

Implementation of the 2010 Arizona Immigration Laws Statutory Provisions for Peace Officers Arizona POST - June 2010

This handout contains the initial analysis of the statute for purposes of implementing SB 1070. Officers must keep in mind that legislative changes in the statutes or judicial interpretations of the statutes may occur. Please stay current on such developments.

SB1070 and HB2162 added the following new statutes to Arizona Revised Statutes:

- A.R.S. § 11-1051 Cooperation and assistance in enforcement of immigration laws; indemnification
- A.R.S. § 13-1509 Willful failure to complete or carry an alien registration document; assessment; exception; authenticated records
- A.R.S. § 13-2928 Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definition
- A.R.S. § 13-2929 Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens; vehicle impoundment; exception

The two bills also result in revisions to the following statutes:

- A.R.S. § 13-2319 Smuggling
- A.R.S. § 13-3883 Arrest by officer without warrant
- A.R.S. § 23-212 Knowingly employing unauthorized aliens
- A.R.S. § 23-212.01 Intentionally employing unauthorized aliens
- A.R.S. § 23-214 Verification of employment eligibility
- A.R.S. § 28-3511 Removal and immobilization or impoundment of vehicle
- A.R.S. § 41-1724 Gang and immigration intelligence team enforcement mission fund

A.R.S. § 11-1051 Cooperation and assistance in enforcement of immigration laws; indemnification

Summary

This statute is the core of the new legislation. It prohibits any official or agency of the state or its political subdivisions from limiting or restricting the enforcement of federal immigration laws to “less than the full extent permitted by federal law.” A.R.S. § 11-1051(A).

The statute applies when a law enforcement officer makes a lawful stop, detention or arrest of a person, and reasonable suspicion exists to believe the person is both an alien and unlawfully present in the United States. The officer is required to make a reasonable attempt, when practicable, to determine the immigration status of the person who is stopped. There is an exception if the officer believes that the determination may hinder or obstruct an investigation. Persons who are arrested may not be released unless their immigration status is verified by Immigrations and Customs Enforcement (ICE), Customs and Border Protection (CBP), or a 287g certified officer. A.R.S. § 11-1051(B).

Importantly, the statute also authorizes any legal resident of this state to file suit to challenge any official or agency that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws. Penalties may amount to \$500 to \$5000 per day. A.R.S. § 11-1051(H).

From a law enforcement perspective, A.R.S. § 11-1051 affects the work done by officers in two situations:

1. When a law enforcement officer has made a lawful stop, detention or arrest of a person for a crime or offense based on reasonable suspicion or probable cause and subsequently develops separate reasonable suspicion to believe the person is an alien and is unlawfully present in the United States.
2. When an officer makes an arrest requiring determination of immigration status.

The following is a look at A.R.S. § 11-1051, provision by provision. The specific statutory language is quoted in italics.

A. No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.

B. For any lawful stop, detention or arrest... in the enforcement of any other law or ordinance of a county, city or town or this state...

This section applies to suspected violators and not to victims or witnesses. The stop, detention or arrest must be based on reasonable suspicion or probable cause of a criminal or civil violation or the violation of a local ordinance.

An officer has the authority to have a voluntary contact with any person without implicating constitutional rights. This statute does not expand or restrict that authority in the context of immigration enforcement. However, officers must understand that actions motivated by race or national origin will be subject to close scrutiny under the law.

...where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States...

The focus here is on reasonable suspicion that a person is an alien and unlawfully present in the U.S., not reasonable suspicion of criminal activity. Officers must be able to list the specific facts and circumstances that lead them to suspect that the person is unlawfully present. It is the totality of the circumstances that determines whether there is reasonable suspicion.

In all lawful stops in which there is reasonable suspicion/probable cause of a civil traffic or criminal violation (includes drivers of vehicles stopped for traffic violations; does not include passengers unless they have committed a separate violation), the first step the officer should take is to ask for identification. If the person presents presumptive identification (see discussion below), the issue of whether he or she may be unlawfully present in the United States is resolved and no further immigration inquiry is necessary in the absence of additional facts or an arrest requiring verification.

In establishing whether reasonable suspicion exists that the person is an alien and unlawfully present, the officer may consider all relevant facts and circumstances, including:

FACTORS WHICH MAY BE CONSIDERED, AMONG OTHERS, IN DEVELOPING REASONABLE SUSPICION OF UNLAWFUL PRESENCE

- Lack of identification (if otherwise required by law)
- Possession of foreign identification
- Flight and/or preparation for flight
- Engaging in evasive maneuvers, in vehicle, on foot, etc.
- Voluntary statements by the person regarding his or her citizenship or unlawful presence
Note that if the person is in custody for purposes of *Miranda*, he or she may not be questioned about immigration status until after the reading and waiver of *Miranda* rights.
- Foreign vehicle registration
- Counter-surveillance or lookout activity
- In company of other unlawfully present aliens
- Location, including for example:

A place where unlawfully present aliens are known to congregate looking for work

A location known for human smuggling or known smuggling routes

- Traveling in tandem
- Vehicle is overcrowded or rides heavily
- Passengers in vehicle attempt to hide or avoid detection
- Prior information about the person
- Inability to provide his or her residential address
- Claim of not knowing others in same vehicle or at same location
- Providing inconsistent or illogical information
- Dress
- Demeanor – for example, unusual or unexplained nervousness, erratic behavior, refusal to make eye contact
- Significant difficulty communicating in English

In the context of applying these new laws, reasonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion that the person is an unlawfully present alien. The requirement of particularized suspicion encompasses two elements. First, the assessment must be based upon the totality of the circumstances. Second, that assessment must arouse a reasonable suspicion that the particular person is unlawfully present in the United States.

Officers shall not consider race or color in determining reasonable suspicion that a person is unlawfully present in the United States. If an officer does not have reasonable suspicion without reliance on race or color, then reasonable suspicion does not exist.

...a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation...

If reasonable suspicion of unlawful presence exists and it is practicable (see below), call ICE, CBP or a 287g certified officer to determine the immigration status of the person. If ICE, CBP or a 287g certified officer advises that a person is unlawfully in the U.S., officers should ask whether there is any record that the person has ever completed an alien registration document and whether the person has any other authorization from the federal government to remain in the United States. Officers should then ask the person for his or her alien registration document. If the person does not produce an alien registration document, or ICE, CBP, or a 287g certified officer advises the officer that there is no record that the person has ever completed such a document and that the person is not otherwise authorized to remain in the U.S., the officer may consider this information in an investigation for a violation of A.R.S. § 13-1509 (see below).

...when practicable...

Unless otherwise directed by a supervisor for operational reasons, an officer may decide whether it is practicable at the time of the incident to inquire about immigration status. The officer may wish to consider:

- Call load at the time
- Available personnel on scene
- Location
- Available back-up
- Criticality of incident and of other present duties
- Ability to contact ICE, CBP, or a 287g certified officer
- Availability of ICE, CBP, or a 287g certified officer

...except if the determination may hinder or obstruct an investigation...

Unless otherwise directed by a supervisor for operational reasons, an officer may decide whether the determination may hinder or obstruct an investigation. The officer may wish to consider when or whether to investigate immigration status in light of the need for suspect, victim and witness cooperation in an investigation, for example, complex investigations of money laundering, human trafficking, drug smuggling or other situations that require significant cooperation of those involved. In each case, the individual officer must make the determination of whether inquiring into immigration status during the investigative stage will obstruct or hinder an investigation.

Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 USC 1373(c).

There are multiple ways to read this requirement. Among them, in addition to others:

- Some read it to apply to every person arrested.
- Some read it to apply to every person arrested where reasonable suspicion exists that the person is an alien and unlawfully present.

Officers should follow the direction given by their agency in the implementation of this provision. The arrestee may not be released unless immigration status is verified by ICE, CBP, or a 287g certified officer. The ICE Law Enforcement Support Center (LESC) number in Vermont is 802-872-6020. It is recommended to use the Vermont phone number as the primary line although local ICE numbers provided for law enforcement use are also appropriate. These phone numbers are 24-hours a day, for official law enforcement business only, and they are NOT for dissemination to the general public. The general public has a different phone number for customer service.

Officers should be familiar with their agency's policy on whether to release or book in these situations.

...a law enforcement official ...may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution

Generally, the only permitted consideration of race, color or national origin in law enforcement is when it is included in a specific suspect description. In the immigration context, the Ninth Circuit Court of Appeals has held that Hispanic appearance is not a relevant factor for immigration enforcement in the border states, including Arizona. However, in determining whether a person is an alien who is unlawfully present in the United States, the country of birth may be one factor that, in combination with others, may lead to a determination of reasonable suspicion of unlawful presence.

A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

- 1. A valid Arizona driver license.*
- 2. A valid Arizona nonoperating identification license.*
- 3. A valid tribal enrollment card or other form of tribal identification.*
- 4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.*

A list of the currently known forms of identification that meet the subsection four requirements is included as a separate handout in this training. That list is up to date as of June 15, 2010, however it is not an all-inclusive or comprehensive list.

D. Notwithstanding any other law, a law enforcement agency may securely transport an alien who the agency has received verification is unlawfully present...to a federal facility in this state...

This section permits the transport of aliens who are unlawfully present in the United States to ICE. It is clear under the law that a person may be transported to ICE if the person is under arrest for a state or local criminal violation or if ICE has indicated the person is in violation of federal criminal law. Officers should be aware, however, that the Ninth Circuit Court of Appeals has held that local law enforcement may not enforce federal civil violations. If the person is not under arrest and ICE requests transport solely for a federal civil violation, officers should consult their agency's policy on this issue.

E. See above – an alien's immigration status may be determined by ICE, CBP or a 287g certified officer.

F. Officials or agencies may not be prohibited or in any way restricted from sending, receiving or maintaining information relating to immigration status or exchanging that information with other agencies or officials for official purposes.

H - K. Any legal resident of the State may bring suit against an agency for implementing a policy that limits or restricts the enforcement of federal immigration laws. Awards in these suits include daily civil penalties, and may include attorney fees and costs. Officers are to be indemnified by their agency against reasonable costs and expenses, including attorneys fees, in connection with any suit related to this statute, unless the officer acts in bad faith.

A.R.S. § 13-1509 Willful failure to complete or carry an alien registration document.

A. In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 USC section 1304(e) or 1306 (a).

F. This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

The title of this statute is somewhat misleading. An officer may not arrest an alien who is authorized to be in the United States simply because he or she does not have immigration documents in his or her possession.

The statute permits the arrest of any person who is in violation of either of the following federal immigration statutes and who is not authorized to be present in the United States:

8 U.S.C. § 1304 (e) requires all registered aliens age 18 or older to carry, at all times, his or her certificate of alien registration or alien registration receipt card.

Elements of 8 U.S.C. § 1304(e)

1. An alien
2. Who registers
3. Who is 18 years of age or older
4. And fails to carry registration or registration card

An arrest under § 13-1509 for a violation of this statute may only be made when the officer encounters an alien who has registered but who has remained in the country beyond the time or conditions authorized by their registration and who is not carrying his or her registration documents. For example, a person who comes into the country on a student visa which is now expired and who does not have that visa in his or her possession.

8 U.S.C. § 1306 (a) makes it a federal crime for an alien who is required to register and be fingerprinted to willfully fail to register or be fingerprinted. An alien is required to register if

the alien is 14 years of age or older, not registered and in the United States 30 days or longer. If the alien is under 14, the parent has the legal responsibility to register the child.

Elements of 8 U.S.C. § 1306 (a)

1. An alien
2. Who is 14 or older
3. In the U.S. more than 30 days
4. Willfully
5. Fails to register

An arrest under § 13-1509 requires evidence of each element.

Whenever ICE, CBP or a 287g certified officer advises that an alien is unlawfully in the U.S., officers should ask whether there is any record that the person has ever completed an alien registration document and whether the person has any other authorization from the federal government to remain in the United States. Officers should then ask the person for his or her alien registration document.

Officers may not consider race or color in the enforcement of this section, except as previously discussed.

Violation is a class 1 misdemeanor.

A.R.S. § 13-2319 Smuggling

This statute is revised to make it clear that, in the enforcement of this section, a peace officer may lawfully stop any person who is operating a motor vehicle if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law. This does not change Arizona law.

A.R.S. § 23-212 Knowingly employing unauthorized aliens

A.R.S. § 23-212.01 Intentionally employing unauthorized aliens

Each of these statutes is amended to include an affirmative defense that the employer was entrapped.

A.R.S. § 23-214 Verification of employment eligibility

This statute was amended to require that an employer keep the record of e-verification of employees for the duration of the employee's employment or a minimum of three years, whichever is longer.

A.R.S. § 13-2928 Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment

Three separate offenses are included within this statute. In order to prove any one of the subsections (A, B or C), an officer must provide proof of all the listed elements within that subsection:

A. Applies to a vehicle occupant

1. Stopping on a street, roadway or highway
2. To attempt to hire, or to hire and pick up passenger
3. For work at a different location
4. If the motor vehicle blocks or impedes the normal movement of traffic

Officers should note that this subsection applies to all persons, without regard to immigration status.

B. Applies to a worker getting hired on the street

1. Entering a motor vehicle
2. That is stopped on a street, roadway or highway
3. In order to be hired by an occupant of the vehicle
4. To be transported to work at a different location
5. If the motor vehicle blocks or impedes the normal movement of traffic

Officers should note that this subsection applies to all persons, without regard to immigration status.

C. Applies to a worker who is applying, soliciting, working

1. Is unlawfully present in the US
2. Is an unauthorized alien (does not have the legal right or authorization under federal law to work)
3. Knowingly applies for work, or solicits work in a public place, or performs work as an employee or independent contractor in this state

D. Officers may not consider race, color or national origin in the enforcement of this section except as previously discussed.

E. Immigration status is to be determined by ICE, CBP, or a 287g certified officer.

F. Class 1 misdemeanor

G. “Solicit” is defined as verbal communication or nonverbal communication that would indicate a willingness to be employed. “Unauthorized alien” is defined as an alien who does not have the legal right to work in the U.S. according to the federal government.

A.R.S. § 13-2929 Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens; vehicle impoundment

A. If a person is in violation of a criminal law and transports, conceals or invites as follows:

1. Transporting with knowledge
 - a. Transports or moves, or attempts to transport or move
 - b. An alien
 - c. In furtherance of the illegal presence of the alien
 - d. In a means of transportation
 - e. If the person knows or recklessly disregards that the alien has come to, entered or remained in the US in violation of law
2. Concealing with knowledge
 - a. Conceals, harbors or shields or attempts
 - b. An alien
 - c. From detection in any place
 - d. If the person knows or recklessly disregards that the alien has come to, entered or remained in the US in violation of law
3. Inviting
 - a. Encourages or induces
 - b. An alien
 - c. To come to or reside in this state
 - d. If the person knows or recklessly disregards that such coming to, entering or residing in this state is or will be in violation of law

A means of transportation used in the commission of this section is subject to impoundment under § 28-3511.

Officers may not consider race, color or national origin in the enforcement of this section except as previously discussed.

Exceptions: CPS workers, persons acting as first responders, ambulance attendants, EMT’s.

Immigration status is to be determined by ICE, CBP, or a 287g certified officer.

Class 1 misdemeanor; if there are more than 10 aliens the violation is a class 6 felony.

A.R.S. § 13-3883 Arrest by an officer without a warrant

A peace officer may arrest with probable cause if the person to be arrested has committed any public offense that makes the person removable from the United States. This does not appear to change Arizona law.

A.R.S. § 28-3511 Removal and immobilization or impoundment of vehicle

This statute adds violations of A.R.S. § 13-2929 as grounds for mandatory impoundment.

A.R.S. § 41-1724 Gang and immigration intelligence team enforcement mission fund

This statute establishes the GIITEM fund for monies deposited pursuant to A.R.S. § 11-1051 and monies appropriated by the legislature. The funds are subject to legislative appropriation and are for gang and immigration enforcement and county jail reimbursement cost relating to illegal immigration.

A.R.S. § 41-1724(C) includes this statement:

This act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.