

Supreme Court Determines Arizona's Legal Arizona Workers Act Not Preempted by Federal Law

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The U.S. Supreme Court has rejected arguments that the controversial Legal Arizona Workers Act ("LAWA") was preempted by federal law and would lead to discrimination by employers. *Chamber of Commerce of the United States v. Whiting*, No. 09-115 (May 26, 2011). The Legal Arizona Workers Act imposes sanctions on employers that knowingly or intentionally hire unauthorized workers, as well as requires employers to participate in the federal E-Verify program.

The Court's highly anticipated decision likely will have an impact beyond Arizona's borders. Struggling with the presence of illegal immigrants, states throughout the country have been looking to Arizona. Legislation requiring the use of E-Verify already has been enacted in several states: Georgia, Mississippi, South Carolina, and Utah. The Supreme Court's ruling does not address Arizona's other controversial immigration statute, S.B. 1070, which requires law enforcement officials to attempt to determine the immigration status of any person that they believe to be an alien unlawfully present in the United States. (See our Global Immigration Blog, <http://www.globalimmigrationblog.com/>, to follow the legal rulings.)

Overview of the Act

LAWA requires the Attorney General or County Attorney to investigate all complaints made *by anyone* against an employer relating to the employment of unauthorized aliens. The U.S. Immigration and Customs Enforcement (ICE) agency and local enforcement will be informed of valid complaints, and the County Attorneys may file charges against the employer. The Act also provides for a progressive penalty system that depends on whether the violating employer "knowingly" or "intentionally" employed the unauthorized alien. The Act applies to Arizona employers of all sizes.

Under the Act, “knowingly” is defined as it is under federal immigration law, which permits violations to be based on an employer's constructive knowledge of a person's lack of legal status, other than the person's appearance or accent. If a court finds that an employer knowingly employed an unauthorized alien, the employer must terminate the employment. The employer also must file a signed affidavit with the County Attorney's office stating that employment has been terminated and promising not to employ an unauthorized alien in the future; failure to file the affidavit within three business days of the court's order will result in the suspension of the employer's business license(s). In addition, the employer will be placed on probation for three years, during which it must file quarterly reports with the County Attorney listing each new employee who is hired at the location where the unauthorized alien was previously employed.

The penalties are even harsher for employers who are found to have intentionally hired an unauthorized alien. For purposes of the Act, "intentionally" means the employer had knowledge of the circumstances that made its conduct illegal, even if it did not know that its conduct actually violated the law. If a court finds that an employer intentionally employed an unauthorized alien, in addition to terminating the employment and filing a signed affidavit with the County Attorney's office as for knowingly hiring an unauthorized alien, the employer's business license(s) *will be* suspended for at least 10 days, and it will be placed on probation for five years, during which it must file quarterly reports with the County Attorney listing each new employee who is hired by the employer at the location where the unauthorized alien was employed. Moreover, if the employer knowingly or intentionally employs an unauthorized alien at anytime during the probationary period, all business licenses of the employer necessary to operate its business will be *permanently revoked*.

The other major provision of the Act requires all employers use the federal E-Verify system to verify the employment eligibility of all new hires beginning January 1, 2008. Despite this, some Arizona employers have decided to wait for the Supreme Court's decision on the validity of the LAVA before enrolling in E-Verify.

Lower Court Decisions

In late 2007, business and civil rights groups unsuccessfully sought to enjoin LAVA from taking effect. Rejecting the challenge, the U.S. District Court for Arizona held that LAVA was not expressly or impliedly preempted by the federal Immigration Reform and Control Act of 1986 (“IRCA”).

In September 2008, the Ninth Circuit Court of Appeals affirmed the District Court's decision. It said LAVA was a “licensing” statute that fell within IRCA's “savings clause” and was not expressly preempted. The Ninth Circuit also found that LAVA's E-Verify requirement was not preempted by the federal Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which created the E-Verify system (formerly known as the Basic Pilot Program).

Supreme Court Decision

The Supreme Court affirmed the Ninth Circuit decision. Writing for the 5-3 majority, Chief Justice John Roberts rejected the preemption challenges, noting that, in enacting LAVA,

“Arizona has taken the route least likely to cause tension with federal law.” *Chamber of Commerce of the United States v. Whiting*, No. 09-115 (May 26, 2011). In its decision, the Supreme Court tackled each of the preemption arguments in turn.

First, as to the argument that LAWA’s licensing provisions are expressly preempted by federal law, the Court noted that while IRCA prohibits states from imposing “civil or criminal sanctions” on employers that employ unauthorized aliens, the federal law specifically preserves state authority to impose sanctions “through licensing and similar laws.” It concluded that LAWA falls squarely within this savings clause, allowing states to enact “licensing and similar laws.” The Court specifically rejected the argument that Arizona’s law is not a “licensing” law because it operates only to suspend and revoke licenses, rather than to grant licenses. According to the Court, the argument was without “basis in law, fact or logic.”

As to the argument that LAWA’s licensing provisions were “impliedly preempted” because they conflict with federal law, the Court again pointed to IRCA’s savings clause and concluded that because Congress specifically preserved such authority to the states, it clearly did not intend to prevent states from using appropriate tools to exercise that authority. The Court also noted that “Arizona went the extra mile in ensuring that its law closely tracks IRCA’s provisions in all material respects.” Thus, the LAWA is not impliedly preempted by federal law.

The Court also rejected the argument that LAWA will force employers to “err on the side of discrimination” rather than risk losing their business licenses by hiring unauthorized workers. The Court countered that “[t]hat is not the choice” because license termination would occur only for egregious violations when an employer knowingly or intentionally hires unauthorized workers. It explained, “These limits ensure that licensing sanctions are imposed only when an employer’s conduct fully justifies them. An employer acting in good faith need have no fear of the sanctions.”

Finally, as to the argument that LAWA’s E-Verify mandate is impliedly preempted by federal law, the Court said, “The provision of IIRIRA setting up the program that includes E-Verify contains no language circumscribing state action.” While IIRIRA restricts the federal government’s ability to require the use of E-Verify, that restriction does not affect what the states may do. Moreover, the Court also held that Arizona’s mandate does not conflict with the federal scheme. It noted that the consequences of an employer not using E-Verify are the same under both state and federal law — “the employer forfeits the otherwise available rebuttable presumption that it complied with the law.”

Implications

For employers that may have waited to enroll in E-Verify, the wait is over. Arizona employers should be enrolled in E-Verify and consistently verifying the work authorization of all new employees. Under LAWA, use of E-Verify is a defense to the significant consequences that will result from an employer’s knowing or intentional hiring of unauthorized workers.

When LAWA took effect in January 2008, some warned that the Act would be aggressively enforced by the state’s County Attorneys. There have been a handful of known raids and only

three known enforcement actions pursued against Arizona employers. However, now that the cloud of uncertainty over the validity of the Act has been lifted, we may see a rise in the number of cases brought under LAWA. Therefore, Arizona employers should continue to ensure their compliance with LAWA's requirements. In addition to participation in E-Verify, employers should review their Form I-9 compliance programs to ensure their Form I-9s are consistently being completed properly.

The Supreme Court's decision upholding LAWA's E-Verify requirement is likely to spur other states to consider passing such legislation, now with some comfort that such a requirement will survive a preemption challenge

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