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## High Cost of Low-Cost Workers: Missouri Enacts New Law Targeting Employers of Unauthorized Workers, The

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## NOTES

# The High Cost of Low-Cost Workers: Missouri Enacts New Law Targeting Employers of Unauthorized Workers

### I. INTRODUCTION

There are approximately twelve million unauthorized aliens in the United States.<sup>1</sup> Nearly eight million of these individuals are workers, and they account for approximately 5% of the total civilian labor force.<sup>2</sup> This problem is worsening: the number of unauthorized residents has doubled since 1996.<sup>3</sup> Indeed, explosive growth of illegal immigrants led Congress to attempt comprehensive immigration reform in both 2006 and 2007.<sup>4</sup> Both tries ended without success.

In the face of Congress's failure to stem the tide of illegal immigration, many states and municipalities have taken action themselves. Many of these efforts have aimed at the magnet that draws these individuals to America – employment.<sup>5</sup> One of the most common state-level reforms has focused on the expansion of mandatory employer participation in the federal E-Verify program – the federal program that allows employers to verify the residency status of new hires.<sup>6</sup> Missouri is among the states that have adopted such a

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1. ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERV., UNAUTHORIZED EMPLOYMENT IN THE UNITED STATES: ISSUES, OPTIONS, AND LEGISLATION 1 (Mar. 2, 2009), available at [http://assets.opencrs.com/rpts/RL33973\\_20090302.pdf](http://assets.opencrs.com/rpts/RL33973_20090302.pdf).

2. *Id.*

3. RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERV., UNAUTHORIZED ALIENS IN THE UNITED STATES: ESTIMATES SINCE 1986, at 3 (Jan. 24, 2007) (noting approximately six million unauthorized aliens in 1996), available at <http://www.ilw.com/immigdaily/news/2007,0315-crs.pdf>.

4. See Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

5. *Employment Verification, Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing on Re-authorization of E-Verify Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 110th Cong. 6-7 (2008) [hereinafter Stana] (statement of Richard M. Stana, Director, Homeland Security and Justice Issues, United States Government Accountability Office), available at <http://www.gao.gov/new.items/d08729t.pdf>.

6. Arizona, Mississippi, and South Carolina have enacted legislation that would eventually require all employers to enroll in E-Verify. Missouri, Utah, Colorado,

provision. The enactment of new state laws relating to immigration has resulted in lawsuits in several jurisdictions challenging the states' power to make use of E-Verify mandatory for employers and even contesting their power to legislate in the field of immigration. These suits have had only limited success. This note seeks to explain Missouri's enactment of a law requiring use of E-Verify by certain employers, track recent developments that have made it more difficult to employ unauthorized workers, and advocate the position that this legislation will be upheld in the face of legal challenges.

The following Section addresses federal immigration law and the subsequent creation of the E-Verify program. It also examines Missouri's recent enactment that requires some employers to enroll in the E-Verify program and provides stiff penalties for any entity that employs unauthorized workers. Section III considers recent cases out of Arizona, Oklahoma, and Missouri that have decided whether the type of statute adopted by Missouri is preempted by federal law, or otherwise not allowed. Finally, in Section IV, this Article contends that Missouri's law will stand up to constitutional scrutiny. Specifically, the case law from other jurisdictions indicates courts are willing to allow states to regulate aliens (rather than immigration) to the extent the regulation is done in a traditional area of state control, like employment.

## II. LEGAL BACKGROUND

The power to regulate legal migration into the United States is clearly vested in the federal government by the Constitution.<sup>7</sup> However, the Supreme Court of the United States has never interpreted the grant of power in the Constitution to preempt every state statute dealing with aliens.<sup>8</sup> When the Constitution does not expressly limit a field of legislation to federal authority, state power may typically be exercised through traditional state police powers such as "regulat[ion of] the employment relationship."<sup>9</sup> Yet recently Congress has legislated in the intersection of these fields – immigration and em-

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Oklahoma, Minnesota, Rhode Island, Georgia, and North Carolina have mandated through legislation or executive order that all public employers and contractors must enroll. Tennessee uniquely provides protection against sanctions for enrollment. See Lindsay L. Chichester, Dinsmore & Shohl, LLP, *State E-Verify Legislation: A Summary* (May 21, 2008), [http://www.dinslaw.com/state\\_e-verify\\_legislation/](http://www.dinslaw.com/state_e-verify_legislation/).

7. U.S. CONST., art. 1, § 8, cl. 4 (Congress has the power "[t]o establish a uniform rule of naturalization . . ."); *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

8. See *DeCanas*, 424 U.S. at 355 (providing examples of cases upholding state actions).

9. *Id.* at 356.

ployment – in an effort to provide a uniform law aimed at preventing employers from hiring, and often exploiting, unauthorized workers.<sup>10</sup>

### A. *Immigration Reform and Control Act of 1986*

The first major law to tackle illegal immigration enforcement by penalizing the employer was the Immigration Reform and Control Act of 1986 (IRCA).<sup>11</sup> The law made it illegal “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.”<sup>12</sup> To assist employers in the verification of employees’ work status, Congress devised a system based on a list of documents that would verify both an employee’s identity and his or her employment authorization.<sup>13</sup> The program, commonly known as the I-9 system, requires all employers to fill out a form and retain a copy for their records.<sup>14</sup> Failure to comply with the I-9 system may result in civil penalties and, upon a finding of a pattern of violations, criminal sanctions against employers.<sup>15</sup> If prosecuted, any entity that establishes good faith compliance with the I-9 process has an affirmative defense that it did not knowingly employ an unauthorized worker in violation of IRCA.<sup>16</sup>

The IRCA was meant to be a comprehensive immigration law, and it expressly preempts all state or local laws that impose criminal or civil penalties for violations of acts covered by it.<sup>17</sup> However, the statute specifically excludes “licensing and similar laws” from the statutory preemption<sup>18</sup> and therefore does not preempt every state law dealing with aliens. Since no definition of “licensing and similar laws” is provided, however, a significant amount of litigation has attempted to determine which state and local laws fall under the savings clause and avoid preemption.<sup>19</sup>

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10. For an explanation of the historical development of legislation relating to illegal immigration, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

11. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

12. 8 U.S.C. § 1324a(a)(1)(A) (2006).

13. *Id.* § 1324a(b).

14. *Id.* §§ 1324a(b)(1)(A), (b)(3).

15. *Id.* §§ 1324a(e)(4)(A)(i)-(iii), (e)(5), (f)(1).

16. *Id.* §§ 1324a(a)(3), (b)(6)(A).

17. *Id.* § 1324a(h)(2). Specifically, the preemption clause states, “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.” *Id.*

18. *Id.*

19. See discussion *infra* Section III.

### B. E-Verify

The I-9 program's success in deterring the employment of unauthorized workers proved to be underwhelming. To remedy its shortcomings, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>20</sup> The IIRIRA sought to complement the IRCA's I-9 system through the development of three pilot programs that aimed to improve the verification process.<sup>21</sup> The goal was to reduce "(1) false claims of U.S. citizenship and document fraud, (2) discrimination against employees, (3) violations of civil liberties and privacy, and (4) the burden on employers to verify employees' work eligibility."<sup>22</sup> The only program still in use is E-Verify.<sup>23</sup>

E-Verify is a voluntary, web-based system that allows employers to compare information given by newly hired employees on their I-9 forms to Social Security Administration (SSA) and Department of Homeland Security (DHS) databases containing more than five hundred million records.<sup>24</sup>

To verify a new employee's status, employers log onto the web-based system within three days of hiring the employee and input the employee's information.<sup>25</sup> The program then compares the provided name and social security number to the SSA's database to see if a match exists.<sup>26</sup> If it does, the employer is immediately notified that the verification was successful.<sup>27</sup> If a match cannot be found immediately, then the next steps taken under the program depend on whether the new employee is a U.S. citizen.<sup>28</sup>

For an individual that cannot be matched and *claims to be a U.S. citizen*, the SSA issues a "tentative nonconfirmation" of legal employment status, and the employer must relay the notification to the affected employee.<sup>29</sup> The employee then has eight days to visit the local SSA office to initiate an attempt to resolve any inaccuracy in the records that could result in a confirmation of

20. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 to -724 (1996).

21. *Id.* §§ 401-405, 110 Stat. at 3009-655 to -666 (codified in relevant part in notes at 8 U.S.C. § 1324(a)). The three initial programs were Basic Pilot, the Machine-Readable Document Pilot Program, and the Citizen Attestation Pilot. Bruno, *supra* note 1, at 3-4.

22. Stana, *supra* note 5, at 6-7.

23. *Id.* at 6 n.10. E-Verify was known as Basic Pilot until 2007. *Id.* at 7.

24. *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse: Hearing on Re-authorization of E-Verify Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 1-2 (2008) [hereinafter Scharfen] (statement of Jonathan "Jock" Scharfen, Acting Director, U.S. Citizenship and Immigration Services), available at <http://www.uscis.gov/files/pressrelease/testimony.pdf>.

25. Stana, *supra* note 5, at 7.

26. *Id.*

27. *Id.*

28. *Id.* at 8.

29. *Id.* at 8-9.

his or her positive employment status.<sup>30</sup> No negative employment actions may be taken against the employee during this appeal period.<sup>31</sup> If the tentative nonconfirmation is not challenged within eight days, the employer receives a “final nonconfirmation” from the SSA.<sup>32</sup> After receipt of the final nonconfirmation, the employer must terminate the employee or notify DHS of intent to continue employment.<sup>33</sup>

If a *non-citizen* employee’s information does not match the SSA’s records, the entered data is compared to DHS databases, including information from U.S. Citizenship and Immigration Services (USCIS).<sup>34</sup> A failure by the DHS databases to resolve the problem prompts a referral to an immigration status verifier who works for USCIS.<sup>35</sup> If this individual cannot otherwise verify the worker’s authorized status, DHS issues a “tentative nonconfirmation” that must be given to the employee by his or her employer.<sup>36</sup> The employee then has eight days to contact DHS and begin the process to resolve the dispute.<sup>37</sup> Again, before resolution of the issue, employers are prohibited from taking any adverse actions against the employee.<sup>38</sup> The failure to contest a negative finding within eight days, or an unsuccessful attempt to resolve the tentative nonconfirmation, causes a final nonconfirmation to be sent to the employer with the same effect as one from the SSA.<sup>39</sup> A match at any point, in either process, results in a confirmation being sent to the employer, which authorizes continued employment of the non-citizen.

There are three typical reasons E-Verify may not match a prospective employee to information in the databases (commonly referred to as a mismatch).<sup>40</sup> The most likely reason, which occurs in between 3.5% and 5% of all queries, is that the individual is not authorized to work in the United States or chooses not to contest the tentative nonconfirmation.<sup>41</sup> The program was designed and instituted to detect the former, while the latter may be a cause for concern if the person was actually authorized to work. Otherwise, a mis-

30. *Id.* A positive side effect of this process is the improved accuracy of SSA’s records.

31. *Id.*

32. *Id.*

33. *Id.* at 9. If the entity continues to employ an unauthorized worker, it is subject to a rebuttable presumption that it has “knowingly employed an unauthorized alien” in violation of 8 U.S.C. § 1324a(a)(1)(A) (in statutory note § 403(a)(4)(C)(iii)).

34. Stana, *supra* note 5, at 7-9.

35. *Id.* at 7.

36. *Id.* at 8-9.

37. *Id.*

38. *Id.* at 9.

39. *Id.* at 8-9.

40. Scharfen, *supra* note 24, at 3-4.

41. *Id.* at 3 (indicating approximately 5% in 2007); U.S. Citizenship and Immigration Services, E-Verify Statistics (Apr. 23, 2009), [hereinafter E-Verify Statistics], <http://www.dhs.gov> (follow “Program Highlights” hyperlink; then follow “E-Verify Statistics” hyperlink) (indicating 3.5% for the period of April through June 2008).

match is statistically most likely to occur because either the individual changed names or citizenship status without notifying the SSA or the employer input the employee's information incorrectly.<sup>42</sup> Overall, 96.1% of queries are authorized within twenty-four hours, and only 0.37% of individuals who are ultimately determined to be work-authorized receive a tentative nonconfirmation.<sup>43</sup>

The E-Verify program has been undergoing improvements over the last year to answer concerns raised by some commentators. The deficiencies in the program have been well documented by its opponents.<sup>44</sup> Major concerns include high tentative nonconfirmation rates for foreign-born U.S. citizens, identity and document fraud, and employer non-compliance with procedural safeguards.<sup>45</sup>

Another significant concern of many commentators is that potential widespread use of E-Verify could lead to employers not hiring individuals who "look like immigrants" but are actually authorized workers either because of an increased possibility that extra effort will be required to verify the individual's employment status or due to worries about prosecution and civil penalties.<sup>46</sup> The new Missouri law and E-Verify both partially answer that concern by requiring *every* new employee to be processed through the system. Thus, an equal burden is placed on the employer regardless of how the job applicant looks. The DHS is also increasing the amount of training it gives employers and continuing to provide instruction on its website and through distributed information.<sup>47</sup>

DHS is also seeking to improve the E-Verify process by increasing the percentage of automatic matches.<sup>48</sup> One change is the addition of naturalization data to the instantaneous verification databases.<sup>49</sup> "Naturalized citizens who have not . . . updated their records with [SSA] are the largest category" of individuals facing an initial mismatch.<sup>50</sup> With the updates to the program, the instantaneous check will now include this data. In addition, two information-sharing programs have been implemented by DHS to increase automatic verifications. The first update will provide real-time data to DHS from the

42. Scharfen, *supra* note 24, at 3-4.

43. E-Verify Statistics, *supra* note 41. 96.1% of all queries result in automatic determinations of work authorization. *Id.*

44. See NATIONAL IMMIGRATION LAW CENTER, BASIC PILOT/E-VERIFY NOT A MAGIC BULLET (2008), [http://www.npr.org/ombudsman/everifynomagicbullet\\_2008-01-04.pdf](http://www.npr.org/ombudsman/everifynomagicbullet_2008-01-04.pdf) [hereinafter BASIC PILOT]; Stana, *supra* note 5, at 7.

45. WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION 149-64 (2007), <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

46. BASIC PILOT, *supra* note 44, at 2.

47. Scharfen, *supra* note 24, at 5-6.

48. Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Enhancements to E-Verify Program (May 5, 2008), available at <http://www.uscis.gov/files/article/everify050508.pdf>.

49. *Id.*

50. *Id.*

Integrated Border Inspection System for newly arrived, authorized workers; second, the USCIS and SSA soon will establish a similar real-time system.<sup>51</sup> These systems prevent lag between legal admission into the country and data entry from causing a tentative nonconfirmation.<sup>52</sup> Finally, U.S. passport information will soon be included in the E-Verify search to help verify workers who are born abroad to U.S. citizen parents and children who became U.S. citizens due to their parents' naturalization.<sup>53</sup> These initiatives are intended to increase the percentage of instant verifications above the current level of 96.1% (those confirmed within twenty-four hours).<sup>54</sup> These changes are sought to ensure the accuracy of the searched databases and to reduce erroneous nonconfirmations.

Another concern is that E-Verify does not do enough to prevent document fraud. To that end, another improvement is a photo screening tool, which is part of the web interface.<sup>55</sup> This is the first phase of a biometric verification system that will eventually complement E-Verify; the initial database contains nearly fifteen million images stored in DHS databases.<sup>56</sup> When an employer enters information on a document for which a picture exists, it will show up on the computer screen. This addition provides employers with a way to verify the authenticity of the documents.

Depending on one's viewpoint, E-Verify is a promising, developing program that ensures that law-abiding employers remain in compliance with the law or a costly vehicle for racial discrimination that does not help the problem of the millions of unauthorized workers currently within our borders. Regardless of an individual's opinion of the program, it figures largely in the future of American business.<sup>57</sup> Almost 100,000 employers have registered for E-Verify, and an additional 4,000 employers sign up each month.<sup>58</sup> The DHS has indicated a desire to require enrollment of every business in the country at some point,<sup>59</sup> and many states have already begun this process.

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51. Scharfen, *supra* note 24, at 4.

52. *Id.*

53. *Id.* at 4-5.

54. E-Verify Statistics, *supra* note 41.

55. U.S. Citizenship and Immigration Services, E-Verify Program Highlights (May 1, 2009), <http://www.dhs.gov> (follow "Program Highlights" hyperlink).

56. *Id.* The pictures are those from the Employment Authorization Document or Permanent Resident Card ("Green Card"). *Id.*

57. *See* Scharfen, *supra* note 24, at 1.

58. *Id.*

59. *Id.*



### C. *Missouri Law*

It is estimated that approximately 65,000 unauthorized workers reside in Missouri.<sup>60</sup> In his 2008 State of the State Address, Governor Matt Blunt described illegal immigration as a “travesty of the rule of law” and called on the legislature to “[t]urn [off] the magnets” that attract unauthorized workers to Missouri and to “require stronger employment verification[] to punish those who knowingly hire illegals.”<sup>61</sup> Against this backdrop, a number of bills were introduced during the 2008 legislative session dealing with various immigration issues. Ultimately, one omnibus bill emerged from a conference committee and was sent to the governor.<sup>62</sup> As a whole, the bill enacted twenty-four new sections covering all areas of state government and regulation.<sup>63</sup>

#### 1. Operative Provisions

Missouri Revised Statutes sections 285.525-285.540 are the operative provisions pertaining to Missouri employers that resulted from the omnibus bill.<sup>64</sup> These sections require some Missouri businesses to enroll in the E-Verify program and allow the revocation of the business license of any entity that knowingly employs an unauthorized worker. Governor Blunt signed the legislation on July 7, 2008, noting that, in the face of Washington’s failure to curb illegal immigration, the Missouri legislature “safeguard[ed] the tax dollars of hard-working Missourians by requiring verification of the legal employment status of [workers].”<sup>65</sup>

Specifically, section 285.530.1 forbids any Missouri employer from “knowingly employ[ing], hir[ing] for employment, or continu[ing] to employ an unauthorized alien to perform work within the State of Missouri.”<sup>66</sup> The second part of the section goes further and demands the use of a “federal work authorization program” with respect to all new employees hired by any business entity that receives a state contract or grant exceeding five thousand dollars or any “entity receiving a state-administered or subsidized tax credit,

60. Federation for American Immigration Reform, Extended Immigration Data for Missouri, [http://www.fairus.org/site/PageServer?pagename=research\\_research3a34](http://www.fairus.org/site/PageServer?pagename=research_research3a34) (last visited Nov. 20, 2008).

61. Governor Matt Blunt, State of the State Address, (Jan. 15, 2008), in MO. H.R. J., 2008 Reg. Sess. No. 4.

62. See H.R. 1549, 1771, 1395 & 2366, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

63. *Id.*

64. The sections are similar to those proposed in H.R. 1381, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

65. Press Release, Governor Matt Blunt, Gov. Blunt Signs Legislation Protecting Missouri Families, Tax Dollars from Illegal Immigration (July 8, 2008), available at 2008 WLNR 12843056.

66. MO. REV. STAT. § 285.530.1.

tax abatement, or loan from the state.”<sup>67</sup> The statute allocates this extra burden on companies as a condition for the receipt of a state contract or benefit.<sup>68</sup>

The federal government currently employs only one employment authorization program: E-Verify.<sup>69</sup> Thus, for practical purposes, Missouri law requires the specified employers to enroll in E-Verify or any program enacted in its place. After enrolling in the program, the entity must use it to verify the employment status of every employee hired after the date of enrollment.<sup>70</sup> The employer must also retain copies of the verification provided by the federal government for its records.<sup>71</sup> Those entities receiving a state contract or benefit must also provide affidavits to the attorney general’s office confirming enrollment in the program and attesting to not knowingly employing any unauthorized aliens.<sup>72</sup>

While these requirements may seem burdensome to the employer, there are benefits provided to the businesses. Any entity that enrolls in E-Verify and follows the procedures laid out in the statute has an affirmative defense against an alleged violation of section 285.530(1), which prohibits knowingly employing an unauthorized worker.<sup>73</sup> This defense provides a large incentive for all employers in the state to enroll in the program. The legislature also added a protection for employers that use subcontractors. The entity that contracts with a direct subcontractor is protected from liability as long as its contract “affirmatively states that the direct subcontractor is not knowingly in violation of subsection [one].”<sup>74</sup>

## 2. Enforcement and Penalties

The Missouri statutes’ prohibitions against hiring or employing unauthorized workers apply to every business entity operating within the state.<sup>75</sup> However, separate penalty provisions apply to an employer that “knowingly” employs an unauthorized alien generally and one that does so in relation to a state contract, tax credit, loan, etc. Though the penalties are different, the enforcement scheme is the same.

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67. *Id.* § 285.530.2. Section 285.530.3 also requires all public employers to use a “federal work authorization program.”

68. *Id.* § 285.530.2.

69. Stana, *supra* note 5, at 6 n.10.

70. MO. REV. STAT. § 285.530.4.

71. *Id.*

72. *Id.* § 285.530.2.

73. *Id.* § 285.530.4.

74. *Id.* § 285.530.5.

75. *Id.* § 285.530.1. The term “business entity” extends to nearly every organization that employs an individual for any reason. *Id.* § 285.525.1. The only exception to coverage is for individuals who are self-employed and have no employees or for entities that utilize “direct sellers.” *Id.*

The full responsibility of enforcement is given to the Office of the Attorney General.<sup>76</sup> Enforcement actions are initiated by way of a signed, written complaint submitted to the attorney general alleging violations “by any state official, business entity, or state resident.”<sup>77</sup> If substantiated, the attorney general submits a request to the business seeking its documentation of the worker’s status.<sup>78</sup> Once received, the information is transmitted to the federal government for verification.<sup>79</sup> Upon a reply, written notice of the result is provided to the business.<sup>80</sup> The attorney general then acts according to the response given by the federal work authorization program.<sup>81</sup> No state official may make any “independent determination of any alien’s legal status without verification from the federal government.”<sup>82</sup>

A determination by E-Verify that the worker is in fact unauthorized will result in a civil action being initiated by the state against the offending employer in Cole County (the site of Jefferson City – the state capitol).<sup>83</sup> Any employer who had previously enrolled in the E-Verify program will have the benefit of a rebuttable presumption that it did not knowingly employ an unauthorized worker.<sup>84</sup>

If the court finds that the employer did not knowingly employ an unauthorized worker, but the worker is in fact unauthorized, the statute gives the employer fifteen days to correct the situation.<sup>85</sup> The statute provides a list of requirements to remedy a violation of the statute.<sup>86</sup> In particular, the employ-

76. *Id.* § 285.535.1.

77. *Id.* § 285.535.2. The language of the statute only requires the complaint to include information regarding the alleged violator and the alleged violation. *Id.* The following subsections make it clear the violation at issue is that the entity has knowingly employed an unauthorized worker. *See id.* §§ 285.535.5(1)-(2). It is unclear what effect an alleged violation of the requirement to employ the federal work authorization program would have under the statute. However, section 285.530.2 requires the use of an affidavit affirming enrollment and participation in the program. Thus, failing to use the program, or lying about using it, would likely result in a violation of the condition for the contract.

78. *Id.* § 285.535.3. If the business fails to comply within fifteen days it will have its business license, permit, or exemption revoked by the applicable municipal or county governing body. *Id.*

79. *Id.* § 285.4. Presumably the attorney general’s office will use the E-Verify system, but, as noted, the regulations have not yet been issued.

80. *Id.* § 285.535.4.

81. *Id.* §§ 285.535.4(1)-(3). If the results are inconclusive, the attorney general may not take any action until a decision has been reached by the Department of Homeland Security. *Id.* § 285.535.4(3).

82. *Id.* § 285.535.4(3).

83. *Id.* § 285.535.5(2). Obviously a finding that the worker is authorized resolves the complaint. *Id.* § 285.535.4(1).

84. *Id.* § 285.535.5(1).

85. *Id.* § 285.535.5(2)(a).

86. *See id.* §§ 285.535.6(1)-(2).

er must either fire the offending employee or go through a secondary verification allowed by the federal authorization program.<sup>87</sup> Within fifteen days, the employer must also submit a sworn affidavit to the attorney general that the violation has ended, a description of measures taken to end the violation, and contact information for the unauthorized worker.<sup>88</sup>

Other penalties exist if the violating entity is found guilty. A first-time offender loses its business license for fourteen days and must take the corrective measures laid out in section 285.535.6, which are discussed in the previous paragraph.<sup>89</sup> In addition, if the entity is not already required to enroll in E-Verify, it will now be required to do so.<sup>90</sup> Subsequent violations have significantly increased penalties. A second violation of knowingly employing an unauthorized worker results in a one-year suspension of the business's permit or license;<sup>91</sup> a third results in a *permanent* suspension.<sup>92</sup>

On top of the penalties generally available, the statute allows the imposition of additional penalties on violating business entities that receive a benefit from the state in the form of contracts, loans, or receipt of tax credits or other advantages.<sup>93</sup> The first time such a business knowingly employs an unauthorized worker, the state is able to terminate any existing contract and suspend the entity from doing business with, or receiving benefits from, the state for three years.<sup>94</sup> Further, the state may withhold up to 25% of the amount due to the offending employer.<sup>95</sup> Any subsequent violations carry the same possible penalties, but the business may also be *permanently* barred from receiving the benefit from the state.<sup>96</sup>

For fiscal year 2008, the state had contracts with companies ranging from janitorial services to technology suppliers – valued at more than \$6 bil-

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87. *Id.* §§ 285.535.6(1)(a)-(b). See *supra* Section II(B).

88. *Id.* § 285.535.6(2)(a).

89. *Id.* § 285.535.5(2)(b).

90. *Id.* § 285.535.6(2)(b).

91. *Id.* § 285.535.8.

92. *Id.* In the sections discussing enforcement, the statute refers to unauthorized workers by the singular terms “alien” or “employee.” See *id.* §§ 535.5-.6. It is unclear from the language of the statute what the effect is when a complaint alleges that an employer has multiple unauthorized workers. It appears open to interpretation by the courts whether the violations are assessed one per unauthorized worker, one per complaint regardless of the number of workers, or even one per enforcement action brought by the attorney general. Many of the specifics of the enforcement may be filled in by the attorney general's office through its rulemaking authority under the statute. See *id.* § 285.540. Those rules have not yet been issued.

93. *Id.* §§ 285.535.9(1)-(2).

94. *Id.* § 285.535.9(1).

95. *Id.*

96. *Id.* § 285.535.9(2).

lion.<sup>97</sup> Further, the 2007 application year for tax credits saw twenty-six different credits available that resulted in awards of nearly \$250 million in benefits.<sup>98</sup> Though the law does not require every private employer to enroll in E-Verify, any entity that benefits from state contracts or tax incentives and does not enroll in the program risks the loss of significant financial benefits. Even more, the harsh penalties that will be levied on an employer found guilty of knowingly employing an unauthorized worker should lead all employers to strongly consider enrolling in the program. Indeed, the affirmative defense provided by the statute significantly decreases the risk of prosecution and conviction under the statute.

### III. RECENT DEVELOPMENTS

Many states have enacted similar laws requiring use of the E-Verify program by some or all employers.<sup>99</sup> Legal challenges to these laws have had

97. See Missouri Accountability Portal, Expenditures: Payments by Category, <http://mapyourtaxes.mo.gov/MAP/Expenditures/Categories/Default.aspx> (last visited Nov. 11, 2008).

98. See Missouri Accountability Portal, Expenditures: Tax Credit Category, <http://mapyourtaxes.mo.gov/MAP/TaxCredits/Categories/Default.aspx?year=2008> (last visited Nov. 11, 2008).

99. See *supra* note 6 and accompanying text. The federal executive branch has also made two attempts to decrease the employment of unauthorized workers. The first is an Executive Order requiring all departments and agencies to condition contracts on the contractor's use of E-Verify for all new hires during the contract term and for all "persons assigned by the contractor to work . . . on the federal contract." Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 6, 2008) (amending Exec. Order No. 12,989). The second avenue allows greater enforcement of IRCA through a DHS regulation that assigns a presumption of an IRCA violation to any employer that receives a no-match letter from the SSA and fails to take action to correct the problem or follow the safe-harbor procedures. See *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis*, 73 Fed. Reg. 15,944-01, 15,947 (Mar. 26, 2008) [hereinafter *Safe-Harbor Procedures*] (codified at 8 C.F.R. pt. 274a). No-Match Letters are sent by the SSA to employers when the information provided on the employee's W-2 does not match the SSA's records. Social Security Online, Employer Filing Instructions & Information, SSA "No-Match" Letters, <http://www.ssa.gov/employer/nomatchnotices.htm> (last visited Nov. 2, 2008). The regulation provides that constructive knowledge under IRCA may be inferred "depending on the . . . relevant circumstances." 8 C.F.R. § 274a.1(l)(1) (2008). A given example of relevant circumstances includes a failure to "take reasonable steps after receiving information" such as when the employer receives notice from SSA or DHS regarding a mismatch. *Id.* §§ 274a.1(l)(1)(iii)(A)-(C). The regulation also provides safe-harbor procedures for an employer who receives a letter from either department. *Id.* §§ 274a.1(l)(2)(i)-(iii). Shortly after finalization of the rule, a federal court, in *American Federation of Labor v. Chertoff*, issued a preliminary injunction against enforcement of the provisions. 552 F. Supp. 2d 999, 1006 (N.D. Cal. 2007). Subsequent to the injunction, the government appealed to the

mixed results, but the only federal court of appeals to consider the issue determined states have power to regulate licensing of businesses as a sanction for violations of state immigration laws.<sup>100</sup>

The common theme running through legal challenges to laws like Missouri's is the argument that the statute is preempted. There are three layers of preemption that may be argued: (1) the field of immigration is exclusively within the province of the federal government (field preemption); (2) the IRCA's express preemption section prevents the enactment of the state or local law; and (3) the law is invalid due to conflict, or implied, preemption because it "stands as an obstacle to accomplishing the full purposes and objectives of the overriding federal . . . law."<sup>101</sup> This Section discusses how various federal courts have addressed these three issues.

### A. *The Legal Arizona Workers Act*

The state of Arizona enacted the Legal Arizona Workers Act, which became effective September 19, 2007.<sup>102</sup> It requires *every* employer in the state to verify the employment eligibility of each new hire after December 31, 2007, "through the [E]-[V]erify program."<sup>103</sup> Similar to the law Missouri enacted, the Arizona act provides sanctions including probation and revocation of the offending employer's license to operate a business in the state.<sup>104</sup> It also provides a rebuttable presumption that "the employer did not knowingly employ an unauthorized alien" in return for enrollment in E-Verify and compliance with the program.<sup>105</sup>

In *Arizona Contractors Ass'n v. Candelaria*, a number of Arizona trade groups, business groups, employers, and immigration advocacy organizations

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Ninth Circuit and concurrently stayed the proceedings "pending new administrative rulemaking." *Chertoff*, Case No. 3:07cv04472. The DHS re-issued the rule without substantive change during a stay by the district court that allowed for new administrative rulemaking. Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 8 C.F.R. pt. 274a (2008); Press Release, Dep't. of Homeland Sec., DHS Issues Supplemental Final Rule with Guidance for Employers Who Receive Social Security 'No-Match' Letters (Oct. 23, 2008), available at [http://www.dhs.gov/xnews/releases/pr\\_1224771455239.shtm](http://www.dhs.gov/xnews/releases/pr_1224771455239.shtm). Though final, this rule will likely be the source of continued litigation. Regardless, employers should take note that an SSA No-Match letter could serve as evidence of an IRCA violation.

100. See *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 979-80 (9th Cir. 2008).

101. See BLACK'S LAW DICTIONARY 1177 (6th ed. 1991) (describing "obstacle preemption" in preemption definition).

102. Legal Arizona Workers Act, 2007 Ariz. Legis. Serv. ch. 279, § 2 (West) (codified at ARIZ. REV. STAT. ANN. §§ 23-211 to -214).

103. ARIZ. REV. STAT. ANN. § 23-214.A.

104. *Id.* § 23-212.F.1 to .2 f.

105. *Id.* § 23-212.J.

challenged the state's power to regulate immigration through its control of business licensing.<sup>106</sup> The groups specifically alleged that the statute was preempted by the IRCA, violated employer's due process rights, and violated the commerce clause.<sup>107</sup> After a hearing, the trial court rejected all three challenges.<sup>108</sup>

In its decision in *Chicanos Por La Causa v. Napolitano*, the Court of Appeals for the Ninth Circuit affirmed *Candelaria*.<sup>109</sup> The court was primarily concerned with the preemption argument advanced by the plaintiffs.<sup>110</sup> The court considered both express preemption under section 1324a(h)(2) of the IRCA and implied preemption.<sup>111</sup> As discussed above, the IRCA's express preemption provision prohibits states or localities from "imposing civil or criminal sanctions (other than through licensing and similar laws)" on employers who knowingly employ unauthorized workers.<sup>112</sup> The plaintiff groups contended that though Arizona's law was a licensing law on its face – which would gain it protection under the savings clause – it was actually an independent enforcement system in violation of the IRCA.<sup>113</sup>

Instead, the court characterized the subject matter of the statute as relating to employment law rather than immigration.<sup>114</sup> This resulted in a presumption against preemption because employment is a traditional area of state concern, as the Supreme Court of the United States had ruled previously in *DeCanas v. Bica*.<sup>115</sup> The court determined that states were prohibited by the U.S. Constitution from doing one thing: making determinations of an

106. 534 F. Supp. 2d 1036, 1041 (D. Ariz. 2008). A previous suit had been filed, but the trial court found the plaintiff organizations lacked standing and had sued the wrong parties. See *Ariz. Contractors Ass'n, Inc. v. Napolitano*, 526 F. Supp. 2d 968, 985 (D. Ariz. 2007). That suit was refiled and combined with *Candelaria*. See *Candelaria*, 534 F. Supp. 2d at 1040-41.

107. See *Napolitano*, 526 F. Supp. 2d at 976-77.

108. *Candelaria*, 534 F. Supp. 2d at 1045-61.

109. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2008).

110. *Id.* at 863-67. The court also affirmed the ruling that there was no procedural due process violation by finding that an interpretation should be understood to allow an employer to present evidence rebutting any presumption of violating the statute. *Id.* at 867-69.

111. *Id.* at 863.

112. *Id.* at 864 (citing 8 U.S.C. § 1324a(h)(2)). See *supra* notes 17-19 and accompanying text.

113. *Id.* at 864.

114. *Id.* at 864-66.

115. *Id.* (citing *DeCanas v. Bica*, 424 U.S. 351 (1976)). The *Chicanos* court recognized *DeCanas* as the main support for the finding that the "authority to regulate the employment of unauthorized workers is 'within the mainstream' of the state's police power." *Id.* (citing *DeCanas*, 424 U.S. at 356, 365). See also *infra* notes 165-66 and accompanying text.

individual's legal status.<sup>116</sup> Arizona's law, like Missouri's, expressly relies on the federal resolution of work status and prohibits state officials from independently resolving the issue.<sup>117</sup> Thus, Arizona was not over-stepping its bounds. The court examined the specific statute at issue, finding that neither the plain language of IRCA's savings clause nor the congressional intent to prevent state determinations of immigration status were in express conflict with Arizona's statute.<sup>118</sup>

After reaching this decision, the court considered the plaintiff's second contention – that mandatory use of E-Verify was impliedly preempted by federal law.<sup>119</sup> The court rejected this contention because nothing in the state statute “[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>120</sup> Therefore, according to the court, Congress had not barred states from making E-Verify mandatory.<sup>121</sup> On the contrary, the court contended that evidence suggested the federal government encourages expanded use of the program.<sup>122</sup>

*Chicanos* is the first and only ruling by a federal court of appeals on the ability of states to regulate the employment of unauthorized workers in light of the various preemption issues. Lower court decisions do exist to the contrary.<sup>123</sup> One of the most recent cases examines a law passed by Oklahoma with a different scheme of enforcement than the Arizona and Missouri laws.

### B. *The Oklahoma Taxpayer and Citizen Protection Act of 2007*

The Oklahoma Taxpayer and Citizen Protection Act of 2007<sup>124</sup> was passed due to the Oklahoma legislature's belief that “illegal immigration is causing economic hardship and lawlessness in [Oklahoma].”<sup>125</sup> The relevant statutory section, similar to Missouri's, requires all contractors that wish to do business with the state to enroll in E-Verify.<sup>126</sup> However, unlike the Missouri and Arizona laws, the accompanying enforcement mechanism for failure to

116. *Id.* at 864-66.

117. *See* ARIZ. REV. STAT. ANN. § 23-212.B; MO. REV. STAT. § 285.535.13.

118. *Chicanos*, 558 F.3d at 864-66.

119. *Id.* at 866-67.

120. *Id.* at 866 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

121. *Id.* at 867.

122. *Id.*

123. *See also* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484, 518, 513 (M.D. Pa. 2007) (finding city ordinance regulating immigration to be preempted by federal law). At least one municipal ordinance has been permanently enjoined that required property owners to verify a renter's residency status. *See Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 851, 853 (N.D. Tex. 2008) (noting permanent injunction issued previously by the court).

124. 2007 Okla. Sess. Laws ch. 112 (West) (codified as amended in scattered sections of OKLA. STAT. tit. 21-22, 25, 56, 68, 70, 74).

125. *Id.* at § 2.

126. OKLA. STAT. ANN. tit. 25, § 1313.2.



comply with this requirement is incorporated into state tax law.<sup>127</sup> Any state contractor who fails to provide documentation evidencing its compliance with the requirement to enroll in E-Verify shall have income tax withheld on the contract at the maximum marginal tax rate provided by Oklahoma statute.<sup>128</sup> In addition, a separate, private enforcement mechanism provides for the creation of a new tort: wrongful termination of a legal worker.<sup>129</sup>

In *Chamber of Commerce of the United States v. Henry*, a number of business groups sued in federal court contending that the act was preempted by the IRCA and sought a preliminary injunction.<sup>130</sup> The district court established that Congress had the ability to preempt state action on “immigration matters” and had chosen to do so in the IRCA.<sup>131</sup> Turning to the statute at hand, the court broadly applied the express preemption language in the IRCA and granted the preliminary injunction as to both the requirement to use a federal employee verification program and the taxing provision that would be the primary enforcement tool.<sup>132</sup> The court specifically found that the plaintiffs were likely to prove that the taxing statute was a weakly disguised civil sanction that would be prohibited by the IRCA.<sup>133</sup> In an even broader reading, the court invalidated the state’s required enrollment in E-Verify in connection with state contracts and the civil discrimination tort because the “penalties are dependent on failing to follow the State’s regime for regulating the employment of illegal aliens.”<sup>134</sup> The decision has been appealed and is pending before the Court of Appeals for the Tenth Circuit.<sup>135</sup> Regardless of the outcome of this case, there is Missouri precedent that supports the Ninth Circuit’s position.

### C. Gray v. City of Valley Park, Missouri

The only direct indication of how Missouri courts might examine the new statute comes from a decision challenging a city ordinance in Valley Park, Missouri.<sup>136</sup> There, the City of Valley Park enacted a provision penaliz-

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127. See OKLA. STAT. ANN. tit. 68, § 2385.32.

128. *Id.* § 2385.32(A).

129. See *id.* at tit. 25, § 1313.C.1. That statute allows for a civil tort based on discrimination for discharging a legal worker while knowingly employing an unauthorized employee. *Id.*

130. No. CIV-08-109-C, 2008 WL 2329164, at \*1 (W.D. Okla. June 4, 2008).

131. *Id.* at \*5-7 (noting the express preemption of §1324a(h)(2) discussed *supra* note 17).

132. *Id.* at \*7-8.

133. *Id.*

134. *Id.*

135. *Henry*, 2008 WL 2329164, *appeal docketed*, No. 08-6128 (8th Cir. June 20, 2008).

136. See *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).

ing employers for hiring or employing any unlawful worker.<sup>137</sup> The ordinance, as amended,<sup>138</sup> provides for complaints to be filed with the city, followed by a demand for documentation from the employer within three days.<sup>139</sup> That information is then to be verified through E-Verify and will guide the city's subsequent actions.<sup>140</sup> No action can be taken by the city until a determination is made by the system, and only a final nonconfirmation triggers the city's three-day corrective period.<sup>141</sup> The only sanctions provided for in the ordinance are the suspension of city business licenses<sup>142</sup> and mandatory enrollment in E-Verify after multiple violations.<sup>143</sup> Also, an affirmative defense is provided for those employers that use E-Verify.<sup>144</sup> In general, the ordinance is very similar to the later enacted state statute.

Suit was filed in United States District Court for the Eastern District of Missouri, and the key issue was whether the city's amended ordinance was preempted by IRCA.<sup>145</sup> Judge Webber determined that the ordinance was related to employment, an issue under the traditional state police powers, rather than immigration.<sup>146</sup> This critical conclusion led to a presumption against preemption.<sup>147</sup>

The court examined all three kinds of preemption noted in the previous cases.<sup>148</sup> The court began by discussing express preemption. Though it found the language of the IRCA to be unambiguous in allowing the type of

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137. *Reynolds v. City of Valley Park*, 2007 WL 857320, at Findings of Fact, ¶ 7 (Mo. Cir.). A state court issued an order voiding the ordinance on state law grounds. *Id.* at Conclusion of Law, ¶ 13. After presumably seeking legal advice, the city amended its ordinances, rendering the state court injunction moot on appeal. *Reynolds v. City of Valley Park*, 254 S.W.3d 264, 266 (Mo. App. E.D. 2008).

138. The original ordinance was enacted in July 2006, and the *Reynolds* suit was filed shortly thereafter. *Id.* at Findings of Fact, ¶¶ 1, 3. In September 2006, after presumably seeking legal advice, the city amended the ordinance. *Reynolds v. City of Valley Park*, 254 S.W.3d 264, 266 (Mo. App. E.D. 2008). That amendment mooted the city's appeal of the injunctive relief in *Reynolds*. *Id.* The ordinance was amended again in early 2007, and the *Gray* suit was subsequently filed. *Gray*, 2008 WL 294294 at \*1, \*5.

139. *Gray*, 2008 WL 294294 at \*16.

140. *Id.* at \*16-17.

141. *Id.* at \*9, 16-17.

142. *Id.* at \*9-10.

143. *Id.* at \*17.

144. *Id.*

145. *Id.* at \*8-19.

146. *Id.* at \*8. This contention is the same one relied on by the Ninth Circuit in *Chicanos* nine months later. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 983-84 (9th Cir. 2009).

147. *Gray*, 2008 WL 294294 at \*8.

148. *Id.* at \*8-19. The court noted a distinction in implied preemption between field and conflict preemption. *Id.* at \*8. *See also id.* at \*8 n.12 (discussing two ways to classify the categories of preemption). Field preemption has been discussed above as a basis of preemption in and of itself. *See supra* note 101 and accompanying text.

ordinance Valley Park enacted, it nonetheless looked to the legislative history for more support.<sup>149</sup> The court focused on the language in the congressional record that states “[the penalties] are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions.”<sup>150</sup> This language clearly supported the initial reading of the IRCA’s savings clause that leads to a presumption against preemption. Next, the court found that the IRCA does not show Congress intended to preempt the entire field of immigration law.<sup>151</sup> Like the previous cases, the Eastern District relied on *DeCanas*, coupled with the express savings clause of IRCA, to support its conclusion.<sup>152</sup>

Most of the court’s effort focused on explaining why there was no conflict between IRCA and the city’s ordinance, which would also result in preemption. The court defined conflict preemption as arising when either “it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>153</sup> First, the court determined that dual compliance was not impossible because the ordinance relies on E-Verify for all determinations of status.<sup>154</sup> The ordinance was also found not to impede the “purposes and objectives” because individuals in the federal government have actively promoted the expanded use of the program and the local ordinance actually expands the “enforcement of the federal law.”<sup>155</sup> On these bases, the court had no difficulty concluding the law was not barred by the IRCA; indeed, Judge Webber found the ordinance in Valley Park supportive of the IRCA’s purposes and found that it enhanced, rather than impeded, enforcement of the federal law.

#### IV. DISCUSSION

*“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”*<sup>156</sup>

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149. *Gray*, 2008 WL 294294 at \*11-12.

150. *Id.* (citing H.R. Rep. No. 99-682(I), at 58 (1986), as reprinted in 1986 U.S.C.A.N. 5649, 5662) (also indicating support for “fitness to do business laws”).

151. *Id.* at \*13.

152. *Id.*

153. *Id.* (quoting *Freightliner Corp. v. Myrick*, 513 U.S. 280, 287 (1995)).

154. *Id.* at \*16-17.

155. *Id.* at \*13, \*19.

156. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Illegal immigration presents many problems, some of which may best be addressed on a national level. Yet the absence of federal action has encouraged states and cities to take novel approaches, individually working to resolve a common problem.<sup>157</sup> State action has focused on areas such as public benefits, state-issued identification, law enforcement, and employment.<sup>158</sup> During 2007 and 2008 alone, nearly 3,000 immigration-related bills were proposed in state legislatures across the country.<sup>159</sup> Over that same period, approximately 425 of those bills were enacted into law.<sup>160</sup> Those that passed likely have included effective, ineffective, and even counterproductive legislation. Regardless, sub-national experimentation will help resolve the varied concerns of local constituencies and should be encouraged by Congress and the courts.<sup>161</sup> In light of the challenges presented to localized immigration regulation, the decisions in *Chicanos* and *City of Valley Park* addressed the preemption issue in three layers – federal exclusivity, express preemption, and implied preemption.

The idea of federal exclusivity in the area of immigration is an accurate but limited notion. On one hand, the Constitution,<sup>162</sup> the IRCA, and the state laws discussed above provide for federal determinations of citizenship and naturalization status of individuals, and this “is unquestionably exclusively a federal power.”<sup>163</sup> On the other hand, there is no language of exclusivity in the Constitution preventing any regulation relating to unauthorized aliens.<sup>164</sup> This view has been sustained by the Supreme Court in *DeCanas*, where the Court dismissed any idea that laws relating to aliens are “per se pre-empted” by the Constitution.<sup>165</sup> In that case, the Court upheld a California law that barred the employment of unauthorized workers and held that “[s]tates possess broad authority under their police powers to regulate the employment

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157. At least one commentator contends that the reason for state and local action is that those governments bear much of the cost of accommodating illegal aliens. See Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1323, 1324 (2008).

158. NATIONAL CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT: STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION 1 (2008), <http://www.ncsl.org/print/immig/immigreportjuly2008.pdf>.

159. *Id.*

160. *Id.*

161. See Rodriguez, *supra* note 10 (arguing for an expanded role for local and state action on immigration).

162. U.S. CONST. art. I, § 8, cl. 4.

163. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

164. The grant of power in the Constitution is for a “rule of naturalization,” U.S. CONST. art. I, § 8, cl. 4, not something more expansive such as the regulation of aliens. It would take an interpretation similar to that given to the Dormant Commerce Clause to find an exclusive grant of the power to regulate aliens where none is expressly provided.

165. *DeCanas*, 424 U.S. at 355.

relationship.”<sup>166</sup> Missouri’s law regulates the employment relationship and relies entirely on federal determinations of citizenship. Nothing in the scheme raises a constitutional bar to its enforcement based on federal field preemption.

The Missouri statute also falls within the narrow savings clause of the IRCA’s express preemption provision.<sup>167</sup> The penalties only provide for the suspension of business licenses or permits, and no fines or criminal liability can be assessed.<sup>168</sup> The Missouri law falls directly into the wording of the preemption exemption provided by Congress. Even more, the legislative history cited in *City of Valley Park* further supports Congress’s intention to permit enforcement schemes like the one Missouri has chosen to employ. The committee report states that IRCA’s preemption clause is not “intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in [IRCA].”<sup>169</sup>

Finally, there is no evidence that Missouri’s statute would be “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” so that conflict preemption would void the act.<sup>170</sup> In fact, all evidence is to the contrary. The DHS is taking steps towards requiring use of E-Verify for all employers in the United States.<sup>171</sup> In Congress, legislation has been introduced to expand the program,<sup>172</sup> and Bush Administration officials testified about the system’s capability to handle the required number of queries.<sup>173</sup> The fact Congress has not yet chosen to require all employers to

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166. *Id.* at 356.

167. *See* 8 U.S.C. § 1324a(h)(2) (2006).

168. *See* MO. REV. STAT. § 235.535. A sort of penalty is assigned to violations by state contractors, however, the language of the statute makes the requirement and penalty a condition in the contract. *See id.* § 235.530.2.

169. *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*11 (E.D. Mo. Jan. 31, 2008) (citing H.R. Rep. 99-682(I), at 58 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662).

170. *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2008) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). A recent development on this front relates to a state that chose to take the opposite approach of Missouri and Arizona. *See U.S. v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009). Illinois passed a law that would prohibit entities in its state from enrolling in the E-Verify program, and this law was recently struck down because the court found that preventing employers from enrolling was “an obstacle to accomplishment” of Congress’s objectives in developing the E-Verify system. *Id.* at \*2.

171. *See supra* note 59 and accompanying text; *Chicanos*, 558 F.3d at 867.

172. H.R. 6789, 110th Cong. § 2 (2008). It should be noted that it is unlikely that any legislation to make E-Verify mandatory will pass during the current legislative session.

173. Scharfen, *supra* note 24. *But cf.* Stana, *supra* note 5. Of course, continued expansion of the program will be largely dependent on the priorities of the Obama administration. However, there is evidence of support from new DHS Secretary Na-

enroll should have no effect on the ability of states to mandate use of the program. If Congress does not want to allow such statutes, it could pass legislation that would ban them. Further, these state experiments with mandatory enrollment have allowed the program to grow and adapt as it meets a gradually increasing burden, and the use has provided valuable information that has led to many of the recent improvements. Indeed, a preliminary-full rollout may have doomed the program due to significant initial shortcomings.

The approach taken by the Eastern District of Missouri and the Ninth Circuit represents a clear reading of the Constitution and the IRCA that allows states the limited ability to legislate in the area of employment of unauthorized workers. Approaches taken by Missouri, Arizona, and many other states provide employers with the confidence that the individuals they hire are authorized to work in the country. Further, incorporation of the E-Verify program serves as protection against prosecution for violations of the IRCA and other immigration laws.

## V. CONCLUSION

Though opinions as to the wisdom of laws like Missouri's vary, the strong likelihood is that electronic verification of worker authorization is here to stay. Every employer should examine the procedures currently being used in relation to the federal I-9 program, the receipt of Social Security No-Match Letters, and each should consider enrolling in E-Verify to take advantage of state and federal presumptions of compliance. Missouri's new law represents a shift that is taking place across the country in which state and municipal governments will hold employers accountable for ensuring that their employees are authorized to work. An employer's failure to be aware of these regulations could lead to a loss of its business license or the forfeiture of a portion of a state benefit. In light of risks associated with not enrolling in E-Verify, every employer should consider signing up. The benefits provided by the program far outweigh the potential costs. Immigration enforcement has entered an age where sub-national governments are no longer turning a blind eye to the employment of unauthorized workers and many state and local governments – including Missouri – are actively pursuing the offending employers in an effort to control a significant national concern.

MICHAEL B. BARNETT

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politano and President Obama. See Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Compliance Watch: Obama Administration, E-Verify, and State Laws*, IMMIGRATION AUTHORITY, Mar. 20, 2009, <http://www.ogletreedeakins.com/publications/index.cfm?Fuseaction=PubDetail&publicationid=712>.

