ROBISON, CURPHEY & O'CONNELL
A Tradition of Proven Legal Representation

JUNE 2011

U.S. Supreme Court upholds Arizona immigration law.

Supreme Court approves state licensing sanctions on employers who knowingly employ unauthorized aliens.

Arizona was one of the first States to brave the murky waters of state immigration enforcement with its Legal Arizona Worker Act of 2007 (Act). Now, in light of the U.S. Supreme Court's May 26, 2011 decision in *Chamber of Commerce v. Whiting* upholding the Act, it will not be long before other States decide to jump in. Only time will tell whether Congress lets them play, or kicks them out.

Deciding who is and is not allowed to enter the United States (i.e., immigration) has always been a near unconditional power maintained by the federal government. In 1986, Congress further extended that authority to who could and could not work in the United States via the Immigration Reform and Control Act (IRCA), which implemented the infamous Form I-9 documentation requirements. A lesser known fact is that IRCA also informed States that the federal government, and *only* the federal government, could prosecute employers for employing unauthorized aliens, and it would do (and still does) so through a progressive series of criminal and civil penalties (usually fines). The only exception was that States could still impose sanctions through "licensing and similar laws," which lawmakers refer to as the IRCA savings clause. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which, among other things, created the Basic Pilot Program, better known as E-Verify. Hoping E-Verify would someday replace the burdensome I-9, this program was mandatory for federal employers, but voluntary for most everyone else.

Complete immigration reform has been a pressing topic (to say the least) with Americans over the past decade, only to become sidelined time and time again by wars, financial crises, and – its greatest nemesis – politics. No longer content to wait for the federal government, Arizona was one of several States that decided to "act." Its Act not only requires all employers in Arizona to use E-Verify to confirm their employees' eligibility to work in the United States, but it also authorizes state courts to suspend or revoke the business licenses of any employer who knowingly employs unauthorized aliens. For a first offense, the employer must terminate all such aliens, file quarterly reports during a probationary period of 3 to 5 years, and face possible suspension of its license(s) to do business in Arizona. For a second offense (during probation), all of the employer's licenses to do business in Arizona are permanently revoked.

Opposition to the law was quick – including calls for repeal from the Obama administration – but ultimately unsuccessful, as the highest court in the land had its say last week. In *Whiting*, the Chamber of Commerce argued that: (a) the Act was preempted by federal law, which exclusively governs immigration enforcement issues; and (b) Arizona could not require employers to use E-Verify, which has always been voluntary for most employers. In a 5-3 decision (Justice Kagan took no part), the U.S. Supreme Court majority – unsurprisingly, the five more conservative Justices – found that the structure of the Act, which relied heavily upon federal definitions and requirements, fit within the IRCA savings clause and the Act authorized the type of

sanctions that Congress specifically carved out of IRCA for the States. Moreover, the majority did not find overlap in the license sanctions imposed by Arizona and the civil and criminal penalties imposed by IRCA (although, in the long run, the suspension or revocation of a license to do business is probably more financially devastating than a small fine). As for Arizona's E-Verify requirement, the majority found that IIRIRA did not prohibit the States from mandating the use of E-Verify. In short, the majority found no preemption on either issue.

The three dissenting Justices were not so forgiving. According to them, the harsh sanctions imposed by the Act were disproportionate to the progressive civil and criminal penalties allowed under IRCA, which they ultimately feared would lead to more immigration-related employment discrimination. Specifically, the dissenters believed that employers in Arizona would now be hesitant to hire those individuals who they believed, based upon a name or appearance, may turn out to lack the right to work in the United States.

In any event, since the U.S. Supreme Court has approved the Act, employers across the country should be wary of one of two outcomes. First, Congress could amend IRCA and do away with the savings clause, once again hoarding all immigration-related authority for itself. Second, and much more likely, is that Congress will do nothing, giving States without similar laws – like Ohio and Michigan – the green light to copycat the Act, which has the potential of dumping both E-Verify and heavy licensure sanctions upon already overwhelmed employers.

Whether the Republican administrations in either State would currently support such a bill for its tough stance on unauthorized aliens, or oppose it for its increasing burden on employers, is an entirely different question.

This article was written by attorney Jason Van Dam for informational purposes only, and does not constitute legal advice. If you have any questions or concerns about this case, or its potential impact upon your business, please feel free to contact Jason or William V. Beach at Robison, Curphey & O'Connell, LLC.

William V. Beach, Esq.

For more information or questions, please contact Bill at 419-249-7900 or by email at bbeach@rcolaw.com

Jason M. Van Dam, Esq.

For more information or questions, please contact Jason at 419-249-7900 or by email at jvandam@rcolaw.com