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Attorney general mulls legality of illegal worker felony charge

by Ted Carter

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Attorney General Jim Hood is studying whether the U.S. Supreme Court ruling on Arizona's immigration law killed part of a Mississippi statute that made it a felony for an illegal immigrant to work in the state.

Hood said early last week he "did not know" for certain whether the June 25 Arizona ruling nullified the felony provision but would look into it. In that ruling, the Supreme Court found that Arizona overstepped its constitutional authority by setting criminal penalties for working illegally in that state.

"We are still reviewing but have not yet reached a conclusion," said Hood spokeswoman Jan Schaeffer

last week.

Since no criminal prosecutions have occurred under the [Mississippi Employment Protection Act of 2010](#), Hood may be in no rush to ask legislators to delete the provision. But little suspense should await the outcome of Hood's examination, several immigration lawyers say.

They predict the days are numbered for Mississippi's standing as the only state in the union that specifies a felony with a five-year prison sentence for working illegally in the state.

The court ruling, they say, makes it clear that states can't usurp the powers of Congress, which in 1986's Immigration Reform and Control Act set civil penalties for working illegally in the United States.

On the other hand, the Mississippi Employment Protection Act's E-Verify employment rules appear to have avoided any damage. The law requires Mississippi companies to verify electronically through a federal database that a worker is eligible for employment in the United States.

The verify process provides "safe harbor" protection to employers in the event workers are later found to be working illegally. Employers who fail to use E-Verify could lose their business licenses and eligibility for public contracts.

The immigration attorneys emphasized that the ruling upheld the use of a state's licensing power as an immigration enforcement tool.

"Mandating an E-Verify as a license could be a valid use of states' rights," said Todd Photopolos, an attorney with [Butler Snow's](#) Labor & Employment Group and Commercial Litigation Group.

Where the court has a problem, he said, is in efforts by the states "to add a layer of criminal sanctions."

Photopolos and the other attorneys say the Arizona ruling confirmed that Mississippi over-stepped its authority when it subjected unauthorized workers to a minimum of one year in prison and a maximum sentence of five years, as well as hefty fines. The law also suggested authorities hold suspects without bail on the assumption someone in the country illegally should be considered a flight risk.

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Congress specified civil penalties in its landmark 1986 Immigration Reform and Control Act, or IRCA. Mississippi can't preempt those penalties by setting criminal penalties of its own, Photopoulos said.

"I don't see how it passes muster in light of the Arizona ruling."

The felony provision "would clearly be preempted by federal law and likely be held unconstitutional," said Barry Walker, a longtime immigration lawyer with Tupelo's [Walker & Ungo](#).

"To my knowledge there has not been a single case of a felony charge for an undocumented worker," Walker added. "I suspect law enforcement people don't really want to pursue that."

Agreeing with Walker, [Mississippi Immigration Rights Alliance](#) executive director Bill Chandler said local police chiefs, county sheriffs and city and county elected officials did not want to make criminals of undocumented workers in the first place. He expects they will be pleased to see the provision go away.

"I think sheriffs and other law enforcement people want to stay away from that for a number of reasons," Chandler said. "Local enforcement officers figured they have enough to do... The cost of enforcing something like that was highly questionable and ridiculous."

Had any arrests occurred, Chandler said, "We would have been in court immediately."

Like the other immigration lawyers, Walker said he thinks the state's E-Verify requirement would survive under the recent ruling's licensing allowance. The Mississippi law "basically mandates employers to participate in a federal system" as a condition of obtaining a business license, he said.

Pepper Crutcher, an employment lawyer and partner in [Balch & Bingham's](#) Jackson office, agrees. He noted on the firm's immigration law blog soon after the June Arizona ruling that a 2011 Supreme Court ruling in *Chamber of Commerce v. Whiting* upheld Arizona's use of E-Verify as a condition of state business licenses.

"While the pre-emption reasoning in this week's opinion is sweeping, it does not appear to call that 2011 decision into question," Crutcher wrote. "Thus, Mississippi should remain able to enforce its E-Verify mandate for state contractors, a contract being a quasi-license. And Mississippi employers other than state contractors still face the prospect of business license loss if they employ an illegal alien and have not used E-Verify."

Like the other lawyers, Crutcher said he thinks Mississippi's criminal sanctions will be voided. "I don't think that Mississippi is going to be able to enforce criminalization of work by illegals," he said in an interview last week.

As a third-year-law student and executive editor of [Washington & Lee University Law School's](#) legal journal, Nicholas Neidzski spotted problems with the legal soundness of the criminal provisions of Mississippi's law early on. In a 2009 law journal article titled "Unconstitutionality of Mississippi's Employment Act," Neidzski argued the felony clause is a "clear violation" of the pre-emption clause of the Immigration Reform and Control Act "and does not fit into either the 'licensing' or 'similar laws' exception."

Neidzski, who today practices commercial litigation in San Diego, said in an interview last week he thought the Arizona decision "substantially supports" the position he took three years ago. "I'm glad the lawyers (for the government) focused on pre-emption."

In sum, he said, both Arizona and Mississippi sought to regulate conduct above what federal law allows. "And that's improper due to the Supremacy Clause," Neidzski said.

While Neidzski predicted the Supremacy Clause would ultimately be the undoing of the criminalization of undocumented workers, Balch & Bingham's Crutcher thought the criminal sanctions had a strong chance of surviving.

Given that the Supreme Court had been cutting back on the use of re-emption to nullify state laws, it "was not unreasonable to think they might uphold that," Crutcher said.

"I have not seen this sort of federal pre-emption out of the Supreme Court in 20 to 30 years."

Arizona argued (as would have Mississippi had its law been challenged) that its immigration law simply sought to increase the effectiveness of federal immigration laws. "The Supreme Court said 'no.'"

Added Crutcher: "Nobody anticipated that the court would say we won't permit states to increase the penalty for those who break federal immigration law."



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