

SOUTH CAROLINA STATE IMMIGRATION LEGISLATION

Tips for Law Enforcement and Advocates Working With Immigrant Crime Victims

South Carolina Illegal Aliens and Private Employment Act (S20)

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Introduction:

The following chart summarizes the status of each provision. For the provisions of the legislation that remain in effect, this chart provides implementation suggestions for law enforcement and safety planning strategies for victim advocates and attorneys working with immigrant victims of domestic violence, sexual assault, human trafficking and other immigrant crime victims. The goal is to identify measures that help ensure that immigrant victims of criminal activity continue to have access to assistance from the justice, health care, and social services systems that are to be open as a matter of federal law² and state domestic violence, sexual assault and anti-human trafficking laws to all victims without regard to their immigration status.

Status:

Several provisions of this legislation have been overturned and their implementation has been enjoined based on the Supreme Court Decision in Arizona v. United States, 132 S. Ct. 2492, 2495 (2012), and other preemption grounds. Other provisions of this legislation remain in effect.

PROVISIONS ENJOINED BASED ON PREEMPTION <u>United States v. South Carolina</u> , 840 F. Supp. 2d 898 (D.S.C. 2011)		
Provision	Court Reasoning	Result
Section 4(A) and (C) → Makes it a state criminal offense for an unlawfully present person to allow himself or herself to be "transported or moved" within the state or to be harbored or sheltered to avoid apprehension or detection.	This provision of South Carolina law is equivalent of unlawful presence, which the federal government has studiously avoided making a federal crime.	Enjoined, Field and conflict preempted.

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² Examples include: The Violence Against Women Act, the Trafficking Victims Protection Act, The Family Violence Protection and Services Act, The Victims of Crime Act, The Elder Justice Act and The Child Abuse Prevention and Treatment Act

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<p>S.C. Code Ann. § 16–9–460 (2008).</p>		
<p>Subsections 4(b) and (d) → Makes it a state felony punishable by up to five years in prison to “transport, move or attempt to transport” or “conceal, harbor or shelter” a person “with intent to further that person’s unlawful entry into the United States” or to help that person avoid “apprehension or detection by state or federal authorities.” S.C. Code Ann. § 16–9–460 (2008).</p>	<p>The federal harboring and transporting statute is part of a larger statutory scheme which addresses comprehensively the actions of third parties aiding and assisting undocumented immigrants. Congress has <i>expressly</i> carved out a role for state and local law enforcement officers, allowing them to make arrests for violations of immigration laws when specifically authorized by federal immigration statutes and agreements with the Department of Homeland Security. Federal immigration laws vest control over immigration enforcement actions with DHS and immigration proceedings are conducted in federal courts including immigration courts. .</p>	<p>Enjoined based upon field preemption: Congress did not intend to allow the states any further role beyond arresting persons allegedly harboring or transporting unlawfully present persons. (<i>similar to Alabama’s §13</i>)</p>
<p>Section 5 → Makes it unlawful for any person 18 years or older “to fail to carry” in his or her possession a certificate of immigration registration or receipts demonstrating immigration registration. State crime created of failing to carry federally issued immigration documents. S.C. Code Ann. § 16–17–750 (2008).</p>	<p>The Federal government has exclusive authority now and historically to determine what documentation is issued to immigrants and when and whether immigrants are required to carry such documentation. State law immigration documentation requirements directly conflict with federal immigration laws and are preempted</p>	<p>Enjoined as are similar provisions in Alabama and Arizona state immigration laws based on federal preemption. None of these laws would have recognized the types of immigration documentation that immigrant crime victims within the process of obtaining legal status under VAWA, T or U visa requirements would have received from DHS.</p>
<p>Section 15 → Makes it unlawful to make or sell counterfeit identification to a person unlawfully present in the United States. S.C. Code Ann. § 16–13–480 (2008).</p>	<p>The federal government has adopted a pervasive and comprehensive regulatory scheme regarding alien registration that includes the regulation of immigrant identification and registration documentation. Can affect foreign policy.</p>	<p>Enjoined, field preemption.</p>
<p>Section 6 → Directs state and local government law</p>	<p>The federal government's regulation of immigration</p>	<p>Field and obstacle preemption. Irreparable harm. Enjoined</p>

enforcement officers who have stopped, detained, investigated or arrested any person for whom they have a “reasonable suspicion” may be unlawfully present to determine whether the person is lawfully present in the United States. If unlawfully present, officer will decide whether to detain in local custody or deliver the individual to State or federal officials.
S.C. Code Ann. § 17-13-170 (2008).

enforcement is so pervasive and comprehensive that it has not left any room for the state to supplant it. This area has long been under the control of the national government, and the State of South Carolina has not traditionally regulated in this area.

STATE LAW PROVISIONS IMPLEMENTED
http://www.scstatehouse.gov/sess119_2011-2012/bills/20.htm

Provision	Advice/Tips:
<p>Section 1 → Authorizes private civil actions against local political subdivisions that do not enforce the Act. The Act also establishes an Illegal Immigration Enforcement Unit within South Carolina Law Enforcement Division (SLED) and provides that the director shall negotiate the terms of a memorandum of agreement with the United States Immigration and Customs Enforcement at the DHS. S.C. Code Ann. § 6-1-170 (2008).</p>	<p>For Law Enforcement</p> <ul style="list-style-type: none"> • This provision encourages South Carolina law enforcement agencies to enter into 287(g) agreements with the U.S. Department of Homeland Security (DHS). However, DHS is cancelling 287(g) agreements in many jurisdictions, particularly in states that have passed state immigration legislation. DHS enforcement has instead mandated that jurisdictions implement the Secure Communities Program. This state law likely govern coordination with DHS on Secure Communities and other immigration law issues • Implement U visa certification and T visa declaration policies and procedures and train state and local law enforcement on victim protections under immigration law using DHS roll call videos and other DHS and DOJ funded training materials³ • Law enforcement should receive training on DHS policies designed to promote safety and prevent immigration enforcement against

³ DHS roll call videos are available at http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/building-capacity/copy_of_dhs-roll-call-videos ; DHS and DOJ produced and funded U and T visa training materials are available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/building-capacity>

	<p>immigrant crime victims, who are potential witnesses.⁴</p> <ul style="list-style-type: none">• Cooperate with DHS in notifying them when an immigrant detained by local law enforcement is a crime victim or witness⁵ <p>For Advocates:</p> <ul style="list-style-type: none">• Train local law enforcement on the importance of predominant perpetrator determinations and avoiding dual arrests. Failure to obtain qualified interpreters can lead to dual arrests or arrests of battered immigrants rather than perpetrators.• Develop relationships with local law enforcement officials to promote language access for your clients if law enforcement is called to the scene of a domestic violence incident⁶• Develop a safety plan with your client that involves fleeing abuse, rather than fighting back in self-defense• Collaborate with local law enforcement in the development of U visa certification and T visa declaration practices and policies⁷• Advocates working with immigrant crime victims detained under this provision should advocate for the victim's release from detention using the information on the DHS detainer form regarding crime victims⁸ and DHS crime victim memo⁹
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⁴ For an overview of DHS enforcement priorities and victim protection memos go to: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/tools/DHS%20Enforcement%20Priorities%20Memos.pdf/view> and <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts-on-immigration-relief-for-immigrant-crime-victims-and-other-immigrants/DHS%20Enforcement%20Priorities%20Information%20for%20State%20Court%20Judges%207.29.13%20FINAL.pdf/view>

⁵ For information on cooperation with DHS in identifying immigrant crime victims see <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/immigration-detainer-form%20Dec%202012.pdf/view>

⁶ Natalie Lee et al., *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access* (2013), available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/research-reports-and-data/Police%20Response%20U%20Visas%20Language%20Access%20Report%20NIWAP%20%204%2016%2013%20FINAL-bja.pdf/view>

⁷ *Id.* Giselle Hass et al., *U-Visa Legal Advocacy: Overview of Effective Policies and Practice* (2012), available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/research-reports-and-data/Practice-and-Policy-Brief.doc/view>

⁸ DEP'T OF HOMELAND SEC. Immigration Detainer – Notice of Action, available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/immigration-detainer-form%20Dec%202012.pdf/view>

Section 7 → Requires the verification of the immigration status of any person incarcerated or detained in a jail facility and provides for potential delivery of incarcerated persons to federal facilities if they are determined to be unlawfully present in the United States.

S.C. Code Ann. § 23–3–1100 (2008).

For Advocates:

- Train local law enforcement on the importance of predominant perpetrator determinations and avoiding dual arrests. Failure to obtain qualified interpreters can lead to dual arrests or arrests of battered immigrants rather than perpetrators.
- Develop relationships with local law enforcement officials to promote language access for your clients if law enforcement is called to the scene of a domestic violence incident¹⁰
- Develop a safety plan with your client that involves fleeing abuse, rather than fighting back in self-defense
- Collaborate with local law enforcement in the development of U visa certification and T visa declaration practices and policies¹¹
- Some younger victims who arrived in the U.S. as children should also be screened for eligibility for Deferred Action for Childhood Arrivals (DACA) which can provide access to legal work authorization while the victims VAWA, T or U case is pending.¹²
- Advocates working with immigrant crime victims detained under this provision should advocate for the victim's release from detention using the information on the DHS detainer form regarding crime victims¹³ and DHS crime victim memo.¹⁴

⁹ John Morton, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiff Memo* (2011), available at,

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>

¹⁰ Natalie Lee et al., *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access* (2013), available at,

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/research-reports-and-data/Police%20Response%20U%20Visas%20Language%20Access%20Report%20NIWAP%20%204%2016%2013%20FINAL-bja.pdf/view>

¹¹ *Id.* Giselle Hass et al., *U-Visa Legal Advocacy: Overview of Effective Policies and Practice* (2012), available at,

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/research-reports-and-data/Practice-and-Policy-Brief.doc/view>

¹² Deferred Action for Childhood Arrivals (DREAMERS),

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/deferred-action-for-childhood-arrivals-dreamers-can-also-help-immigrant-survivors>

¹³ DEP'T OF HOMELAND SEC. Immigration Detainer – Notice of Action, available at,

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/immigration-detainer-form%20Dec%202012.pdf/view>

¹⁴ John Morton, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiff Memo* (2011), available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>