WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2007-08
(session year)

Senate
(Assembly, Senate or Joint)

Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges & Consumer Protection

(SC-SBEPWDTCCP)

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Hearing Records ... HR (bills and resolutions)
**

Miscellaneous ... Misc
**

( )

Meinholz, Susan

From: Peter Hanson [phanson@wirestaurant.org]
Sent: Monday, February 25, 2008 2:06 PM
To: Sen.Breske; Meinholz, Susan
Cc: Chet Gerlach; Kathi Kilgore; Ed Lump; Trisha Pugal
Subject: SB 404 undocumented workers penalties

Hi Sue,

I have looked over the amendment you had drafted to address some of the concerns that we in the hospitality sector expressed in a meeting with you and the Senator two seeks ago. We like the amendment and we appreciate your willingness to work with us to address our concerns.

WRA has officially changed its position on SB-404 from "against" to "neutral", based on the expectation that SA-1 will be included in the bill that passes the Senate.

Again, thank you for working with us! We'd like to collaborate with you on small business issues more often!

Sincerely,

Pete Hanson
Director of Government Relations
Wisconsin Restaurant Association
p: (608) 270-9950
f: (608) 270-9960
e: phanson@wirestaurant.org


FORWARD
PLURIBUS UNUM

MEMORANDUM

To: Brad Boycks, Wisconsin Builders Association
Jim Boullion, Associated General Contractors of Wisconsin
John Mielke, Associated Builders and Contractors of Wisconsin
John Metcalf, Wisconsin Manufacturers & Commerce

From: Krukowski & Costello, S.C.

Re: Executive Summary – Analysis of 2007 Senate Bill 404, as amended by Senate Amendment 1

Date: March 4, 2008

The following is an Executive Summary of the legal and pragmatic impact of 2007 Senate Bill 404, as amended by Senate Amendment 1.

LEGAL Issues

- The language of Senate Bill 404 will likely be deemed unenforceable based on federal preemption grounds. Specifically, both implied preemption and preemption based on statutory text.

- Implied preemption would likely exist based on the grant in the United States Constitution to the Congress to enact legislation on immigration and the federal government's extensive regulation of the immigration field.

- Preemption based on statutory text would also likely render this legislation unenforceable. Specifically, the Immigration Reform and Control Act states that it preempts "any state of 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."

PRAGMATIC Issues

- Senate Bill 404 would not appear to address the common scenario in which an employer hires an individual with proper documentation but that is not that individual's actual identity.

- The language of Senate Bill 404 does not appear to have any immunity for employers who terminate employees or refuse to hire applicants that cannot "fix" their mismatch information in a timely manner. This policy, although facially neutral, may fall more harshly on specific populations due to flaws in the federal government database and would potentially create liability for employers under Title VII of the Civil Rights Act of 1964, as amended, and the Wisconsin Fair Employment Act.

- In attempting to comply with Senate Bill 404, some employers will be exposed to additional claims under Title VII of the Civil Rights Act of 1964 as amended, the Wisconsin Fair Employment Act, and the Immigration Reform and Control Act. An employer who demands too much verification of the right to work in the United States from an employee or applicant may also face an investigation and/or prosecution from the federal government based on that action.

- Substantial costs related to litigation over the enforceability of this Act are inevitable which may result in certain provisions of the legislation being enjoined on a temporary or permanent basis.

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MEMORANDUM

To: Brad Boycks, Wisconsin Builders Association
Jim Boullion, Associated General Contractors of Wisconsin
John Mielke, Associated Builders and Contractors of Wisconsin
John Metcalf, Wisconsin Manufacturers & Commerce

From: Krukowski & Costello, S.C.

Re: Analysis of 2007 Senate Bill 404, as amended by Senate Amendment 1

Date: March 4, 2008

You have asked us to comment on the legal impact of the provisions of 2007 Senate Bill 404, as amended by Senate Amendment 1. Our comments on this piece of legislation from a legal and pragmatic standpoint are set forth below.

LEGAL AND PRAGMATIC LEGAL ISSUES WITH SENATE BILL 404

It is fair to say that litigation over Senate Bill 404 is inevitable. Many groups will likely be poised to challenge this legislation if passed.

The probable legal issues and outcomes will be discussed in further detail below. From a pragmatic standpoint though, the legislation will create substantial costs from a litigation viewpoint and cause confusion among employers on how to implement the requirements and how to comply on a going forward basis as the litigation process takes place. It also may encourage employers to weed out employees and applicants that they believe carry a higher risk of being unauthorized to work in the United States based on stereotypes. This practice would potentially expose those employers to liability under Title VII of the Civil Rights Act of 1964, as amended, the Wisconsin Fair Employment Act, and the Immigration Reform and Control Act.

From a legal analysis perspective, many of the pieces of legislation of a similar type to Senate Bill 404 are being challenged on numerous legal grounds around the nation. In general, those challenges, at least relative to Senate Bill 404, would be based on federal preemption, both implied and based on statutory text.

FEDERAL PREEMPTION IN GENERAL

Federal preemption is the legal doctrine that flows from the Supremacy Clause in the United States Constitution. See U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or shall be made, under the Authority of the United States, shall be the supreme Law of the Land. ... ."). The doctrine in basic terms holds that, if a federal law (the Constitution, treaty, or statute) is in conflict with a

state statute or local ordinance, the federal law prevails and the state or local law is deemed preempted or unenforceable.

Preemption can take several different forms. The implied preemption concept is based on the argument that Congress when it has enacted a particular piece of legislation, it intended to occupy the entire field that it has addressed with that statute such that any state statute that addresses an issue related to that piece of federal legislation, it is deemed preempted. Examples of this type of preemption arise under the Employee Retirement Income Security Act ("ERISA"), the National Labor Relations Act ("NLRA"), and other typical federal areas like bankruptcy laws, postal laws, and patent laws. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

Preemption may also arise based on a conflict between the text of a federal statute and a state statute or because the text of the federal law explicitly addresses the preemption of state law. For example, if a federal statute states that an employer cannot hire or employ an individual that is not authorized to work in the United States and a state statute makes it unlawful for an employer to discriminate against individuals based on their ability to lawfully work in the United States, the federal law prevails and preempts the state statute.

IMPLIED PREEMPTION

The implied preemption doctrine in the present context gains its foundation from Article I, Section 8 of the United States Constitution that states that Congress has the power "To establish an uniform Rule of Naturalization." Challenges to similar legislation like Senate Bill 404 argue that this specific grant of power to Congress in the Constitution along with comprehensive federal regulation of the immigration field in general suggests that states and local entities cannot intrude into the immigration field with their own legislation. See Lozano, 496 F. Supp. 2d at 518 n.41.

The language of Senate Bill 404 attempts to side-step that issue by not having the State of Wisconsin make any type of determination of whether an individual is within the United States lawfully. Rather, the bill will punish employers with an additional State of Wisconsin penalty who are found to have violated the federal law by employing individuals who are not authorized to work in the United States. In other words, the bill does not authorize the State of Wisconsin to determine if an employee is or is not authorized in the United States. Rather, the bill's provision appears to be triggered once an employer is subject to sanctions and penalties under federal law for hiring individuals unauthorized to work in the United States.

Other parts of the bill appear to require an employer to take an active role in the process of rooting out employees who might not be authorized to work in the United States. Specifically, the bill mandates a $10,000 fine if the employer hires an individual not authorized to work in the United States. An employer can defend against that charge if it made a good faith determination that the employee was authorized to work in the United States. That defense is disallowed if the employer does not address the problem of a "Social Security Number mismatch" within a period set by federal law.

The bill's attempt to establish additional penalties for employers who employ individuals who not authorized to work in the United States after being determined to have done so, presumably by federal authorities, also will run into the preemption doctrine. This concept is analogous to a United States Supreme Court case involving a former Wisconsin statute that attempted to debar for two years public contractors who had received three prior judicial judgments within five years that it had violated the National Labor Relations Act. See Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986).

In Gould, a business was debarred by the State of Wisconsin for two years after its affiliated companies had been found to have committed three Unfair Labor Practices in violation of the National Labor Relations Act. The state penalty of debarment, which was supplemental to the federal penalty, did not make a determination into whether an unfair labor practice occurred. Rather, it waited for a federal determination and then attached itself as a state-imposed supplemental penalty.

The Gould court acknowledged that a state (and a municipality) can draft and enforce laws that implicate itself as a market participant as opposed to laws that exist based on its police power.[1] The market participant argument, however, did not save the statute at issue in Gould. The Supreme Court held that the state statute was preempted by the National Labor Relations Act.

In Gould, the preemption occurred despite the fact that the state statute did not attempt to make a determination into whether the federal law was violated. Preemption occurred because the state statute created an indirect conflict on the federal government's comprehensive regulation of industrial relations. In essence, it prevented the federal government from deciding what penalties were to attach to certain proscribed conduct because the State of Wisconsin (and several other states had passed similar laws) had decided to enact penalties above and beyond what the federal government had determined the penalty to be.

This same concept also was recently litigated in the Seventh Circuit. See Metropolitan Milwaukee Association of Commerce, 431 F.3d 277 (7th Cir. 2005). The County of Milwaukee had a passed a labor peace ordinance that mandated that entities who contracted with the county had to sign a neutrality agreement (among other requirements) with any union that sought to represent its employees. Ultimately, the Seventh Circuit held the ordinance was not enforceable because it conflicted with the federal regulation of industrial relations.

Although the Gould and the Metropolitan Milwaukee Association of Commerce cases addressed state or local attempts to regulate in the labor relations area and not the concept of immigration regulation, it is probably a distinction without a difference. The federal government is the principal (and arguably the sole) author of laws and regulations on immigration policy and regulation similar to labor relations policy and regulation. The states or municipalities that

[1] When a state is purchasing goods and services as a proprietor (market participant), laws that limit the state's choices or actions in this regard are generally treated differently from a preemption standpoint than when a state is limiting a private employer's action with legislation (*i.e.*, police powers). See Building & Construction Trades Council v. Assoc. Builders & Contractors of Massachusetts, 507 U.S. 218 (1993).

attempt to intrude in that area and add supplemental state penalties onto violations of federal immigration policy (*e.g.*, for employing unauthorized individuals) will likely run into the preemption doctrine like the statute in Gould.

PREEMPTION BASED ON STATUTORY TEXT

Preemption based on statutory text was also mentioned above. Cf. Freightliner Corp. v. Myrick, 514 U.S. 280, 288-90 (1995) (implied preemption and preemption based on specific text can co-exist). Two specific federal statutes bear on this issue. First, 42 U.S.C. § 1981 states that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Second, 8 U.S.C. § 1324a 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."

The argument based on 42 U.S.C. § 1981 likely has little merit with respect to Senate Bill 404. Because the protection of 42 U.S.C. § 1981 flows to an entity to make or enforce contracts, the only application where § 1981 would appear to be germane is a situation where an unauthorized individual as a sole proprietor wants to contract with the state – an unlikely scenario. See Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006) (holding that only the party who makes or attempts to make a contract like a corporation can bring a suit under 42 U.S.C. § 1981, not a company's shareholders or officers on a personal level).

The argument based on 8 U.S.C. § 1324a bears more directly on the implementation of Senate Bill 404. Bottom line, § 1324a would likely preempt Senate Bill 404, either partially or wholly, by explicitly forbidding local control or penalties for the employment of unauthorized individuals. See Lozano, 496 F. Supp. 2d at 518-19.

MISCELLANEOUS ISSUES

There is also a litigation risk that an employer who demands too much verification documentation or specific documentation from an employee or applicant will face an investigation and/or prosecution from the federal government for those actions. Moreover, there does not appear to be any immunization concept for employers in Senate Bill 404 or the federal regulation that was stayed that would address liability under Title VII of the Civil Rights Act of 1964, as amended, and the Wisconsin Fair Employment Act. For example, if an employer terminates employees that cannot "fix" their mismatch information in a timely manner and this policy, although facially neutral, falls more harshly on Hispanic or female individuals due to mistakes in the Social Security Administration database, the employer may be liable under the above laws for national origin or sex discrimination.

The E-Verify program is not foolproof by most accounts in the media.[2] For example, it has been reported that many mistakes in the database program exist with respect to women who have changed or hyphenated their surnames because of marriage or divorce. Further, the database information on Hispanic individuals is also reported to have an increased likelihood of mistakes.

The E-Verify program has inherent limits as well. If an applicant presents himself with documents that identify him as "Mike Jones" (but is not really Mike Jones) and has a Social Security Number assigned to Mike Jones, the E-Verify program will likely not help in that scenario. Rather, that fact pattern will fall onto the Human Resources individual of the employer to uncover the deceptive conduct of the employee or applicant.

Uncovering that type of deceptive conduct is not easy and is not something a functional Human Resource department is going to be trained to perform. Moreover, that type of deceptive conduct may be more common place than one may think. In fact, one need not look any farther than the headlines from less than three months ago when the Milwaukee Police Department uncovered the fact that one of its officers, with more than five years of service, was not who he said he was (he took the identity of a dead cousin's who was a United States citizen) and was not authorized to work in the United States.

BACKGROUND ON SIMILAR LEGISLATION

As of the present time, virtually every state in the Union has a law on the books or has legislation pending in its legislature that attempts to regulate the immigration issue in the employment context. In addition, many municipalities have also undertaken the effort to regulate in this area. In fact, one of the most watched cases involves the City of Hazleton in Pennsylvania. That municipality enacted an ordinance that penalized employers and landlords that employed or rented to individuals not authorized to be in the United States. See Lozano v. City of Hazelton, 496 F.Supp. 2d 477 (M.D. Pa. 2007).

In Lozano, the American Civil Liberties Union ("ACLU"), on behalf of many named and unnamed City residents, challenged the enforceability of that ordinance based on various legal grounds. The United States District Court for the Middle District of Pennsylvania agreed that the ordinance could not be enforced and issued an Order directing the City to not enforce the ordinance. The City of Hazleton appealed that decision to the United States Court of Appeals for the Third Circuit. That court will likely issue a decision in late Summer or Fall 2008 although, conceivably, the decision may not be issued until next year sometime. An appeal to the United States Supreme Court for the losing party is a strong possibility.

The State of Arizona also recently passed a statute impacting the employment relationship. In a nutshell, it requires employers to use the Unites States Customs and Immigration Services' E-verify program. It penalizes an employer who knowingly or intentionally employs an unauthorized individual by suspending their license to do business in the state for ten (10) days

[2] The E-verify program is an internet-based program that allows participating employers access to a Social Security Administration database of individuals authorized to work in the United States. It has been reported that the database has significant mistakes, which may cause issues for certain populations.

for the first offense and permanent revocation of the license for the second offense. The statute provides an employer with a rebuttable defense to those violations if it used the E-verify program.

That Arizona law was challenged in court recently and the United States District Court for the District of Arizona did not enjoin its enforcement. A few weeks ago, the District Court dismissed the case by holding that the Arizona law avoids preemption under the Immigration Reform and Control Act. Specifically, the Court held that the Arizona law regulates licensing which is explicitly exempted from preemption under the Immigration Reform and Control Act. The matter was appealed to the United States Court of Appeals for the Ninth Circuit last week. Again, a decision may be forthcoming this year although the Court may not rule until next year.

There are many other similar laws being challenged presently in judicial forums throughout the nation. The exact path or paths the courts will take is impossible to predict with any degree of accuracy. Moreover, this issue – local control, not exclusive federal control, over immigration regulations – is surely one that the United States Supreme Court will have to address and issue a nationwide holding in the future unless Congress steps in with detailed legislation.

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FORWARD
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ROGER BRESKE

STATE SENATOR

12th District

Capitol Address:
State Capitol, South Wing
P.O. Box 7882
Madison, WI 53707-7882
(608) 266-2509

Toll Free:
1 (800) 334-8773

Home Address:
8800 Hwy. 29
Eland, WI 54427
(715) 454-6575

E-Mail Address:
Sen.Breske@legis.state.wi.us

March 7, 2008

Senator Bob Wirch, Chairman
Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection

Dear Senator Wirch:

Thank you for holding an executive session in your committee on Senate Bill 404.

While I firmly believe that at the national level full sweeping reform must be implemented to address the seriousness of undocumented workers in the United States, at the state level there are actions we can take to stem the flow into our workforce. SB404 is one such measure.

SB404 basically prohibits a company starting from seven years from the date of hiring an illegal alien from being eligible for 1) tax exemptions or tax credits; 2) a state or local public contract; and 3) government grants or loans, with a $10,000 fine for each illegal alien the company hires.

Addressing some concerns brought to me as the bill's author by the hospitality industry, wording in the legislation has been changed to match federal statutory language. These changes have been accepted by them, and I am attaching an e-mail sent to my staff stating where they have changed their position of opposition to the bill to one now of neutrality.

I appreciate your action on this bill before our legislative session draws to a close.

Thank you.

Sincerely,

Roger Breske

ROGER BRESKE
State Senator
12th Senate District

RB/sam

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FORWARD

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: MEMBERS OF THE SENATE COMMITTEE ON SMALL BUSINESS, EMERGENCY PREPAREDNESS, WORKFORCE DEVELOPMENT, TECHNICAL COLLEGES AND CONSUMER PROTECTION

FROM: Dan Schmidt, Senior Analyst DWS.

RE: 2007 Senate Bill 404, Relating to Illegal Aliens

DATE: March 11, 2008

This memorandum describes the changes to 2007 Senate Bill 404, relating to illegal aliens and the provisions contained in Senate Amendment 1 to that bill. Senate Amendment 1 was introduced by Senators Breske, Hansen, and Kreitlow on February 21, 2008.

SENATE BILL 404

Under Senate Bill 404, any company that has hired illegal aliens is, for a period of seven years, ineligible to:

1. Receive any income or franchise tax credit or property tax exemption;

2. Enter into a contract with the state or a local government unit for the construction, remodeling, or repair of a public work or building, or for the furnishing of supplies, services, equipment, or material of any kinds; and

3. Receive any grants or loans from a local unit of government.

SENATE AMENDMENT 1

Senate Amendment 1 makes two changes in the bill, as follows:

1. Clarifies that the penalties under the bill apply to illegal aliens who are hired "in violation of U.S.C. s. 1324a (a)." This is the applicable federal law governing the hiring of aliens.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

2. The penalty sections in the bill include a good faith exemption for employers who have received notice that an employee has used a false or incorrect Social Security number if the employer "**corrects**" the problem described in the notice, in the manner prescribed under federal law no later than 30 days after receiving the notice. The amendment requires that the employer "**addresses**" the problem in the manner prescribed under federal law. The amendment deletes the requirement that action be taken within 30 days.

The amendment makes no other changes in the proposed legislation.

DWS:jal