

PUBLICATION

Government Contractor E-Verify Requirements Again Upheld, Other Provisions Stricken

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Another federal appeals court has cleared a state's ability to require state government contractors to use the "E-Verify" system to electronically verify the employment eligibility of their workers. Various business interests challenged an Oklahoma law designed to reduce employment of unauthorized workers. The district court granted an injunction against all challenged aspects of the law. A divided appeals court reversed the district court concerning the "E-Verify" requirement for state government contractors but maintained the injunction against the other two provisions, finding them preempted by federal law. So far, all challenges against laws and executive orders requiring federal and state government contractors to use E-Verify have been unsuccessful. Other parts of the Oklahoma law were still enjoined, and the decision shows how complicated American law can be.

The case was *Chamber of Commerce of the United States of America v. Edmondson*, Nos. 08-6127 & 08-6128 (8th Cir., Feb. 2, 2010).

Two of the three judges found that federal law does not even impliedly preempt Oklahoma's requirement that state contractors use the "E-Verify" system to electronically verify the employment eligibility of their workers. This state requirement is similar to requirements enacted by many state and local governments as well as by the federal government through an executive order. This is in keeping with earlier appeals court decisions arising from challenges to an Arizona law and to the federal executive order. One judge dissented in the Oklahoma case, finding that a requirement to use E-Verify upsets the balance that Congress enacted in making the use of E-Verify voluntary for employers, but almost all courts have been ruling otherwise, and we do not expect the Supreme Court to take up the issue. The other two judges disagreed, for different reasons. One judge said that Oklahoma's requirement for federal contractors is in keeping with the federal scheme. The other judge based his decision on technical rules about "standing" to challenge a law.

Two appeals court judges found that federal law probably "impliedly" preempts Oklahoma's requirement that employers withhold taxes from payments to individual independent contractors who have not presented proof of their authorization to work. The two judges found that Congress intentionally excluded independent contractors from verification obligations, and Oklahoma's tax requirements on employers who did not verify independent contractors would impermissibly subject those employers to possible liability for unlawful discrimination. The third judge found that the federal Tax Injunction Act takes away federal courts' jurisdiction to hear challenges to this provision.

All three federal appeals court judges found that federal law probably "expressly" preempts Oklahoma's treatment as an unlawful employment practice any adverse employment actions against U.S. workers while retaining workers the employer knew or should have known were not authorized to work. Federal law expressly prohibits any state law "sanctions" for employment of unauthorized workers on top of the existing federal penalties for I-9 violations.

The judges designated their decision to be published, suggesting that the full court might not be willing to rehear the case. It seems unlikely that the Supreme Court would decide to hear the case at this stage

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's "E-Verify" program. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.