

Federal Court Strikes Illinois Law Restricting Use of Federal E-Verify Program

by Robert Groban and Peter Steinmeyer

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On March 12, 2009, the United States District Court for the Central District of Illinois declared that Section 12(a) of Illinois Public Act 95-138 (the "Illinois Act") was invalid under the Supremacy Clause of the U.S. Constitution, because it conflicted with the federal Illegal Reform and Immigrant Responsibility Act ("IRIRA"). See *United States of America v. The State of Illinois*, No. 07-3261 (C.D. Ill. Mar. 12, 2009) (the "Decision").

At issue in the Decision was whether Illinois could prohibit employers from using the federal E-Verify program until the federal government establishes that this program makes determinations on employment authorization within three days on 99 percent of the cases that receive tentative nonconfirmations. For those unfamiliar with E-Verify, this is a voluntary program established by IRIRA in 1997 that allows registered employers to determine if new employees are authorized to work. Following completion of the Form I-9, employers who have registered for E-Verify submit certain information about the new hire electronically to E-Verify. The federal government then will provide the employer with either: (1) confirmation that the employee is authorized to work; or (b) tentative nonconfirmation that the employee may not be authorized to work. If the E-Verify program issues such a tentative nonconfirmation, then the employee must seek secondary verification of employment authorization with the relevant federal agencies. When the employee secures this verification, the employer resubmits the verification to the E-Verify program, which makes a final determination that the employee is authorized or not authorized to work.

There have been significant problems with the E-Verify program and the accuracy of the databases that support it. Many have argued that this has resulted in hardships for employees who have work authorization but cannot get the E-Verify program to confirm this. The result under E-Verify is that they must be terminated so the employer is not subject to civil or criminal liability. In response, Illinois enacted the Illinois Act. Basically, it prohibits Illinois employers from enrolling in E-Verify until the

federal government can demonstrate that it can accurately make employment determinations within three days on 99 percent of the employees that receive tentative nonconfirmations. The Illinois Act became effective on January 1, 2008, but the United States sued to declare it invalid on Supremacy grounds and to prevent it from being enforced against Illinois employers who wanted to register with E-Verify. In its Decision, the federal district court agreed with the federal government that the Illinois Act violated the Supremacy Clause of the U.S. Constitution because its provisions were contrary to IRIRA, which allows any employer to register with E-Verify regardless of how accurate its database might be.

The State of Illinois has 30 days to appeal. In the meantime, we strongly recommend that Illinois employers considering E-Verify registration seek counsel as to the implications of both the program and this Decision on their specific situations.

For more information about this Client Alert, please contact:

Robert Groban
New York
(212) 351-4689
Rgroban@ebglaw.com

Peter Steinmeyer
Chicago
(312) 499-1417
Psteinmeyer@ebglaw.com

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