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U.S. Supreme Court's Final Say on Arizona's Immigration Employer Sanctions Law

Arizona initiated state-led immigration enforcement measures in 2008 with a law mandating the use of E-verify and establishing licensing penalties for employers who hire unauthorized workers. On May 26, 2011, in a 5-3 decision, the U.S. Supreme Court upheld the law. Divided across what appeared to be party lines, the Supreme Court's majority noted that employers who act in good faith will not be impacted by the law's licensing provisions because those sanctions are limited to employers who knowingly or intentionally employ unauthorized workers. With the Supreme Court's final say, Arizona and many other states and localities following in Arizona's footsteps were vindicated. With this win, Arizona and states like Arizona will continue on a path to what they believe will ensure increased enforcement of U.S. immigration laws and stem the flow of undocumented workers into the U.S.

How did we get here?

In 2007, Arizona passed the Legal Arizona Workers Act (LAWA). The measure was signed into law by Democrat Janet Napolitano, then the governor of Arizona and now the Secretary of the Department of Homeland Security. LAWA took effect on January 1, 2008. LAWA mandates the use of E-Verify by Arizona employers and empowers the State of Arizona to suspend or revoke employers' business licenses if they are found to have knowingly or intentionally employed aliens who are not authorized to work in the U.S. The law was challenged by the Chamber of Commerce of the United States and various business and civil rights organizations ("Chamber").[1] The Chamber filed a federal preenforcement suit against Arizona, arguing that the state law's license suspension and revocation provisions were both expressly and impliedly preempted by federal immigration law, and that the

[1] *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008).

mandatory use of E-Verify was impliedly preempted. On September 17, 2008, the U.S. Ninth Circuit Court of Appeals affirmed the U.S. District Court ruling upholding LAWA.[2] Three years after the law went into effect, affirming the Ninth Circuit decision, the Supreme Court concluded that Arizona's law is not expressly or impliedly preempted by federal immigration law.

LAWA's provisions authorizing the state to sanction employers through licensing has its roots in the savings clause[3] of the Immigration Reform and Control Act (IRCA). IRCA, a federal law, makes it unlawful to employ aliens who do not have work authorization in the U.S. IRCA also restricts the ability of states to control the employment of unauthorized workers through state legislation that authorizes civil or criminal actions against employers. However, there is one limited exception to this restriction referred to as the savings clause and found within the passage which states — "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[4] It is the Supreme Court's interpretation of the savings clause that serves as the underpinning of the Court's decision in upholding LAWA.

Under the Constitution, federal law is the supreme law of the land. An express preemption provision indicates Congress' intent to prevent States from enacting laws that interfere with federal laws. When a state law clashes with federal law, it is up to the courts to decide whether the state law is preempted by the federal law. Under this doctrine of preemption, if either specific provisions or the law in whole is deemed to be preempted by federal law, it will then be deemed unconstitutional. LAWA passed the test with the Supreme Court concluding that all provisions of the Arizona law were carefully construed within the confines of IRCA and the savings clause. With that, LAWA will remain intact and fully enforceable.

The Claims and the Court's Response

A review of the Court's conclusions in response to the arguments against the licensing sanctions and E-Verify mandates provides employers across the nation with valuable insight into both the tolerance and expectations of the Supreme Court when it comes to the enforcement of U.S. immigration laws and the challenging hurdles the nation faces with a broken immigration system. Understanding the foundation of this decision is critical for employers who are making decisions day-to-day on the time, personnel and budget that should be or can be dedicated to ensuring compliance with federal and now state and local immigration laws.

LAWA's Licensing Provisions

One of the primary arguments against LAWA was that the law was expressly preempeted because the licensing provisions went beyond what is authorized by IRCA's savings clause. The Chamber argued that IRCA's savings clause should apply only to certain types of licenses or license revocation, and given the overbroad definition of "license," LAWA overstepped the limited confines of the exception.

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[2] *Id.*
[3] 8 U.S.C. § 1324a(h)(2).
[4] *Id.* (emphasis added).

In addition, the filing challenged the ability of any state law to utilize the savings clause when it is not contingent on a prior federal determination, i.e., the State cannot revoke a license unless there is a finding at the federal level first that the employer has knowingly or intentionally hired undocumented workers. In particular, IRCA created a centralized enforcement mechanism of procedures and standards for receiving complaints and investigating complaints related to the employment of unauthorized workers. Pursuant to IRCA, the relevant government agencies, the administrative law judge and the employer all work within the same rubric. The goal and purpose is to ensure that U.S. immigration laws are enforced uniformly. LAWA steps outside of these confines by providing a state court with the authority to make a determination on whether or not an employer knowingly or intentionally employed undocumented workers and by implementing its own penalties through the licensing provisions.

One particular sentence in the majority decision highlights and explains the Court's stance and final decision concerning this preemption challenge — "[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."[5] Disagreeing with all of the challenges presented, the Court noted that there are no such limits in the statute and concluded that LAWA falls within the plain text of the savings clause. In addition, the Court concluded that the State procedures "simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing law."[6] Furthermore, the Court found that there is no requirement in the plain text of the law that state licensing sanctions be contingent on a prior federal finding.

Understanding that the licensing provisions of LAWA remain fully intact, Arizona employers should take note of the full definition of "license" under LAWA. The law defines license as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purpose of operating a business . . . ," the definition includes "documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State."[7] While this may appear to go beyond the limits of IRCA's savings clause, the Supreme Court held that "even if a law regulating articles of incorporation, partnership certificates, and the like is not itself a 'licensing law,' it is at the very least 'similar' to a licensing law, and therefore comfortably within the savings clause."[8]

LAWA's E-Verify Mandate

In its filing, the Chamber also argued that the state's mandate that all employer's use E-Verify, a voluntary federal system, impedes the purpose of the program. Among many other concerns, the Chamber pointed to the fact that E-Verify is still considered to be an evolving program prone to errors and is in essence still a pilot program. Therefore, to mandate its use is in direct contradiction to the language of the statute clearly identifying its voluntary nature. Once again, the Supreme Court disagreed with the Chamber's contentions. While E-Verify is not mandatory, the Federal government encourages its use and has a public outreach program designed to educate and promote the program nationwide. The Court also highlighted the fact that the only

[5] *Chamber of Commerce of the U.S. v. Whiting*, No. 09-115, slip op. at 19 (U.S. May 26, 2011).
[6] *Id.* at 15.
[7] A.R.S. § 23–211(9).
[8] *Whiting*, No. 09-115, slip op. at 11.

consequence under LAWA of not using E-Verify is identical to the consequence of not using the system when in limited circumstances it is required by federal law — the employer loses the rebuttable presumption that it complied with the law. Given this, the Court concluded that Arizona's requirement does not obstruct the goals of the federal government and is in line with the goals of expanding its use.

What Does This Mean for Your Business?

With this decision, the patchwork of state and local immigration mandates is expected to continue and increase. Across the board we expect to see an increase in other states' use of IRCA's savings clause to address the employment of undocumented workers. In addition, local governments in states that are unlikely to follow Arizona will continue to adopt similar laws. The decision is also likely to increase support for and speed up potential legislation surrounding E-Verify. With the release of the decision, House Judiciary Committee Chairman Lamar Smith (R-Texas) released a statement in support of the decision and confirmed his commitment to introduce legislation expanding E-Verify and making it mandatory nationwide.

As noted in Justice Breyers' dissenting opinion and echoed by many commentators, it is possible that "either directly or through the uncertainty it creates, the Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens -- without the counterbalancing protection against unlawful discrimination."

For companies conducting business in Arizona, if your house is not in order, it is time to take a comprehensive look at company protocols, procedures and policies. It is clear that LAWA allows the Superior Court of Arizona to suspend or revoke business licenses of employers who ***knowingly or intentionally*** hire unauthorized workers. What should be of concern is how the Arizona courts will come to that conclusion and what fact patterns will lead to a finding of knowing and intentional. What is more important for good-faith employers is that under LAWA, good-faith compliance with IRCA I-9 requirements provides employers with an affirmative defense against these potential claims. In addition, proof of the use of E-Verify on employees found to be undocumented provides employers with a rebuttable presumption that the employer did not knowingly employ an unauthorized worker. Given these two factors, the key for every employer is to take all necessary and possible steps that will protect the company from a charge and a subsequent finding of knowingly or intentionally hiring unauthorized aliens. While all employers may not be able to guarantee a clean workforce, everyone can and should take steps to provide an affirmative defense and a presumption of good faith compliance should charges be filed pursuant to LAWA.

What are the options now that LAWA is here to stay?

Enroll in E-Verify. All Arizona employers should have enrolled in this program as of January 2008, pursuant to LAWA. However, U.S. Citizenship and Immigration Services has acknowledged that not all Arizona employers have actually enrolled in the program. Employers can enroll specific worksites in the E-Verify program, or they may enroll all of their worksites. National employers are NOT required to sign up operations located outside the State of Arizona unless other state statutes require participation.

Regardless of an employer's decision on the E-Verify mandate, compliance with Form I-9 IRCA requirements is not optional. All employers, regardless of industry or size, must make a concerted effort to understand the importance of compliance, and make strategic business decisions to limit liability. Employers continue to be advised to invest the time and resources necessary to develop and implement a compliance policy. In particular, it is recommended that all businesses consider and take action on the following:

- Clean House: Conduct internal audits of I-9 documents, processes and procedures sooner rather than later. Whether you choose to conduct the audit yourself or retain counsel, the results of the audit will go a long way toward assessing exposure and limiting liability under LAWA. Remember, once enrolled in E-Verify, your company is on the government's radar screen and data mining is a possibility. Ensuring that the company has policies and procedures is critical if the business wants to use compliance with I-9 requirements as an affirmative defense against LAWA charges. These will be key because companies cannot present the actual I-9 documents themselves in defense of LAWA charges. IRCA prohibits the use of I-9 documents for any purpose other than enforcement of IRCA.[9]

- Become and remain compliant with IRCA and other federal immigration regulations. Train your Human Resources team to consistently and accurately complete Form I-9s, and provide them with the tools to recognize fraudulent identity and work eligibility documents. Most companies could use a refresher in I-9 training.

- Prepare now for possible workplace disruptions on a variety of fronts. While many feared the prevalence of LAWA enforcement actions, the statistics over the last two years do not support this fear. However, the federal government statistics are of concern. Immigration and Customs Enforcement (ICE) is aggressively executing its mission.

Employers need to be proactive and need to act now to review immigration compliance routinely, and perhaps for the first time, confirm and discuss expectations of these policies with business partners. Survival contingency plans may be key as some industries experience instability in their workforce and their resources throughout the community. The issue is not one of losing some workers, but rather one of businesses losing their

[9] 8 U.S.C. § 1324a(b)(5).

licenses and shutting down permanently. Contingency plans will be crucial to helping your company take every step possible to survive the ebb and flow of business closings and the limited number of available workers in general. To attempt to mitigate the impact of both state and federal enforcement actions, employers must take whatever steps now possible to ensure, at a minimum, that they are in compliance with federal immigration laws.

GT will continue to report on the enactment and implementation of various laws impacting employers as more and more states and localities adopt increasingly strict measures aimed at controlling the employment of undocumented workers and the flow of illegal immigration.

This *Business Immigration and Compliance Alert* was written by **Mahsa Aliaskari**. Special thanks to Rebecca L. Covell and Moncia Baumann. Questions regarding the subject matter of this *Alert* should be directed to Ms. Aliaskari at 310.586.7713 (aliaskarim@gtlaw.com), or to any Greenberg Traurig Business Immigration and Compliance or Labor & Employment Practice team member.

Greenberg Traurig's Business Immigration and Compliance Group has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions, I-9 Audits and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers' responsibilities when faced traditional no-match situations as well as more serious workplace identity theft or other alleged misrepresentations made by employees.

For more insight into immigration compliance and enforcement issues, please visit GT's Immigration Compliance blog at: www.immigrationcomplianceblog.com/.

Immigration and Labor & Employment Team

Atlanta
678.553.2100
David Long-Daniels
Natasha Wilson
Joe D. Whitley
Todd D. Wozniak

Austin
512.920.7200
Sujata Ajmera
Kevin Lashus
Maggie Murphy

Boston
617.310.6000
Joseph W. Ambash
Terence McCourt
Paul Murphy

Chicago
312.456.8400
Ruth A. Bahe-Jachna
Paul T. Fox
Michael D. Karpeles

Dallas
214.665.3600
Hugh E. Hackney
Peter Wahby

Denver
303.572.6500
Naomi G. Beer
Jeannette M. Brook
Brian L. Duffy

Fort Lauderdale
954.765.0500
William R. Clayton
Paul B. Ranis
Caran Rothchild
Michele L. Stocker

Houston
713.374.3500
L. Bradley Hancock
Mary-Olga Lovett
Martha Schoonover
Adelaida Vasquez

Las Vegas
702.792.3773
Tami Cowden
Mark D. Kemple

London*
+44 (0) 203 349 8700
Naomi Feinstein

Los Angeles
310.586.7700
Mahsa Aliaskari
Jennifer Blloshmi†
Michelle Lee Flores
Mark D. Kemple

Miami
305.579.0500
Joseph Z. Fleming
Oscar Levin
Julissa Rodriguez
Ronald M. Rosengarten

New Jersey
973.360.7900
Jonathan Israel
Eric B. Sigda

New York
212.801.9200
Jerrold F. Goldberg
Jonathan Israel
Abby Natelson (TAX?)
Christina Pitrelli
Eric B. Sigda
Jonathan Sulds

Orange County
949.732.6500
Richard Hikida
Todd R. Wulffson

Orlando
407.420.1000
Michele Johnson
Ronald Schirtzer

Palm Beach County North
561.650.7900
Bridget A. Berry
Mark F. Bideau
Lorie M. Gleim

Palm Beach County South
561.955.7600
Stephen A. Mendelsohn

Philadelphia
215.988.7800
James N. Boudreau
Kelly Bunting
Robert M. Goldich

Phoenix
602.445.8000
John Alan Doran
Michael Mason
Daniel B. Pasternak
Lawrence Rosenfeld
Mona M. Stone

Sacramento
916.442.1111
Kurt A. Kappes
Carol Livingston
James Nelson

San Francisco
415.655.1300
Scott Lawson
Kenneth Steinthal

Silicon Valley
650.328.8500
William J. Goines
Magan P. Ray

Tallahassee
850.222.6891
Lorence Bielby
John Londot

Tampa
813.318.5700
Cynthia May
Richard C. McCrea
Peter Zinober

Tysons Corner
703.749.1300
Kristin Bolayir†
Patty Elmas†
Craig A. Etter
Dawn Lurie
Laura Reiff
Glenn E. Reyes†
John Scalia
Rebecca Schechter
Martha Schoonover

Washington, D.C.
202.331.3100
Dawn M. Lurie
Laura Reiff

†*Not admitted to the practice of law.*