

Supreme Court Immigration Decision Means "Patchwork Regulation" For Employers

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The U.S. Supreme Court's recent decision in [*Chamber of Commerce of the United States v. Whiting*](#), which upheld an Arizona statute that sanctioned employers for knowingly or intentionally employing unauthorized aliens, means that employers with multi-state operations will have to conform to a patchwork of laws rather than a single, uniform federal standard. It also means that we can expect many more states to enact such laws.

The Legal Arizona Workers Act provides that the licenses of employers can be revoked or suspended in certain circumstances where the employers knowingly or intentionally employ unauthorized aliens. The Act uses the federal government's definition of "unauthorized alien" and applies federal standards in determining who is an "unauthorized alien."

The Act also requires all Arizona employers to use the [E-Verify](#) federal electronic system to confirm that new hires are legally authorized to work in the United States.

The plaintiffs in *Whiting*, a coalition of the U.S. Chamber of Commerce and various immigrants' rights groups, had argued that the Arizona statute was preempted by the federal Immigration Reform and Control Act of 1986. The IRCA does generally preempt state or local laws that impose sanctions for employing unauthorized aliens. However, the IRCA contains an exception for "licensing and similar laws." The Court held that the "business license" provisions of the Arizona statute fell within the exception and were not preempted. Although there are limits on a state's power to regulate immigration, the Court affirmed states' authority to establish conditions for the issuance of business licenses. The Court upheld the E-Verify requirement on the ground that it did not conflict with federal law.

Impact of Decision

The decision in *Whiting* means that employers will have to be conscious of applicable state requirements in addition to the IRCA. According to the Supreme Court, the following states have laws that provide for suspension or revocation of business licenses as a sanction for employing unauthorized aliens: Colorado, Mississippi, Missouri, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. The states of Mississippi, South Carolina, and Virginia also require employers to use E-Verify or other method of verification.

In addition, Georgia has recently enacted the Illegal Immigration Reform and Enforcement Act of 2011, which among other things requires employers to use E-Verify as a condition of issuance and renewal of business licenses. The E-Verify mandate of the Georgia law will take effect January 1, 2012, for employers with 500 or more employees, and will be phased in for smaller employers.

And now that the legal hurdles have been lifted, more states will be encouraged to pass laws similar to Arizona's, imposing compliance burdens on companies operating in multiple states.

The Supreme Court decision does not apply to other state efforts to regulate immigration law, including Arizona's S.B. 1070, which requires the police to check the immigration status of individuals in certain circumstances, or the portions of Georgia's newly enacted statute that criminalize using fraudulent identification to obtain employment, transporting or moving an illegal alien in a motor vehicle, or harboring an illegal alien.

A federal court issued a preliminary injunction, prohibiting the state from putting into effect the main provisions of Arizona S.B. 1070. The injunction was upheld by the U.S. Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Northern Mariana Islands), and the case is on appeal to the U.S. Supreme Court while six other challenges to the law are pending. Other states' efforts at criminalization may also be vulnerable to constitutional challenges.

If you have a question about the *Whiting* decision, the IRCA, or compliance with state immigration laws, or any other immigration law issue, please feel free to contact any member of Constangy's **Immigration Law Practice Group**, or the Constangy attorney of your choice.

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