WILLIAM J. HUGHES
CENTER FOR PUBLIC POLICY
THE RICHARD STOCKTON COLLEGE OF NEW JERSEY

RESEARCH BRIEF

Immigration Policy:

Understanding the Impact of a Changing Policy Environment on Local Businesses

April 2012

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Research Brief

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Introduction: The Demographics of Immigration in New Jersey

The mission of the William J. Hughes Center for Public Policy is to educate the broader public, and institutions of civil society, on how national policy issues impact southern New Jersey. One such issue is how changes in immigration policy may affect local businesses that employ unauthorized immigrants[1] in southern New Jersey. Shifts in immigration policy are not inconsequential for New Jersey because the Garden State is one of six states that demographers refer to as traditional gateways for immigrants (both legal and unauthorized).[2] A distinguishing characteristic of the six gateway states is that they are the only states that have more than a million foreign-born residents.

Census data indicate that New Jersey will continue to be an important point of destination for immigration, even as newly arrived migrants increasingly settle in non-gateway states. In 2010, about two-thirds of foreign-born individuals who entered the United States prior to 2005 were concentrated in the six gateway states (including New Jersey). However, only 58% of the newly arrived (i.e., since 2005) migrated to gateway states, which suggests the points of destination for new immigrants are expanding geographically.[3] Nonetheless, the overwhelming majority of the foreign-born population in the country is not newly arrived; 83% entered the United States prior to 2005, while 17% arrived thereafter.[4] This share of newly arrived immigrants is mirrored precisely in New Jersey and Florida; whereas in California, New York, and Illinois it is slightly lower and Texas has a higher proportion of post-2005 immigrants. Thus, the trend toward a

[1] The phrase "unauthorized immigrants" refers to foreign-born non-citizens currently residing within the United States who are not legal immigrants. The phrase will be used interchangeably with "non-legal immigrants or workers."
[2] The other five gateway states are California, New York, Texas, Florida, and Illinois.
[3] Nathan P. Walters and Edward N. Trevelyan , The Newly Arrived Foreign-Born Population of the United States: 2010, American Community Survey Briefs, ACSBR/10-1 November 2011, p.3; www.census.gov/prod/2011pubs/acsbr10-16.pdf; (Accessed 12/13/11).
[4] *Ibid*., p.4.

broader geographic distribution of newly arrived immigrants, beyond the traditional gateway states, is more evident in California, New York, and Illinois than in Texas, Florida and New Jersey.

The importance of New Jersey as a gateway state is amplified when its demographic profile is considered from the standpoints of population density and percent change in population. Unlike the other five gateway states, New Jersey is not among the ten most populous states in the nation. While the Garden State ranks 6th in terms of the size of its foreign-born population, it is 11th in terms of its overall population. However, New Jersey ranks first among all states in the nation in population density,[5] though this is largely because it ranks 46th in terms of land area.[6] Thus, while New Jersey has the fewest residents among the gateway states it has the most persons per square mile. A similar pattern holds when the immigrant population is disaggregated from the overall population of the state. Census data indicate that New Jersey ranks first among the gateway states in terms of the number of foreign-born residents, unauthorized immigrants, and unauthorized workers per square mile.[7]

Despite its ranking at the bottom of gateway states, in terms of overall population and square miles, the gateway designation is certainly warranted for New Jersey. It ranks 6th in the nation in terms of the number of foreign-born residents; 5th in the share of unauthorized immigrants in its population; and, 4th in terms of the proportion of unauthorized workers in its labor force (8.6%).[8] The designation is even further justified by evaluating the population of unauthorized immigrants

[5] Census Bureau, Resident Population Data (http://2010.census.gov/2010census/data/apportionment-dens-text.php). Accessed 1/8/2012.
[6] Netstate.com. (http://www.netstate.com/states/tables/st_size.htm). (Accessed 1/8/2012).
[7] Calculations based on the following sources: (http://www.census.gov/prod/2011pubs/acsbr10-16.pdf); (Accessed 1/8/2012); (http://www.census.gov/prod/2011pubs/acsbr10-16.pdf); (Accessed 1/8/2012); and Jeffrey S. Passel and D' Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center (February 1, 2011) (http://pewhispanic.org/files/reports/133.pdf) (Accessed 1/9/2012).
[8] Passell, *supra* note 7, at p.17.

in New Jersey, in terms of percent changes.[9] Census data indicate that New Jersey had the 6th largest population of unauthorized immigrants in both 1990 and 2000. However, among the six gateway states, New Jersey had by far the largest percentage increase in its unauthorized immigrant population (242% from 1990 to 2000). In 2005, New Jersey displaced Illinois as the state with the fifth largest number of unauthorized immigrants; that ranking held through the recent 2010 census.

The Pew Center notes that the overall population of unauthorized immigrants peaked in the United States in 2007; at approximately 12 million and declined 6.7% by 2010.[10] This decline is also reflected in the gateway states, except for Texas which actually saw an increase of 14% in 2007-2010 in its population of unauthorized immigrants. During the same period, the number of unauthorized immigrants declined by 8.3% in New Jersey, while the adjacent state of New York experienced a significantly larger decrease of 24.2%. The unauthorized immigrant population of New Jersey is markedly larger than the other two neighboring states (Pennsylvania and Delaware, which are not gateway states). Even though Pennsylvania has approximately four million more residents, New Jersey has slightly more than three times as many unauthorized immigrants (160,000 and 550,000, respectively); whereas in Delaware the unauthorized immigrant population is estimated at only 25,000.

Immigration & Employers:

The necessity of understanding the demographic dimensions of immigration is reinforced by the fact that among many employers are only nominally familiar with the substantive changes in immigration policy over the past few decades. Private sector employers typically understand

[9] The calculations for the discussion of percent changes are based on underlying data from Passel and Cohn, supra note 7, at 23.
[10] *Ibid.*

their relationship to immigration policy rather narrowly in terms of employment law and personnel procedures, i.e., compliance with I-9 requirements and voluntary participation in employee verification programs (e.g. E-Verify). However, the post-9/11 changes in immigration policy suggest that a broader frame of reference is essential if local businesses endeavor to avoid civil and criminal penalties, maintain workforce and wage stability, and mitigate the derivative effects of immigration policies from other states.

This broader perspective is particularly relevant to states with substantial numbers of unauthorized immigrants in their labor force. In New Jersey, for instance, approximately 73% of the non-legal immigrant population of 550,000 is of working age, or approximately 400,000 workers.[11] Thus, while 6.2% of its overall population is comprised of unauthorized immigrants, non-legal workers constitute 8.6% of the labor force of New Jersey.

Pre-9/11 Immigration Policy:

An important underlying assumption of the following narrative is that a critical juncture in the trajectory of immigration policy in the United States is marked by the horrific attacks of 9/11. Before September 22, 2001 immigration policy was broadly conceived as proceeding along two seemingly distinct tracks: foreign and domestic policy. In the former, the national government enjoyed full (plenary) constitutional, statutory, and administrative power in securing our national borders and regulating the entry of non-citizens into the United States. In the latter, the intergovernmental dynamic between the national and sub-federal (state and local) governments was significantly more qualified. While the national government held a presumptive claim to plenary power over domestic immigration policy in matters of civil immigration law,

[11] *Supra* note 7, at p. 21. Calculation based on Table A2 and Table 4, p. 14.

overlapping areas of jurisdiction existed wherein state and local governments exercised their police power in criminal law enforcement. These areas of cooperative federalism were circumscribed by the Supremacy Clause of the Constitution in two important respects - i.e., federal law superseded contravening regulations by states and their political subdivisions, and the national government expressly and implicitly preempted sub-federal governments from regulating the same policy fields it occupied (hence, the doctrine of federal preemption).

Enactment of the Immigration Reform and Control Act of 1986 (IRCA)[12] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[13] affected, but did not fundamentally alter, the underlying stability in the respective spheres of authority over immigration policy shared by the federal government and the various states. Among various provisions, the salient features of IRCA are: 1) an expedited program for temporary resident status for unauthorized immigrants who entered the United States before January 1, 1982; 2) employer sanctions for knowingly hiring unauthorized workers; 3) an employee-eligibility verification program (a precursor to E-Verify); 4) increased border security; 5) the prohibition of certain forms of federal welfare benefits to unauthorized immigrants who were granted temporary resident status under IRCA (primarily Medicaid and Food Stamps); 6) a temporary agricultural worker program, and 7) the establishment of a Special Counsel for Immigration-Related Unfair Employment Practices (in the Department of Justice) to investigate employment discrimination related to (IRCA) employer sanctions.[14] The 16 members of New Jersey's 1986 Congressional delegation voted for the statute generally along partisan lines: six of eight

[12] Public Law 99-603, 100 Stat 3359; Also known as the Simpson-Mazzoli Act; Approved 238-173 (House, 10/15/1986) and 63-24 (Senate, 10/17/1986); Signed by President Ronald Reagan on 11/6/1986.
[13] Division C of Pub. L. 104-208, 110 Stat. 3009-546; Incorporated into the Omnibus Consolidated Appropriations Act of 1997.
[14] http://thomas.loc.gov/cgi-bin/bdquery/z?d099:SN01200:@@@D&summ2=m&|TOM:/bss/d099query.html| (Accessed 1/28/2012).

Democrats in the House supported IRCA, while five of six House Republicans opposed it. The state's two (Democrat) senators also voted for the bill.

For present purposes, the relevant provision of the 1996 IIRIRA is Section 133,[15] which amended Section 287 [g] (8 U.S.C. 1357) to allow the U. S. Attorney General to enter into formal agreements with state and local law enforcement agencies to, in effect, perform certain functions of federal immigration officials. Support for IIRIRA generally, and the Section 287 provision more specifically, cannot be ascertained from roll call votes because the legislation was incorporated into a broader omnibus bill.[16] Vote tallies for the entire bill do not translate precisely into support for each constitutive element of the legislation.

The two acts introduced new elements into immigration policy that assumed even greater significance after 9/11. In popular discourse and partisan debates the IRCA is typically associated with three policy developments: 1) the codification of amnesty for illegal aliens who resided in the United States prior to January 1982; 2) increased border security along the southwestern United States; and 3) a regime of employer sanctions. Though rarely enforced, the third element of IRCA prefigured a consequential shift in immigration policy, from an almost exclusive focus on the illegal status of unauthorized workers to a broader framework that more explicitly placed civil and criminal liability on businesses for employing unauthorized workers. First, the IRCA mandated that employers collect - and transmit to the federal government through I-9 forms - data on the work-eligibility status of prospective employees. Second, IRCA imposed civil and criminal penalties on businesses that knowingly hired undocumented workers.

[15] Sec. 133, Acceptance of State Services to Carry Out Immigration Enforcement, Public Law 104–208—Sept. 30, 1996, 110 Stat. 3009.

[16] However, only 3 of New Jersey's 13 members of the House of Representatives voted for the omnibus bill (http://www.govtrack.us/congress/vote.xpd?vote=h1996-247) (Accessed 1/26/2012). The Senate approved the bill on a voice vote on 9/30/1996.
(http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03610:@@@S|TOM:/bss/d104query.html| (Accessed 1/26/2012).

In 1996 the IIRIRA established the E-Verify federal (web-based) database to centralize collection of I-9 data and provide employers a mechanism for checking the work-eligibility of prospective and current employees. Though utilization of the database is not mandatory, potentially serious consequences occur if employers do not respond in a timely manner to receipt of a TNC (tentative non-confirmation) notice regarding specific employees for whom work eligibility cannot be verified.[17] While participation in E-Verify is voluntary for most employers, except for certain classes of federal contractors,[18] members of the U.S. Congress have introduced legislation to mandate universal application to all public and private sector employers. The number of states that have adopted some variation of E-Verify requirements in 2011 alone attests to the increasing political salience of immigration in the broader polity. At the beginning of the year only four states mandated participation in the program; that number increased to 14 by December;[19] the number is projected to increase to 18 by 2013.[20] Mandatory participation in E-Verify has not been adopted in New Jersey, though United States Senator Robert Menendez (D-NJ) has introduced legislation that would mandate employee verification for all employers.[21]

Since its inception, the federal government has expanded its reliance on E-Verify despite persistent problems with data accuracy, the lack of mandatory participation, and the substantial costs businesses incur in employee verification, estimated at approximately $100 million annually; however, if E-Verify is mandated for all employers nationwide, the estimated costs for

[17]Facts About E-Verify, National Immigration Law Center, NILC, Updated January 2011(www.NILC.org).
[18] Federal Register, 48 CFR Parts 2, 22, and 52, Vol. 73, No. 221, Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification, 2008.
[19]E-Verify FAQ, National Conference of State Legislatures, NCSL,(http://www.ncsl.org/?tabid=13127); (Accessed 12/17/2011).
[20] Arvelo, Jason, "Employer E-Verify Mandate Expands to 18 States: Chart of the Day." Bloomberg Government, Sept. 28, 2011.
[21] S. 1258, Comprehensive Immigration Reform Act of 2011, Introduced 6/22/2011. (http://thomas.loc.gov/cgi-bin/thomas) (Accessed 1/29/2012). Rep. Lamar Smith (R-TX) introduced the Legal Workforce Act the same month, to also mandate utilization of the E-Verify system (H.R. 2164), introduced 6/14/2011 (http://thomas.loc.gov/cgi-bin/bdquery/D?d112:2:./temp/~bdO4VZ::|/home/LegislativeData.php|) (Accessed 1/29/2012).

2010 would have been $2.7 billion.[22] Notwithstanding these drawbacks, E-Verify provides employers an important incentive to participate, i.e., a favorable presumption of making a good faith effort to not knowingly employ ineligible workers.[23] Businesses are therefore accorded a greater probability of avoiding civil and criminal liability for employing unauthorized immigrants if they utilize the E-Verify database. However, employers can also be vulnerable to allegations of violating employment discrimination statutes through overly zealous efforts to avoid hiring unauthorized workers. Even before the implementation of E-Verify, a General Accounting Office (GAO, now the Government Accountability Office) report found that an unintended consequence of the IRCA work-eligibility requirements was that employers engaged in a serious pattern of discrimination against otherwise eligible workers on the basis of appearance, accent, and national origin.[24] Concerns about employment discrimination persist despite the additional layer of eligibility verification that E-Verify provides businesses.[25] A clear implication of the GAO report for employer sanctions and discrimination is that proper training and education of employers could have mitigated the unintended consequence of businesses engaging in employment discrimination, particularly if their intent was not to discriminate but to shield themselves from the possibility of civil or criminal penalties.[26] In enacting IRCA Congress clearly anticipated the possibility of the GAO findings. The statute stipulates that employer sanctions are to be terminated if the GAO determines that employee discrimination results from businesses endeavoring to avoid civil and criminal liability under the strictures of

[22] Arvelo, Jason, "'Free' E-Verify May Cost Small Business $2.6 billion," Bloomberg Government. Jan. 27, 2011.
[23] Farhang Heydari, NOTE: Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions, 110 Colum. L. Rev. 1526, October, 2010, p.3.
[24] General Accounting Office (GAO), Immigration Reform: Employer Sanctions and the Question of Discrimination, GAO/T-GGD-+O, March 30, 1990, p.5.

[25] Robert Koulish, *Immigration and American Democracy: Subverting the Rule of Law* (New York & London: Routledge, 2010), pp: 101-102.

[26] *supra* note 24.

IRCA. Congress was especially concerned that unintended victims of employment discrimination on the basis of national origin or language would in fact be authorized immigrants and citizens who are work-eligible. Under IRCA, employers therefore face the daunting legal conundrum of avoiding both employer sanctions, on the one hand, and employment discrimination lawsuits, on the other.

Post-9/11 Immigration Policy:

Although IRCA and IIRIRA were enacted 1986 and 1996, respectively, their implications for intergovernmental spheres of authority over immigration policy were not fully apparent until after the terrorist attacks of 9/11. In the immediate aftermath of September 11, 2001, the primary objective of the federal government was to preempt further attacks by Al Qaeda. The Department of Justice (DOJ) invoked its authority to enforce immigration laws, through its supervision of the Immigration and Naturalization Service (INS), to conduct warrantless detention and interrogation of hundreds of (predominantly Muslim) non-citizens residing in the United States.[27] The rationale for integrating immigration policy into the broader anti- terrorism response to 9/11 was that individuals who posed a potential security risk could be held for putative violations of immigration laws. Immigration law therefore became the linchpin for expansive (anti-terrorist) governmental authority because due process guarantees for non-citizens in immigration investigations (as matters of civil law) are considerably less stringent than is the case for citizens and non-citizens in the context of criminal law enforcement.[28]

The response of the national government to the terrorist attacks of 9/11 generated three important developments at the intersection of immigration and national security policy.

[27] Alden, Edward, *The Closing of the American Border: Terrorism, Immigration, and Security Since 9/11*, Council of Foreign Relations, Harper Collins, 2008, pp: 81-90.
[28] *Ibid.*

Moreover, all three developments have serious policy implications for businesses that employ unauthorized workers. The first is that the United States prosecuted its Global War on Terrorism (GWOT) by vastly expanding and consolidating the national security apparatus of the national government. This process entailed authorizing broad (war-time) emergency powers for the President; enactment of the Patriot Act, establishment of the Department of Homeland Security (DHS), incorporation of INS into DHS (as the Bureau of Citizenship and Immigration Services, USCIS); and, the deployment of an array of database and technological platforms (including E-Verify, U. S. Visitor and Immigrant Status Indicator Technology, US-VISIT; Real ID, Public Law 109-13, 119 Stat. 302, 2005; SBI*net*, and the National Security Entry-Exit Registration System, NSEERS).[29] Consequently, the federal government now commands an immensely broadened capacity to identify and monitor individuals who enter the United States and may pose a security threat.

The incorporation of E-Verify into the broader (national security) infrastructure of data collection and mining augurs well for improving data accuracy, but it also suggests the E-Verify program is evolving into a dual-purpose system, i.e., to verify employment-eligibility through I-9 data, and to utilize those data to help identify legal and unauthorized employees who represent potential security risks. The status quo prior to 9/11 no longer holds, i.e., the I-9 Forms and E-Verify are no longer used exclusively for purposes of employee eligibility. They have acquired the additional value of enhancing the national security infrastructure of the United States. Employers must therefore recognize the possibility that the data they submit to the E-Verify system may also be used in national security investigations, which may include not only the employee-eligibility status of individuals under investigation, but also their circumstances of employment.

[29] *Supra* note 25, at pp:78-88.

The second (post-9/11) major development in immigration policy is predicated on the significantly enhanced capacity of the federal government to integrate data-sharing among executive branch departments, federal and local law enforcement agencies, and the intelligence community. As a result, the quality and accuracy of data gathering systems, across various governmental agencies, have improved markedly since 9/11. The derivative benefit of these processes for immigration policy is that the federal government can more effectively ameliorate the data inaccuracy that characterized the initial years of the E-Verify program. This development is facilitating an important shift in immigration policy the Obama Administration initiated in September 2009, i.e. a shift from often highly publicized and controversial workplace raids to immigration audits. A February 2009 workplace raid in Bellingham, Washington, in which 28 non-legal workers were arrested, drew particular ire against the Obama Administration from Hispanic and immigrant advocacy groups.[30]

Immigration audits involve Immigration & Customs Enforcement notices to employers that their employment-eligibility data must be forfeited to ICE agents. If the eligibility status of certain workers is questioned additional documents must be submitted. Typically, however, employees are summarily dismissed and employers are levied a substantial fine. Businesses also assume the additional costs associated with hiring and training replacement employees, managing disruption to the normal flow of business, and retaining legal and consulting services.[31] In the first year of immigration audits a major clothing manufacturer in Los Angeles

[30] Feds shift gears on illegal immigration: Less focus on workplace raids, more probes into hiring records, USA Today, July 21, 2009, p. 3A.

[31]Miriam Jordan and Cam Simpson, "More Employers Face Immigration Audits," 11/20/09, (http://online.wsj.com/article/SB125866577819456287.html) (Accessed 12/16/11).

was compelled to fire 1,800 employees (about one-fourth of its workforce) because of discrepancies in the worker eligibility documents of many of its employees.[32]

Despite criticisms from immigration advocates that audits constitute "silent raids," the federal government has substantially increased its reliance on immigration audits to weaken the job-magnet effect in certain sectors of the labor market. In the first year of the program (2009), the Obama Administration conducted approximately 1,000 immigration audits; by the end of 2011 that figure was almost 2,400, with approximately 200 criminal proceedings against employers.[33] Immigration audits have been conducted in all 50 states, but certain sectors of the economy attract particular scrutiny from ICE officials. These include financial services, defense, critical infrastructure, agriculture, construction, and hospitality.[34] The last three industries are of particular importance to southern New Jersey. By July of 2010 approximately 25 New Jersey businesses were notified as a result of immigration audits that they were not in compliance with federal work-eligibility requirements.[35]

The nominal level of attention immigration audits receive in the popular press, trade journals, and government press releases means that too often employers first learn about immigration audits once they are notified by ICE officials that their businesses are being audited. At that point, businesses have little recourse but to secure legal counsel and cooperate fully with ICE

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[32]Lewis, Neil, "In Search for Illegal Workers, Immigration Officials Will Audit more companies," The New York Times, Nov. 20, 2009 Sec. A, p.14.

[33] Miriam Jordan, Immigration Audits Drive Illegal Workers Underground, Aug.15, 2011, http://online.wsj.com/article/SB10001424053111904480904576496200011699920.html, (Accessed 12/13/11); Jennifer Epstein, New ICE Audits Target 1,000 Firms, http://www.politico.com/news/stories/0611/57108.html, (Accessed 12/14/11).

[34] Dana Olsen, An ICE Storm of Immigration Audits is Coming, Corporate Counsel; June 22, 2011; (http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202498023756&An_ICE_Storm_of_Immigration_Audits_is_Coming=&src=EMC-Email&et=editorial&bu=Corporate%20Counsel&pt=Corporate%20Counsel%20Daily%20Alerts&cn=cc20110622&kw=The%20ICE%20Storm%3A%20Employers%20to%20be%20Targeted%20for%20Immigration%20Audits).

[35] Hany S. Brollesy, Esq. NJ Businesses Targeted for Immigration Enforcement Even if the Workforce is 100% Legal!; (http://www.njlca.org/pages/Fliers/I-9Article.pdf); July 28, 2010. (Accessed 12/18/11).

officials. For employers to be fully proactive, it is insufficient to simply ensure that I-9 forms are properly completed and submitted. Businesses can benefit from understanding immigration audits within the broader policy environment that has undergone substantial changes since 9/11. In that context, the incorporation of immigration policy into the Department of Homeland Security suggests that the federal government has a vastly enhanced administrative and technological capacity to pursue its objective of discouraging unauthorized employment with greater rigor and accuracy. Moreover, small and large businesses should also be fully cognizant that a key development in post-9/11 immigration policy is a shift in emphasis from apprehending authorized workers at employment sites to administrative scrutiny of the hiring records of employers. The consequence of this shift is that the burdens of civil and criminal liabilities, for engaging in non-legal employment, are increasingly redirected from employees to employers.

The third critical development in (post-9/11) immigration policy relates directly to the intergovernmental spheres of overlapping authority among the federal government and the various states and localities. Despite the unprecedented expansion of the national security infrastructure, the federal government lacked the personnel to adequately provide border security against future terrorist attacks. The George W. Bush Administration substantially increased the human resources dedicated to its anti-terrorism campaign by essentially federalizing local law enforcement officials through an expansive re-interpretation of a key provision of the (1996) IIRIRA, i.e., Section 287 (g).

In its original formulation, Section 287 (g) of the IIRIRA was interpreted by the Clinton Administration to allow the federal government to enter into cooperative arrangements (through a Memorandum of Understanding, a MOU, or a Memorandum of Agreement, a MOA) with state

and local police to enforce criminal immigration laws.[36] The MOUs/MOAs precluded state and local officials from enforcing immigration laws that were expressly preempted by the federal government. After 9/11, however, the Office of Legal Counsel (OLC) in the Bush Administration interpreted Section 287 (g) as recognizing the inherent authority of states to enforce immigration law.[37] The practical effect of the OLC interpretation is that states and localities are now afforded broader latitude to also enforce certain dimensions of civil immigration law. Although the Bush Administration adopted a more expansive interpretation of Section 287 (g) than its predecessor, the proposition that states are not categorically preempted from regulating the non-criminal activity of unauthorized immigrants is not without legal precedent.[38]

The approach of the Bush Administration to Section 287 (g) prefigured a shift in the (legislative) center of gravity in immigration policy. In the decade since Section 287 (g) was interpreted more expansively, hundreds of statutes and ordinances have been enacted to assert more control over unauthorized immigrant workers by states and their political subdivisions.[39] Many of these enactments impose even more stringent employer sanctions than federal law, as the recent legislative enactments in Arizona and Alabama suggest. In May 2011, the Supreme Court affirmed the constitutionality of the Arizona employer sanctions, including mandatory participation in the federal E-Verify program, as well as the suspension or revocation of business licenses for hiring unauthorized workers.[40] The Court has also agreed to rule on constitutional challenges to other provisions of the Legal Arizona Workers Act, on grounds of federal

[36] *Supra* note 25, at pp: 134-139.
[37] *Ibid.*
[38] *DeCanas v. Bica*, 424 U.S. 351 (1976)
[39] Broder, Tanya, "State and Local Policies on Immigrant Access to Services: Promoting Integration of Isolation?" National Immigration Law Center, May 2007.
[40] *Chamber of Commerce v. Whiting*, 563 U.S. ___ (2011)

preemption. The scope of the Alabama statute was temporarily limited, pending a full hearing, by the 11th Circuit Court of Appeals for requiring school districts to check the residency status of school children, and mandating that immigrants carry proper documentation to verify their legal status.[41] However, the trend among states and localities to assert authority in regulating immigration, beyond violations of state criminal statues, is not uni-directional. At least four states and approximately 50 localities expressly prohibit law enforcement officers from investigating the immigrant status of suspects, or generally limit the role of police in enforcing federal immigration laws.[42]

At least in the cases of Arizona and Alabama, the federal judiciary has demonstrated a willingness to accommodate the imposition of employer sanctions to discourage the hiring of unauthorized workers. What remains unclear is whether the courts will ultimately invoke the preemption doctrine to prevent these and other sub-federal governments from adopting policies that essentially create serious disincentives for non-citizens to remain in their communities. Enforcement of the recently enacted anti-immigrant legislation in Alabama, widely perceived to the most restrictive in the country, demonstrates that beyond a certain threshold, unauthorized immigrants will not endure the burdens, costs, and insecurities of raising their families in unwelcoming and punitive communities. However, instead of returning to their country of birth, the displaced immigrants move to other states or localities with less stringent policies on the unauthorized immigrants. One of the unintended consequences of increased border security after 9/11 is that many unauthorized immigrants do not visit their home countries for fear of being

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41 Stacy Teicher Khadaroo, Appeals court curtails Alabama immigration law, for now, **(**http://www.csmonitor.com/USA/Justice/2011/1014/Appeals-court-curtails-Alabama-immigration-law-for-now), October 14, 2011.

42 Keith Cunningham-Parmeter. Forced Federalism: States as Laboratories of Immigration Reform, U.C. Hastings College of the Law Hastings Law Journal, July, 2011, p.20.

barred from re-entering the United States.[43] Consequently, when states and localities implement policies to remove unauthorized immigrants, other communities are then faced with an influx of displaced immigrants. States with large populations of foreign-born immigrants and less restrictive environments for immigrants, i.e., gateway states like New Jersey, may become points of destination for immigrants seeking brighter economic futures for their families. It is therefore incumbent upon local businesses to anticipate how changes in the immigration policies of other states may have derivative effects on their own labor market. For instance, an unexpected influx of unauthorized immigrants into a local economy may place businesses at a severe competitive disadvantage if they choose to continue to hire only legal workers. At a recent immigration roundtable hosted by the William J. Hughes Center for Public Policy at Richard Stockton College,[44] a participant noted that he was unable to sustain his construction business because he was unwilling to hire non-legal workers at depressed wages, unlike some of his competitors.

As a gateway state for immigrants, New Jersey is not immune from the potentially de-stabilizing effects, on local economies, from legislative efforts to restrict illegal immigration. In 2006, Riverside, New Jersey adopted an ordinance to penalize employers and landlords who hire or rent housing to illegal immigrants.[45] The ordinance was modeled after a similar ordinance in Hazelton, Pennsylvania that was challenged in federal court.[46] The Riverside ordinance resulted in the out-migration of several hundred recently established immigrants, which had a deleterious effect on local businesses, several of which closed or experienced significant reductions in business activity. Additionally, the municipality was strained financially from an ensuing

[43] *Supra* note 27.
[44] October 20, 2011.
[45] New Jersey Ordinance 2006 -#16, entitled the "Illegal Immigration Relief Act." (http://www.aclu.org/immigrants-rights/riverside-nj-ordinance-no-2006-16) (Accessed 1/29/2012)
[46] The ordinance was invalidated by the 3rd Circuit Court of Appeals, but the United States Supreme Court vacated that decision and remanded the case for reconsideration. (http://www.huffingtonpost.com/2011/06/06/hazleton-pennsylvania-immigration_n_871791.html). (Accessed 1/29/2012).

lawsuit[47] against the ordinance by a coalition of local business interests and immigrant rights groups.[48] The ordinance was rescinded a year later.[49]

The New Jersey Legislature has considered several bills in recent years, though none have been enacted into law, to protect the rights of unauthorized immigrants; while others have attempted to impose restrictions on illegal immigrants. Some of measures include efforts to:

1) prohibit New Jersey institutions of higher education from enrolling unauthorized immigrants and non-citizens as students;[50]

2) require that the NJ Dept. of Education distribute letters to school districts reminding school officials of their responsibility to enroll students regardless of their immigration status;[51]

3) condemn the legislature of Arizona for enacting restrictions on unauthorized immigrants;[52]

4) instruct the New Jersey Attorney General to enter into an agreement with the U. S. Attorney General to authorize corrections officers in the state to investigate the immigration status of inmates;[53]

5) memorialize the President and Congress to enact immigration reform;[54]

6) require county prosecutors to determine, and report to U. S. Immigration and Customs Enforcement, the immigration status of individuals held for violent crimes;[55]

7) memorialize the President and Congress to enact immigration reform to better serve the national interest;[56] and,

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[47] See *Riverside Coalition of Business Persons and Landlords, et. al. v. Township of Riverside*. Civil Docket Case #:1:06-cv-05521-RMB-JS (http://www.clearinghouse.net/chDocs/public/IM-NJ-0001-9000.pdf). (Accessed 1/29/2012).
[48] ACLU, Anti-Immigrant Ordinances: Riverside, N.J. (http://www.aclu.org/immigrants-rights/anti-immigrant-ordinances-riverside-nj) (Accessed 1/29/2012).
[49] Ken Belson and Jill Capuzzo, "Towns Rethink Law Against Illegal Immigrants," New York Times, Sept. 26, 2007 (http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?pagewanted=all) (Accessed 1/29/2012).
[50] Assembly, No. 1029, 215th Legislature, Sponsors: Assemblymen: Anthony M. Bucco and Michael Patrick Carroll, (Dist. 25).
[51] Assembly, No. 718, 215th Legislature, Sponsors; Assemblyman Ruben J. Ramos (Dist. 33) and Assemblywoman Annette Quijano (Dist. 20).
[52] Senate Resolution No. 15, 215th Legislature, Sponsor: Senator M. Teresa Ruiz (Dist. 29).
[53] Assembly, No. 549, 214th Legislature, Sponsors: Assemblywoman Amy H. Handlin (Dist. 13) and Assemblyman Jay Webber (Dist. 26).
[54] Assembly Resolution No. 69, 214th Legislature, Sponsors: Assemblyman Brian E. Rumpf and Assemblywoman DiAnne C. Gove (Dist. 9).
[55] Senate, No. 1472, 214th Legislature, Sponsor: Senator Ronald L. Rice (Dist. 28).

8) require that certain agencies of state government include contract provisions to terminate contractual relationships with vendors if the latter fail to comply with federal immigration laws.[57]

These legislature initiatives indicate that despite the experience of Riverside, New Jersey, a significant level of interest persists in granting state and local governments broader authority to regulate or restrict illegal immigration.

Conclusion:

The broadening of immigration into a national security priority, and its increasing politicization in recent years, suggest that an ostensibly permanent alteration in the domestic political ecology of immigration policy has been underway since 9/11. The policy responses to the terrorist attacks disrupted the trajectory of stable, incremental development in the policy field of immigration. Consequently, the balance of intergovernmental authority over immigration policy may therefore remain in flux for the foreseeable future. This scenario suggests that a return to the status quo before 9/11 may not obtain, at least not in the near-term. This level of policy uncertainty has significant implications for the businesses that manage the complexities of employee-eligibility requirements.

First, employers need to satisfy the increasingly rigorous level of scrutiny the federal government is applying to the employment of legal and non-legal immigrants, while avoiding the unintended consequence of discriminating against immigrants in order to avoid such scrutiny. A strategy for meeting both imperatives can only be formulated proactively, not once an employer is the subject of an immigration audit.

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[56] Senate Concurrent Resolution No. 77, Sponsor: Senator Christopher J. Connors (Dist. 9)
[57] Assembly, No. 1302, 209th Legislature, Sponsors: Assemblymen George F. Geist (Dist. 4) and Samuel D. Thompson (Dist. 13).

Second, the post-9/11 coupling of immigration and national security policy means the federal government now commands a vastly expanded and integrated capacity for data collection and verification. As utilization of databases such as E-Verify become increasingly prevalent, employers will need to significantly enhance their capability to provide accurate and verifiable documentation to the federal government. This approach is more cost-effective than incurring the unanticipated expenses of responding to an immigration audit.

Third, employers need to be fully aware that the development of immigration policy occurs within the American system of federalism. States and localities are increasingly regulating and criminalizing the activity of unauthorized immigrants and imposing punitive sanctions on businesses that employ them. Since 9/11 the federal government has relied increasingly, both expressly and implicitly, on states and localities to assume broader responsibilities in immigration policy, especially now that a closer nexus exists between immigration and national security policy.

Moreover, the gateway designation of New Jersey means that the demographic dimensions of both legal and non-legal immigration amplify the significance of the preceding conclusions for businesses in New Jersey. It is therefore incumbent upon businesses in the Garden State, to an even greater extent than employers in non-gateway states, to develop clear-sighted and proactive employment policies and procedures that are informed by the policy and demographic complexities of legal and unauthorized immigration in the United States. The Hughes Center can play a facilitative role in assisting local businesses in southern New Jersey achieve that objective.

Recommendation: The information and analysis provided herein suggest that the William J. Hughes Center for Public Policy can advance its mission of public service by promoting discussion and deliberation on a range of important public policy issues, such as the impact of immigration on the business community in New Jersey. This report recommends that the Hughes Center explore opportunities to assist local businesses, and other institutions of civil society, gain a broader understanding of how national policy issues, like immigration, can directly affect the broader environment in which they operate. The policy and demographic dimensions of immigration should be of particular interest to businesses in southern New Jersey precisely because the gateway designation of the Garden State means it is not immune from the national and regional consequences of authorized and unauthorized immigration.