



# ARIZONA HOUSE OF REPRESENTATIVES

Fifty-sixth Legislature  
Second Regular Session

House: APPROP DPA 10-7-0-0 | 3<sup>rd</sup> Read DPA 31-28-0-0-1

Senate: MAPS DPA/SE 4-3-0-0 | 3<sup>rd</sup> Read DPA 16-13-1-0-0

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## **HCR2060: lawful presence; e-verify program; penalties**

**NOW: border; benefits; fentanyl; illegal entry**

**Sponsor: Representative Toma, LD 27**

**Senate Engrossed**

The House Engrossed version of HCR 2060 submits a proposition to the voters relating to employment and the use of the E-Verify program.

The Senate adopted a strike-everything amendment that does the following:

### **Overview**

Submits a proposition to the voters, entitled the *Secure the Border Act*, establishing state criminal liability for a range of border-related conduct and certain existing drug offenses involving fentanyl that cause death. Prescribes various enforcement mechanisms for these border-related provisions and grants immunity to certain state personnel who enforce these provisions as part of their official duties.

### **History**

#### ***Federal Immigration Laws***

8 U.S.C. chapter 12 contains numerous federal statutes relating to aliens, immigration and nationality in the U.S. For purposes of this chapter, *alien* means any person not a citizen or national of the U.S. ([8 U.S.C. § 1101\(a\)\(3\)](#)). It is a federal crime for an alien to do any of the following:

- 1) enter or attempt to enter the U.S. at any time or place other than as designated by immigration officers;
- 2) elude examination or inspection by immigration officers;
- 3) attempt to enter or obtain entry into the U.S. by a willfully false or misleading representation or the willful concealment of a material fact.

Under this provision, a first-time offense carries a maximum prison term for 6 months and/or a fine, and a subsequent offense carries a maximum prison term of 2 years and/or a fine ([8 U.S.C. § 1325\(a\)](#)).

Any alien who is physically present in the U.S. or who arrives in the U.S. may apply for asylum. In order to receive asylum status, the applicant must show that they are a refugee as defined in [8 U.S.C. § 1101\(a\)\(42\)\(A\)](#) and, in order to show refugee status, the applicant must establish that race, religion, nationality, membership in a particular social group or political opinion was or will be at least one central reason for persecuting the applicant ([8 U.S.C. § 1158](#)).

Federal immigration officers or judges are required to order the removal of certain aliens if they suspect that an arriving alien may be inadmissible for certain reasons, including for certain terrorist activities enumerated in [8 U.S.C. § 1182\(a\)\(3\)\(B\)](#) ([8 U.S.C. § 1225\(c\)](#)).

Federal law also outlines other alien terrorist removal procedures in 8 U.S.C. chapter 12, subchapter V. Additionally, under certain circumstances, the U.S. Attorney General is authorized to remove an alien who has been sentenced to a term of imprisonment before the alien has completed the sentence ([8 U.S.C. § 1231\(a\)\(4\)\(B\)](#)).

### ***Arizona Benefits and E-Verify Laws***

Arizona law requires any natural person who applies for a state or local public benefit, or any federal public benefit that requires participants to be citizens or legal residents of the U.S. or otherwise lawfully present in the U.S., to submit at least one of the following documents demonstrating lawful presence in the U.S.:

- 1) an Arizona driver license issued after 1996 or an Arizona nonoperating identification license;
- 2) a birth certificate or delayed birth certificate issued in any state, territory or possession of the U.S.;
- 3) a U.S. certificate of birth abroad;
- 4) a U.S. passport;
- 5) a foreign passport with a U.S. visa;
- 6) an I-94 form with a photograph;
- 7) a U.S. citizenship and immigration services employment authorization document or refugee travel document;
- 8) a U.S. certificate of naturalization;
- 9) a U.S. certificate of citizenship;
- 10) a tribal certificate of Indian blood;
- 11) a tribal or Bureau of Indian Affairs affidavit of birth.

Any person applying for such benefits must sign a sworn affidavit stating under penalty of perjury that the documents presented are true, and failure to report discovered violations of federal immigration law by a state employee is a class 2 misdemeanor (A.R.S. §§ [1-501](#) and [1-502](#)).

The E-Verify program is a web-based system that employers must use after hiring an employee to verify the employee's employment eligibility. Statute requires employers to keep a record of the verification for the duration of the employee's employment or at least three years, whichever is longer ([A.R.S. § 23-214](#)). For these purposes, an *employer* is defined as any individual or type of organization that transacts business in Arizona. Employer includes this state, any political subdivision and self-employed individuals. In the case of an independent contractor, employer means the independent contractor and does not include the person or organization that uses the contract labor ([A.R.S. § 23-211](#)).

Similarly, the U.S. Department of Homeland Security is responsible for administering the Systematic Alien Verification for Entitlements (SAVE) program, which is an online service that allows federal, state and local benefits-granting agencies to verify a benefit applicant's immigration status or citizenship ([U.S. Citizenship and Immigration Services](#)).

### ***Arizona Narcotic Drug Laws***

Arizona's criminal code defines a *narcotic drug* to encompass a detailed list of materials, compounds, mixtures or preparations containing various substances or derivatives. Examples of narcotic drugs include cocaine, fentanyl and heroin, among many others ([A.R.S. § 13-3401](#)).

Statute outlines several criminal offenses relating to narcotic drugs in [A.R.S. § 13-3408](#). Specifically, subsection A, paragraph 7 of that statute makes it a class 2 felony offense for a

person to knowingly transport for sale, import into Arizona, offer to transport for sale or import into Arizona, sell, transfer or offer to sell or transfer a narcotic drug.

For a first-time offense, and in the absence of any mitigating or aggravating circumstances, a class 2 felony is punishable by either a term of imprisonment in the following ranges or up to 7 years of probation for eligible offenses:

- 1) 4 years (minimum);
- 2) 5 years (presumptive); or
- 3) 10 years (maximum) (A.R.S. §§ [13-702](#), [13-902](#)).

However, [A.R.S. § 13-701](#) outlines a process for a court or a trier of fact to find that an offense involved certain enumerated mitigating circumstances (subsection E) or aggravating circumstances (subsection D), which may operate to reduce the minimum prison sentence above to 3 years or to enhance the maximum prison sentence to 12.5 years. Additionally, more specific sentencing requirements may apply in certain circumstances, including discrete sentencing ranges or probation eligibility provisions that may apply for repeat offenses or for offenses involving specific drugs or amounts of drugs (A.R.S. §§ [13-3408](#), [13-3419](#), [13-3420](#)).

For purposes of drug offenses under the criminal code, *sale* (or *sell*) is defined as an exchange for anything of value or advantage, present or prospective. Further, *transfer* means to furnish, deliver or give away ([A.R.S. § 13-3401](#)). For purposes of the criminal code, *possess* means to knowingly have physical possession or otherwise to exercise dominion or control over property ([A.R.S. § 13-105](#)).

## **Provisions**

### ***Border Crimes and Enforcement***

1. Adds a new article to the criminal code establishing criminal offenses and enforcement provisions relating to certain border activities (described further below), and notwithstanding any other law, prohibits this new article from being enforced in any manner until any part of Section 2 of [S.B. 4, 88th Leg., 4th Called Sess. \(2023\)](#) that was enacted in the state of Texas, or any other law of any other state similar to this law, has been in effect for a period of 60 consecutive dates at any time on or after the effective date of this new article. (Sec. 5)
2. For purposes of this new article, defines terms as follows:
  - a) *alien* means a person who is not a citizen or national of the U.S. as described in [8 U.S.C. § 1101](#);
  - b) *port of entry* means a port of entry in the U.S. as described in [19 C.F.R. part 101.1](#). (Sec. 5)
3. Establishes *illegal entry from a foreign nation* (Illegal Entry) as a criminal offense involving a person who is an alien who enters or attempts to enter Arizona directly from a foreign nation at any location other than a lawful port of entry. (Sec. 5)
4. Provides for an affirmative defense for Illegal Entry if either of the following applies:
  - a) the federal government has granted the defendant lawful presence in the U.S. or asylum under [8 U.S.C. § 1158](#);
  - b) the defendant's conduct does not constitute a violation of [8 U.S.C. § 1325](#)(a). (Sec. 5)
5. Prohibits a person from being arrested for Illegal Entry without probable cause, which must be established by any of the following:
  - a) a law enforcement officer who witnesses the violation;
  - b) a technological recording of the violation;

- c) any other constitutionally sufficient indicia of probable cause. (Sec. 5)
- 6. Specifies that the section establishing Illegal Entry as a crime may only be enforced prospectively and prohibits the section from being construed to apply to the conduct of any person who entered Arizona unlawfully from a foreign nation at any time before the section becomes enforceable. (Sec. 5)
- 7. Deems an alien to lack lawful presence for purposes of Illegal Entry if the alien was either:
  - a) paroled pursuant to a programmatic grant of parole, including under any parole program not created under notice-and-comment rulemaking that establishes specific characteristics under which an alien would be entitled to parole and that has been applied to more than one hundred aliens during one calendar year;
  - b) required to be detained under the U.S. Immigration and Nationality Act but was not detained and instead was paroled into the U.S. (Sec. 5)
- 8. Classifies Illegal Entry as a class 1 misdemeanor, unless the person has previously been convicted of Illegal Entry, in which case the offense becomes a class 6 felony. (Sec. 5)
- 9. Makes a person who is convicted of Illegal Entry ineligible for probation, pardon, commutation or suspension of sentence or release on any other basis until the person has served a term of incarceration as determined by the court. (Sec. 5)
- 10. Establishes a process for a judge or magistrate to issue an *order to return to a foreign nation* (Return Order) in certain circumstances for a person who is arrested for Illegal Entry, which must discharge the person and require the person to return to the foreign nation from which the person entered or attempted to enter the U.S. or the person's nation of origin and may be issued if all of the following apply:
  - a) the person agrees to the Return Order;
  - b) the person has not previously been convicted of an offense under this new article or previously obtained a discharge under a Return Order;
  - c) the person is not charged with another class 1 misdemeanor or any felony offense;
  - d) before the issuance of the Return Order, the arresting law enforcement agency does all of the following:
    - i. collects all identifying information of the person, which must include taking fingerprints from the person and using other applicable photographic and biometric measures to identify the person;
    - ii. cross-reference the collected information with all relevant local, state and federal criminal databases and federal lists or classifications that are used to identify a person as a threat or potential threat to national security (Sec. 5)
- 11. After conviction for an offense under this new article, requires the judge to enter an order that requires the convicted person to return to the foreign nation from which the person entered or attempted to enter the U.S. or the person's nation of origin, which takes effect on completion of the person's term of incarceration or imprisonment. (Sec. 5)
- 12. At any time before a person is convicted of or adjudicated for an Illegal Entry violation, allows a court to dismiss the charge pending against the person and issue a Return Order. (Sec. 5)
- 13. Requires a Return Order issued under this new section to include an authorization that allows a state or local law enforcement agency to transport the person to a port of entry or to any point of transfer into federal custody. (Sec. 5)

14. Establishes *refusal to comply with an order to return to a foreign nation* as a class 4 felony offense involving a person who is an alien meeting all of the following circumstances:
  - a) the person is charged with or convicted of an offense under this new article;
  - b) a magistrate or judge, as applicable, issues a Return Order;
  - c) the person refuses to comply with the Return Order. (Sec. 5)
15. Holds a state or local government entity, official, employee or contractor immune from liability for damages arising from a state cause of action resulting from action taken by the entity or person to enforce this new article or any order issued pursuant to the article during the course and scope of the entity's or person's office, employment or performance for or on behalf of the state of Arizona or local government. (Sec. 5)
16. Specifies that this immunity provision does not affect a defense, immunity or jurisdictional bar available to the state of Arizona or a local government or an official, employee or contractor of this state or a local government. (Sec. 5)
17. Notwithstanding any other law, if a county or local law enforcement agency does not have the capacity to hold a person who is arrested for or convicted of an offense included in this new article, requires the director of the Arizona Department of Corrections to accept arrested or convicted persons who are charged with or convicted of an offense included in this new article at any facility in Arizona that has available capacity. (Sec. 5)

***Public Benefits and Employment Eligibility***

18. Notwithstanding any other law and to the extent allowed by federal law, makes it a class 6 felony offense for any natural person who is not lawfully present in the U.S. to knowingly apply for a federal public benefit or a state or local public benefit by submitting a false document to any entity that administers the benefit. (Sec. 3)
19. If a natural person who applies for any federal public benefit pursuant to [A.R.S. § 1-501](#) or any state or local public benefit pursuant to [A.R.S. § 1-502](#) is not a citizen or national of the U.S., requires the Arizona agency or political subdivision that administers the benefit to use the SAVE program (or any successor program that is designated by the U.S. Department of Homeland Security) to verify the validity of the documents provided by the applicant and to verify the applicant's eligibility for benefits. (Sec. 3)
20. Specifies that the above provision does not relieve a natural person of any requirement to submit documentation that is required for benefits pursuant to A.R.S. §§ [1-501](#) or [1-502](#). (Sec. 3)
21. For the purposes of the above provisions, defines terms as follows:
  - a) *federal public benefit* has the same meaning prescribed in [A.R.S. § 1-501](#).
  - b) *state or local public benefit* has the same meaning prescribed in [A.R.S. § 1-502](#). (Sec. 3)
22. Prohibits any natural person who is not lawfully present in the U.S. from knowingly submitting false information or documents to an employer to evade detection of employment eligibility under the E-Verify program. (Sec. 6)
23. Classifies a violation of the above prohibition as a class 1 misdemeanor, unless the person has previously been convicted of a violation of the prohibition, in which case the offense becomes a class 6 felony. (Sec. 6)

24. Makes a person who is convicted of a violation of this prohibition ineligible for probation, pardon, commutation or suspension of sentence or release on any other basis until the person has served a term of incarceration as determined by the court. (Sec. 6)

#### ***Sale of Lethal Fentanyl***

25. Establishes *sale of lethal fentanyl* as a criminal offense involving a person who is at least 18 years old who knowingly sells fentanyl in violation of [A.R.S. § 13-3408](#), subsection A, paragraph 7 and both of the following apply:
  - a) the person knows that the drug being sold contains fentanyl;
  - b) the fentanyl causes the death of another person. (Sec. 4)
26. Provides an affirmative defense to sale of lethal fentanyl that the fentanyl and its precursor chemicals were either manufactured in the U.S. or were lawfully imported into the U.S. (Sec. 4)
27. Classifies sale of lethal fentanyl as a class 2 felony, except that the presumptive, minimum and maximum sentences are increased by five years. (Sec. 4)

#### ***Miscellaneous***

28. Entitles this measure as the *Secure the Border Act*. (Sec. 1)
29. Includes legislative findings and declarations regarding the purpose of the *Secure the Border Act*. (Sec. 2)
30. Permits the President of the Senate, Speaker of the House of Representatives, Minority Leader of the Senate or Minority Leader of the House of Representatives to file a lawsuit or intervene in any action concerning the *Secure the Border Act* if the individual seeks to defend its constitutionality, validity or enforceability. (Sec. 7)
31. Prohibits any settlement of a lawsuit challenging the *Secure the Border Act* from being entered before service of a 21-day notice to the President of the Senate, Speaker of the House of Representatives, Minority Leader of the Senate or Minority Leader of the House of Representatives, and deems a failure to comply with this notice requirement to invalidate the settlement and constitute a violation of [A.R.S. § 38-443](#) (nonfeasance in public office). (Sec. 7)
32. Includes a severability clause. (Sec. 8)