



SUPREME COURT ALLOWS STATES TO TARGET EMPLOYERS TO CURB ILLEGAL IMMIGRATION

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On May 26, 2011, the United States Supreme Court declared that states are allowed to enact state immigration laws, when the state laws target employers who might be employing illegal aliens. Chamber of Commerce v. Whiting (No. 09-115, 5/26/11). As a result of the decision, employers may face new legal exposures governing their hiring and retention practices. Employers may soon be covered by both state and federal immigration requirements – and those requirements do not necessarily have to be consistent. The decision underscores the need for HR professionals to carefully and thoroughly comply with immigration rules.

Background and Analysis of Decision. Controlling immigration has long been considered the exclusive province of federal law. In 1952, Congress passed the Immigration and Naturalization Act (“INA”) which provided comprehensive rules governing immigration and naturalization. In 1986, additional federal immigration rules were added in the form of the Immigration Reform and Control Act (“IRCA”). Part of IRCA included new measures focused on the employment process, including the creation of the well-know “I-9” form, which is now a standard hiring requirement of all U.S. employers. IRCA also included language stating that federal immigration law “preempts any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ...unauthorized aliens.”

In 1996, Congress again addressed growing concerns over rampant immigration violations by passing the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). Under this Act, the government established an electronic internet database system, known as “E-verify”, that allows employers to verify information supplied by an employee on the I-9 form. The government is prohibited under IIRIRA from requiring employers to utilize E-Verify (with the exception of employers who qualify as federal contractors).

Despite these multiple federal attempts to address immigration issues, the influx of illegal aliens and unauthorized workers has continued. By 2005, state legislators were experiencing increased political pressure to respond to the perceived “crisis”, particularly in border states such as Arizona, Texas and California.

As the federal government appeared increasingly unable or unwilling to respond to the growing immigration problem, State legislatures began adopting state laws to stem the flow of illegal immigrants. In 2007, the state of Arizona passed the Legal Arizona Workers Act. Under this Act, any employer who employs unauthorized aliens or fails to

comply with the new requirements of the state law can have their right to do business in the state suspended or revoked (a harsher potential civil penalty than provided under federal law). It requires all employers to use the E-Verify system in addition to completing the I-9 forms. It allows anyone, including anonymous tipsters, to report any employer suspected of violating the law and requires state law enforcement to investigate each complaint.

Opponents challenged the Arizona law on several grounds. They claimed that the state law was contrary to many aspects of federal immigration law, such as the investigation procedures, the mandatory vs. permissive use of E-Verify, and the penalty scheme. They argued that the threatened suspension or revocation of the right to do business was not the type of “license” excepted in the federal preemption law, and that allowing this practice as a method of avoiding federal preemption would effectively nullify any preemption. They claimed that the state law should be preempted to avoid a patchwork of state and federal immigration legislation, including inconsistent requirements, which could create an enforcement nightmare, particularly for employers with multi-state locations. The opposition groups included business associations (led by the national Chamber of Commerce), Civil Rights groups, who contended that the law could lead to unfair discrimination against minorities, and the Obama administration.

Despite these arguments, the Supreme Court upheld the Arizona statute, in a 5 to 3 decision.

Impact of Decision. The Supreme Court’s decision could have significant future impact on Wisconsin employers.

As we know, concerns about illegal immigration continue to rise, and the federal government continues to be perceived as incapable or unwilling to take effective measures to address the problem. (For example, it has been estimated that Wisconsin alone has at least 100,000 illegal immigrants within its borders, many of whom are unlawfully employed.) This situation continues to put pressure on state legislatures to take action on a local level. With the new decision in Whiting, it is likely that we will see more state laws passed on immigration topics.

In fact, Arizona subsequently passed another controversial law, SB 1070, which would allow its law enforcement agencies to detain individuals suspected of being unlawfully in the country. Enforcement of that law has currently been enjoined by the 9th Circuit Court of Appeals. And on May 24, 2011, just two days before the Whiting decision was issued, Representative Don Pridemore (R-Hartford) introduced state legislation in Wisconsin which would force law enforcement officials to ask those stopped for civil or criminal violations for proof of citizenship or legal immigration status. If the person fails to provide any such information, they could be detained for up to 48 hours until they provide proof that they are in the country legally. If they cannot prove their legal status after that time, the individual would be turned over to federal immigration or border patrol agencies.

Unlike the Legal Arizona Worker's Act, the other Arizona law (SB 1070) and the law proposed by Representative Pridemore do not specifically involve any "licensing" of employers. They will face a more difficult legal hurdle avoiding federal preemption.

On the other hand, now that the U.S. Supreme Court has highlighted a method for states to pass immigration laws, it is very likely that other states will adopt immigration laws that primarily target employers, such as the Legal Arizona Worker's Act. State legislators continue to be pressured by constituents to pass state immigration rules, and thus far the employer-targeted laws are the only ones found not to be preempted by federal law.

Thus, it appears likely that employers, including Wisconsin employers, will face increasing legal exposure and new immigration requirements, such as the mandatory use of E-Verify. Opponents in the Whiting case pointed out that E-Verify requires significant training and internal administrative expense, and that approximately 18% of the time the system may erroneously conclude that the new worker was not eligible for hire. Opponents also argued that these new requirements, and the enhanced penalties in the state laws may lead to more employers refusing to hire minorities (or coming up with pretextual reasons for excluding them) for fear of violating the technical hiring requirements. These issues will create further challenges for employers.

Moreover, under an Arizona-type law, competitors, disgruntled employees or ex-employees, or other individuals simply bent on mischief could secretly and anonymously "report" an employer to the state, which would be "required" to mount an investigation of the employer. Responding to such investigations would involve additional time and expense.

Recommendations for HR Professionals. Although Wisconsin has not yet adopted an Arizona-type immigration law, it may only be a matter of time before it does so. (Wisconsin employers with plants in Arizona or in other states with such laws will immediately have to begin compliance.) However, Wisconsin employers and local HR professionals would be well advised to anticipate the potential future exposure as well as current exposures, and take steps now to ensure compliance. Recommended actions include the following.

- Review the federal I-9 form requirements. These requirements are updated periodically on the federal website. There are many written guidance available to assist employers in administering I-9 forms.
- Require all individuals involved in your hiring process to train on I-9 requirements at least once per year.

- Perform an annual audit of I-9 forms to ensure that you have a properly completed I-9 form for every employee hired after 1986, and that those forms are secure and safe.
- Have an independent professional audit your I-9 procedures and perform random audits of completed I-9 forms. An independent audit may identify deficiencies that an internal audit may miss. The cost of an independent audit will be far less than the penalties of an immigration violation.
- If you are a federal contractor, ensure that you are utilizing the E-Verify system and have posted the E-Verify posters as required by the federal regulations.
- If you are not a federal contractor, explore the E-Verify option and begin learning its processes. It is likely that all employers will eventually be required to utilize the E-Verify system. By voluntarily learning and using this system, you will get ahead of the curve.
- Avoid taking risks. For example, some employers, when they learn that one of their workers has a false identity, may be tempted to take steps to protect or rehire that person once they obtain proper identity. Such steps are extremely risky. It may be true that workers with false identities are among your best workers, with stellar attendance records and utmost compliance with your rules and expectations. (The fear of deportation generally serves as a strong motivator.) This is not a good reason to cut corners and possibly violate the immigration laws. Immigration violations carry both civil and criminal penalties. Under state laws such as Arizona, it may cost your company the right to do business, as well as landing you in jail.

Additional information on the new Supreme Court case, pending state legislation, and other immigration topics can be obtained from the author.