

## In This Issue:

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In *Chamber of Commerce of the United States of America v. Whiting*, the U.S. Supreme Court held that federal law does not preempt the Legal Arizona Workers Act or other state laws mandating E-Verify or penalizing employers that knowingly or intentionally hire undocumented workers.

## U.S. Supreme Court Upholds Arizona Law Mandating Use of E-Verify and Penalizing Employers that Hire Undocumented Workers

By Neil Alexander and Michael Lehet

On May 26, 2011, the U.S. Supreme Court issued its ruling on the constitutionality of the Legal Arizona Workers Act (LAWA). Signed into law in 2007 by then-Arizona Governor Janet Napolitano, LAWA penalizes Arizona employers that knowingly or intentionally hire undocumented workers by suspending or revoking their business licenses. The statute also requires that all Arizona employers use E-Verify, the federal, online employment eligibility verification program, to confirm the work authorization of newly hired employees. In a 5-to-3 opinion in *Chamber of Commerce of the United States v. Whiting*, from which Justice Elena Kagan recused herself, the Court held that federal law does not preempt LAWA and upheld the statute as constitutional.

### LAWA and Similar State Laws

LAWA prohibits employers from knowingly or intentionally hiring undocumented workers to perform services in Arizona. Employers found liable under the statute risk the suspension of their business “license” for the first offense and face the mandatory revocation of their business license for the second offense. The statute broadly defines “license” as “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state.”

LAWA also requires that employers use E-Verify to confirm the work authorization of any individual hired to perform services in Arizona. Although the statute requires the use of E-Verify, it does not contain any penalty for not doing so; rather, employers that fail to use E-Verify forgo a defense under the statute. This defense provides that an employer is entitled to a rebuttable presumption that it did not knowingly or intentionally hire an undocumented worker if it proves it previously confirmed that individual’s work authorization using E-Verify.

Following LAWA’s enactment, several other states implemented their own laws punishing employers that employ undocumented workers. These states and others also implemented legislation mandating the use of E-Verify by employers.

## Challenges to LAWA

Months before its effective date of January 1, 2008, various businesses and civil rights organizations filed a lawsuit in federal district court claiming LAWA violated the Arizona and U.S. Constitutions. In particular, they claimed that federal immigration laws, specifically the Immigration Reform and Control Act (IRCA), preempts LAWA, and they asserted that the investigation and hearing procedures preceding license suspension and revocation do not provide adequate due process for employers. The district court rejected these arguments and concluded that LAWA was constitutional. The Ninth Circuit Court of Appeals subsequently affirmed this decision. Thereafter, the petitioners, led by the U.S. Chamber of Commerce, successfully petitioned the U.S. Supreme Court for review.

The petitioners challenged LAWA on three grounds. First, they claimed that federal law expressly preempts LAWA because the former prohibits states from imposing “civil or criminal sanctions” on those that employ undocumented workers, “other than through licensing and similar laws.” The petitioners argued that LAWA is not a “licensing” law because it operates only to suspend and revoke licenses rather than grant them.

Second, they argued that federal law impliedly preempts LAWA because Congress intended the federal system of immigration-related employment laws to be exclusive and the Arizona statute necessarily conflicts with this intent. The petitioners also claimed that LAWA and similar state laws lead employers to err on the side of discrimination rather than risk the “business death penalty” by hiring undocumented workers. This discrimination, the petitioners reasoned, is prohibited by IRCA, thereby rendering LAWA in conflict with federal law.

Third, the petitioners argued that federal law impliedly preempts LAWA because E-Verify was originally established as an entirely voluntary program. LAWA, on the other hand, requires that employers use the system.

## The Supreme Court Upholds LAWA

The Supreme Court, like the Ninth Circuit and the district court, concluded that federal law does not preempt LAWA.

The majority rejected the petitioner’s first argument, finding that LAWA’s penalty provision falls squarely within the “licensing and similar laws” exception and “[t]here 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.” Four of the eight justices also rejected the argument that federal law impliedly preempts LAWA. In doing so, the justices noted that LAWA is consistent with both the purposes and text of IRCA and thus does not conflict with federal law. The justices also rejected petitioners’ concerns that employers will err on the side of discrimination, explaining that license suspension and revocation is not triggered simply by hiring or employing undocumented workers; instead, it is triggered when employers *knowingly or intentionally* hire undocumented workers. The justices further explained that federal and state laws protect against employment discrimination and provide employers with a strong incentive not to discriminate.

The majority also rejected the argument that federal law impliedly preempts LAWA because the former created E-Verify as a voluntary program but the latter requires that all employers use it. The fact that E-Verify was originally voluntary and now is required by federal law under only certain circumstances, the majority explained, has no bearing on what states may do with respect to the program. In addition, the majority concluded that LAWA is consistent with the federal law establishing E-Verify because it merely requires use of the already available program and affords the same rebuttable presumption defense provided to E-Verify users under federal law.

## Practical Implications of Ruling

The Supreme Court’s decision in *Whiting* may have far-reaching consequences for employers in Arizona and the rest of the country. At a minimum, this decision gives all states the “green light” to enact legislation similar to LAWA, mandating the use of E-Verify and penalizing employers, through license suspension or revocation, for knowingly or intentionally employing undocumented workers. Moreover, the ruling may empower states to enact other, more creative, “licensing and similar laws” aimed at deterring employment of undocumented workers. Most importantly, the *Whiting* decision authorizes states to play some role in the enforcement of immigration-related laws without fear of federal preemption.

Given this ruling and its likely implications, employers should take the following steps to minimize their risk of legal exposure:

1. Conduct a comprehensive audit of all I-9 forms and remedy any errors or omissions.
2. Train human resources personnel on all applicable employment eligibility verification processes, including completing I-9 forms and using E-Verify.
3. If required under state or federal law, employers should immediately register for and begin using E-Verify on a going forward basis.
4. Investigate and respond to all Social Security No-Match Letters received from the Social Security Administration.
5. As appropriate, consult with legal counsel to address these and other immigration-related workplace matters, including incidents of suspected identity fraud and theft.

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