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9th Circuit Upholds Arizona's Immigration Employer Sanctions Law

As predicted by many, on September 17, 2008, the U.S. Ninth Circuit Court of Appeals (the Court) affirmed the [U.S. District Court ruling](#) upholding the Legal Arizona Workers Act (LAWA).¹ LAWA took effect on January 1, 2008, 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. LAWA also mandates the use of the E-Verify system for Arizona employers. Agreeing with the lower court, the Court affirmed that LAWA serves only as a "licensing" measure and does not violate or encroach on federal law. While the business community hoped the Court would recognize this as an example of an attempt by Arizona to preempt federal immigration law, the state was instead vindicated as it moves towards demanding increased enforcement.



The Decision

The Court's decision starts with an acknowledgment of the frustration states face following the failure of the U.S. Congress to enact [comprehensive immigration reform](#) in 2007. With the enactment of LAWA, Arizona joined other states by enacting their own legislation to police immigration related activity. In fact, Arizona increased the level of state action by taking advantage of an exception to the preemption clause of the Immigration Reform & Control Act of 1986 (IRCA). The exception to the clause relates to licensing laws. LAWA's bold move in authorizing Arizona state courts to suspend or revoke business licenses provides the state with an enforcement mechanism not used previously. All businesses must take this seriously.

The Court's bottom line:

"LAWA does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that LAWA is a 'licensing' measure that falls within the savings clause of IRCA's preemption provision."²

¹ *CPLC v. Napolitano*, __ F.3d __ (9th Cir. 2008).

² *Id.* at 13076.

The Claims and the Court’s Response

The primary express preemption challenge to LAWA was based on section 1324a(h)(2) of IRCA, which specifically 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.” (emphasis added)

Plaintiffs argued that the state law created an adjudication and enforcement system independent of federal enforcement of IRCA violations and was therefore beyond the scope of the provision and exemption for licensing laws. The Court did not find the argument persuasive. Citing the legislative history and House Reports noting that “states can condition an employer’s ‘fitness to do business’ on hiring documented workers[,]”³ the Court concluded that “because the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers, an assumption of non-preemption applies here.”⁴ Furthermore, the Court held that LAWA’s broad “definition of ‘license’ is in line with the terms traditionally used and falls within the savings clause.”⁵

The secondary preemption challenge relied on implied preemption arising from LAWA’s mandate that all Arizona employers must enroll in and utilize the federal E-Verify program. While Congress has made this a voluntary program for a number of reasons, the Court once again upheld the previous decision and noted that “Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation.”⁶ Based on this interpretation, the Court concluded that the E-Verify mandate did not violate or conflict with federal law or the intent of Congress.⁷ The Court went on to note that while use of the program is mandatory, there is no penalty for violation of the requirement. The Court also incorrectly, describes E-Verify as “an alternative to the I-9 system.”⁸ It is important for all employers to understand that use of the E-Verify program does not in any way waive an employer’s obligation to complete the Form I-9. With or without E-Verify, all employers in the U.S. are required to complete a Form I-9 for all new employees to verify identity and work eligibility.

³ Citing H.R. Rep. No. 99-682(i), at 58 (1986) as reprinted in 1986 U.S.C.C.A.N. 5649, 5662 [13076].

⁴ *CPLC v. Napolitano*, ___ F.3d ___, 13074 (9th Cir. 2008).

⁵ *Id.*

⁶ *Id.* at 13077.

⁷ *Id.* at 13066.

⁸ *Id.* at 13068.

Interestingly there is no mention of the impact and implications of the Memorandum of Understanding (MOU) employers are required to sign with the Department of Homeland Security when joining the E-Verify program. As long as use of E-Verify remains voluntary, employers retain the right to choose whether or not they want to be subjected to the provisions of the MOU. Once enrollment in E-Verify is mandatory, that right to choose is stripped. This factor is important because the MOU contains provisions that may not be fully understood and/or correctly implemented leading to actions by employers that run afoul of federal discrimination laws.

The burden on employers continues to grow as they are now required to figure out which laws apply when a conflict arises, while simultaneously attempting to implement the provisions of the E-Verify MOU. Although a successor to the Basic Pilot program that was in existence for over 10 years, the E-Verify program itself should be regarded as still in its infancy. FAQs and guidance issued by U.S. Citizenship and Immigration Services (USCIS) provides limited answers to key issues relating to hiring procedures and day to day questions from those who are ultimately responsible for maintaining and administering the program for the company. Any employer contemplating participation in the E-Verify program should recognize the additional burdens the program imposes, including the extra time and often unavailable resources needed to review and implement strategies and procedures necessary for ensuring compliance with state and federal immigration and discrimination laws.

Plaintiff's due process challenge did not fare any better. Once again confirming the lower court decision, the Court interpreted the statute as it is written, to "allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized."⁹

There remains glimmer of hope for those who would prefer to see LAWA revised, The Court acknowledged that the decision was issued in a vacuum, nothing that

"[w]e uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision."¹⁰

With the June 2008 raids of Golf & Entertainment Centers, Arizona saw its first enforcement action pursuant to LAWA. Pending the outcome of that investigation and ensuing sanctions pursuant to LAWA, the Court may see other challenges where a business claim may prevail based on the particular set of circumstances and application of LAWA.

What Does This Mean for Your Business?

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 aliens. For now, 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



⁹ *Id.* at 13066.

¹⁰ *Id.*

hiring unauthorized aliens. While all employers may not be able to guarantee a clean workforce, everyone can and should take steps that will provide an affirmative defense against charges filed pursuant to LAWA. In fact, LAWA specifically provides an affirmative defense when the employer can show good-faith compliance with Form I-9 IRCA requirements.

What are the options now that LAWA is in effect and the Court has upheld all provisions?

- Enroll in [E-Verify](#). Presumably, all Arizona employers should have enrolled in this program as of January 2008, pursuant to LAWA. However USCIS has acknowledged that less than half of all Arizona employers have actually enrolled in the program. Employers can enroll in the E-Verify program by a specific worksite location or at all of their locations. Keep in mind that limiting your exposure to E-Verify is something to consider. National employers are NOT required to sign up operations located outside the state of Arizona unless other state statutes require participation.
- Consider the pros and cons of investing resources in developing a good-faith compliance program for the Form I-9 IRCA requirements as an affirmative defense against LAWA charges, instead of or in addition to relying on the rebuttable presumption that using the E-Verify program provides. Some are arguing that since LAWA does not provide for any specific penalties or sanctions for employers not enrolling in E-Verify, employers still have the option of not enrolling. Based on this view, many employers are opting not to enroll in the program. This decision may prove to be an extremely risky one. Without the rebuttable presumption E-Verify provides, an employer is left only with its compliance with the Form I-9 to defend against LAWA claims. Furthermore, assuming an employer files for licensure renewal annually, the renewals often include general representations that the employer is compliant with all applicable state laws. In light of this, failure to enroll in E-Verify, could place licensure in jeopardy. This is a risky choice to take, however, given the lack of clarity or specific guidance, it is also one that may lead to future law suits as the law is enforced and interpreted. The decision and consequences of not enrolling should be carefully considered with legal counsel.

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.
- 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. After discussing the risks with counsel, consider running your current workforce through the Social Security Number Verification System (SSNVS). Use of this tool to ensures that your employees' Social Security numbers used for payroll match up with the information on record with the SSA.

- Prepare now for possible workplace disruptions on a variety of fronts. As LAWA enforcement actions become more prevalent, additional employees may leave the state. Should your company be investigated, severe losses could occur. You should plan for continuing shifts in your workforce and for locating the necessary replacements.

Key Amendments to Legal Arizona Workers Act

In response to the outcry from the community and following the recommendations and findings of the Ad Hoc Committee on Business Owners and Work Site Enforcement, HB 2745 was passed and adopted on May 1, 2008, amending and adding provisions to LAWA.

One of these provisions has led to some confusion and misinterpretation of protections and “grandfathering” of violations. Specifically, LAWA was amended to apply only to employees hired after December 31, 2007. Based on this, state law enforcement and sanctions apply only to violations of LAWA occurring after December 31, 2007. This refers only to violations of LAWA; violation of federal laws, specifically IRCA, are not waived or “grandfathered” in any way.

Some of the other key amendments include the following:

- **Independent Contractors.** LAWA is expanded by creating potential liability for employers who knowingly contract with an unauthorized alien or “with a person who employs or contracts with an unauthorized alien to perform the labor. . . .” The goal of this provision is to prevent employers from circumventing LAWA.
- **Investigation Process.** Complaints submitted using the official complaint form must be investigated. All other complaints may be investigated. Nothing in LAWA prohibits anonymous complaints. Unfortunately, there is still no mechanism in place to prevent frivolous complaints filed by competitors or disgruntled employees or customers.
- **Sheriff’s Office Role in Investigation Process.** LAWA was originally silent on the role of state law enforcement. The amendment confirms that county sheriffs and local law enforcement agencies may assist in investigating complaints filed pursuant to LAWA.
- **Site-Specific Sanctions.** If a business license is specific to a location, only that license would be suspended or revoked. In contrast, if the employer possesses only general licenses, then all of its locations are at risk.
- **License Defined.** The amendment broadly defines license as any “agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law.” This could presumably include articles of incorporation, articles of organization, or certificates of partnership.
- **Payment of Wages in Cash.** The amendment penalizes employers paying in cash, and failing to properly withhold taxes and other required deductions. The Attorney General may file charges seeking penalties. Specifically, the penalties may equal the greater of treble the amount of all withholdings, payments, contributions, or premiums that should have been paid, or \$5,000 for each employee for whom a violation was committed.

The amendment also establishes a voluntary Employer Enhanced Compliance Program (the Program) to be administered by the Attorney General. Compliance with the Program would provide participating employers with an affirmative defense against charges filed pursuant to LAWA. The Program requirements seem to establish “best practices” and standard policies for employers. Participation in the Program requires the employer to sign and submit an affidavit and agreement with the Attorney General, agreeing to the following:

- Enrollment and use of the E-Verify program for all new employees.
- Use of SSNVS within 30 days after signing the affidavit for every existing employee who is not verified through the E-Verify system.
- Implementation of a Social Security Number No-Match policy and procedure dictated by the Program.



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 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 LAWA, 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 update you on the Legal Arizona Workers Act and other state legislation, as well as the upcoming publication of the new Social Security No-Match rule.

This *Business Immigration and Compliance Alert* was written by Mahsa Aliaskari. Questions regarding the subject matter of this Alert should be directed to Ms. Aliaskari (310.586.7713; aliaskarim@gtlaw.com), or any Greenberg Traurig Business Immigration and Compliance or Labor & Employment Practice team members.

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