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Chamber of Commerce v. Whiting Ignites Employment-Based Immigration Reform

This month's column looks at a dynamic and evolving issue that is positioned to fundamentally change the size, scope, and nature of employment law: immigration. The U.S. Supreme Court set the stage for comprehensive employment-based immigration reform when it recently decided *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (May 26, 2011). In a 5-3 decision (Justice Elena Kagan

did not take part the consideration or decision of the case), the Supreme Court upheld the Legal Arizona Workers Act, which provides, in pertinent part: (1) that business licenses may be suspended or revoked when employers knowingly or intentionally employ unauthorized aliens; and (2) that employers must use E-Verify to confirm that their employees are legally authorized for employment. *Ariz. Rev. Stat. Ann.* §§ 23-211, 212, 212.01 (2010).

E-Verify is a federally provided, Internet-based system that allows employers to verify an employee's work authorization status. *Chicanos Por La Causa Inc. v. Napolitano*, 558 F.3d 856, 862 (9th Cir. 2009). Simply stated, *Whiting* allows states to require businesses to comply with certain employment-based immigration laws as a condition of business licensure. 131 S. Ct. 1968, 1973. According to *Whiting*, employers who do not comply with certain employment-based immigration laws can lose their right to do business in a particular state.



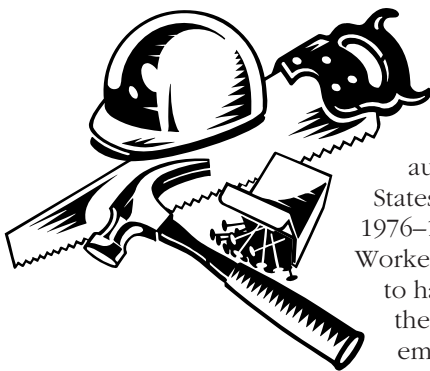
government's determination pursuant to" 8 U.S.C. § 1373(c) in "determining whether an employee is an unauthorized alien." *Id.* If an employer is found liable under the Arizona statute, his or her business license can be forfeited. *Id.* at 1976-1977.

The U.S. Chamber of Commerce and various other business and civil rights organizations sued Arizona state officials in federal court, challenging the constitutionality of the Legal Arizona Workers Act. *Whiting*, 131 S. Ct. 1968, 1977. The plaintiffs argued that the act was pre-empted by federal law, specifically, the Immigration Reform and Control Act, 8 U.S.C. § 1324a(a)(1)(A), and that the state-mandated use of E-Verify was pre-empted by the same federal law. *Id.* A critical argument made by the plaintiffs was that the Legal Arizona Workers Act purports to be a licensing law, but the statute is unconstitutional because it only operates to *suspend and revoke* licenses, rather than to *grant* them. *Whiting*, 131 S. Ct. 1968, 1979.

In *Whiting*, the Supreme Court rejected the plaintiffs' argument, finding it "contrary to common sense. There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether." *Whiting*, 131 S. Ct. 1968, 1979. The Supreme Court held that states may establish procedures for prohibiting unlawful immigration through licensing laws, such as those in Arizona. *See id.*; *see also* 8 U.S.C. § 1324a(h)(2).

The Legal Arizona Workers Act

The Legal Arizona Workers Act requires that employers use E-Verify to confirm that their employees are lawfully authorized to work in the United States. *Whiting*, 131 S. Ct. 1968, 1976-1977. Under the Legal Arizona Workers Act, if an employer is alleged to have hired an unauthorized alien, the state would first verify the employee's work authorization with the federal government pursuant to 8 U.S.C. § 1373(c). *Whiting*, 131 S. Ct. 1968, 1976. If the individual is an unauthorized alien, then Arizona must notify federal and local officials and sue the employer in Arizona state court. *Id.* When such a suit is filed, "the court shall consider only the federal



The *Whiting* Decision Allows States to Regulate Employment-Based Immigration via Licensing Laws

Whiting allows all 50 states to control illegal immigration through certain licensing laws. 131 S. Ct. 1968. In response to *Whiting*, several states—including Louisiana, Alabama, and Tennessee—have already passed licensing statutes mandating that employers use E-Verify.

Louisiana

On June 9, 2011, the Louisiana House of Representatives voted 86-0 to approve Louisiana House Bill 646. *See* H.B. 646, 2011 Leg., Reg. Sess. (La. 2011), which has since gone into effect. According to this law, Louisiana employers must use E-Verify to determine their employees' immigration status. *Id.* Consistent with the precedent set in the *Whit-*

ing decision, Louisiana employers who violate the E-Verify mandate risk the suspension or revocation of their business licenses as well as civil penalties. See 131 S. Ct. 1968.

For a first violation of the statute, the penalty would be no more than \$500 for each alien employed, hired, recruited, or referred in violation of the law. See H.B. 646, 2011 Leg., Reg. Sess. (La. 2011). For a second violation, the state would assess a fine of no more than \$1,000 for each alien employed, hired, recruited, or referred in violation of the law. *Id.* For a third violation, the state would suspend the employer's business license and assess a fine of no more than \$2,500 for each alien employed, hired, recruited, or referred in violation of the law. *Id.* Employers charged with violating the statute would be required to litigate their licensure revocation, civil penalty, and injunction proceedings in Baton Rouge. *Id.*

Alabama

Gov. Robert Bentley signed the Beason-Hammon Alabama Taxpayer and Citizen Protection Act on June 9, 2011. See H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011). This statute will eventually require all Alabama employers to use E-Verify to determine an employee's immigration status. *Id.* Among numerous other requirements that are in accordance with the *Whiting* decision, the Beason-Hammon Act requires Alabama employers who contract with the state to use E-Verify to confirm their employees' lawful employment authorization, or risk losing their licenses to do business with Alabama state agencies. See *id.* This provision will become effective Jan. 1, 2012. See *id.* In addition, effective April 1, 2012, all Alabama businesses must enroll in E-Verify and confirm the employment eligibility of their employees through E-Verify according to E-Verify's criteria. *Id.* Employers who violate this provision of the act also risk losing their business licenses. Compare *id.* with *Whiting*, 131 S. Ct. 1968.

Tennessee

According to Tennessee's H.B. 1378, signed into law by Gov. Bill Haslam on June 7, 2011, employers in the state are required to use E-Verify. Moreover, according to the law, in Tennessee, "a person shall not knowingly employ, recruit or refer for a fee for employment an illegal alien." Tenn. Code Ann. § 50-1-103(b). To comply with this statutory mandate, Tennessee employers must verify the immigration status of each newly hired employee at least 14 calendar days after hiring the person by using the E-Verify system. *Id.* § 50-1-103(d). Tennessee employers who violate the law the first time risk having their business licenses suspended until they prove that they are no longer in violation of the statute. *Id.* § 50-1-103(e)(1)(A). A second violation of the statute puts employers at risk of having their

business licenses suspended for one year. *Id.* § 50-1-103(e)(1)(B).

The *Whiting* Decision Encourages Employment-Based Immigration Reform at the Federal Level

States obviously have interpreted *Whiting* as a mandate that allows them to respond to the national outcry for comprehensive immigration reform by enacting licensing statutes to regulate unlawful employment-based immigration. However, the U.S. Congress has also taken action in light of *Whiting*. The Legal Workforce Act (H.R. 2164), which was introduced in the U.S. House of Representatives on June 14, 2011, by Rep. Lamar Smith (R-Texas), is the most comprehensive legislative proposal dealing with verification of federal workers' employment status since the *Whiting* decision. 131 S. Ct. 1968. The Legal Workforce Act would amend § 274A of the Immigration and Nationality Act by creating a new employment verification system, the Employment Eligibility Verification System (EEVS), and mandating nationwide compliance within two years of enactment of the law. See 112th Cong., H.R. 2164 § 2 (2011). The EEVS would be patterned on the current E-Verify system and would provide verification or tentative nonverification of an individual's work authorization within three working days of an initial inquiry. *Id.* § 3. In cases of tentative nonverification, the Social Security Administration would specify a secondary verification process in order to provide final verification or nonverification within 10 working days of the tentative nonverification. *Id.*

The Legal Workforce Act would require employers to verify that individuals who have received an employment offer are not considered unauthorized aliens during a specified "verification period." H.R. 2164 § 2. The bill also proposes criminal liability "by fine and/or prison sentence of 1 to 15 years for individuals who (to secure employment) knowingly provide a Social Security number or other identification document that belongs to another person." *Id.* According to the Legal Workforce Act, "a court shall not place on probation any individual convicted of a violation of this clause ..." and "no term of imprisonment imposed on an individual ... shall run concurrently with any other term of imprisonment imposed on the individual under any other provision of law." *Id.* As such, the legislation would impose stringent criminal liability on individuals who defraud employers by presenting fraudulent documents to obtain employment. *Id.*

If enacted in its current form, H.R. 2164 § 2 establishes the following time lines for compliance:

- employers with 10,000 or more employees: six months after enactment of the statute;
- employers with 500–9,999 employees: 12 months

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- after enactment;
- employers with 20–499 employees: 18 months after enactment;
- employers with 1–19 employees: 24 months after enactment;
- companies that recruit and refer employees: 12 months after enactment; and
- employees who provide agricultural labor or services: 36 months after enactment.

The Legal Workforce Act would also allow employers to voluntarily verify the employment status of “any individual employed by the employer within 30 days of enactment, so long as such verification is completed on a nondiscriminatory basis.” *Id.* Employers who choose to complete voluntary verifications would be required to verify the status of all workers who are employed. *Id.*

In its current form, employers who fail to use the EEVS established by the Legal Workforce Act would be subject to fines and/or criminal liability under certain circumstances. *See* H.R. 2164 § 8. Technical violations associated with paperwork and Form I-9 deficiencies would result in fines that range from \$250 (for routine infractions) to \$25,000 (for more egregious violations). *Id.* However, persons or entities that engage in a pattern or practice of hiring unauthorized workers would be fined no more than \$15,000 for each unauthorized alien, imprisoned for not less than one year and not more than 10 years, or both. *Id.* If enacted, the Legal Workforce Act would significantly increase an employer’s civil and criminal risks associated with violating federal employment-based immigration laws.

Employment-Based Immigration Reforms Are Likely to Change the Nature and Scope of Employment Law

In the immigration context, employment law is currently experiencing fundamental regulatory reforms that are occurring at the federal level as well as the state level. These reforms are likely to change the size, scope, and nature of employment law. The stakes may become higher than ever before. Whereas regulatory infractions of various employment statutes—such as Title VII, the Fair Labor Standards Act, and the Family and Medical Leave Act—normally would not result in a company’s inability to continue doing business, violations of employment-based immigration licensing laws that follow the *Whiting* precedent could eventually force a company to close its doors. *Whiting*, 131 S. Ct. 1968. As this statutory trend continues, employers must take care to comply with E-Verify and other immigration-related state licensing statutes in order to prevent any interruption in their right to do business. Lawyers who specialize in employment law must also prepare for a dramatic change in the scope of employment law

as states and Congress continue to implement laws to reform employment-based immigration.

Employment lawyers who practice in jurisdictions that enact licensing statutes similar to the Legal Arizona Workers Act will eventually be called on to advise and defend employers in injunction proceedings in which the employer’s state and/or municipal business license is subject to revocation. Therefore, employment attorneys will need to develop competency in state and municipal licensing laws (or consult with attorneys who are competent in those areas). In addition, employment attorneys should prepare for larger volumes of criminal defense litigation arising from employers’ violations of state and federal immigration laws. Finally, because immigration law will continue to affect the development of employment law, employment attorneys should begin to educate themselves with the pertinent employment-based immigration regulations (or consult with competent immigration attorneys) in order to reduce the risk of prosecution—and the sanctions that might follow—or avoid it altogether. **TFL**

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