**Employment Law**



# What the Decision in *Arizona v. United States* Means for Employers

By Jeffrey Campolongo Contact All Articles

The Legal Intelligencer | July 27, 2012



Jeffrey Campolongo

On June 25, the U.S. Supreme Court found that multiple portions of an Arizona immigration law, commonly referred to as SB 1070 or the "Support Our Law Enforcement and Safe Neighborhoods Act," were pre-empted by federal law in the case of *Arizona v. United States* , 567 U.S. ___ (2012) (June 25, 2012). The most widely publicized portion of the law pertains to checking immigration status during police stops, but an important provision that left many in Arizona in the midst of a potential new employment scheme was a provision making it a misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor," punishable by a $2,500 fine and up to six months in jail.

***RELATED ITEMS***

- **France Repeals Sexual Harassment Law for Being Too Vague**
- **EEOC Rules That Title VII Applies to Gender Identity Claims**

In the majority opinion written by Justice Anthony M. Kennedy, the court ruled that three out of four sections of the law were pre-empted by federal immigration law. Kennedy was joined by Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg, Stephen G. Breyer and Sonia Sotomayor. Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. dissented to striking down the employment portion of the law, in large part due to the Supreme Court's past stance on a California law regulating the employment of aliens. Justice Elena Kagan recused herself, as she was formerly the solicitor general of the United States, and previously defended the federal government's position on pre-emption.

In 1976, a California law withstood a constitutional challenge to its imposition of a civil penalty for aliens seeking employment in the state. See *De Canas v. Bica* , 424 U.S. 351, 95 S.Ct. 933 (1976). The constitutionality of the California law was distinguished from the Arizona law based upon the fact the California law was passed prior to the existence of any federal regulation scheme that affected employment. That is no longer the case.

The Immigration Reform and Control Act of 1986 (IRCA), is the federal law that regulates the employment of aliens. IRCA, which requires employers to verify applicants' identification and employment authorization, makes it illegal for employers to knowingly hire, recruit, refer or employ aliens. It has criminal and civil penalties for employers who violate the law.

While IRCA does impose potential civil penalties and immigration status issues on those whose alien status is discovered in the employment process, the federal law imposes no criminal penalties on aliens applying for or maintaining employment. The Supreme Court found that Congress made clear that information submitted to employers pertaining to employment status or eligibility "may not be used" for prosecution related to immigration. Not surprisingly, the Supreme Court therefore found that SB 1070 is contrary to federal immigration law and policy.

Arizona explains that, as made clear through the plain language of IRCA but more particularly by its legislative history, Congress specifically chose not to criminally charge aliens for seeking employment. According to the decision, in devising IRCA, Congress actually discussed the possibility of criminal offenses for aliens applying for employment or working within the United States. The fact that no such criminal penalties exist is, according to the decision, evidence of the federal government's intent not to create such penalties.

Scalia, in a widely discussed concurring and dissenting decision, took great issue with the federal government's immigration policy and enforcement, which seemed to greatly influence his own opinion on the Arizona law. Both Scalia and Alito disagreed with the majority that there is a federal immigration scheme clearly intended to displace state law. Scalia pointed out that "at the time *De Canas* was decided, [the Arizona law] would have been indubitably lawful." He insisted that the "only relevant change" is the imposition of penalties and restrictions on employers. The absence of any penalty of alien applicants "is not the same as a deliberate choice to prohibit the states from imposing criminal penalties" and the majority opinion engaged in guesswork when stating Congress intended there not to be any penalty.

Interestingly, the majority opinion noted that aliens already face employer exploitation and making them subject to criminal charges is inconsistent with "federal policy and objectives." In light of these policy concerns, the decision concluded that the Arizona law would interfere with federal law and policy and interfere with the federal goals concerning immigration and enforcement.

While IRCA does require employers to verify employment authorization, it specifically prohibits employers from taking additional measures to check citizenship status and prohibits discriminatory employment practices. An employer cannot require additional or specific documentation from individuals whose citizenship or immigration status they question. Employers cannot treat non-citizens differently, nor can they treat employees or applicants differently because of a perception of looking or sounding "foreign." The policy of nondiscrimination, coupled with limiting penalties to employers does lend some support toward the majority's interpretation of legislative intent and public policy.

While IRCA is enforced through the Department of Justice, discrimination in employment based on national origin, color or race is also prohibited by the Equal Employment Opportunity Commission. In Pennsylvania, the Human Relations Act makes it unlawful to discriminate in employment on the basis of race, color, ancestry or national origin. Thus, while employers are subject to stiff penalties for knowingly employing aliens, it is also unlawful to discriminate against individuals an employer may merely suspect of non-citizen status because of superficial factors or discriminatory animus. Employers should be careful to abide by the IRCA verification requirements but not to make unfounded presumptions in employment decisions or to harass or otherwise discriminate against employees they believe may be of foreign origin.

A very simple way to avoid immigration/employment-related issues is to ensure that every new employee legibly and accurately completes an I-9 form. The I-9 is a one-page form employees complete, verifying their identity as well as proving they are allowed to work in the United States. An employee must present documentation of identity and work authorization. Certain documents, like a U.S. passport or a permanent residency card, can prove both identity and that one is legally authorized to work. However, employers may not tell employees which employment authorization documents they must provide. The I-9 form sets forth a list of eligible documents. Because there are often times when some employees are authorized to work, but do not possess one of the documents on the list, the best practice is to verify with an immigration attorney or the Department of Labor whether the employee has been issued a document not on the list.•

**Jeffrey Campolongo** *concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.*

Type your comment here...

Comments are not moderated.
For more information, please see our **terms and conditions**.
To report offensive comments, **Click Here**.

REVIEW POST

## From the Law.com Network

THE NATIONAL LAW JOURNAL

**Lawsuit alleges NCAA's scholarship rules violate antitrust laws**

**Idaho Law School Pins Branch Campus Hopes on the Lottery**

LTN LAW TECHNOLOGY NEWS

**The Good, Bad and Ugly News From Black Hat USA 2012**

**ABA Tech Survey: A Third of Lawyers Use Tablets, a Few Still on Dial-Up**

Deloitte.

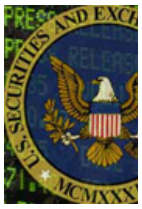


THE RECORDER

**Golden Gate Names Interim Dean**

**ITC Judge Invalidates Rambus Patents for Prior Art, Calling Former Executives 'Dishonest'**

dbr DAILY BUSINESS RE



**SEC finds Miami investors on city's**

**Hedge fund bank involves $1.1 billi losses**

## THE LEGAL INTELLIGENCER