Labor & Employment Law

The Future of Work Status Legislation and E-Verify

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In the current debate over unauthorized immigration, many policymakers have proposed improvements to the nation's ability to verify eligibility to work in the United States. Work status laws are primarily directed at closing the back door on illegal immigration by curtailing the employment opportunities that lure unauthorized immigrants into the country.[1] The existing work verification system is thought to be inadequate to deter these unauthorized workers, hard to enforce, and burdensome on employers. Both state and federal authorities have sought to enforce work eligibility rules through new mechanisms, including state and local mandates and a new federal electronic verification system called "E-Verify."[2] Yet the future of work eligibility verification programs at the state level—and mandatory E-Verify participation at the state and federal levels—remains uncertain. Congressional support of E-Verify has been uneven, and work status legislation has faced continued legal challenges in the courts. The issues before the courts are likely to turn on issues of preemption and will perhaps soon be decided by the United States Supreme Court.

Efforts to verify a person's right to work in the United States were practically unknown before the passage of the Immigration Reform and Control Act of 1986 ("IRCA"), which prohibited U.S. employers from knowingly hiring or continuing to employ unauthorized aliens.[3] IRCA set up a paper-based system whereby employers have been required to review documents of employees hired after the effective date of IRCA, complete a Form I-9 together with the employee, and maintain these I-9 records according to federal regulations or face fines and penalties.[4] Dissatisfaction with aspects of this system led Congress to make changes in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA required the Attorney General to create three pilot work verification programs, including a program titled the "Basic Pilot Program," for the more efficient and accurate verification of work status.[5] Congress also directed the President to review and assess the paper-based system, and make necessary changes, subject to its oversight.[6] At the same time, Congress authorized the President to designate demonstration projects to strengthen the employment verification systems.[7] Congress made participation in the Basic Pilot Program voluntary, with the exception of certain federal government entities and other entities subject to an order under INA §§ 274A(e)(4) and 274B(g), for whom Congress mandated participation.[8]

Basic Pilot Program, now renamed "E-Verify," has recently become an important part of work status laws (or employment eligibility verification law). The E-Verify program, an Internet-based electronic system, works by checking the information and documents presented by employees as part of the I-9 employment eligibility verification process against information in Social Security Administration and Department of Homeland Security databases.[9] The program then produces one of three responses: 1) Confirmation (meaning that the information matches Federal government databases); 2) Tentative Non-Confirmation; and 3) Final Non-Confirmation.[10] Employers can only fire employees based on the results of E-Verify after receiving a Final Non-Confirmation from the E-Verify system.[11] Most employers are only permitted to use E-Verify prospectively and only once an employee has been hired.[12]

Congress has repeatedly shown an unwillingness to commit the nation permanently to the E-Verify system. Congress allowed E-Verify to expire in March 6, 2009,[13] although it continued to authorize funding of the operation of the system through September 30, 2009. Prior to the expiration, the Senate stalled on legislation to reauthorize the program for a five-year period.[14] Instead of the five-year reauthorization, Congress opted for a short-term reauthorization.[15] After vigorous debate in the summer and early fall of 2009, Congress passed a three-year extension of the program until the end of September 2012 and continued to make participation voluntary.[16] The provision for extending E-Verify also included funding to operate and improve the system.

Out of frustration with the failure of the existing work verification process to deter illegal immigration, many states and localities have sought to enforce their own work status laws and to influence whether E-Verify will be used within their jurisdictions. These state and local efforts have led to court challenges, and the few courts deciding work status legislation and E-Verify cases have been slightly more encouraging of the program than Congress. Still, there is only one circuit court of appeal case addressing any of the now-existing state legislation, and that case was before the Ninth Circuit court on a facial challenge to an Arizona law that mandated the use of E-Verify by businesses holding Arizona state licenses.[17] In *Chicanos Por La Causa v. Napolitano*, the Ninth Circuit dismissed the challenge to the Arizona law but noted that it considered the law "against a blank factual background of enforcement and outside the context of any particular case," thus leaving the door open for as-applied challenges.[18] The plaintiffs sought certiorari, however, and on November 2, 2009, the United States Supreme Court invited the Solicitor General to submit a brief on whether certiorari should be granted.[19]

Many of the legal challenges to state and local work status verification laws are preemption challenges. Because the Immigration Reform and Control Act (IRCA) of 1986 contains an express preemption clause, the express preemption challenges decide whether the laws at issue fall within the savings clause for "licensing and similar laws."[20] The implied preemption challenges decide whether requiring mandatory participation

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in the voluntary federal E-Verify program is "field" or "conflict" preempted.

In *United States v. Illinois*, the United States filed suit seeking a declaration that federal law preempted an anti-E-Verify state law, Section 12(a) of Illinois Public Act 95-138 (hereafter "Illinois Act"), and a permanent injunction enjoining its enforcement.[21] The Illinois Act amended the Illinois Right to Privacy in the Workplace Act and prohibited Illinois employers from enrolling in the E-Verify electronic employment eligibility verification program until E-Verify was faster and more accurate.[22] The district court held that the law was preempted.[23] It rejected Illinois's argument that there was no controversy for the court to decide since E-Verify expired on March 6, 2009, when the short reauthorization ended, because funds had been appropriated for the program through September 30, 2009.[24] The court granted the United States's Motion for Summary Judgment, finding Congress preempted the Illinois legislation by extending E-Verify to all the U.S. states in 2003, and indicating in its House Report that it wanted to allow any employer, regardless of the state of business, to enroll in E-Verify.[25] The court concluded that although E-Verify was originally a test program, Congress—not Illinois—can set the terms and length of testing of a federal program.[26]

While Congress has temporized and the federal courts have not yet had their full say in determining the validity of work status laws, the executive branch has moved in a direction favoring the use of E-Verify. The Clinton Administration began the trend when President Clinton sought to improve economy and efficiency in government procurement practices through Executive Order 12,989,[27] which determined that economy and efficiency would be improved through stability and dependability.[28] The Order set out the government's policy not to contract with entities that knowingly employ unauthorized aliens because contractors who employ unauthorized aliens have a less stable and less dependable workforce.[29] President Bush revised the Clinton Order through EO 13,465,[30] which specifically named E-Verify as the mechanism for promoting economy and efficiency because it is the best available means for confirming identity and work eligibility.[31] In accordance with the philosophy behind this Executive Order, the Administration published a rule in January 2009 mandating the use of E-Verify for federal contractors and subcontractors.[32]

In *Chamber of Commerce v. Chertoff*, various parties sought to challenge Executive Order 13465 and the corresponding federal contractor rule on preemption grounds.[33] The lawsuit managed to delay implementation of the federal contractor rule four times: the rule originally was scheduled to go into effect on January 15, 2009, but after the lawsuit was filed, the Department of Homeland Security delayed the effective date of the rule until January 15, 2009, and implementation until February 20. Later, the Obama Administration postponed the rule until May 21, 2009.[34] In late May, the parties in the litigation agreed to extend the applicability date to September 8, 2009.[35] The Administration then completed its review of the federal contractor rule and decided to reaffirm it. Following reaffirmance of the federal contracting rule by the new Administration, the U.S. District Court for the District of Maryland ruled against the plaintiffs, holding, among other things, that the government could require federal contractors to use E-Verify as a condition of doing business with the federal government because contracting with the government is a voluntary undertaking.[36] The plaintiffs were unable to convince the court to stay its ruling, and the federal contractor rule therefore went into effect while the plaintiffs pursued an appeal.

The Chamber of Commerce case did not implicate preemption arguments, but state and local efforts to verify work status are generally evaluated under express preemption analysis. Whether a law is upheld under the Supremacy Clause of the United States Constitution will depend on the court's interpretation of IRCA's savings clause and how the court defines "licensing or similar requirement."[37] A mandate to use (or not use) E-Verify will likely be analyzed under an implied preemption analysis.

The express preemption analysis, and implied preemption analysis to a lesser degree, depends upon the classification of the law as an exercise of the police power or as an interference with federal immigration policy. The United States Supreme Court has emphatically upheld the federal government's supreme power in the field of immigration, naturalization, and deportation, emphasizing that this power is made clear by the Constitution[38] and by Alexander Hamilton, James Madison, and John Jay through the Federalist Papers.[39] However, these broad federal government powers change slightly after entry of the alien resident.[40] After entry, the resident alien is subject to state's police powers, and state legislatures can pass laws applying to the alien.[41] Unlike the states, the federal government does not possess general police powers to regulate aliens and may act only pursuant to the powers granted it by the Constitution.[42]

In *Chicanos Por La Causa v. Napolitano*, the Ninth Circuit upheld the Arizona Legal Workers Act as a valid regulation within the state's police powers to regulate the employment of aliens.[43] The Ninth Circuit noted the Act was passed to curb illegal immigration, and reflected the rising frustration at the state level with the U.S. Congress's failure to enact comprehensive immigration reform.[44] The Act targets employers that hire illegal aliens by revoking their business licenses.[45] Under the Act, Arizona courts may suspend or revoke the license of employers that knowingly or intentionally hire unauthorized aliens, and the Act provides a graduated series of sanctions for non-compliance.[46] It requires mandatory participation by Arizona employers in the E-Verify program but fails to provide a penalty for failure to enroll and participate in the program.[47] The Arizona Act provides an affirmative defense for good-faith compliance.[48]

The Ninth Circuit Court broadly interpreted the savings clause, holding that the Arizona Act was a licensing law.[49] The court relied heavily on a prior U.S. Supreme Court case, *De Canas v. Bica*,[50] and gave the Arizona law a presumption of non-preemption because the law was within the states' traditional power to regulate aliens after entry.[51] In *De Canas,* the Court upheld a state law that prohibited the employment of illegal aliens as "'within the mainstream' of the state's police powers."[52] There the preemption challenge to the State law failed because "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a

determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[53] In the Arizona case, the Ninth Circuit consulted Black's Law Dictionary to define "license," holding that the Arizona law fell within IRCA's savings clause as "a permission, usually revocable, to commit some act that would otherwise be unlawful."[54]

The Ninth Circuit also held that the Arizona Act was not impliedly preempted through conflict preemption because the state law did not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[55] The court concluded that the mandatory use of E-Verify at the state level did not impede Congress's purpose to develop a reliable and non-burdensome work-authorization verification system.[56] It also found no strong evidence that Congress intended to forbid states from requiring mandatory participation in E-Verify.[57] Rather, the court found evidence Congress "implicitly strongly encouraged" expanded use of E-Verify because Congress extended the duration and availability of E-Verify to all the states.[58] Consequently, it found that Arizona's requirement that in-state employers participate in E-Verify was consistent and furthered this congressional purpose to increase usage of the electronic employee eligibility verification program, and thus was not impliedly conflict preempted.[59]

The district court in *Lozano v. U.S. District Court for the Middle District of Pennsylvania* reached a different result. There the court held that the ordinances it considered were expressly preempted as immigration legislation not within the IRCA saving clause.[60] In *Lozano*, the City of Hazleton, Pennsylvania, had passed a number of ordinances to address an increasing illegal immigrant population.[61] One of the ordinances prohibited the employment and harboring of illegal aliens.[62] Under the ordinance, participation in E-Verify was mandatory in some instances, and violations of the ordinance could result in suspension of the business permit.[63]

The court in *Lozano* relied on Supreme Court cases that the Ninth Circuit in the Arizona case had dismissed as irrelevant because they did not involve preemption or state regulation.[64] Consequently, the *Lozano* court was able to conclude that the Pennsylvania ordinances interfered with immigration policy. The Court's statements in the cases relied upon by the district court describe IRCA as a "'comprehensive scheme' that prohibits the employment of unauthorized workers in the United States"[65] and "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'"[66] Therefore, the *Lozano* court narrowly interpreted the savings clause to preserve the national government power and invalidated the Hazleton ordinances.

Hazleton had asserted that its laws fell within the IRCA savings clause because they did not impose criminal or civil penalties, which are expressly preempted by the preemption clause.[67] Rather, Hazleton argued, its ordinances penalized businesses that employed illegal aliens in accordance with the terms of the savings clause by suspending their business permits, which amounted to a "licensing or similar law."[68] The district court rejected the city's argument that it could regulate employers who hire illegal employees provided that Hazleton did not impose civil or criminal sanctions but merely suspended the employer's business permit.[69] The court reasoned that suspension of the business permit was "the ultimate sanction" because the city could force the employer out of business by suspending its business permit.[70] The court therefore concluded that the city's interpretation was at odds with the plain language of the preemption provision because "it would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless."[71] The court also read "license" more narrowly than the Ninth Circuit and concluded that licensing "refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws."[72]

After finding express preemption, the *Lozano* court then discussed implied preemption for completeness reasons.[73] The court easily found field preemption because of the statements it imported from the Supreme Court that IRCA was a comprehensive scheme regulating immigration.[74] The court also found conflict preemption, in part based on the discrepancy between the local ordinance and federal law because the ordinance sometimes required mandatory participation in E-Verify, which is voluntary at the federal level except for federal contractors.[75]

As these cases show, the validity of E-Verify laws will likely be decided under conflict, rather than field, preemption principles during the implied preemption analysis. When courts decide whether states can mandate (or prohibit) the use of the federal E-Verify program at the state level, their focus will likely be upon the context surrounding E-Verify, including different congressional extensions of the program. The weight courts will give to the various congressional extensions of E-Verify's duration and availability will probably be the most persuasive evidence of congressional intent.

The availability of E-Verify as a voluntary or as a mandatory program will have an impact on the thousands of employers participating in the program at the state and federal level. The states have not been uniformly receptive to the E-Verify program. Whereas Arizona and Mississippi require all employers to use E-Verify, South Carolina only encourages its employers to use E-Verify.[76] In Colorado, Georgia, Missouri, Nebraska, Oklahoma, Rhode Island, and Utah, public contractors must participate in E-Verify.[77] In Colorado, Georgia, Idaho, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, and Utah, state agencies must utilize E-Verify.[78]

In Tennessee, use of E-Verify serves as a defense to a state or local charge that the employer has knowingly hired an illegal alien.[79] To date, Illinois is the only State that attempted to prevent its employers from participating in E-Verify.[80] At the federal level, the federal contractors rule applies to all federal contractors and subcontractors as of September 8, 2009.[81]

E-Verify has not yet been made a permanent part of the nation's work status verification landscape, but some form of enhanced federal workplace status verification is likely in the cards, particularly as the Administration and Congress begin debating comprehensive immigration reform in coming months. In prior attempts at immigration reform, improved

work status verification was key to gaining support for any proposed legislation that would legalize the undocumented. Whether state and local laws mandating work status verification will survive preemption challenges may turn on the language of any forthcoming immigration reform bill, particularly if the current workplace verification provisions of IIRIRA are modified or strengthened.

Endnotes

1 P.L. 99-603 "IRCA," H.R. Rep. No. 99-692(I) (1986) ("This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions . . . . Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.").

2 48 CFR 22.1800 et seq.

3 8 U.S.C. § 1324a, Pub. L. No. 99-603, 100 Stat.3359 (1986).

4 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.1.

5 *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") §§ 401-405, Pub. L. 104-208, Div. C, Title IV, Subtitle A, 110 Stat. 3009-655 through 3009-666, codified as a note to 8 U.S.C. § 1324a.

6 8 U.S.C. § 1324a(d).

7 8 U.S.C. § 1324a(d)(4).

8 *See* IIRIRA §§ 402(a), (e).

9 USCIS, E-Verify User Manual: For General Users, Program Administrators and Designated Agents 4 (2008).

10 USCIS, E-Verify User Manual: For General Users, Program Administrators and Designated Agents (2008).

11 *Id.* at 37.

12 *Id.* at 8.

13 *See* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 Pub. L. No. 110-329 Division A, § 106, 122 Stat. 3574 (2008).

14 *See* Employee Verification Amendment Act of 2008, H.R. 6633 [110th Congress].

15 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act.

16 The three-year extension of E-Verify was included in a $42.8 billion appropriations bill for the Department of Homeland Security (DHS), which was signed into law by President Barack Obama on Oct. 28, 2009. *See* Department of Homeland Security Appropriations Act of 2010, P. L. 111-83 (Oct. 28, 2009).

17 Chicanos Por La Causa v. Napolitano, 558 F.3d 856 (9th Cir. 2009).

18 *Id.* at 861.

19 Chamber of Commerce of the U.S. v. Candelaria, Order, Nov. 2, 2009, 2009 US LEXIS 7708.

20 *See* 8 U.S.C. § 1324a(h)(2) (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, recruit, or refer for a fee for employment unauthorized aliens.).

21 United States v. Illinois, U.S. Dist. LEXIS 19533 ((C.D. Ill., March 11, 2009) [not reported in F.Supp.2d.].

22 *Id.* at 4-5.

23 *Id.* at 8-9.

24 *Id.* at 7-8.

25 *Id.* (referencing H.R. Rep. No. 108-304(I), at 6 (2003).

26 *Id.* at 7.

27 Exec. Order No. 12,989, 61 Fed. Reg. 6091 (Feb. 13, 1996).

28 *Id.*

29 *Id.* at § 1(a).

30 Exec. Order No. 13,465, 73 Fed. Reg. 33285 (June 6, 2008).

31 *Id.* at § 1(b).

32 74 Fed. Reg. 5621 (January 30, 2009); *see also* 73 Fed. Reg. 67650-51 (Nov. 14, 2008).

33 Chamber of Commerce of the U.S. v. Chertoff, 2008 WL 5644799 (D. Md. 2008) (Trial Pleading [complaint] filed Dec. 23, 2008). For docket, see 8:08cv03444.

34 74 Fed. Reg. 5621 (January 30, 2009).

35 74 Fed. Reg. 26981 (June 5, 2009).

36 Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726 (D. Md., Aug. 25, 2009). For docket, see 8:08cv03444-AW.

37 *See* 8 U.S.C. § 1324a(h)(2).

38 U.S. Const. art. I, § 8 ("The Congress shall have the power . . . to establish a uniform rule of naturalization.").

39 Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (referencing, in particular, Federalist Papers Nos. 3, 4, 5, 42, and 80).

40 *Id.* at 76.

41 *Id.*

42 *Id.*

43 Chicanos Por La Causa v. Napolitano, 558 F.3d 856, 869 (9th Cir. 2009).

44 *Id.* at 860.

45 *Id.*

46 *Id.* at 862.

47 *Id.*

48 *Id.*

49 *Id.* at 866.

50 De Canas v. Bica, 424 U.S. 351 (1976).

51 *Chicanos*, 558 F.3d at 865.

52 *Id.* at 864 (citing *De Canas*, 424 U.S. at 356, 365).

53 *Id.* at 864 (citing *De Canas*, 424 U.S. at 355).

54 *Id.* at 865 (citing Black's Law Dictionary 938 (8th ed. 2004)).

55 *Id.* at 866 (referencing Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000)).

56 *Id.* at 866.

57 *Id.* at 867.

58 *Id.*

59 *Id.*

60 Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 519-21 (M.D. Pa. 2007).

61 *Id.* at 484.

62 *Id.*

63 *Id.* at 519, 527.

64 *Chicanos*, 558 F.3d at 865 (distinguishing Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002); citing INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 (1991)).

65 *Lozano*, 496 F. Supp at 518 (citing *Hoffman Plastic*, 535 U.S. at 147).

66 *Id.* at 518 (citing *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194).

67 *Id.* at 519; *see* 8 U.S.C § 1324a(h)(2) (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.).

68 *Id.* at 519.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 521.

74 *Id.* (citing Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147-148 (2002)).

75 *Id.* at 527 (paraphrasing Illegal Immigration Relief Act Ordinance ("IIRA") § 4.C (providing that all Hazleton city agencies must participate in E-Verify); paraphrasing IIRA § 4.D (requiring all businesses that seek a city contract or grant to participate in E-Verify)).

76 *Id.*

77 *Id.*

78 *Id.*

79 *See* T.C.A. §§ 12-4-124 (Contracts with persons utilizing the services of illegal immigrants), 50-1-103 (Definitions).

80 *See* 820 ILCS § 55/12 (Restrictions on Use of Employment Eligibility Verification Systems).

81 74 Fed. Reg. 26981 (June 5, 2009); USCIS, Federal Contractors Required to Use E-Verify Beginning Sept. 8, 2009 (2009).