

PREEMPTION WHO SHOULD MAKE IMMIGRATION LAW?

Q. Can any state mandate the use of E-verify as a matter of state law?

This is a disputed question. Many legal experts say the immigration enforcement laws now being passed in state capitals are not constitutional, and many of the new measures are being challenged in court. The U.S. Supreme Court is currently deciding if immigration law, including law mandating the use of E-Verify, is a federal prerogative or if the states may rightfully act. If the courts determine that these laws fall under federal authority, any state laws would be preempted by the federal law that makes E-Verify strictly voluntary.

Q. What is preemption?

Federal preemption is a legal term used when the Constitution or Congress give the federal government exclusive power to legislate on an issue. Preemption of state law can be "explicit" – for example, when a federal law expressly states that it preempts or supplants state law. Or preemption can be "implied" – when a federal law overlaps with a state measure and the courts decide that the federal mandate leaves no room for additional state input.

Q. Is it settled that federal immigration laws preempt all state laws dealing with illegal immigrants?

No. Most legal experts agree that immigration is largely a federal matter: certainly for the last hundred years there has been no question that border policy and citizenship are exclusively federal matters. But there are some gray areas. When states legislate in areas that normally fall under state authority – for example, local policing or the issuing of business licenses – but do so in a way that touches on immigration law, things get tricky. In those cases, there may be express or implied preemption concerns or both. This is what the U.S. Supreme Court is considering now: where are the boundaries, and which state laws are or are not trumped by federal immigration law.

Q. What does the Constitution say about preemption?

The preemption doctrine derives from the Supremacy Clause in the Constitution (Article VI, clause 2), which declares that the Constitution and federal law are the supreme law of the land. The doctrine is a kind of tie breaker that gives the upper hand to Congress in policy disputes with the states. If Congress is empowered by the Constitution to legislate on an issue, it is likewise empowered to preempt or override related state legislation.

Q. What does the Immigration Reform and Control Act (IRCA) say about preemption?

The 1986 Immigration Reform and Control Act (IRCA) explicitly prohibits states from imposing sanctions on businesses that hire unauthorized workers. But one phrase in the statute – a seven-word parenthesis known as the "savings clause" that allows states some leeway in the matter of "licenses and similar laws" – has created a contested gray area.

Many states have taken the IRCA parenthesis to mean they have the authority to suspend or revoke the business licenses of employers who hire unauthorized workers. Businesses and many constitutional lawyers disagree. IRCA does not explicitly say whether states can make E-Verify mandatory for businesses.

Q. What arguments have states made in support of their power to make and enforce laws relating to unauthorized immigrants?

States argue that because IRCA has not worked to prevent illegal immigration and Congress has not acted to reform the immigration system, states have a responsibility to act and may address the problem by imposing sanctions on employers who knowingly hire unauthorized workers. They also argue that the parenthetical “savings clause” that allows states some leeway in the matter of “licenses and similar laws” leaves room for the states to impose their own sanctions in issuing and revoking business licenses. As long as a state sanctions law deals only with business licenses, this argument goes, it is expressly authorized by IRCA and there is no preemption. As for E-Verify, the argument is that Congress has not explicitly prohibited states from requiring businesses to use E-Verify – and that therefore they may do so.

Q. What arguments have business groups made in challenging employer sanctions laws like Arizona’s Legal Arizona Workers Act?

The main argument made by those who challenge state employer sanctions laws is that for nearly two centuries the Supreme Court has ruled that immigration regulation is the exclusive province of the federal government – and that therefore state efforts to regulate immigration are expressly preempted. Legal experts also argue that state immigration enforcement could upset a delicate balance struck in the 1986 Immigration Reform and Control Act. That law sought to balance the penalties incurred by employers who hire illegal immigrants and employers who discriminate in order to avoid hiring illegal workers. IRCA also sought to ensure that complying with the law would not be too burdensome for employers. Business groups argue that state and local efforts aimed at enforcement alone upset this balance and are contrary to the spirit of federal law and are therefore implicitly preempted.

Q. What arguments have business groups made in challenging state efforts to mandate E-Verify?

According to many legal experts, this too is preempted. Because federal law makes E-Verify completely voluntary and IRCA mandates only the less cumbersome I-9 verification process, state laws that mandate the use of E-Verify conflict with federal immigration law. Legal experts also argue that states do not have authority under the Constitution to impose financial burdens on the federal government. By making E-Verify mandatory, a state improperly forces the federal government to expend money and other resources on a system that the federal law insists is voluntary.

Q. What has happened in the courts so far?

Two types of preemption cases have recently come through the courts. Some involve municipal ordinances that restrict access to housing based on immigration status. Others involve state and local legislation regulating and sanctioning employers for hiring undocumented workers.

In virtually all of the housing-related litigation, local ordinances were found to be preempted and therefore invalid: in Hazleton, PA, Riverside, NJ, Escondido, CA, and Farmers Branch, TX. The town of Hazleton has asked the U.S. Supreme Court to review the lower court's decision against it, but the high court has not yet ruled on that request.

On employer sanctions, the courts are divided. Federal district courts in Oklahoma and Pennsylvania ruled that state and municipal efforts to impose sanctions and mandate the use of E-Verify were preempted and therefore invalid, while a federal district court in Arizona found that the Arizona law mandating the use of E-Verify was not preempted and therefore could stand. The Arizona case is now under review by the U.S. Supreme Court, and a decision is expected in the spring of 2011.

Q. Will the Supreme Court settle the preemption issues?

Maybe. The Arizona case was argued in the Supreme Court in early December 2010. A decision is not expected for several months. It's possible that the ruling will be so narrow and the justices so divided that the court will not give clear guidance to the states. But ideally, the justices will resolve all of the outstanding issues, resolving the confusion created by the conflicting decisions of lower courts, drawing a bright line between state and federal authority and making clear whether or not the states can mandate enrollment in E-Verify. Whatever the Supreme Court says about the issues will be binding on all the states as well as the federal government, unless and until Congress acts to change the immigration code.

Q. What should state legislators do about immigration at this point?

Wait and see what the Supreme Court says. Any other course of action, whether passing employer sanctions laws or measures that mandate the use of E-Verify, runs the risk of incurring costly, time-consuming litigation and ultimately being declared unconstitutional.