

INTERNATIONAL MIGRATION  
PAPERS

**36**

EMPLOYER SANCTIONS:  
FRENCH, GERMAN AND US  
EXPERIENCES



**Philip Martin and Mark Miller**

International Migration Branch  
INTERNATIONAL LABOUR OFFICE GENEVA

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## **Foreword**

The International Migration Papers (IMP) is a Working Paper series of the International Migration Branch devoted to making available to ILO's constituents as early as possible the product of its recent research on global migration trends, the conditions of employment of migrants, and the impact of state policies on migration and the treatment of migrants.

This paper of Philip Martin and Mark Miller reviews and compares the efforts of three major countries of immigration - France, Germany and the United States of America - to stop the employment of unauthorized foreign workers through sanctions imposed on employers. Employers' sanctions usually involving financial penalties are generally considered as one of the more effective instruments for controlling illegal migration because they are supposed to deny unauthorized foreigners opportunities for employment. This preview of experiences of the three countries provides many concrete examples of the complexity of enforcing sanctions in industrial democracies. Sanctions may also have unintended consequences on freedom of association and provide a cover for discriminatory practices. Nevertheless, the authors argue that sanctions, properly designed and implemented, can be made effective and serve as valuable instruments of immigration control.

Geneva, September 2000

M.I. Abella,  
Chief,  
International Migration Branch

## 1. Summary

Employer sanctions are fines and other penalties imposed on employers who knowingly recruit, hire or retain unauthorized workers. They are a fairly recent addition to labour and immigration laws in industrial democracies, existing only since the mid-1970s in western Europe, since the late-1980s in the US, and since 1997 in the UK.<sup>1</sup>

Employer sanctions laws have two major purposes:

- to reinforce border and other migration control measures so as to discourage the entry and employment of unauthorized workers<sup>2</sup>; and
- to protect the labour market from unfair competition, so that for example some employers do not gain unfair advantages over others and unauthorized workers are not exploited.

In most European countries, employer sanctions are enforced by labour department inspectors as a small part of a general campaign against “illegal work”, defined to include the employment of unauthorized foreigners as well as the employment of citizens and legal immigrants who are also drawing welfare or other benefits or not paying required employment-related taxes. In the US, by contrast, sanctions are enforced by immigration inspectors, with relatively little cooperation from federal and state labour agencies, and these interior inspectors are a small part of a larger effort to control illegal immigration that focuses on preventing illegal entry.

Controlling illegal immigration and employment is difficult and becoming more so: the OECD concluded that sanctions “appear to be of very limited effectiveness” in deterring illegal entry and employment (1999, 244). Perhaps the best way to think about preventing the entry and employment of unauthorized workers is to remember that, with powerful and often mutual worker and employer incentives to violate the law, sanctions must be aggressively enforced and constantly fine tuned to keep up changes in employer and worker behavior in response to sanctions laws and enforcement efforts. Just as narrow guest worker programmes expanded from labour market issues into general immigration and integration policies, so preventing the entry and employment of unauthorized workers may become part of broader campaigns against tax avoidance and organized smuggling.

Our review of employer sanctions laws and their enforcement in the United States, Germany, and France reaches three broad conclusions:

- ! Employer sanctions are seen by enforcement agencies and labour and migration specialists as necessary but not sufficient to prevent the entry and employment of unauthorized workers, i.e.,

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<sup>1</sup> The Asylum and Immigration Act 1996, which introduces employer sanctions to the UK, went into effect January 27, 1997. Employers are liable for penalties of up to L5000 (\$8,000) per illegal worker hired. The Race Relations Act makes it unlawful for employers to discriminate on the basis of race or ethnicity in hiring: <http://www.open.gov.uk/home-off/ind.htm>.

<sup>2</sup> The deterrence effect of employer sanctions is often summarized in slogans such as “closing the labour market door” to unauthorized workers, “de-magnetizing” the attraction of jobs that offer illegal workers higher wages than they could earn at home, or scaring employers into being secondary or private immigration police by discouraging them under threat of fine or imprisonment from hiring illegal workers.

without sanctions, there would be more unauthorized worker employment, but sanctions alone cannot prevent such employment.

- ! Sanctions are believed to be less effective at deterring illegal entry and employment in the 1990s than they were when first introduced in the 1970s and 1980s for several reasons, including: (1) the spread of false documents, (2) the rise of subcontractors and other middlemen in more flexible labour markets, (3) inadequate labour and immigration law strategies and enforcement budgets and insufficient cooperation between agencies, and (4) a job-creation boom in countries such as the US that has lowered unemployment rates and made employers more willing to hire available unauthorized workers. Some employer, union, and other groups that once accepted sanctions as necessary to draw a bright line between legal and illegal immigration no longer support sanctions, including many of the US unions such as the United Farm Workers who represent workers whose wages and benefits are depressed by the presence of unauthorized workers.<sup>3</sup>
- ! Sanctions enforcement differs from the enforcement of most labour laws for three reasons: (1) there may be no natural incentives for self-enforcement, or, in some cases, increasing incentives to defy enforcement as employers and workers become dependent on each other;<sup>4</sup> (2) effective enforcement often requires coordination among agencies with different traditions, expertise, and missions, such as immigration, labour, and tax agencies; and (3) illegal immigration and employment is increasingly organized by international criminals whose activities are not criminal in some of the areas in which they operate, complicating cooperation among enforcement agencies across borders.

Employer sanctions laws are at a crossroads in the industrial democracies. Although there is little likelihood that they will be repealed, there is a possibility that illegal immigration and employment will be perceived as a “victimless crime” that deserves lower enforcement priority, as when raids unite employers, unions, elected officials and migrant activists in protest against the enforcement agency. Under these conditions, which have occurred in the US apple and meat packing industries in 1999, government agencies with multiple missions—such as the US Immigration and Naturalization Service, charged with both removing criminal aliens and enforcing employer sanctions - tend to focus their resources on activities that win them praise. Since removing criminal aliens wins the INS praise, while sanctions enforcement brings attacks from employers, worker groups, and politicians, removing criminal aliens has become the INS’s highest priority.

Countries can avoid ever-more illegal entry and employment with continued innovation in three areas:

- ! *Legal Innovation.* Continued revision and strengthening of laws against smuggling and illegal alien employment, such as enacting laws that jointly penalize middlemen contractors as well as the beneficiaries of the illegal labour- general contractors, farmers, or garment designers and

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<sup>3</sup> There are three major types of labour laws: (i) labour relations laws that give workers rights to organize and bargain collectively; (ii) protective labour laws that establish minimum wages, maximum hours of work, and establish eligibility for work-related benefits such as unemployment insurance, and (iii) sanctions and antidiscrimination laws that prohibit employers from hiring or retaining unauthorized aliens or using prohibited criteria such as race or sex to hire, promote and lay off workers.

<sup>4</sup> Labour laws such as those that regulate minimum wages are to some extent self-enforcing because at least one party—workers—have an incentive to ensure that they are enforced. Unauthorized workers and their employers may have a mutual incentive not to enforce laws prohibiting the hiring unauthorized workers, which means that strong social condemnation and active enforcement efforts are needed to minimize violations of sanctions laws.

retailers. Laws that permit the confiscation of goods and profits earned by illegal alien employment can encourage private policing of middlemen. Employer sanctions laws have two major purposes:

- ! *Technology.* Technology has made it easier for workers, employers, and others to forge documents and evade effective sanctions enforcement. Identification documents can be made counterfeit resistant, and creative cross checking of administrative and other data can give governments powerful new tools for targeting their enforcement efforts. Germany and the US use cross checks of computer data bases to detect apparent cases of unauthorized worker employment, which makes field enforcement more efficient and effective. France requires employers to fax information on new hires to a central office.
- ! *Research.* Research documenting typical smuggling patterns, the buffer or shock absorber role of labour market middlemen, and the links between smuggling workers and other types of smuggling have helped governments to refine their labour, immigration, and tax laws and enforcement strategies. Additional research can make enforcement efforts more efficient and effective.

Legal innovation, technology, and research can help governments to discourage illegal entry and employment. But the key to success is widespread public support—the perception that illegal immigration and employment are wrong because workers are exploited, some employers gain unfair advantage, and the presence of illegal workers may slow the development of emigration countries, creating jobs there and deterring emigration.<sup>5</sup> Leadership and sensitivity are required to deter illegal immigration and employment in a manner that does not add to discrimination against minority residents and feed xenophobia against foreigners.

This paper reviews the major features of US, German, and French sanctions laws (penalties, implementation, enforcement strategies, and involvement of unions, employer groups, and activists), the evolution and implementation of employer sanctions in each country, and current issues in enforcement and effectiveness. It concludes with a comparative assessment of sanctions enforcement in the three countries to highlight successes and failures in the evolution of employer sanctions laws and their implementation.

## **2. Introduction**

### **2.1. Evolution**

Employer sanctions in France, Germany, and the US were responses to illegal immigration; they represent efforts to reassert control over and prevent illegal immigration and employment. In France, employer sanctions were introduced in 1972, before the recruitment of nonseasonal foreign workers was halted in 1974, and they were considered an essential mechanism to reassert control over what

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<sup>5</sup> Sanctions work best when and where they are needed least. Large companies in labour markets awash with workers do not need to hire illegal aliens, and they do not do so deliberately. Small and medium-sized employers under competitive are more likely to violate all labour laws, including those that prohibit the employment of illegal aliens.

was perceived as out of control immigration. Germany enacted employer sanctions in 1972, also as part of a drive to reassert control over labour migration; guest worker recruitment was suspended in 1973. The US enacted sanctions in 1986, as part of a “Grand Bargain” that legalized about 2.7 million unauthorized foreigners; legalization came first, and sanctions began to be enforced in 1987-88.

In France and Germany, there was little opposition from employers to the introduction of sanctions. Unions and migrant advocates in France and Germany generally supported the introduction of sanctions, believing that, by minimizing illegal immigration, the status and legitimacy of authorized migrants would be improved. The ILO and other international organizations considered sanctions an integral part of effective migration management in the 1970s. ILO Convention 143, approved in 1975, says “provision shall be made under national laws or regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers.” (Convention 143, Article 6, 1). The EC issued a draft directive in 1976 that encouraged the adoption of employer sanctions for similar reasons.<sup>6</sup>

The US followed a different path to employer sanctions. Although sanctions were proposed by US presidents as early as the 1950s, approved twice by the US House of Representatives in the 1970s, and recommended as the key to effective control over illegal immigration by all of the study commissions that examined illegal immigration over the past 50 years, they were not adopted until 1986, and then over the objections of many US employers and minority groups. Those objecting to sanctions helped to prevent the US sanctions system from including one key element that has limited their effectiveness—a counterfeit-resistant work authorization document.<sup>7</sup> The US is one of the few countries to allow employees to present one or more of many documents to prove identification and authorization to work, and to prohibit employers from requesting any particular document(s).

After two to three decades of experience, enforcement personnel in all three countries complain that efforts to deter the employment of unauthorized workers are under-appreciated by prosecutors, judges, and other public officials. These officials and the broader public, they complain, see illegal alien employment as, at worst, a victimless crime, encouraging employers and unauthorized workers to flout sanctions laws. In the US, where interior enforcement funds are somewhat fungible - they can be used to enforce employer sanctions or to detect and remove criminal aliens—the priority of most regional INS offices is criminal aliens, not unauthorized workers, reflecting what the INS believes to be the priorities of taxpayers.

Table 1 summarizes the main features of the employer sanctions systems in France, Germany, and the US. The table makes several points clear:

- Each country imposes different obligations on employers, and each uses data employers are required to provide as a cornerstone of enforcement efforts.
- France and Germany rely on labour ministries to enforce sanctions; the US relies on the Immigration agency.

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<sup>6</sup> The British objected to the draft EC directive because the criminal sanctions called for might infringe on UK sovereignty and might increase discrimination against minority workers.

<sup>7</sup> Opposition to sanctions also caused the INS to take a very slow and methodical approach to enforcement.



- There is remarkable similarity in the “problem industries”.
- The percentage of unauthorized workers in each country’s work force ranges from 1.5 to 3 per cent; foreigners are 8 to 11 per cent of each country’s work force, so the percentage of legal foreign workers is more similar than the percentage of unauthorized workers

## 2.2. Theory of sanctions violations

The economic theory of unlawful behavior for economic gain is based on individuals making rational decisions, i.e., an individual compares the certain payoff from lawful behavior and the uncertain payoff from unlawful behavior selects the option with the highest expected value. Thus, increasing the penalty associated with unlawful behavior, increasing the probability of detection, or both can reduce unlawful behavior. Social stigma or other opprobrium attached to lawbreakers can also encourage lawful behavior.

**Table 1. Employers’ sanctions: Comparison of main features in France, Germany and the United States**

	France	Germany	United States
Sanctions enacted	1972	1972	1986
Major enforcement agency	Labor	Labor	Immigration
Fine	1,000 times minimum wage	DM100,000 (\$52,600)	\$100-\$10,000
Employer obligation	Fax information on new hires to registry	Check work permit; enrol in health/tax system	Complete I-9 form
Enforcement	Tips and fax information	Tips and cross-checks between databases	Tips and priorities determined locally
Major violating industries	Construction, agriculture, hotels and restaurants, janitorial, garments	Construction, agriculture, hotels and restaurants, janitorial, garments	Construction, agriculture, hotels and restaurants, janitorial, garments
Enforcement issues	Sub-contracting, coordination between agencies	Sub-contracting, intra-EU services	Document fraud, making enforcement an INS priority
Estimated illegal workers	400,000	600,000	4,000,000
Total foreign workers	1,600,000	2,500,000	15,000,000

Total foreign as per cent of total employment	6	7	11
Illegal as per cent of total employment	1.5	1.7	2.9

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### 3. FRANCE

France has a long immigration tradition, and thus substantial citizen and resident alien minority populations. In 1930, aliens comprised roughly the same percentage of the total population of France, six to seven per cent, as they did in 1999.

After 1945, France actively sought to increase its population and work force via immigration and the recruitment of foreign labour, and thus tolerated technically illegal immigration. By 1970, the alien population stood at over four million, and one-third of the construction workers were foreigners and 25 per cent of auto workers were foreigners. Mounting economic and sociopolitical difficulties contributed to a 1974 decision to stop most further foreign worker recruitment.

Since 1975, the French Government has allowed family reunification for resident aliens and admission of refugees. Illegal immigration continued alongside family unification, and was dealt with through:

- periodic legalizations;
- tougher visa, border, and interior enforcement.

The characteristics of the legal resident alien population of France evolved markedly since 1975, as analyzed by Claude-Valentin Marie.<sup>8</sup> France's resident alien population stabilized at about 3.6 million, in part due to liberal naturalization and nationality laws, while alien worker employment declined. Foreign workers were adversely affected by recession and economic restructuring in the 1970s and 1980s, accounting for nearly half of all jobs lost in the auto industry. The unemployment rate of foreign workers in France is roughly double the 11-12 per cent rate of French nationals, and there is little prospect for reducing this 2-1 gap, since many of the unemployed foreigners are older workers first hired in the 1960s who would be the last hired in an economic boom. In 1975, two thirds of alien employees were employed in the manufacturing and construction, and 25 per cent were employed in services. By the 1990s, those proportions reversed-in 1991, the Ministry of Labour estimated that 39 per cent of foreigners were employed in services.

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<sup>8</sup>Claude-Valentin Marie, *Réstructuration du système productif, emploi des étrangers et travail illégal: l'expérience française*, manuscript.

These broad trends have affected illegal migration and employment in France. There was and is little illegal alien employment in highly-unionized auto plants. However, most aliens finding a first job in the 1990s are hired by small firms that historically have been more prone to hire such workers. The shift from industrial to service employment along with trends toward greater labour market flexibility, declining unionization and growing precariousness of employment have all contributed to a flourishing underground economy that includes French workers and legal immigrants eluding taxes as well as illegal workers.

### **3.1. From illegal aliens to illegal work: 1972-1992**

Postwar French immigration policy is based on the law of November 2, 1945, which facilitated the immigration of needed workers and their families and created a National Immigration Office (ONI) to implement it; the ONI has since become the Office of International Migrations (OIM). In 1947, the ONI was made responsible for regulating the admission of up to 200,000 Italians.

However, many Italians and other foreigners arrived illegally, and later had their status regularized, so that French policy in practice was rolling legalization-between 1948 and 1981, some 1.4 million or 60 per cent of the 2.4 million legally admitted aliens in France (not including Algerians and sub-Saharan Africans) received their residence and work permits through legalization.<sup>9</sup> Both foreign workers and French employers found ONI procedures cumbersome; many workers preferred to go on their own to France, and the French Government proved willing to legalize them once they found a French employer to sponsor them.

Between 1962 and 1974, assembly-line industries recruited hundreds of thousands of foreign workers to work in factories; most lived in high rise apartment buildings in the suburbs surrounding French cities. These guest workers were probationary immigrants, and acquired more rights through renewal of work and residence permits. During the late 1960s, there were demonstrations against out-of-control migration in France. Student protests and strikes in 1968 convinced the French Government that a major effort would have to be made to reassert control over immigration.

On July 11, 1972, the employment of foreign workers without proper work permits was made unlawful in France, and regulations were developed to implement the law. A judicial mission was established in 1975 whose purpose was to prevent illegal immigration and employment. It became the "Interministry Liaison Mission to Combat Manpower Trafficking" in 1976, when employers who hired aliens illegally could be fined by the National Immigration Office a sum equivalent to 500 times the minimum hourly wage for each worker found to be illegally employed, or about \$1,000 per worker in 1980. Repeat offenders could be imprisoned for one to two months. In 1976 and 1977, there were some 1,624 and 2,208 employer violations of section L 341-6 of the Work Code, which prohibits employers from hiring foreign workers without proper permits.

The Interministry Liaison Mission kept track of enforcement of the all laws aimed against illegal migration and employment. Enforcement peaked in 1976 and again in 1984, however, it should be emphasized that the detection of illegal alien employment by enforcement personnel did not necessarily lead to punishment of the employer.

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<sup>9</sup> Ministry of Social Affairs and National Solidarity, "The employment market and immigrants in an irregular situation: Lessons from the recent legalization in France," *International Migration Review*, 18:3, p. 559 (Fall, 1984).

Trafficking infractions by employers are violations of section L 341-6 of the Work Code, which penalizes employers for hiring irregular-status aliens. The level of enforcement of employer sanctions fluctuated with overall enforcement of laws against illegal immigration and employment. The annual report on the year 1979 by the Interministry Liaison Mission summarized the first four years of enforcement of the 1976 law reinforcing employer sanctions as follows:

*"After four years of functioning, it is necessary to recognize that the objective was not totally attained and that irregular-status alien employment remains an important problem both with regard to the employment situation and on the social and human level of those workers themselves. On the other hand, it is difficult to evaluate the number of clandestine foreign workers and thus to know whether it is more important in 1980 than it was in 1976."*<sup>10</sup>

Implementation of employer sanctions over the initial period of enforcement was complicated by a number of factors. Among those was the continuation of legalization despite the intent announced during the Fontanet-Marcellin-Gorse decrees period of the early 1970s to terminate the practice. A number of "exceptional" collective legalizations occurred during this period, particularly in the spring of 1980 when some 4,000 Parisian garment workers, primarily Turks, were granted legal status. Legalization diverted staff and resources and reduced their availability for sanctions enforcement.

The law of October 17, 1981 made employment of irregular-status aliens a criminal offense subject to fines of FF2,000 to FF20,000 and imprisonment from two months to a year, with penalties up to FF40,000 and two years for repeat offenders. This fine could be imposed for each alien worker involved. However, these stiffer sanctions were delayed until a new legalization programme, which had been expanded and extended, was completed. Seasonal workers were permitted to apply for legalization, and sanctions enforcement dropped sharply in 1982.

Enforcement of employer sanctions did not begin again until mid-1982. On August 31, 1983, the French Government adopted a series of measures proposed by the Interministry Liaison Mission which aimed at reinforcing the effort to curb illegal alien residency and employment while promoting the "insertion" of legally resident alien communities in France. This linkage was made explicit in the 1983 annual report of the Interministry Liaison Mission.

Stopping clandestine immigration, combating employers of irregular-status aliens and controlling migratory fluxes effectively constitute a priority objective (for the French Government). Failure in this case would put in doubt the insertion of legally resident alien communities in France."<sup>11</sup>

The August 31, 1983, measures increased the administrative fine for employers of irregular-status aliens from 500 to 2,000 times the minimum hourly wage for each alien illegally employed, bringing it to FF26,340 or \$3,000 on January 1, 1985. The Interministry Liaison Mission staff was increased, allowing the Mission to open a regional office in Marseilles. The number of specialized labour inspectors was increased to 55, and in September, 1985, the Minister of Justice addressed a memorandum to all public prosecutors that reiterated the grave consequences of illegal alien employment and called upon prosecutors to "rigorously apply" the text of the laws concerning penalties.

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<sup>10</sup> Mission de liaison interministerielle pour la lutte contre les traffics de main-d'oeuvre, *Bilan...pour l'annee 1979*, p.2.

<sup>11</sup> Mission de liaison interministerielle pour la lutte contre les traffics de main-d'oeuvre, *Bilan...pour l'annee 1983*, p.21.

In June 1984, the first of twenty-three priority departmental coordinating committees authorized by a governmental memorandum (circulaire) of November 21, 1983 was established to facilitate the exchange of information so as to more effectively detect and sanction violations stemming from illegal alien employment. The Parisian area coordination committee included representatives from the police, fiscal authorities, the Department of Labour and Employment, the Department of Sanitary and Social Affairs, the National Employment Agency, the National Immigration Office, the enforcement arm for social security and family allowance taxes (URSSAF) and the departmental authority for state finances and economic affairs. Representatives from other public organizations and the prosecutor's office were also invited. The Paris-area coordinating committee served as the model for the coordinating committees established in other priority areas.

The termination of legalization combined with the measures taken in 1983 and 1984 resulted in an increase in enforcement of laws against illegal immigration and employment as measured by complaints communicated to the Interministry Liaison Committee. The total of 2,245 *procès-verbaux* communicated to the Mission in 1983 was the highest ever. The number of *procès-verbaux* for infraction of article L 341-6, which prohibits employment of irregular-status aliens, rose from 549 in 1982 to 947 in 1983. The increase in legal complaints was matched by increased court action, enforcement of the administrative fine, and penalties against employers of irregular-status aliens. About 1,300 court decisions ordering employers to pay fines of at least FF2,000 were made during 1983. In Paris, the first six months of 1984 witnessed a 50 per cent increase in the number of persons found guilty of employing illegal aliens relative to the 1983 period. The Director of the Interministry Liaison Mission summed up the judiciary's handling of employer sanctions over the first six months of 1984 as follows:

*"The sampling of judgements rendered during the first half of 1984 by various courts appears to us as very indicative of the current tendency toward hardening of legal counteraction vis a vis employers of irregular-status aliens. The great majority of fines are to be found from now on above the minimum provided by the law, which denotes a clear cut understanding by the courts of matters connected to manpower trafficking."*<sup>12</sup>

There was an official perception that enforcement of employer sanctions was beginning to bear fruit by 1985. The 1981-1983 period was seen as a stage where the policy instruments were "broken in" and the policy outlined in 1981 had taken concrete form. In March of 1985, Mrs. Georgina Dufoix, the Minister of Social Affairs and National Solidarity and the spokesperson for the French Government, declared that the results of enforcement of laws against illegal immigration and employment had a ". . . very encouraging balance sheet".<sup>13</sup>

The Interministry Liaison Mission report on the 1986-1987 enforcement period showed that the number of infractions reported decreased, particularly for employment of aliens without permits and illegal (underground) labour. French officials and labour inspectors interviewed in 1987 and 1988 spoke of a "demobilization" over this period linked to the uncertainty created by a decision not to prosecute a large case because of the ambiguity of the law under which the citations had been issued (the provision of the Labour Code prohibiting illegal or underground labour, *travail clandestine*) and to the changes in French Government.

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<sup>12</sup>*Le Quotidien de Paris*, 26 March, 1985.

<sup>13</sup>Agence France Presse dispatch, 25 March 1985.

In an October 1987 address of unusual candor, the new director of the Interministry Liaison Mission maintained that the level of legal complaints ". . . is of little impact and unrevealing of a mass of legal contentions which is a priori surprising since illegal employment is a widespread mass phenomenon."<sup>14</sup> She criticized in particular the disjuncture between data on apprehensions of aliens for illegal entry and/or residency and the number of infractions detected for manpower trafficking—in 1986, for example, 16,500 aliens were apprehended, but only 3,700 citations were issued for trafficking. She was also critical of the geographical imbalance in enforcement, noting that more than 84 per cent of the legal complaints originated in three regions. Two-thirds of the complaints for illegal alien employment were dismissed by provincial courts, as opposed to less than 10 per cent in the Paris region. Parisian area courts assessed fines of over FF10,000 francs on 53 per cent of the individuals punished sentenced 56 per cent to prison, versus 40 per cent of individuals convicted in the provinces.<sup>15</sup>

The speech concluded with questioning of the efficacy of the effort being made to curb illegal employment, of which illegal alien employment was a significant component. Were the means utilized appropriate and sufficient? Was an essentially enforcement approach correct? Was there truly the oft-affirmed political will to curb illegal employment? Did enforcement services possess sufficient understanding and know how to implement policy? Overall, her assessment was that the action undertaken was unsatisfactory since there were too few legal complaints and morale among enforcement services was low.<sup>16</sup>

In 1987, a revised legal text was adopted redefining illegal employment, and there was a "remobilization" of enforcement efforts reflected in an upsurge in citations in 1987, particularly for employment of aliens without permits. A significant increase in enforcement as measured by complaints for illegal employment of aliens continued in 1988 and 1989.<sup>17</sup> To signify tougher enforcement, employers convicted under laws aimed at curbing illegal alien employment and residency in France were expressly excluded from the pardons traditionally extended at the onset of a new presidential term.

By the late 1980s, what had begun as a campaign against illegal alien employment had been largely subsumed under a campaign against illegal employment in general. The focus shifted from illegal alien workers to violations of labour and tax laws. This shift was reflected in the reporting on enforcement - data were collapsed into one series so that, from 1989 on, French data cover enforcement of laws against all illegal employment practices.

In 1990, construction had the highest level of violations, and violations increased with the expansion of building - about one-third of all violations were in construction, and construction, agriculture, services, and hotels and restaurants accounted for 70 per cent of violations. There were more complaints in the 1989-91 period, but it is not clear if more complaints mean that enforcement was becoming more effective or if there was more illegal alien employment in France.

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<sup>14</sup> G. Hue, "Travail illégal, emploi atypique", talk given at the *Journées INRWFP-ENM*, 13-15 Oct. 1987, p.4.

<sup>15</sup> Ibid. p.4.

<sup>16</sup> Ibid.

<sup>17</sup> Interview with G. Hue, June, 1990.

The key statistic in French data in the early 1990s was that 75 per cent of the employers sanctioned for hiring illegal alien workers were French or EU citizens, not immigrant employers hiring unauthorized workers. Illegal alien employment, the reporting emphasized, was only one dimension of a much broader socio-economic problem. In 1992, a Ministry of Justice analysis of violations of laws against illegal employment between 1988 and 1989 found that 6,131 persons had 7,244 punished infractions, but convictions for illegal alien employment were only a quarter of total convictions. While 75 per cent of the convictions involved French and EU citizens, non-EU aliens were 22 per cent of all those convicted.

North African-origin employers predominated among those convicted for illegal alien employment. Three quarters of convictions for illegal work involved French citizens, who may or may not be of immigrant origin, while 15 per cent of the convictions involved aliens. However, only 52 per cent of convictions for illegal alien employment involved French citizens while 37 per cent involved non-EU aliens.<sup>18</sup>

Overall, 25 per cent of the convictions for illegal work resulted in incarcerations, suggesting that the severity of punishment for illegal work was greater than for comparable offenses. Moreover, illegal alien employment was more severely punished than other illegal work transgressions. According to Claude-Valentin Marie:

*“Three major traits characterize the punishment of unauthorized alien employment as compared to that meted out for clandestine work: it is more severe; it is the object of more extreme views by judges; and fines for it are heavier. Incarcerations are slightly more prevalent in cases of unauthorized alien employment and sentences rarely are partially suspended as judges opt for either incarceration or total suspension of sentence. The level of fines levied for unauthorized alien employment is superior to that levied in cases of recourse to clandestine workers. Regardless of the type of infraction, aliens from non-European Union countries are punished more severely than are French citizens.”<sup>19</sup>*

### **3.2. Prevention: 1992-1998**

The most recent data concern the 1992 to 1996 period; they were compiled by the successor to the Interministry Liaison Mission. The new agency created in 1997 is known by the French acronym DILTI. For the years 1992 through 1995, the statistics are cumulative. For 1996, however, the 10,000 dossiers or reports (procès-verbaux) analyzed represented only sixty-two per cent of the total written up that year, but they confirmed trends apparent throughout the 1990s.

The single most noteworthy trend, aside from the continued prevalence of French citizens violating laws against illegal employment, was the steady decline in the percentage of complaints alleging employment of unauthorized aliens- only five per cent of the 10,000 dossiers examined in 1996 involved suspected employment of aliens without employment permits, down from 13 per cent in 1992. In 1995, less than nine per cent of the 21,622 illegally employed workers detected were aliens without employment authorization, down from 17 per cent in 1992.

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<sup>18</sup> This section draws extensively from C.-V. Marie, *Réstructuration du système productif...*, op.cit.

<sup>19</sup> C.-V. Marie, *Réstructuration du système productif, emplois des étrangers et travail illégal: l'expérience française*, p. 28. (An abridged, translated version of this paper appears in *The Annals*, July, 1994).

The downward trend in aliens detected without work permits probably reflects growing competition for jobs. Aliens without employment permission may be shunted aside in favor of unemployed French workers, or legally-authorized foreign workers. Many aliens authorized for employment work illegally, as do French citizens - 40 to 50 per cent of workers employed illegally between 1992 and 1995 were aliens. The same DILTI statistics suggest that foreign employers in the 1990s were disproportionately involved in the hiring of foreigners without permits. In 1995, 15,040 persons were charged with illegal employment. Of these employers, 78 per cent were French citizens, 4 per cent were citizens of other European Union countries and 18 per cent were foreigners from outside the EU. However, they comprised half of the employers charged with employment of aliens without permits.

An important enforcement innovation required many employers to fax information only prospective employees to social security authorities prior to hiring the worker. This pre-hiring information was entered into a nation-wide data base and used to detect illegal work. More than 83,400 inquiries were made of the data base in 1995 and more than two thirds of the cases involving dissimulation of employment were initiated after a check revealed that a pre-hiring declaration had not been made. DILTI officials interviewed in 1999 credited these pre-hiring declarations with making their enforcement more effective. An unknown number of employers, particularly in agriculture, do not have to make pre-hiring declarations.<sup>20</sup> Since 1993, the Ministry of the Interior has encouraged departmental prefectures to establish a telephone and fax procedure to verify the authenticity of documents held by foreign workers. However, use of the procedure is spotty: many employers are unaware of the procedure and in some cases there are too few administrative personnel available to verify documents that are submitted.<sup>21</sup>

By the late 1990s, the French had many means to punish the illegal employment of aliens. Employers risked three year prison terms and fines of FF30,000 (roughly \$6,000) for each unauthorized foreign worker. Moreover, the convictions of the employers could be publicized, and any goods involved in illegal alien employment could be confiscated. Violating employers faced bans on professional activity for up to five years, exclusion from public markets for up to five years and, in the case of non-French employers, exclusion from French territory for a maximum of five years. Employers also faced a civil or administrative fine from the Office of International Migration of between FF9,045 and FF30,180, depending on the nature of the infraction.<sup>22</sup>

A National Assembly commission made seven specific recommendations to increase punishments in 1995 and 1996. For example, if the employer were a naturalized French citizen, he or she could be stripped of French citizenship for employing illegal workers, and the employer could be required to pay the cost of repatriating unauthorized foreign workers. A foreign employer could lose his or her residency permit, and a French employer could lose civic rights for five years. Police could be authorized to enter employment sites and to consult personnel registries in order to verify employment eligibility.<sup>23</sup>

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<sup>20</sup> CFDT, "Le travail illégal et l'immigration: Réactions de la CFDT: Migration Société, 7:39, p.73.

<sup>21</sup> Patrick Weil, *Mission d'étude des législations de la nationalité et de l'immigration*, p. 114

<sup>22</sup> *Ibid*, p. 113.

<sup>23</sup> Assemblée Nationale, *Immigration clandestine et séjour irrégulier d'étrangers en France*, tome I, p. 214.



National elections in 1997 brought a new government into power, and it established a twelve member commission to study French legislation pertaining to nationality and immigration. This commission rejected many of the National Assembly commission recommendations, and instead proposed an amnesty. The legalization of 1997-98 gave legal residency to 80,000 aliens. According to the newly elected government, unjust immigration laws adopted by Conservative governments earlier in the 1990s had created a group of illegal aliens, i.e. many of those legalized would not have required legalization if Conservative government laws had not been enacted.

### **3.3. Enforcement issues**

How effective have French laws and enforcement efforts been? The best statement is the testimony given by Gérard Moreau to the National Assembly commission on November 21, 1995. He concluded that measures against illegal employment of aliens, incrementally developed over the past quarter century, had a considerable deterrent effect. The major emphasis in policy since 1997 has been upon prevention of illegal employment. The report of the Weil commission in 1997 recommended a series of steps to make illegal employment less attractive, ranging from changing rules for unemployment insurance for seasonal or short-term employees to reductions in payroll taxes for employment in sectors heavily affected by illegal employment, especially illegal employment of aliens.

Since 1977, the Office of International Migrations (OMI), has been empowered to levy an administrative fine- separate from judicial punishment - on employers who illegally hire aliens- the so-called special contribution, a complementary fine for non-payment of social security taxes, etc. The special contribution is an automatic fine, subject to administrative appeal, that punishes an employer irrespective of the outcome of legal proceedings.

Administratively, a special contribution should be collected after every infraction for illegal alien employment. However, to levy the special contribution, OMI must be notified by the director of a departmental labour and employment office. By 1990, a debate had developed over the special contribution, with many enforcement personnel and administrators concluding that the fine of FF32,000 francs was too high. Some labour inspectors reported that they hesitated to write up illegal alien employment infractions because it was too much. If it were levied, small and marginal firms might go out of business. Sometimes only one violation would be written up when additional aliens were illegally employed and/or additional citations could have been issued.

Most citations for illegal alien employment are made by labour inspectors, but police, gendarmes, agricultural inspectors are also empowered to write up violations. When a labour inspector writes up a citation for illegal employment of an alien, it has the force of law unless overturned or forgiven during appeal.

The decree of November 8, 1990 modified the special contribution. Three levels of special contributions tailored to the nature of the illegal alien employment offense were instituted:

- The normal fine would henceforth be 1000 times the minimum hourly wage (FF16,870 francs as of July 1, 1992).
- An augmented fine would be due from employers who already had been subject to the special contribution in the five years prior to the infraction. The augmented fine was 2,000 times the minimum hourly wage (or FF33,740 as of July 1, 1992).
- A reduced fine was inaugurated for illegal employment of an alien which was not accompanied by other infractions. Such a reduction was at the discretion of OMI consequent to a recommendation from a department-level director of labour and employment.

This same decree instituted a ten per cent surcharge on the special contribution if it were not paid within two months. An interagency directive made application of the November 8, 1990 decree retroactive to cover all dossiers in which there had not been notification of the fine or which were under appeal until the end of 1992. During this period, a new computer-assisted procedure for the administration of the special contribution was put into place and became operational as of December, 1991. In 1992, 2,498 special contributions were assessed, the highest level ever, up from the 1,370 annual average special contribution fines levied between 1977 and 1989. Between 1977 and 1992, a total of 25,942 infractions for illegal employment of aliens had been transmitted to OMI. French officials interviewed in 1993-94 spoke of significant progress in enforcement of employer sanctions.

OMI reported that "the reform made in 1990 and the amelioration of management procedures regarding recovery and issues surrounding it have therefore allowed a clear redressing of the situation and even contributed to heightened efficacy of this administrative sanction."<sup>24</sup> Nevertheless, a disproportionately high number of illegal alien employment cases involve employers who themselves are aliens. They frequently leave France and do not pay the fine. Other employers declare insolvency or are imprisoned and cannot pay.<sup>25</sup>

The enforcement powers of the other services vary. Labour inspectors, for instance, can inspect any site without prior notification, but they cannot verify identities - only the judicial police can verify identities. The judicial police, on the other hand, must have a justifiable motive for entering a business. Inter-agency cooperation is limited - of the 9,890 dossiers communicated to what is now DILTI in 1995, 12 per cent involved agents from several ministries, and 75 per cent were reported by the police and gendarmerie.<sup>26</sup> Hence, the role played by police and gendarmes in the enforcement of laws against illegal employment was more pronounced in the mid 1990s than it was in the 1975 to 1990 period.

### 3.4. Legal issues

The statistics on enforcement compiled by the Interministry Liaison Mission (now DILTI) are charges for possible prosecution - legal authorities decide whether or not to prosecute employers on the basis of the *procès-verbaux*. One chronic problem has been the reluctance of prosecutors to bring criminal charges against employers after the administrative fine, the special contribution, was levied. Some prosecutors argued criminal charges after the special contribution violates the legal principle one punishment per crime. The French Government, however, rejects this interpretation. It maintains that the special contribution is levied for violation of the Office of International Migrations' monopoly over admission of aliens to France.

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<sup>24</sup> L'Office des Migrations Internationales, 1992 *Numéro Spécial d'Actualités Migrations*, pp. 77-78.

<sup>25</sup> The severity of the special contribution fine in addition to judicial punishments for illegal alien employment and punishments for related offenses like nonpayment of social security taxes, figured in the background to a sharp drop in recovery of special contribution fines between 1985 and 1989. OMI received only 11 per cent of the special contributions levied in 1985, 8 per cent in 1986, 4.28% in 1987 and 3.24% in 1989. Data for 1990 and 1991 was not comparable. However, by 1992, the recovery rate had increased to 19 per cent.

<sup>26</sup> DILTI, *La verbalisation du travail illégal: les chiffres de l'année, 1995*, pp.23-24.

There has been some reluctance of public prosecutors to pursue criminal charges against employers. In one noteworthy case that adversely affected overall enforcement in 1986, a public prosecutor found ambiguous the provisions in the Labour Code prohibiting illegal employment, under which charges had been brought against an employer employing some 350 aliens. The case was not prosecuted, and the dismissal led to redrafting of the law. The result was an upsurge in citations made by labour inspectors beginning in 1987.

A great deal of enforcement is not recorded. Administrative and other sanctions, such as fines collected for nonpayment of mandatory health insurance premiums, are not recorded. Many enforcement activities have a deterrent effect even if they do not result in the writing up of complaints and successful prosecution of employers in the courts. Agricultural inspectors in particular tell of workers, presumably illegally employed, running into the fields as they approach. Prosecution of employers under criminal law, of course, must comply with standard rules of evidence and procedure. Complaints generally are not prosecuted unless the case includes all the elements needed for success.

An upsurge in criminality over the last several decades has fed anti-immigrant sentiment and profoundly affected politics in many Western European states, including France. Enforcement agents have far broader responsibilities above and beyond the enforcement of laws prohibiting illegal employment of aliens. For many labour inspectors and police officers, enforcement of employer sanctions is a low priority. Labour inspectors, in particular, often do not write up complaints for infractions that they detect because they have higher enforcement priorities. This is why the Interministry Liaison Mission and its successor DILTI devoted much of its effort, in addition to studying illegal migration and illegal alien employment, to informing enforcement agents about the various laws penalizing illegal alien employment and the priority attached to their enforcement by the government.

Labour inspection historically has concentrated on factories. However, most illegal alien employment is not in factories, which often have a substantial union presence. Illegal alien employment is concentrated in small businesses, an environment different from the classic focus of labour inspector training and service. This disjuncture between the focus of labour inspection and the focus of illegal alien employment mean that labour inspectors tend to look more for unsafe working conditions than illegal alien employment. Enforcement of laws prohibiting illegal alien employment is largely incidental to routine enforcement of social legislation by enforcement agents. Enforcement agents must have a reason to suspect illegal alien employment, i.e. a tip, before launching a non-routine investigation.

Inadequacy of resources is the factor most cited by authorities in charge of enforcement of employer sanctions when asked to discuss problems of enforcement. In the key agricultural department of the Vaucluse in May 1990, for example, there were five enforcement personnel with a budget of some FF38,000, which greatly limited the number of inspections that could be made.

In March of 1995, there were 2,910 labour inspectors authorized to make inspections and 32 agents specialized in illegal employment enforcement. They made 284,921 site inspections in 1992 and detected 921,856 violations - 23,345 of these were written up, of which 2,270 concerned illegal employment.

Within the Ministry of the Interior, a new agency, known by the acronym DICILEC, was created in late 1994, mainly out of the Air and Frontier Police, for control of immigration and illegal employment. It had 950 operational agents, of whom about one hundred had administrative jobs. DICILEC's major responsibilities pertain to prevention of illegal immigration across land and maritime frontiers and at points of entry, with a special emphasis on combating illegal migration, especially manpower

trafficking or smuggling.<sup>27</sup> Additionally, there are 4,000 police potentially competent to enforce laws against illegal employment.

The number of fiscal agents available to write up citations for infractions related to illegal employment, say for non-payment of employment taxes, was estimated at 1,100. Agents from the Gendarmerie, customs, maritime affairs and social security also participate in enforcement.

Historically, employer sanctions were advocated by trade unions and progressive political parties because they made employers responsible for illegal employment that previously was punished by deportation and other penalties levied against the illegally employed alien. Particularly in the Paris area, a number of labour inspectors interviewed in the 1985 through 1987 period indicated that they often did not write up complaints for fear of putting marginal firms out of business or locate four illegal alien employees but charge the employer with hiring one.

In the South of France, particularly in the department of the Var, a movement developed among labour inspectors against enforcement of employer sanctions. A group calling itself the anti-racist collective distributed tracts and argued that enforcement punished alien workers with deportation while their employers escaped punishment. One of the complaints heard in the South of France was that deportation of the illegal alien worker prevented them from collecting the pay and employment-related benefits due to them being under French law. This, coupled with the perception that employers would not be punished, appeared to prompt the protest. The proportionality concern, therefore, paradoxically appeared to affect enforcement in two ways. Too heavy of a fine against employers was seen by some French labour inspectors as a reason not to write up complaints, while other inspectors claimed just the opposite and also did not write up complaints.

A further problem affecting punishment of offending employers arises from their ability to adapt changing enforcement strategies. Some employers have thwarted enforcement by going, as it were, deeper underground, such as the Paris area garment industry, which has relocated from the city to the suburbs. Another employer strategy has been to utilize subcontractors who employ illegal aliens. French law has been revised to punish subcontractors and firms that knowingly encourage illegal alien employment through subcontracting. The 1993 law empowered the government to levy the special contribution fine, in certain circumstances, upon clients who have contracts with employers who utilize illegal foreign workers.<sup>28</sup>

The problem of subcontractors employing aliens ineligible to work remains particularly significant in the construction industry. The phenomenal growth of subcontracting in construction and service industries like cleaning and maintenance mitigates against successful enforcement of laws prohibiting illegal employment of aliens. The trend towards deregulation and greater flexibility in labour markets, as exemplified by the growth of temporary worker agencies and eased regulations concerning employment of nonpermanent workers, tends to undercut governmental policies aimed at curbing illegal alien entry and employment.

### **3.5. Lessons and recommendations**

French officials interviewed in January 1999 believed that the implementation of the December 31, 1992 law obliging employers to report workers they intend to hire was helpful in deterring the

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<sup>27</sup> Assemblée Nationale, *Immigration clandestine et séjour irrégulier des étrangers en France*, tome II, pp. 77-89.

<sup>28</sup> DILTI, *La lutte contre le travail illégal: Rapport d'activité 1977*. P. 55.

employment of illegal workers. By January 1995, more than 176,000 firms had made 1.2 million declarations to social security authorities before employment began. From September 1993 to December 1994, there were over 1.8 million such prior declarations. These figures suggest that the experiment begun in 1992 succeeded, and many firms were voluntarily complying.

French enforcement history demonstrates that employer sanctions enforcement is not a threat to civil liberties or something that aggravates employment discrimination against minorities.<sup>29</sup> On the contrary, legally resident and citizen minorities in particular have a great stake in effective enforcement of laws punishing illegal employment of aliens as well as other related labour laws. France does not have a mandatory national identification document. But over 95 per cent of French citizens carry a national identity card. All aliens are required to carry appropriate identification. While there is concern over falsification of identify documents<sup>30</sup> -safeguards have been instituted to prevent abuse of identity documents by authorities and others - and the availability of reliable identification in France is critical to French enforcement efforts. Particularly noteworthy in this respect is the growing ability of labour inspectors and social security agents to exchange information and to coordinate their enforcement efforts with the assistance of computer data bases.

French experience with enforcement of laws against illegal alien employment makes it clear that sanctions laws need to be revised and reinforced continuously. However, it must be recognized that it is much more difficult to migrate illegally to France in 1999 than it was in 1969, and employers who hire unauthorized alien labour run the risk of detection and punishment. All parties know where illegal alien employment is most common, and the government's effort to prevent illegal employment in these problem industries appears to be making headway.

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<sup>29</sup> In 1998 France created an Observatory of Discrimination to monitor discrimination against minorities and immigrants and promised to: (1) end the practice of permitting employers to specify that they want French nationals when they request workers from an employment office and (2) re-examine current requirements that persons employed by state-run companies must be French nationals.

<sup>30</sup> The report prepared by Patrick Weil and his commission in 1997 indicated that document fraud, especially falsification of employment and residency permits, is a growing problem. Weil recommended that foreign workers be required to use their passports to identify themselves and that a sticker (vignette) placed on the passport be used instead of too easily falsifiable employment authorizations.

## 4. GERMANY

Germany is the largest economy in Europe and has become Europe's major destination for immigrants and migrant workers. Germany imported foreign guest workers between the mid-1950s and 1973, under the theory that they would rotate in and out of the labour market as needed. When this rotation principle was tested during the recession of 1966-67, it seemed to work. Between 1966 and 1967 the employment of guest workers fell by 25 per cent, while German employment fell only 3 per cent. But subsequent experience showed that there is nothing more permanent than unskilled temporary workers.

### 4.1. Guest workers and sanctions: 1960-72

Germany was primarily a country of emigration until the 1950s, with the major destination being the US. Of the 63 million immigrants who arrived in the United States between 1820 and 1996, over 7 million or 11 per cent were from Germany.<sup>31</sup> Germans were one-third of the immigrants arriving in the United States during the 1850s and 1890s, and one-fourth of the immigrants arriving during the 1830s, 1840s, 1870s, 1880s, and 1950s. In the 1980 Census of Population (COP), some 60 million Americans, or one in four, reported German roots.

During World War II, Germany used *Fremdarbeiter* in its factories. In August 1944, there were 7.5 million foreign workers - two million war prisoners and 5.7 million civilian workers - employed in German agriculture and factories, and they were about one-third of the total labour force (Herbert, 1997). War-time employment of foreigners gave German employers experience dealing with foreign workers, so that, in the opinion of some Germans, when labour shortages appeared in the 1950s, German managers were confident that they could once again manage a multinational workforce.

When the Federal Republic of Germany was founded in 1949, there was massive unemployment. Currency reform, Marshall Plan aide, and the development of the "social market economy" put Germany on the path to sustained economic growth, but unemployment remained high as West Germany absorbed millions of ethnic and East Germans.<sup>32</sup> There were 79,000 Italian farm workers in Germany when the first labour recruitment agreement with Italy was signed in 1955, permitting German farmers to hire Italian migrant workers to harvest their crops. Italy was willing to see its unemployed workers emigrate, but insisted that they be recruited and employed on the basis of a bilateral labour agreement. It soon became apparent, however, that the real need for labour was in the German factories producing cars, machine tools, coal and steel, and consumer durables for booming export and domestic markets.

In 1960, for the first time, the number of job vacancies exceeded the number of registered unemployed, and nonfarm employers requested permission to recruit foreign workers. There were four reasons why importing foreign workers seemed to be the right thing to do in the 1960s (Böhning, 1984, Krane, 1975, 1979):

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<sup>31</sup> Over the past 176 years, Germany has sent about 1.5 million more immigrants to the US than Mexico. (INS, 1997).

<sup>32</sup> The former West Germany absorbed large numbers of Germans who moved west: one writer called the westward movement of 8 million Germans between 1944 and 1946 "the greatest migratory movement of modern times." (Ardaugh, 1987, 13). Estimates of the number of Germans who moved west between the end of World War II and the construction of the Berlin Wall in 1961 range from 9 to 13 million.

the Germany labour force was shrinking for demographic and related reasons in the early 1960s, including a delayed baby boom, the spread and availability of educational opportunities, and better pensions that prompted earlier retirements; for "family-political" reasons, options such as encouraging more women to seek jobs were not pursued.

- There was a reluctance to risk what was still perceived to be a fragile economic recovery on risky mechanization and rationalization alternatives to importing foreign workers (Lutz, 1963, Kindleberger, 1967). Unions did not oppose importing foreign workers in an era of full employment after securing the promise that foreigners would be treated equally, and thus would not undercut German workers.
- Europe was unifying anyway, and Germany had agreed that Italians and other EC nationals would have freedom of movement rights after January 1, 1968 (Böhning, 1972). With Italians soon able to come as they wished, Germany thought it was simply regulating unilaterally the rate at which EC workers would in any event soon arrive.
- In the early 1960s Germany had an undervalued currency in a world of fixed exchange rates. This attracted local and foreign capital to invest in Germany to produce goods for export markets. American multinationals poured so many Department of Labor dollars into Europe that a French writer warned of *The American Challenge* to Europe. Germans had little incentive to invest and create jobs abroad in this era.

The 1957 Treaty of Rome established the European Economic Community and guaranteed citizens of member states the right to work in any EEC nation on an equal basis with natives after 1968.<sup>33</sup> The Berlin Wall closed the door from East to West Germany in 1961, encouraging labour-short German manufacturers to cast a wider net for additional labour. There were 329,000 foreign workers in 1960, one million in 1964 and, after a dip in 1996/97, the employment of foreign workers in Germany climbed to 2.6 million in 1973.

German employers recruited "guest workers" under the terms of labour agreements signed with, inter alia, Greece, Spain, Yugoslavia, and Turkey in the early 1960s.<sup>34</sup> Most guest workers were farmers between 18 and 35, although a significant number of semi-skilled construction workers, miners, and even school teachers migrated to Germany to work on assembly lines. News of jobs which paid in one month a year's earnings at home spread rapidly, and there were soon long lists of Turks and Yugoslavs signed up waiting for their chance to go abroad. Most migrant workers were recruited anonymously, but German employers could request particular workers, which permitted migrants to jump the queue by persuading their friends and relatives already abroad to have German employers request them by name. Others migrated illegally, found a job, and then persuaded their employers to request them. By some estimates, 20 to 30 per cent of the Turks employed in Germany during the peak recruitment years went originally as "tourists".

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<sup>33</sup> Freedom of movement within the EEC means that a worker from any member state may enter another, remain for up to 3 months in search of a job, and then, if the migrant finds employment, the host country must grant any necessary work and residence permits.

<sup>34</sup> Germany recruited workers during the 1960s from EC-member country Italy and from 7 non-EC recruitment countries: Greece, Morocco, Portugal, Spain, Tunisia, Turkey, and Yugoslavia. Greece became a member of the EC in 1981, and Spain and Portugal became members in 1986. Greece had to wait until 1988 before its citizens got full freedom of movement rights, and Spain and Portugal, scheduled to have freedom of movement rights, in 1993, got mobility rights one year early in 1992.

Between 1955 and 1973, some 15 to 20 million guest workers shuttled in and out of West Germany. However, foreign workers could “earn” an immigrant status. For example, if the initial one-year work permit was renewed, the foreign worker could bring his family to Germany. Although most guest workers left after two or three years as anticipated, by 1973 only two-thirds of the 4 million foreigners in Germany were in the workforce - the others were non-working family members and children. This growing number of foreign workers and foreign residents made it seem that the government had lost control of migration. By 1973, 11 per cent of the entire German workforce was foreign and in some factories, one-third of the workforce was foreign.<sup>35</sup> A wave of wildcat strikes in 1972-73 that involved a significant number of foreign workers convinced the government that foreign worker recruitment must be stopped, and the government used the October 1973 oil embargo to announce a ban on the further recruitment of guest workers.

Employer sanctions were enacted in 1972, in the context of a broader reform of public policy towards aliens.<sup>36</sup> In 1975 came the first revisions to sanctions: anyone who recruited aliens for employment purposes outside of the official Labour Department recruitment procedures was liable for fines up to DM 50,000 and prison terms of up to three years. Since guest worker recruitment was suspended in November 1973, this made the recruitment of unskilled foreign workers unlawful. Employers who negligently or intentionally hired aliens not entitled to work could be fined up to DM 50,000, and the Federal Ministry for Labour and Social Affairs in Nuremberg was charged with enforcement of these recruitment and employment laws. A Central Agency to Combat the Illegal Entry of Foreigners was established in 1976 within the agency responsible for border enforcement in Koblenz.

In 1982, the maximum fine per alien employed was raised to DM100,000, and 25 offices were established to combat the underground economy and illegal alien employment. Employers found to have exploited unauthorized foreign workers could be imprisoned for up to five years. In 1996, the inspectors began 473,000 civil and criminal actions for all types of labour law and immigration violations, 80 per cent in the former West Germany, and down from 632,000 in 1993, 620,000 in 1994, and 512,000 in 1995. German inspectors completed 474,000 cases in 1996 and, in 317,000 or two-thirds of the cases, an employer or worker was warned and issued a civil fine. About 55,000 criminal citations were issued.

#### **4.2. AFG violations and enforcement**

All foreigners employed in Germany except EU nationals and citizens of Norway and Iceland need valid residence permits to obtain the necessary work permits from the German Department of Labour before being hired. EU nationals may enter Germany and seek work, and if they find a job in Germany, the Department of Labor must issue them work permits.

There are two major violations of German labour law that involve foreign workers: illegal alien employment (both the employer and foreign worker violate paragraph 229.1 of the *Arbeitsförderungsgesetz* or AFG), and the unlawful transfer of foreign workers from one employer

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<sup>35</sup> At Opel’s Russelheim plant, for example, foreigners were one-third of the factory’s 30,000 employees, and Opel had a transportation department to get foreign workers from their countries of origin to Germany as well as a housing department to operate the barracks where most single male workers lived.

<sup>36</sup> The Employment Promotion Act Section 229, paragraph 1, subparagraph 2.



to another (*Arbeitnehmerüberlassung*), or shifting a foreign worker from an approved to an unapproved job, e.g. importing him as a painter and assigning him to lay bricks.

In 1998, the maximum fine for employing illegal alien workers was DM100,000 (\$60,000). However, if the employer exploits the foreign workers by putting them in worse conditions than similar German workers, or employs five or more foreign workers without permits for 30 days or more, or employs foreign workers without permits for a second or third time, then the employer can be charged with criminal violations, and be sentenced to 3 to 5 years in jail. Foreign workers employed illegally can be fined up to DM1,000.

When illegal foreign workers are found, they are usually expelled from Germany, and their employers are fined. German authorities try to obtain back wages due to illegal workers from their employers, but there is no system for sending back wages to the expelled worker in his country of origin. German law permits prosecutors to ask courts to fine employers the equivalent of any profits they derived from employing illegal workers, and to ask courts to fine illegal foreign workers the equivalent of their German earnings, but these penalties are rarely sought or imposed.

Sanctions laws are enforced by the German Department of Labor, which in 1996 had 184 federal-state offices, including 44 with special enforcement teams devoted to preventing illegal foreign worker employment. There were some 1,600 inspectors, plus an extra 840 inspectors who inspect construction sites. In addition, some 1,000 employees of the former west-east German customs office were assigned to labour law enforcement in the mid-1990s.

In 1996, about 87,000 or 18 per cent of the cases opened by labour inspectors involved illegal alien employment, and 8,500 cases involved unlawful worker transfers.<sup>37</sup> In 1996, there were a total of 55,300 citations issued for employing illegal aliens, including 9,100 criminal citations that involved DM37 million in fines (\$22 million), or an average criminal fine of \$2,400 (in 1995, there were 6,500 criminal sanctions and DM33 million in fines).<sup>38</sup> In 1996, labour inspectors checked 424,000 workers at work, and checked 1.1 million pay and work permit records.

Germany's labour office reported that it had detected 406,000 cases of illegal employment in 1998 and levied fines of DM225 million. Most of the cases were in construction, and enforcement experience suggests that violations are commonplace - over half of the 66 foreign construction firms inspected in June 1999 in Baden-Württemberg violated German labour laws, usually by not paying their (foreign) workers the German minimum wage. Some 2.5 million persons were employed in the German construction industry in 1998; 1.8 million in the west and 0.7 million in the east.

Germany probably spends more to prevent the employment of illegal foreign workers than any other country; about five times more per worker than the US. In 1994, there were over 78,000 inspections of German employers suspected of employing illegal aliens, and almost half of these inspections

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<sup>37</sup> In construction, worker transfers are generally forbidden. However, many firms try to transfer foreign workers on a construction site from one employer to another by signing a contract that e.g., has stonemason X build a wall for contractor Y. In reality, contractor Y wants to use stonemason X's workers. In 1996, there were 1143 criminal charges of unlawful worker transfers, and fines of DM47 million.

<sup>38</sup> A sweep of hotels and restaurants involving 3,600 inspectors and police in March 1995 found that 830 of the 3,600 restaurants checked had illegal foreign workers. About 6,000 or 43 per cent of the 15,000 employees were foreigners who were required to have work permits, and 1,300 of them (22 per cent) did not. Two-thirds of the 15,000 restaurant employees were not carrying their social insurance cards with them, as required in construction, hotels and restaurants, and in fairs and other temporary exhibitions.

(42,000) led to fines that totaled DM 24 million (US \$17 million) and/or warnings. By comparison, the INS fined US employers \$11 million in 1994 for employing illegal aliens and/or not completing I-9 forms.

Germany has about 1,500 labour market inspectors. At an annual cost of about DM 100,000 (US \$70,000) per inspector, the Labour Ministry spends DM 150 million (US \$110 million) annually on labour market enforcement, which encompasses everything from preventing German workers from drawing UI benefits while working to preventing illegal foreign workers from finding jobs. In a labour market with about 40 million workers, Germany spends almost \$3 per worker per year on labour law enforcement.<sup>39</sup> The US, by contrast, had 245 INS worksite investigators in 1994, and an additional 900 Department of Labour inspectors. At an average cost of \$75,000 per inspector, the US spends \$86 million annually on federal labour law enforcement, or \$0.66 per worker and year.

German labour officials attribute their relatively generous funding to the public's desire to preserve a generous welfare state and an orderly labour market. For example, unarmed German labour inspectors can obtain local police support for worksite inspections at no cost to the labour ministry, so that, when 15 to 20 labour inspectors enter a construction site, they may have 20 or 40 local police to surround the site to prevent workers from running away. In the US, by contrast, INS investigators can be armed, and they normally work without the cooperation of other government agencies when conducting work place raids.

German labour enforcement officials interviewed in the 1980s and early 1990s were generally optimistic that they could maintain illegal alien employment at comparatively low levels. They emphasized that forged documents were rarely encountered, that unions and other employers often provided tips to supplement cross checks of computer databases, and that most German employers who were fined promptly paid the fines to avoid negative publicity.<sup>40</sup> Fines are registered with local chambers of commerce, and public agencies and other firms can require employers bidding for contracts to provide information about that firm's labour law violations.

By the mid- to late 1990s, German labour inspectors were less optimistic, noting that Poles could enter Germany without visas, that new foreign worker programmes were created to accommodate the employment of foreigners, and that German employers who used to simply pay their fines and promise to be more careful had changed their behavior:

1. An increasing percentage of the fines (20-30 per cent) were appealed in the late 1990s. According to German labour inspectors, administrative courts that generally levy fines of a few hundred DM for traffic and similar violations often reduce fines of hundreds of thousands or millions of DM proposed by German labour inspectors for labour market violations.
2. Many of the small subcontractors cited for criminal violations of employer sanctions laws go out of business and do not pay their fines, or local prosecutors do not prosecute them. For example, of the 12,400 citations (Ermittlungsverfahren) issued by the Berlin police against employers charged with employing illegal workers in construction, only 1000 were taken up by local prosecutors in 1996.

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<sup>39</sup> In some areas, expenditures per worker are far higher. In Brandenburg, a labour market with almost one million workers, 150 additional labour inspectors were added to the normal 43 in 1996-97, bringing enforcement expenditures to \$14 per worker per year.

<sup>40</sup> If a German firm contests a fine, its name can be made public.

3. There is little international cooperation in enforcing employer sanctions laws, so that what is illegal in Germany can be advertised openly in Portugal or the UK.

This last issue, international cooperation, is a particular issue in construction.

#### **4.2.1. Construction: postings abroad**

The Berlin Wall fell in November 1989, Germany unified in 1990, and plans to return the German capital to Berlin made that city Europe's major construction site for most of the 1990s. In the mid-1990s, there were some 10,000 building sites in Berlin, including 300 major projects. In 1997, contractors and subcontractors in Berlin employed about 550,000 workers, including 200,000 foreigners, while some 25,000 German construction workers were unemployed.

German unions and labour law authorities attributed the high joblessness to competition from legal and unauthorized foreign workers. To deter illegal immigration and employment, extra labour inspectors were assigned to Berlin-area construction sites. In conjunction with police, they mounted at least one "major inspection" each month in the 1990s.

A major work site inspection involves up to 100 police with dogs to surround the construction site to prevent anyone from leaving during the inspection, and 200 to 300 labour inspectors to check the legal status of each worker on the site. A convoy of 50 or more vehicles is assembled near the site to be inspected, police surround the site, and inspectors rush into the partially assembled buildings so that they can determine exactly what task workers are doing (the worker may be legal if he is laying bricks, but not if he is painting, and he must be working for the "right" employer).<sup>41</sup> The workers are quickly interviewed where they are employed to determine what they are doing, and then taken to a central location on the work site where their work permits are reviewed; construction workers are required to carry work permits with their photos. Workers without proper permits are handcuffed, placed in police vans, and taken to detention facilities.<sup>42</sup> If their suspected unauthorized status is confirmed by the Aliens Police, the Aliens Police removes them from Germany.

Despite spectacular raids, 15 to 25 per cent of the workers on most construction sites in Berlin were believed to be unauthorized in the mid-1990s. Many of the employers found with unauthorized workers are subcontractors; after being caught, some go out of business and rather than pay their fines. Local prosecutors who consider drugs and other crimes to have higher priority often do not take up "victimless" cases involving the employment of foreign workers. Germany does not have strict joint liability, so the general contractor at a large construction site is usually not liable for the subcontractor's violations.

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<sup>41</sup> There are two major violations of German labour laws that involve foreign workers: illegal alien employment (both the employer and foreign worker violate para. 229 of the German labour law, AFG), and the unlawful transfer of foreign workers from one employer to another (Arbeitnehmerüberlassung). In 1996, about 87,000 or 18 per cent of the cases opened involved illegal alien employment, and 8500 cases involved unlawful worker transfers. In 1996, there were a total of 55,300 citations issued for employing illegal aliens, including 9100 criminal citations that involved DM37 million in fines (\$22 million), or an average criminal fine of \$2400 (in 1995, there were 6500 criminal sanctions and DM33 million in fines). In 1996, labour inspectors checked 424,000 workers at work, and checked 1.1 million pay and work permit records.

The third enforcement task involving foreign workers is the new recruitment law (Entsendegesetz). Beginning January 1, 1997, all workers employed on German construction sites must be paid at least the minimum wage negotiated between German unions and employers.

<sup>42</sup> In 1998, Berlin reportedly filled its detention facilities with apprehended foreign workers.

The Berlin construction problem was mirrored throughout Germany. For example, in August 1995, the president of the German Craft Association was discovered to have employed Romanian construction workers in Munich whose work permits expired on July 31, 1995, making them illegal workers. Under so-called *Werkvertraege*, German firms are permitted to make contracts with Eastern European firms to supply both workers and other elements necessary to complete particular (parts of) projects. The German association president's firm - despite the president's public statements against foreign construction workers - was accused of violating Germany's employer sanctions law. He countered that all German firms competing for public construction contracts must employ up to 50 per cent foreign workers.

The experience of construction in Berlin unleashed a debate over how to deal with the combination of high unemployment among German workers and employer complaints of labour shortages. Employers and many academics tend to put the blame on rigidities and excesses in the German labour market. They argue that unemployment insurance benefits and assistance can continue indefinitely at relatively high levels, so unemployed German and legal foreign workers can avoid "hard and dirty jobs" that other foreigners are willing to take.<sup>43</sup> If minimum wages were lowered and benefits reduced, this argument runs, German and resident foreign workers would be more likely to apply for jobs, and German employers would be more likely to hire them. On the other hand, unions attribute the combination of high unemployment among German and resident foreigners and labour shortages to lapses in labour law enforcement: more inspectors are needed as well as higher penalties and new laws that would make the general contractor liable for all labour law and immigration violations found on a work site.<sup>44</sup>

The construction debate led to a German effort to persuade the EU to allow member states to require intra-EU migrants to be paid the local minimum wage to minimize wage or social dumping. About five per cent of the EU's 370 million residents live outside their country of citizenship, but less than two per cent of the EU's labour force, about 2.5 million persons, are intra-EU migrants. The EU has been trying to encourage intra-EU mobility by removing "artificial" barriers to worker movement and making it easier to accumulate pension and other benefits despite working in several EU nations.

Germany's case for a regulation of transferring workers within the EU was based on conditions in its construction industry in 1994, when there were 1.4 million employees in the German construction industry, plus 800,000 in associated industries. There were about 137,000 unemployed German construction workers, each of whom receiving an average DM40,000 (US \$28,000) per year in unemployment insurance benefits, and 150,000 foreign construction workers in Germany, including 110,000 EU nationals from the UK, Ireland, and Portugal, and 40,000 East Europeans, mostly from Poland and the Czech Republic. Many of these foreign workers were employees of firms based outside Germany, and they are posted or sent temporarily to Germany, so that they were considered employees of a British, Dutch, or Portuguese firm "providing services" in Germany.

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<sup>43</sup> In Germany, UI benefits are 60 to 63 per cent of previous earnings for about two years, and then about 50 per cent of earnings indefinitely, while in the US, UI benefits are typically 50 per cent of previous earnings for a maximum of six months. Thus, a \$1200 monthly UI check is equivalent to \$8.50 per hour for a 35-hour week, a fairly high wage for e.g., a 45 year old unemployed construction worker. In addition, construction workers receive a Christmas bonus ("13th month's salary") that was 100 per cent, and is now 77 per cent of their usually monthly wage.

<sup>44</sup> In addition, subcontractors could be required to post a bond to cover the cost of unpaid wages and fines, which would permit the market to help determine their reliability, since the more reliable contractors could presumably get bonds more cheaply.

Germany pointed out that a construction firm in Portugal, for example, could agree to provide workers to a German firm for DM 20 to 30 (US \$14 to \$20) per hour, which was near the prevailing wage in German construction. The Portuguese workers actually sent to Germany, however, were paid as little as DM 6 to 8 (US\$4.25 to \$5.60) per hour, which was better than they could earn at home. Germany argued that assigning British, Irish, or Portuguese workers to Germany in such a fashion produced unfair competition in the labour market, since no German firm could pay a German worker such a low wage (in 1995 the total hourly cost of construction labour was estimated to be \$35 in Germany, \$31 in the US, and \$14 and \$12 in the UK and Spain). Furthermore, the non-Germans were willing to work 70 or more hours a week, since they were in Germany to maximize their earnings.

On March 1, 1996, Germany adopted *Entsendereglung* or *Entsenderichtlinie*, rules for sending EU workers into Germany. EU construction workers with freedom of movement rights had to be paid at least the minimum wage negotiated between German construction unions and construction companies, about 20DM (US\$14) per hour, plus offer them the same vacation pay available to unionized German workers (payroll taxes add about 70 per cent or DM 14 (US\$ 10) to the hourly wage for German workers). Employers violating this law could be fined up to DM50,000 (US \$35,000).

On December 16, 1996 the EU adopted as a directive one version of the German proposal to deal with the posting of workers from one EU country to another: EU workers posted to another EU country must normally be paid at least the same wages as local workers from the first day of their employment abroad; countries may permit them to earn lower than prevailing wages for their first month abroad. EU member countries were given two years to approve national implementing legislation.

It is not clear how well the regulations on posting abroad are working. A June 1997 sweep of 55 construction sites in Germany and 19 foreign offices of construction firms, including several in Portugal, found 47 firms that employed 1,500 workers illegally, paying them below minimum wage, or not paying social security taxes. Under the *Entsendegesetz*, German employers of EU workers posted to Germany must pay them at least the minimum wage of DM17 per hour in the former West Germany and register them with the Department of Labor. German construction union *IG Bau* alleged that many Portuguese workers were not paid the minimum wage, and some of those who were paid DM17 per hour had to rebate part of their pay as a fee to get the job in Germany, or agree to pay extra high prices for food and lodging, or work more hours than they are paid for, all violations that are difficult to detect.

Germany found it harder to deal with self-employed EU workers. For example, British or Irish workers could enter Germany as tourists and go to work, claiming to be self-employed carpenters or masons. EU citizens have the right to provide services in any country within the EU. A British contractor was fined in 1997 for not registering with the German Department of Labor as a foreign employer and also for not paying the 14 per cent payroll tax that construction employers in Germany must pay into the construction workers' holiday fund. The builder maintained that the British workers affiliated with him in Germany were self-employed, so that he was not an employer in Germany and did not owe social security and other taxes on their earnings.

German labour inspectors countered that 5 to 10 EU workers on a construction site were rarely all "independent contractors" and thus are not exempt from payroll taxes and minimum wages. One said, "If we see five men building one wall, we do not accept that each one of them is self-employed." Labour inspectors assert that the EU workers are often (illegally) supervised on German work sites, and they cannot be considered truly independent unless they are enrolled in local German associations of independent contractor craftsmen.

#### 4.2.2. Five foreign worker programmes in the 1990s

After EC-92 measures stimulated economic and job growth in the former West Germany, and Eastern European nations eased their emigration restrictions, Poles and other Eastern Europeans began arriving in Germany during their summer vacations and taking odd jobs in agriculture and construction. As word spread that Poles were able to earn in one month a year's wages at home, hundreds of thousands arrived as tourists but sought jobs, undermining employer sanctions laws. For foreign policy reasons, Germany was reluctant to "recreate the Berlin Wall" on its eastern borders, but was also unwilling to tolerate the widespread employment of unauthorized foreigners.

The compromise was to develop five foreign worker programmes that permitted about 350,000 mostly Eastern Europeans to work legally in Germany in the mid-1990s (Hönekopp, 1997). Most were employed less than a full year, so the 1990s foreign worker programmes added the equivalent of about 150,000 full-time equivalent workers to the German workforce in 1993-94, before being reduced by administrative measures aimed at halting abuses. Unlike 1960s guest worker programmes, the 1990s foreign worker programmes have a different purpose—to make inevitable migration legal and to cope with micro labour shortages in agriculture, hotels, and construction, not macro or economy-wide labour shortages. These 1990s programmes included a variety of rules and incentives that encourage foreign workers to return to their countries of origin.

The most important programme involves **project-tied** workers. Under this programme, German firms sub-contract with foreign firms to, for example, erect the structure of a new office building under which the latter supplies the expertise and workers to complete this phase of the project. The employer-to-employer subcontracting agreement is submitted to the German Employment Service for approval, which checks to ensure that the foreigners will be paid prevailing wages. The foreigners are then admitted to Germany for a maximum two years, and are considered posted employees of foreign firms while in Germany, much as an American specialist sent to Germany to repair a computer would be an employee of the US firm while abroad. About half of the subcontracted migrant workers in Germany are from Poland.

There are no firm-specific quotas on the number of subcontracted foreign workers who can be employed, but there are industry-by-industry ceilings and a countrywide quota. There were an average 46,000 project-tied foreign workers in Germany in 1996, half Polish, down from a peak 95,000 in 1992. The number was reduced because of scandals that involved German contractors using project-tied agreements as a backdoor guest worker programme.

Most newly-arrived foreign workers are employed seasonally in Germany. About 150,000 **seasonal** foreign workers were in Germany in 1994, but most stayed only a few months, so that seasonal foreign workers contributed the equivalent of 40,000 full-time workers to the German labour force. The number rose to 200,000 in 1996-97, and was reduced to 170,000 in 1998, when Germany attempted to require some unemployed Germans and resident foreigners each receiving unemployment insurance benefits of about \$250 a week to accept harvesting jobs that pay about \$300 a week.

About 90 per cent of seasonal foreign workers are requested by name by German employers. Seasonal foreign workers can remain up to 90 days in Germany, and most are employed in agriculture, restaurants, or construction. Seasonal foreign workers receive bilingual contracts that describe the job and work place, specify the pay and the start and stop dates, and spell out provisions for employer-provided housing, meals, and travel arrangements. The German Employment Service reviews the proposed contracts and tests the local labour market before issuing seasonal work permits to

foreigners.<sup>45</sup> Both German employers and seasonal foreign workers make required payroll tax contributions that add about 35 per cent to the hourly wage in agriculture of 6 to 10 DM. However, if seasonal foreign workers are employed less than 2 months, the workers and their employers do not have to pay social security taxes on their wages.

The third programme is for border **commuters** from the Czech Republic and Poland. If local workers are not available in Germany within 50 km of these eastern borders, employers can request permission from the German Employment Service to employ commuter workers at prevailing wages. Daily cross-border commuting is encouraged, but frontier workers are permitted to remain overnight in Germany for up to two days each week.

The fourth programme permits about 6,000 young East Europeans to work and learn in Germany for up to 18 months. These new *Gastarbeiter* or **work-and-learn** programmes are reciprocal, i.e., 18 to 40 year old Eastern European trainees can live and work in Germany, and young Germans likewise have the opportunity to live and train in Poland, Russia, Romania, etc. German employers submit work-and-learn offers to their local ES offices which, without testing the German labour market to ensure that young Germans or settled foreigners are available, transmits the employer's job offer to an ES office in Eastern Europe. There are quotas on the number of persons from each of the Eastern European countries who can be in work-and-learn programmes in Germany.

The fifth programme permits about 1,000 **nurses** from the former Yugoslavia to work in Germany. The 1990s foreign worker programmes mostly brought workers from Eastern Europe into Germany, and they were accompanied by significantly more border enforcement. Germany in 1998 had 6,200 border police on its 1,000 km eastern border with Poland and the Czech Republic (about the same number as the US has on its 2,000 mile border with Mexico). In 1997, they apprehended about 20,000 foreigners - most were from Romania, Albania and Bulgaria - attempting to enter Germany, as well as 500 border crossing guides. German border police can stop cars and trucks within 30 km of the border and search them for unauthorized foreigners.

### 4.3. Discrimination

Germany had about 2.8 million employed foreign workers in 1998. Foreigners were about 8 per cent of German employees, and included 2 million wage and salary workers and 130,000 self-employed foreigners. Foreign workers constitute far more than their average eight per cent of the workforce in a few sectors: construction, janitorial services, and hotels and restaurants. For example, in 1997, about 29 per cent of the wage and salary workers employed in hotels and restaurants were foreigners, as were 24 per cent of those employed in janitorial services and 22 per cent of those employed in foundries.

Most of the foreigners in Germany have been there for a long time; consequently 90 per cent of the foreigners in Germany have the same labour market rights as Germans and EU nationals.<sup>46</sup> However, the 15 per cent unemployment rate of non-EU foreign residents in 1998 was about twice the 7.7 per cent rate of Germans, reflecting the instability of many of the industries in which foreigners are concentrated as well as discrimination.

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<sup>45</sup> About 90 per cent of seasonal foreign workers are requested by name by German employers.

<sup>46</sup> The effect of past foreign worker recruitment is evident at Ford-Germany, which employs 40,000 people of 48 different nationalities. Over 50 per cent of Ford Germany's employees are foreigners.

Germany has a complex system for regulating the access of newcomers to the labour market. Some employers reportedly avoid hiring foreigners because of their exposure to potentially costly sanctions for hiring unauthorized workers. Ethnic Germans coming from the ex-USSR and Eastern Europe are German citizens upon arrival in Germany. However, many do not speak German, so they may be treated as "foreigners" by employers when they seek work, even though they are German citizens with full labour market rights. Newcomers arriving to join settled immigrants, as well as asylum seekers, have limited access to the labour market. Asylum seekers have since May 1997 been unable to get work permits, and family members of settled immigrants arriving for family unification must generally wait four years after arrival for work permits.

It is hard to determine the extent of discrimination against foreigners in the German labour market, and how much of any such discrimination is due to employer sanctions. As in other industrial countries, there are two contradictory perspectives on employer attitudes toward foreigners. On the one hand, employers prefer foreigners because, given their home country frame of reference, they are more likely to be satisfied with prevailing wages and working conditions, which tend to be below average in the sectors where they are concentrated. On the other hand employers who want to avoid sanctions for hiring unauthorized workers simply reject all foreign-type applicants.<sup>47</sup>

#### **4.4. Growth of illegal employment**

Estimates of illegal alien employment in Germany range from 300,000 to one million, concentrated mainly in agriculture, hotels and restaurants and construction. The estimated number of unauthorized workers has been rising in Germany despite (1) an unemployment rate of over 20 per cent for legal foreign workers and (2) the availability of legal channels to hire migrant workers.<sup>48</sup>

Most experts point to several trends to explain apparently rising illegal alien employment in Germany. First is the growing dependence of some German sectors on recently arrived foreign workers so that, even if regulations on hiring foreigners in agriculture or construction are tightened, employers and workers may risk violating sanctions laws, and appeal penalties if they are imposed. Second seems to be a declining perception that unauthorized employment is a serious crime, as indicated by the frustration of labour inspectors with courts that reduce or fail to fine violators, vitiating the demonstration effect of inspections.

The campaign against unauthorized foreign workers in 1999 was obscured in part by the debate over so-called DM630 jobs. Beginning April 1, 1999, workers employed in "second" jobs that pay less than DM630 a month must pay 17 per cent for social security and 22 per cent for income tax, reducing their take home pay to DM380 a month. Workers who have only one DM630 job take home the entire

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<sup>47</sup>In 1998 the EU created an office in Vienna to monitor and work against racism and discrimination against minorities and immigrants. It has not yet developed a statistical system for collecting data on discrimination against foreigners.

<sup>48</sup> German enforcement of employer sanctions depends largely on complaints from employers, unions, and workers and on a computer comparison of two employee lists. The employers of "dependent" employees (those who earn less than 4500 DM monthly) must register them with one of the various social insurance programmes, and this list is then compared with the list of work permits issued in order to spot persons on one list but not the other. Fines are stiffer for evading social insurance taxes which add 20 to 40 per cent to wages, and this compulsion to register for social insurance is believed to minimize the employment of aliens who do not have work permits. However, if the employer does not register employees for social insurance, this computer matching process fails to detect illegal aliens.



amount.<sup>49</sup> Some 1.6 million Germans holding an estimated 5.6 million jobs were affected by the new rules, and employers of part-time second job holders like e.g. soccer clubs, bars, and other complained bitterly when many of these workers quit because the reduced take-home pay did not make it worthwhile to take on the added work. As a result of the new payroll taxes, the number of DM630 jobs is expected to shrink by 30 to 50 per cent.

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<sup>49</sup> Before the change, employers paid a flat 22 per cent tax on the DM630 wages, and workers took home the entire DM630 a month, even if it was their second or third job.

## 5. UNITED STATES

### 5.1. Long road to sanctions

The US began debating the need for employer sanctions to deter the recruitment and employment of unauthorized workers in the early 1950s, during the so-called Bracero era, when Mexican workers were recruited under a series of bilateral agreements to work seasonally in US agriculture. Illegal immigration occurred alongside legal guest worker movements: between 1942 and 1964, there were 4.6 million Bracero admissions and 4.9 million Mexicans apprehended in the US.<sup>50</sup>

In an effort to encourage Mexican workers to enter the US legally and to discourage US employers from hiring illegal “wetbacks”, the Mexican Foreign Minister on August 8, 1946 suggested that, if the US were to impose “sanctions on American employers who employ illegal entrants, the result would promptly come about that Mexican workers would not in the future” migrate illegally (Congressional Research Service, 1980, 26). The President's Commission on Migratory Labour in 1951 echoed the Mexican proposal, recommending that federal “legislation be enacted making it unlawful to employ aliens illegally in the United States” (President's Commission, 1951, 178). US President Truman also believed that the expansion of the Bracero programme in the early 1950s might lead to increased illegal immigration. In signing the 1951 Bracero agreement, PL-78, Truman sent a note to Mexican President Aleman suggesting that the first programme be only six months long to keep up the pressure on Congress to approve an employer sanctions law.

However, during the Congressional debate over what became the Immigration and Nationality Act of 1952, an amendment in the Senate to penalize US employers who had “reasonable grounds to believe a worker was not legally in the US” was defeated on a 69 to 12 vote. Instead of sanctions, the so-called Texas proviso was included in the INA - the willful importation, transportation, or harboring of illegal aliens became a felony punishable by fines of up to \$2,000 or five years imprisonment, but “employment of an illegal alien” was specifically exempted from the definition of harboring. This remained US law until 1986, despite Congressional approval twice by the House of Representatives in the 1970s of a sanctions law. Agricultural employers blocked the approval of sanctions in the Senate.

Every study commission in the 1970s and 1980s, including the Select Commission on Immigration and Refugee Policy, recommended that employer sanctions be the cornerstone of an effective US deterrent to illegal immigration and employment. SCIRP's core recommendation in 1981 was a “Grand Bargain:” penalties on employers of illegal aliens to deter future entries, and the legalization of foreigners illegally present in the US to avoid mass deportations and to bring resident illegals into the mainstream of American life.

Sanctions were opposed by employers who did not want to become “deputy INS agents” and by many immigrant advocates who feared that the threat of fines would deter employers from hiring minority workers who might appear to be unauthorized. During the 1984 presidential election, for example, Democrats Jesse Jackson and Walter Mondale campaigned against employer sanctions on the ground that they would increase labour market discrimination in US labour markets.

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<sup>50</sup> Both Bracero admissions and apprehensions measure events, not unique individuals. Some estimate that one to two million Mexicans were admitted as Braceros, i.e., some returned year after year.

## 5.2. IRCA's sanctions provisions

The Immigration Reform and Control Act or IRCA was signed into law in November 1986. IRCA created three new offenses that US employers may commit:

- hiring new employees without verifying that person's legal right to work in the United States, i.e., without completing an Employment Eligibility Verification Form or I-9 Form on each newly hired worker;
- knowingly hiring or continuing to employ unauthorized alien workers;
- discriminating against workers by demanding a particular form of documentation, or documentation only from some workers.

Employers who knowingly hire illegal alien workers are subject to civil money penalties of \$250 to \$2,000 per worker for a first offense, \$2,000 to \$5,000 per alien for a second offense, and \$3,000 to \$10,000 per alien for a third offense. Failure to complete I-9 employment verification forms properly carries a fine of \$100 to \$1,000 per worker. Employers charged with knowingly hiring illegal aliens or failing to verify the work authorization of new hires are assessed proposed fines by INS, and then the accused employer is entitled to a hearing before an administrative law judge. Employers can appeal these decisions of the administrative law judge to the courts.<sup>51</sup>

The INS is solely responsible for the enforcement of employer sanctions; the US Department of Labor, which enforces federal labour laws, did not want responsibility for enforcing sanctions. The INS enforced the sanctions in phases, making all US employers liable for fines on December 1, 1988, two years after IRCA was signed. First, there was a six month education period, during which the INS visited employers (and annual meetings of employers) and explained the sanctions law, including its I-9 and anti-discrimination provisions. This was followed by a 12-month period during which first offenders received only a citation or warning, i.e. INS began issuing fines for first offenses in June 1988. Farm employers engaged in seasonal agricultural services were not subject to sanctions, and thus did not have to complete I-9 employment verification forms, until December 1, 1988.

## 5.3. 1988-98: Compliance

There were three major efforts in the late 1980s to measure employer compliance with employer sanctions laws. One was by the Immigration and Naturalization Service, another by the US General Accounting Office, and a third by Department of Labor. Each used a different definition of compliance with IRCA's sanctions provisions, and each found different levels of employer compliance. The INS found 70 per cent employer compliance, US General Accounting Office 50 per cent compliance, and Department of Labor 40 per cent compliance.

- The INS conducted 22,000 INS inspections in the late 1980s, and found 70 to 80 per cent of employers in compliance. The INS defined non-compliance as issuing a Notice of Intent to Fine (NIF), Form I-763 to the employer for violations of I-9 forms or having unauthorized workers on the payroll **after** the INS gave the employer a chance to correct the mistake or fire the worker. INS

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<sup>51</sup> Employers who engage in a pattern or practice of hiring illegal aliens are subject to criminal penalties of up to \$3,000 per alien or six month prison terms. It is also unlawful for an employer to require newly hired workers to post a bond with the employer under which the employer is compensated if the worker turns out to be an illegal alien.

can also issue a Warning Notice, Form I-846. The INS usually gives three days notice before inspecting workplaces, and obtains permission from workers before interviewing them.<sup>52</sup>

- The US General Accounting Office (GAO) surveyed 6,000 of the nation's six million non-farm employers, and defined compliance as having as many I-9 forms on file as workers hired since June 1987. GAO found that 50 per cent of the employers in its sample were in compliance.
- Department of Labor's Employment Standards Administration (ESA), whose 1,600 agents visited 60,000 US employers in 1988-89, found 40 per cent of employers in compliance with sanctions laws. Non-compliance was defined as a paperwork violation forwarded to INS for investigation. Department of Labor noted that its inspectors target employers most likely to violate labour laws. Department of Labor inspectors do not warn employers that they are about to make an inspection, nor do they ask employer permission to speak to workers.

There were three major compliance issues in the late 1980s and early 1990s: INS's enforcement strategy, document fraud, and interagency cooperation.

***Enforcement of sanctions by INS.*** Most analyses stressed that the INS faced a new challenge in sanctions enforcement: instead of dealing primarily with individuals who were often not US citizens and who tended not to protest poor service and inconsistent advice, the INS in sanctions enforcement had to deal with US employers who had in-house attorneys and often close contact with political leaders. Thus, if the INS proposed to fine a powerful employer in the late 1980s and early 1990s, it often received a letter from a Congressional representative arguing that the INS should devote its limited enforcement resources to "serious violators" or criminal aliens, not the business being fined.

The INS, very aware of the potential of mistaken or aggressive enforcement to turn business against the new law, and with no in-house expertise in the enforcement of labour laws, proceeded cautiously. The INS developed its first sanctions cases thoroughly and with continuous attorney supervision (Fix and Hill, 1990). As a result, there were only a handful of sanctions cases brought against employers.

The INS initially had a two-track random and targeted enforcement strategy: some of the six million US employers were targeted randomly for enforcement, and others in "high-violator" industries, such as agriculture, construction, janitorial and similar services, and garments and similar manufacturing, were targeted more intensely. However, this strategy suffered from too few resources—about two per cent of the INS's budget was devoted to sanctions enforcement, so that few employers in targeted industries were inspected while resources were spent to audit the I-9 forms of public agencies and other employers for compliance. The INS provides most employers with three-day advance notice that it is about to audit their I-9 forms.

The INS was unable to send a signal in the late 1980s that compliance with employer sanctions was important, and then the number of work place inspections dropped sharply in the 1990s. In FY89, there were about 15,000 investigations of employers for immigration violations; in FY95 there were 6,000. Fines dropped as well. The INS assessed employers \$4 million in fines in 1989, and \$4.1 million in 1995. There were many other indicators that (1) sanctions enforcement was a relatively low priority for the INS and (2) that many US employers did not take compliance with sanctions seriously. For example:

- Between April 1988 and August 1995 the INS proposed \$96 million in fines on employers, but settled for \$38 million, or 40 per cent. Fewer than half of the 12,700 US employers that INS

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<sup>52</sup> The INS reported that in FY97 that 3 per cent of the employers it inspected were employing illegal alien workers.

inspectors recommended be fined between 1989 and 1994 for employing illegal aliens or not completing I-9 employee verification forms were in fact fined. The average INS fine levied on employers between 1989 and 1994 was \$1,612, which one employer called publicly "the cost of doing business."

- There were major discrepancies between cities in sanctions enforcement that reflected the different priorities of the 33 INS district directors. Between 1989 and 1994, the INS collected more fines from employers in Laredo, Texas than in Los Angeles, and more in Grand Island, Nebraska than in Fresno, California.
- In 1995, when there were 5,000 Border Patrol agents, only 300 of the INS's 1,800 investigators enforced the employer sanctions provisions of IRCA. There was a backlog of 36,000 leads of employers possibly employing illegal aliens in September 1994. President Clinton proposed a doubling of the number of INS inspectors in the FY96 budget, but Congress did not agree—the INS in 1999 had about 900 inspectors.
- The INS reported that 8,700 unauthorized workers were removed from 900 US employers in 1996.
- The first case in which the INS charged an employer with repeatedly accepting false documents from illegal alien workers was brought in August 1994, when the manager of a Los Angeles medical clinic was indicted for knowingly accepting false Social Security and Green Cards from illegal workers hired to work in the clinic.
- In August 1995, 70 Thai illegal alien women were discovered by labour inspectors living and working in a fenced seven-unit apartment in El Monte they could not leave. The INS investigated the case after receiving a tip in 1992, but the local federal attorney refused to ask a court to issue a search warrant, so the INS did not pursue its investigation—state labour inspectors finally found the Thai garment workers.
- In October 1995, the INS launched raids on some of the estimated 2,500 of the 6,000 sewing shops in New York City believed to be operating in violation of labour and immigration laws - here are 22,000 garment contractors in the US. The INS in New York City apprehended 1,228 unauthorized workers - 80 per cent were Mexicans or Salvadorans - but, because of the costs of detaining and deporting them, most were released immediately, with deportation hearings scheduled for two to six months in the future. The INS apprehended 12,000 illegal alien workers in US workplaces in FY95.
- In Fall 1996, the INS proposed to fine a home owner \$450 for failing to complete an I-9 employee verification form for a worker he hired to do heavy yard work. According to the INS, the homeowner drove to a "knownday-labour pickup point" in San Rafael, California, picked up two men, and drove them to his home. INS agents observing the day labour market followed the homeowner up a dirt road to his property. When the INS agents appeared, one worker fled and the other was apprehended. The home owner argued that he should not be fined because work had not yet begun, so the workers had not yet been "hired".

**Document fraud.** The premise of IRCA was that most of the 6.5 million employers and 140 million persons working for wages during a typical year are US citizens and legal immigrants, and thus the employment verification process should not (1) require a new national identification card and (2) not be burdensome to employers or workers. IRCA thus permitted newly hired employees to present any one of 29 different documents to establish identity and authorization to work in the US, everything from driver's licenses and social security cards to tribal Indian and military identification cards. Furthermore, to avoid charges of discrimination, employees usually do not demand any particular form

of identification from a newly hired worker, nor declare that the identification looked forged and would not be accepted. To protect themselves, most employers copied the documents presented by the workers and attached them to the I-9 forms that they kept available for INS inspection.

Document fraud is the "counterfeiting, sale, and/or use of identity documents or breeder documents such as birth certificates and Social Security cards, alien registration documents and stamps, passports and visas" to enter and work in the US. It is widespread, and high-quality forged work authorization and identification documents are for sale at most weekend markets. A driver's license and green card costs \$30 to \$100, depending on quality.

There are two major proposals to decrease document fraud: (1) issue a new work authorization document or (2) make the most commonly presented work authorization documents, social security cards, driver's licenses, and green cards (INS 551 forms) more counterfeit resistant. The Social Security Administration has consistently opposed efforts to make the Social Security card more counterfeit resistant, emphasizing that the purpose of the Social Security number was and is to permit employers to report accurately an individual's earnings for the purpose of qualifying for a federal payment in retirement, not to establish that the person presenting a Social Security card was actually the person whose name and Social Security number appear on the card.

Nonetheless, procedures for making the Social Security card more counterfeit resistant have been implemented. Beginning on April 15, 1974, non-US citizens were required to provide documentary evidence of age, identity, and status, and Social Security number records were changed to reflect the issuance of a Social Security number to a non US citizen. Beginning in 1978, all applicants for Social Security numbers had to provide evidence of their age, identity and status. Beginning in May 1982, "NOT VALID FOR EMPLOYMENT" was printed on the Social Security cards of non-citizens not authorized to work. Beginning September 14, 1992, some Social Security cards were issued with the legend "VALID FOR WORK ONLY WITH INS AUTHORIZATION."

In an August 1999 report on reducing document fraud, the GAO concluded that issuing counterfeit-resistant Social Security cards for 277 million US residents with active Social Security numbers could cost \$4 billion, and \$9 billion if new Social Security cards with computer chips capable of holding personal identification data were issued.<sup>53</sup> The GAO concluded that from October 1996 to May 1998, at least 78,000 workers used fraudulent documents to obtain US employment - 60 per cent of fraudulent immigration documents and 36 per cent were phony Social Security cards.

The INS is in the midst of requiring that the 12 to 14 million legal immigrants in the US who are not US citizens replace their green cards with new fraud-resistant cards that contain holograms and digital photos. The INS issued the first new cards in April 1998. However, in August 1999, the General Accounting Office said that counterfeit high-tech green cards had begun to appear in Los Angeles.

***Interagency cooperation.*** Between June 1992 and November 1998, the Department of Labor's Employment Standards Administration had a Memorandum of Understanding with the INS that required its labour inspectors to contact INS when their investigations to detect labour law violations turned up information about suspected illegal migrants. However, the Department of Labor provided few tips to the INS because it feared that workers would be afraid to cooperate in wage and other labour law investigations. About 70 per cent of the Employment Standards Administration investigations are launched after it receives worker complaints. The INS requires three days' notice of I-9 inspections, while inspectors rarely spend three days on a wage and hour audit. Of the 367,000

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<sup>53</sup> General Accounting Office. 1999. *Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System*. T-GGD/HEHS-99-175. July 22. <http://www.gao.gov/new.items/g399175t.pdf>

employer Form I-9 reviews that the Labour Department conducted between FY 1988 and 1998, only 236 employers were suspected of employing unauthorized aliens and were referred to INS.

The Memorandum of Understanding did not increase INS sanctions' effectiveness, and many state labour agencies became reluctant to cooperate with ESA. California's Department of Labor Standards Enforcement said that "We don't cooperate with the INS because it would make it difficult to enforce the laws and get workers to testify against employers." For example, ESA inspectors in the Targeted Industries Partnership Programme or TIPP programme had to decide between cooperation with a state labour agency or a sister federal agency, the INS. TIPP is a federal-state effort in California aimed at better enforcement of labour laws in agriculture and the garment industry. It aims to enlist "the resources of employer groups... toward educating their constituents and encouraging voluntary compliance with labour and health and safety laws rather than resisting TIPP and its compliance efforts...employer groups have come to recognize the futility of lobbying to protect the recidivist employer." However, it has been hard to sustain high levels of enforcement: TIPP issued 282 civil citations and 144 criminal citations issued in 1993, and 170 civil and 47 criminal citations issued in 1998.

The TIPP operations were complicated by the fact that TIPP was a federal-state effort, and that state inspectors did not want to cooperate with the INS while federal inspectors were required to notify the INS if they detected apparently unauthorized workers. In November 1998, the Employment Standards Administration signed a new Memorandum of Understanding with the INS that says its investigators will not inform INS when they respond to tips of violations of labour laws and find suspected unauthorized workers which happens in 70 per cent of their investigations. They will instead inform INS if they discover suspected unauthorized workers in the 30 per cent of investigations based on random audits. The change in the Memorandum of Understanding is intended to make unauthorized workers more willing to complain about wage and safety violations.

The US Commission on Immigration Reform in 1997 advocated that Labour take a more active role in employer sanctions enforcement, arguing that verifying that only authorized workers are hired should be seen as integral to Department of Labor's mission of protecting US workers. The CIR recommended that Labour be responsible for verifying employer compliance with the employment verification requirements.

#### **5.4. Discrimination**

Reacting to fears that, in order to avoid sanctions, some employers would simply refuse to hire "foreign-looking" workers, IRCA prohibited employers of four or more workers from discriminating against persons when hiring or discharging them because of their national origin or citizenship status. Every newly hired worker and his or her employer must complete an Employment Eligibility Verification, or I-9, form, showing documents to the employer that establish the worker's right to be employed in the US. To prevent discrimination against minority workers, employers are not permitted to ask for more documents from some newly hired workers than others, for example, green cards from those with accents and driver's licenses for others, or to demand particular documents; or to ask probing questions, such as "where were you born?"

An Office of the Special Counsel for Immigration Related Employment Practices (OSC) in the Department of Justice was created to enforce laws that prohibit discrimination at the point when employers hire workers. The Special Counsel reviews complaints that employers have committed unfair immigration-related employment practices, investigates, and if he or she finds evidence to support the complaint, charge the offending employer with discrimination and order him:

- to cease and desist from such discrimination,
- to hire persons with backpay against whom the employer discriminated and to pay a civil money penalty of \$1,000 per person discriminated against and
- to make a record of all applicants denied jobs, and make this available to the Special Counsel.<sup>54</sup>

It is not clear if, and how much, labour market discrimination has increased because of employer sanctions. A 1990 GAO survey of US employers concluded that 20 per cent discriminated on the basis of citizenship or foreign characteristics, which the GAO termed “widespread discrimination.” (GAO, 1990).<sup>55</sup> Between 1987 and 1997, the OSC received more than 6,000 complaints of immigration-related discrimination and recovered nearly \$2 million in back pay and more than \$1.2 million in civil penalties from employers. However, after a peak 761 complaints in FY92, the number of complaints of immigration-related discrimination fell to 325 in FY98, and to less than 300 in FY99. In August 1999, the OSC won its largest-ever judgement- \$367,000 from Townsend Culinary Inc., a Maryland food-processing plant that was found to have imposed tougher hiring standards on 660 non-citizen applicants than on US citizens applying for jobs.

One problem with the enforcement of anti-discrimination laws is resources. The OSC is a relatively small Washington-based organization, and workers who may have suffered discrimination because of employer sanctions may not easily find the OSC web site or toll-free telephone number to register a complaint. Most states have anti-discrimination offices that are accessible to migrant workers, and many have agreed to forward complaints they receive about sanctions-related discrimination—over which state agencies have no jurisdiction - to the OSC. However, most of the complaints received by the OSC come from workers who received advice from unions, migrant advocacy and other NGOs, not from state anti-discrimination agencies.

Some employers have complained that sanctions combined with these anti-discrimination provisions put them in a Catch-22 situation. If they aggressively check documents, they can be accused of discrimination; if they did not, they can be accused of knowingly hiring illegal aliens. In response to such employer complaints, the anti-discrimination provisions of US immigration law were amended in 1996 to require the Department of Justice to prove that an employer intended to discriminate before the OSC could fine an employer accused of discrimination.<sup>56</sup>

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<sup>54</sup> The GAO was charged with surveying employers to determine whether they had begun to engage in discrimination against “foreign-looking” workers for fear of sanctions enforcement. In March 1990, the GAO reported that sanctions had caused “widespread discrimination” by employers against minority workers who are legally authorized to work in the US. This GAO finding led all members of the US civil rights coalition except the AFL-CIO to urge the repeal of employer sanctions. There was a failed effort in Congress in 1990 to repeal sanctions.

<sup>55</sup> Some employers did not accept valid work authorization documents, and some employers said they only asked alien employees, rather than all employees, to show documents. GAO recommended fewer work authorization documents.

<sup>56</sup> A Los Angeles-area garment firm, Aztec Productions, that demanded an INS work authorization document from a Latino US citizen, paid \$27,000 to settle a charge that the firm unlawfully discriminated in hiring, including \$5,000 in back pay. The man presented a driver's license and Social Security card, and was told to return with an INS work authorization document. When he returned with proof of US citizenship, he was told that all vacant jobs had been filled. “INS: Raids, Do Not Hire,” 1999. Rural Migration News, April 1999.



### 5.5. Methods to verify eligibility

The Commission on Immigration Reform in 1995 called mandatory employer participation in a national verification system "the linchpin" of efforts to reduce illegal immigration. Congress rejected the CIR's recommendation, but included three pilot programmes in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, signed on September 30, 1996. The INS was required by October 1997 to begin to test three pilot employee eligibility verification systems, and to encourage employers in sectors with a history of employing illegal immigrants to participate. Even though employer participation is voluntary, most employers encouraged by the INS to participate do so, since participation usually means an end to disruptive work place raids.

The three pilot verification systems are the:

- ***Basic Employment Verification Pilot (EVP)***, renamed the Basic Employment Confirmation Pilot in 1998, which allows employers to check first electronically the Social Security and then INS A-numbers of newly hired workers against Social Security and INS databases, using a computer and modem.<sup>57</sup> As of May 1999, some 1,826 companies, some with multiple sites, were enrolled in Basic Pilot in the six states where it has been established - California, Florida, Illinois, New York, Texas and Nebraska.
- ***Citizen Attestation Pilot***, which verifies employment eligibility only for newly hired alien employees in states which have driver's licenses or ID cards that include a photograph- Arizona, Massachusetts Maryland, Michigan, and Virginia. Employers who elect to participate must enter into a Memorandum of Understanding with the INS, and then the employer may submit the A-numbers of newly hired non-US citizens to the INS to verify their eligibility to work in the US.
- ***Machine-Readable Document Pilot***, which has been limited to Iowa because only Iowa puts machine-readable Social Security numbers on driver licenses and identification cards.

IIRIRA also ordered the INS to examine ways to reduce the number of documents—29 in 1996- that newly hired workers could present to confirm their identity and work eligibility. In February 1998, the INS proposed a reduction from 27 to 14 in the number of acceptable identity and work authorization documents. The INS received so many comments that this regulation has not yet gone into effect; as of Spring 1999, newly hired workers could present any of 8 documents that establish both identity and work authorization (e.g. US passport), 12 that establish identity (e.g. driver's license), and 7 that establish authorization to work (e.g. Social Security card).<sup>58</sup>

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<sup>57</sup> The information on non-US citizens is checked against the INS's Alien Status Verification Index, a data base with 50 million immigration records maintained for the INS by Lockheed Martin Information Systems. Within seconds, the employer gets one of two responses from the INS - "employment authorized" or "institute secondary verification," which means that the employer sends the INS additional information from the I-9 form. The INS responds to the secondary verification information within three days. If the employee's right to work cannot be verified, the employee has 30 days to contact the INS and verify his right to work. After 30 days, if the employee has not received work authorization, he is not eligible to work in the US.

Employers participating in the pilot programme cannot be penalized for hiring unauthorized workers if the confirmation system approved the hires.

<sup>58</sup> In February 1997, INS began issuing a new Employment Authorization Document containing visible security features, such as a hologram. In April 1998, INS began issuing a new version of the green card for lawful permanent resident aliens with a hologram, digital photograph and fingerprint images. All existing green cards are to be replaced with the new green card in a process that could take until 2010.

No evaluations of the pilot employer verification systems have been done, but most journalistic evaluations have been negative.<sup>59</sup> The largest single employer participating in the Basic Pilot or EVP is the state of Florida, with 95,000 employees. A disproportionate number of rural employers, led by meat and poultry processing firms, have signed up for the Basic Pilot at the urging of the INS. The INS says that "A lot of our recruiting effort [for Basic Pilot] was directed to agriculture... because that's where you have a lot of low-skill labour."

However, the INS has had trouble meeting its employer-enrollment targets. The INS hoped to have 16,000 employers enrolled in the Basic Pilot by October 1, 1999; as of November 1998, INS had only enrolled 2,519 employers.

Some of those who have investigated the hiring practices of employers in the basic pilot conclude that participation can help employers to evade effective sanctions enforcement. On May 23, 1996, the INS announced the most US meatpackers would participate in the Employment Verification Pilot. The largest US meatpacker, IBP, has 48 plants and 42,000 employees concentrated in the midwestern states, and a rapidly increasing Hispanic and immigrant workforce in these plants. IBP has been able to avoid fines up to 1998, even though the INS estimates that at least 25 per cent of the workers of IBP and other meat packing plants are unauthorized.

Participating in the Basic Pilot seems to help firms not only to avoid fines for hiring unauthorized workers but also disruptive workplace raids. The IBP strategy is a case in point. Turnover is high in meat packing plants - many plants hiring two workers in the course of the year to keep one "disassembly-line" job filled. This 100 per cent turnover rate makes employee recruitment an ongoing activity. IBP and most other meatpackers offer signing bonuses to current employee or independent recruiters who bring workers to the plant - for each worker who is hired and remains on the job for 30 to 60 days, the current employee or recruiter receives \$200 to \$400. Current employees tell their friends and relatives in their areas of origin about the availability of jobs. Many recruiters operate near bus stations in south Texas along the Mexican border, offering bus tickets to newly arrived migrants that take them north to meat packing plants.

When the workers arrive at IBP and other meat packing plants, they present their work documentation, IBP submits the information they provide to Social Security and the INS to check against their databases, and the employee goes to work immediately. If IBP receives a report that the Social Security or A-number appears to be invalid, the worker is given 30 days to report to Social Security or INS and clarify the discrepancy - if he does not, IBP must terminate him or risk fines for knowingly employing unauthorized workers. The EVP system thus adds to high turnover in meat packing plants, as workers let go from one plant may go to work for 30 days in another. Workers often "lend" valid work authorization documents to friends - in some cases, the same Social Security number appears to be employed at 4-5 plants in one area.

Some recruiters operate in Mexico, running radio ads that offer US meat packing jobs that pay at least \$8 an hour and medical and dental insurance paid by the employer - the ads specify that Mexican workers who respond must have authorization to work in the US. Some 1,500 workers were sent by

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<sup>59</sup> The INS reported that a Basic Employment Verification Pilot involving 234 employers who had 80,000 employees in 1996 in Santa Ana and City of Industry, including Disneyland, checked on the status of 11,500 non-US citizens over seven months, and found that 2,948 newly hired workers were not legally authorized to work. In a midwestern meat packing experiment, 27 per cent of the non-US citizens hired were found to have presented false documents.

bus from Fresnillo, Zacatecas - where several recruiters operate - to IBP plants in the first nine months of 1998, and IBP acknowledged that three to five per cent of its new hires were recruited in Mexico.<sup>60</sup> The recruiters' activities in Mexico are lawful, because their ads specify that the workers must be legally authorized to work in the US. However, workers acknowledge that some Mexicans who hear the ads hire smugglers to get into the US, and then buy or rent false documents to get hired.

### **5.6. "Operation Vanguard"**

Even though most of the major US meatpackers participate in the basic pilot programme, the INS regional office in Omaha estimated in 1998 that the percentage of unauthorized workers in the midwest was 25 per cent and rising. The INS regional office launched "Operation Prime Beef" in November 1998 to reduce unauthorized worker employment in meat packing (renamed "Operation Vanguard" after meatpackers charged that the INS was trying to shut down their plants).

Under Operation Vanguard, the INS in January 1999 subpoenaed the I-9 forms completed by employers and newly hired workers in meat packing plants, and checked the Social Security numbers and A-numbers of (employed) workers against Social Security and INS databases - these employee data were already checked by meatpackers enrolled in the EVP. In March 1999, the INS announced that a review of 26,000 employee records at 40 meat packing plants in Nebraska found that the data of 4,500 (17 per cent) employees did not match the data in INS databases. Employers were asked to advise these workers to clarify their status before the INS interviewed them in plant visits in May-June 1999. Most of the workers suspected of being unauthorized quit. The INS reported in June 1999 that 2,149 of the 3,135 workers that it planned to interview quit before it arrived, so that the INS interviewed 1,040 workers and arrested 34 unauthorized workers.

Operation Vanguard united meatpackers, migrant advocates, farmers and political leaders against sanctions enforcement. Meatpackers and farmers complained that the INS was increasing turnover and driving away needed workers at a time of extraordinarily low unemployment rates (about two per cent) and very low pork prices. If meatpackers had to slow their lines, or operate at less than full capacity, they may buy fewer animals, further depressing prices for farmers. Former Nebraska Gov. Ben Nelson, who was hired by farmers to lobby for changes in INS enforcement strategy, said "It was ill-advised for Operation Vanguard to start out in a state with such low employment and an already big problem with a shortage of labour... There has been an adverse economic impact on agriculture because of this."

The American Meat Institute complained that Vanguard contributed to record low pork prices in 1998. There were 101 million hogs slaughtered in 1998 - 55 per cent in Iowa, North Carolina, Illinois and Minnesota. Farm prices for hogs fell to \$14 a 100-weight in December 1998, the lowest level since 1963. One reason for low prices was that hog producers greatly expanded production in late 1997, after disease outbreaks in Asia, and before the full dimensions of the Asian financial crisis were apparent. It takes 10-months from breeding until hogs are ready for slaughter, and in 1998, farmers were sending 2.2 million hogs each week to be slaughtered, up sharply from 1997 levels of 1.6 million hogs a week. Production shrank in 1999, and prices rose to \$40 a 100-weight.

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<sup>60</sup> Laurie P. Cohen, "Meatpacker Taps Mexican Labour Force, Thanks to Help From an INS Programme," Wall Street Journal, October 15, 1998.

Migrant advocates complained that Vanguard targeted Hispanics. Advocates and local leaders noted that requiring employers to notify suspected unauthorized workers did not necessarily cause them to leave the US. If they quit their jobs and they stayed in the area, the migrants might strain private social service organizations or turn to drug dealing because they could not get jobs to support themselves. The National Council of La Raza asked President Clinton in July 1999 to suspend Operation Vanguard, arguing that it increases discrimination against Asians and Latinos. Operation Vanguard affected local decision making. The Lexington, Nebraska Board of Education in April 1999 postponed a decision on hiring bilingual teachers and aides for four elementary schools in order to see how Operation Vanguard would affect school enrollments in Fall 1999.

In response to the outcry over Vanguard, Nebraska Governor Mike Johanns in 1999 appointed a panel to develop recommendations for federal and local officials to deal with undocumented workers. The panel is reviewing five questions: 1) Does Vanguard belong in the work place; 2) Will Vanguard improve conditions for workers in meat packing plants; 3) How does Vanguard affect legal immigrants? 4) What is the impact of Vanguard on the livestock industry; 5) What is the impact of Vanguard on communities? The state cannot affect INS enforcement efforts, but a state report concluding that Vanguard is not appropriate could strengthen efforts to repeal sanctions.

The INS planned to move Operation Vanguard to Iowa and other Midwestern states, but Social Security in Summer 1999 stopped permitting INS agents to check employee records against its database, citing privacy concerns.

In an operation similar to Vanguard, the INS in Washington state subpoenaed and checked the I-9 information of employees of 13 Yakima-area apple packing plants in January-February 1999, identified about 1,700 unauthorized workers - from 10 to 70 per cent of each plant's workers- and ordered the plants in February-March 1999 to have 562 workers clear up their records or to fire the workers. The INS said that, if the workers were still employed when it inspected the plants, and turned out to be unauthorized, the apple packing employers would be deemed to have knowingly hired illegal workers and be fined. The INS in May 1999 raided Highland Fruit Growers and arrested 25 unauthorized workers, the first raid in the area of 1999.

There are about 15,000 apple-packing workers in Washington, most of whom earn about \$8 an hour - many are Mexican-born women. By issuing do-not-hire letters, the INS hoped to get employers to fire illegal workers, but avoid the cost of detaining and deporting them. As in Nebraska, the INS strategy united normal foes. Apple packers and farmers, unions, churches and NGOs, and political leaders condemned the INS while immigration control advocates criticized the INS for not removing illegal workers from the US.

Many of the apple plants are in Yakima county, which has 67,000 Latinos in a population of 220,000. Yakima's Catholic bishop, Carlos A. Sevilla, said "I find that to release 700 individuals from employment within a week's time is not only devastating to the families, which will be impacted severely, but also to the civic community as a whole." Democratic Governor Gary Locke said, "I don't support what the INS is doing." The Yakima Chicano/Latino Coalition: (1) urged the apple plants to defy the INS and not fire the suspected illegal workers; (2) urged Congress to give illegal apple workers amnesty; and (3) opposed suggestions to replace the fired unauthorized workers with nonimmigrants who might receive H-2B visas.

An INS spokesperson countered that the protests reflect "a significant erosion of respect for federal immigration law. It is to the point where individuals and certain business interests and other special interests have adopted an attitude that it is their right to violate these laws, and that the federal government is conducting some sort of persecution for simply now enforcing what is the law of the

land." INS Commissioner Meissner defended the do-not-hire strategy, saying that the INS was trying to "really change the dynamics, change the climate, and change the decision-making process of these migrants."

### **5.7. Future directions: CIR, unions**

Employer sanctions in the US are widely considered to be less than totally effective in preventing the entry and employment of unauthorized workers,<sup>61</sup> but there is little agreement on how to make sanctions more effective to deter illegal immigration and employment. Counterfeit documents are widely available, and penalties on those who produce and sell false documents are comparatively mild: sentences for those convicted of forging documents generally range from 10 months to six years in prison.

#### ***CIR***

In August 1994, the US Commission on Immigration Reform concluded that the employer sanctions system adopted in 1986 had failed, largely because many unauthorized workers presented false documents to employers. The CIR recommended "a comprehensive strategy to deter unlawful immigration, in part through measures designed to make it more difficult for illegal immigrants to obtain work in the United States." In 1992, the grower-dominated Commission on Agricultural Workers concluded that "employer sanctions have been ineffective at preventing, and have not significantly curtailed, the employment of unauthorized workers in agriculture."

The CIR recommended unanimously that the existing I-9 system be retained, but that all authorized workers be issued a credit-type Social Security card that would also include personal information, such as date of birth and perhaps a fingerprint. Newly hired employees would have to present these "Employee Verification Registration" cards to their employers after being hired, and employers would, under the CIR's proposal, swipe the cards through credit-card type authentication terminals or called an 800 number to verify the SSN. The employer could ask one or two personal questions of the newly hired employee to determine whether the new hire was presenting his own card. This mandatory national verification system would be "the linchpin" of efforts to reduce illegal immigration.

The CIR estimated that each verification could be done for one half-cent, so that verifying the 50 to 60 million new hires annually in the US would cost \$25 to \$30 million. The CIR concluded that a national registry could be established within five years for total cost of \$250 to \$300 million. Estimates of the cost of issuing new identity cards to all US residents, and clearing up problems in the INS database, could cost considerably more. The CIR recommended that some states test its proposal so that problems could be identified and corrected before a national registry is launched.

The employee verification system recommended by the CIR has a precedent in the Systematic Alien Verification for Eligibility (SAVE) system that is used to determine whether non-US citizens who apply for means-tested welfare benefits are legally in the US. Unauthorized aliens are generally not eligible for welfare assistance. Applicants for means-tested federal welfare benefits must present social security cards and other identification to prove that they are legally in the US, and the information they provide is checked against INS and other data bases. The SAVE system, however,

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<sup>61</sup> Wayne Cornelius, reviewing comparative studies of employer sanctions, concluded that: "there is not a single documented case of successfully using employer sanctions laws to reduce the population of illegal immigrants anywhere in the world."

has a high error rate. In more than five per cent of the cases in 1994, identification numbers submitted for verification were reported to be false when they were in fact valid, in part because of lags in issuing Social Security numbers to legal immigrants and entering them into the verification database. To avoid having such "false negatives" prompt US employers to reject legal workers, the CIR recommended that US employers not refuse to hire a worker until a second check confirmed that the number was indeed false.



### **INS dilemma: apple industry**

The apple example illustrates what is likely to happen if the INS continues to aggressively enforce employer sanctions laws. There is a looming world wide glut of apples. Worldwide apple production was 55 million metric tons in 1997, including 18 million metric tons produced in China, 11 million metric tons produced in Europe, and six million metric tons produced in North America. Apple production is increasing much faster than population growth and consumption per capita is stable in the industrial democracies.

Some 3,000 Washington apple growers produce about 4 billion pounds of apples each year - 60 per cent of US apples - on the eastern slopes of the Cascade mountains. These apples are worth about \$1 billion a year, or \$0.25 a pound. The apple industry is expanding, with the costs of planting new trees estimated at \$12,000 to \$15,000 per acre; most apples are planted in areas with few people, as wheat and other grains are replaced by apples. With yields of 50 to 60-1000 pound bins per acre, newly planted dwarf apples can be produced for about \$0.20 a pound. Apple pickers receive about \$0.01 per pound for picking apples - about \$10 for picking a 900 to 1,000-pound bin that contains about 5,000 apples. The state of Washington estimated that apple pickers earned an average \$5,750 in 1996, and packing house workers earned \$11,000. However, farmers receive only about one-fourth of the retail price of apples - the farm value of a \$1 pound of apples was 23 per cent.

If the INS were to aggressively enforce employer sanctions laws, apple picking and packing would likely be mechanized. In the fields, apple growers would likely increase the mechanization of pruning, and explore the use of chemicals to thin apples to eliminate some buds so that the apples that are produced are larger; thinning is currently done by hand. There are two major ways to machine pick apples: (1) adapt the wine grape harvester that uses circulating rods to move through the tree and shake off fruit and (2) adapt the nut harvester that grasps the tree trunk and shakes off the fruit, either with one shake, or after two or three progressively harder shakes. Machine-harvested fruit can be sorted electronically.

Once in the packing house, machines could replace many of the women who inspect and pack apples. Bob Mathison of Stemilt Growers Inc, one of the largest growers and packers, was quoted as saying: "We are blessed with a bountiful labour supply. If there is something we want done, we throw bodies at it and they cost \$7.50 an hour... You saw those people turning apples in the same direction? If we have to pay \$12 an hour, those people are gone," replaced by apple-sorting machines. Israel's El-Op Fruitronics subsidiary has developed a \$30,000-a-lane Optigrade II fruit sorter that can sort up to 10 apples or peaches a second by comparing each piece to stored images of different grades of fruit; one machine replaces 15 hand sorters and uses neural network (artificial intelligence) systems to learn how to separate good and bad fruit.

There are several other potentially useful sanctions enforcement strategies, including private lawsuits. In 1998, the Federation for American Immigration Reform financed a civil suit by Commercial Cleaning Services against Colin Service Systems. Commercial accused Colin in federal court of hiring illegal aliens and underbidding Commercial for public and private cleaning contracts. Colin countered that Commercial failed to withhold required payroll taxes. Colin in 1998 had about 4,000 employees, compared with 80 for Commercial and paid a \$1 million fine to the INS in March 1996 to settle charges that it unlawfully hired illegal workers.

In 1999, two Massachusetts janitorial firms, System Management Inc. of Lawrence, and Forget Me Not Services of Wilmington, sued Aid Maintenance Inc. of Pawtucket, Rhode Island, alleging that Aid Maintenance was able to underbid them and win cleaning jobs because it hired undocumented workers and paid them sub-standard wages. The INS in 1992 found that 38 per cent of the SSNs on Aid Maintenance I-9 forms were false.



A Harris poll in 1994 found that 53 per cent of Americans favored a national work permit system for US citizens and authorized aliens, up from 46 per cent in 1990, but the CIR proposal was attacked widely. Civil liberties groups decried the new cards with personal data as "Big Brother" authoritarianism not suited to American individualism. The American Civil Liberties Union, an influential NGO, called the CIR proposal "a fundamental violation of privacy;" 42 members of the US House of Representatives signed a letter to President Clinton opposing the CIR proposal on the grounds that it would increase labour market discrimination against minorities.

Instead of employee verification, many immigration activists want the US Government to step up labour law enforcement. Cecilia Munoz of the National Council of La Raza says that: "We are absolutely convinced that if you actually go after labour law violations, which the government has never done, that is when you start to eliminate the job market for undocumented labour."

### *Position of trade unions*

The AFL-CIO has long been a key supporter of employer sanctions. That support may be eroding, however, as unions launch organizing campaigns among immigrant janitors, hotel and restaurant workers, and farm workers. Unions organizing immigrant workers argue that sanctions laws are often used to intimidate workers and to forestall organizing drives. During organizing drives, some employers provide the INS with tips about unauthorized workers. As a result, the INS sometimes stages raids during or after organizing drives. One organizer said: "the biggest hurdle I face is fear of retaliation by undocumented workers. The sanctions aren't doing what they were supposed to do. They've become another tool for employers."<sup>62</sup>

In a recently publicized case, general manager of the Holiday Inn Express in downtown Minneapolis apparently did just what labour organizers feared. The hotel's workers on August 26, 1999 voted for union representation. Just before negotiations were to start on October 13, 1999, the manager called the INS, which staged a raid and apprehended eight housekeepers. One week later, several hundred protestors converged on the hotel. The Hotel Employees and Restaurant Employees International Union paid the bail to have the housekeepers released and filed an unfair labour practice charge against Holiday Inn Express with the National Labour Relations Board.

There are three major types of labour laws in US work places:

- protective labour laws that establish minimum wages and maximum hours of work and safe working conditions, enforced by federal and state labour inspectors;
- labour relations laws that give workers the right to organize into unions and bargain collectively, enforced for most workers by a federal agency, the National Labour Relations Board;
- anti-discrimination laws, enforced by federal and state labour departments as well as independent equal opportunity agencies and private lawyers.

The INS and the NLRB have an agreement that the former will not be used to interfere with union activities. However, employers who provide tips to the INS do not usually report that a union organizing campaign is underway, and there is no comprehensive listing of union organizing that the INS could consult. Thus, if an employer calls the INS, and unauthorized workers are apprehended, US courts have held that they can be deported, even if the employer's call to the INS was unlawful retaliation for the workers' protected union activities.

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<sup>62</sup> Nancy Cleeland, "Unions questioning sanctions against employers over hiring," Los Angeles Times, October 12, 1999.

US labour laws protect all workers in the US, regardless of their legal status. However, problems arise when employers violate the labour rights of unauthorized workers, and administrative agencies order remedies. For example, the US Supreme Court in 1984 confirmed that unauthorized or illegal alien workers employed in the US enjoy the union organizing rights granted to most private sector workers under the National Labor Relations Act. In one case, illegal alien workers demanded higher wages and better working conditions at two Chicago leather factories. The company Sure-Tan called the INS, which inspected the factories, and sent the unauthorized workers to Mexico. When the matter was brought to the NLRB, the latter ordered the workers reinstated, since the employer called the INS in retaliation for their protected union activities.<sup>63</sup>

The US Supreme Court first emphasized that unauthorized workers were protected by labour relations laws: "If undocumented alien employees were excluded from . . . protection against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all employees and impeding effective collective bargaining." However, the court also reasoned that if employers were ordered to reinstate unauthorized workers who were outside the US, a remedy for labour law violations might frustrate the competing goal of the Immigration and Nationality Act to deter illegal immigration.

Several federal courts have held that Sure-Tan's bar to back pay applies only in cases where the unauthorized workers left the US - they reasoned that the Sure-Tan decision was directed primarily at not encouraging illegal entry. The Second Circuit US Court of Appeals in December 1997 used this reasoning to uphold a National Labour Relations Board order requiring APRA Fuel Oil Buyers Group Inc, a Brooklyn heating-oil company, to provide illegal workers wrongfully fired for their union activities with back pay and reinstatement. APRA hired the two workers in 1989-1990, knowing that they were not authorized to work in the US. After they were hired, the two unauthorized workers signed Teamster authorization cards, and APRA told them to disavow their signatures or be fired. They did not disavow, and were fired in January-February, 1991. The NLRB concluded the firings were unlawful retaliation for the workers' union activities, and the courts agreed. The NLRB in 1995 ordered the company: (1) to provide back pay to the two workers from the date of their unlawful discharges until either they were reinstated by APRA or failed to produce work authorization documents and, (2) to reinstate the men if they produced work authorization documents.

APRA appealed, citing the Sure-Tan decision. The Second Circuit reasoned that the purpose of the Immigration Reform and Control Act of 1986 was "to reduce the incentive for employers to hire illegal aliens." Since IRCA did not affect the NLRB's remedial powers, the Second Circuit held that the NLRB could continue to fashion remedies for labour law violations so long as they do not conflict with IRCA. Requiring employers to provide back pay and reinstatement for unlawfully discharged unauthorized workers, the court concluded, "helps to ensure that employers who comply with the IRCA do not suffer a competitive disadvantage for their obedience to the law." If back pay were not required, the court reasoned, unauthorized workers would be "an easy target for employers resisting union organization, and thus, frustrate the rights of lawful US workers under the NLRA."

However, being reported by one's employer to the INS does not protect a union activist from deportation, according to a decision of the US Court of Appeals for the Second Circuit in September 1997.<sup>64</sup> An Ecuadorian woman who was active in a Union of Needletrades, Industrial and Textile

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<sup>63</sup> NLRB v Sure-Tan, Inc. 467 US 883 (104 S.C.2803) (1984).

<sup>64</sup> Montero v. Immigration and Naturalization Service, CA 2, No. 96-4130, 8/28/97.

Employees campaign to organize workers at STC Knitting Inc in Long Island City, was reported by her employer to the INS. UNITE won an election to represent STC employees. The employer asked the INS to check its workers' identification, and several of the workers were unauthorized, including the union activist. The INS moved to deport the unauthorized workers, and an immigration judge and the Board of Immigration Appeals agreed that the unauthorized workers should be removed from the US.

On behalf of the unauthorized workers, the UNITE union argued that, because the INS only learned of their status through the employer's violation of the NLRA, the unauthorized workers should not be deported. The court said that it does not matter how the INS learns that a worker is in the US unlawfully; once located, unauthorized aliens can be deported. According to the court, in drafting Section 274A of IRCA, the employer sanctions provisions, Congress did not intend to diminish existing labour protection. Thus, unauthorized workers, like most US workers, are protected from employer retaliation for union activities, but "prospective labour law remedies to undocumented aliens consistently has been dependent upon whether the alien is permitted by the INS to remain in the United States."

These cases have weakened union support for sanctions. During the AFL-CIO's national convention in Los Angeles in October 1999, several unions, including the United Farm Workers, urged the AFL-CIO to support another amnesty for unauthorized workers and withdraw support for employer sanctions. The AFL-CIO agreed to hold four town meetings on the issue- in Los Angeles, Chicago, Atlanta and New York- and to reconsider the issue in January 2000. In 1994 the AFL-CIO Executive Council called for a re-examination of the employer sanctions provisions of IRCA, saying that they were both leading to discrimination against minority US workers and encouraging some employers to take advantage of illegal workers and hire them in preference to US employees. The Executive Council in 1994 called for more enforcement of IRCA's anti-discrimination provisions, an end to Department of Labor inspectors checking on the immigrant status of workers, and a "fraud-proof, non-discriminatory, non-card system[be developed]to enable employers to verify very quickly every new hire's eligibility."<sup>65</sup>

### **5.8. Future directions: INS**

Workplace enforcement falls under the investigation function of the INS, absorbing \$251 million or 8 per cent of the INS's \$3.1 billion budget in FY97. Between FY92 and FY97, the number of fines levied against employers decreased from 2,000 to 888, and fines levied decreased from \$17 million to \$8 million.<sup>66</sup> In FY98, the INS completed 6,100 lead-driven investigations and 400 compliance audits.

The most recent summary of INS sanctions enforcement activity noted that, despite focusing on employers likely to violate employer sanctions, the INS proposed fines on employers in 17 per cent of investigations (GAO, 1999, 22), and began criminal proceedings in less than 2 per cent. Between October 1, 1996, and May 29, 1998, INS completed about 9,600 employer investigations that were

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<sup>65</sup> James Parks, "Labour seeks alternative fair immigration policy," AFL-CIO News, August 22, 1994, 7.

<sup>66</sup> In FY97, the INS levied fines of \$7.8 million for illegal immigration against 888 US employers. FY97 was the peak year of INS workplace raids; 19,000 illegal immigrants were removed as a result of worksite operations. About two per cent of INS' enforcement manpower is devoted to worksite enforcement.

based on leads from various sources, such as the public or other agencies; about 27,000 unauthorized workers were apprehended.

- In about 3,500 investigations (36 per cent of all investigations) INS reported that about 78,000 fraudulent documents pertaining to about 50,000 unauthorized aliens were used to obtain employment.<sup>67</sup>
- In about 2,100 ( 60 per cent of the 3,500 investigations) in which INS found fraudulent documents, INS determined that the employer had complied with the employment verification process and did not knowingly hire unauthorized aliens, but that unauthorized aliens' use of fraudulent documents circumvented the process.
- In the other 1,400 ( 40 per cent of the 3,500 investigations) involving fraudulent documents, INS decided to fine the employer, take no action against the employer for various reasons (e.g., the employer went out of business), or issue the employer a warning notice.

The INS has a complicated strategy to fine employers, and collects only about half of the fines that it levies. In sanctions cases closed by the INS between October 1, 1996, and February 1, 1998, INS issued Notices of Intent to Fine against 833 employers for a total of \$6.1 million. After receiving a NIF, the employer may negotiate the fine amount and payment schedule with INS and may receive a smaller fine. Following settlement discussions, INS issues a Final Order for the amount of the fine. Final Orders were issued against 794 employers for \$4.9 million, and a total of \$2.5 million (or 51 per cent of the amount ordered) was collected. Reasons given by INS officials explaining why the total amount due was not collected were the following: (1) the employer went out of business; (2) the employer filed for bankruptcy; (3) the employer died; or (4) the business moved, and INS was unable to track down the employer.

INS investigators prepare Employer Case Activity Reports to document activities such as the opening of a case, a Form I-9 inspection, or the arrest of unauthorized aliens. Data from these reports are entered into INS' Employer Case Activity database, which contained 69,000 employer sanctions cases since August 1989.<sup>68</sup>

INS Commissioner Doris Meissner frequently says that sanctions enforcement deserves higher priority: "The focus of our work site enforcement needs increasingly to be directed at employers. Work is the incentive that brings illegal immigrants into our country. [Enforcement] can't just be done at the border." However, she added, in the US "There is a much stronger political consensus about border enforcement than there is about the way enforcement should be done away from the border." Another INS official said that the INS focuses on border enforcement because of a "unique coalition of special interest groups that join together and influence both political parties against effective interior enforcement - and specifically work site enforcement and employer sanctions."<sup>69</sup>

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<sup>67</sup> Of the 78,000 fraudulent documents identified, about 60 per cent were INS documents, such as permanent resident cards; about 36 per cent were Social Security cards; and about 4 per cent were other documents, such as drivers' licenses.

<sup>68</sup> Employer sanctions cases between 1989 and 1997 are searchable at: <http://www.cis.org/search.htm>

<sup>69</sup> INS: Smuggling, Foreigners' Rights. 1999. Migration News. January. The number of workers apprehended at work sites has dropped, from an average of 1,465 a month in 1997 to 368 in June 1998. One INS field manager in 1999 said "We basically have ceased worksite enforcement" in response to a lack of political support. Workplace raids often

The de-emphasis on workplace raids has been traced to the reaction to an April 23, 1998 raid at First Paragon Floral in Miami, where workers were held in cold flower storage facilities for several hours. Three of the 23 workers arrested were legal immigrants, and another eight were eligible for work permits. In May 1998, the INS announced new procedures for inspecting workplaces in search of unauthorized workers when it believes that the employer unknowingly hired illegal workers. All inspections must begin with an I-9 check, followed by a report to the employer of suspected unauthorized aliens. Employers are then given a chance to re-verify suspect workers or fire them.

If the employer does not comply, the INS then makes plans to do a work site raid and apprehend the unauthorized workers. All raids must follow "a written operation plan" which must receive prior approval from the INS district office - there are 33 district offices. The district office, in turn, must receive approval from one of the three regional offices. If the raid is likely to have media impact or community impact, it must be approved by INS headquarters in Washington DC.

If the INS believes the employer knowingly hired illegal workers, the INS apprehends the workers first, after filing a written operational plan, and then inspects I-9 forms and employment records.

The political pressure exerted on the INS when it enforces employer sanctions is well illustrated by what happened in the Vidalia onion industry in southeastern Georgia in 1998. Some onion growers, belonging to an organization, Vidalia Harvesting Inc., had applied for legal H-2A foreign workers, but withdrew their applications in favor of hiring unauthorized workers through crew leaders when the US Department of Labor insisted that the H-2A as well as domestic workers would have to be paid \$0.80 per 50-pound bag of onions picked. The growers maintained that the prevailing wage was \$0.70 to \$0.75 per 60-pound bag. The Department of Labor also insisted that the growers provide housing at no charge to the legal H-2A workers.

On May 13, 1998, the INS launched operation "Southern Denial" in the Vidalia onion industry, apprehending 21 of the estimated 3,500 to 5,000 peak harvest workers employed by 147 onion growers.<sup>70</sup> Growers and their Congressional representatives protested loudly-the INS operation was stopped after one day. A Congressmen complained of an "apparent lack of regard for farmers in this situation...(the raids) threaten one of Georgia's most famous and economically valuable crops, Vidalia onions." Senator Paul Coverdell (R-GA) complained of the INS' "indiscriminate and inappropriate use of extreme enforcement tactics against Vidalia area onion growers...(interfering with) honest farmers who are simply trying to get their products from the field to the marketplace."

The INS agreed not to stage any more work place raids against Vidalia onion growers if they made changes for the 1999 season, including: (1) hiring only legal workers; and (2) making available to the INS business records, including FLC agreements.<sup>71</sup> The INS agreement was widely condemned by those favoring more sanctions enforcement. Many papers called the agreement an "amnesty" for illegal workers during the 1998 season, since unauthorized workers could work without fear of INS raids. A typical editorial asserted: "The Georgia case demonstrated that the INS bowed to employer pressure because the operation had hit right in the middle of the onion harvest when demand for cheap labour is highest."

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produce complaints from agricultural and business groups and their lawyers, ethnic lobbies and civil rights groups.

<sup>70</sup> Vidalia onions represent about 10 per cent of US onion production.

<sup>71</sup> GAO. 1998. H-2A Agricultural Guestworker Programme: Experiences of Individual Vidalia Onion Growers. Washington. GAO, September 10. GAO/HEHS-98-236R. B-280987.

Most experts believe that the growers will turn to mechanical harvesters, which are used in Texas and Europe. A machines costing \$100,000 each can, with five or six workers, harvest 15 acres a day; the equivalent of a hand crew of 60 workers.

In January 1999, the INS published a new "Interior Enforcement Strategy;" described as a "five-year, phased plan [to] preserve the integrity of the legal immigration system and promote public safety and national security by deterring illegal migration, preventing immigration-related crimes, and removing individuals, especially criminals, who are unlawfully present in the United States." The five strategic priorities in the new IES are to:

- identify and remove criminal aliens;<sup>72</sup>
- deter and reduce alien smuggling or trafficking;
- cooperate with local communities impacted by illegal migration;
- reduce benefit fraud and other document abuse; and
- block and remove employer access to undocumented workers.

The INS said it could evaluate the effectiveness of its new interior enforcement strategy by examining: (1) trends in wages in industries that typically hire illegal immigrants; (2) local crime rates; and (3) trends in the cost of smuggling aliens or obtaining fraudulent immigration documents. Joe Greene, INS district director in Denver and author of the new interior enforcement strategy, said that "80 to 85 per cent of employers really want to comply with this law [employer sanctions], so let's help them do that."

In April 1999, Filiberto's, a chain of Mexican restaurants based in Phoenix, agreed to pay a \$2 million fine, "the biggest fine for a work site enforcement case in US history," according to the INS. In 1997, nearly 200 illegal immigrants were arrested when the INS raided 15 Filiberto's restaurants. However, the INS collected nothing from the largest proposed fine in the first five years of sanctions, namely the \$580,000 assessed against Piedmont Quilting Corp. of Walhalla, South Carolina.

## **6. Comparative lessons**

Controlling illegal immigration and employment is difficult and becoming more so in industrial democracies. Perhaps the best way to think about preventing the entry and employment of unauthorized workers is to remember that, with powerful and often mutual worker and employer incentives to violate the law, sanctions enforcement be given high priority and constantly fine tuned to keep up with employer and worker behavior that evolves in response to laws and enforcement.

Success in curbing illegal immigration and employment depends on continued innovation in three areas:

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<sup>72</sup> There are 221,000 foreign-born criminals in federal, state or local jails—two-thirds of them illegal immigrants—plus 142,000 foreigners on parole or probation and subject to removal, and 161,000 foreigners who are absconders, that is, persons who disappeared after receiving deportation/removal orders.

- *Legal Innovation.* Continued revision and strengthening of laws against smuggling and illegal alien employment, such as enacting laws that penalize the beneficiaries of labour provided by middlemen such as labour contractors so that private enforcement complements public enforcement.
- *Technology.* Technology has made it easier for workers, employers, and others to forge documents and evade sanctions enforcement, but creative uses of administrative data can give governments powerful new tools for concentrating enforcement efforts. Germany and the US are using comparisons of computer data bases to detect apparent cases of unauthorized worker employment, which makes field enforcement more efficient and effective.
- *Research.* Research documenting typical smuggling patterns, the buffer or shock absorber role of labour market middlemen, and the interaction of smuggling workers and other types of smuggling have helped governments to refine their enforcement strategies.

Continued fine tuning of employer sanctions will receive widespread support only if there is a consensus that illegal entry and employment are serious offenses whose prevention requires significant resources. This consensus in support of sanctions enforcement was never as strong as enforcement agencies wanted, and seems to erode when the economy is booming, as in the US, or in particular sectors, as with construction and agriculture in Europe.

Thus, the first prerequisite for an effective employer sanctions regime for the 21<sup>st</sup> century is consensus that hiring unauthorized workers is a serious offense:

- the presence of unauthorized workers may disadvantage vulnerable citizen and legal immigrant workers as well as hand economic advantages to employers who violate the law;
- requiring all employers to hire legal workers and abide by immigration and labour laws encourages the evolution of high-wage and high-productivity economies, where the industrial economies long-run comparative advantage lies;
- effective enforcement of employer sanctions laws may encourage the production of goods and services in emigration countries, creating jobs there and deterring emigration.

Once a country decides that the enforcement of employer sanctions laws is a top priority, on par with preventing child labour or minimum wage violations, the issue of how to fine tune sanctions enforcement remains. There are four major options, listed below in the order in which they are likely to be tried:

- changes in enforcement strategies with current laws and penalties, such as the US “do-not-hire” strategy and the German concentrated enforcement in construction;
- higher penalties and more enforcement staff to increase the probability that violators will be detected and, when caught, they will be punished more severely;
- changing laws, including strict joint liability to increase the amount of private policing of employers over subcontractors work or developing new identification cards and systems that expedite computer cross checking of worker and employer data;
- declaring "war" on illegal immigration and employment, as the US did with drugs, and changing laws to allow, for example, the confiscation and sale of businesses that are repeat violators of employer sanctions laws.

The experience of France, Germany, and the US suggests three lessons:

1. Employer sanctions may not be the only line of defense against illegal alien entry and employment. Border enforcement and internal controls are needed to reinforce sanctions. Few employers can resist the ready availability of unauthorized workers eager for jobs, especially if false documents or other mechanisms are available to avoid severe penalties.
2. There needs to be more effort to coordinate labour and immigration enforcement. In all three countries, separate agencies that report to interior and labour departments are involved in the enforcement of sanctions enforcement. These agencies, which have different missions, are often uneasy partners in the enforcement of sanctions.
3. Penalties may have to be increased. One problem with violations of labour laws in many countries is that, if caught, employers are required to pay the minimum or premium wages they should have paid in the first place. With unauthorized workers unwilling to file complaints for the understandable reason that they may be detected, and other workers and employers reluctant to complain to authorities, enforcement agencies may need to develop more effective strategies to detect and then punish violators, such as fines that equal the wages earned or profits made as a result of unauthorized employment.

There is no doubt that sanctions clearly work best when and where they are needed least. Large companies in labour markets awash with workers do not need to hire illegal aliens, and they do not do so deliberately. Small and medium-sized employers are more likely to violate labour laws, including those that prohibit the employment of illegal aliens, in order to survive competition.

## **7. Best practices on sanctions**

Employer sanctions and their enforcement can be conceptualized as consisting of three dimensions. At the core, there are legal texts which specify punishments for employers of illegal aliens and which are part of a broader legal system. The second dimension involves the governmental personnel available to enforce employer sanctions, their organization, resources and strategies. The third dimension involves civil society, groups and associations that mediate between governments and societies such as trade unions and employer associations. States and societies vary greatly in terms of their legal systems, governments and public administrations and relationships between governments and society. The history of enforcement of employer sanctions strongly reflects the weight of the three variables.

The United States, for instance, is often referred to as a weak state. Theorists such as Louis Haartz held long ago that the deeply embedded liberalism of American political culture limited the capacity of the US Government to regulate societal affairs. *Vis-à-vis* France and Germany, the US Government is less interventionist and intrusive, especially in the economy and labour market. The American ideal of freedom signifies an absence or modest role of government, whereas the German ideal of freedom requires a strong state capable of providing security. French and German Governments have often been viewed as stronger and more capable of regulating societal affairs than the US.



Germany has strong socio-economic interest groups, especially organized labour and employer groups, that are systemically involved in socio-economic policymaking. The institutionalized involvement of social partners in Germany contrasts with the French case, where such institutions are weak and with the US, where such institutions are virtually non-existent. Complex relationships between states and the societies they govern sometimes are viewed in terms of zero-sum games, but recent theory encourages a conceptualization of states (or governments) as embedded in societies with governance constrained and shaped through interactions with civil society.

### **7.1. Legal innovations**

Laws matter: there is a difference between societies that do and do not sanction employers for the unauthorized employment of aliens. Societies without employer sanctions laws, such as the US prior to 1986, tolerate and encourage illegal immigration. The vast majority of states attempt to regulate international migration and they view unauthorized migration with varying degrees of concern.

The starting point, then, is incrimination of unauthorized employment of aliens, using two distinct but related strategies:

- employer sanctions should be part of a broader campaign against illegal work which usually principally involves citizens rather than non-citizens;
- employer sanctions should be a component of a broad strategy to deter and punish illegal migration.

By focussing on illegal alien employment as a particularly socially harmful aspect of illegal employment in general, governments can keep distinct legal immigrants and immigration and illegal immigration. Moreover, enforcement of employer sanctions becomes labour law enforcement in addition to immigration law enforcement.

The wisdom of such an approach became apparent in the French case between 1972 and 1984. Part of the French enforcement problem arose from confusion over terms like illegal employment and clandestines, thus mixing immigration and illegality. It was only in the 1990s with substitution of “dissimulated” for clandestine and illegal employment that a full and precise clarification and distinction was achieved. Hence, the legal text incriminating unauthorized alien employment should make clear that such employment is a particularly harmful instance of a broader class of infractions involving illegal employment.

There is a tendency for lawmakers to underscore the priority they attach to deterring illegal immigration by increasing fines, jail terms and other punishments for illegal employment of aliens. However, if those punishments are viewed as too high by labour inspectors and court systems, increasing penalties can be counterproductive. Ideally, an employer sanctions law would provide prosecutors with the flexibility to mete out heavy punishments against employers who profit enormously from illegal employment of aliens, including jail time for recurrent and worse offenders. However, the law should be flexible enough to enable prosecutors to prevent employers from viewing the fines simply as the cost of doing business. The law punishing illegal employment in Germany was amended to give courts the discretion to increase fines enormously in such cases.

Progressive fines and possible jail terms for illegal alien employment should be complemented by further penalties that enable authorities to confiscate goods, machines, vehicles and properties used for recurrent or more severe forms of illegal alien employment, such as manpower trafficking and humansmuggling. Moreover, wayward employers should be barred from bidding for public contracts. Employer sanctions should also apply to beneficiaries of illegal employment practices by sub-

contractors. Finally, governments should be empowered to disclose and publicize actions taken to punish wayward employers.

Illegal alien employment often involves several infractions against labour laws, immigration laws and social security regulations. In such instances, multiple punishments may be appropriate. However, prevalent legal doctrine holds that one can only be punished once for an offence, so sanctions laws must make clear that governments are empowered to pursue wayward employers for numerous infractions arising from illegal employment.

## **7.2. Enforcement strategies**

Employer sanctions laws should require all employers to record or transmit verifiable information concerning the eligibility of a prospective employee for employment prior to the onset of employment, with specific and appropriate punishments for failure to do so. Moreover, there should be stiff penalties for usage of fraudulent documents or fraudulent use of bonafide documents and for the manufacture and sale of fraudulent documents. Authorities charged with verification of prospective employee eligibility for employment should be empowered to cross check their data for compliance with related laws and regulations such as social security requirements. These legal innovations presuppose a reasonably secure system for identification of persons and for verifying their identities.

Legal innovation alone will not suffice. Best practices also require effective enforcement of employer sanctions. The simultaneous, multiple violations that characterize illegal alien employment necessitate inter-agency coordination and cooperation. Ministries or Departments of Labour, Justice, Immigration and social security agencies need to at least establish inter-agency structures to coordinate and facilitate enforcement of laws that punish illegal alien employment that extend from the national level to administrative sub-units to the local level.

The inter-agency structures should be charged with reporting on enforcement of laws against illegal employment, especially illegal employment of aliens, as well as with training and public information functions. Enforcement personnel from various services charged with enforcement of immigration, labour and social security laws often require training to alert them to the laws enforcement by other agencies, and the social harm arising from illegal employment practices. The mandate of the inter-agency structures should also include building of awareness of the harm done by illegal employment among critical audiences, such as judges and prosecutors, and the general public.

No amount of inter-agency coordination will suffice if inadequate resources are devoted to enforcement of laws against illegal alien employment. It may be necessary, as in France, to develop a body of enforcement agents specializing in enforcement of laws against illegal employment of aliens. One of the major functions of the inter-agency structures should be to monitor and ensure that sufficient enforcement agents are devoted to enforcement of laws against illegal alien employment. Credible and effective administrative systems must be put in place for recovery of fines, and administrative or court discretion to reduce or forgive fines should be limited and closely monitored by the inter-agency structures.

The employment of illegal aliens is primarily a labour market offense, and thus labour and related agencies should take the lead in enforcement. The roles of various police services and immigration agencies should be secondary but complementary. For example, police involvement may be required to arrest and possibly incarcerate certain employers, and immigration service agents may be required to verify documents. The growing role of organized crime in human trafficking increasingly

necessitates deeper involvement of police agencies, security and intelligence agencies and, in extreme instances, militaries in coordinated enforcement actions.

Concepts of security have evolved significantly in the post-Cold War period. Broader strategies against illegal immigration involve much more than enforcement of laws against illegal employment of aliens. However, credible enforcement of employer sanctions remains an irreplaceable component of any coherent strategy to deter illegal immigration.

### **7.3. Civil society**

The third dimension focuses on the involvement of civil society in enforcement of laws against illegal employment of aliens. All laws have a symbolic function; their goal is voluntary compliance. Involvement of social actors, especially trade unions and employer groups, in securing voluntary compliance and aiding in the detection and punishment of non-compliance is critical. History and institutional frameworks endow governments with quite different capacities to mobilize civil society to help implement laws against illegal employment of aliens.

In Germany the pattern of the involvement of the social partners in industrial relations appears advantageous. In France industrial relations are less institutionalized, but progress has been made towards mobilizing social forces to better ensure compliance with laws against illegal work, such as the recent agreements signed between the French Ministry of Labour and various professional groups that allow businesses injured by competitors who employ illegal workers to seek legal redress.

Prevention of illegal alien employment, like any form of illegal employment, is preferable to its repression. The shift to a strategy to reduce incentives for illegal hiring of aliens makes a great deal of sense, but must be cognizant of mounting evidence of coercive manpower trafficking and virtual enslavement of human beings.

Perceptions of government capacities to control international migration and prevent illegal immigration affect perceptions of legitimacy, identity and security. Support for parties and governments, especially in Europe, can crumble or mushroom over immigration issues. The politicization of immigration questions makes mobilization of civil society in support of effective enforcement of employer sanctions a democratic imperative. This appears better and more widely understood in Western Europe than in the United States. However, understanding of the high stakes involved in constructing credible strategies of immigration control in democratic settings is generally lacking even amongst political elites, including foreign policy and security communities.

**Appendix 1.****Evolution of French Sanctions Policy**

July 11, 1972	Illegal employment made an indictable offense.
1972	Initial ordonnances promulgated concerning temporary work, trafficking of labour and manpower leasing.
July, 1974	Non-seasonal alien worker recruitment suspended.
December 31, 1975	Civil law regulating subcontracting in public and private markets adopted.
1974 - 1976	Laws which provide for the hiring of labour inspectors specializing in control of foreign labour in 23 "priority" departments adopted.
July 10, 1976	A "special contribution" civil fine payable to the National Immigration Office for illegal employment of alien workers instituted.
August 10, 1976	Interministry Mission to Combat Manpower Trafficking created.
1980 - 1983	Four governmental studies of illegal work and the underground economy completed.
October 17/29, 1981	New laws make illegal employment of aliens a more serious offense - a misdemeanor subject to police courts and fines are increased.
February 2, 1982	New ordonnances reinforce regulation of manpower leasing.
August 31, 1983	Cabinet reinforces policy against illegal alien migration and employment by: <ul style="list-style-type: none"> <li>• the creation of 55 new positions for labour inspectors specializing in control of foreign labour;</li> <li>• the creation of department-level interagency committees to combat illegal alien migration and employment in 23 "priority" departments;</li> <li>• creation of a branch office of the Interministry Liaison Mission to Combat Manpower Trafficking in Marseille;</li> <li>• Augmentation of the "special contribution" civil fine from 500 to 2,000 times the minimum hourly wage (30,200 francs as of January 1, 1990);</li> </ul>

July 25, 1985	Illegal work made a misdemeanor.
January 16, 1986	Laws pertaining to illegal alien migration and employment extended to overseas departments.
March 14, 1986	Decree replaces department-level interagency committees created August 31, 1983, with similar committees with a broader mandate to combat illegal work (the underground economy) in addition to illegal alien migration and employment.
January 27, 1987	Law redefines illegal employment infraction. The definition of illegal work is simplified and its applicability broadened.
July 21, 1988	Amnesty law expressly excludes those punished for illegal work, illegal alien employment and manpower trafficking and leasing.
January 13, 1989	Law again redefines the definition of an illegal employment infraction.
January 16, 1989	Interministerial decree extends the competency of the Interministry Mission to the underground economy.
July 10, 1989	New labour law measures adopted which: <ul style="list-style-type: none"> <li>• newly incriminate illegal alien employment through intermediaries;</li> <li>• redefine and more severely punish violation of the prohibition against reimbursement of fees paid to the International Migrations Office for foreign worker recruitment;</li> </ul>
January 2, 1990	Labour law amendment enables officers of the Judiciary police, after court authorization, to enter workplaces on the presumption of illegal employment or illegal alien employment.
July 12, 1990	Law modifies labour code articles pertaining to subcontracting and leasing of labour. Fines for infractions doubled to 8,000 to 40,000 FF. Unions authorized to act on behalf of the workers involved.
July 25, 1990	Decree redefines the role of department-level commissions.
November 8, 1990	Decree modulates special contribution administrative fine for illegal alien employment. The routine fine is set at 16,870 francs, double for employers who previously have been fined within the last five years and a reduced fine became possible for illegal alien employment without complementary violations if recommended by departmental authorities.
January 3, 1991	Law extends authority to bring charges for illegal work

	infractions to social security and other enforcement agents.
April 18/22, 1991	Government makes grant of employment authorization to Poles contingent on no adverse labour market effect.
September 26, 1991	Asylum seekers no longer automatically authorized to work (as of October 1, 1991).
October 1, 1991	Decree facilitates abrogation of short-term visas for aliens who work without authorization.
October 3/4, 1991	Government acts to facilitate recovery of social security payments due in illegal work cases.
October 30, 1991	Decree reinforces the role of judicial authorities within departmental commissions and associates more fully socio-professional representatives in department-level campaigns against illegal work.
December 31, 1991	Major new law overhauls and brings together legislation concerning illegal employment.
January 24, 1992	Prime Minister authorizes departmental prefects (the chief governmental authority) to sign partnership agreements with unions and employer organizations to reduce illegal employment.
December 31, 1992	Experimental requirement obligating employers to declare their employment intentions prior to actual employment of an employee made a general requirement for all employers.
March 29, 1993	Decree authorizes social security organisms to use a national identification system to verify whether employers have complied with the obligation to declare all employees prior to the start of employment.
1994	Creation of DICCILEC, the “Central Direction for Control of Immigration and Combatting Illegal Employment” in the Ministry of Interior.
March 11, 1997	Creation of DILTI, the “Inter-ministry Delegation to Combat Illegal Employment”. Also adoption of a new law which substituted dissimulated work for clandestine work so as to avoid conflation of illegal employment with illegal alien employment and unreported work. Henceforth, failure to declare employees to social security and other required authorities in and of itself constitutes an infraction. It is no longer necessary to demonstrate cumulative (repeated) failure to do so. The law also made it possible to charge the Office of International Migration administrative for illegal employment of aliens fine to clients of certain employers.

**Sources:** Gervaise Hue, *Légalité, efficacité et travail clandestine*, March, 1990, pp. 4-7; and Claude-Valentin Marie "Evolution de la réglementation en matière de lutte contre le travail clandestin et les traffics de main-d'oeuvre et l'emploi non-déclaré," DILTI, La lutte contre le travail illégal, Paris, Documentation Française, 1998.

### **Germany: Enforcement of employers' sanctions 1993-98**

Germany conducts more labour market enforcement than most other industrial democracies. Between 1993 and 1998, German labour market inspectors began an average 526,000 investigations of illegal labour market activities. The number of investigations fell between 1993 and 1998, but the percentage of inspections that resulted in criminal referrals increased, from 8 per cent in 1993-94 to 15 per cent in 1998. The percentage of investigations that resulted in fines and warnings remained in the 50 to 60 per cent range.

Most German labour market cases involve "Black work," such as Germans and legal foreigners working while drawing unemployment insurance taxes or employers and workers not paying required payroll taxes. However, the share of all cases involving employers or illegal foreign workers rose in the 1990s, to about 75,000 in 1998. In about one-seventh of the illegal foreign worker cases, inspectors recommended criminal penalties; in half, inspectors recommended fines or warnings. Fines for illegal foreign worker cases were higher than average: these cases were 12 to 17 per cent of all investigations, but accounted for about one fourth of the fines assessed.



## Bibliography

- Assemblée Nationale. 1996. *Immigration clandestine et séjour irrégulier d'étrangers en France*. Rapport 2699. Paris.
- Beauftragte der Bundesregierung für Ausländerfragen. 1999. *Daten und Fakten zur Ausländersituation*. Bonn. June.
- Böhning, W. R. 1984. *Studies in International Labour Migration*. London. Macmillan.
- Böhning, W. R. 1972. *The migration of workers in the United Kingdom and the European Community*. Oxford University Press for the Institute of Race Relations.
- Center for Immigration Studies. 1999. *US employers fined by the INS for sanctions violations*. [www.cis.org/search.html](http://www.cis.org/search.html), New York, 1987-1997.
- Collier, Robert and Louis Freedberg. 1998. *Workplace called key to immigration control*. San Francisco Chronicle, October.
- Cornelius, Wayne A., Philip L. Martin and James F. Hollifield. Eds. 1994. *Controlling immigration: A global perspective*. Stanford, CA. Stanford University Press.
- Cornelius, Wayne A. 1983. "Simpson-Mazzoli vs. the realities of Mexican immigration", in Wayne A. Cornelius and Ricardo Anzaldúa Montoya. Eds. *America's new immigration law: Origins, rationales, and potential consequences*. San Diego. Center for US-Mexican Studies, University of California, San Diego, Monograph Series 11.
- DILTI. Délégation interministérielle à la lutte contre le travail illégal. 1997. *La verbalisation du travail illégal: Les chiffres de l'année 1995*. Paris. Ministère de l'emploi et de la solidarité.
- DILTI. 1998. *La lutte contre le travail illégal: Rapport d'activité 1997*, Paris. La Documentation Française.
- General Accounting Office. 1999. *Illegal aliens. Significant obstacles to reducing unauthorized alien employment exist*. April. Washington. GAO/GGD 99-33.
- General Accounting Office. 1999. *Illegal aliens: Fraudulent documents undermining the effectiveness of the employment verification system*. July. Washington. T-GGD/HEHS-99-175.
- General Accounting Office. 1990. *Immigration reform: Employer sanctions and the question of discrimination*. March. Washington. GAO/GGD-90-62.
- Herbert, Ulrich. 1997. *Hitler's foreign workers: Enforced foreign labour in Germany under the Third Reich*. New York. Cambridge University Press.
- Hönekopp, Elmar (ed.). 1987. *Aspekte der Ausländerbeschäftigung in der BRD*. Nürnberg. Bundesanstalt für Arbeit. Institut für Arbeitsmarkt- und Berufsforschung. 114 p.

Hönekopp, Elmar. 1997. "The New Labour Migration as an Instrument of German Foreign Policy". 165-182, in Münz, Rainer and Myron Weiner (eds.). *Migrants, refugees, and foreign policy: US and German policies toward countries of origin*. Providence, RI. Berghahn Books.

Lutz, Vera. 1963. *Foreign workers and domestic wage levels with an illustration from the Swiss case*. Banca Nazionale del Lavoro. Rome. Quarterly Review. Vol. XVI. Nos. 64-67

Marie, Claude-Valentin. 1997. *Les Etats membres de l'UE face a l'immigration en 1994: montée de l'intolérance et rigueur accrue des politiques de control*. Luxembourg. EU.

Migration News. 1998. <http://migration.ucdavis.edu> Monthly.

Miller, Mark J., 1995. *Deterring illegal migration in Europe and the United States and update*

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Miller, Mark J., 1995. *Employer sanctions in France: From the campaign against illegal alien employment to the campaign against illegal work*. Washington, DC. Commission on Immigration Reform.

Miller, Mark J., 1986. *Employer sanctions in Western Europe*. New York. Center for Migration Studies. Occasional Paper.

OECD. 1999. Trends in International Migration. Paris. SOPEMI. October. [www.oecd.org](http://www.oecd.org)

Schiller, Günter, Drettakis, Emmanuel, Böhning, W.R. 1967. *Ausländische Arbeitnehmer und*

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Servan-Schreiber, Jean Jacques. 1988. *The American Challenge*. New York. Atheneum. First

US Department of Justice. Office of the Special Counsel for Immigration Related Employment Practices. Washington. <http://www.usdoj.gov/crt/osc/>

Weil, Patrick. 1997. *Mission d'étude des législations de la nationalité et de l'immigration*, Paris. La Documentation Française.

Weil, Patrick. 1997. *The state matters: Immigration control in developed countries*. New York. United Nations.

**Labour Market and  
Sanctions  
Enforcement in**

**Germany: 1993-98**

	1993	1994	1995	1996	1997	1998	Average
All Cases (1)	631,875	620,296	511,777	472,671	476,477	445,536	526,439
Criminal Cases	48,281	46,722	47,023	56,364	62,102	64,663	54,193
Fines and Warnings	325,792	355,503	302,986	261,757	270,280	269,101	297,570
Fines Assessed (DM mil)	56	72	93	110	173	225	122
Fines Collected (DM mil)	31	36	42	43	51	56	43
Collections/Per cent of Assess	55%	49%	46%	39%	30%	25%	41%
Illegal Foreign Worker Cases (2)	75,311	78,345	79,554	86,792	78,551	75,390	78,991
Criminal Cases	5,884	5,281	8,466	9,147	11,484	10,597	8,477
Fines and Warnings	30,736	36,876	42,402	46,160	43,157	37,740	39,512
Fines Assessed (DM mil)	15	24	33	37	42	50	34

(1) Ermittlungsverfahren-Bussgeldverfahren, Strafverfahren aufgegriffen

(2) Illegale Auslaenderbeschaeftigung-employers and workers





**Appendix 3.**

**United States: Form I-9**





**INTERNATIONAL MIGRATION PAPERS**  
**CAHIERS DE MIGRATIONS INTERNATIONALES**  
**ESTUDIOS SOBRE MIGRACIONES INTERNACIONALES**

1. Adjustments to labour shortages and foreign workers in the Republic of Korea  
M.I. Abella; Y.B. Park; W.R. Böhning, 1995.
2. Consumption and investments from migrants' remittances in the South Pacific  
Richard P.C. Brown, 1995.
3. Training abroad: German and Japanese schemes for workers from transition economies or developing countries,  
Christiane Kuptsch; Nana Oishi, 1995.
4. Discrimination against migrant workers and ethnic minorities in access to employment in the Netherlands  
F. Bovenkerk; M.J.I. Gras; D. Ramsøedh, with the assistance of M. Dankoor and A. Havelaar, 1995.
5. Orderly international migration of workers and incentives to stay - options for emigration countries  
M.I. Abella; K.J. Lönnroth, 1995.
6. From outlawing discrimination to promoting equality: Canada's experience with anti-discrimination legislation  
C. Ventura, 1995.
- 7 G. Arbeitsmarkt-Diskriminierung gegenüber ausländischen Arbeitnehmern in Deutschland  
A. Goldberg; D. Mourinho; U. Kulke, 1995.
- 7 E. Labour market discrimination against foreign workers in Germany  
A. Goldberg; D. Mourinho; U. Kulke, 1996.
- 8 E. The integration of migrant workers in the labour market: Policies and their impact  
W.R. Böhning; R. Zegers de Beijl, 1995.
- 8 F. L'intégration des travailleurs migrants sur le marché du travail: Les politiques et leur impact

- W.R. Böhning; R. Zegers de Beijl, 1996.
- 9 S.** La discriminación laboral a los trabajadores inmigrantes en España  
Colectivo IOE: M.A. de Prada; W. Actis; C. Pereda, y R. Pérez Molina, 1995.
- 9 E.** Labour market discrimination against migrant workers in Spain  
Colectivo IOE: M.A. de Prada; W. Actis; C. Pereda, y R. Pérez Molina, 1996.
- 10.** The jobs and effects of migrant workers in Northern America - Three essays.  
J. Samuel; P.L. Martin; J.E. Taylor, 1995.
- 11.** The jobs and effects of migrant workers in Italy - Three essays.  
L. Frey; R. Livraghi; A. Venturini; A. Righi; L. Tronti, 1996.
- 12.** Discrimination against racial/ethnic minorities in access to employment in the United States: Empirical findings from situation testing  
M. Bendick, Jr., 1996.
- 13.** Employeur des travailleurs étrangers: Manuel sur les politiques et les procédures plus particulièrement applicables aux pays à bas ou moyen revenus  
W.R. Böhning, 1996.
- 14.** Protecting (im)migrants and ethnic minorities from discrimination in employment: Finnish and Swedish experiences  
K. Vuori, with the assistance of R. Zegers de Beijl, 1996.
- 15F.** Les migrations en provenance du Maghreb et la pression migratoire: Situation actuelle et prévisions  
D. Giubilaro, 1997
- 15E.** Migration from the Maghreb and migration pressures: Current situation and future prospects  
D. Giubilaro, 1997
- 16.** The documentation and evaluation of anti-discrimination training activities in the Netherlands  
J.P. Abell; A.E. Havelaar; M.M. Dankoor, 1997
- 17.** Global nations. The impact of globalization on international migration  
P. Stalker, 1997

- 18.** Anti-discrimination training activities in Finland  
K. Vuori, 1997
- 19.** Emigration pressures and structural change. Case study of the Philippines  
A. Saith, 1997
- 20.** Emigration pressures and structural change. Case study of Indonesia  
D. Nayyar, 1997
- 21.** The evaluation of anti-discrimination training activities in the United Kingdom  
P. Taylor; D. Powell; J. Wrench, 1997
- 22.** Pratiques de formations antidiscriminatoires en Belgique  
F. Castelain-Kinet; S. Bouquin; H. Delagrance; T. Denutte, 1998
- 23E.** Discrimination in access to employment on grounds of foreign origin: the case of Belgium  
P. Arrijn; S. Feld; A. Nayer, 1998
- 23F.** La discrimination à l'accès à l'emploi en raison de l'origine étrangère : le cas de la Belgique  
P. Arrijn; S. Feld; A. Nayer, 1998
- 24.** Labour immigration and integration in low- and middle-income countries: Towards an evaluation of the effectiveness of migration policies  
J. Doomernik, 1998
- 25.** Protecting migrants and ethnic minorities from discrimination in employment: the Danish experience  
N.-E. Hansen, I. McClure, 1998
- 26.** Illegal migration and employment in Russia  
Eugene Krassinets, 1998
- 27.** The effectiveness of integration policies towards immigrants and their descendants in France, Germany and The Netherlands  
Jeroen Doomernik, 1998
- 28.** Approche juridique de la discrimination à l'accès à l'emploi en Belgique en raison de l'origine étrangère  
B. Smeesters, sous la direction de A. Nayer, 1999

29. The documentation and evaluation of anti-discrimination training in the United States  
M. Bendick, Jr., M.L. Egan, S. Lofhjelm, 1999
30. Illegal labour migration and employment in Hungary  
J. Juhász with contributions from M. Cosmeanu; I. Ramond; J. Gmitra, A. Bácskai, 1999.
31. Foreign labour in Lithuania: Immigration, employment and illegal work  
A. Sipaviciene, in cooperation with V. Kanopiene, 1999.
32. Legal and illegal labour migration in the Czech Republic: Background and current trends. Milada Horáková, 2000.
33. Migrant labour - An annotated bibliography  
R. Chen; M. Madamba, 2000.
34. Settlement and integration policies towards immigrants and their descendants in Sweden  
Charles Westin, 2000.
35. United States policies for admission of professional and technical workers: Objectives and outcomes  
Philip Martin, Richard Chen and Mark Madamba, 2000.