

U.S. Supreme Court Upholds Arizona Law Sanctioning Employers for Hiring Unauthorized (Illegal) Aliens

Alaskan and other Pacific Region employers should brace for potential fallout

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In *Chamber of Commerce v. Whiting*, a case closely watched by businesses, state and local chambers of commerce, and immigration policymakers, the U.S. Supreme Court yesterday issued an opinion upholding an Arizona law that imposes sanctions for employing unauthorized aliens.

Background

Arizona passed a law by which businesses could have their licenses revoked if they were found to have intentionally or knowingly employed unauthorized (illegal) aliens. The law also mandated that employers use E-Verify, the Department of Homeland Security's employment eligibility verification program, to check the employability status of each worker.

Business and civil rights organizations filed suit arguing that Arizona's law was pre-empted by the Immigration Reform and Control Act of 1986 (IRCA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IRCA expressly pre-empts any state or local laws except licensing laws. Federal law provides that E-Verify is permissive (not mandatory).

The plaintiffs argued that Arizona's law was pre-empted because it was more than simply a licensing statute. It reached business organization (incorporation and LLC formation), too. They also argued that it was pre-empted because it required state businesses to use E-Verify, thereby creating a conflict between state and federal law. Plaintiffs additionally contended that the law was impliedly pre-empted because it undermined the comprehensive scheme of immigration-related laws that Congress had enacted to regulate alien employment. The district court rejected all of these arguments and upheld the law. The U.S. Court of Appeals for the 9th Circuit affirmed.

Opinion

The U.S. Supreme Court affirmed by a 5-3 vote. Chief Justice John Roberts wrote for the majority, joined by Justices Kennedy, Scalia, Thomas, and Alito. The Court held that Arizona's law did not run afoul of any express pre-emption provision because the IRCA allows licensing-related measures, and that is all that the Arizona law purports to affect. The Court further held that the law was not impliedly pre-empted.

There are two general types of implied pre-emption. Field pre-emption arises when a state law implicates an area of law traditionally occupied by federal legislation. Conflict pre-emption exists where the state law undermines federal law or otherwise frustrates the goals and purposes of the federal law.

The Court concluded that Arizona's law did not implicate either of these implied pre-emption analyses. Congress allowed states to adopt licensing measures. Arizona did so, and its statutory terms adopted federal terms, definitions, and concepts. Consequently, Arizona's law did not undermine or frustrate the goals of federal law.

Justices Breyer, Ginsburg, and Sotomayor dissented. They argued that such laws will lead to more employment discrimination because in uncertain or unclear cases businesses will be inclined to deny employment rather than risk the licensing "death penalty" by hiring someone who later turns out to be an unauthorized alien. They noted that E-Verify is not a fail-proof system. The dissenting justices also contended that allowing the states to regulate illegal aliens in this manner will lead to a patch quilt of conflicting rules and decisions undermining uniform federal standards.

Significance

Including Arizona, nine states currently have laws that penalize employers that employ illegal aliens: Colorado, Mississippi, Missouri, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. In the wake of the

Court's opinion, it is quite likely, perhaps probable, that Alaska and other Pacific Region states will see comparable measures enacted at either the state or local level.

Suggested next steps for Alaskan and other Pacific Region employers

- › Businesses that operate in more than one state should be sure that they update their hiring procedures to reflect local requirements.
- › In anticipation of similar measures being introduced in Alaska and other Pacific Region states, employers should self-audit to make sure that their I-9 procedures comply with all legal requirements.
- › Employers not already using E-Verify may wish to review the system and familiarize themselves with its features.
- › Employers with questions should confer with counsel to make sure their hiring and employment practices comply with all immigration standards.

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