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EMPLOYMENT LAW COMMENTARY

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EMPLOYERS CAUGHT IN CROSSHAIRS OF IMMIGRATION DEBATE – UNDERSTANDING AND COMPLYING WITH THE CALIFORNIA IMMIGRANT WORKER PROTECTION ACT

By Kwan Park

The increasingly polarized political climate has placed California employers in the middle of the dispute between the federal and California governments over immigration policy. On October 5, 2017, Governor Jerry Brown of California signed the Immigrant Worker Protection Act (AB 450) into law. The new statute, which took effect on January 1, 2018, imposes various prohibitions and requirements on California employers with regard to federal immigration enforcement actions in the workplace. For example, whereas employers could previously consent to federal agents' inspection of the workplace and review of employee records, this is no longer true in California under state law. Violation of AB 450 could result in thousands of dollars in penalties for an employer. As

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discussed below, the federal government is currently challenging AB 450 on preemption grounds. While the future of AB 450 is uncertain, it remains in effect for now.

POTENTIAL PREEMPTION OF AB 450 BY FEDERAL LAW

The federal government filed a lawsuit on March 6, 2018, against California, asking for AB 450 and other recently enacted California "sanctuary" laws to be declared constitutionally invalid and seeking injunctions against the enforcement of these laws. The federal government has already moved for a preliminary injunction, arguing that these laws obstruct the enforcement of federal law, including the Immigration Reform and Control Act of 1986, in violation of the Supremacy Clause of the U.S. Constitution.[1] In its court filings, the federal government has cited to *Arizona v. United States*, a 2012 U.S. Supreme Court case in which certain provisions of Arizona law that criminalized undocumented presence and work and authorized warrantless arrests of aliens believed to be removable from the United States were held to be preempted by federal law.[1] The hearing on the federal government's preliminary injunction motion is currently set for June 20, 2018, in federal court in Sacramento, California.[3] The scheduling of the hearing, which was set recently on March 29, 2018, was delayed in part by the filing of defendants' motion to transfer the lawsuit from Sacramento to San Francisco, where a lawsuit by California against the federal government regarding new immigration-related conditions for federal funding is being heard.[4] The court denied defendants' motion to transfer on March 29, 2018.[5]

AB 450 PROHIBITIONS AND REQUIREMENTS

AB 450 applies to all public and private employers in California. It contains three types of prohibitions on employers. Recent guidance from the California Labor Commissioner and California Attorney General has confirmed that the application of these prohibitions is a "factual, case-by-case determination" that depends on the totality of circumstances in each specific situation.[6]

1. AB 450 prohibits employers from providing "voluntary consent" to an "immigration enforcement agent" to enter any "nonpublic areas of a place of labor." None of the quoted terms has been defined in the statute. The prohibition here is inapplicable if the agent provides a judicial warrant (a warrant signed by a judge upon a finding of probable cause). It also does not prevent employers from taking the agent to a nonpublic area where employees are not present for the purpose of verifying whether the agent has a judicial warrant.[7]

   According to the recent official guidance on AB 450, an example of providing "voluntary consent" to enter a "nonpublic" area could be freely asking or inviting an immigration enforcement agent to enter that area. The law does not require physically blocking or physically interfering with the entry of an immigration enforcement agent in order to show that voluntary consent was not provided. A "nonpublic" area is one that the general public is not normally free to enter or access, for example, an office where payroll or personnel records are kept, or an area that an employer designates (for instance, by posting signs or keeping doors closed) as restricted to employees or management of the business. AB 450's prohibition against voluntary consent does not apply to a public place of labor — an area that the general public is normally free to enter and access — such as the dining room of a restaurant or the sales floor of a store during business hours. The definition of "immigration enforcement agent" continues to remain unclear, however. No doubt it refers to U.S. Immigration and Customs Enforcement (ICE) agents, but the California Attorney General's office has identified an ICE agent only as an example of an "immigration enforcement agent."[8] Accordingly, it is possible that AB 450 extends to officials of other federal agencies with immigration-related functions, such as those in the U.S. Department of Labor, which may at times review I-9 forms, and the U.S. Citizenship and Immigration Services.

2. AB 450 prohibits employers from providing voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records without a subpoena (which can be issued under the authority of a government agency or an attorney without the need for prior court approval) or judicial warrant. This prohibition is inapplicable where an immigration agency has issued a "Notice of Inspection" of "I-9 Employment Eligibility Verification forms and other documents,"[9] in which case employers would be entitled to at least three business days to produce the demanded I-9 forms.[10] (As discussed below, an employer's receipt of a Notice of Inspection triggers certain notice obligations for the employer.) Of course, federal officials may instead use judicial warrants to get around the three-day notice period.

   The penalty for violating the first or second prohibition under AB 450 is $2,000 to $5,000 for the first violation and $5,000 to $10,000 for each subsequent violation. AB 450 provides both the California Labor Commissioner and the California Attorney General with the authority to enforce the first two prohibitions

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through civil action. Any penalty collected is to be deposited in the Labor Enforcement and Compliance Fund, a source of funding for the California Labor Commissioner's Office.[11]

3. AB 450 prohibits employers from re-verifying the employment eligibility of a current employee unless specifically required by federal law. The penalty for violating this prohibition is up to $10,000. This penalty is recoverable only by the California Labor Commissioner.[12]

AB 450 also imposes two notice requirements on employers regarding record inspections by federal immigration agencies.

1. AB 450 requires employers to provide each current employee (and the employee's authorized representative, such as a union, if any) with a notice of any inspection of I-9 forms or other employment records by an immigration agency within 72 hours of receiving notice of the inspection. (A simple visit by an immigration enforcement agent would not presumably by itself, absent receipt of a Notice of Inspection, trigger this notice obligation.) Employers must post the notice in the language normally used to communicate employment information to employees. The notice must contain the following information: (a) the name of the immigration agency conducting the inspection; (b) the date that the employer received notice of the inspection; (c) the nature of the inspection to the extent known; and (d) a copy of the Notice of Inspection. Upon reasonable request, employers must also separately provide a copy of the Notice of Inspection to any affected employee.[13] The California Labor Commissioner's office has made a notice template available online at: https://www.dir.ca.gov/DLSE/C_90.2_EE_Notice.pdf.

2. Within 72 hours of receiving written notice from the immigration agency of the results of the inspection of I-9 forms or other employment records, employers must also provide each affected employee (and the employee's authorized representative, such as a union, if any) with a notice regarding the results. The term "affected employee" in this context means "an employee identified by the immigration agency inspection results to be an employee who may lack work authorization, or any employee whose work authorization documents have been identified by the immigration agency inspection to have deficiencies." The notice to the affected employee must be delivered by hand at the workplace if possible or, if hand delivery is not possible, by mail and email (if addresses are known). The notice must contain the following information: (a) a description of any and all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee; (b) the time period for correcting any potential deficiencies identified by the immigration agency; (c) the time and date of any meeting with the employer to correct any identified deficiencies; and (d) notice that the employee has the right to representation during any meeting scheduled with the employer. Employers that fail to provide the required notices are subject to penalties of $2,000 to $5,000 for a first violation, and $5,000 to $10,000 for each subsequent violation. These penalties are recoverable only by the California Labor Commissioner. The penalties need not be imposed, however, if an employer fails to provide required notice to an employee at the "express and specific direction or request of the federal government."[14]

PRACTICAL STEPS FOR EMPLOYERS

There are several steps employers can take to minimize the risk of unintentionally violating AB 450:

1. Develop written guidelines to inform employees (especially frontline employees) about the appropriate person to contact or actions to take in case immigration enforcement agents appear at the workplace unannounced.

2. Designate certain individuals in a workplace to handle communications with immigration enforcement agents and provide training on AB 450's prohibitions and requirements to these individuals. For example, designated individuals will need to know the difference between a judicial warrant, a subpoena, and a Notice of Inspection. Only a judicial warrant is acceptable to allow agents to enter nonpublic places in a workplace, whereas either a judicial warrant or a subpoena is acceptable to allow agents to inspect employee records. The prohibition regarding the inspection of I-9 forms and other documents is inapplicable where a Notice of Inspection has been issued, but the receipt of a Notice of Inspection triggers notice obligations.

3. Because employers' own designation of certain areas in a workplace as "public" or "nonpublic" would not be dispositive, employers should preemptively identify which areas of the workplace are not normally accessible to the general public.

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The impact and validity of AB 450 are expected to continue receiving press coverage as the lawsuit in Sacramento develops and ICE and other federal agencies step up immigration enforcement in California. As AB 450 is still in effect, however, employers should continue proactively addressing potential compliance issues with AB 450 until they have heard otherwise from a court.

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1 Brief of Plaintiff, Doc. No. 2, *United States v. California*, No. 2:18-cv-490-JAM-KJN (E.D. Cal. Mar. 6, 2018).

2 *Arizona v. United States*, 567 U.S. 387 (2012).

3 Order, Doc. No. 39, *United States v. California*, No. 2:18-cv-490-JAM-KJN (E.D. Cal. Mar. 29, 2018).

4 Brief of Defendants, Doc. No. 18, *United States v. California*, No. 2:18-cv-490-JAM-KJN (E.D. Cal. Mar. 13, 2018).

5 Order, Doc. No. 41, *United States v. California*, No. 2:18-cv-490-JAM-KJN (E.D. Cal. Mar. 29, 2018).

6 https://www.dir.ca.gov/dlse/AB_450_QA.pdf.

7 Cal. Gov. Code § 7285.1.

8 https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/iwpa.pdf.

9 Cal. Gov. Code § 7285.2.

10 8 C.F.R. § 274a.2(b)(B)(ii).

11 Cal. Gov. Code §§ 7285.1-2.

12 Cal. Lab. Code § 1019.2.

13 *Id.* § 90.2.

14 *Id.*
