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Lynda S. Zengerle on

United States v. Illinois Decision Striking Down Law Restricting E-Verify Use

2009 Emerging Issues 3500

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The national debate on immigration has given rise to a crazy quilt of state legislation seeking to change in some ways what already exists on the federal level. Approximately 1500 pieces of immigration-related legislation were introduced in the first half of 2007, and 182 bills became law in 43 states. *See* Anthony Faiola, *States' Immigrant Policies Diverge; In Differences, Some See Obstacles For a National Law,* Washington Post, Oct. 15, 2007, at A1. The trend continues, according to the National Conference of State Legislatures (http://www.ncsl.org/programs/immig/2008StateLegislationImmigration.htm). Given the strong anti-immigrant sentiment being expressed throughout the country, driven in large part by the sluggish economy and high unemployment, it is not at all surprising that most of these laws are designed to make up for perceived failures in federal immigration laws to deal with the presence of substantial numbers of illegal aliens in the United States. One law that was enacted in Illinois, however, is particularly noteworthy because it sought to prevent employers from using one of the most potent tools created by the federal government to deal with the issue of employment authorization, the federal E-Verify Program.

In 1987, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §101(a), 100 Stat. 3360, went into effect and made it illegal for an employer to hire an individual who does not have valid authorization to work in the United States. The government provided a form, I-9, and instructions that, practically speaking, turned every employer in the United States into an immigration officer. Employers complained that their ability to confirm an individual's eligibility to work legally in the United States was hampered by the lack of tools at their disposal. They did not have what they needed to determine who had – and who didn't have – legal work authorization. Since failure to make the right decision could lead to substantial monetary penalties and even imprisonment, these complaints were taken seriously.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, sections 401 to 403 of which created a program to enable employers to confirm electronically the validity of work authorization claimed by newly hired employees. This program, initially called the Basic Pilot Program, was originally designed to be available in a minimum of the five to seven states identified as having the highest population of illegal aliens. Any employer in those states would be eligible to participate in

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the program. Illinois was identified as one of the five states with the largest estimated population of illegal aliens. Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,314 (Dep't of Justice notice Sept. 15, 1997).

In 2003, Congress instructed the Department of Homeland Security (DHS), the federal agency responsible for the Basic Pilot Program, to expand the program to all fifty states. As of today, there are funds appropriated to operate the program, now referred to as E-Verify, through September 30, 2009. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. D (Department of Homeland Security Appropriations Act, 2009), Title IV, 122 Stat. 3574, 3676 (2008).

Employers participating in the E-Verify system have the ability to verify the information provided by an employee in completing the employee's section of the I-9 form. The employee has the option of selecting among various documents approved by DHS to establish identity and work eligibility. The employer checks the information provided by the employee electronically against records maintained by DHS and the Social Security Administration (SSA), about 60 million and 449 million records, respectively. The employer receives either confirmation that the new hire is authorized to work in the United States or a Tentative Nonconfirmation Notice (TNC) indicating that the documentation provided cannot be verified. Employers are obligated to inform the new hire that secondary verification is required and to advise on how to obtain such verification.

Not everyone was enthusiastic about the new photo tool screening feature designed to detect when a photo is superimposed on an authentic immigration document or when a document is counterfeit. Among other objections, the reliability of DHS and SSA databases is challenged by opponents of this federal program.

In August 2007, Illinois amended the Illinois Right to Privacy Act to add provisions (the Illinois Act) that stated:

> Employers are *prohibited* from enrolling in any Employment Eligibility Verification System, including the Basic Pilot Program, as authorized by 8 U.S.C. Section 1324a, Notes, Pilot Programs for Enforcement Eligibility Confirmation (enacted by PL 104-208, div. C, title IV, subtitle A), until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the ten-

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> tative nonconfirmation notices issued to employers within 3 days, unless otherwise required by federal law. [emphasis added]

Illinois Pub. Act 95-138, Section 12(a), codified at 820 ILCS 55/12(a). The United States sued the state of Illinois to prevent the Illinois Act from going into effect. Illinois agreed not to enforce the law during the period in which the case was being litigated. Text Order entered December 14, 2007; Joint Stipulation and Motion to Stay Proceedings (d/e 12) in *United States v. Illinois*, Case No. 07-3261 (C.D. Ill.).

The United States based its request to have the Illinois Act declared unconstitutional on the Supremacy Clause. The Supreme Court held almost seventy years ago that a state law cannot be upheld if that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The federal district court hearing the U.S. challenge to the Illinois Act reasoned that Congress had created the Basic Pilot Program, now E-Verify, to give all employers access to a means to confirm work eligibility for new hires. In 2003, Congress extended the ability to participate in the pilot program to all employers in the United States. H.R. Rep. No. 108-304 (I), at 7 (2003).

The Court went on to hold that the

> Illinois Act frustrates Congress' purpose by prohibiting Illinois employers from participating in the Federal Program unless the Federal Program meets Illinois' standard for accuracy and speed. Illinois cannot dictate to Congress the standards that federal programs must meet. This clearly frustrates the Congressional purpose of making the Federal Program available to all employers. The Illinois Act is invalid under the Supremacy Clause.

United States v. Illinois, 2009 U.S. Dist. LEXIS 19533, at *6 (C.D. Ill. Mar. 11, 2009).

As noted above, the majority of state laws seek to enhance enforcement of federal immigration laws and supplement them in certain instances. A statute adopted by the Arizona state legislature went far beyond the federal statutes in forcing businesses to weed out illegal aliens in their work forces. This state statute was upheld recently in *Arizona Contractors Ass'n, Inc. v. Candelaria,* 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd, Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008). In seeking to discern which state statutes will fail if challenged in federal court, it is important to remember that the courts will generally strike down a state law if it determines that Con-

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gress has expressed its intent to preempt in "explicit statutory language," whenever it is clear that a state agency seeks to regulate "in a field that Congress intended the Federal Government to occupy exclusively," or when state action actually conflicts with federal law. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Federal courts may well uphold state laws that exceed federal enforcement requirements while striking down state laws that seek to water down or prevent enforcement of federal laws. The Illinois law clearly falls in the latter category and, consequently, has been deemed unconstitutional. It is likely that similar state laws will suffer the same fate.

Additional Information is Available at

Ann Allott et al., Immigration Enforcement: I-9 Compliance Manual (Matthew Bender 2009) (forthcoming);

Ted J. Chiappari & Stephen Yale-Loehr, *Can Cities and States Legally Regulate Immigration?*, 12 Bender's Immigr. Bull. 1195 (Sept. 1, 2007);

Gary Endelman & Cynthia Lange, *The "Perils of Preemption": Immigration and the Federalist Paradox*, 13 Bender's Immigr. Bull. 1217 (Oct. 1, 2008);

Melanie MacCurdy, *The Controversy Over Undocumented Non-Citizens: Can States and Localities "Regulate" Immigration?,* 12 Bender's Immigr. Bull. 1621 (Nov. 15, 2007);

Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 12 Bender's Immigr. Bull. 901 (July 15, 2007);

Ben Stanley, *Preemption Issues Arising from State and Local Laws Mandating Use of the Federal E-Verify Program*, 13 Bender's Immigr. Bull. 433 (Apr. 15, 2008);

Stephen Yale-Loehr & Ted Chiappari, *Immigration: Cities and States Rush in Where Congress Fears to Tread*, 12 Bender's Immigr. Bull. 341 (Mar. 15, 2007).

A related commentary is Ann Allott on Arizona and Illinois Laws (and Lawsuits) on Undocumented Workers, 2008 Emerging Issues 980 (2007).

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About the Author. Lynda S. Zengerle is a partner in the Washington office of Steptoe & Johnson LLP (http://www.steptoe.com/professionals-427.html), where she heads the immigration practice in the International Department. Ms. Zengerle has three decades of experience representing corporations and individuals in immigration matters. She twice chaired the Committee on Immigration for the Administrative Law and Regulatory Practice Section of the American Bar Association and was twice appointed to the ABA's Coordinating Committee on Immigration. She served for three years as an Adjunct Professor of Law at the Georgetown University Law Center and has been an instructor at the Judge Advocate General's Center and School in Charlottesville, Virginia, since 2004. She is currently an Adjunct Professor at the George Mason University School of Law. Her federal government experience includes service on the staff of Senator Russell B. Long (D.-La.), as an economist for the Arms Control and Disarmament Agency, and as a staff attorney for the Administrative Conference of the United States.

Ms. Zengerle often provides commentary on immigration law matters to national broadcast and print media, including The *Today* show, the *New York Times*, the *Washington Post*, and the *Washington Times*, and has written for numerous publications including the *Michigan Law Review* and the *ABA Journal*. She was the only private-sector attorney invited by the Department of Homeland Security to participate in the forum on visa policies hosted in December 2003 by the Bureau of Immigration and Customs Enforcement. She was appointed to the Visa Policy and Processing Working Group, which is part of the Secure Borders Open Door Advisory Committee, to provide immigration-related advice and recommendations to DHS and DOS on efforts to maintain security while still extending a welcome to visitors to the United States.

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