

Virginia State Crime Commission



Preemption Analysis of Recent Legislation
in Virginia and Other States

July 24, 2007

Agenda



- Preemption Analysis of Virginia Legislation
 - Employment penalties;
 - Criminal penalties;
 - Criminal law and procedure; and,
 - Law enforcement authority.
- State Legislative Trends

Employment Penalties

Employment Penalties



- Over the past 4 legislative sessions, there have been at least 8 bills that establish criminal or civil penalties for hiring illegal aliens or that create requirements for employers.
- Section 1324a of the U.S. Code, which penalizes employers for hiring illegal aliens, **expressly** preempts state action:
 - “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.”

Employment Penalties (cont.)



- Legislation that directly penalizes an employer for hiring an illegal alien is preempted.
- Examples:
 - HB 1067 and HB 2605 (2007) proposed to amend Va. Code §40.1-11.1 to make the penalty for employing an illegal alien \$100 per day employed.
 - HB 2328 (2007) proposed to amend Va. Code §40.1-11.1 to make it a Class 1 misdemeanor to fail to confirm the legality of an employee through the electronic verification-of-work authorization program operated by DHS.
- Analysis: Both examples are expressly preempted by U.S. Code § 1324a because they penalize employers for hiring illegal aliens.
 - Furthermore, existing code section Va. Code §40.1-11.1 is expressly preempted as well, since it criminalizes conduct already made illegal by § 1324a.

Employment Penalties (cont.)



- Legislation that penalizes employers for failing to comply with workers' compensation regulations with regard to illegal aliens is likely preempted.
- Example:
 - HB 2688 (2007) proposed criminal and civil penalties for employers who fail to pay workers' compensation benefits to unauthorized aliens.
- Analysis: The U.S. Supreme Court held in Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002), that back pay to an illegal alien would interfere with explicit statutory prohibitions, such as preventing illegal aliens from obtaining a job with false documents. The idea behind HB 2688 runs counter to the prohibition of hiring illegal aliens found in 1324a and is, therefore, most likely preempted pursuant to Hoffman.

Employment Penalties (cont.)



- U.S. Code § 1324a specifically permits measures that address the hiring of illegal aliens through “licensing and similar laws.”
- Example:
 - HB 3130 (2007) sought to prohibit the issuance of a business license to any individual who cannot provide legal documents proving such individual is legally eligible to be employed or to work in the United States.
- Analysis: This example appears to be permitted by § 1324a.

Employment Penalties (cont.)



- Requirements for public contract/contractors is another measure states may enact to prevent the employment of illegal aliens.
- Example:
 - HB2826 (2007) requires every “public body” to participate in federal work authorization programs to verify new employees and requires all contractors of public bodies to participate in the federal programs.
- Analysis: This example appears to be permitted by § 1324a.

Criminal Penalties and Criminal Procedure

Criminal Penalties (cont.)



- Legislation that creates criminal penalties to punish assisting or harboring illegal aliens is preempted.
- Example:
 - HB 2622 (2007) proposes to make it a Class 6 felony to transport, conceal, or shield from detection a known illegal alien.
- Analysis: This bill is very similar to U.S. Code § 1324, the federal anti-harboring statute. HB 2622 is preempted because:
 - Consistent with the second part of the DeCanas test:
 - Congress has already acted (with section § 1324);
 - Subject matter of § 1324 relevant to HB 2622 is not a “peripheral concern.”; and,
 - Presence of § 1324 evidences Congress’ intent to expressly “occupy the field.”

Criminal Penalties (cont.)



- Legislation that criminalizes illegal presence is likely preempted.
- Examples:
 - Both HB 1918 (2007) and HB 1970 (2007) proposed to make it a Class 1 misdemeanor to be present in the United States illegally.
- Analysis: These examples are preempted:
 - It is already a federal crime under 8 U.S.C. §1325(a) for a person to enter the U.S. illegally, so Congress has already (1) acted and, (2) the subject matter of §1325(a) relevant to both bills is not a “peripheral concern.”
 - It also is a civil violation, under § 1227(a)(1)(B), for an alien to be present in the country illegally. The misdemeanor punishment in the examples creates a conflict between federal and state law, because these examples punish the act more severely than federal law.

Criminal Procedure



- Legislation that creates a presumption against bail for illegal aliens is not preempted.
- Examples:
 - HB 2322 (2007), HB 3206 (2007) and SB 1421 (2007) all create a presumption against bail for “any felony committed by the person after entering the United States unlawfully.”
- Analysis: There are no preemption issues with limiting bail to illegal aliens:
 - There are no relevant statutes in U.S. immigration law addressing a presumption against bail for illegal aliens; and,
 - Criminal illegal aliens are required to be detained during removal proceedings. Denial of bail for illegal aliens awaiting deportation is constitutional, but they cannot be held “indefinitely.”
- Note : If intended to cover all illegal aliens, the language should not be limited to only those illegal aliens who “enter” the United States unlawfully.

Law Enforcement Authority

Law Enforcement Authority



- Legislation that permits the State Police or local law enforcement to enter into MOUs with ICE are not preempted.
- Examples:
 - HB 2926 (2007), HB 2933 (2007), HB 1618 (2007), SB 1045 (2007), and HB 487 (2006) all attempted to grant sheriffs, police, or the State Police with powers to enforce immigration law under agreement with ICE, under the “287(g)” program.
- Analysis: There are no preemption issues with these examples.
 - In fact, 8 U.S.C.A. § 1357(g) expressly permits state and local law enforcement to enter into MOU’s with ICE to enforce immigration law.
 - The Virginia Attorney General’s Office has issued an advisory opinion concluding that, under Virginia law, local sheriff’s and police departments have the authority to enter into a MOU with ICE.

Law Enforcement Authority (cont.)



- Legislation that creates programs to train law enforcement in languages other than English are not preempted.
- Example:
 - HB 592 (2006) requires the Department of Criminal Justice Services to advise and assist law-enforcement agencies in developing programs and incentives to encourage law-enforcement officers to learn languages in addition to English
- Analysis: This example is not preempted.

Law Enforcement Authority (cont.)



- Legislation that prevents localities from banning cooperation with the federal government is preempted.
- Example;
 - HB 2931 (2007) prohibits any local government from enacting ordinances that prevent communication or cooperation with federal officials regarding immigration.
- Analysis: This example is preempted.
 - 8 U.S.C. § 1373 and § 1644 already prohibit state and local governments from preventing communication with the federal government on immigration matters.
 - These statutes evidence a clear congressional intent to “occupy the field.”

Law Enforcement Authority (cont.)



- Legislation that expands Va. Code § 19.2-81.6 is preempted.
- Example:
 - HB 1970 (2007) attempted to remove the requirement from § 19.2-81.6 that the illegal alien must have been previously convicted of a felony before he could be arrested.
- Analysis : § 19.2-81.6 is based a specific grant of power to the states under U.S. Code § 1252c. The proposed removal of the felony requirement from § 19.2-81.6 exceeds the authority granted under § 1252c.

Law Enforcement Authority (cont.)



- It is unclear whether legislation that grants state law enforcement broad powers to enforce immigration law are, at this time, preempted.
- Examples:
 - HB 2936 (2007) and HB 1837 (2005), sought to grant all Virginia law enforcement the authority to make warrantless arrests for immigration law violations upon confirmation of the individual's legal status with ICE.
- Analysis : It is not clear what the state's role is in enforcing immigration law. The Ninth and Tenth Circuits already permit local enforcement to make arrests of criminal immigration law violations. The Tenth Circuit, seems to extend state enforcement authority to civil violations of law. It is unclear whether the Fourth Circuit would agree with the two circuits. However, no court has addressed whether the existence of § 1252c, § 1324, and § 1357 creates clear congressional intent to "occupy the field" under the second part of the DeCanas test.

Law Enforcement Authority (cont.)



- A recent report by the Congressional Research Service (CRS) detailed some criticisms with the 2002 DOJ Office of Legal Counsel memo.
- The CRS noted that there are critics who consider the memo “deeply flawed,” specifically noting:
 - Immigration has long been considered a distinctly federal concern;
 - Federal law authorizes state and local enforcement of immigration laws only in specific circumstances, not broadly; and,
 - Generally, opinion letters are not controlling and should be considered only persuasive.

State Legislative Trends

State Legislative Trends



- The National Conference of State Legislatures (NCSL) reports that, as of April 2007, there were at least 1169 bills introduced in state legislatures concerning illegal immigration.
 - At least one bill was introduced in every state.

State Legislative Trends (cont.)



- There were 41 states that introduced a total of 199 bills regarding the employment of illegal aliens.
 - At least 11 states had bills penalizing the hiring of illegal aliens
 - Alabama, California, Iowa, Kansas, Kentucky, New Hampshire, New Mexico, Oklahoma, Oregon, South Dakota, and Wisconsin.
 - Example : HA 1337 (Iowa) creates a \$1K penalty for knowingly employing an illegal alien. Repeated infractions by a corporate officer can result in a “serious misdemeanor.”

State Legislative Trends (cont.)



- At least 7 states introduced bills that would revoke business licenses of firms that hire illegal aliens (Alabama, Arizona, Nevada, New Mexico, New York, and Pennsylvania).
 - Example : HB 1284 (New Mexico) would revoke any “permit, license or other authorization to conduct business” for knowingly employing an illegal alien.
- 7 states introduced bills intending to deny state contracts to firms hiring illegal aliens or for failing to use federal programs to verify the employment status of potential employees
 - Alabama, Colorado, Florida, Kentucky, Louisiana, New Mexico, and South Carolina.
 - Example: HB 1073 (Colorado) mandates that public contracts require the verification of eligibility for each employee under the Basic Pilot Program.

State Legislative Trends (cont.)



- As of April 2007, there were 129 bills introduced in 30 states relating to law enforcement initiatives.
 - Initiatives range from state-wide MOU's with ICE, enhanced authority for state and local officers to enforce immigration law, prohibitions against non-cooperation policies, and even restrictions on assistance to federal agencies.
- At least 8 states have proposed some type of MOU with ICE (Arizona, California, Kentucky, Minnesota, Oklahoma, Pennsylvania, Missouri, and New Hampshire).
 - Example : SB 413 (Oklahoma) authorizes the Oklahoma Homeland Security Director or Governor to enter into an MOU with ICE, which applies to designated law enforcement officers, contingent upon funding.
- New York and Washington introduced bills to limit the ability of state/local law enforcement to enforce federal immigration law.
 - Example : SB 5647 (Washington) provides that all general or limited authority Washington peace officers or specially commissioned Washington peace officers shall “refrain from the enforcement of federal civil immigration laws” unless otherwise required by law or court order.

State Legislative Trends (cont.)



- Both Kansas and South Carolina have introduced bills to restrict access to bail for illegal aliens charged with felonies.
 - Example : Under HB 3057 (South Carolina), whether the accused is an illegal alien and flight risk is a factor reviewed for the determination of bail.

State Legislative Trends (cont.)



- At least 6 states have proposed “comprehensive” legislative initiatives or “omnibus” immigration bills, which include:
 - Federal worker authorization programs (Georgia, Missouri, North Carolina, Oklahoma, South Carolina, and Tennessee);
 - Creation of state law enforcement MOU’s with ICE (Georgia, Oklahoma, North Carolina, and South Carolina);
 - Denying business licenses for employing illegal aliens (Missouri); and,
 - Checking immigration status when individual is charged with a felony or DUI (Oklahoma and South Carolina).

State Legislative Trends: Georgia



- This year, the Georgia General Assembly passed comprehensive immigration reform (SB 529). It included initiatives in the public safety/ criminal justice area, including:
 - Work Authorization Program:
 - Every public employer shall register and participate in the federal work authorization program to verify information of all new employees
 - All contractors and subcontractors must participate with the work authorization program. Applies only to employers with 500 employees or more in 2007, but by 2009 it will apply to all contractors and subcontractors

State Legislative Trends: Georgia (cont.)



- MOU with ICE – authorizes the commissioner of public safety to negotiate a MOU with ICE, and also includes the following:
 - The commissioner is to designate appropriate peace officers to be trained in accordance with the MOU;
 - Training shall be funded pursuant to the federal Homeland Security Appropriation Act of 2006 or subsequent federal funds; and,
 - In accordance with the MOU, a trained peace officer is authorized to enforce federal immigration and customs laws.

State Legislative Trends: Georgia (cont.)



- **Contacting ICE** – Mandates that when any person who has been charged with a felony or a DUI, and who is confined for any period of time, a reasonable effort shall be made to determine the nationality of the person.
 - If the person is a foreign national then a reasonable effort shall be made to determine if the person is lawfully admitted to the United States, and if lawfully admitted check to ensure lawful status has not expired.
 - If verification of lawful status can not be made from documents in the possession of the prisoner, verification shall be made within 48 hours through a query to ICE's Law Enforcement Support Center (LESC) or other office of the United States.