



LEGAL OR ILLEGAL?

*The state has weighed in on illegal aliens to accompany the existing federal law.
Is it legal to rent to illegal aliens?*

ONE OF THE HOTTEST political topics in this election season has been how to deal with illegal aliens. The politicians and governments continue to grapple with the issue. Well, the state has now also weighed in on the issue.

Over the last few months, there have been two developments in Texas. In the last legislative session, the state legislature adopted a state law (House Bill 11) prohibiting the harboring of illegal aliens. In January, a lawsuit was filed against the state of Texas in the federal district court in San Antonio challenging the constitutionality of the new Texas law.

The suit, filed by an attorney with the Mexican American Legal Defense and Education Fund, states that when Governor Abbott signed HB 11 into law, he stated "Texas will not sit idly by while the federal government fails to do its job and secure the border." The suit raises concerns over how Texas will enforce this law.

The New State Law

The new law, which took effect September 1, 2015, amends the Texas Penal Code and provides that:

A person commits an offense if the person, with the intent to obtain a pecuniary benefit, knowingly . . . encourages or induces a person to enter or remain in this country in violation of federal law by concealing, harboring, or shielding that person from detection.

Federal Law

Federal law provides:

Any person who knowingly or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation . . . shall be punished as provided [elsewhere in the law].

What is "Harboring"?

We now have a state law to accompany the existing federal law making it illegal for a person to harbor illegal aliens. This begs the question: Is it illegal to rent to illegal aliens?

As a general rule, it is not a crime for a removable alien to remain present in the United States. In *Villas at Parkside Partners v. City of Farmers Branch*, the Fifth Circuit (the court of appeals governing federal cases in Texas) explained that illegal aliens, while classified as persons removable from the United States, are not necessarily evading federal detection and may need a reliable address for the federal government to enforce the removal process.

The court stated that federal law not only contemplates a non-citizen's residence in the United States until potential deportation, but also requires the non-citizen to provide a reliable address to the federal government to guarantee and speed the removal process. The court found that a city's blanket prohibition on renting to illegal non-citizens was an obstruction of the goal of bringing potentially removable non-citizens to the attention of the federal authorities.

In *Lozano v. City of Hazleton*, the Third Circuit (a Pennsylvania case) clarified that: "*renting an apartment in the normal course of business is not, without more conduct that prevents the government from detecting an alien's unlawful presence. Thus, it is highly unlikely that renting an apartment to an unauthorized alien would be sufficient to constitute harboring in violation of the [Immigration and Nationality Act]*"

Although the Supreme Court vacated this judgment and remanded it back to the Court of Appeals for further consideration, the Supreme Court did not disturb the court's reasoning on the question of what conduct constitutes harboring.

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In the Farmers Branch case, the Fifth Circuit has also specifically stated that a landlord who knowingly continues to lease to a renter whose residential occupancy license has been revoked does not rise to the level of someone who "hides" the illegal alien from detection. This is because the court interpreted the federal statute's phrase "harbor, shield or conceal" to imply a requirement that "something is being hidden from detection."

Other courts have held that evidence of concealment is not necessary; however, courts have been unwilling to convict a landlord of "harboring" merely because the landlord rented an apartment to someone he knew, or had reason to know, was not legally in the United States without other evidence.

Convictions

Cases where persons are successfully convicted of harboring illegal aliens involve situations where individuals:

- (i) fail to make necessary state and federal employment-related disclosures;
- (ii) are involved in smuggling undocumented individuals into the country;
- (iii) attempt to warn undocumented individuals of the presence of law enforcement authorities; or
- (iv) provide specific assistance in obtaining false documents.

In *United States v. Singh*, the Fifth Circuit found a defendant may have been guilty of harboring when he employed undocumented individuals in his convenience store,

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and those individuals lived in a back room of the store. In *United States v. Sanchez*, the Eighth Circuit (an Illinois case) held a defendant guilty of harboring because she and her husband met with illegal aliens, were told by the aliens that they were illegal, and in return informed the aliens that they could provide immigration papers for them and pay to rent an apartment for them.

What You Can Do

For the most part, as long as you have sound policies and procedures with respect to your application and rental criteria, you should not have a problem with allegations under the harboring statute. Obviously, you could go as far as confirming citizen status and, if the applicant is not a U.S. citizen, using the standard TAA Supplemental Rental Application for Non-U.S. Citizens, which will allow you to confirm the basis upon which an applicant is here legally.

For a number of reasons, it is beneficial to confirm the identification of applicants with at least a government-issued identification card such as a driver's license. By relying on a government-issued identification card as evidence that an application was authorized to be in this country, it stands to reason that the government would be hard pressed to allege that you knowingly rented to (much less "harbored") illegal aliens.

By taking some common sense precautions, you should be able to avoid unnecessary problems. 

Want to know more about legal issues affecting the apartment industry? Come see HAA General Counsel Howard Bookstaff live on Friday, April 29 from 11:30 a.m. to 1 p.m. for HAA's first **It's the Law Luncheon** of 2016. See the HAA calendar at www.haaonline.org for details.



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