



# COMMONWEALTH OF VIRGINIA

*Office of the Attorney General*

Kenneth T. Cuccinelli, II  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071

February 2, 2010

FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Thomas Davis Rust  
Member, House of Delegates  
P.O. Box 406  
Richmond, Virginia 20170

Dear Delegate Rust:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## **Issue Presented**

You inquire whether federal law would preempt Virginia law imposing a “civil or criminal sanction” for hiring unauthorized aliens. Specifically, you ask whether federal law preempts § 40.1-11.1,<sup>1</sup> which prohibits the hiring of an unauthorized alien and whether the Commissioner of Labor and Industry may seek an injunction prohibiting the hiring of unauthorized aliens pursuant to § 40.1-49.4(F)(2).

## **Response**

It is my opinion that federal law governing the employment of unauthorized aliens explicitly and implicitly preempts any Virginia law that would impose civil or criminal sanctions upon persons employing such aliens. Further, it is my opinion that imposition of an injunction constitutes a civil sanction which is preempted by federal law.

## **Background**

Section 40.1-6 designates the powers and duties of the Commissioner of Labor and Industry (the “Commissioner”). Section 40.1-11.1 declares unlawful the employment of unauthorized aliens,<sup>2</sup> but it is your understanding that the enforcement of § 40.1-11.1 is preempted by 8 U.S.C. § 1324a(h)(2).

---

<sup>1</sup>For purposes of this opinion, all references to federal code sections will be identified with the appropriate reference to the United States Code (“U.S.C.”). Statutes listed without the U.S.C. designation refer to the *Virginia Code*.

<sup>2</sup>Section 40.1-11.1 provides, in pertinent part, that “[i]t shall be unlawful and constitute a Class 1 misdemeanor for any employer or any person acting as an agent for an employer, or any person who, for a fee, refers an alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States for employment to an employer, or an officer, agent or representative of a labor organization to knowingly employ, continue to employ, or refer for employment any alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States.”

However, you note that § 40.1-49.4(F)(2) authorizes the Commissioner to petition a circuit court to enjoin any violation of Title 40.1. You suggest the Commissioner could use such authority to petition the court to enjoin a violation of § 40.1-11.1 for persons hiring unauthorized aliens. You further suggest that such action effectively would circumvent the federal law because an injunctive remedy would not constitute a civil or criminal sanction.

### **Applicable Law and Discussion**

#### **I. The Supremacy Clause and Federal Preemption**

The Supremacy Clause of the Constitution of the United States declares that the “Constitution, and the Laws of the United States” “shall be the supreme Law of the Land,” notwithstanding the laws of any state to the contrary.<sup>3</sup> Therefore, to the extent that state or local laws or ordinances conflict with or are contrary to federal law, they are preempted by federal law. Moreover, in many cases, even where a state or local law or ordinance occupies the same field of law, to the extent that a federal law dominates that field, the state or local law is preempted.<sup>4</sup>

Several distinct doctrines have developed in Supremacy Clause jurisprudence.<sup>5</sup> First, “[e]xpress preemption” applies where Congress explicitly declares that a federal law is intended to supersede state law.<sup>6</sup> A second doctrine, implied preemption, takes two forms—field preemption and conflict preemption.<sup>7</sup> Field preemption exists “if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”<sup>8</sup> Conflict preemption acts to void any state statute or local ordinance to the extent it conflicts with a federal statute.<sup>9</sup> Conflict preemption recognizes that “to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.”<sup>10</sup>

It is “an established principle that an intention of the Congress of the United States to exclude the states from exerting their police power must be clearly manifested.”<sup>11</sup> In addition, Congress may limit its preemption of state and local regulation of a particular field.<sup>12</sup> When Congress chooses to limit its

---

<sup>3</sup> U.S. CONST. art. VI, cl. 2.

<sup>4</sup> See *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 240 (2d Cir. 2006).

<sup>5</sup> See *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1255 (N.Y. 2006).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (citations omitted). “Congress’s intent to preempt state law may be implied where it has designed a pervasive scheme of regulation that leaves no room for the state to supplement, or where it legislates in “a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.”” *Silva*, 469 F.3d at 240 (citations omitted).

<sup>9</sup> *Balbuena*, 845 N.E.2d at 1255.

<sup>10</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (noting state regulation must yield to federal regulation in context of National Labor Relations Act).

<sup>11</sup> *Nat’l Mar. Union v. Norfolk*, 202 Va. 672, 677, 119 S.E.2d 307, 311 (1961).

<sup>12</sup> *Id.*

preemption, state regulation outside of the limitation is not forbidden or replaced.<sup>13</sup> However, where a field of law traditionally has not been the exclusive province of the states, such as in the area of immigration law, field preemption by federal law can be implicit, despite a narrow limitation.<sup>14</sup>

## II. The Immigration Reform and Control Act of 1986

Congress has asserted federal authority over immigration and naturalization of aliens and their employment.<sup>15</sup> The federal Immigration Reform and Control Act of 1986<sup>16</sup> (“IRCA”) presents a “comprehensive scheme prohibiting the employment of illegal aliens in the United States.”<sup>17</sup> IRCA “forcefully” makes combating the employment of illegal aliens central to immigration law,<sup>18</sup> which “is plainly a field in which the federal interest is dominant.”<sup>19</sup> IRCA has established an extensive employment verification system to prevent employment of illegal aliens.<sup>20</sup> To enforce this public policy, “IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.”<sup>21</sup> Federal immigration law distinguishes among various categories of visas thereby determining which noncitizens legally are authorized to work in the United States.<sup>22</sup>

“Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening [the] explicit ... policies” mandated by IRCA.<sup>23</sup> An employee would have to provide false documentation to the prospective employer or the employer would have to fail in his duty to check the employee’s documentation. If an employer unknowingly hires an unauthorized alien, he must discharge the alien upon discovery of the unauthorized status.<sup>24</sup> Employers who violate IRCA are subject to civil fines.<sup>25</sup>

As part of the “comprehensive scheme” to combat the employment of illegal aliens, IRCA provides that “[t]he 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

---

<sup>13</sup> *Id.*

<sup>14</sup> See *Balbuena*, 845 N.E.2d at 1256 (noting that although IRCA and other federal statutes occupy full spectrum of immigration law, nothing indicates that Congress meant to affect state regulation of occupational health and safety; states possess broad authority under police powers).

<sup>15</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

<sup>16</sup> Pub. L. No. 99-603, 100 Stat. 3359.

<sup>17</sup> See *Hoffman*, 535 U.S. at 147; see also *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 821 (Md. 2005) (noting characterization of IRCA as comprehensive scheme).

<sup>18</sup> See *Hoffman*, 535 U.S. at 147; *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 (1991).

<sup>19</sup> *Silva*, 469 F.3d at 240.

<sup>20</sup> See *Hoffman*, 535 U.S. at 147.

<sup>21</sup> *Id.* at 148 (citing 8 U.S.C. § 1324a(b)).

<sup>22</sup> *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004).

<sup>23</sup> See *Hoffman*, 535 U.S. at 148 (citing 8 U.S.C. § 1324a(b)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

fee for employment, unauthorized aliens.”<sup>26</sup> Therefore, Congress clearly has demonstrated its intent to preempt state and local laws imposing civil or criminal sanctions upon persons or companies that employ or recruit unauthorized aliens or accept a fee to refer such aliens for employment, except for licensing and similar laws.

### III. Injunctive Relief and Federal Preemption

In 8 U.S.C. § 1324a(h)(2), Congress explicitly “preempt[s] any State or local law imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”<sup>27</sup> A civil injunction is “[a] court order commanding or preventing an action.”<sup>28</sup> A “sanction” is “[a] penalty or coercive measure that results from failure to comply with a law, rule, or order.”<sup>29</sup> Injunctions commonly are understood to constitute a sanction.<sup>30</sup> Therefore, if granted, a civil injunction to enforce Virginia’s statute prohibiting the hiring of unauthorized aliens would constitute a sanction, which explicitly is preempted by 8 U.S.C. § 1324a(h)(2).<sup>31</sup>

Although § 40.1-49.4(F)(2), empowers the Commissioner to petition a circuit court to enjoin any violation of Title 40.1, he may not circumvent the federal preemption simply by seeking to enjoin an employer from hiring unauthorized aliens. The Commissioner may not obtain an injunction because such an action is a civil sanction that is prohibited, *i.e.* preempted, by IRCA.<sup>32</sup>

Although IRCA would preempt the award of injunctions to police immigration laws, the statute contains a “savings” clause that permits states and localities to address immigration violations through “licensing and similar laws.”<sup>33</sup> Courts are divided on whether to read that provision narrowly or

---

<sup>26</sup> 8 U.S.C.S. § 1324a(h)(2) (LexisNexis 2007).

<sup>27</sup> Congress expressly limits its preemption by providing an exception for “licensing and similar laws.” 8 U.S.C.S. § 1324a(h)(2). State licensing and similar laws traditionally have been implemented in the exercise of a state’s police powers in protection of the public health, safety, and welfare. *See, e.g.*, VA. CODE ANN. § 54.1-100 (2009) (providing for regulation of professions and occupations for purpose of protecting public health, safety, and welfare).

<sup>28</sup> BLACK’S LAW DICTIONARY 855 (9th ed. 2009).

<sup>29</sup> *Id.* at 1458.

<sup>30</sup> *See, e.g.*, SEC v. M & A West Inc., 538 F.3d 1043, 1055 (9th Cir. 2008); United States v. Brennan, 395 F.3d 59, 72 (2d Cir. 2005) (describing injunctions as civil sanctions).

<sup>31</sup> *See* CIBA Corp. v. Weinberger, 412 U.S. 640, 644 (1973) (describing civil injunction proceedings, criminal penalties, and *in rem* seizure and condemnation as types of sanctions that could be applied in enforcement of Federal Food, Drug, and Cosmetic Act); Retail Clerks Int’l Assoc. v. Schermerhorn, 375 U.S. 96, 100 (1963) (indicating that injunctions constitute one of wide variety of sanctions, also including damage suits and criminal penalties); United States v. United States Gypsum Co., 340 U.S. 76, 82 (1950) (noting that court order included “sanction of an injunction against violation of the” order); PFS Distribution Co. v. Raduechel, 574 F.3d 580, 598 (8th Cir. 2009) (describing preliminary injunction as sufficient sanction for certain conduct).

<sup>32</sup> *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007) (holding that IRCA preempts municipal ordinance governing illegal immigrants).

<sup>33</sup> 8 U.S.C.S. § 1324(a)(h)(2).

The Honorable Thomas Davis Rust  
February 2, 2010  
Page 5

broadly.<sup>34</sup> Moreover, the Commissioner or a locality certainly may notify an employer that it is in violation of immigration law. Additionally, the Commissioner may inform such employer that if the violation is not redressed, he will report the violation to Immigration and Customs Enforcement.

### Conclusion

Accordingly, it is my opinion that federal law governing the employment of unauthorized aliens explicitly and implicitly preempts any Virginia law that would impose civil or criminal sanctions upon persons employing such aliens. Further, it is my opinion that imposition of an injunction constitutes a civil sanction which is preempted by federal law.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken Cuccinelli", with a horizontal line and a small flourish underneath.

Kenneth T. Cuccinelli  
Attorney General

1:1133; 1:941/09-071

---

<sup>34</sup> See *Lozano*, 496 F. Supp. 2d at 520, 533 (invalidating city licensing scheme as incompatible with IRCA); *but see Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2009) (upholding Arizona licensing scheme against facial challenge), *petition for cert. filed sub nom. Chamber of Commerce v. Candelaria*, 130 S. Ct. 534 (U.S. Nov. 2, 2009) (No. 09-115).