

December 13, 2010

The Supreme Court heard oral argument on December 8, 2010 in *Chamber of Commerce v. Whiting*, Docket No. 09-115, to determine if the Legal Arizona Workers Act ("LAWA") is preempted by federal law. Passed in 2007, LAWA is a controversial law that requires mandatory use of E-Verify by all employers in Arizona and threatens to invoke the business "death sentence" by revoking their business license if they knowingly hire or employ unauthorized workers. The outcome of this case has significant ramifications for employers in all states because it will set the precedent for whether states have the right to create rules on the use of E-Verify or impose their own immigration legislation on employers.

Background

The petitioners in this case include various pro-employer groups and civil rights activists. They argue that LAWA is unconstitutional because it is expressly preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"). In their view, the Arizona law frustrates Congress' legislative scheme under the IRCA by creating a state forum for adjudicating employment of unauthorized workers and disrupting the delicate balance between deterrence and discrimination. They also claim that states lack any authority to require E-Verify participation because the federal government has made participation in E-Verify voluntary for private employers.

The respondents, which include various government officials and Arizona state and county attorneys, allege that LAWA is not preempted because it is a licensing law that falls squarely within IRCA's saving clause. The respondents emphasize that mandating participation in E-Verify does not interfere with federal objectives given that it only broadens participation in the program that the federal government has made available and does not impose any sanctions on employers who fail to use E-Verify. They posit that LAWA largely mirrors the federal legislation and only imposes different, additional sanctions.

After a hearing on the merits in a Federal District Court in Arizona, the district court wholesale rejected the petitioners' arguments. On appeal, the Ninth Circuit affirmed, holding that LAWA is not preempted because it falls within the IRCA's savings clause and Congress did not expressly forbid state laws requiring mandatory use of E-Verify.

Oral Argument

During oral argument, the Court avoided making any broad pronouncements on the right of a state to pass immigration legislation. Instead, a significant portion of the argument revolved around whether LAWA fell within the IRCA's saving clause as a licensing law.

Several Justices, however, expressed serious doubts about the authority of states to require mandatory E-Verify participation. Justice Ruth Bader Ginsburg, for example, continually expressed her skepticism that Arizona could "set the rules on a Federal resource" such as E-Verify. Justices Stephen Breyer and Sonia Sotomayor raised similar concerns arguing that LAWA's requirement that employers participate in E-Verify before garnering a good faith defense was an additional burden that directly conflicted with the IRCA's requirements. In their view, the IRCA merely requires employers properly to complete an I-9 Form, without using E-Verify, to acquire the affirmative defense. They also noted that the harsh sanctions imposed by Arizona's law did not appropriately balance the need to deter employment of illegal workers against mitigating the risk of encouraging employers to discriminate.

Justice Breyer most clearly summarized these concerns when he stated:

"Now, what I was looking at specifically is "Federal law says." If you look at the driver's license and Social Security card, those are I-9 docs. Then the employer has established an affirmative defense and has not violated the law.... Arizona law ... says, in determining whether there is an unauthorized alien, the court shall consider the Federal government's determination. It creates a rebuttable presumption. That means it might be rebutted.

So, your law. Employer, look at the driver's license and Social Security, you are not home free. Employer, if

it turns out that you have been hiring this illegal immigrant and he's not an American, your business is finished. But what happens if I discriminate, under our law? Nothing."

It was Justice Kennedy, however, that had the strongest reaction to E-Verify. In his view, making an optional program like E-Verify mandatory was "almost a classic example of a State doing something that is inconsistent with a Federal requirement."

In any event, several other Justices, including Samuel Alito, John Roberts, and Antonin Scalia seemed to support the notion that LAWA was not preempted by the IRCA because it met the savings clause exception and only acted to supplement federal immigration laws and enforcement efforts. Justice Scalia, an admitted ardent supporter of states' rights, indicated that this case might turn on whether states have a right to pass immigration legislation because of the lax federal response to the immigration crisis:

"But what Arizona says has occurred here is that the [federal] scheme in place has not been enforced, and Arizona and other States are in serious trouble financially and for other reasons because of -- of unrestrained immigration. And therefore, they had to take this very massive -- I agree this step is massive, and one wouldn't have expected it to occur under this statute, but expectations change when the Federal Government has -- has simply not enforced the immigration restrictions."

Significance of *Chamber of Commerce v. Whiting*

Although it is difficult to predict the final resolution of this case, the Court's decision will set the tone for whether states can continue to pass laws regulating the hiring of undocumented workers and mandating use of E-Verify. As we reported earlier this year, there is a growing patchwork of state E-Verify and immigration legislation. Currently, there are three states (i.e., Mississippi, South Carolina, and Utah) in addition to Arizona that require all employers to use E-Verify, and there are a number of other states and localities that impose some type of immigration regulation on private employers.

If the Court decides to uphold LAWA it will undoubtedly encourage states to continue passing similar legislation that impose their own procedures for employment verification and sanctions for violations. Rather than having a simple, uniform federal scheme, this patchwork of immigration laws will cause employers operating in multiple states expense and confusion as they try to comply with the various and potentially conflicting state laws.

In the meantime, we will continue to keep you posted on developments in this area. If you would like to discuss these issues further or have questions about this *Alert*, please contact one of the attorneys listed above.

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Key Contacts

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
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Leslie Cancel
San Francisco

lcancel@cooley.com
+1 415 693 2175

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