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# *STATE/LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW: ILLEGAL AND IMPRACTICAL*

## I. INTRODUCTION

Under the U.S. Constitution, the power to regulate immigration is exclusively a federal power. Exercising that power more than 20 years ago with the passage in 1986 of the Immigration Reform and Control Act ("IRCA"), Congress established a complex, carefully-balanced, nationally-uniform and comprehensive federal system for regulating the employment of aliens. That comprehensive federal scheme prohibits the employment of unauthorized aliens and imposes significant, but graduated, penalties on employers who violate the restrictions of that scheme. What IRCA did not and could not do was predict the high level of demand and opportunities for foreign-born workers in the U.S. economy.

Trying to fix the perceived "broken" immigration system, some state and local governments have attempted to take on the federal government's job. The result so far has been a complex, diverse and disconnected web of state and local laws that discourage development of new businesses and impose additional, unnecessary costs on employers who are already suffering from the worst financial crisis in history. Immigration reform is needed, but it must be undertaken at the national level with a realistic view of the needs of businesses for foreign born workers, both skilled and unskilled, due to shortages here at home. There must be an efficient and effective path to citizenship for those already here, and attention must be paid to the realities and complexities of a global marketplace.





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Although citizens and public officials may be frustrated concerning the apparent lack of adequate enforcement of federal immigration laws, the "will of the people" alone in urging action at the state and local level does not "bestow the imprimatur of constitutionality" on any new laws. *See Villas at Parkside Partners v. City of Farmers Branch,* 2008 WL 2201980 (N.D. Tex. 2008)(Slip Op. at 4-5). For the reasons set forth below, I believe that (1) the U.S. Constitution and federal immigration law severely restrict the ability of state and local governments to enact laws that impose sanctions on employers for knowingly hiring "unauthorized aliens," and (2) the factual premise underlying the call for state and local action - that undocumented/unauthorized aliens are a net financial burden – is seriously flawed.

## A. SUMMARY OF FEDERAL IMMIGRATION LAW

### 1. Immigration Reform and Control Act of 1986

In 1986 Congress added to the Immigration and Nationality Act ("INA") through the Immigration Reform and Control Act ("IRCA"), 8 U.S.C. §§1324a-1324b. IRCA fundamentally altered the federal government's regulation of immigration, establishing a complex, carefully-balanced, nationally-uniform, and comprehensive federal system for regulating the employment of aliens. *See* Statement by President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. of Pres. Doc. 1534, 1986 USCCAN 5856-1 (IRCA "is the most comprehensive reform of our immigration laws since 1952"). IRCA's "keystone and major element" (*id.*) was to create, for the first time, "a comprehensive scheme prohibiting the employment of unauthorized aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

IRCA was a product of years of intense debate. *See* Statement by President Reagan at 4 ("The act I am signing today is the product of one of the longest and most difficult legislative undertakings of recent memory."); Peter H. Schuck, Introduction: Immigration Law and Policy in the 1990's, 7 Yale L. & Pol'y Rev. 1, 8 (1989) ("IRCA was adopted only after almost a decade of intensive, highly visible public debate punctuated by several bills that passed one or both houses by razor-thin margins only to die without final approval."). The legislation was enacted based on, "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging unauthorized employment with measures to protect those who might be adversely affected." *Nat'l Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), rev'd on other grounds, 502 U.S. 183 (1991).

IRCA created a system that carefully balanced enforcing the ban against employing unauthorized aliens, limiting the burdens and risks on employers, and avoiding a system that would foster discrimination or penalize lawful workers. Under IRCA, "the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process." *Collins Foods Int'l, Inc., v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (citing H.R. Rep. No. 99-682(I) (1986), 1986 USCCAN 5649). Congress was also greatly concerned that employers might, out of fear of sanctions, discriminate against lawfully authorized employees or job applicants who looked or sounded foreign. *See, e.g.*, H.R. Rep. No. 99-682(I) at 68, 1986 USCCAN at 5672 ("Numerous witnesses over the past three Congresses

have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members.").

Congress chose to stop short of one-sided enforcement and deterrence to balance its other objectives of avoiding discrimination and limiting the burden on employers. Congress' careful balancing is reflected in the I-9 process and in IRCA's graduated scale of penalties, complementary anti-discrimination provisions, and extensive adjudicative process.

Congress also stated its intent in §115 of IRCA that the employment provisions, together with the remainder of the immigration laws, be enforced uniformly:

It is the sense of the Congress that – (1) the immigration laws of the United States should be enforced vigorously and uniformly, and (2) in the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens.

P.L. 99-603

In furtherance of IRCA's balanced, comprehensive, and uniform system, Congress enacted a broad express preemption provision: "The 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." 8 U.S.C. §1324a(h)(2).

IRCA made it unlawful to employ an alien "knowing the alien is an unauthorized alien" (8 U.S.C. §1324a(a)(1)(A)), and established an "employment verification system" (commonly known as the "I-9 process") that requires potential employees to show documents establishing

identity and employment authorization, and requires employers to execute an I-9 form. 8 U.S.C. §1324a(b)(1); 8 C.F.R. §274a.2(a)(2). Under IRCA, an employer's compliance in good faith with the I-9 process is a defense to liability, and a good faith attempt to comply generally establishes compliance despite any technical or procedural failures. 8 U.S.C. §1324a(a)(3), (b)(6); *see also* 8 U.S.C. §1324a(b)(1)(A) (employer need only determine new hire's documents reasonably appear to be genuine).

IRCA amended the INA to establish a detailed process for adjudicating whether an employer knowingly hired an unauthorized alien. There must be notice, an opportunity for an evidentiary hearing before a federal administrative law judge under procedures governed by the federal Administrative Procedure Act, a finding that a knowing violation has occurred based on a preponderance of the evidence, an opportunity for an administrative appeal, and the right to review in the federal Courts of Appeals. 8 U.S.C. §1324a(e)(2)-(3), (7)-(8).

IRCA included sanctions that may be imposed against an employer who is found to have violated the law. 8 U.S.C. §1324a(e)(4), (f). An offending employer is subject to a graduated system of civil penalties that, taking into account a recent adjustment for inflation, range from $375 per unauthorized alien for the first violation to no more than $16,000 for third and subsequent violations. 8 U.S.C. §1324a(e)(4); 8 C.F.R. §274a.10(b)(1)(ii)(A); 73 Fed. Reg. 10130, 10133 (Feb. 26, 2008). Pattern or practice violators are subject to civil injunctions brought by the Attorney General in federal district court, and criminal prosecution with penalties

of up to $3,000 per unauthorized alien and a total prison term not to exceed six months. 8 U.S.C. §1324a(f).

IRCA also enacted detailed anti-discrimination provisions with separate penalties for employers who require additional documents or engage in other discriminatory acts. 8 U.S.C. §1324b.

Manifesting its clear intent to displace state law, Congress included an express preemption provision in IRCA to "preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)" on employers. 8 U.S.C. §1324a(h)(2). Congress also provided that the executive branch could not make a "major change" to IRCA without congressional approval, and even minor changes required 60 days notice to Congress. 8 U.S.C. §1324a(d)(3).

The legislative history explains that the purpose of IRCA's preemption provision is to bar state and local laws – leaving only a narrow category of regulations whose sanctions are based on a *federal finding* of an IRCA violation:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment, or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person **who has been found to have violated the sanctions provisions in this legislation**.

H.R. Rep. No. 99-682(I) at 58, 1986 USCCAN at 5662 (emphases added).

The House Report underscores what IRCA itself establishes: Congress intended that for any sanctions to be imposed, the sanctioning authority must await completion of the federal process, and a federal finding that the employer has violated IRCA. That is the only conclusion that can be drawn because the lynchpin of a violation of IRCA is a finding that the target employee was an "unauthorized alien" at the time he was hired. Under federal law, work authorization is granted by **federal immigration agencies** upon application or concurrently with certain status determinations. 8 C.F.R. §§274a.12(a), (b), (c), 274a.13, 274a.14. IRCA creates a **federal adjudicative procedure** to determine whether an employer has employed a worker who lacked work authorization. *See* 8 U.S.C. §1324a(e)(3), (7)-(8). Only **federal** immigration judges and courts have the authority to make such determinations because only **federal** immigration judges and courts have the authority to decide who is and is not a citizen, and who can and cannot remain in this country. *DeCanas v. Bica,* 424 U.S. 351, 354-55 (1976); 8 U.S.C. §1229a(a)(1)("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); 8 U.S.C. §1229a(a)(3)(proceeding before the administrative law judge is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been admitted, removed from the United States.").

Nothing in IRCA purports to give states broad authority to create their own employer sanctions schemes, complete with parallel adjudication and enforcement systems and additional compliance requirements. To the contrary, IRCA's language, structure, history, and relationship to other statutes all confirm that Congress intended to expressly preempt state and local employer

sanctions schemes, allowing only a narrow range of measures that are predicated on a federal finding under IRCA that an employer has hired an unauthorized alien and that involve a state licensing law.

**2. The Basic Pilot Program – "E-Verify"**

Ten years after IRCA, Congress enacted a *voluntary* and *experimental* system called the "Basic Pilot Program." 8 U.S.C. §1324a note, §403(a). That program – renamed "E-Verify" – allows employers choosing to enroll to verify a new hire's work authorization over the Internet. Congress expressly made the program voluntary, providing that any employer, "may elect to participate in that pilot program" and that the government "may not require any person or other entity to participate." 8 U.S.C. §1324a note, §402(a) (entitled "Voluntary election"). E-Verify is also experimental.

Employers who enroll in E-Verify must learn how to use it; register for the program, which includes signing a Memorandum of Understanding ("MOU") with federal agencies; complete a tutorial; pass a multiple-choice test; and submit for all new hires data such as employee name, date of birth, and Social Security number.

E-Verify primarily operates by comparing data entered by employers electronically to information in Social Security Administration ("SSA") and Department of Homeland Security ("DHS") databases. If the data do not match, E-Verify issues a "tentative non-confirmation"; if an employee does not contest the tentative non-confirmation within eight working days, the employer must either terminate the employee or notify DHS that the employer is not doing so.

According to a comprehensive report issued by the U.S. Government Accountability Office ("GAO") on June 10, 2008, E-Verify has high levels of erroneous tentative non-confirmations due to widespread errors in the underlying government databases and a lack of employer compliance with program rules, that reduce effectiveness and contribute to discrimination. GAO, *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System,* GAO-08-895T (Washington, D.C.: June 10, 2008)("GAO 2008 Report"). GAO estimates that it would cost the federal government (USCIS and SSA combined) more than $1 Billion over fiscal years 2009-20012 to make E-Verify mandatory for all employers to use for new hires only, and more than $1.1 Billion over that same period if E-Verify were mandated for use for both new hires and current employees.

Most employers and businesses believe that E-Verify will not solve or correct employment verification concerns. E-Verify will not prevent or correct identity theft, less than 1% of employers nationwide currently use E-Verify, according to public and private studies E-Verify is error-prone, and it is set to expire March 6, 2009.[1]

## B. THE SUPREMACY CLAUSE AND FEDERAL PREEMPTION

### 1. Express Preemption

The power of Congress to preempt state law is a "fundamental principle of the Constitution" embodied in the Supremacy Clause, Article VI, Section 2. *Crosby v. Nat'l Foreign Trade*

[1] For a detailed and comprehensive outline of the disadvantages and problems with E-Verify see the article, "Why Mandatory Employer Participation Will Hurt Workers, Businesses, and the Struggling U.S. Economy," published by the National Immigration Law Center, February, 2009 (copy attached).

*Council*, 530 U.S. 363, 372 (2000). "[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered," and what "must be implied is of no less force than that which is expressed." *Id.* at 373 (punctuation omitted). State law is preempted either if a federal statute expressly so provides or if, among other reasons, the state law conflicts with federal law. *Id.* at 372-73.

There is no question that immigration is an area of uniquely federal responsibility. *DeCanas,* 424 U.S. at 354 ("Power to regulate immigration is unquestionably exclusively a federal power."); *Toll v. Moreno*, 458 U.S. 1, 10 (1982). Moreover, in matters relating to immigration, there is a special need for nationwide consistency given the "explicit constitutional requirement of uniformity" in Article I, §8, and the myriad problems that would result for citizens and non-citizens alike if each of the 50 states – or each of thousands of localities – were permitted to adopt its own rules for the treatment of aliens. *Graham v. Richardson*, 403 U.S. 365, 382 (1971); *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "Nation's need 'to speak with one voice' in immigration matters"); Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (laws relating to foreign nationals are intertwined with foreign relations).

Under IRCA, the employment of unauthorized aliens is subject to a detailed, carefully balanced, federal regulatory scheme that "'forcefully' ma[kes] combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds*, 535 U.S. at 147 (quoting *National Center for Immigrants' Rights*, 502 U.S. at 194). Immigration is an area in which federal interests are both well-established and particularly strong. The Supreme

Court has ruled that "an 'assumption' of nonpre-emption is not triggered when the United States regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). In addition, courts "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 106; *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 217 (2004); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870-71 (2000); *Int'l Paper Co. v. Ouelelette*, 479 U.S. 481, 492-94 (1987).

Nothing in the language of the parenthetical savings clause contained in 8 U.S.C. §1324a(h)(2) authorizes states to create their own adjudication and enforcement systems, or empowers states to make determinations about who is and who is not an "unauthorized alien." Nor could such a reading be reconciled with "the statute as a whole" and "its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The Supreme Court has required that this mandate be observed with respect to savings clauses such as that at issue here. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("we are obliged in interpreting the saving clause to consider . . . the role of the saving clause in [the statute] as a whole"); *American Bankers Ass'n v. Gould*, 412 F.3d 1081, 1086 (9th Cir. 2005) (in considering express preemption, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (punctuation and internal quotation marks omitted).

Congress manifestly sought in IRCA and §1324a(h)(2) to create a uniform, comprehensive, federal regulatory system for deciding which employers may be sanctioned for hiring

unauthorized aliens. The parenthetical savings clause cannot be read as silently authorizing the creation of parallel state procedures and systems that would inevitably introduce complexity and non-uniformity of results. Rather, the savings clause allows states to make state licensing decisions based on federal findings pursuant to the careful IRCA process set forth in 8 U.S.C. §1324a(e) that an employer has violated IRCA and is subject to its sanctions.

The Supreme Court's analysis in *Locke* is particularly instructive. At issue there was whether a savings clause that permitted states to impose "additional liability or requirements" pertaining to "the discharge of oil or other pollution by oil within [a] state," allowed states to regulate the at-sea conduct of ships. 529 U.S. at 104. Before analyzing the meaning of this savings clause, the Supreme Court described the comprehensive federal scheme regulating national and international maritime commerce and conduct of ships. *Id.* at 99-103. Because of this comprehensive federal regulation, the Supreme Court rejected a broad interpretation, finding that it was "quite unlikely that Congress would use a means so indirect as the saving clauses in [the statute] to upset the settled division of authority by allowing States to impose additional unique substantive regulation on the at-sea conduct of vessels." *Id.* at 106.

The same analysis applies here. It is implausible that Congress would use a seven-word parenthetical (that says nothing about state authority to create parallel adjudicatory systems or to impose additional compliance requirements on employers) to upend IRCA's regulatory scheme. *See also Int'l Paper Co.*, 479 U.S. at 494 ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause").