



Supreme Court Says Federal Law Does Not Preempt Legal Arizona Workers Act

On May 26, 2011, the Supreme Court upheld an Arizona law that allows the state to suspend or revoke the business licenses of employers that knowingly or intentionally employ unauthorized aliens, and also requires all Arizona employers to use E-Verify.

Background

The Immigration Reform and Control Act (IRCA) makes it unlawful for a person or entity to recruit, hire, or refer for a fee unauthorized aliens for employment in the United States. IRCA expressly preempts state and local laws that impose civil or criminal penalties (other than through licensing and similar laws) on employers, recruiters, or referrers of unauthorized aliens. Under IRCA, employers must take appropriate steps to verify an employee's eligibility for employment. To check the work authorization status of employees, employers can use the federal web-based E-Verify system.

A number of states, including Arizona, have enacted laws imposing sanctions through licensing and similar laws against employers that employ unauthorized aliens. The [Legal Arizona Workers Act of 2007](#) (as amended) prohibits businesses from knowingly or intentionally hiring "an alien who does not have the legal right or authorization under federal law to work in the United States" and provides for the suspension or revocation of their business licenses for doing so. The Arizona law also requires Arizona employers to use E-Verify to check the employment authorization of all new hires after December 31, 2007.

BUCK COMMENT. *As the Supreme Court noted in the decision discussed below, Colorado, Mississippi, Missouri, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia have "recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, licensing and similar laws." The Court also noted that Mississippi, South Carolina, Utah, and Virginia have passed laws mandating the use of E-Verify.*

The U.S. Chamber of Commerce challenged the Arizona law, arguing that IRCA preempted the state law's licensing and revocation provisions and the mandatory use of E-Verify. Both the federal district court and the U.S. Court of Appeals for the Ninth Circuit upheld the Arizona law.

Chamber of Commerce v. Whiting

In [*Chamber of Commerce v. Whiting*](#), the Supreme Court considered whether:

- Arizona's licensing law is expressly preempted by federal immigration law;
- Arizona's licensing law is impliedly preempted by federal immigration law; and
- Arizona's requirement that all employers use E-verify runs afoul of federal law that makes use of the system voluntary.

In a 5-3 decision, the Court upheld the Arizona law against claims that it was expressly or impliedly preempted by federal legislation and found Arizona's decision to mandate the use of E-Verify "is entirely consistent with the federal law." In doing so, the Court focused on the licensing exemption to IRCA's general preemption of state laws governing the employment of illegal aliens. Reading the word "licensing" broadly, the Court found that Arizona's law was "well within the confines of the authority Congress chose to leave to the States." Because Congress preserved authority to the states, the Court concluded, Congress intended to permit states to use appropriate tools such as sanctions in exercising that authority. Thus, states may adopt tougher penalties than federal law provides to prevent the hiring of illegal workers.

The Court also held that federal law did not preempt Arizona's requirement that employers use the federal E-Verify system to determine worker status. Although the Immigration Reform and Immigrant Responsibility Act restricts the federal government's ability to require the use of E-Verify, it does not restrict what states can do. Thus, the Court held, states can mandate use of the federal system to confirm that those they employ are legally authorized workers.

BUCK COMMENT. *Beginning in July 2006, the City of Hazleton, Pennsylvania adopted a series of local ordinances that sought, among other things, to regulate the employment of unlawful aliens. A federal district court enjoined Hazleton from enforcing the employment provisions of the ordinances on preemption grounds. The United States Court of Appeals for the Third Circuit agreed. The Supreme Court in Hazleton v. Lozano (Docket No. 10-772) has now vacated judgment and remanded the case for further consideration in light of the Whiting decision.*

Rejecting the Chamber's concern that employers would "err on the side of discrimination" in their hiring practices rather than risk their business licenses, the Court made clear that the Arizona law covers only "intentional or knowing" violations. Thus, employers that act in good faith are not subject to losing their licenses for hiring unauthorized workers, and employers that use the I-9 system and E-Verify to validate employment eligibility enjoy safe harbors from liability. The Court also noted that IRCA has its own antidiscrimination provisions that impose sanctions on employers for engaging in unfair employment practices, such as discriminating on the basis of citizenship or national origin. In addition, other federal and state antidiscrimination laws further protect against employment discrimination.

Conclusion

The Court's ruling underscores the need for employers to have in place effective policies and procedures to ensure that the workers they hire are eligible to work in the United States. Arizona employers should immediately enroll in E-Verify, if they have not already, and verify the work authorization status of all new hires.

Although the *Whiting* decision's immediate impact is on Arizona employers, it opens the door for other states and local jurisdictions to adopt bills that mirror Arizona's law or similar laws to prevent the employment of unauthorized aliens. Thus, employers should continue to monitor initiatives in other states and localities in which they operate. Employers should provide appropriate training for their employees involved in their hiring process on all required steps to verify the work status of new hires through E-Verify or other appropriate means, and on applicable federal and state laws against employment discrimination. In addition, employers should review their Form I-9 compliance programs.

Buck's consultants would be pleased to review the impact of this decision on your employment policies and practices.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.