against employers under the newly proposed legislation.

² This writer could not locate a Fiscal Note & Local Impact Statement for S.B. 176; however, there is a Fiscal Note & Local Impact State for S.B. 323 of the 129th G.A., which indicates that "estimates of the potential cost savings or revenue loss cannot be made at this time." <http://www.lsc.state.oh.us/fiscal/fiscalnotes/129ga/sb0323in.pdf>

immigration status, which employers are already prohibited from employing undocumented workers in the first place.

There are many industries dependent on the undocumented community for its primary work force, and these industries will certainly be negatively impacted by not providing these workers equal protection under the law. Simply put, this legislation makes little, if any sense, from so many different and varying perspectives, from so many different and varying factions, that hopefully the General Assembly will realize now is not the time to deconstruct the workers' compensation fund, and ultimately, stagnate an already struggling economy.