



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 1, 2010

The Honorable Mike Jorgenson
Idaho State Senate
Statehouse Mail
Boise, ID 83720

Re: Our File No.: 10-30813 Idaho Dairyman's Association-Proposed Prohibition of
False Impersonation for Employment Purposes Act

Dear Senator Jorgenson:

Your request for a legal opinion from the Attorney General's Office with respect to a new draft of the legislation being proposed by the Idaho Dairyman's Association to control illegal immigration was forwarded to me for a response. The major change to the original proposed legislation is the removal of the term "unauthorized alien(s)." The new draft thus applies generally, and not merely aliens, with regard to the regulated activity.

The new draft legislation proposes three criminal statutes relating to employment of persons using false identification:

Section 18-2803 provides that any person who falsely verifies, publishes, acknowledges or provides documentation in the name of another person, or who falsely provides any written instrument in order to gain employment that is relied upon by an employer as true, shall be guilty of a misdemeanor punishable by imprisonment in county jail not exceeding two years, or by fine not exceeding \$5,000.

Section 18-2804 provides that a person, who willfully destroys, alters, falsifies or commits theft of public records to assist a person to become an employee or manufactures false identification to assist a person to become an employee, shall be guilty of a felony punishable by imprisonment in state prison for not more than 14 years or by fine not exceeding \$250,000.

Section 18-2805 provides that an employer shall not hire an employee knowing that the employee is providing false documentation to impersonate

another person or knowing the employee is falsely providing any written instrument in order to gain employment. The legislation provides that an employer violating the provision shall be guilty of a misdemeanor punishable by imprisonment in county jail for not more than 2 years or by a fine not exceeding \$50,000.

Given the short time within which to respond to all possible issues raised by the proposed legislation, my review is directed to what I understand to be the area of the Association's chief concern: regulating employment of unauthorized aliens.

CONCLUSION

The new draft legislation likely would be held preempted, if challenged judicially, by federal immigration law to the extent that it attempts to regulate or criminalize the employment of aliens and related use of false documents or public records, an area that is preempted by the Immigration Reform and Control Act ("IRCA").

ANALYSIS

This analysis is directed solely to the Legislature's authority to adopt the proposed legislation. The most immediately relevant ground for judicial challenge as to such authority is the possibility of its preemption by federal law to the extent that it may applied to the employment of aliens. There also may be other contexts where federal law supersedes otherwise applicable state statute given the legislation's expansive definition of the term "employer," but it appears that the chief motivation for bill is the Association's concern with unauthorized-alien employment. We must stress in this respect that because the proposed legislation is not "facially" invalid—*i.e.*, incapable of valid application under any circumstances—any such challenge must be made on a case-by-case, "as-applied," basis. *E.g.*, State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). This analysis focuses the likelihood of a successful preemption challenge if the proposed law were used in an effort to regulate employment of aliens.

The Supremacy Clause of the United States Constitution provides that federal laws and treaties are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Accordingly, when Congress acts within the scope of its constitutional authority, the laws it enacts may preempt state or local action within that field. Federal law may preempt state or local law in three ways: (1) express preemption where federal law expressly commands that state law is displaced; (2) field preemption where federal statutory scheme is sufficiently comprehensive to infer Congress left no room for supplementary regulations by the states; and (3) conflict preemption where there is an actual conflict between federal and state law, or where compliance with both is impossible. Gadda v. Ashcroft, 377 F.3d 934, 945, 946 (9th Cir. 2004). The United States Supreme Court has held the power to regulate immigration is exclusively a federal power. DeCanas v. Bica, 424 U.S. 351 (1976). And, the power to restrict, limit, regulate and register aliens is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law. Hines v. Davidowitz, 312 U.S. 52 (1941).

Congress has used its immigration-related power broadly in matters corresponding to those covered by the Association's proposed legislation. The Immigration and Nationality Act ("INA") is a comprehensive federal immigration law that sets out a national-origin quota system, establishes preferences for foreigners with special employment-related skills, and creates deportation policy and procedures. In 1986, Congress amended the INA by enacting the Immigration Reform and Control Act ("IRCA"). IRCA makes it unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien with respect to such employment and also makes it unlawful for employers to hire an individual without verifying the employment eligibility of such individual. 8 U.S.C. § 1324a(a)(1). The Act sets up an employment verification system that requires a person or entity to attest under the penalty of perjury that it has verified an individual is not an unauthorized alien by examining documents that establishes the individual's identity and that he/she is authorized to work in the United States. 8 U.S.C. § 1324a(b). The employment verification system is referred to as the I-9 system. Section 1324a(b) also sets out the particular type of documents that an employer would have to examine to establish an individual's identity and employment eligibility.

IRCA also provides a comprehensive scheme to enforce violations of 8 U.S.C. §1324c(a). Subsection 1324c(d) provides that in conducting investigations immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated, the administrative law judges and immigration officers may compel by subpoena the attendance of witnesses and production of evidence, the Act provides for notice and an opportunity for hearing before issuance of an order that a person has violated subsection (a), there are provisions for administrative appellate review and judicial review of a final order. Persons or entities found to have violated any of these provisions may be ordered to cease and desist engaging in the unlawful activity and be assessed a civil money penalty. In the case of first time-offenders, this penalty is between \$250 and \$2,000 for each fraudulent document or prohibited activity. For subsequent offenses, the civil penalty is between \$2,000 and \$5,000. In addition to imposing civil penalties for immigration-related document fraud, the INA also imposes criminal penalties for those who prepare or assist in preparing fraudulent immigration documents for a fee or other remuneration. 8 U.S.C. § 1324c.

Most important for present purposes, IRCA has a preemption provision that *expressly* supersedes state law and provides: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). As explained above, the Association's proposed legislation contains only criminal sanctions and thus does not fall within the "licensing or similar laws" exception from IRCA's express preemption provision. See Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 862 (9th Cir. 2009) (discussing and applying the "licensing and similar laws" to state statute that, *inter alia*, "allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens").

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In sum, the new draft legislation makes it unlawful for an employer to hire an employee knowing that he/she is using false documents to impersonate another, or the employer knows the employee is falsely providing any written instrument in order to gain employment. The legislation attempts to regulate the employment of, among others, aliens by making it unlawful for a person to use false documents to gain employment. Its only sanctions are criminal in nature. The legislation thus would be susceptible to a successful "as applied" federal preemption challenge because IRCA expressly supersedes state regulation in this area except as permitted by the "licensing or similar law" exception in 8 U.S.C. § 1324a(h)(2).

I hope this response is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Kane", written over a horizontal line.

BRIAN KANE

Assistant Chief Deputy

BK/tjn