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Legal Sidebar

Federal Regulation of Alien Employment and Preemption over State Laws

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The Immigration Reform and Control Act of 1986 (IRCA) established rules governing the employment of non-U.S. nationals (aliens) in the United States. IRCA made it unlawful for employers to knowingly hire "unauthorized aliens" who lack federal permission to work in this country. The statute also created an employment verification system to determine an employee's work eligibility. IRCA's comprehensive scheme for regulating alien employment displaced a considerable amount of state regulation. But questions remain about the degree of that displacement. In the last decade, the Supreme Court considered several challenges to state laws regulating the employment of aliens. These challenges centered on whether IRCA preempted those state laws, rendering them unenforceable. The Court has held that certain state laws regulating alien employment are preempted because they intrude upon the federal government's regulatory domain, such as those imposing criminal penalties upon unauthorized aliens who seek employment. But the Court has upheld other state laws or actions relating to the employment of aliens that do not necessarily interfere with the federal immigration enforcement scheme, including measures requiring employers within the state to participate in the federal electronic employer verification system or sanctioning persons who obtain employment through use of fraudulent documents. This Legal Sidebar provides an overview of IRCA, the doctrine of federal preemption, and the Supreme Court's jurisprudence about the preemptive reach of IRCA over state employment laws.

The Immigration Reform and Control Act of 1986

Before IRCA, federal law did not directly address the employment of aliens who were unlawfully present in the United States, and, to the extent the employment of unlawfully present aliens was regulated, it was done at the state level. For example, a pre-IRCA California statute prohibited the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." The enactment of IRCA in 1986 stemmed from federal lawmakers' concerns about the flow of unauthorized immigration into the United States. Congress sought to create a comprehensive framework for "combatting the employment of illegal aliens," which Congress believed would reduce incentives for aliens to unlawfully enter the country to seek employment.

IRCA made it unlawful for an employer to knowingly hire an "unauthorized alien," defined as an alien who was not a lawful permanent resident (LPR) or otherwise authorized by immigration officials to be

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employed in the United States. IRCA created an "employment verification system" that required an employee to complete an I-9 Form attesting that he or she is a U.S. citizen or national, an LPR, or otherwise authorized to work under federal law. An employee must provide certain information on the I-9, including his or her name, address, and Social Security number. Employers must sign the I-9, attesting that they have verified an employee is not an unauthorized alien by examining certain documents, such as a U.S. passport or resident alien card. Employers must also retain the I-9 for inspection.

IRCA provided both criminal and civil penalties for employers who knowingly hired unauthorized aliens or violated the employment-verification requirements. It is not a crime simply for an alien to work in the United States without authorization, but an alien who engages in unauthorized employment may face adverse immigration consequences. Moreover, aliens who use false identification documents to establish employment authorization may be subject to criminal penalties under IRCA and other statutes.

IRCA expressly preempted state or local laws imposing criminal or civil sanctions, "other than through licensing and similar laws," on those who employ unauthorized aliens. It also provided that an I-9 and information "contained in or appended to such form" may not be "used" for purposes other than enforcement of federal immigration laws or prosecution under federal criminal statutes for fraud, perjury, and related conduct. IRCA similarly barred use of the "employment verification system" for purposes other than to enforce federal immigration laws and fraud-related federal criminal statutes.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) directed immigration authorities to establish a Basic Pilot Program to allow employers to confirm a job applicant's employment eligibility through "a toll-free telephone line or other toll-free electronic media." This pilot program became known as E-Verify, and it currently operates as an internet-based system. E-Verify was originally scheduled to end in 2001, but Congress has extended it multiple times. While IIRIRA requires federal agencies to use E-Verify, it generally does not require participation by private entities. (Pursuant to an Executive Order, however, the DHS Secretary required entities entering into certain contracts with the federal government to use E-Verify.) An employer who uses E-Verify to confirm employment eligibility is entitled to a rebuttable presumption that the employer has not violated IRCA's prohibition against hiring unauthorized aliens.

The Doctrine of Federal Preemption

The Supremacy Clause provides that the "the Laws of the United States ... shall be the supreme Law of the Land." Based on this Clause, federal laws supersede (or "preempt") conflicting state laws. A federal statute *expressly* preempts state law if it contains explicit preemptive language, but a federal statute may also *impliedly* preempt state law if the federal law's structure and purpose show Congress's preemptive intent. There are two types of implied preemption. First, states may not regulate a field that Congress has determined to have the exclusive power to regulate ("field preemption"). Second, state laws are preempted if they conflict with federal law ("conflict preemption")—either because compliance with both the federal and state law is a physical impossibility, or because the state law creates an obstacle to the accomplishment of the "full purposes and objectives" of Congress. Ultimately, courts consider whether Congress intended to supersede the state law based on the federal statute's text, structure, and purpose. (A more detailed discussion of federal preemption can be found in this CRS Report.)

Supreme Court Jurisprudence Concerning State Regulation of Alien Employment

The Supreme Court has repeatedly recognized that federal law preempts many state or local activities addressing immigration-related matters, though not every state enactment "which in any way deals with aliens is a regulation of immigration and thus *per se* preempted." Before enactment of IRCA, for

example, the Court in *De Canas v. Bica* held that federal immigration laws did not preempt a California law barring employers from hiring unlawfully present aliens because states have traditionally broad police powers over employment to protect workers in those states. Moreover, the Court reasoned, the "central concern" of then-existing federal immigration laws was to regulate the admission of aliens, not the employment of unlawfully present aliens. As noted, IRCA ultimately established a comprehensive federal scheme for regulating the employment of aliens in the United States, and state laws like the one considered in *De Canas* are now preempted. Still, the Court's recognition in *De Canas* that states have broad authority to regulate employment of persons in their jurisdictions may inform judicial analysis of IRCA's preemptive effect. The Supreme Court generally begins its preemption analysis with the assumption that Congress did not intend to displace state laws. In the case of IRCA, the High Court has tended to disfavor field preemption arguments against state or local measures, which assert that IRCA left no room for states to adopt measures that incidentally relate to the employment of aliens in their jurisdictions. Instead, the Court's analysis has turned on whether a challenged state or local measure is either expressly preempted by IRCA or conflicts with the federal law's objectives and purposes.

Chamber of Commerce v. Whiting

In 2011, the Supreme Court in *Chamber of Commerce v. Whiting* considered whether IRCA restricted states from regulating alien employment through business licensing laws, and whether IIRIRA barred states from requiring employers to participate in the E-Verify program. The Court held that IRCA did not preempt an Arizona law allowing the suspension and revocation of business licenses belonging to employers who hire unauthorized aliens. In a 5-3 opinion, the Court determined that the state law's licensing provisions were permissible because, although IRCA expressly preempted state laws that imposed sanctions on employers of unauthorized aliens, it included a proviso that expressly allowed states to impose sanctions "through licensing and similar laws." The Court also ruled that federal law did not impliedly preempt Arizona's requirement that employers within the state use E-Verify. The Court reasoned that, while IIRIRA limits the federal government's ability to mandate E-Verify for nonfederal entities, it does not restrict states from requiring E-Verify. Further, in the Court's view, Arizona's use of E-Verify was compatible with IIRIRA's objectives of ensuring reliability in employment authorization verification and preventing fraud.

Arizona v. United States

A year after *Whiting*, the Supreme Court again considered IRCA's preemptive effect on state regulation of alien employment. In *Arizona v. United States*, the Court in 2012 considered an Arizona measure that aimed to deter unlawfully present aliens from working or residing in the state. One component of the measure made it a criminal offense for "unauthorized aliens" to work in that state. The Court recognized in a 5-3 vote that IRCA preempted this criminal sanction. The Court observed that while IRCA expressly barred states from imposing criminal penalties on *employers* of unauthorized aliens, it was silent on whether those penalties may be imposed on the employees themselves. Still, the Court held that IRCA impliedly preempted state laws that criminalized such conduct. In the Court's view, Congress had made a "deliberate choice" not to impose criminal sanctions on aliens who unlawfully work in the United States, and the Arizona statute frustrated the "full purposes and objectives" of Congress.

Kansas v. Garcia

More recently, in 2020, the Supreme Court in *Kansas v. Garcia* considered whether IRCA barred states from criminally prosecuting unauthorized aliens who obtained employment through fraud. In that case, aliens who had presented stolen Social Security numbers on their tax withholding forms argued that IRCA prevented the state of Kansas from prosecuting them because the Social Security numbers were also included within their I-9s, and IRCA bars the "use" of any information "contained in" an I-9 except to

enforce federal law. The Court disagreed in a 5-4 opinion, ruling that IRCA's restriction on the "use" of information found within an I-9 does not bar any use of that information outside federal law enforcement. To interpret IRCA so broadly, the Court declared, "is flatly contrary to standard English usage" because a person can "use" information "'contained in' many different places." The Court concluded that IRCA's restriction on the use of I-9-related information does not prevent states from regulating "things that an employee must or may do to satisfy requirements unrelated to work authorization," such as the completion of tax forms.

The Court also held that IRCA did not impliedly preempt application of Kansas law to prosecute aliens who fraudulently gain employment. The Court reasoned that state regulation of the use of tax withholding forms—used to enforce tax laws—is "fundamentally unrelated" to work authorization, and therefore does not intrude upon a field implicitly reserved to Congress. Further, the Court held, Kansas's prosecution of aliens who use stolen Social Security numbers creates no obstacle to IRCA's objective of regulating the employment of aliens. The Court distinguished *Arizona*, which held that IRCA impliedly preempted a state law making it a crime for unauthorized aliens to work because Congress, through IRCA, had made a "considered decision" not to criminalize that conduct. Here, Congress made no similar determination that aliens who use false identities on tax withholding forms should not face criminal prosecution. Finally, the Court concluded that the possibility that the state prosecutions might impact federal enforcement priorities does not provide a basis for preemption because the Supremacy Clause prioritizes federal law, not simply "the criminal law enforcement priorities or preferences of federal officers."

Legislative Developments

In a few closely divided decisions, the Supreme Court has wrestled with the extent to which IRCA displaced state laws regulating the employment of unlawfully present aliens. While the Court has ruled that IRCA generally bars states from imposing penalties on both employers of unauthorized aliens as well as those engaging in unauthorized employment, the Court has recognized that states retain authority to regulate the employment of unauthorized aliens through licensing laws, mandatory participation in the E-Verify system, and the enforcement of criminal laws relating to identity theft and fraud. In recent decades, states have enacted different measures for regulating the employment of unlawfully present aliens. For example, some states require all employers to use E-Verify, while other states limit mandatory use of that program to public employers or contractors. But many states do not require employers to participate in E-Verify. Additionally, some states impose licensing (or public contract-related) penalties on employers that hire unauthorized aliens or fail to meet mandatory E-Verify requirements. While states have addressed the employment of unlawfully present aliens to some degree, Congress has also considered legislation that would preempt or authorize state regulation in this area. In the 116th Congress, for example, the Accountability Through Electronic Verification Act (S. 556, H.R. 1399) and the Legal Workforce Act (H.R. 250) would require all employers in the United States to participate in E-Verify. Additionally, the Legal Workforce Act would create a new, electronic-based employment eligibility verification process that displaces the paper-based I-9 process. The bill would also preempt any state or local law, ordinance, policy, or rule relating to the hiring, continued employment, or employment eligibility status verification of unauthorized aliens. But the bill would allow states to impose penalties through business licensing and similar laws on employers who violate the E-Verify requirements.

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