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State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments

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Summary

An estimated 37 million foreign-born persons currently reside in the United States, almost a third of whom may be present without authorization, and in recent years the number of aliens who unlawfully reside in the United States has grown significantly. The movement of aliens (both legal and non-legal) to "nontraditional" areas and the growth in the unauthorized alien population have led some states and localities to enact measures geared at stopping unauthorized aliens from arriving and settling within their communities. Typically, such measures have sought to (1) limit the employment and hiring of unauthorized aliens, including through the denial of permits to entities that employ such persons, as well as through the regulation of day labor centers; (2) restrict the ability of such aliens to rent or occupy a dwelling within a state or locality's jurisdiction; and/or (3) deny such individuals access to state and local services or benefits.

State or local restrictions upon unauthorized aliens' access to employment or housing and eligibility for public benefits have been challenged on at least one of the following grounds: (1) such restrictions are preempted by federal law, including the Immigration and Nationality Act (INA), and are, therefore, unenforceable by federal or state courts; (2) the measures run afoul of the Equal Protection Clause of the Fourteenth Amendment, which requires states and localities to accord all persons equal protection under the law; (3) such restrictions deprive persons of a liberty or property interest without providing them adequate due process, in violation of Fourteenth Amendment requirements; and (4) the restrictions run afoul of federal civil rights statutes, including the Fair Housing Act, Title VII of the Civil Rights Act, and 42 U.S.C. § 1981. Arguably, these challenges are more significant with respect to state and local restrictions on employing and renting property to illegal aliens than they are with regard to state and local restrictions on unauthorized aliens' access to public services and benefits.

This report discusses the constitutional issues raised in relation to state and local laws intended to deter the presence of unauthorized aliens, along with the implications that federal civil rights statutes might have on the implementation and enforcement of measures restricting such persons' ability to obtain employment, housing, or other state and local benefits or services. The report also discusses recent judicial developments at the federal level concerning local ordinances aimed at deterring the presence of unauthorized aliens within a locality's jurisdiction.

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Introduction

Recently, several states and localities have considered and/or enacted measures intended to deter the presence of aliens who are present in the United States without legal authorization (i.e., aliens commonly referred to in discourse as "illegal" or "unauthorized" aliens). Typically, such measures have sought to (1) limit the employment and hiring of unauthorized aliens, including through the denial of permits to entities that employ such persons, as well as through the regulation of day labor centers; (2) restrict the ability of such aliens to rent or occupy a dwelling within a state or locality's jurisdiction; and/or (3) deny such individuals access to state and local services or benefits.

Several of these measures have been challenged in court, including on federal preemption and Fourteenth Amendment grounds. Thus far, every legal challenge brought in federal court concerning restrictions on employment or the renting of property has resulted in either the contested measure being struck down; the parties' reaching a settlement agreement that precludes enforcement of the contested ordinance; or the presiding court enjoining the enforcement of the ordinance pending trial. These cases illustrate the difficulties states and localities face in attempting to regulate the presence and rights of aliens within their jurisdictions in a manner consonant with federal law. Over time, the courts have narrowed the legal bases upon which states and localities may enact legislation affecting aliens. State and local authority to regulate aliens has also been limited, directly or impliedly, by the growing scope of federal immigration law. With the enactment of federal employer sanctions, welfare reform, and other recent immigration laws, Congress has left increasingly few gaps and crevices for states and localities to fill. Significantly, these laws have not only broadened the substantive regulation of aliens (e.g., employment eligibility), but have also established discrete procedures for determining alien eligibility for employment and certain benefits. Perhaps ironically then, even as new state and local measures to deter illegal immigration are motivated in part by a perceived lack of federal enforcement of immigration law, the degree to which states and localities may regulate immigration-related matters has been curbed by the growing breadth of federal immigration law on the books.

This report discusses the constitutional issues raised in relation to state and local laws intended to deter the presence of unauthorized aliens, along with the implications that federal civil rights statutes might have on the implementation and

enforcement of measures restricting such persons' ability to obtain employment, housing, or other state and local benefits or services. This report also discusses recent judicial developments at the federal level concerning local measures aimed at deterring the presence of illegal aliens.

I. Factual Background

An estimated 37 million foreign-born persons currently reside in the United States, almost a third of whom may be present without authorization.[1] Over the past several years, the number of aliens who unlawfully reside in the United States has grown significantly, from an estimated 3.2 million in 1986 to more than 11 million in 2005.[2] The number of unauthorized aliens in the United States is estimated to increase by 500,000 annually.[3]

The movement of aliens (both legal and non-legal) to "nontraditional" areas,[4] and the growth in the unauthorized alien population[5] have led some states and localities to enact measures geared at stopping unauthorized aliens from arriving and settling within their communities. Since early 2006, several dozen localities have considered and/or passed legislation aimed at deterring the presence of unauthorized aliens within their jurisdictions.[6] In many cases, such legislation has sought to deny or revoke licenses for businesses that employ unauthorized aliens, bar such aliens from renting, leasing, or owning property, and prohibit such aliens from receiving various public benefits.

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[1] The other two-thirds of foreign-born U.S. residents are legal permanent residents (i.e., "legal immigrants") or naturalized citizens. *See* CRS Report RS22574, *Immigration Reform: Brief Synthesis of Issue*, by Ruth Ellen Wasem. The foreign-born figure does not include aliens who have been admitted into the United States on a temporary basis ("nonimmigrants") — e.g., temporary workers, foreign students, diplomats, business travelers, and tourists.

[2] See CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem. See also Jeffrey S. Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, March 7, 2006, available at [http://pewhispanic.org/files/reports/61.pdf] (hereinafter "Pew Study").

[3] Pew Study, *supra* note 2.

[4] Pew Hispanic Center, *The New Latino South: The Context and Consequences of Rapid Population Growth*, presented at the conference "Immigration to New Settlement Areas," July 26, 2005, available at [http://pewhispanic.org/files/execsum/50.pdf].

[5] CRS Report RL33874, *supra* note 2.

[6] The Fair Immigration Reform Movement, an immigration advocacy group, maintains a database listing local legislative activity concerning immigration, which may be accessed at [http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/].

II. Relevant Immigration-Related Legal Issues

State or local restrictions upon unauthorized aliens' access to employment or housing and eligibility for public benefits could potentially be challenged on at least one of the following grounds: (1) such restrictions are preempted by federal immigration law, and are, therefore, unenforceable by federal or state courts; (2) the measures run afoul of the Equal Protection Clause of the Fourteenth Amendment, which requires states and localities to accord all persons equal protection under the law; or (3) such restrictions deprive persons of a liberty or property interest without providing them adequate due process, in violation of Fourteenth Amendment requirements.

The following sections describe these legal concepts in more detail, particularly as they relate to state and local regulation of unauthorized aliens within their territory.

Preemption

While federal and state power to regulate certain matters overlaps, the Supreme Court has long recognized that authority to determine which foreigners may enter and remain in the United States "is unquestionably exclusively a federal power."[7] "States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[8]

Further, the Supremacy Clause of the U.S. Constitution provides that federal laws and treaties are "the supreme Law of the Land."[9] Accordingly, when Congress acts within the scope of its constitutional authority, the laws it enacts may preempt otherwise permissible state or local action within that field. State or local action may be either *expressly* or *impliedly* preempted by federal law. In general, a valid act of Congress may preempt state or local action in a given area if (1) an express legislative statement of preemption is given (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).[10]

Through the Immigration and Nationality Act (INA),[11] the federal government has instituted a comprehensive framework to regulate the admission and removal of aliens, as well as the conditions of aliens' continued presence in the United States. Additionally, the INA was amended pursuant to the Immigration Reform and Control

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[7] DeCanas v. Bica, 424 U.S. 351, 354 (1976).

[8] Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (internal citations omitted).

[9] U.S. CONST. art. VI, cl. 2.

[10] See, e.g., Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 248-249 (1984); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 203-204 (1983).

[11] 8 U.S.C. §§ 1101 *et seq.*

Act of 1986 (IRCA) to establish a scheme to combat the employment of illegal aliens, and this system is now "central to the policy of immigration law.[12]

On the one hand, the INA sets forth various categories of legal aliens, and grants certain rights to aliens falling within those categories. On the other hand, the INA establishes an enforcement regime to deter the unlawful presence of aliens, including through the use of employer sanctions, criminal and/or civil penalties, and deportation.

Although there is little room for state or local action addressing immigration, the Supreme Court has never held that "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted."[13] In the 1976 case of *DeCanas v. Bica*, the Supreme Court held that state regulation of matters only tangentially related to immigration would, "absent congressional action[,]...not be an invalid state incursion on federal power."[14] The Court further indicated that field preemption claims against state action that did not conflict with federal law could only be justified when the "complete ouster of state power...was the clear and manifest purpose of Congress."[15]

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[16] Being entitled to "equal protection" does not equate to "equal treatment." Generally, the judicial review standard applied to state and local laws that treat different categories of persons differently — the "rational basis" test — is highly deferential. However, if a distinction disadvantages a "suspect class" or relates to a "fundamental right," a reviewing court will require the state or locality to demonstrate that the distinction is justified by a compelling government interest ("strict scrutiny"). Other tests falling between rational basis and strict scrutiny have also been applied on occasion.

All persons in the United States are entitled to "equal protection" under the Fourteenth Amendment, and states are limited in the degree to which they may

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[12] Hoffman Plastic Compounds, Inc. v. N.L.R.B, 535 U.S. 137, 147 (2002) (internal quotations omitted).

[13] *DeCanas*, 424 U.S. at 355. Indeed, during the nineteenth century, when federal regulation of immigration was far more limited in scope, state legislation limiting the rights and privileges of certain categories of aliens was common. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776 -1875)*, 93 COLUM. L. REV. 1833 (1993). Many of these restrictions would now be preempted by federal immigration law.

[14] *DeCanas*, 424 U.S. at 356.

[15] Id. at 357.

[16] U.S. CONST., amend. XIV, § 1.

restrict rights and privileges to persons on account of unauthorized alienage.[17] In the 1982 case of *Plyler v. Doe*, the Supreme Court held that a Texas statute that would have prohibited unauthorized student aliens from receiving a free public elementary and secondary education violated the Constitution.[18] The Court determined that unauthorized immigrants are entitled to protection under the Equal Protection Clause of the Fourteenth Amendment.[19] Finding that unauthorized immigrants are not a "suspect class" and education is not a "fundamental right," but also sensitive to the hardship that could result to a discrete class of children not accountable for their unauthorized immigration status, the Court evaluated the Texas statute under an "intermediate" standard of review, requiring that the statute further a substantial state goal. The *Plyler* Court ruled that the state's interests in enacting the statute — namely, to conserve the state's educational resources, to prevent an influx of illegal immigrants, and to maintain high-quality public education — were not legitimately furthered by the legislation. As a result, the Court struck down the Texas statute.[20]

Procedural Due Process

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law."[21] The Supreme Court has long recognized that the Due Process Clause contained in the Fifth and Fourteenth Amendments[22] "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[23]

States and localities may not arbitrarily interfere with certain key interests possessed by persons. Such interests may only be deprived through fair and just procedures. "Procedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or

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[17] Because of its broad plenary power over immigration and naturalization, the federal government has significantly greater leeway than states in the measures it may take with respect to aliens. See Matthews v. Diaz, 426 U.S. 67, 84-87 (1976). "The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." Id. at 84-85. However, the Supreme Court has suggested that "undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens." Plyler v. Doe, 457 U.S. 202, 226 (1982).

[18] 457 U.S. 202 (1982).

[19] Id. at 210.

[20] *Plyler*, 457 U.S. at 227-31 (1982).

[21] U.S. CONST., amend. XIV, § 1

[22] Both the Fifth and Fourteenth Amendments protect persons from government action depriving them of life, liberty, or property. However, the Fifth Amendment concerns obligations owed by the federal government, whereas the Fourteenth Amendment covers activities by state and local governments.

[23] Zadvydas v. Davis, 533 U.S. 678, 693 (2001). See also, e.g., *Plyler*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

property."[24] The type of procedures necessary to satisfy due process may depend upon the circumstances and interests involved. In the case of *Matthews v. Eldridge*, the Supreme Court announced the prevailing standard for assessing the requirements of due process, finding that:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: *first*, the private interest that will be affected by the official action; *second*, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the administrative and fiscal burdens that the additional or substitute procedural requirements would entail.[25]

Although the requirements of due process may vary depending on the particular context, states and localities must provide persons with the ability to contest the basis upon which they are to be deprived of a protected interest. Essential requirements of due process are notice and a hearing before an impartial tribunal.[26] Due process may also require additional procedural protections to minimize the occurrence of unfair or mistaken deprivations of protected interests.[27]

The Supreme Court has long recognized that the procedural protections of the Due Process Clause only apply to direct government action that deprives a person of a protected interest;[28] it "does not apply to the indirect adverse effects of governmental action."[29] While persons who are indirectly affected by government action may, in some cases, posses a legal cause of action against the government or

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[24] Carey v. Piphus, 435 U.S. 247, 259 (1978) (ital. added).

[25] Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (ital. added).

[26] See, e.g., Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (describing notice of a proposed deprivation of interest as "[a]n elementary and fundamental requirement of due process"); *Matthews*, 424 U.S. at 333 ("[S]ome form of hearing is required before an individual is finally deprived of a...[protected] interest."); *In re* Murchison, 349 U.S. 133, 135 (1955)("A fair trial in a fair tribunal is a basic requirement of due process.").

[27] In many circumstances, due process may require an opportunity to confront and cross examine adverse witnesses; discovery of evidence being used by the government to support its action; an obligation by the decisionmaker to base his or her ruling solely upon the administrative or judicial record; and a right to be represented and assisted by counsel. *See* CONGRESSIONAL RESEARCH SERVICE, CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 1795-1800 (Johnny H. Killian, et al. eds., 2004) (*hereinafter* "CONSTITUTION ANNOTATED").

[28] E.g., O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (finding that nursing home residents had no constitutional right to a hearing before a state or federal agency revoked the home's authority to provide them with nursing care at government expense); Legal Tender Cases, 79 U.S. 457, 451 (1870) ("[The Due Process Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.").

[29] *O'Bannon*, 447 U.S. at 789.

another party, this cause of action would not be based upon a procedural due process claim.

III. Immigration-Related Legal Issues Raised by State or Local Restrictions on the Employment of Unauthorized Aliens

The ability of states and localities to restrict the employment or hiring of unauthorized aliens may depend upon the form that those restrictions take. Regardless, such restrictions may potentially be subject to preemption and procedural due process challenges.

Preemption

INA§ 274A generally prohibits the hiring, referring, recruiting for a fee, or continued employment of illegal aliens. Violators may be subject to cease and desist orders, civil monetary penalties, and (in the case of serial offenders) criminal fines and/or imprisonment for up to six months. Notably, INA § 274A(h)(2) expressly preempts any state or local law imposing civil or criminal sanctions upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.[30] However, state and local regulation of such practices through licensing and similar laws is *exempted* from this provision.[31] Accordingly, while federal law clearly preempts the imposition of any additional criminal or civil penalties upon those involved in the unlawful employment of aliens, states and localities are not *expressly* preempted from denying a business license to an entity that hires or employs unauthorized aliens. As will be discussed later,[32] it is a question of ongoing legal debate as to whether this exclusion from preemption is intended to apply to *all* state and local measures denying licenses to employers of unauthorized aliens, or only to those that deny licenses to businesses that have been found to have violated INA § 274A.

INA § 274A(h)(2) does not expressly preempt every state or local measure denying licenses to businesses that employ illegal aliens, nor does it expressly authorize such measures. However, even if state or local regulation of certain conduct involving immigration is not preempted in all circumstances, the *manner and scope* of such regulation may nevertheless trigger preemption or other constitutional concerns.

The manner in which a locality chooses to implement an ordinance might raise significant preemption issues, especially if it authorizes local authorities to make an independent assessment of a person's immigration status. The power to regulate

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[30] INA § 274A(h)(2); 8 U.S.C. § 1324a.

[31] Id. See generally H.R. REP. 99-682(I), at 58 (1986) (describing purpose behind licensing exemption).

[32] See *infra* at 21-22 (discussing litigation concerning scope of preemption exemption to INA § 274A).

immigration and determine which aliens may enter or remain in the United States is exclusively a federal power. The INA generally vests authority in the Attorney General and Secretary of Homeland Security, along with immigration judges within the Department of Justice's Executive Office of Immigration Review, to administer and enforce all laws relating to immigration and naturalization, including determinations regarding the immigration status of aliens (though such determinations are subject to judicial review in many circumstances).[33] Accordingly, states and localities are preempted by federal law from substantively categorizing aliens or making an independent assessment as to whether an alien has committed an immigration violation.[34] Such authority is conferred exclusively to designated federal authorities by the INA.[35] A state or local measure targeting unauthorized aliens may have a better chance of surviving a preemption challenge if its penalties are triggered

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[33] E.g., INA §§ 103, 240, 242, 287; 8 U.S.C. §§ 1103, 1239a, 1252, 1357.

[34] League of United Latin American Citizens v. Wilson, 908 F.Supp. 755, 769-771 (C.D.Cal. 1995) (finding that voter-approved California initiative requiring state personnel to verify immigration status of persons with whom they came into contact was preempted, in part, because it required the state to make an independent determination as to whether a person was in violation of federal immigration laws).

[35] It should be noted that states and localities are not prohibited from assisting in the enforcement of (as opposed to adjudicating) federal immigration laws in some circumstances. It is generally recognized that states and localities may make arrests for criminal violations of the INA. E.g., Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983); United States v. Vasquez-Alvarez, 176 F. 3d 1294 (10th Cir. 1999). See generally CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Blas Nuñez-Neto, Michael John Garcia, and Karma Ester. Further, under INA § 287(g), the Attorney General is permitted to enter agreements with states and localities to permit their law enforcement officers to perform additional duties relating to immigration law enforcement. However, the ability of states and localities to *enforce* federal immigration law does not permit them to impose new and additional penalties upon persons on account of federal immigration violations. While the former is permitted in certain circumstances, the latter is generally precluded pursuant to the Supremacy Clause. But see Arizona v. Salzar, Case No. CR2006-005932 (Ariz. Sup. Ct. June 9, 2006) (lower state court ruling upholding state's alien smuggling law against preemption challenge, as federal and state laws criminalizing alien smuggling had "compatible purposes"); contra State of New Hampshire v. Barros-Batistele, Case. No. 05-CR-1474, 1475 (N.H. Dist. Ct. August 12, 2005) (lower state court ruling dismissing on preemption grounds trespassing charges brought against an alien on account of his suspected unlawful entry and presence in the United States).

by a federal determination of an alien's unlawful status,[36] rather than pursuant to an independent determination that an alien is not lawfully present in the United States.

Additionally, state or local measures penalizing businesses that employ unauthorized aliens arguably may be preempted if they impose different or more onerous employment eligibility verification requirements than used by the federal government.[37] Likewise, a state or local employer sanction regime likely could not penalize persons for employing unauthorized aliens using a lower scienter (i.e., degree of awareness) threshold than used by the federal government.[38]

Although the preemption clause in INA § 274A is, by its own language, not intended to preempt every state and local licensing measure affecting the employment of unauthorized aliens, some measures may still be unenforceable on field or conflict preemption grounds. One factor that courts may consider in determining if a local ordinance is preempted by federal immigration law is whether the ordinance "focuses directly upon...essentially local problems and is tailored to combat effectively the

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[36] There is some dispute regarding when aliens may be determined to be unlawfully present. Compare United States v. Lucio, 428 F.3d 519 (5th Cir. 2005) (upholding conviction of alien pursuant to a criminal statute barring aliens who are illegally present in the United States from possessing a firearm, even though deportation proceedings against the alien had not been initiated pending resolution of alien's application for adjustment to legal status); United States v. Atandi, 376 F.3d 1186 (10th Cir. 2004) ("an alien who commits a status violation is illegally or unlawfully in the United States, regardless of whether a removal order has been issued"); with Lozano v. City of Hazleton, 496 F. Supp.2d 477 (M.D. Pa. 2007) (finding that local prohibition on renting or leasing dwelling units to unauthorized aliens was preempted by federal law, in part because the aliens had not been ordered removed, and the federal government could ultimately adjust their status and permit them to remain in the United States); *Plyler*, 457 U.S. at 241 n. 6 ("Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country.")(Powell, J., concurring). It should be noted that certain federal immigration statutes appear to permit or require states and localities to take action against aliens who are unlawfully present in the United States, even if such aliens have not been ordered removed by federal authorities. See 8 U.S.C. § 1621 (requiring states and localities to deny public benefits to non-qualified aliens, including those who are present in the United States without legal authorization).

[37] Under INA § 274A, employers are required to participate in a paper-based employment verification system (commonly referred to as the "I-9 system"), which requires employers to examine certain documents presented by new hires (e.g., a driver's license, U.S. passport, or resident alien card) to verify identity and work eligibility, and complete and retain I-9 verification forms. INA § 274A(b); 8 U.S.C. § 1324a(b). See generally CRS Report RL33973, *Unauthorized Employment in the United States: Issues and Options*, by Andorra Bruno.

[38] For example, a state or locality would likely be preempted from penalizing any business that hires an unauthorized alien, given that federal law only penalizes employers who *knowingly* hire such persons (except in cases where the employer fails to comply with proscribed employment verification requirements). See INA § 274A(a)(1); 8 U.S.C. § 1324a(a)(1).

perceived evils."[39] Prior to the enactment of federal employer sanctions, the *DeCanas* Court upheld a California statute restricting the employment of illegal aliens, stating that "Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions."[40] Because INA § 274A(h)(2) recognizes the ability of states and localities to, at least in certain circumstances, deny business permits to entities that employ unauthorized aliens, such measures appear more likely to survive legal challenges when they are narrowly tailored and based on legitimate purposes, as was the case for those that were upheld in *DeCanas*.

States and localities may have greater leeway in restricting the establishment of day labor centers within their jurisdictions, though such facilities may indirectly facilitate the hiring of unauthorized aliens. As previously mentioned, states and localities are not preempted from regulating matters only tangentially related to federal immigration law.[41] Federal immigration law is silent on the matter of day labor centers. Based on the Court's reasoning in *DeCanas*, it would appear that states and localities could generally restrict the construction of day labor centers, at least so long as it could be demonstrated that such restrictions were addressed at "essentially local problems" and were tailored to "combat effectively the perceived evils."[42]

Procedural Due Process

State and local restrictions on the hiring and employment of illegal immigrants also may be challenged on procedural due process grounds, depending upon the form such restrictions take. If, for example, a state or locality revoked the business permit of an entity that employed or hired unauthorized aliens, the *employer's* interests under the Due Process Clause would be implicated. The liberty interest protected by the Due Process Clause extends to the "right of the individual to contract, to engage in any of the common occupations of life,"[43] and this interest would be implicated by state or local action penalizing employers on account of the employment contracts

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[39] *DeCanas*, 424 U.S. at 357. Case law following *DeCanas* has addressed working conditions and labor rights of illegal aliens under federal labor statutes. See, e.g., Hoffman Plastic Compounds, Inc. v. N.L.R.B, 535 U.S. 137 (2002); Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984).

[40] Id. at 356-357.

[41] Id.

[42] Id. This is not to say that every state or local restriction on day labor centers, regardless of its scope, would be equally likely to withstand a preemption challenge. For example, it might be argued that a measure imposing civil or criminal penalties on day labor centers that facilitate the employment of illegal aliens is preempted by federal laws barring the harboring of such persons. See INA § 274(a); 8 U.S.C. § 1324(a) (discussing penalties for harboring an illegal alien, or encouraging or inducing an alien to reside in the United States).

[43] Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

they enter. Further, the granting of a business license may accord the licensee with a property interest that may not be *revoked* unless procedural due process requirements are met,[44] though no such property interest exists which guarantees the *issuance* of a license.[45]

Accordingly, states and localities must provide employers with the ability to contest the basis upon which they are to be deprived of a protected interest. At a minimum, employers would need to be provided with notice and a hearing before an impartial tribunal, during which they could challenge state or local findings regarding their employment practices. State and local measures that provide employers with similar procedural protections as those accorded to businesses by the federal government under INA § 274A may be more likely to withstand a procedural due process challenge than those measures that do not.[46]

State and local measures that sanction business entities employing unauthorized aliens arguably could not be challenged on procedural due process grounds by employees of the affected businesses. As discussed previously, the procedural requirements of the Due Process Clause are triggered by a *direct* deprivation of a protected interest by the government.[47] Persons who are indirectly affected by the government's deprivation of a third party's protected interests "have no constitutional right to interject themselves into the dispute."[48] Arguably then, a state or local restriction upon a business that employs unauthorized aliens only *directly* affects the rights of the business itself, and not those persons who depend upon the business for their livelihood. Indeed, while INA § 274A accords certain procedural protections to persons accused of employing unauthorized aliens, no similar procedural protections are given to employees of businesses affected by this regime (though federal law does prohibit businesses from engaging in, and allows affected individuals to make complaints for, employment discrimination against persons on account of race, nationality, or — in the case of U.S. citizens and certain protected

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[44] Bell v. Burson, 402 U.S. 535, 539 (1971). In addition, "[t]he assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment...[, although] business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense...." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) (ital. in original). See also Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) ("complainant's business...is a property right, entitled to protection against unlawful injury or interference").

[45] *Bell*, 402 U.S. at 539.

[46] Before the federal government may sanction a business for unlawful employment practices relating to unauthorized aliens, the business must be provided with notice of the proposed action and a hearing before an administrative law judge in which the basis for the proposed order may be challenged. The administrative judge's decision is subject to administrative appellate and judicial review within specified time periods. INA § 274A(e); 8 U.S.C. § 1324a(e).

[47] *Supra* at 6.

[48] *O'Bannon*, 447 U.S. at 788.

categories of aliens — citizenship status[49]). Similarly, a state or locality penalizing a business that hired or employed unauthorized aliens probably would not be *constitutionally* required to provide any sort of process to employees of the affected business, though an affected employee might still be able to obtain legal remedy on a separate statutory or constitutional ground.

It should be noted that a federal district court recently held that a local ordinance denying business permits to entities that hired unauthorized aliens failed to provide sufficient procedural protections to *employees* of affected businesses,[50] who might be terminated by a business attempting to avoid violating the ordinance. Additionally, it could be argued that employees affected by the actions of a business attempting to comply with ordinance requirements would be owed due process to the extent that those actions were compelled by regulatory requirements.[51] However, it is unclear whether such an argument would deemed compelling by a reviewing court, as the Supreme Court has held that the government is responsible for the actions of private parties only in a very limited number of circumstances.[52]

IV. Immigration-Related Legal Issues Raised by State or Local Restrictions Upon Tenancy or Dwelling

The ability of states and localities to bar illegal aliens from renting or occupying a dwelling unit raises issues under both the preemption doctrine and the Fourteenth Amendment. The following sections describe these issues in detail.

Preemption

Measures to restrict unauthorized aliens from renting or occupying a dwelling unit could possibly be challenged on preemption grounds, especially if such measures impose civil or criminal penalties upon violators. The INA establishes grounds by which an alien may be excluded or removed from the United States, and also entrusts

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[49] INA § 274B; 8 U.S.C. § 1324b.

[50] *Lozano*, 496 F. Supp.2d 477 at 533-537. The Supreme Court has recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the [Due Process Clause]." Greene v. McElroy, 360 U.S. 474, 492 (1959). See also, e.g., Truax v. Ruch, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); Conn v. Gilbert, 526 U.S. 286, 291-292 (1999) (discussing Court's recognition of due process right to choose one's field of private employment). Accordingly, it would appear that state or local measures that directly penalized unauthorized aliens on account of their employment would implicate the Due Process Clause of the Fourteenth Amendment.

[51] CONSTITUTION ANNOTATED, *supra* note 27, at 1896-1897 (discussing Supreme Court recognition of this argument in a limited set of circumstances).

[52] Id.

the federal government with exclusive authority over removal and exclusion. In addition, INA § 274 criminalizes various activities relating to the bringing in and harboring of aliens who lack the lawful authority to enter or remain in the United States, and also criminalizes certain other activities concerning the transportation of such aliens or the encouragement or inducement of such aliens to reside in the United States. Courts have generally interpreted the scope of INA § 274 broadly, and it may very well cover renting property to an illegal alien or otherwise permitting him to dwell in an occupancy, at least when it is done in knowing or reckless disregard of the alien's illegal status.[53] A reviewing court might consider arguments that state or local measures barring persons from renting property to unauthorized aliens, or otherwise permitting such persons from occupying a dwelling unit, constitute "additional or auxiliary regulation[s]" to a federal scheme. This argument is probably strongest in cases where *criminal* penalties are imposed upon persons who violate a non-federal dwelling restriction, but it may also be applicable in cases where non-criminal penalties are imposed.[54]

Even assuming that federal immigration law does not necessarily preempt states and localities from restricting aliens' ability to rent or lease property, the manner and scope of such restrictions may nevertheless trigger preemption concerns.[55] Arguably, a state or locality also could not deny an alien a benefit or privilege, including the right to rent or occupy a property, on account of an independent assessment that the person was in violation of federal immigration law. The INA generally vests authority in specific federal authorities to administer and enforce all laws relating to immigration and naturalization, including determinations regarding the immigration status of aliens.[56] Accordingly, states and localities would apparently be preempted from making an independent assessment as to whether an alien has committed a federal immigration violation (e.g., that the alien is an "illegal alien"), and imposing

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[53] E.g., United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (finding that a church official violated the harboring provision when he invited an illegal alien to stay in an apartment behind his church, and interpreting harboring statute as not requiring an intent to avoid detection); United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982) (suggesting that "harboring" an alien is a broader concept than other smuggling provisions relating to the concealment of an alien or the shielding of an alien from detection); United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (upholding harboring conviction of defendant who provided illegal aliens with apartment, and concluding that harboring provision was not limited to clandestine sheltering only). See also Cristina Rodriguez, et al., Migration Policy Institute, National Center on Immigrant Integration Policy, *Testing the Limit: A Framework for Assessing the Legality of State and Local Immigration Measures*, at 24-27 (discussing merits and weaknesses of argument that federal alien smuggling statute preempts local restrictions on renting to unauthorized aliens)

[54] But see Arizona v. Salzar, Case No. CR2006-005932 (Ariz. Sup. Ct. June 9, 2006)(lower state court ruling upholding state's alien smuggling law against preemption challenge, as federal and state laws criminalizing alien smuggling had "compatible purposes"); contra State of New Hampshire v. Barros-Batistele, Case. No. 05-CR-1474, 1475 (N.H. Dist. Ct. August 12, 2005) (lower state court dismissal on preemption grounds of trespassing charges brought against an alien on account his suspected unlawful entry into the United States).

[55] See *supra* at 7-9.

[56] INA §§ 103, 240, 242, 287; 8 U.S.C. §§ 1103, 1239a, 1252, 1357.

penalties against such aliens on the basis of that assessment.[57] An even more serious preemption challenge would exist if a state or locality denied persons housing access using a different alien classification system than that employed by the federal government (e.g., if a state or locality denied residency to any alien who entered the United States unlawfully, even though some such aliens — asylees, for example — have legal immigration status under federal law).[58]

Equal Protection

The degree to which states and localities may restrict persons' ability to obtain private housing on account of alienage remains unsettled. As early as 1886, the Supreme Court recognized that Equal Protection Clause applied to state classifications based on alienage.[59] Nevertheless, during the early part of the twentieth century, the Supreme Court upheld a number of state laws denying rights and privileges to persons on account of their alienage (regardless of whether such aliens were lawfully present in the United States),[60] in part because states were able to demonstrate a "special public interest" that was advanced through such measures.[61]

However, these decisions came at an earlier period of Fourteenth Amendment jurisprudence, and over time "the Court's decisions gradually have restricted the activities from which States are free to exclude aliens."[62] Although none of these decisions has been expressly overruled, in at least some cases their precedential value has been questioned.[63] Nevertheless, it appears well-established, even following the

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[57] On the other hand, states and localities would not appear to be preempted from using a federal determination that an alien was unlawfully present in the United States as a basis for denying the alien a benefit or privilege, though such a denial might be preempted or constitutionally barred on other grounds.

[58] *League of United Latin American Citizens*, 908 F.Supp. at 769-771 (finding that voter-approved California initiative requiring state personnel to verify immigration status of persons with whom they came into contact was preempted, in part, because it required the state to make an independent determination as to whether a person was in violation of federal immigration laws).

[59] See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[60] E.g., Heim v. McCall, 239 U.S. 175 (1915) (upholding state law barring non-citizens from being employed on public works projects); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (upholding conviction of person under state law prohibiting an alien from owning a rifle or shotgun); Clarke v. Deckebach, 274 U.S. 392 (1927) (upholding local ordinance barring an alien from being licensed to operate a pool hall); Frick v. Webb, 263 U.S. 326 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197, 220 (1923); Webb v. O'Brien, 263 U.S. 313 (1923) (all upholding states' ability to deny aliens the right to own or lease agricultural lands).

[61] See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-421 (1948); *see also* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 149-151 (1994).

[62] Ambach v. Norwick, 441 U.S. 68, 72-73 (1979).

[63] See *Takahashi*, 334 U.S. at 410 (1948) (finding that California statute barring issuance (continued...)

Court's decision in *Plyler*, that states may impose greater restrictions upon the rights of unauthorized aliens than may be imposed upon citizens or legal immigrants, at least when the direct subjects of regulation are not children.[64]

Additionally, alienage-based restrictions that directly or indirectly impact the legal rights of the U.S.-born children of illegal immigrants might face more significant legal challenges. In the 1948 case of *Oyama v. California*,[65] the Court found that a California statute banning alien landholding impermissibly discriminated against the citizen child of an alien, because it required the child to prove that his alien parent did not purchase property in the child's name to circumvent alien ownership restrictions — a burden not imposed upon the children of U.S. citizens.[66] Depending on the manner and scope of a state or local housing restriction on illegal immigrants, the measure could trigger an *Oyama*-like challenge by a U.S. citizen directly or indirectly impacted by the rule (e.g., a citizen child or spouse of an illegal immigrant whose property rights are impaired on account of family membership).

Procedural Due Process

State or local measures that seek to bar unauthorized aliens from renting or occupying property very likely implicate a "property" interest affected by the Due Process Clause. The right to "maintain control over...[one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance."[67] A government measure requiring the termination of a lease between a property owner and lessee deprives one or both of the parties of several property-related interests, including "the right of sale, the right of occupancy, the right to

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[63] (...continued)
of fishing licenses to lawfully present aliens ineligible for citizenship denied such aliens equal protection, and could not be justified as protecting special interest of the state in conserving public fishing); Sei Fujii v. State 242 P.2d 617 (Cal. 1952) (finding California law restricting land ownership by aliens to violate the Fourteenth Amendment, and also concluding that earlier Supreme Court decisions upholding alien land laws were not in accord with subsequent Court jurisprudence).

[64] Compare Graham v. Richardson 403 U.S. 365, 372 (1971) (finding state classifications based on alienage, as such, to be "inherently suspect and subject to close judicial scrutiny") with *Plyler*, 457 U.S. at 219 n. 19 (finding that the unauthorized presence of illegal aliens is not a "constitutional irrelevancy," and such aliens do not constitute a "suspect class").

[65] 332 U.S. 633 (1948).

[66] It should be noted that the Court only ruled the California alien land law unconstitutional as applied in the case before it. It did not reach the question of whether states could constitutionally bar aliens from owning real property, nor expressly overrule earlier Court decisions upholding alien land laws. In separate concurrences, Justice Black (joined by Justice Douglas) and Justice Murphy (joined by Justice Rutledge) argued that the California statute unconstitutionally abridged the property rights of aliens. Id. at 647 (Black, J., concurring); id. at 650 (Murphy, J., concurring).

[67] United States v. James Daniel Good Real Property, 510 U.S. 43, 53-54 (1993) (holding that the Due Process Clause compels government to give notice and meaningful opportunity to be heard before seizing real property subject to civil forfeiture).

unrestricted use and enjoyment, and the right to receive rents."[68] In addition, a number of local ordinances barring persons from leasing real property to unauthorized aliens are enforced through the imposition of monetary penalties upon offenders. Those who are compelled to pay such fines are deprived of an additional property interest. Ordinances that subject violators to incarceration would also deprive offenders of a liberty interest. State or local measures barring the housing of illegal immigrants therefore appear likely to deprive property owners and/or tenants of an interest protected by the Fourteenth Amendment's Due Process Clause. Accordingly, states and localities enacting such measures must provide procedural protections to minimize the occurrence of unfair or mistaken deprivations of protected interests.[69]

V. Immigration-Related Issues Raised by State and/or Local Restrictions on Public Benefits/Services

Some localities are attempting to deter the presence of illegal aliens within their borders via the denial of services and/or benefits.[70] Such denials may be less prone to legal challenges than measures pertaining to housing and employment. Court cases recognizing federal and/or state restrictions based on unlawful presence in the

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[68] See id. See also Greene v. Lindsey, 456 U.S. 444, 450-451 (1982) (recognizing that tenants have a significant property interest in "the right to continued residence in their homes").

[69] Although some state or local housing restrictions may directly affect the property interests of both tenants and lessors, others may not. For example, a state or locality may choose to impose civil penalties upon persons who lease real property to unauthorized aliens, while imposing no direct penalty upon an alien who leases or occupies such property. An unauthorized alien might not be able to challenge such a measure on procedural due process grounds, as the government action only affects the alien's property interests *indirectly* (e.g., if a property owner breaks a lease with an unauthorized alien tenant to avoid incurring a civil fine). While the alien may have a cause of action against the government or, more directly, the lessor (e.g., for breach of the lease agreement), he or she may not be able to raise a procedural due process claim against the government. See *supra* at 6.

[70] See e.g., Ariz. Stat. § 15-232 (restricting adult education services to U.S. citizens, legal residents or persons otherwise lawfully present in the United States); Ariz. Stat. §§ 15-1803 and 15-1825 (restricting in-state tuition and state financial aid for state university and community colleges to the same); Ariz. Stat. Rev. § 46-803 (denying child care assistance to illegal immigrants); Colo Rev. Stat. § 24-76.5-103 (requiring agencies and state political subdivisions to verify the lawful presence in the United States of any applicant applying for state or local benefits excluding services needed for emergency medical conditions). On July 10, 2007, the Prince William County Board of Supervisors passed a resolution which would: (1) require police to check the immigration status of people they detain if they have reason to believe that the person is an illegal alien; and (2) require the County Executive to provide the Board with a plan outlining which benefits the county has the discretion to deny to those who are illegally present. Services recommended for restriction from illegal immigrants include: adult services to allow elderly and disabled individuals to remain in homes; in-home services; sheriff adult identification services; rental and mortgage assistance programs; substance abuse program; elderly/disabled tax relief programs.

United States are less likely to raise equal protection and preemption challenges. Instead, such challenges are likely to hinge on the scope of benefit being denied, as well as whether states can constitutionally make an independent assessment of a person's immigration status when deciding to deny such benefits.

The degree to which states and localities may deny services or benefits based on unlawful presence in the United States remains unclear. During the 1970s and early 1980s, the U.S. Supreme Court decided a series of cases on governmental authority to discriminate against aliens in providing governmental benefits. Collectively, these cases set forth the following basic constitutional principles: state governments generally cannot discriminate between aliens who are authorized to live here indefinitely and U.S. citizens when setting eligibility requirements for state benefits;[71] states have broader but limited authority to discriminate against aliens who are here illegally;[72] and the federal government, by contrast, has wide discretion to discriminate both between citizens and legal aliens, as well as between classes of legal aliens.[73]

Federal law has established a general rule as to which benefits must be denied to aliens unlawfully residing in the United States. In addition, federal law delineates which local public benefits must be provided regardless of immigration status. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) prohibits many classes of noncitizens, legal and illegal alike, from receiving assistance. Generally, illegal aliens are denied federal benefits and may qualify for state benefits only under laws passed by the states after the PRWORA's enactment.[74] The class of benefits denied is broad and covers: (1) grants, contracts, loans, and licenses, and (2) retirement, welfare, health, disability, housing, food, unemployment, postsecondary education,[75] and similar benefits. Notably, PRWORA delineates exceptions to the aforementioned bars. These exceptions include the following:

- treatment under Medicaid for emergency medical conditions (other than those related to an organ transplant);

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[71] See Graham v. Richardson, 403 U.S. 365 (1971)(declaring state-imposed welfare restrictions on legal immigrants unconstitutional, both because the state statutes violated the Fourteenth Amendment's equal protection clause and because they encroached upon the exclusive federal power to regulate immigration).

[72] See Plyler v. Doe, 457 U.S. 202 (1982)(recognizing that illegal aliens are due lesser constitutional protection than legal aliens are). For discussion of the Plyer decision, see CRS Report 97-542A, *The Right of Undocumented Alien Children to Basic Education: An Overview of Plyler v. Doe.*

[73] See Mathews v. Diaz, 426 U.S. 67, 84 (1976)(declaring that the federal government's broad plenary power over immigration and naturalizing provides the federal government leeway to draw distinctions among aliens in providing benefits so long as the distinctions are not "wholly irrational.")

[74] See 8 U.S.C. § 1621(d)(defining the term "federal public benefit").

[75] As noted above, the U.S. Supreme Court has held that states cannot deny elementary and secondary education on the basis of unauthorized immigration status.

- short-term, in kind emergency disaster relief;
- immunizations against immunizable diseases and testing for and treatment of symptoms of communicable diseases; and
- services or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelters) designated by the Attorney General as: (i) delivering in-kind services at the community level, (ii) providing assistance without individual determinations of each recipient's needs, and (iii) being necessary for the protection of life and safety.

The PRWORA also expressly bars unauthorized aliens from most state and locally funded benefits. The restrictions on these benefits parallel the restrictions on federal benefits.[76] As such, unauthorized aliens are generally barred from state and local government contracts, licenses, grants, loans, and assistance.[77] However, states and localities are prohibited from denying benefits and/or services for emergency medical care, disaster relief, and immunizations.

Although federal law has established a general framework as to what services may or not be denied to illegal aliens, courts have yet to weigh in on the issue of when localities have discretion to make lawful presence a requirement for services to be made available.[78] Some of these services may include bus tours for senior citizens, leadership training programs for adults, rental and mortgage assistance, drug treatment, health care for the uninsured, access to libraries and parks. Courts will have to interpret how broadly the term "local public benefit" should be interpreted and whether it is consistent with a congressional purpose. This interpretation may depend on which services can be construed as to encourage illegal immigration. While services such as health care for the uninsured or rental assistance arguably fall within the purview of "local public benefit," others such as access to parks or libraries are less clear cut.

Another potential challenge may arise as to the implementation of the denial of services to illegal aliens. Specifically, who will make the determination as to whether an alien is legally in the United States or not. As previously discussed, the manner in which a locality chooses to implement an ordinance or statute might raise significant preemption issues.

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[76] 8 U.S.C. § 1621.

[77] 8 U.S.C. § 1621(c)(defining "state or local public benefit").

[78] On November 30, 2007, a federal judge dismissed a lawsuit challenging a local resolution restricting services to illegal aliens. The court found that the plaintiffs lacked standing to challenge the resolution passed by the Prince William County Board of Supervisors.

VI. Potential Limitations Imposed by Federal Civil Rights Statutes

Some state and local measures restricting the hiring or housing of unauthorized aliens could also potentially conflict with existing federal anti-discrimination laws. Under Title VII of the Civil Rights Act,[79] employers are prohibited from discriminating on the basis of race, color, religion, sex, or national origin.[80] The Supreme Court has ruled that, with respect to Title VII, "the term 'national origin' does not embrace a requirement of United States citizenship."[81] In reaching this result, the Court reasoned that national origin refers to the country in which someone is born or from which his or her ancestors came. Because individuals who share the same national origin do not necessarily share the same citizenship status, the Court determined that Title VII's prohibition on national origin discrimination does not necessarily make it illegal for employers to discriminate on the basis of citizenship status or alienage. Any state or local measure restricting the hiring or employment of unauthorized aliens must comply with Title VII requirements.[82] Thus, for example, a local ordinance that authorized the enforcement of an employment complaint that alleged violations solely on the basis of an employee's race or national origin would not be legally enforceable.

However, it is possible that an ordinance restricting the employment of unauthorized aliens could, when implemented, encourage violations of Title VII in situations where discrimination on the basis of citizenship would have the effect or purpose of discriminating on the basis of national origin. For example, employers who are concerned about inadvertently hiring unlawful workers may become reluctant to hire individuals from certain ethnic backgrounds, and such reluctance could have the unlawful effect of discriminating on the basis of national origin. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. As the Court has noted, "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[83] In an effort to comply with such ordinances, therefore, some employers may engage in practices that could give rise to legal challenges under Title VII.

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[79] 42 U.S.C. §§ 2000e *et seq*.

[80] Id. at §2000e-2. INA § 274B contains a similar prohibition with respect to employment-based discrimination on the basis of national origin or citizenship. 8 U.S.C. § 1324b.

[81] Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

[82] Title VII contains a preemption provision that states, "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7. In other words, state laws that conflict with Title VII are preempted.

[83] Farah, 414 U.S. at 92.

Like Title VII, the Fair Housing Act (FHA) prohibits discrimination on a number of grounds, including national origin, although the FHA forbids discrimination in the sale or rental of housing rather than employment.[84] In the housing context, as in the employment context, courts have found that citizenship discrimination does not automatically constitute national origin discrimination under the FHA, although courts have held that the FHA would prohibit citizenship discrimination if such discrimination had the purpose or effect of discriminating on the basis of national origin.[85] As a result, any state or local measure that authorizes the enforcement of housing complaints based solely on the national origin of a dwelling's inhabitants would be impermissible.[86] Further, if landlords who are attempting to comply with an ordinance barring the tenancy of illegal aliens engage in national origin discrimination, then such actions may give rise to legal challenges under the FHA.

Thus far, only one federal court has considered the question of whether a local ordinance intended to deter the housing of unauthorized aliens constitutes a violation of the FHA. In *Lozano v. City of Hazleton*,[87] the court dismissed the plaintiffs' facial challenge to the FHA, concluding that the plaintiffs had failed to show that there was no set of circumstances under which the ordinance would be valid. The court did, however, leave the door open to a possible "as applied" challenge to the local ordinances in question, noting, "Because the statutes have not yet gone into effect, we cannot know whether they would have the discriminatory effect that plaintiffs claim."[88]

It is also possible that an employment or housing ordinance aimed at unauthorized aliens could give rise to violations of 42 U.S.C. § 1981. This provision, which was originally enacted as part of the Civil Rights Act of 1870, states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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[84] 42 U.S.C. §§ 3604(a).

[85] See, e.g., Espinoza v. Hillwood Square Mut. Asso., 522 F. Supp. 559 (D. Va. 1981).

[86] Like Title VII, the FHA contains a preemption provision that states, "Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.C. § 3615.

[87] Lozano v. City of Hazleton, 496 F. Supp.2d 477 (M.D. Pa. 2007).

[88] Id. at 546.

Although the Supreme Court has held that an alien is a "person" for purposes of § 1981,[89] the Court has not addressed whether *unauthorized* aliens are encompassed within the statute's definition of "person." The Court, however, has held that unauthorized aliens are "persons" in the context of the Fourteenth Amendment,[90] and, therefore, might be inclined to make a similar finding with respect to the definition of "person" under § 1981. If unauthorized aliens are protected from discrimination by governmental actors under the statute, then states or localities that pass employment or housing ordinances aimed at unauthorized aliens may be liable for violations of § 1981. Indeed, a federal district court recently held in the *Lozano* case that a local ordinance intended to deter the employment and housing of unauthorized aliens was a violation of § 1981.[91]

In addition, although the Supreme Court has held that § 1981 prohibits alienage discrimination by governmental actors,[92] the Court has never addressed the question of whether § 1981 bars alienage discrimination by private actors. Until 1991, when Congress amended § 1981, the federal courts of appeals that had considered the issue were split with regard to this question. Since the amendments to § 1981, some courts have confirmed that the statute applies to private discrimination against aliens.[93] As a result, it is possible, but not certain, that a court might find that an employer or landlord who, in complying with a state or local measure, refused to employ or rent to an unauthorized alien was in violation of § 1981.

VII. Recent Federal Judicial Activity Concerning Local Ordinances

Several local measures attempting to deter the housing or employment of unauthorized aliens are the subject of ongoing litigation. Thus far, only one federal district court has issued a decision following trial regarding the legality of a local anti-illegal immigration ordinance. Pre-trial injunctions have been issued in a few other cases, either following settlement by the parties or pending a final determination by a reviewing court regarding the legality of the contested ordinance. The following sections briefly describe recent judicial activity at the federal level.[94]

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[89] *Takahashi*, 334 U.S. at 419.

[90] *Plyler*, 457 U.S. at 210.

[91] *Lozano*, 496 F. Supp. 2d. at 547-48. See *infra* at 21-23.

[92] *Takahashi*, 334 U.S. at 419.

[93] See, e.g., Anderson v. Conboy, 156 F.3d 167, 169 (2nd Cir. 1998).

[94] Some legal challenges of local immigration ordinances have been made in state courts on state legal grounds. See Reynolds v. City of Valley Park, Findings of Fact, Conclusions of Law, Order and Judgment, Case No. 06-CC-3802 (E.D.Mo. 2006) (ruling that local ordinance restricting property owners from allowing illegal immigrants to occupy dwelling was contrary to Missouri law); Riverside Coalition of Business Persons v. Township of Riverside, Case No. L-2965-06 (N.J. Sup. Ct. Law Div.) (challenging local ordinance banning the renting of dwelling units to unauthorized aliens, with offenders subject to a civil

(continued...)

Lozano v. City of Hazleton

On July 26, 2007, the first trial decision was reached by a federal court concerning the legality of a local ordinance intended to deter the housing and employment of unauthorized aliens. In the case of *Lozano v. City of Hazleton*, the U.S. District Court for the Middle District of Pennsylvania struck down an ordinance enacted by Hazleton, Pennsylvania. Hazleton initially enacted an ordinance in July 2006 that denied business permits to entities that employed illegal aliens and imposed civil penalties upon persons who rented dwelling units to such aliens. In the following months, Hazleton enacted a substitute ordinance and thereafter amended this replacement ordinance to further clarify its scope and application.[95] In general, the Hazleton ordinance at issue in *Lozano*: (1) denied or suspended the business permit of any entity that employed unauthorized aliens; (2) created a cause of action for "lawful" employees against their employer, if they were discharged at a time when the business employed unauthorized aliens; and (3) barred persons from letting, leasing, or renting a dwelling unit to an unauthorized alien, with offenders subject to a revocation of their rental license and, in the case of a second or subsequent violation, a civil fine. The district court found that the ordinance was unconstitutional on preemption and procedural grounds, and also violated 42 U.S.C. § 1981, though the court did reject plaintiffs' claims that the ordinance violated the Equal Protection Clause or the FHA.[96]

The district court held that the Hazleton ordinance's restrictions on the employment of unauthorized aliens were unconstitutional on *express, field, and conflict preemption grounds*. In ruling that the Hazleton ordinance was *expressly preempted*, the court interpreted the licensing exception to preemption found in INA § 274A(h) narrowly. According to the court, the only state or local licensing requirements intended to be excluded from preemption were those which denied permits to entities found to have violated the requirements of INA § 274A.[97] States and localities were not authorized to impose their own, separate requirements on businesses with respect to the employment of unauthorized aliens, and deny permits to those businesses on account of violating these non-federal requirements. The *Lozano* court also held that the employment-related provisions of the Hazleton ordinance were impliedly preempted under *field preemption* grounds. The court reasoned that pursuant to INA § 274A, the federal government had created a

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[94] (...continued)
fine for each violation, and denying business permits to entities that hire or employ such aliens).

[95] Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act (September 12, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf]; Ordinance 2006-40, Illegal Immigration Relief Act Implementation Amendment (December 13, 2006) available at [http://www.aclu.org/pdfs/immigrants/hazleton_ordinance_200635.pdf].

[96] The court also held that parts of the ordinance violated certain state law requirements. *Lozano*, 496 F. Supp.2d at 548-553.

[97] The court did not clearly specify whether a state or locality may "find" that a business violated the requirements of INA § 274A, or whether such a finding must be made by the federal government before a licensing restriction may be imposed.

comprehensive scheme to control the employment of unauthorized aliens. This scheme left no room for state or local regulation of such matters,[98] except by allowing states and localities to impose licensing restrictions upon entities found to have violated federal requirements. Finally, the court held that the employment-related provisions of the ordinance were unenforceable on *conflict preemption* grounds because they imposed supplemental requirements on employers above and beyond what was required under federal law.[99]

The district court also held that the Hazleton ordinance's restrictions on the housing of illegal aliens were unenforceable on *conflict preemption* grounds. The court stated that while the ordinance would deny housing to any alien lacking legal immigration status,

> the federal government permits several categories of persons who may not be technically lawfully present in the United States to work and presumably live here....[including]: 1.) aliens who have completed an application for asylum or withholding of removal; 2) aliens who have filed an application for adjustment of status to lawful permanent resident; 3) aliens who have filed an application for suspension of deportation; 4) aliens paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest; [and] 5) aliens who are granted deferred action an act of administrative convenience to the government which gives some cases lower priority.[100]

The court also noted that federal law may permit certain unlawfully present aliens to adjust to legal status and eventually become U.S. citizens.[101] The court therefore concluded that the Hazleton ordinance conflicted with federal law and was preempted,[102] because it denied city residency to aliens who may be legally permitted to stay in the United States.

The *Lozano* court also held that the housing and employment components of the Hazleton ordinance did not provide procedural safeguards sufficient to fulfill the due process requirements of the Fourteenth Amendment, as affected individuals were provided with insufficient notice and opportunity to be heard before being susceptible

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[98] *Lozano*, 496 F. Supp. 2d. at 523-525.

[99] Id. at 525-529.

[100] Id. at 530-531 (internal quotations omitted).

[101] Id. at 531.

[102] The *Lozano* court also held that the housing provisions of the ordinance, which authorized Hazleton officials to examine paperwork of tenants to determine whether they were lawfully present in the United States, were in direct conflict with federal law purportedly providing that an alien's legal status may only be determined by an immigration judge. Id. at 533 (quoting language in INA § 240(a)(3) that states that a removal proceeding before an immigration judge is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States"). But see *supra* note 36 (discussing conflicting court opinion regarding when an alien may be considered unlawfully present).

to city action that deprived them of a liberty or property interest.[103] Notably, the court found procedural safeguards were owed not only to affected businesses and property owners, but also to employees who might be fired or tenants who might be evicted by entities attempting to comply with ordinance requirements.[104]

The court dismissed plaintiffs' claim that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment,[105] as well as the claim that the ordinance violated the Fair Housing Act's prohibition on discrimination in residential real estate-related transactions on the basis of race or national origin.[106] In doing so, the court held that the ordinance did not facially discriminate against a suspect class or implicate a fundamental right.[107] The court also found that the ordinance was rationally related to legitimate government interests in reducing crime caused by illegal immigrants in the city and safeguarding community resources spent on law enforcement, education, and heath care.[108] However, the court found that the ordinance violated 42 U.S.C. § 1981 by effectively barring unauthorized aliens from entering leases.[109]

Hazleton has appealed the court's ruling. It remains to be seen whether the district court's decision will be upheld, or whether courts in other jurisdictions will reach similar conclusions with respect to immigration control ordinances enacted by other localities.

Villas at Parkside Partners v. City of Farmers Branch

On May 12, 2007, the voters of Farmers Branch, Texas, approved an ordinance requiring property owners and/or managers, as a prerequisite to entering into any lease or rental arrangement, to verify the citizenship or lawful immigration status of the applicants for tenancy (Ordinance 2903).[110] Ordinance 2903 superseded a similar ordinance, adopted in November 2006, that had been the subject of state litigation and a temporary restraining order barring its enforcement. A violation of the new ordinance would constitute a misdemeanor offense, with offenders subject to a $500 fine. If a family was denied tenancy on account of their immigration status, they would be entitled to a hearing in which they could challenge the eligibility determination.

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[103] *Lozano*, 496 F. Supp.2d at 533-537.

[104] Id. at 536-537.

[105] Id. at 538-542.

[106] Id. at 545-546.

[107] Id. at 538-542.

[108] Id. at 542.

[109] *Lozano*, 496 F. Supp.2d at 547-548.

[110] Farmers Branch, Tx., Ordinance 2903 (approved by May 12, 2007), available at [http://www.ci.farmers-branch.tx.us/Communication/Immigration%20Ordinances.html].

Ordinance 2903 is the subject of a legal challenge before the U.S. District Court for the Northern District of Texas. The plaintiffs argue, among other things, that the ordinance is preempted by federal law and violates equal protection and due process requirements of the Fourteenth Amendment. On May 21, 2007, the district court granted plaintiffs' request for the issuance of a temporary restraining order precluding enforcement of the ordinance, based on a preliminary determination pending trial that the ordinance was preempted by federal law.[111] Specifically, the court found that the ordinance "adopts federal housing regulations that govern which noncitizens may receive housing subsidies from the federal government, not federal immigration standards that determine which noncitizens are legally in this country."[112] Based on this finding, the court made an initial determination, pending trial, that the ordinance regulated conduct relating to alienage using different categorizations from those used in federal immigration law. Accordingly, the ordinance conflicted with federal law and was therefore preempted. Litigation regarding the Farmers Branch ordinance is ongoing.

In January 2008, the Farmers Branch City Council approved another ordinance intended to deter unlawfully present aliens from renting homes or apartments (Ordinance 2952).[113] The ordinance will take effect following a final judgment by federal district court in the ongoing litigation involving Ordinance 2903.

Stewart v. Cherokee County

This case involves a challenge to an ordinance enacted by Cherokee County, Georgia in December, 2006, which barred persons from renting dwelling units to unauthorized aliens.[114] On January 4, 2007, plaintiff filed suit in the U.S. District Court for the Northern District of Georgia claiming that the ordinance, among other things, was preempted by federal immigration laws, conflicted with the equal protection and procedural due process requirements of the Fourteenth Amendment, and violated various federal civil rights statutes.[115] That same day, with the consent of Cherokee County, the presiding judge issued a temporary restraining order preventing enforcement of the ordinance and staying the case, pending judicial resolution of challenges to similarly-worded ordinances in Hazleton, Pennsylvania and Riverside, New Jersey.[116] Subsequently, Riverside repealed its ordinance and a

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[111] Vazquez v. City of Farmers Branch, Memorandum Opinion and Order Granting Temporary Restraining Order, 2007 WL 1498763, Case No. 3-06CV2376-R (N.D. Tex., May 21, 2007).

[112] Id. at *10.

[113] Farmers Branch, Tx., Ordinance 2952 (approved January 22, 2008), available at [http://www.ci.farmers-branch.tx.us/Communication/Immigration%20Ordinances.html].

[114] Cherokee County, Ga., Ordinance 2006-03, To Establish Penalties for the Harboring of Illegal Aliens in Cherokee County (December 5, 2006), available at [http://clearinghouse.wustl.edu/chDocs/public/IM-GA-0001-0003.pdf].

[115] Stewart v. Cherokee County, Complaint, filed Jan 4, 2007, Case No. 07 CV 0015 (N.D. Ga.), available at [http://clearinghouse.wustl.edu/chDocs/public/IM-GA-0001-0001.pdf].

[116] Stewart v. Cherokee County, Consent Order Granting Plaintiffs' Motion for Temporary (continued...)

federal district court struck down the Hazleton ordinance on a number of constitutional and statutory grounds. On August 28, 2007, the presiding court administratively closed the case concerning the Cherokee County ordinance and advised the parties that the case could be reopened if the parties filed a motion to that effect.[117]

Garrett v. City of Escondido

This case concerned a legal challenge to an ordinance adopted by Escondido, California that barred the renting of dwelling units to illegal immigrants.[118] Offending property owners were potentially subject to civil and criminal penalties. Plaintiffs challenged the ordinance on preemption and procedural due process grounds. On November 20, 2006, the U.S. District Court for the Southern District of California issued a temporary restraining order barring enforcement of the ordinance pending trial, finding that serious preemption and due process concerns were raised by the measure.[119] Shortly thereafter, the parties entered into a settlement agreement in which Escondido agreed not to enforce the ordinance. On December 15, 2006, the district court issued a permanent injunction implementing the settlement agreement and barring enforcement of the ordinance.[120]

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[116] (...continued)
Restraining Order and Preliminary Injunction and for Stay, Case No. 07 CV 0015 (N.D. Ga., January 4, 2007), available at [http://www.aclu.org/pdfs/immigrants/cherokeecounty_tro.pdf].

[117] Stewart v. Cherokee County, Order , Case No. 07 CV 0015 (N.D. Ga., August 28, 2007).

[118] Escondido, Ca., Ordinance No. 2006-38 R: An Ordinance of the City of Escondido, California Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido (October 18, 2006), available at [http://clearinghouse.wustl.edu/chDocs/public/IM-CA-0001-0002.pdf].

[119] Garrett v. City of Escondido, Order Granting Plaintiffs' Application For Temporary Restraining Order, 465 F.Supp.2d 1043 (S.D. Ca. 2006).

[120] Garrett v. City of Escondido, Order re: Stipulated Final Judgment and Permanent Injunction, Case No. IM-CA-0001-0006 (S.D. Ca., December 15, 2006), available at [http://clearinghouse.wustl.edu/chDocs/public/IM-CA-0001-0009.pdf].