



McKENNA EMPLOYMENT BULLETIN

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U.S. SUPREME COURT RULES STATES CAN REVOKE LICENSES OF EMPLOYERS WHO EMPLOY UNAUTHORIZED ALIENS

The U.S. Supreme Court in Chamber of Commerce of U.S. v. Whiting, 2011 WL 2039365 (May 26, 2011), upheld the Arizona statute that gives the state the authority to suspend and revoke the licenses of state employers who knowingly or intentionally employ unauthorized aliens and mandates how employment status must be verified. Historically, addressing the employment of unauthorized aliens has fallen under federal jurisdiction.

In 1986, the U.S. Congress enacted 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.” 8 U.S.C. §1324a(a)(1)(A). Under IRCA, employers may be subjected to federal civil and criminal sanctions. IRCA expressly preempts states from imposing civil or criminal sanctions upon those who “employ, or recruit or refer for a fee for employment, unauthorized aliens.” §1324a(h)(2).

IRCA also requires that employers verify an employee’s eligibility for employment. In 1996, Congress created E-Verify, which is an internet-based system that employers “may use” to verify the status of employees.

Thereafter, several states, including Arizona, enacted laws attempting to impose sanctions for employing unauthorized aliens. Arizona’s law is at issue in this case. The Legal Arizona Workers Act provides that the licenses of state employers may be suspended or revoked if the employer knowingly or intentionally employs unauthorized aliens. The law also requires that all Arizona employers use E-Verify.

In response to Arizona’s law, the U.S. Chamber of Commerce filed this suit, arguing that the IRCA preempted Arizona’s license suspension and revocation provisions as well as the mandatory use of E-Verify.

The Supreme Court held that the plain language of IRCA’s preemption clause did not invalidate Arizona’s statute because the statute only imposed licensing conditions on businesses operating within the State and did not subject those businesses to civil or criminal penalties and that nothing in the E-Verify provision prohibited the states from mandating participation.

This decision will give states more leeway in setting policies affecting the employment of unauthorized aliens.

A TERMINATED SEX OFFENDER HAS NO RIGHT TO EMPLOYMENT

In May v. Wal-Mart Stores, Inc., 2011 WL 1627341 (E.D.Mich. 2011), the Plaintiff sued Wal-Mart for terminating him for being a sex offender. He sued under theories of breach of contract and Title VII. The district court dismissed the case.

The plaintiff worked for Wal-Mart for approximately fifteen years. At the time he was hired, his supervisor allegedly knew of his sex-offender status. Thereafter, Wal-Mart instituted a new policy of doing background checks and terminated approximately 400 employees who were registered sex offenders. The plaintiff was told he was terminated for “poor work performance” but believed his termination was the result of the new policy.

The plaintiff claimed that defendant unlawfully terminated him without cause because defendant had known about his criminal conviction for fifteen years before terminating his employment and that defendant breached an unspecified employment agreement when it changed the terms of employment by instituting a policy of investigating criminal backgrounds and terminating registered sex offenders. The court held these claims fail as a matter of law because under Michigan law plaintiff’s employment was at will. In Michigan, as in other “at will” states, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason.

The plaintiff also claimed that defendant unlawfully discriminated against him in violation of Title VII when he was terminated for being a registered sex offender. In order to state a claim under Title VII, plaintiff must first allege that he is a member of a protected class. Registered sex offenders are not a member of a protected class.

STEPS REASONABLY CALCULATED TO END HARASSMENT CAN PROTECT YOU AGAINST LATER HARASSMENT

In the E.E.O.C. v. Xerxes Corp., 2011 WL 1549509 (4th Cir. 2011), an employer responded to reported incidents of racial harassment against African-American assembly workers by their Caucasian co-workers. The employer had in place extensive anti-harassment policies. The employer promptly investigated and took appropriate remedial action when incidents of harassment were reported. The employer also interviewed employees, trained and re-trained employees and supervisors on the company’s anti-harassment policies, suspended and terminated the harassing employees through progressive disciplinary procedures, and worked in cooperation with local union representatives, the EEOC investigators, and a local sheriff’s office. Thus, even though all incidents of racial harassment did not cease, the employer was not liable because the steps the employer took were reasonably calculated to end the harassment and, therefore, were reasonable as a matter of law.

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