



# Iowa General Assembly

## 2011 Legal Updates

Legislative Services Agency – Legal Services Division

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**Purpose.** *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

### STATE AUTHORITY TO REGULATE EMPLOYMENT OF UNAUTHORIZED ALIENS AND TO MANDATE USE OF E-VERIFY

Filed by the United States Supreme Court  
May 26, 2011

#### Chamber of Commerce v. Whiting

No. 09–115

<http://www.supremecourt.gov/opinions/10pdf/09-115.pdf>

**Background.** In 2007, the state of Arizona enacted the Legal Arizona Workers Act (“the Act”), which made the employment of unauthorized aliens illegal under state law. The Act provides for the suspension of the business license of an Arizona employer who knowingly or intentionally employs an unauthorized alien for the location at which the unauthorized alien was employed. For a second violation, the business license is permanently revoked. The Act also requires all employers to use a federal electronic verification system (E-Verify) to confirm that the workers they employ are legally authorized to work in the United States. The U.S. Chamber of Commerce, along with various business and civil rights organizations, the petitioners in this case, filed suit in federal court against state officials charged with enforcing the Act, the respondents. The petitioners argued that the provisions of the Act relating to business licenses were expressly and impliedly preempted by the federal Immigration Reform and Control Act (IRCA). The IRCA preempts “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.” The respondents contended that the business license provisions fall within that parenthetical phrase, the savings clause, under which state authority is preserved. The petitioners also argued that the E-Verify requirement is impliedly preempted by the federal Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which created the E-Verify program, but made participation voluntary. The respondents contended that it was not the implied intent of the IIRIRA to prohibit states from requiring participation in E-Verify. The District Court for the District of Arizona found for the respondents. The Ninth Circuit Court of Appeals affirmed.

**Issues.** Whether the provisions of the Legal Arizona Workers Act providing for the suspension and revocation of business licenses are expressly or impliedly preempted by federal law and whether the provision requiring participation in E-Verify is impliedly preempted by federal law.

**Holding.** The Court’s 5-3 majority decision (Justice Elena Kagan did not participate) upheld the lower court’s ruling that the provisions of the Legal Arizona Workers Act at issue are neither expressly nor impliedly preempted by federal law and are therefore valid based upon several grounds.

The Court held that the provisions of the Act providing for the suspension or revocation of business licenses are of the sort Congress intended to permit by excluding “licensing and similar laws” from the IRCA’s preemption language. Thus, the business license provisions are not expressly preempted. The Court noted that the Act’s definition of “license” is similar to a common definition under federal law, as well as dictionary definitions, and concluded that the Act is facially a “licensing law,” and even if it were not, it would at least be “similar” to a licensing law. The petitioners made a detailed argument based on the legislative history of the IRCA that “licensing and similar laws” was meant to carry a more specific meaning which would exclude state laws such as the Act. The Court rejected this argument because the plain language of the IRCA was sufficient to resolve the question.

The Court also held that the business license provisions are not impliedly preempted by the IRCA. The petitioners made various arguments asserting that Congress, in enacting the IRCA, intended federal authority relating to illegal immigration to be exclusive, and that the Act upsets the careful balance Congress sought to strike in this area. The Court disagreed, holding that the Arizona law did nothing more than implement sanctions that Congress expressly permitted through the

IRCA's language on licensing laws. The Court noted that the Act adopts the federal definition of the term "unauthorized alien" to describe persons the employment of whom the Act prohibits, and requires state investigators to verify the work authorization of alleged unauthorized aliens with the federal government, forbidding them from making an independent determination of an alleged unauthorized alien's status on a state level. Thus, the Act does not circumvent or supersede the federal system, but merely implements it as states are permitted to do. The Court further noted that regulating in-state business through licensing laws has never been an issue in which federal concerns dominate, so there is no incursion on federal authority. The Court also rejected an assertion that the Act would encourage employers to discriminate against legal workers who appear foreign rather than risk losing their business licenses because the Act penalizes only the knowing or intentional hiring of an unauthorized alien and such penalties are restricted to only the most severe employer misconduct. Furthermore, the use of E-Verify provides employers with a safe harbor under the Act.

The Court further held that the Act's requirement for Arizona employers to use E-Verify is not impliedly preempted by the IIRIRA. The petitioners argued that Congress, when it created E-Verify, intended it to be a voluntary and non-burdensome alternative for employers to check the work status of employees, and that mandating its use on the state level is contrary to that purpose. The Court stated that there is no language in the IIRIRA which in any way circumscribes state action relating to E-Verify and also noted that the consequences for an employer not using E-Verify are the same under both the Act and under federal law: the employer loses the rebuttable presumption that the employer complied with the law in hiring the employee in question. The Court thus found no conflict between the Act's mandatory use of E-Verify, and optional use under the IIRIRA. The Court also rejected arguments questioning the reliability of E-Verify and the ability of the E-Verify system to handle the increased load from mandatory use.

**Dissent.** Two dissents were filed in this case. Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, argued that the Act upsets the balance Congress struck in immigration policy between the goals of discouraging the hiring of unauthorized aliens, avoiding placing an undue burden on employers, and preventing discrimination in hiring. He asserted that Arizona's interpretation of the phrase "licensing and similar laws" to include business licenses is overbroad, with the potential to sweep in any document that a state might choose to classify as a license. He argued that a narrower meaning for that phrase can be gleaned from the legislative history of the IRCA. Justice Sonia Sotomayor argued, in her dissent, that "licensing and similar laws," when read in the context of the entire statute, should be understood to mean that a state is only permitted to sanction an employer pursuant to a licensing law after a final determination has been made by the federal government that the employer violated federal law. She noted language in the IRCA declaring that it is the sense of Congress that "the immigration laws of the United States should be enforced vigorously and uniformly," and asserted the majority decision would lead to a patchwork of state immigration laws. She questioned the ability of state prosecutors and courts to accurately resolve complex technical questions of federal immigration law that will arise under the Act. Both dissents disagreed with the presumption that the lack of any language in the IIRIRA regarding state use of E-Verify indicated intent for the states to be permitted to require its use. The dissenting justices would have ruled that only Congress has the authority to make using E-Verify mandatory.

**Impact and Applicability.** The Court held that the IRCA's preemption of state laws imposing civil or criminal penalties on employers of unauthorized aliens "other than through licensing and similar laws" should be interpreted according to the plain language of the statute. Narrower interpretations were rejected. The Court did not define an outer boundary for what might be considered a licensing or similar law; however, the decision specifies that a state-based enforcement scheme related to business licenses would be permissible. Under the Act, a business license is defined as any agency permit, certificate, approval, registration, charter, or similar form of required state-issued authorization to operate a business; this might include articles of incorporation, certificates of partnership, or grants of authority to out-of-state companies to transact in-state business. The Court also upheld the right of states to mandate that employers verify through the E-Verify program the employment eligibility of employees they hire.

In recent years, several states have enacted laws similar to the provisions at issue in this case. This case identifies legal principles applicable to the enactment and enforcement of such laws.

Iowa Code §715A.2A currently provides that an employer who hires or continues to employ a person knowing the person is not authorized to be employed in the United States is subject to a civil penalty ranging from \$200 to \$10,000 per worker. An employer who complies with federal employment authorization verification procedures is provided an affirmative defense to any alleged violation of this Code section. Iowa law does not require employers to participate in E-Verify.

*LSA Monitor*: Jack Ewing, Legal Services, (515) 281-6048.