



SUPREME COURT UPHOLDS LEGAL ARIZONA WORKERS ACT WITH LIMITED IMPLICATIONS FOR OTHER STATE IMMIGRATION LAWS

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In a highly anticipated decision that concludes one of the most significant immigration legal battles of recent years, the US Supreme Court upheld the Legal Arizona Workers Act.

The act, which took effect in January 2008, is best known for allowing the state of Arizona to suspend or revoke the business licenses of employers who are found to have knowingly hired unauthorized workers. The law also requires all employers statewide to use the federal government's E-Verify program to confirm the work eligibility of their new hires.

The Supreme Court's decision is its first in over three decades to deal directly with the authority of states to regulate the employment of immigrants. The decision was also the highest court's first opportunity to rule on the legality of one of a spate of recent immigration enforcement laws enacted by states following Congress's failure to pass comprehensive immigration reform in 2007.

As a result, the ruling sparked intense commentary and debate among lawmakers, legal scholars, and immigrant advocates. While nearly all observers agree on the overall importance of *Chamber of Commerce v. Whiting*, there are differing opinions on the implications of the decision for other recently enacted state immigration enforcement measures.

Supporters of such measures, including Arizona Governor Jan Brewer and Kansas Secretary of State Kris Kobach, a major architect of the Arizona-type laws, hailed the new decision as a green light for other states to follow Arizona's lead and enact their own state immigration enforcement legislation.

Other commentators, however, have noted that the Supreme Court's decision is narrowly tailored to the specific statutory language of the Legal Arizona Workers Act. Thus, the decision is of little consequence for state laws that go beyond the narrow scope of the 2007 Arizona law.

The road to the Supreme Court

Almost from its inception, the Legal Arizona Workers Act was highly controversial, having been labeled in 2007 by supporters and opponents alike as one of the toughest immigration enforcement measures to be passed by any state.

Just one week after it was signed, a coalition of immigrant-rights and business groups, including the US Chamber of Commerce, filed a lawsuit to enjoin the act. These groups argued primarily that the new act was preempted by provisions of two federal laws: the 1986 Immigration Reform and Control Act (IRCA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). They also claimed that the act violated the Supremacy Clause and the Fourteenth Amendment to the US Constitution.

In February 2008, the federal district court in Arizona dismissed the lawsuit challenging the Legal Arizona Workers Act, and a year later the 9th US Circuit Court of Appeals affirmed that decision. The *Whiting* case was an appeal from that ruling.

Writing for the court's 5-3 majority, Chief Justice John Roberts ruled that, given the statutory language of the relevant federal laws, the Arizona law is not preempted. While IRCA expressly preempts states and localities from imposing their own sanctions on employers who knowingly hire unauthorized workers, it provides an exception for "licensing and similar laws." Concluding that the portion of the Arizona law that allows the state to suspend or revoke business licenses was a "licensing law," Chief Justice Roberts ruled that the law falls within the confines of that exception.

With respect to the mandatory E-Verify provisions of the Arizona law, Chief Justice Roberts took a similar approach. Although IIRIRA prohibits the federal government from mandating participation in E-Verify, nothing in the law prevents a state from requiring participation from its employers. Thus the act, he wrote, is not preempted by IIRIRA. The majority opinion also emphasized that nothing in Arizona's E-Verify law conflicted with the federal government's overarching E-Verify scheme.

In his dissent, Justice Stephen Breyer wrote that Congress could not have intended for the word "licensing" in IRCA to be read so broadly as to include any kind of license that the state issues. Rather, he argued, the word should be interpreted in the context of the statute's language. Justice Breyer also emphasized that both the licensing and E-Verify provisions of the act upset the delicate "balancing" of considerations that Congress sought to accomplish through IRCA: balancing the need to prevent the hiring of unauthorized immigrants, on the one hand, with the need to prevent employer discrimination of workers who looked or sounded "foreign," on the other.

Future implications of the "Whiting" ruling

The most immediate impact of the *Whiting* ruling is clearly on states with mandatory E-Verify laws already in place. To date, four states other than Arizona (Alabama, Georgia, Mississippi, and Utah) have passed laws requiring all employers to participate in E-Verify, and an additional 11 states require some subgroup of employers (such as those receiving public contracts) to use E-Verify.

Whiting also bodes well for states or localities that have passed laws allowing for the suspension or revocation of business licenses of employers who have knowingly hired unauthorized immigrants. Just days after the Supreme Court issued its opinion in *Whiting*, it vacated a 2010 decision by the 3rd US Circuit Court of Appeals that declared unconstitutional an ordinance allowing the city of Hazleton, Pennsylvania to suspend or revoke the business licenses of employers found to have knowingly hired unauthorized immigrants. The Supreme Court directed the appeals court to reconsider the case in light of *Whiting*.

The ruling in *Whiting* will also perhaps spur Arizona and other states to take steps to more rigorously enforce their current laws. Although the Legal Arizona Workers Act has been on the books since 2007, the provisions of the law have rarely been enforced. As of fall 2010, only three enforcement actions under the act had been pursued against Arizona employers, and in July 2010 *The Arizona Republic* reported that only about one-third of the state's 100,000 employers had signed up for the E-Verify program.

Less clear, however, is whether the *Whiting* decision will embolden other state and federal lawmakers to push for laws that mirror the provisions of the Legal Arizona Workers Act. While some legislators have indicated in the weeks since the ruling that they will pursue similar laws in their own states, it is not necessarily certain that the majority of states will follow suit and ultimately pass such laws.

Most states will likely wait to see how full implementation of the Legal Arizona Workers Act plays out in Arizona before deciding whether to enact their own mandatory E-Verify or immigration licensing laws. Because Arizona has only tentatively enforced the provisions of the Legal Arizona Workers Act thus far, it is unclear what consequences full enforcement of the law will have on the state's economy and regulatory costs. A departure of businesses from the state or dramatic increases in costs could lead other states to rethink efforts to enact similar laws.

The decision in *Whiting* has also generated considerable interest in its implications for the future of another Arizona immigration law, the more controversial SB 1070. That law, which the state legislature passed in April 2010, allows state and local law enforcement officials to question anyone who is stopped by the police about their immigration status, so long as a police officer has a "reasonable suspicion" that the stopped individual is an unauthorized immigrant.

While some supporters of state-level immigration action have argued that the ruling in *Whiting* indicates that the court will also be inclined to uphold the constitutionality of SB 1070, most analysts agree that the *Whiting* decision will have little effect on the outcome of lawsuits surrounding SB 1070-like laws.

For one, the ruling in *Whiting* involved the narrow issue of the interpretation of statutory language that allowed states and localities to have some role in the licensing of businesses. There is no corresponding language in any federal statute allowing state law enforcement agents to directly enforce federal immigration law. *Whiting* also did not deal with the broader issues of preemption raised by SB 1070-type laws.

Additionally, while the Legal Arizona Workers Act case arrived at the Supreme Court after both the Arizona district court and the 9th Circuit had upheld the law, in the current SB 1070 case, the opposite is true. Last summer, a district court judge in Arizona ruled that several portions of SB 1070 were likely unconstitutional and preempted by federal law, and enjoined various provisions of the law from taking effect. The 9th Circuit then affirmed that decision in April of 2011.