



IMMIGRATION

Working in the Shadows

The government rarely prosecutes employers for hiring undocumented workers who provide their bosses with large rewards, and little risk

➤ THE CAMPAIGN AGAINST undocumented laborers in the U.S. escalated in August as federal agents with Immigration and Customs Enforcement (ICE) raided seven Mississippi poultry processing facilities, sweeping up 680 people on suspicion of unlawful status—the most severe crackdown in over a decade.

Scenes of children crying after school, begging for the return of their parents while immigration officials insisted they were just doing their job, presented a jarring portrait to many Americans.

The outcry was immediate, and

though more than 300 people were temporarily released from detention, the operation served as a reminder of how important these workers are in their communities and how integral the undocumented workforce—which often operates in the shadows—is to the U.S. labor market at large.

But while undocumented employees are frequently terrified of law enforcement action, the companies that profit from their labor have largely escaped scrutiny for their role in the dysfunctional

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immigration system. For companies that hire illegal immigrants, knowingly or not, prosecutions are few and penalties are low. And everyone involved in the system knows it.

TARGETS ON THEIR BACK

When the federal government pursues violations related to undocumented labor, it is workers, and not the companies, who bear the brunt of the enforcement action.

According to Justice Department data, obtained by Syracuse University's research center Transactional Records Access Clearinghouse (TRAC),

HARD LABOR Migrant workers, left, often live in property owned or run by their employers. This entangles bosses in the lives of undocumented employees in ways that complicate plausible deniability.

prosecutions of employers are exceedingly rare. Only 11 people were prosecuted for knowingly employing undocumented workers in the 12 months before March 2019, and no corporate entities were targeted.

The department, however, emphasizes that the lag time between arrests and prosecutions can make it difficult to draw conclusions from the data.

“Law enforcement operations can take time. ICE has publicly stated that it has initiated worksite audits and inspections at thousands of businesses across the country over the last couple of years,” a spokesperson said. “Oftentimes, those audits and inspections are the beginning of a lengthy process that could potentially lead to criminal charges.”

To be sure, the differences between how laws are enforced against companies versus undocumented individuals are complex.

For companies, employing an undocumented worker is not enough to generate criminal liability. Among other criteria, the hiring of undocumented employees has to be done knowingly, which is complicated by the fact that many undocumented workers present fraudulent documents.

While the process for investigating workers can be swift—often involving sweeps, lineups and mass detentions—the process for employers is more protracted.

“What generally happens is that these employers are issued notices of inspection,” Allen Orr, an attorney who represents companies in immigration matters, said. “It’s a paper chase; it’s not a raid. It’s a long administrative process. The employer gets back a

notice of suspect documents, and then the employer deals with employees on site by dismissing them. If there’s constructive knowledge found by the company, then they are fined heavily.”

Fines appear to be the government’s preferred method of handling violations of immigration labor law by businesses. From 2009 to 2014, the number of fines issued by ICE in civil cases grew by more than 1,200 percent, according to a report from the Congressional Research Service, with hundreds of fines yielding over \$16.2 million in penalties in 2014.

“You usually see large fines” in cases of significant violations, said Orr, “but very rarely do you see people go to jail.”

For Jay Gervasi, a workers’ compensation attorney who frequently represents migrant employees in North Carolina, many of these cases are merely the result of an employer looking the other way when hiring an undocumented worker.

“In the vast majority of cases I’ve handled in which an undocumented worker is injured, the employers are fully aware that everyone there was undocumented,” he said. “They are happy to use the undocumented workers, and sometimes they’re cynical enough to use their undocumented status to thwart their workers’ compensation claims. It does hang over people.”

This awareness, however, may not reach all the way to the top. In many cases, the employee who is aware of a worker’s undocumented status is a lower-level human resources

representative, so broader attempts to prosecute company executives or the corporation are seldom possible.

“The way justice is administered is the same way it’s administered in every other area of law,” Orr said. “The lower-level person, the drug dealer, for example, he goes to jail. The distributor doesn’t go to jail. He gets fined.”

But Bryan Cox, a spokesman for ICE, said the idea the agency doesn’t prioritize cases against employers “could not be more inaccurate.”

“ICE Homeland Security Investigations (HSI) is equally focused in its worksite enforcement efforts on those who unlawfully seek employment as well as the employers who knowingly hire them,” Cox said, highlighting the case of James Brantley, a Tennessee slaughterhouse owner who was sentenced to 18 months in prison in July for hiring undocumented workers and avoiding payroll taxes by paying them cash for 20 years.

Cox also pointed to the prosecution of 72 managers during the 2018 financial year, who were charged with more crimes than those counted by TRAC for knowingly employing undocumented workers. But while worksite arrests, including for being illegally present in the U.S., were multiple times higher last year than in 2017, manager indictments hardly budged.

A former top HSI official, who spoke on the condition of anonymity in order to be candid about his experience, said that immigration enforcement in employment has been lumbering forward for years, enabled by a lack of reform at the federal level.

“It works today the same way that it did under the Bush and Obama administrations,” the immigration official, who worked under both presidents, said. “It doesn’t matter how great your case is. We presented cases to the Department of Justice, and it’s

“The investment is hardly an act of charity.”

BENJAMIN LOWY/GETTY

up to them to take up prosecution. HSI can do the greatest criminal investigation there is, but if it's not meeting the Department of Justice's prosecutorial priorities, then it's going to sit on the back burner."

A current law enforcement official who works with these prosecutors also acknowledged the challenges they face.

"Some federal prosecutors have expressed frustration about the statutory bar required to meet in order to prosecute employers who are intent on evading immigration law," they said.

AGRICULTURAL BACKBONE

The disparities and complexities with criminal prosecution are only one part of the puzzle.

As the number of undocumented immigrants living in the U.S. has surged in recent decades—to 10.5 million in 2017, according to the Pew Research Center—federal lawmakers have failed to comprehensively overhaul the immigration system in a way that accounts for those already living and working here without paperwork.

Nearly all of the experts who spoke with *Newsweek*, regardless of inclination towards immigration, described the current system as fundamentally flawed, if not completely broken.

While the system has failed to change around them, employers have felt an acute demand for workers in sectors that involve manual labor, especially agriculture. Just under 22 million full-time and part-time jobs were involved in the agriculture and food business in 2017, totalling 11 percent of all U.S. employment.

"The law of supply and demand generally outweighs the statutory law, and what we're seeing here is that policy-makers and Congress are all perfectly okay with having this black-market system of undocumented labor to keep American business thriving," Jeremy

McKinney, an executive committee member of the American Immigration Lawyers Association, said.

According to a 2018 report prepared for the Department of Labor, 49 percent of all U.S. crop workers in 2015 and 2016 were immigrants who lacked work authorization.

Employment of such workers, who in many cases leave their families and support networks behind, often requires employers to provide basic social services, further entangling them in the lives of their undocumented employees in ways that complicate plausible deniability.

Fifteen percent of farmworkers reported living on property owned or administered by their employer, the same report found. Migrant farmworkers, defined as someone who traveled more than 75 miles to find work, were nearly three times as likely to live in employer-provided housing for free.

"Employers will house them, provide transportation and really facilitate the undocumented workforce's ability to work," the former HSI official said. "They're underpaid, overworked and in many cases deductions are being made from their paychecks so they're left with little disposable income."

But the investment is hardly an act of charity. When asked whether or not undocumented work was part of the business model of agriculture, the official replied, "absolutely."

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HOLDING PATTERN ICE raids multiple Mississippi plants on August 7, leading to officers detaining 680 undocumented workers, in the biggest raid in a decade.

with ICE to provide testimony about their employer's potential complicity in exchange for some consideration of lawful status. But many don't view the administration as acting in good faith. In fact, ICE recently revised guidance "to make it easier to deport individuals" who decide to cooperate as victims of crime in other matters, McKinney said.

"These individuals stepped forward to cooperate with the authorities to report a crime, and they're supposed to get protection under the law, and they're not. Why is that?" he asked. "It's because the administration changed. When it comes to employment, we're trying to provide HSI with witnesses, but I've only been able to get one person to come forward because they're afraid that they're going to be coming out of the shadows and putting themselves out there, only to be arrested."

Suspicion and paranoia quickly spread after the latest raids, destabilizing an already fraught situation. McGowan said that people are "hearing rumors about ICE vehicles" on patrol and now residents "are just on high alert."

"There's definitely a concern that more raids will occur soon," McGowan said. "People have expressed that they're sort of living in apprehension all the time. Part of it is just the unknown. That's the biggest thing, the unknown."

But this fear, it seems, is still mainly borne by the immigrant workers who operate the plants and tend the farms. Their employers are able to carry on, buoyed by a long, winding justice system that affords them a due process that can seem elusive to those they once hired. ■

BROKEN SYSTEM, BROKEN PROMISES

McKinney, the immigration lawyer, highlighted the perceived unfairness of a system that seems to entrap employees, but rarely those complicit in their employment.

"All the stakeholders in this system understand that the American immigration system is broken, and they understand that the enforcement side is broken when it comes to workers and employers," McKinney said. "But a lot of times they don't enforce the law against employers, because the view is that, 'Oh, the system doesn't work, the process is too long and the fines are too small.' They come to that conclusion when it comes to employers, and yet they're completely willing to take a broken immigration system and apply it with abandon against workers. I don't understand that."

The former HSI official echoed this sentiment, opining that "many of

the folks at HSI would say what we've got is not a sufficient deterrent, and I don't think that the current administration thinks so either."

While the government sorts out how to resolve the dueling pressures of the economy and immigration law, undocumented farmworkers who provide an essential service to American consumers are living on edge.

Many immigrants whose family members were swept up in the Mississippi raids are still looking for their loved ones, according to Amelia McGowan, a senior attorney at the Mississippi Center for Justice who helped coordinate legal representation for impacted families.

The raids resurfaced old fears about ICE worksite actions that were triggered most significantly in 2006, when the agency conducted worksite raids of six Swift & Company meat-packing plants in the Midwest, the