



## Creating conditions to support healthy people: State policies that affect the health of undocumented immigrants and their families

### **METHODOLOGY**

The findings from this policy report are the result of a multi-step process designed to: 1) select broad policy areas; 2) select relevant laws or policies within each; 3) create policy indicators for each; 4) develop and apply a scoring system to classify state policies as inclusive or exclusive and 5) search for and score the outcome for each indicator from existing policy sources. Each step of the process is described within.

#### **1. Selection of policy areas**

We began by determining broad areas of policy that are among the most salient to immigrant health and the subject of state policy activity. We generated a list of possible policy areas based on a social determinants of health approach and knowledge of active policy areas in immigrant law and policy. We selected policies that met two criteria:

1. Had a direct impact on immigrants based on their legal status.
2. Had a clear influence on the social determinants of health, such as access to health care and economic or social factors that affect health.

In total, five policy areas were selected (Table A-1). The first three policy areas are relevant to immigration policy and directly affect access to health care and are recognized social determinants of health: public health and welfare benefits, higher education, and labor and employment practices.(1) The last two policy areas are more explicitly related to the rights of

undocumented immigrants and to current immigration policy debates: Driver licensing and identification and the federal enforcement program, Secure Communities.<sup>1</sup> While public health literature on these two issues is limited, there is growing evidence that health outcomes are affected by experiences related to possessing identification, the means to be mobile, and enforcement in communities.(2)

**Table A-1: Policy Areas and Specific Policies**

| Policy Area  | Specific Policy   |
|--|---|
| <b>Policy Area 1: Public health and welfare benefits</b> | <ul style="list-style-type: none"> <li>- Medicaid for undocumented children</li> <li>- Full prenatal care for pregnant undocumented women</li> <li>- Supplemental Nutrition Assistance Program</li> </ul> |
| <b>Policy Area 2: Education</b>                          | <ul style="list-style-type: none"> <li>- Higher education tuition and scholarships</li> </ul>   |
| <b>Policy Area 3: Employment and labor practices</b>     | <ul style="list-style-type: none"> <li>- Use of E-Verify</li> <li>- Worker's compensation laws</li> </ul>   |
| <b>Policy Area 4: Driver licensing and IDs</b>           | <ul style="list-style-type: none"> <li>- State drivers' licenses</li> <li>- Compliance with REAL ID</li> </ul>  |
| <b>Policy Area 5: Secure Communities</b>                 | <ul style="list-style-type: none"> <li>- Limiting the impact of Secure Communities</li> </ul>   |

## 2. Selection of specific law or policy

Within each policy area, a variety of public policies exist. We sought to identify one to three specific policies that would represent each policy area. For some of the policy areas, such as Secure Communities and higher education, there were a limited number of specific policies available to consider. In those cases, we examined all of the current policies within that area. For the other areas, we selected policies that met these criteria:

<sup>1</sup> After the time period that this policy review covers, Secure Communities was replaced with a revised program called the Priority Enforcement Program (PEP). It reduces, but does not eliminate, the jail holds that US Immigration and Customs Enforcement (ICE) requests local law enforcement to conduct of those who are arrested and who may also be undocumented immigrants. While the new policy may reduce and/or shift who is deported, it remains to be seen if the “chilling effect” of the new program is any less than the old one. See: [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) and <http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html>

1. The policy is representative of a range of issues that might influence the health of undocumented immigrants.
2. There exists variation across states in the policy to allow for examination of inclusion compared to exclusion. This included policies where federal policy allows for states to establish their own policy or allows variation in the implementation of federal policy. Policies that were solely determined at the federal level and had no state variation were not included.
3. Information for all 50 states is available and has been previously reviewed by another established policy or legal organization. We relied on the existing policy summaries of other organizations that had the expertise to accurately identify those policies.
4. The policy was enacted and current as of December 2014.

The final selection of specific policies under each area is listed in Table A-1.

In the two policy areas, public health and welfare benefits as well as labor and employment, where many policies exist, we further define the scope of these two policy areas and provide rationale for their selection.

*Public health and welfare benefits:* The scope of these benefits is large. The US Department of Health and Human Services classifies public benefits as those that provide "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit or any similar benefit."(3, p.771) For most benefits, undocumented immigrants are excluded entirely from any claim on federal funds through these programs. These benefits include cash assistance such as Temporary Assistance for Needy Families (TANF), full scope Medicaid (health insurance), ability to use the ACA health insurance exchanges, and the Supplemental Nutrition Assistance Program (SNAP, previously known, and often still referred to, as Food Stamps). Federal law allows federal funding for undocumented immigrants in highly restricted circumstances, such as payment for some life-saving hospital care through Emergency Medicaid.(4) In addition, hospitals are subject to the Emergency Medical Treatment and Active Labor Act (EMTALA), which requires that all hospitals provide life-saving care

without consideration of ability to pay. There is also an effort to protect the general public health through providing immunizations and communicable disease testing and treatment to everyone regardless of insurance coverage or legal status. Other basic humanitarian assistance is offered by programs that make universal access available based only on income for breast and cervical cancer screening and treatment, school breakfast and lunch programs, WIC (supplemental nutrition for pregnant women and young children), and some short-term, noncash emergency disaster relief.(3)

Where state variation exists, it is the result of the federal government allowing states to offer additional benefits, generally at their own expense, or where optional benefits can result in more inclusive benefit packages. Examples of these types of policies include: children's health insurance, prenatal care, and eligibility criteria for SNAP. Health care for undocumented children and, in some cases, prenatal care, is funded by states; prenatal care is also funded through the Unborn Child State Plan Amendments under the State Children's Health Insurance Program. For SNAP funding, the USDA provides two options for calculating family income to determine eligibility. The prorated option allows family members who are not eligible for SNAP, generally undocumented family members, to be included in the calculation of family income. For example, consider a family with two undocumented parents and two citizen children and a monthly income of \$1600. To determine the children's eligibility, the prorated calculation would base income eligibility on the amount of income available to support the entire family ( $\$1600/4 = \$400/\text{month per child}$ ). In contrast, by excluding the parents because of their undocumented status, the alternate formula would assume that the family's entire income is available to just the two children ( $\$1600/2 = \$800/\text{month per child}$ ). This alternate calculation could result in the children's income being too high to qualify for SNAP. (See [http://www.fns.usda.gov/sites/default/files/Non-Citizen\\_Guidance\\_063011.pdf](http://www.fns.usda.gov/sites/default/files/Non-Citizen_Guidance_063011.pdf) and [http://www.fns.usda.gov/sites/default/files/10-State\\_Options.pdf](http://www.fns.usda.gov/sites/default/files/10-State_Options.pdf))

*Labor and employment practices.* There are a limited number of laws and policies that explicitly relate to the position and rights of undocumented workers. Some provide workers with

protections, such as laws that allow workers to keep their legal status private in employment litigation or that prevent employers from using legal status to retaliate against employees. Other laws, however, attempt to limit the labor force participation of undocumented immigrants, such as employer prohibition and sanctions against hiring undocumented workers, requiring verification of work documents, and mandating the use of the national E-Verify database. An extensive and complex set of federal and state labor laws include general protection for all workers, regardless of legal status. Overall, many of the key laws that provide labor protections for undocumented immigrants come from general laws and policies related to wages (e.g. minimum wage laws, pay documentation), work hours (e.g. breaks and overtime), remedies for discrimination, union organizing, health and safety, and protection against employer retaliation. Key federal labor laws include health and safety protections; Title VII of the Civil Rights Act that protects workers from discrimination due to race, sex, religion, or national origin; the Fair Labor Standards Act, which protects against wage theft; and the National Labor Relations Act, which provides union organizing protections. Many states have laws that mirror or reinforce these federal laws, creating complex layers of worker protection. For example, in 2013 California passed AB263 to increase protections against an employer using a worker's immigration status in retaliation for asserting state-protected labor rights.<sup>(5)</sup> In theory, these worker protection policies aim to promote undocumented worker integration in the labor force by ensuring the same protection for all workers.

In addition, a wide range of labor laws that are specific to an industry or job title have an impact on undocumented workers. While such policies were beyond the scope of this report, these include policies related to agricultural safety, the Domestic Workers' Bill of Rights, and car wash wage laws, which contribute an important area of labor and employment protections in occupations that employ large numbers of undocumented workers.<sup>(6-8)</sup>

The laws that explicitly attempt to exclude undocumented workers from the labor market are often in conflict with the set of laws that attempt to protect workplace rights and benefits. There is a fundamental contradiction in protecting undocumented workers rights as laborers

but prohibiting them from legally working. Scholars refer to this intersection as "immigration law" and argue that immigration and labor/employment law should be brought together to be studied and practiced at their intersection to better protect the rights of immigrant workers.(9)

### **3. Identification of policy indicator**

To clearly identify how state policy addresses each area (Table A-1), we developed specific outcomes for each of the selected policies. Each policy indicator that we created (Table A-2) had an explicit Yes or No regarding the existence of (or lack of) the policy. Most of the policy indicators involved the provision of an inclusive right, such as access to health care or driver licensing. For example, for higher education policies related to in-state tuition, the policy outcome was "State offers in-state tuition." In some cases, however, the policy indicator was whether or not a state had taken an exclusionary action. For example, for the specific policy of "Use of E-verify" we wanted to capture which states mandated its use, an exclusionary action, and which states restricted its use, a more inclusive action; therefore, two policy indicators were developed: presence of 1) a policy *mandating* employers use E-Verify and 2) a policy *prohibiting* employers from using E-Verify. Since these two outcomes are the result of different policies, rather than gradations of a single policy, we code them separately. The result is a list of indicators for each policy that allow for a systematic and explicit approach to coding each state based on their policy outcome.

### **4. Scoring of inclusive and exclusive policies**

We assigned scores for each policy indicator to determine what outcome constituted an inclusive or exclusive policy. In addition, a neutral category was created. Given the structure of each policy indicator, the policy outcomes under consideration were "Yes, a policy exists" or "No, no policy exists." Therefore, for each policy, we determined which of the two outcomes constituted an inclusive policy and which constituted an exclusive policy and, in a small number of cases, what outcome was considered neutral. The inclusive outcomes were given a score of +1 and the exclusive outcomes were given a score of -1 and neutral was given a score of 0.

For almost all of the policy indicators, the *existence* of a policy constituted the inclusive outcome. For example, for "State provides health insurance to children regardless of legal status," the states with a policy are coded as inclusive and are scored accordingly with a +1. In these cases, the *absence* of a policy constitutes the exclusionary outcome since undocumented immigrant children are excluded from health insurance by federal law, and the state is scored with a -1. When a state does not extend a right to undocumented immigrants that is allowed under federal law, it engages in a policy of exclusion. For example, although the federal law prohibits undocumented immigrants from driving privileges, the federal law also allows states to individually grant these privileges. If a state did not have legislation granting drivers' licenses to undocumented immigrants, we scored that policy as exclusionary. The policy outcomes that were determined to be neutral were scored for policy indicators that have opposite outcomes. For example, mandated use of E-Verify and restrictions of use on E-Verify each represent one end of exclusive-inclusive policy outcomes. Table A-2 presents each of the five policy areas, their specific policies, and which outcomes were inclusive, exclusive, or neutral. Each policy was then classified according to this scoring scheme. Once the policies for each state were identified, the states' overall inclusive score was calculated.

**Table A-2: Specific Policies and Scores**

| Policy Indicator  | Coding         |             |               |
|---|----------------|-------------|---------------|
|   | Exclusive (-1) | Neutral (0) | Inclusive (1) |
| <b>Public health and welfare benefits</b>   |                |             |               |
| State provides health insurance to children regardless of legal status  | No policy      | -           | Yes           |
| State provides care to pregnant women regardless of legal status  | No policy      | -           | Yes           |
| State counts both ineligible non-citizen income and persons in SNAP calculations (vs including all income but not undocumented persons) | No             | -           | Yes           |
| <b>Higher Education</b>   |                |             |               |
| State provides in-state tuition to undocumented students  | No policy      | -           | Yes           |
| State provides access to scholarships or financial aid for undocumented students  | No policy      | -           | Yes           |
| <b>Labor and Employment</b>   |                |             |               |
| State mandates employers use E-Verify   | Yes            | No policy   | -             |
| State prohibits employers from using E-Verify   | -              | No policy   | Yes           |
| State includes undocumented immigrants in the definition of employee for workers' compensation  | -              | No/Limited  | Yes           |
| <b>Driver licensing and IDs</b>   |                |             |               |
| State offers drivers' licenses for undocumented immigrants  | No policy      |             | Yes           |
| State statutory opposition or resolution in opposition to compliance with REAL ID   |                | No policy   | Yes           |
| <b>Secure Communities</b>   |                |             |               |
| State limits participation in Secure Communities  | No policy      |             | Yes           |

## **5. Data sources**

To scan for policies, we identified recent, existing policy reviews that could provide a response for each policy indicator (see Appendix: Policy Sources). These sources included 50-state policy reports, legal articles, government websites and reports, and other policy reports. After a response was found to each policy indicator from one of these existing sources, we cross-checked the information by examining the current state code or regulation where the policy originated to verify the accuracy of each review.

After information regarding each policy indicator was identified and verified, we documented the results in a database, including the following information for each policy:

- Yes/No response to indicator question and corresponding score of -1, 0, +1
- Description of the policy
- Number/name of originating legislation or code
- Policy source

## **Limitations**

The overall goal of this state-level policy report is to present a broad picture of the policies that can have an impact, directly or indirectly, on the health of undocumented immigrants and their families. The goal is not to provide a comprehensive listing of all areas of policy; rather, we provide a broad picture of how states include or exclude undocumented immigrants and their families through their direct or indirect policies that carry implications for individuals who lack authorization to be in, or work in, the United States. As a result, this scan does not include a comprehensive list of all policies that influence the social determinants of health. Additional policies that affect the health of undocumented immigrants and merit attention include housing or child welfare policies. In addition, it is important to note that this scan is not a legal analysis and does not provide specific information such as the constitutionality or long-term legal implications of each policy.

## References

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