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# New Immigration Act for S.C. Employers

## *What Are the Requirements and Is the Act Constitutional?*

*By Christian E. Boesl and Charles L. Appleby IV*

### Introduction

The debate on how to handle immigration is nothing new in the United States. The question is whether it is a federal or state issue. Traditionally, immigration has always been a federal issue; however, in recent years and particularly after the demise of the Federal Comprehensive Immigration Reform Act of 2007, numerous states, including South Carolina, have taken matters into their own hands. *See generally* S. 1348, 110th Cong.

South Carolina's Illegal Immigration Reform Act, which goes into effect in less than a year, is a multi-issue act relating to employment, law enforcement, public benefits, ID/licenses, legal services and education. H. 4400, 117th Gen. Assem. (S.C. 2008). This article will discuss the requirements for public and private employers, how one method of compliance may place employers at risk of federal discrimination charges, and current litigation surrounding similar state laws around the country.

According to the National Council of State Legislatures (NCSL), state laws related to immigration have increased dramatically in recent years:

- In 2005, 300 bills were introduced and 38 laws were enacted.
- In 2006, activity doubled: 570 bills were introduced and 84 laws were enacted.
- In 2007, activity tripled: 1,562 bills were introduced and 240 laws were enacted.

*State Immigration-Related Legislation for 2008 Nears 2007 Levels*, July 24, 2008, www.ncsl.org/programs/press/2008/pr0708immigrationlegislation.htm. The trend shows no signs of slowing as 1,267 bills relating to immigration were introduced in state legislatures across the country as of July 2008, with at least 175 of those bills becoming law in 39 states. *Id.* In 2008, as in recent years, the top three areas of interest are identification and driver's licenses (203 bills introduced – 30 laws enacted), employment (198 bills introduced – 18 laws enacted) and law enforcement (214 bills introduced – 10 laws enacted). *Id.*

### South Carolina Illegal Immigration Reform Act

The South Carolina Illegal Immigration Reform Act (South Carolina Act) was introduced in the House on January 9, 2008, passed by the General Assembly on May 29, 2008, and signed by Gov. Sanford on June 4, 2008. H. 4400. It affects both private and public employers in the state. The South Carolina Act does not affect an employer's obligation to complete an Employment Eligibility

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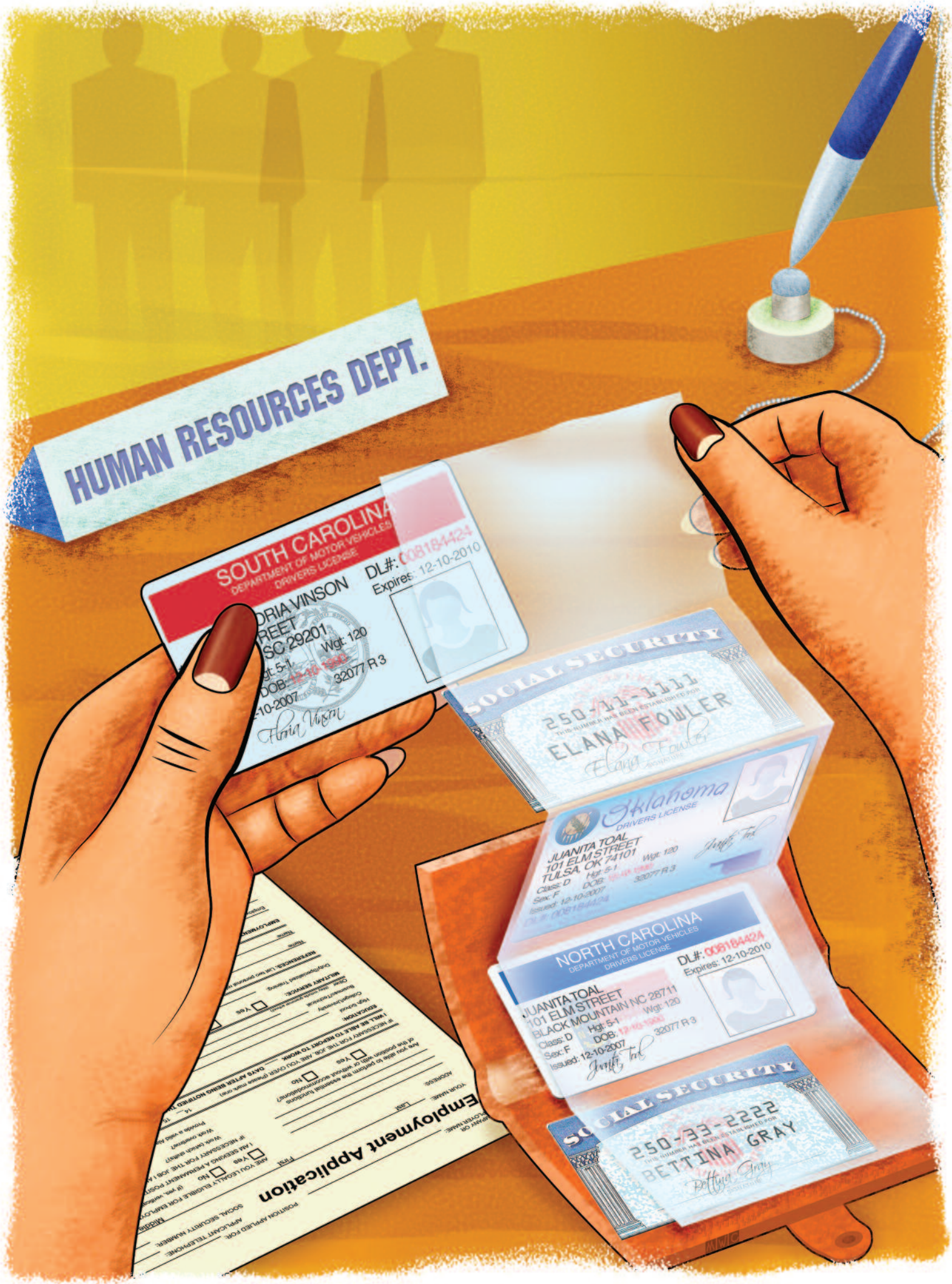
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Employment Application

Verification Form, also known as a "Form I-9," but instead includes additional state requirements for verifying a worker's eligibility. *Id.*

**Requirements: private employers**

On July 1, 2009, all private employers in South Carolina must have a valid state employment license in order to hire a new employee. S.C. CODE ANN. § 41-8-20(A) (2007); *see generally* §§ 41-8-10(E); 12-8-10(3),(4); 12-8-520 (defining private employer). No action is required to obtain this license as the state will automatically "impute" a license to all private employers in July 2009. *Id.* However, private employers must comply with the provisions of the Act to ensure their license remains valid. (*See* Compliance Deadline below.)

In addition to other requirements, the South Carolina Act prohibits a private employer from knowingly or intentionally employing an unauthorized alien and requires private employers to verify the work authorization of all new hires. *Id.* at §§ 41-8-30, 41-8-20; *see also*, *id.* at § 12-6-1175 (disallowing a business expense deduction for an unauthorized worker); § 12-8-595 (mandating withholding a seven percent income tax if the employee does not provide a SSN or ITIN). A private employer has two options for verifying new hires:

(1) Register and participate in the federal work authorization program (E-Verify) and verify the work authorization of every new employee within five business days after employing a new employee; or

(2) Employ only workers who, at the time of employment:
   a. possess a valid South Carolina driver's license or identification card,
   b. are eligible to obtain a South Carolina driver's license or identification card by providing proof of name, social security number and date and place of birth, or
   c. possess a valid driver's license or identification card from another state deemed by the executive director of the Department of Motor Vehicles to have requirements at least as strict as those in South Carolina.

*Id.* at § 41-8-20(B)(C). A private employer must choose either option one or option two but cannot use both.[1]

If an employer utilizes option one, E-Verify, in good faith, the employer is presumed to have complied with the South Carolina Act. S.C. CODE ANN. § 41-8-40. However, if an employer chooses to participate in E-Verify, the employer must use it with all new hires and satisfy additional requirements. E-Verify User Manual, *supra* note 1. If an employer utilizes option two and requests a South Carolina driver's license or the equivalent, the employer risks penalties for possible

federal discrimination charges. *See*, Requirements: Option 2 – Driver's License/ID or Equivalent below. In any event, the employer must not knowingly or intentionally employ an unauthorized alien and must verify new hires through either option one or option two.

**Requirements: public employers**

Every department, agency or instrumentality of the state is considered a public employer. S.C. CODE ANN. § 8-14-10(A)(5). The South Carolina Act requires all public employers to verify new hires through E-Verify. *Id*. at § 8-14-20(A). In addition, public employers may not enter a service contract with a contractor, subcontractor or sub-subcontractor unless the contractor agrees to verify its employees through either option one or two as stated above. *Id*. at § 8-14-20(B). Public employers are in compliance with the new law if they obtain a written statement from the contractor certifying the contractor will comply with the requirements of the chapter and agree to provide to the public employer any documentation required to establish either:

- The applicability of the chapter to the contractor, subcontractor and sub-subcontractor; or
- Compliance with the chapter by the contractor and any subcontractor or sub-subcontractor.

*Id*. at § 8-14-40. A public employer or contractor who complies with the requirements in good faith is not subject to sanctions or civil or administrative action for employing an individual who is not authorized to work in the United States. *Id*. at § 8-14-50.

**Requirements: Option 1 – E-Verify**

The Basic Pilot Program, also referred to as E-Verify, was established by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA). 8 U.S.C.A. §1324a. It started in California, Florida, Illinois, New York and Texas in 1997. The Basic Pilot Program Extension and Expansion Act of 2003 amended IIRIRA to make the program available to employers in all 50 states, extended its authorization until November 2008 and placed the Secretary of Homeland Security in charge of the program. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. 108-156. On September 27, 2008, Congress passed H.R. 2638, a stop-gap spending bill, which contained a reauthorization of the E-Verify program until March 6, 2009 and funding for the program through 2009 at $100 million. H.R. 2638, Title 4. While there were several proposed bills which would have authorized a longer extension, the fate of the program past March of next year is now left in the hands of a new administration and Congress. Congress is expected to extend the program further next year, therefore, until Congress decides to discontinue use of E-Verify, employers should follow the instructions below to register and participate in the program.

Employers can register for E-Verify at https://www.vis-dhs.com/EmployerRegistration. Employers who participate in E-Verify must provide notice to employees and applicants of their participation in the program. Notifying Prospective Employees of your E-Verify Participation, E-Verify User Manual, *supra* note 1, at 2.1.1. Notices are available to print online after an employer registers with E-Verify. However, if it is difficult for the employer to post notices, the employer should provide notices with the application materials.

After completing the Form I-9—which all employers are required to complete under federal law—employers then enter information from the Form I-9 into the E-Verify system. The information is compared against 425 million records in the Social Security Administration (SSA) database and 60 million records in the Department of Homeland Security's (DHS) immigration database. *See* E-Verify: Frequently Asked Questions, National Conference of State Legislatures, May 5, 2008, *available at* www.ncsl.org/programs/immig/EVerifyFAQ.htm. Most inquiries are resolved immediately. However, do not be surprised if some take several days or longer before a final determination is made. If an inquiry cannot be confirmed instantly by DHS and SSA, the employer will receive a "tentative non-confirmation notice." Viewing Results of an Initial Verification, E-Verify User Manual, *supra* note 1, at 3.2.3.

When the system provides a tentative non-confirmation notice, the employee has an opportunity to contact SSA or U.S. Citizenship and Immigration Services (USCIS), using instructions provided to the employer by the E-Verify system, to clear up his/her records. Notifying an Employee of a Tentative Non-confirmation (TNC) Response, E-Verify User Manual, *supra* note 1, at 3.2.5. The employee has eight federal workdays to contact one of the two offices. *Id*. If your client is the employer, it is important to remind him that he cannot take adverse action, including firing, suspending or withholding pay or training while the employee attempts to resolve a tentative non-confirmation. Preventing Discrimination: The E-Verify Rules of Use, *supra* note 1, at 2.2.

It is the employer's responsibility to continue checking the E-Verify system for updates on the employee's status. If the employee is successful, the E-Verify databases are updated and the employer is notified of the employee's final work-authorization status after logging into the E-Verify system. E-Verify Responses to SSA Referrals, E-Verify User Manual, *supra* note 1, at 3.2.6.1; E-Verify Responses after Employee Referral to DHS, E-Verify User Manual, *supra* note 1, at 3.3.7. If the employee fails to contest the non-confirmation or is unsuccessful in doing so, the employer is notified of the final non-confirmation after logging into the E-Verify system. *Id*. If the employer receives a final non-confirmation, he must terminate the employee or face a presumption that he violated IRCA. *Id*.; *see also*, E-Verify Memorandum of Understanding, Art. II §C para. 9, Art. III.

For additional information on E-Verify, employers should visit

www.dhs.gov/e-verify.

**Requirements: Option 2 – driver's license/ID or equivalent**

Requesting an applicant produce a driver's license or equivalent is one method of complying with the South Carolina Act. However, requesting an applicant produce a driver's license or particular document to establish identity or work eligibility can fall within the discriminatory practice referred to as document abuse. Instructions for Completing the Form I-9 (Employment Eligibility Verification Form), U.S. Dept. of Homeland Security and U.S. Citizenship and Immigration Services, Form M-274, pg. 15, Nov. 1, 2007, available at www.uscis.gov/files/nativedocuments/m-274.pdf. All work-authorized individuals are protected against discrimination from document abuse, which can be categorized into four types of conduct:

(1) Improperly requesting employees to produce more documents than are required by the Form I-9 to establish the employee's identity and work authorization;
(2) Improperly requesting employees to produce a particular document, such as a driver's license, to establish identity or work eligibility;
(3) Improperly rejecting documents that reasonably appear to be genuine and belong to the employee presenting them;
(4) Improperly treating groups of applicants differently when completing the Form I-9, such as requiring certain groups of employees who look or sound "foreign" to produce particular documents the employer does not require other employees to produce.

*Id*.

Employers who commit document abuse in violation of the anti-discrimination provision of the Immigration and Naturalization Act (INA) are subject to civil penalties of $110 to $1,100 for each individual discriminated against. 8 U.S.C.A. §1324b(g)(2)(B)(IV). Therefore, when complying with the South Carolina Act, employers should seriously consider not using option two, requesting a driver's license/ID or equivalent, to avoid liability for violation of the INA.

**Compliance deadline**

Private employers with 100 or more employees must comply with the South Carolina Act by July 1, 2009. S.C. CODE ANN. § 41-8-20(B). All other private employers must comply by July 1, 2010. *Id*. at § 41-8-20(C). Government contractors, subcontractors and sub-subcontractors with 500 or more employees must comply with the South Carolina Act by January 1, 2009. *Id*. at § 8-14-20(D). Government contractors, subcontractors and sub-subcontractors with 100 to 499 employees must comply by July 1, 2009. All other contractors, subcontractors and sub-subcontractors must comply by January 1, 2010.

**Penalties and enforcement**

Employers who violate the South Carolina Act are subject to civil penalties of $100 to $1,000 for each new employee whose work status they fail to verify. *Id*. at § 41-8-50(D). It is a separate violation each time an employer fails to verify the immigration status of a new employee. *Id*. at § 41-8-50(E). However, an employer can avoid an initial fine by registering and E-Verifying an employee within 72 hours of being notified of the violation. *Id*. at § 41-8-50(D).

The first time an employer is caught knowingly or intentionally hiring an unauthorized alien, all business licenses, including the employer's South Carolina Employment License, are suspended, and the employer is prohibited from doing business or hiring new employees for 10 to 30 days. S.C. CODE ANN. § 41-8-50(D). In addition, the employer must terminate all illegal alien employees and pay reinstatement fees up to $1,000 to cover investigation and enforcement costs. *Id*. On the second offense, the same penalties apply except the amount of time an employer is prohibited from doing business or hiring new employees is increased to 30 to 60 days. *Id*. On a third or subsequent offense, the employer's licenses are revoked for a minimum of five years and the licenses can only be reinstated if the employer agrees to various additional penalties, including probation for three years and submitting compliance reports. *Id*. An employer may obtain a probationary license after the third offense only if, after a 90-day suspension, the employer agrees to three years probation, submits compliance reports, terminates all illegal alien employees and pays reinstatement fees of up to $1,000. *Id*.

In addition to the above, any person, including an employer or employee, who knowingly makes or files any false, fictitious or fraudulent document, statement or report is guilty of a felony and can face jail time of up to five years. S.C. CODE ANN. § 41-8-70.

To enforce the South Carolina Act and ensure employers in violation are subject to the appropriate penalties, the director of the Department of Labor, Licensing and Regulation will develop a statewide random auditing program. *Id*. at § 41-8-120.

**Good practice for employers**

It is important to remember that the requirements of the South Carolina Act only apply to new hires. All existing employees are grandfathered in as long as the employer complied with the original Form I-9 requirements when initially hiring those employees. While the enforcement of the South Carolina Act does not begin until 2009, it is recommended that you advise your clients to start working on a method of compliance now so there is enough lead time to work out any problems or kinks that may arise.

## Current Litigation Surrounding Similar State Laws

**Introduction**

Federal law first created sanc-

tions for employers of unauthorized aliens in the 1986 Immigration Reform and Control Act (IRCA). Along with many other provisions, IRCA makes it unlawful to hire or continue to employ a person known to be an unauthorized alien. 8 U.S.C. § 1324a(1)(A), (a)(2). Before IRCA, federal law did not displace state authority to enact and enforce sanctions against employers of unauthorized aliens except to the extent the state law conflicted with federal enactments. *De Canas v. Bica*, 424 U.S. 351 (1976). However, when enacting IRCA, Congress included a preemption clause that states, "The provisions of [the statute] preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C.A. § 1324a(h)(2). It is uncertain how a district court in South Carolina would rule in a case should one come before it regarding the preemption clause and the South Carolina Act, as court decisions have fallen on both sides in cases involving laws similar to the South Carolina Act.

**Pennsylvania U.S. District Court finds immigration law preempted by IRCA**

Hazleton, Pennsylvania prohibited the employment of unlawful workers and the harboring of undocumented aliens in its Illegal Immigration Relief Act Ordinance of 2006 (IIRA). See HAZLETON, PA., ORDINANCE 2006-18 (2006). After enactment of the IIRA, the American Civil Liberties Union (ACLU) filed suit against the city in the U.S. District Court for the Middle District of Pennsylvania alleging nine causes of action. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (hereinafter *Lozano*). In particular, the plaintiffs alleged federal law, more specifically, IRCA, preempted the Act under the Supremacy Clause. *Id.* at 518.

The city argued there was no violation of the prohibitions included in IRCA's preemption clause. The city stated they "avoided the use of criminal or civil sanctions but seized Congress's implied invitation to create local enforcement provisions—such as the suspension of business permits for businesses that employ an unauthorized alien." *Id.* at 519. The city argued such measures are within the "licensing and similar laws" exception to IRCA's preemption clause. *Id.*

In rejecting this interpretation, the court found suspending a business permit would force the employer out of business and would be the "ultimate sanction." *Id.* According to the court, "[i]t would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty." *Id.* The court also found the pervasiveness of federal law governing the employment of illegal aliens clearly illustrates that "IRCA is a comprehensive scheme" that "leaves no room for state regulation." *Lozano,* 496 F. Supp. 2d at 523. "[A]ny addi-

tions by local governments would be either in conflict with the law or a duplication of its terms—the very definition of field pre-emption." *Id*. The court emphatically declared, "Immigration is a national issue … Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives." *Id*. While the *Lozano* court found federal law preempted the Hazleton Ordinance, an Arizona District Court upheld the Legal Arizona Workers Act.

**Arizona U.S. District Court finds immigration law *not* pre-empted by IRCA**

The Legal Arizona Workers Act prohibits employers from intentionally or knowingly employing any unauthorized alien. A.R.S. §§ 23-212(A), 23-211(6), & (8). While it mirrors the federal law in many respects, it goes further than federal law by requiring employers to verify the eligibility of new hires through the E-Verify program. *Id*. at § 23-214. An employer's first violation for employing an illegal alien results in suspension of the business license for up to 10 days and a three-year probation period. *Id*. at § 23-212(F). An employer's second violation that occurs during the probationary period results in the permanent revocation of its business license. *Id*.

In 2008, 12 non-profit corporations, including chambers of commerce, business associations and trade associations, brought suit against numerous county attorneys seeking a temporary restraining order and preliminary injunction against the Act's enforcement. *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008). The plaintiffs alleged, among other causes of action, the Arizona Act violated IRCA's preemption clause. *Id*. The district court found (1) the Legal Arizona Workers Act was not preempted by IRCA; (2) the statute did not, on its face, violate employers' right to procedural due process; and (3) the statute did not violate the Commerce Clause. *Id*. On September 17, 2008, a three-judge panel of the Ninth Circuit Court of Appeals upheld the district court's decision and found the Arizona Act not preempted by IRCA. *Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, (9th Cir. 2008) (citing *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008). The Court of Appeals noted the Arizona Act had not been enforced against any employer since taking effect nine months prior and the challenge was brought "against a blank factual background … outside the context of any particular case." *Id*. Therefore, "[i]f and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision." *Id*.

As evidenced by the above decisions, federal courts around the country do not have the same opinion on state immigration reform efforts. Currently, we are not certain how a federal court in South Carolina might rule on a challenge

to the South Carolina Act. However, for a further in-depth discussion of the possible challenges to local immigration laws, see *A Tale of Two Cities: Is Lozano v. City of Haxleton the Judicial Epilogue to the Story of Local Immigration Regulation in Beaufort County, South Carolina?*, Jason P. Luther, S.C. L. Rev. 59:573 (2008).

**Illinois defies trend by prohibiting use of E-Verify—DHS files suit**

As of May 5, 2008, 10 states require use of E-Verify for public and/or private employers—seven through legislature and three though executive orders. The 10 states requiring E-Verify include: Arizona (H2779, 2007), Colorado (H1343, 2006), Georgia (S529, 2006), Idaho (Exec. Order, 2006), Minnesota (Exec. Order, 2008), Mississippi (S2988, March 2008), North Carolina (S1523, 2006), Oklahoma (H1804, 2007), Rhode Island (Exec. Order 2008) and Utah (S81, March 2008). E-Verify: Frequently Asked Questions, NCSL Immigrant Policy Project May 5, 2008, *available at* www.ncsl.org/programs/immigEVerifyFAQ.htm. Due to the inaccuracy of the database, Illinois, who ranks in the top five states with the highest number of immigrant workers, chose to prohibit the use of E-Verify. *Homeland Security Files Suit to Stop Illinois Law That Limits Use of E-Verify*, The Bureau of National Affairs, Inc., Workplace Immigration Report Vol. 1, No. 1 ISSN 1940-1981 (October 22, 2007).

An amendment to the Illinois Right to Privacy in the Workplace Act prohibits Illinois employers from enrolling in any Employment Eligibility Verification System, including E-Verify, as authorized by federal law until the SSA and DHS databases are able to make a determination on 99 percent of the tentative non-confirmation notices issued to employers within three days, unless otherwise required by federal law. Illinois H1744. One month after enactment of the new law, the Department of Homeland Security (DHS) sued Illinois, arguing the new law was preempted by federal law and should be declared illegal. *United States v. Illinois*, C.D. Ill., No. 07-3261, complaint filed 9/24/07. While the law was originally scheduled to go into effect January 1, 2008, the state agreed not to enforce the law until the DHS lawsuit is over.

## Conclusion

Whether the South Carolina Act is constitutional remains to be seen. What is certain is as of 2009, all employers will be required to implement procedures to ensure they are in compliance with the South Carolina Act or face penalties that could ultimately shut down their business.

*Christian E. Boesl and Charles L. Appleby IV practice in the Columbia office of Collins and Lacy, PC.*

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[1] E-Verify User Manual, U.S. Citizenship and Immigration Services, 2.2 Preventing Discrimination: The E-Verify Rules of Use, April 2008, *available at* www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.