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Dino DiCianno
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Dear Mr. DiCianno:

You have requested legal advice regarding Assembly Bill (A.B.) 383 and the Federal Immigration Reform and Control Act (IRCA).

QUESTION

Does the ICRA preempt A.B. 383's requirement that the Tax Commission impose an administrative fine on business licensees who violate IRCA?

ANALYSIS

ICRA prohibits employers from hiring or continuing to employ a person who they know is an illegal immigrant. 8 U.S.C.A. § 1324a(a). It also requires employers to use certain procedures to verify an applicant's eligibility for employment. 8 U.S.C.A. § 1324a(b). The U.S. Attorney General is authorized to investigate violations and enforce the chapter. 8 U.S.C. A. § 1324a(e). Finally, IRCA expressly preempts "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." 8 U.S.C.A. § 1324a(h)(2).

Assembly Bill 383 of the 2007 regular session requires the Tax Commission to impose an administrative fine on any business license holder who it determines has "willfully, flagrantly, or otherwise egregiously" violated the IRCA. Act of June 2, 2007, ch.316, § 10, 2007, Nev. Stat. 1266, 1270. The Tax Commission must hold a hearing if

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it receives information that the U.S. Attorney General has issued a final order finding that a Nevada business license holder has violated IRCA. *Id.* The purpose of the hearing is to determine whether the violation was willful, flagrant, or otherwise egregious. *Id.* If the Tax Commission finds that it was, it is required to impose an administrative fine, which is to be set by regulation. *Id.*

Federal law preempts state law under the Supremacy Clause (U.S. CONST. art. VI, § _____, cl. 2) of the U.S. Constitution, which provides that federal law is the supreme law of the land. *Siaperas v. Montana State Compensation Ins. Fund*, 480 F.3d 1001, 1004 (9th Cir. 2007). "Express preemption occurs when Congress enacts a statute that expressly commands that state law on the particular subject is displaced." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *Gaddis v. Ashcroft* 377 F.3c 934, 944 (9th Cir. 2004).

Here, IRCA expressly preempts state and local laws which impose criminal or civil sanctions on employers who hire illegal immigrants, except through licensing and similar laws. 8 U.S.C.A. § 1324a(h)(2). ("The provision 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.") Therefore, the remaining question is whether the administrative fine allowed by A.B. 383 is a permitted licensing law.

IRCA's legislative history (House Report No. 99-682(I)) shows that "licensing" refers to revoking a local license for a violation of IRCA. Further, the phrase "through licensing or similar laws" means the suspension, revocation, or refusal to renew a state or local license or permit. *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 519, (M.D.Pa. 2007).

In *Lozano*, the district court analyzed a local ordinance making it "unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City." *Id.* at 515. Businesses that violated the ordinance were penalized by a suspension of their business license. *Id.* at 519. The City of Hazelton argued that its ordinance was not preempted because it followed 8 U.S.C. A. § 1324a(h)(2) with "exacting precision" and, instead of criminal and civil sanctions as prohibited by IRCA, a business permit suspension "amounts to 'licensing and similar laws' as provided by the IRCA." *Id.* at 519.

The court concluded that IRCA preempted the ordinance because the revocation of the business license was a punishment for *violating the local ordinance, rather than the federal law.* *Id.* at 519 (emphasis added). Thus, IRCA's "licensing or similar laws" exception was not applicable. The court reasoned: "Under the *Hazelton's* interpretation of the provision, a state or local municipality properly can impose any rule they choose

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on employers with regard to hiring illegal aliens as long as the sanction imposed is to force the employer out of business by suspending its business permit” *Id.* In other words, accepting the city’s argument would mean that state and local governments could directly regulate the employment of immigrants, as long as the penalty was to suspend or revoke the business license. *Id.*

The court’s decision in *Lozano* outlines the federal government’s interest in immigration and the reasons for federal preemption of state laws relating to immigration. *Id.* at 518. Its discussion of what constitutes “licensing or similar laws” indicates that this exception was intended to allow state action against an employer’s license for violations of IRCA, but does not grant states carte blanche to impose direct regulations on employment of immigrants. *Id.* at 519–520.

Similar to the violative local regulation in *Lozano*, A.B. 383 will cause certain federal violations to be treated more harshly than others pursuant to local regulation. Businesses need go no further than compliance with the federal law in order to escape any effect of A.B. 383. But those who do not comply will face the possibility of an additional fine, depending on the circumstances of their violation and any regulations of the Tax Commission necessary to the enforcement of A.B. 383. Although A.B. 383 does not impose any state compliance requirements distinct from IRCA, it indirectly regulates employment practices relating to illegal immigrants because it increases the punishment for certain violations. In effect, A.B. 383 singles out “egregious” violations, and therefore imposes an additional, local deterrent inconsistent with rationale and holding in *Lozano*. Further, the monetary fine imposed by A.B. 383 on those “who employ, or recruit or refer for a fee for employment, unauthorized aliens,” is a civil sanction expressly preempted pursuant to 8 U.S.C.A. § 1324a(h)(2).

In addition to the express preemption of a state civil sanction, a state statute is impliedly preempted where it conflicts with the federal law or where Congress has occupied a field or subject to the preclusion of state law. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). As the court in *Lozano* thoroughly discussed, the federal government has an overriding interest in uniform national treatment of immigration. See *Lozano*, 496 F.Supp. 2d 477, at 519. IRCA created a “comprehensive scheme” prohibiting employment of illegal immigrants. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147 (2002). The *Lozano* court’s analysis demonstrates that Congress intended to exclusively occupy the regulatory field of employment of immigrants. See *id.*

Part of this comprehensive scheme is to set monetary penalties for violations of IRCA. 8 U.S.C.A. § 1324a(e)(4). For employers who knowingly hire, refer for a fee, or continue to employ an illegal immigrant, a schedule of increasing civil penalties already exists under the federal scheme. *Id.*; see also 8 C.F.R. § 274a.10(b)(1). This schedule prescribes the minimum and maximum civil fines for first, second, and three or more

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offenses. 8 C.F.R. § 274a.10(b)(1). For employers who fail to comply with employment verification procedures, the regulations set forth a separate schedule of minimum and maximum fines. 8 C.F.R. § 274a.10(b)(2).

Regardless of the type of violation, A.B. 383 seeks to further punish business license holders who the Tax Commission deems to be especially "bad." This punishment runs contrary to federal law, which prescribes maximum monetary penalties as part of a comprehensive scheme of regulations.

Finally, we suggest that you provide a copy of this opinion to the Legislative counsel for review and possible legislative action.

CONCLUSION

IRCA preempts state laws imposing civil or criminal sanctions, but does not preempt "licensing or similar laws." The "administrative fine" imposed by A.B. 383 is a "civil sanction" which is both expressly and impliedly preempted by federal law. It is not a licensing or "fitness to do business" law because the Tax Commission has no other authority to act against an employer's business license for immigration-related matters. Therefore, it is an attempt to impose an additional state sanction on certain businesses that violate the federal law, which is expressly preempted. A.B. 383 also conflicts with the comprehensive federal scheme, which already sets maximum monetary sanctions for violations of IRCA.

Sincerely,

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