

## **BILL ANALYSIS**

H.B. 4  
By: Spiller  
State Affairs  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

According to data from U.S. Customs and Border Protection (CBP), there were nearly 2.4 million migrant encounters along the southern border of the United States in fiscal year 2022, a record-high figure. Data from CBP also indicates that over one million encounters were recorded in Texas sectors alone that year, as opposed to under 300,000 encounters in fiscal year 2020. Moreover, the U.S. Border Patrol has seen an increase in repeat border crossings as well. In fiscal year 2019, just seven percent of migrants were apprehended more than once within a fiscal year. According to CBP data, this recidivism rate increased in fiscal years 2020 and 2021 to 26 percent and 27 percent, respectively, meaning that more than a quarter of migrants attempted to illegally cross the border at least twice. Due in part to the influx of border encounters, the State of Texas launched Operation Lone Star in March 2021, deploying the Texas National Guard and the Department of Public Safety to help secure the southern border. H.B. 4 seeks to further address the issue of border security by creating criminal offenses related to illegal entry into or presence in the state by an alien that can be enforced by all law enforcement officials in Texas and by authorizing the removal of such aliens in lieu of arrest.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

H.B. 4 amends the Penal Code to create the Class B misdemeanor offense of illegal entry from a foreign nation for a person who is an alien and enters or attempts to enter Texas from a foreign nation at any location other than a lawful port of entry. The bill defines "alien" by reference to federal law, as it existed on January 1, 2023, as any person who is not a citizen or national of the United States and defines "port of entry" as a port of entry in the United States as designated by applicable federal regulations, which specify that the term refers to any place designated by executive order of the U.S. President, by order of the Secretary of the Treasury, or by Act of Congress, at which a U.S. Customs and Border Protection officer is authorized to accept entries of merchandise to collect duties, and to enforce the various provisions of the customs and navigation laws. Those regulations also specify that "port of entry" incorporates the geographical area under the jurisdiction of a port director and excludes customs ports in the Virgin Islands.

H.B. 4 enhances the penalty for a subsequent conviction of the offense of illegal entry from a foreign nation to a state jail felony. The bill establishes the following as affirmative defenses to prosecution for the offense:

- the federal government has granted the defendant lawful presence in the United States or asylum under applicable federal law;
- the defendant's conduct does not constitute a violation of federal law establishing a criminal penalty for an alien who enters or attempts to enter the United States at any time or place other than as designated by immigration officers, eludes examination or inspection by immigration officers, or attempts to enter or obtains entry to the United States by a wilfully false or misleading representation or the wilful concealment of a material fact; or
- the defendant was approved for benefits under the federal Deferred Action for Childhood Arrivals program (DACA) between June 15, 2012, and July 16, 2021.

For purposes of the affirmative defense to prosecution involving the federal government granting lawful presence or asylum, the following federal programs do not provide an affirmative defense:

- the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA); and
- any program not enacted by the U.S. Congress that is a successor to or materially similar to DAPA or DACA.

H.B. 4 creates the Class A misdemeanor offense of illegal reentry by certain aliens for a person who is an alien and enters, attempts to enter, or is at any time found in Texas after the person has been denied admission to or excluded, deported, or removed from the United States or has departed from the United States while an order of exclusion, deportation, or removal is outstanding. The bill enhances the penalty for the offense to a third degree felony under the following circumstances:

- the defendant's removal was subsequent to a conviction for commission of two or more misdemeanors involving drugs, crimes against a person, or both;
- the defendant was excluded pursuant to federal law regarding the removal of aliens who are inadmissible on security and related grounds because the defendant was excludable on the basis of terrorist activities;
- the defendant was removed pursuant to federal law regarding alien terrorist removal procedures; or
- the defendant was removed pursuant to federal law regarding the removal of nonviolent offenders prior to completion of a sentence of imprisonment.

The bill enhances the penalty for the offense to a second degree felony if the defendant was removed subsequent to a conviction for the commission of a felony. For purposes of these provisions, "removal" includes any agreement in which an alien stipulates to removal pursuant to a criminal proceeding under either federal or state law.

H.B. 4 authorizes a peace officer, in lieu of arrest, to remove a person detained for a violation that constitutes the offense of illegal entry from a foreign nation or illegal reentry by certain aliens by doing the following:

- collecting any identifying information the person may have;
- transporting the person to a port of entry; and
- ordering the person to return to the foreign nation from which the person entered or attempted to enter.

The bill prohibits a court from abating the prosecution of either offense on the basis that a federal determination regarding the immigration status of the defendant is pending.

H.B. 4 creates the second degree felony offense of refusal to comply with an order to return to a foreign nation for a person who is an alien and, following a violation that constitutes the offense of illegal entry from a foreign nation or illegal reentry by certain aliens, refuses to

comply with a peace officer's order in lieu of arrest to return to the foreign nation from which the person entered or attempted to enter.

H.B. 4 amends the Civil Practice and Remedies Code to require a local government or the state to indemnify, as applicable, an official, employee, or contractor of the local government or state, including an elected or appointed state official, unless the court or jury determines that the official, employee, or contractor acted in bad faith, with conscious indifference, or with recklessness, for damages arising from a cause of action resulting from the following:

- an action taken by the official, employee, or contractor to enforce the offenses established by the bill during the course and scope of their office, employment, or contractual performance for or service on behalf of the local government or state, as applicable; or
- an ultra vires action taken by the official, employee, or contractor in good faith to enforce the offenses on behalf of the local government or state, as applicable.

The bill establishes that "damages" includes any and all damages, fines, fees, penalties, court costs, attorney's fees, or other assessments. Indemnification under these provisions is not subject to local government tort claims payment limits or state payment and insurance limits for indemnification for certain public servants, as applicable. The bill entitles a state official, employee, or contractor who may be entitled to indemnification for damages arising from such a cause of action to representation by the attorney general, subject to statutory provisions relating to state liability for the conduct of public servants, in an action in connection with which the person may be entitled to that indemnification.

H.B. 4 requires a local government or the state to indemnify an official, employee, or contractor of the local government or state, as applicable, for reasonable attorney's fees incurred in defense of a criminal prosecution against the official, employee, or contractor for an action taken by the person to enforce the offenses established by the bill during the course and scope of their office, employment, or contractual performance for or service on behalf of the local government or state, as applicable.

H.B. 4 requires an appeal for a civil action brought against a person who may be entitled to local government or state indemnification under the bill's provisions for damages awarded against the person in the action to be taken directly to the Texas Supreme Court.

H.B. 4 establishes that the bill's provisions regarding indemnification do not affect a defense, immunity, or jurisdictional bar available to the state or a local government or an official, employee, or contractor of the state or a local government.

H.B. 4 establishes that it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in the bill, and every application of the bill's provisions to every person, group of persons, or circumstances, is severable from each other. If any application of any bill provision to any person, group of persons, or circumstances is found by a court to be invalid for any reason, the remaining applications of that provision to all other persons and circumstances are severed and may not be affected.

#### **EFFECTIVE DATE**

December 1, 2023, or, if the bill does not receive the necessary vote, the 91st day after the last day of the legislative session.