

## Legislative and Legal Issues for 2008

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## Immigration Reform: Itinerary

- Capitol Hill
- Federal Agencies
- State Legislatures
- The Courts



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## Immigration Reform



Immigration marchers  
in front of University Club

Washington, DC;  
April 11, 2006

- America's dynamic economy and demographics –
  - 70 million baby boomers to retire
  - 58 million new workers needed
  - 23 million from natural growth and current immigration levels – still need 35 million new workers



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## Demographics

- Nearly half of current growth is immigrants
- 13% of our population is foreign-born
- An estimated 12 million undocumented workers currently in country – the size of Ohio – with 7 million in the workforce
- Nearly 500,000 undocumented workers cross our borders every year – 98% do so for JOBS
- This is an economic issue – the market at work



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## Immigration Reform

- High priority issue, but politically divisive
- Combination of tighter border security & temporary worker program may be needed for bi-partisan support
- Comprehensive program was considered more likely to pass with Democrats controlling Congress
- Goal was to move reform leg this year before presidential campaigns
- Expanded enforcement by ICE, even with some clubs



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## Two Camps for Immigration Reform

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• <b>Conservatives –</b> <ul style="list-style-type: none"> <li>– Border security first, reform later</li> <li>– Less worried about economic side of the issue</li> <li>– No resolution of the undocumented workers issue</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• <b>Moderates –</b> <ul style="list-style-type: none"> <li>– Secure borders and reform immigration process</li> <li>– Provide for stronger interior enforcement</li> <li>– Guest worker program</li> <li>– Require undocumented workers to pay fines, pay back taxes, learn English, etc.</li> </ul> </li> </ul> |
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## ***The Secure Borders, Economic Opportunity & Immigration Reform Act***

- DHS Secretary Chertoff and Commerce Secretary Gutierrez led Administration efforts on this issue
- Senators Edward Kennedy (D-Mass.) and Jon Kyl (R-Ariz.) took the lead in the Senate – S.1639
- Senate Majority Leader Harry Reid (D-Nev.) wanted to limit debate on the bill
- Conservatives wanted additional debate time
- When Leader Reid's motion to limit debate failed to pass, he pulled the bill from further consideration



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## **What the Club Industry Lost**

- No increase in border security or interior enforcement measures
- No guest worker program
- No enhancement to the H-2B seasonal worker visa program
- No means to stem the flow of the 500,000 illegal aliens who cross the border each year
- No answer to the problem of the 12 million illegal aliens already here



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## **The SAVE Act**

- Rep. Heath Shuler (D-N.C.) and Sen. Mark Pryor (D-Ark.) introduced the Secure America Through Verification and Enforcement Act
  - Increases number of Border Patrol Agents by 8,000
  - Increases the number of ICE helicopters and boats
  - Requires a “virtual fence” on our borders with drones, sensors, cameras, and other technologies
  - Requires a national strategy be established to secure our international land and maritime borders by 2011
  - Increases penalties for immigration violations and violators in the country



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## **The SAVE Act**

- Issues for businesses:
  - Mandates the use of the E-Verify Program within 2 years for those with 100+ employees and 3 years for those with 30+ employees
  - Must re-verify all current workers within 4 years
  - Provides safe harbor for employer
  - Prohibits deduction of wages from employer's taxes if the wage was paid to an illegal alien – 6 yr. look back
  - Requires an employee to resolve a No-Match letter within 10 business days or he must be fired
- Stuck in Committee - Discharge Petition filed 3/11/08



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## **The Senate's Piecemeal Approach**

- Force the debate on Democrats for 2008
- 11 Republican Senators filed 15 bills:
  - More jail time for illegally entering the U.S.
  - A 2010 completion date for the 700 mile fence
  - A requirement that English be the official language used on all fed. documents and for all services
  - A penalty for states knowingly issuing driver's licenses to illegal immigrants
  - A requirement that illegal aliens in prisons be deported rather than released back into the country
  - Use of E-Verify and immediate use of the No-Match rules



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## **The Roadmap for 2008**

- Border security must be first
- Both House and Senate bills do this
- Little interest in broader immigration reform packages in 2008
- Many Democrats oppose anything that is not comprehensive
- Many Republicans oppose anything that is comprehensive



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## Immigration Background

- 1996 guest worker programs failed to consider the market -- cap numbers too low
- 2008 40% of *independents* place illegal immigration as #1 priority
- Ohio 5th special election in Dec. 2007 – Bob Latta (R) won by 14% all on anti-immigration issues
- Will continue to be controversial issue



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## H-2B Legislation in Congress

- Visas for seasonal workers – capped at 33,000 from Oct – March & 33,000 from April - Sept
- Cap reached for first half of FY 2008 – before year even started
- Cap for 2<sup>nd</sup> half of year reached 3 months in advance
- In FY '06 the cap was nearly double the current number because of the Returning Worker Exemption (RWE) – which expired 9/30/07



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## H-2B Visa Legislation

- Rep. Bart Stupak (D-Mich.) introduced **Save Our Small and Seasonal Businesses Act of 2007**
  - H-2B visas approved in past 3 years aren't counted against cap for the current year
  - Makes permanent the returning worker exemption
- Sen. Barbara Mikulski (D-Md.) and Sen. John Warner (R-Va.) introduced same bill with major difference -- the Senate bill provides the returning worker exemption for only 5 years.
- Rep. Thelma Drake (R-Va.) introduced the Giving Relief to Our Small Businesses Act in February – 2 year RWE
- Politics is stopping these bills from moving forward



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## Increasing American Wages & Benefits Act

- Sponsored by Sen. Bernard Sanders (I-Vt)
- Strengthens labor provisions in the H-2B program
- Drafted by labor unions and includes:
  - The right for a worker to sue if hiring the H-2B worker “directly or adversely affected his wages or working condition”
  - Requirement to send special notice to the state HQs & local offices of unions re job openings
  - Requirement to pay the govt's prevailing wage
- House & Senate leadership hard-pressed to say “no”
- Sen. Durbin (D-Ill.), Majority Whip, is a co-sponsor



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## Congressional Hispanic Caucus

- Forced Speaker Pelosi (D-Calif.) to remove H-2B from as attachment to earlier bills
- Positioning this as an “immigration” issue not as a temporary worker issue
- Caucus sees H-2B as a well regarded piece of legislation and they are using their opposition to secure other immigration fixes
- Even though having no RWE is potentially harmful to Hispanic workers, 15 of the 21 CHC members are still against letting it go through without broader reforms
- They are trying to work it into the SAVE Act



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## Federal Agencies



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## New SSA No-Match Regulations

- No-match letters issued by SSA to warn employer about questions regarding identity of worker
- 138,000 letters issued in 2006
- Estimated 5% of US workforce is unauthorized
- Occupations with highest proportions:
 

– Agricultural	29%
– Roofers	29%
– Construction laborers	25%
– Grounds maintenance	25%
– Painters	22%
– Cooks	20%



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## SSA No-Match Regulations

- New rules were to have gone into effect 9/14/07
- Employers were to:
  - Check their records for typos within 30 days
  - If no errors, notify employee to check information in records
  - If employee found no errors, employee must resolve discrepancy with SSA local office within 90 days
  - If no resolution, employer must use different I-9 documents and a photo id to re-verify employee – all within 3 days
  - Total of 93 days to resolve issue
- Federal court stayed the issuance of the letters – government appealed
- DHS is revising the rules for May 2008 re-issue



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## Dealing with a No-Match letter

- A letter is not grounds for immediate termination
- Help your employee resolve issue with SSA – you are on the hook
- When reviewing the new I-9 information – remember actual vs. constructive knowledge
- If no resolution, you must weigh being prosecuted for employing an illegal alien vs. being sued for discrimination
- Document everything you do to resolve the issue



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## Other Immigration Related Regs.

- DoJ increasing fines for knowingly employing an illegal alien – up by \$100 to \$5,000/employee – starting 3/27/08
- New DoL H-2B visa regs. that will speed processing of applications by moving it from a gov't-certified system to an employer-attestation system – 2008
- DHS reduced the number of documents an employer may accept under Form I-9
  - From 29 to 24 docs to prove identity & work authorization
  - Effective 12/25/07



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## State Legislatures



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## In the States: Immigration

- Over 1,400 pieces of legislation related to immigration were considered in state legislatures this year – 2.5 times what was introduced in 2006
- Bills covered a broad spectrum: education, law enforcement, voting, public benefits, etc
- Many of these bills forbid employers from “intentionally or knowingly hiring an illegal immigrant”
- Challenge of new AZ statute because of strict penalties imposed, including loss of a business license, & because it is seen by some as a federal issue that states cannot pre-empt



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## State Action in 2008

- **Employing Illegal Aliens**
  - Filed in IN in 1/08 and in CA and NJ in 2/08
  - Requires use of E-Verify – safe harbor for employer
  - Allows suspension of the employer's business license for first offense and revocation for future offenses
  - In 2007 – 244 state immigration laws enacted and more will come in 2008



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## The Courts



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## H-2B/FLSA Litigation

- **Application of Fair Labor Standards Act to H-2B workers** *Juan Javier Rivera, et al. v. The Brickman Group, Ltd.* January 7, 2008 WL 81570 (E.D.Pa.),
- If an H-2B worker pays for recruiter, visa and transportation costs, the employer must reimburse those costs
- If the employer deducts the cost from the 1st paycheck -- could mean the employer has not paid minimum wage



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## H-2B/FLSA Litigation

- Opens up an award of back pay, punitive damages and attorney's fees for those workers if they sue and win
- ***Any expense that is primarily for the benefit or convenience of the employer must be paid by the employer – period***
- An employer who fails to reimburse or pays the costs and reimburses itself from the employee's first paycheck could be in violation of the FLSA



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## Hazleton, Pennsylvania Case

- City's response to need for immigration reform
- A company employing an illegal worker would have its operating permit suspended – revoked if it happened a 2nd time
- Federal Court ruled that this was unconstitutional under the Supremacy Clause - federal gov't is the only entity that may regulate immigration
- BUT, MO city ordinance and AZ state law upheld by Federal Courts (1/31/08 and 2/7/08)  
City of Hazleton may appeal court's ruling



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## Other Key Legislative Issues

- Challenges to Club Privacy Rights
- Paid Sick Leave
- Pool Safety Legislation
- Small Business Health Plans



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## Challenges to Club Rights

- Rep. Carolyn Maloney (D-N.Y.) introduced HR 1817, the Ending Tax Breaks for Discrimination Act
  - Stops individuals from deducting meals and other business expenses if they are paid to a "discriminatory club"
  - Broad language - if the club has a women's only golf tournament, it could be a "discriminatory club"
- Rep. Maloney's Fair Play-Equal Access in Membership Resolution
  - No member or staffer from the Executive, Legislative or Judicial branch should be part of a private club



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## Paid Sick Leave

- Sen. Edward Kennedy (D-Mass.) and Rep. Rosa DeLauro (D-Conn.) introduced the Healthy Families Act.
  - Calls for all employers with 15 or more employees to provide 7 days of sick leave with pay and benefits per year for employees working 30 or more hours per week or a pro rata number of days for those working less than 30 hours a week
  - Kennedy is the Chairman of the HELP Committee so this will get a hearing and a vote
- **Paid Sick Leave**
  - CA, CT, FL, MA, MN, NC, OH, PA, TN, & WV have legislation pending for 7+ days of sick leave. Now mandated in San Francisco & DC.



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## Pool Safety Legislation



- Federal legislation in House & Senate
- Seven states considered bills this year
- Focus varied from pool safety (drain & pool covers & barriers) to sanitation
- Proposals tend to pass when tied to tragic event
- MD jury awarded \$4 million to family whose son drowned in club pool
- Court found pool management company (not club) liable for failing to adequately train lifeguards & staff the pool



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## Pool and Spa Safety Legislation

- Two requirements:
  - Anti-entrapment drain covers must comply with American Society of Mechanical Engineers/ American National Standards Institute (ASME/ANSI) A112.19.8 performance standard or successor standard.
  - Pools and spas with only one drain must install:
    - A safety vacuum release system; or
    - A suction-limiting vent system; or
    - A gravity drainage system; or
    - An automatic pump shut-off system; or
    - Another approved drain disablement device



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## Pool and Spa Safety Legislation

- Bill was held up in the Senate by a "hold"
- Finally it was attached to the Energy Bill
- Passed the Senate, passed the House and on December 19, 2007 President Bush signed it
- Clubs must make necessary changes within one year – December 19, 2008
- "Public pools and spas" includes private club pools and spas



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## Health Insurance

### **The Problem:**

- In 2007 average premium for a family was > \$12,000; of that amount \$3,300 was by the employee.
- State legislatures mandate that insurance providers cover specific individual procedures in standard plans – nearly 1,900 mandates across the country
- Too many mandates mean fewer providers competing for your business
- Small businesses pay nearly 20% more in administrative costs for insurance plans
- 57% of uninsured in U.S. work in small businesses



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## Small Business Health Plans (SBHPs)

### • The Problem

- Small businesses pay nearly 20% more in administrative costs for insurance plans
- State legislatures mandate that insurance providers cover specific individual procedures in standard plans – nearly 1,900 mandates across the country
- Too many mandates mean less providers competing for your business
- Of the 47 million uninsured in America, approximately 28 million work in small businesses
- Premium costs for small businesses continue to rise



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## Small Business Health Plans

### • The Solution

- Spread risk over more individuals by pooling businesses through trade or professional associations
- Increase the bargaining power of businesses to lower premiums and administrative costs
- Establish 3 or 4 standard health care plans that include the most typical state mandates thereby eliminating the different mandates found across the country
- Allow the market to determine the remaining plans that are offered to employers/employees



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## House and Senate proposals

### • House

- Successfully passed SBHPs numerous times, only to see it fail in the Senate

### • Senate

- Sen. Michael Enzi (R-Wyo.) introduced a comprehensive plan
  - Allows for cross-state pooling for small businesses through associations
  - Provides a government subsidy for low-income individuals to purchase insurance



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## The National Club Association

YOUR VOICE IN WASHINGTON, DC

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