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IMMIGRATION LAW

Immigration Enforcement Today, Tomorrow and Beyond

Avoid IRCA violations and sanctions

BY LOUIS R. MOFFA JR.

Under the U.S. Constitution, the power to regulate immigration is exclusively a federal power. Exercising that power more than 20 years ago with the passage in 1986 of the Immigration Reform and Control Act ("IRCA"), Congress established a complex, carefully-balanced, nationally-uniform and comprehensive federal system for regulating the employment of aliens. That comprehensive federal scheme prohibits the employment of unauthorized aliens and imposes significant, but graduated, penalties on employers who violate the restrictions of that scheme. What IRCA did not and could not predict was increasing demand and opportunities for foreign-born workers in the U.S. economy.

Solving a Problem — Or Creating More?

Trying to fix the perceived "broken" immigration system and responding to vocal and emotional demands for greater immigration enforcement, state and local governments have stepped into the breach to take on the federal government's job. In 2008 alone, more than 200 immigration-related employment bills were introduced in state legislatures, and 20 laws were passed in 14 states. Those laws impose sanctions on employers that knowingly hire unauthorized aliens, including suspension and loss of business licenses. The laws also require employers to verify employment eligibility using the federal E-Verify system — an experimental, voluntary Internet-based system tied into records maintained by the Department of Homeland Security and the Social Security Administration.

On September 17, 2008, the U.S. Court of Appeals for the Ninth Circuit upheld Arizona's Legal Arizona Workers Act ("LAWA") against constitutional challenges that it is preempted by federal immigration law and violates employers' rights to due process of law. *Chicanos Por La Causa, Inc. v. Napolitano,* 544 F.3d 976 (9th Cir. 2008). LAWA imposes tough licensing sanctions (e.g., suspension and revocation) against employers found to have knowingly or intentionally hired unauthorized workers, requires employers to use E-Verify, and prescribes a mandatory investigation and prosecution process for the attorney general and county prosecutors.

A similar law in Missouri also withstood constitutional challenges in the trial court. *Gray v. City of Valley Park, Mo.,* 2008 WL 294294 (E.D. Mo. 2008). That case is on appeal to the U.S. Court of Appeals for the Eighth Circuit. In July 2007, however, another law passed by Hazelton, Pa., was declared unconstitutional and invalidated by a federal district court in Scranton. *Lozano v. City of Hazleton,* 496 F.Supp.2d 477 (M.D. Pa. 2007). That case is pending before the Third Circuit. To round out the field, a federal trial judge in Oklahoma, like his counterpart in Scranton, voided that state's attempt to impose sanctions on employers for hiring unauthorized workers. *Chamber of Commerce of the U.S. v. Henry,* 2008 WL 2329164 (W.D. Okla. 2008). That case is pending in the Tenth Circuit.

The split among federal trial courts on the complex legal issues involved makes it likely that there will be a split among the federal appellate courts, leaving it to the U.S. Supreme Court to resolve the legal conflict. Nonetheless, the *Napolitano* decision will add fuel to the fire of state and local legislators who believe that there is a desperate need for local enforcement of federal immigration law.

The existing patchwork of

Moffa is a partner in the Litigation Department of Montgomery McCracken Walker & Rhoads in Philadelphia. Moffa is also an Adjunct Professor of Law at Rutgers School of Law-Camden, where he teaches courses in Civil Rights and Appellate Advocacy and Litigation.

state and local laws is confusing and conflicts with the comprehensive and uniform scheme of IRCA. The result is a complex, unconnected web of state and local laws that discourage development of new businesses and impose additional, unnecessary costs on employers who are already suffering from the worst financial crisis in history.

Immigration Reform and Control Act of 1986

In 1986, Congress added IRCA to the Immigration and Nationality Act ("INA"), 8 U.S.C. §§1324a-1324b. IRCA made it unlawful to employ an alien "knowing the alien is an unauthorized alien" (8 U.S.C. §1324a (a) (1) (A)), and established an "employment verification system" (commonly known as the "I-9 process") that requires potential employees to show documents establishing identity and employment authorization, and requires employers to execute an I-9 form. 8 U.S.C. §1324a (b)(1); 8 C.F.R. §274a.2(a)(2). Under IRCA, an employer's compliance in good faith with the I-9 process is a defense to liability.

IRCA amended the INA to establish a detailed process for adjudicating whether an employer knowingly hired an unauthorized alien. There must be notice, an opportunity for an evidentiary hearing before a federal administrative law judge under procedures governed by the federal Administrative Procedure Act, a finding that a knowing violation has occurred based on a preponderance of the evidence, an opportunity for an administrative appeal, and the right to review in the federal Courts of Appeals. 8 U.S.C. §1324a (e) (2)-(3), (7)-(8).

An offending employer is subject to a graduated system of civil penalties that range from $375 per unauthorized alien for the first violation to $16,000 for third and subsequent violations. 8 U.S.C. §1324a (e)(4); 8 C.F.R. §274a.10(b)(1)(ii)(A); 73 Fed. Reg. 10130, 10133 (Feb. 26, 2008). Pattern or practice violators are subject to civil injunctions brought by the Attorney General in federal district court, and criminal prosecution with penalties of up to $3,000 per unauthorized alien and a total prison term not to exceed six months. 8 U.S.C. §1324a (f). IRCA also enacted detailed anti-discrimination provisions with separate penalties. 8 U.S.C. §1324b.

Manifesting its clear intent to displace state law, Congress included a provision in IRCA to "preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)" on employers. 8 U.S.C. §1324a (h) (2).

The Basic Pilot Program: "E-Verify"

In 1996, Congress enacted a voluntary and experimental system called the "Basic Pilot Program." 8 U.S.C. §1324a note, §403(a). That program — recently renamed "E-Verify" — allows employers to verify a new hire's work authorization over the Internet. Employers who choose to enroll in E-Verify must register for the program, sign a Memorandum of Understanding ("MOU") with federal agencies, complete a tutorial, pass a multiple-choice test and submit for all new hires data such as employee name, date of birth, and Social Security number. Under current law, Department of Homeland Security ("DHS") officials have the right to inspect an employer's I-9 forms with three days advance notice, 8 C.F.R. § 274a.2(b)(2)(ii), and no subpoena or warrant is necessary. DHS must obtain a subpoena, a warrant or consent to access other employment records. The MOU required for participation in E-Verify, however, gives DHS consent to review employment records that would otherwise require a subpoena or warrant.

E-Verify primarily operates by comparing data entered by employers electronically to information in Social Security Administration ("SSA") and DHS databases. If the data do not match, E-Verify issues a "tentative non-confirmation." Then, if an employee does not contest the tentative nonconfirmation within eight working days, the employer must either terminate the employee or notify DHS that the employer is not doing so.

Although the E-Verify program was set to expire in November 2008, it was recently extended on a voluntary basis through March 6. Arizona, Arkansas, Colorado, Georgia, Idaho, Minnesota, Mississippi, Missouri, Oklahoma, Rhode Island and South Carolina have all mandated its use in some form.

I-9 Compliance and Audits

IRCA requires all employers to verify that every person that is hired is either: a U.S. citizen, a lawful permanent resident or a foreign national with authorization to work in the U.S. Within three business days of beginning a job, the employee must furnish identity and employment eligibility documents. It is the responsibility of the employer to examine the documents to determine whether they are genuine and relate to the specific employee. Every employer must complete an I-9 form for all employees hired after November 4, 1986. Failure to use the correct version of the form is a violation of IRCA and the implementing regulations. Although the current version of the I-9, OMB No. 1615-0047, is set to expire June 30, DHS recently issued an interim rule proposing to alter the form in several technical respects. "Documents Acceptable for Employment Eligibility Verification," 73 Fed. Reg. 76505 (December 17, 2008).

Once completed, the I-9 forms should be kept in a file separate from the employee personnel files, and they must be retained for the longer of three years after employment begins, or one year after employment is terminated. If an employee has only temporary employment authorization, a reverification of employment eligibility must be conducted prior to expiration of the employment authorization. DHS and ICE officials have the right to audit employers' I-9 forms upon three days advance notice. Each mistake or a failure to complete an I-9 counts as a separate violation. Accurate completion of an I-9 is a good-faith defense to a charge of knowingly hiring unauthorized workers. In order to avoid IRCA

violations and sanctions, employers should, (1) educate and train appropriate personnel in the requirements of federal immigration law, especially the I-9 verification process, (2) conduct regular, annual internal I-9 audits to correct deficiencies and purge documents that are no longer required, and (3) keep abreast of changes in both federal and state law requirements and restrictions regarding the employment of aliens.

Conclusion

With millions of undocumented, unauthorized residents and workers present in the U.S., immigration reform is sorely needed. Such reform demands uniform rules and standards, a realistic view of the needs of businesses for both skilled and unskilled foreign-born workers and genuine consideration of the moral and humane treatment owed to all people in this free society. There must be an effective and efficient path to citizenship for those already here, and attention must be paid to the realities and complexities of the global marketplace. Only the federal government, not states and municipalities, is constitutionally equipped and empowered to achieve these goals.■