

LEGAL CONSIDERATIONS FOR
MINNESOTA CONGREGATIONS THAT
SERVE UNDOCUMENTED IMMIGRANTS



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CORPORATE IMMIGRATION LAW

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Within the first week of his second administration, President Donald Trump signed nearly a dozen executive orders that would drastically alter the landscape of immigration policy. Among the changes are the militarization of the United States - Mexico border and the commitment to deport more undocumented people than any other previous administration in history.

In addition to these executive orders, the new administration also rescinded a long time policy that prevented immigration enforcement in certain locations. With very few exceptions, the Sensitive Locations Policy stated that the federal government would not enforce immigration violations inside places of worship and other sensitive locations, such as hospitals, schools, places of public demonstrations, and places where a religious or ceremonial activity is taking place (such as weddings and funerals). While the rescission of the Sensitive Locations Policy may be challenged in the courts, this does not mean that congregations providing assistance to undocumented immigrants are immune from prosecution under federal immigration laws.

Since the rescission of the policy, congregations across the country have been left wondering what they can do and what risks they face when carrying out their spiritual calling to welcome the stranger. The following charts set out the types of activities congregations providing “sanctuary” to undocumented immigrants – as well as those congregations that support them – might take. The purpose is to help provide general guidance on where providing assistance to undocumented immigrants might be considered unlawful activity, creating risks of potential legal liability for the congregation providing sanctuary services.¹

GENERAL FACTORS TO CONSIDER

Factors that could reduce the risk of illegality, enforcement, and penalties with respect to actions taken to assist immigrants in the United States without authorization include the following:

- Build a written record demonstrating the extent to which actions were taken based on firmly held religious beliefs;
- Carefully screen and select guests based on need and absence of criminal risk or risk of violence; and
- Consult with an attorney before undertaking sanctuary activities.

This analysis is intended for general information purposes only and should not be construed as legal advice or legal opinions. This general analysis is not a substitute for consultation with an attorney.

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ACTION: EMPLOYING INDIVIDUALS WITHOUT WORK AUTHORIZATION

Likely to be considered unlawful?	Definitely unlawful. § 274A of the Immigration and Nationality Act, 8 U.S.C. 1324a.
Likely to be enforced?	Highly likely. ICE regularly audits employers to enforce immigration law.
Potential Liability	DHS may impose civil penalties per unauthorized worker. Such penalties may dramatically increase for multiple offenses and may be imposed for each noncompliant I-9. DHS may also impose criminal penalties of up to six months imprisonment for engaging in a pattern of knowingly employing unauthorized workers.
Persons Potentially Liable	Employers are held liable. “Employer” includes owners of the corporate entity, chief executive, and persons responsible for compliance with immigration laws.
Risk to Nonprofit Status	Employing individuals without work authorization could potentially jeopardize a congregation’s non-profit status. Among the factors considered: whether a court found the congregation knowingly violated the law; the scale of illegal activity relative to the congregation’s other ministries; the number of persons benefiting from the illegal activity; whether the illegal activity posed a threat to public safety; the extent to which the illegal activity was motivated by religious beliefs.
Actions to Reduce Risk	For purposes of immigration law, “employment” is not defined by whether an immigrant is getting paid. The government will look at a number of factors, including whether the congregation is benefiting from services provided, regardless of whether they are being paid. Congregations should not accept any service from a guest that provides a benefit to the congregation, unless they have authorization documents and can complete a Form I-9.

ACTION: PROVIDING HOUSING TO UNDOCUMENTED IMMIGRANTS TARGETED FOR DEPORTATION

Likely to be considered unlawful?	<p>Potentially unlawful. Landlords are not required to ask about a tenant’s immigration status. In this sense, a congregation may offer housing to anyone without asking about immigration status. However, it is a federal immigration crime to “conceal, harbor, or shield from detection” an undocumented immigrant, knowing or in reckless disregard of the fact that the immigrant entered or remains in the United States in violation of the law. The term “harbor” is not defined by the statute. Courts interpret “harboring” by evaluating whether housing substantially facilitates the individual’s remaining in the United States unlawfully,² though not all jurisdictions follow this test and define “harbor” as simply “affording shelter to.”³ So far, no court with direct authority over Minnesota has decided that providing housing alone is unlawful “harboring.” Other courts have focused on the intent underlying the housing, such as providing “refuge to an unlawful alien because he’s an unlawful alien.”⁴ Other courts have looked at intent to conceal or profit from the guest.⁵ Therefore, it is unlawful to house an undocumented immigrant with the intent to conceal the immigrant from detection or enforcement by immigration officials.</p> <p>If the congregation were ever charged with harboring on the basis of providing housing alone, then publicizing the presence of the guest will not necessarily protect the guest or the congregation from legal liability. In a case involving more services than just providing housing, the 8th Circuit rejected the argument that a defendant must conceal an undocumented immigrant in order to be convicted of harboring.⁶</p>
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<p>Likely to be enforced?</p>	<p>It is certainly possible, and even likely, that the current administration will order US Attorneys to pursue prosecution of congregations providing sanctuary in the form of housing to undocumented immigrants. The administration’s messaging about tough enforcement of immigration laws generally, and its rescission of the Sensitive Locations Policy more specifically, increase the risk of immigration enforcement in religious buildings. Additionally, the administration may wield its immigration enforcement power disparately to target some religious groups over others.</p>
<p>Potential Liability</p>	<p>Violation of federal anti-harboring laws is a felony-level offense: “for each alien in respect to whom [a violation of the harboring provision] occurs,” a defendant shall “be fined under title 18, imprisoned not more than 5 years, or both.” Penalties could be:</p> <ul style="list-style-type: none"> • Up to 10 years, if harboring was for congregation’s commercial gain. • Up to 20 years, if the harbored person causes serious bodily harm or places the life of any person in jeopardy. • Up to life imprisonment, if the harboring results in the death of a person. <p>In addition, civil forfeiture may apply when there is a “substantial connection between the property and the offense.”⁷</p>
<p>Persons Potentially Liable</p>	<p>The congregation may face criminal penalties. Whether any individual faces criminal liability may depend on whether the individual committed any prohibited acts and the legal relationships between the individual and the congregation.⁸ The Congregation could face civil liability, but its employees would not.⁹</p>
<p>Risk to Nonprofit Status</p>	<p>For housing to create a risk to tax-exempt status, the law would need to clearly make such conduct unlawful. If the law were to change, including as the result of a successful prosecution of the congregation, the IRS would consider the following factors:</p> <ul style="list-style-type: none"> • Whether a court found the congregation knowingly violated the law • The scale of unlawful activity relative to the congregation’s other ministries • The number of persons benefiting from the unlawful activity • Whether the unlawful activity posed a threat to public safety • The extent to which the unlawful activity was motivated by religious beliefs <p>There is also a risk that tax-exempt status could be revoked on “public policy” grounds. In other words, the government could threaten tax-exempt status for congregations providing housing to undocumented immigrants on grounds it is against public policy, regardless of whether doing so is actually unlawful. Because this is a broad and not well-understood doctrine, the risk is difficult to evaluate.</p>
<p>Actions to Reduce Risk</p>	<p>The following actions will increase the likelihood that providing housing and material support to another party providing housing crosses over into illegal conduct and therefore should be avoided:</p> <ul style="list-style-type: none"> • Attempting to shield the guest from immigration enforcement • Obtaining financial benefit from the living arrangement • Providing “other inducements” for the guest to remain in the United States

ACTION: DRIVING UNDOCUMENTED IMMIGRANTS TO APPOINTMENTS, SCHOOL, WORK, ETC.

Likely to be considered unlawful?	Probably not unlawful. It is a felony to “transport or move” an undocumented immigrant knowing or in reckless disregard of the fact that the immigrant entered or remains in the U.S. in violation of the law. 8 U.S.C. § 1324(a)(1)(A)(ii). However, 8th Circuit case law has clarified that the act of transporting must be made “willfully” and in “furtherance of” the immigrant remaining in the United States unlawfully, e.g., by helping the immigrant navigate around a highway law-enforcement checkpoint where the immigrant’s status might otherwise have been revealed. Driving a person who happens to be an undocumented immigrant to appointments likely does not further the immigrant remaining in the United States unlawfully. However, it would be unlawful “transport” to drive an undocumented immigrant away from the congregation in order to avoid detection by immigration enforcement officers.
Likely to be enforced?	With the uptick in strict enforcement of immigration laws comes the potential increased risk of traffic stops against persons whom the law enforcement officer suspects might be an undocumented immigrant. Prudent, careful driving is an important practical way to mitigate this risk.
Potential Liability	Violation of federal anti-transporting laws is a felony-level offense.
Persons Potentially Liable	The person or persons providing transportation in violation of federal transporting law could be held liable. The congregation could be held liable for unlawful transporting if it can be proved the transporting was arranged by the congregation or on the congregation’s behalf.
Risk to Nonprofit Status	See Providing Housing to Undocumented Immigrants , above.

ACTION: PROVIDING SUPPORT TO INDIVIDUALS FACING DEPORTATION WHO ARE HOUSED IN SANCTUARY SPACES (I.E., “SANCTUARY SUPPORTING” CONGREGATIONS)

Likely to be considered unlawful?	Currently not explicitly unlawful; but potentially could be found to be so. A “sanctuary supporting” congregation could be exposed to potential criminal liability, especially if the sanctuary congregation it is supporting is charged with unlawful activity, such as harboring. First, it could be argued that supporting the sanctuary congregation is itself unlawful “harboring,” to the extent the support “substantially facilitates” the person’s continued unlawful presence in the country. Second, these activities could give rise to criminal liability under a theory of “aiding and abetting,” as well. ¹⁰ Generally, courts will look to whether the defendant aided and abetted the hosting congregation, and not necessarily the person(s) living in the sanctuary space. ¹¹
Likely to be enforced?	See answer above.
Potential Liability	See Providing Housing to Undocumented Immigrants , above. 18 U.S.C. § 2 provides that a person guilty of aiding and abetting is punishable as a principal.
Persons Potentially Liable	See Providing Housing to Undocumented Immigrants , above.
Risk to Nonprofit Status	See Providing Housing to Undocumented Immigrants , above.
Actions to Reduce Risk	The following actions will increase the likelihood that providing housing and material support to another party providing housing crosses over into illegal conduct and therefore should be avoided: <ul style="list-style-type: none"> • Attempting to shield the guest from immigration enforcement • Obtaining financial benefit from the living arrangement • Providing “other inducements” for the guest to remain in the United States

ACTION: CREATING A TEAM TO ASSIST FAMILIES AFFECTED BY ICE ENFORCEMENT ACTIONS

Likely to be considered unlawful?	Probably not unlawful. To the extent accompaniment of an undocumented person impedes an ICE raid, a court may find the response unlawful because such action may “substantially facilitate an alien’s remaining in the United States unlawfully.” ¹² The test is whether the activities substantially facilitate the alien remaining in the United States unlawfully.
Likely to be enforced?	More likely to be enforced in the case that accompaniment impedes an ICE raid.
Potential Liability	See Providing Housing to Undocumented Immigrants , above.
Persons Potentially Liable	See Providing Housing to Undocumented Immigrants , above.
Risk to Nonprofit Status	See Providing Housing to Undocumented Immigrants , above.

ACTION: PARTICIPATING IN RAPID RESPONSE NETWORKS TO RESPOND TO AND BE PRESENT AT ICE RAIDS OF HOMES AND OTHER INSTITUTIONS

Likely to be considered unlawful?	Probably not unlawful. To the extent accompaniment of an undocumented person impedes an ICE raid, a court may find the response unlawful because such action may “substantially facilitate an alien’s remaining in the United States unlawfully. Simply being present is not unlawful, but if the response network impedes an ICE raid, a court may find the response unlawful.
Likely to be enforced?	More likely to be enforced in the case that accompaniment impedes an ICE raid.
Potential Liability	See Providing Housing to Undocumented Immigrants , above.
Persons Potentially Liable	See Providing Housing to Undocumented Immigrants , above.
Risk to Nonprofit Status	See Providing Housing to Undocumented Immigrants , above.
Actions to Reduce Risk	If participating in a rapid response at an ICE raid, provide support for those facing potential government actions. Being present helps to ensure that proper procedures are followed by law enforcement and limits the potential for abuses. Do not, however, engage in activity that impedes law enforcement, such as: <ul style="list-style-type: none"> • Violent or threatening behavior directed towards law enforcement • Obstructing government officers

ACTION: PROVIDING MEETING SPACE FOR ORGANIZERS, ACTIVISTS, LAWYERS, AND COMMUNITY MEMBERS TO MEET

Likely to be considered unlawful?	Definitely not unlawful.
Likely to be enforced?	Not unlawful, therefore no risk of enforcement.
Potential Liability	Not unlawful, therefore no potential legal liability.
Persons Potentially Liable	Not unlawful, therefore no one is potentially liable.
Risk to Nonprofit Status	Not likely, as merely providing meeting space does not rise to an attempt to “influence legislation.”
Actions to Reduce Risk	Providing space for community members to discuss social issues does not create any legal issues.

ACTION: PROVIDING ADVOCACY FOR POSITIVE IMMIGRATION POLICY REFORM AND AGAINST UNJUST IMMIGRATION POLICY

Likely to be considered unlawful?	Definitely not unlawful.
Likely to be enforced?	Not unlawful, therefore no risk of enforcement.
Potential Liability	Not unlawful, therefore no potential legal liability.
Persons Potentially Liable	Not unlawful, therefore no one is potentially liable.
Risk to Nonprofit Status	A 501(c)(3) tax-exempt congregation may attempt to “influence legislation,” by “contact[ing], or urg[ing] the public to contact, members or employees of a legislative body for the purpose of proposing, supporting or opposing legislation.” A congregation’s tax-exempt status will be at risk only if a “substantial part” of its “overall activities” is devoted to “excessive lobbying.” ¹³
Actions to Reduce Risk	<p>Providing space for community members to discuss social issues does not create any legal issues. To avoid any lobbying activities (which are permissible up to the point they become “excessive”), Congregations are encouraged to not provide material or financial support for activities that contact, or urge others to contact, members of a legislative body.</p> <p>It is okay to engage in advocacy, including both for legislative change and for other forms opposing unjust policies. The IRS specifically provides that churches “may... involve themselves in issues of public policy without the activity being considered as lobbying,” including, conducting “educational meetings, prepar[ing] and distribut[ing] educational materials, or otherwise consider[ing] public policy issues in an educational manner.”¹⁴</p>

¹This analysis addresses U.S. immigration law as applied in Minnesota and the Eighth Circuit and was prepared by several attorneys with the Minneapolis-based law firm, Nilan Johnson Lewis, PA (John Medeiros, Maria Brekke, Sara Lewenstein, Allison Lange Garrison, and Anna Schwingler), with research and contributions from Rebecca Bernhard, Megan Kier, and the Faith-Based Advocacy Group of the Minnesota/Dakotas Chapter of the American Immigration Lawyers Association (AILA).

²*United States v. Gomez*, No. 07-05068-01-CR-SW-FJG, 2008 U.S. Dist. LEXIS 114801, at *13 (W.D. Mo. July 29, 2008) (collecting cases from United States Courts of Appeal, (2d, 5th, 6th, and 9th Circuits) and explaining that courts “have been fairly consistent in holding that ‘harboring’ encompasses language to the effect of ‘substantially facilitating’ an alien’s remaining unlawfully in this country or to afford shelter to an improperly admitted alien”).

³*Brewer v. Salyer*, 2007 U.S. Dist. LEXIS 36156, at *28 (E.D. Ca. May 16, 2007) (affirming “employment and harboring might lead to a harboring violation, but employment alone does not equal a harboring violation.” Citing an earlier decision, the court notes “‘harbor’ means ‘to afford shelter to’ and does require an intent to avoid detection”).

⁴*United States v. Costello*, 666 F.3d 1040, 1045 (7th Cir.2012).

⁵*U.S. v. McClellan*, 794 F.3d 743 (7th Cir. 2015) (when the basis for the harboring conviction is housing there must be evidence that the defendant intended to safeguard the person from authorities); *U.S. v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. 2013) (“harboring” means more than “sheltering”). In an early precedent-setting case, the United States Court of Appeals for the Ninth Circuit held that merely providing shelter, with knowledge of a person’s unlawful presence, is sufficient to constitute the crime of harboring. *U.S. v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976) (“harbor” means to afford shelter to” and does not require the intent to avoid detection). However, more recent case law out of the 9th Circuit suggests that the ruling of Acosta may no longer be in effect, and that harboring requires proof of intent to violate the law. *U.S. v. You*, 382 F.3d 958 (9th Cir. 2004) (holding that knowledge and criminal intent are both required, and that acting with the purpose of avoiding the aliens’ detection by immigration authorities is synonymous with having acted with the necessary intent).

⁶*United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002) (“They argue that they did not try to hide Ms. Zhong, and that she was working in Mr. Ma’s restaurant in plain view. We reject that argument.”) (citing *United States v. Evans*, 531 F.2d 428, 428 (9th Cir. 1976)); see also *infra* Row 4 and n.10.

⁷*United States v. Two Hundred Fifty-Six Thousand Two Hundred Thirty-Five Dollars*, 691 F. Supp. 2d 932, 939 (N.D. Ia. 2010) (citing 18 U.S.C. § 983(c)(3)). We are aware of cases involving forfeiture of money derived from harboring activities and vehicles used to transport immigrants in the United States unlawfully.

⁸E.g., *United States v. Acambaro Mexican Rest., Inc.*, 631 F.3d 880, 882-83 (8th Cir. 2011) (affirming imposition of fines pursuant to plea agreement when statute also provided for forfeiture of profits, land, and buildings, and declining to pierce the corporate veil to impose criminal liability on the defendant company’s sole shareholder).

⁹Minn. Stat. § 181.970 (“An employer shall defend and indemnify its employee for civil damages, penalties, or fines claimed or levied against the employee, provided that the employee: (1) was acting in the performance of the duties of the employee’s position; (2) was not guilty of intentional misconduct, willful neglect of the duties of the employee’s position, or bad faith; and (3) has not been indemnified by another person for the same damages, penalties, or fines.”).

¹⁰For the government to prosecute the congregation for aiding and abetting, it would need to prove that “(1) the defendant business associated herself with an unlawful venture; (2) the defendant participated in it as something she wished to bring about; and (3) the defendant sought by her actions to make it succeed.” *U.S. v. Mitchell*, 388 F.3d 1139 (8th Cir. 2004).

¹¹*U.S. v. Lopez-Martinez*, 543 F.3d 509 (9th Cir. 2008) (ruling that the prosecution need not demonstrate that the defendant was working for financial gain but only that the principal stood to benefit financially); *U.S. v. Garcia-Paulin*, 627 F.3d 127 (5th Cir. 2010) (an aiding and abetting charge can only be sustained if the defendant is aiding and abetting the principal and not the alien being brought to the United States).

¹²See *United States v. Shum*, 496 F.3d 390, 391-92 (5th Cir. 2007); *United States v. Varkonyi*, 645 F.2d 453, 459-60 (5th Cir. 1981) (upholding conviction for harboring where, among other things, the defendant interfered with immigration agents to protect immigrants from apprehension).

¹³See IRS Pub. 1828, “Tax Guide for Churches & Religious Organizations,” available at <https://www.irs.gov/pub/irs-pdf/p1828.pdf> (“IRS Pub. 1828”). The IRS will “consider[] a variety of factors, including the time devoted by both compensated and volunteer worker(s) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.” *Id.* It is important to note that under the “substantial part” test, the IRS does not weigh lobbying activities in isolation, but against the congregation’s “overall activities.” IRS.gov, “Measuring Lobbying: Substantial Part Test,” available at <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test> (last checked on March 24, 2017). A congregation’s lobbying would thus only become “excessive lobbying” if it were to reach the point where it comprised a “substantial part” of the sum total of all the congregation’s activities, including preparing for and providing worship services, religious education, care and support activities provided to congregation members, charitable activities, weddings, funerals, etc. A congregation engaging in significant lobbying activity should consult with a tax or non-profit attorney to identify where that point might be reached in its individual case.

¹⁴IRS Pub. 1828.