

U.S. Supreme Court: No Federal Preemption in State's I-9 Fraud Case

By Michael H. Neifach & Amy L. Peck

March 5, 2020

Meet the Authors



Michael H. Neifach

Office Managing Principal
(703) 483-8300
Michael.Neifach@jacksonlewis.com



Amy L. Peck

Principal
402-391-1991
Amy.Peck@jacksonlewis.com

Related Services

Immigration

Federal law does not preempt a state's ability to bring criminal prosecutions against individuals for providing false or fraudulent information in connection with their employment, the U.S. Supreme Court has decided. [*Kansas v. Garcia*](#), No. 17-834 (Mar. 3, 2020).

Background

This case involved three individuals who were convicted of identity theft under Kansas law for using other peoples' Social Security numbers to gain employment. The individuals had provided false Social Security numbers on their I-9 forms and on their state tax-withholding forms. Form I-9 Employment Eligibility Verification is a federal employment eligibility verification form.

In its prosecutions of the three individuals, the State of Kansas dropped its previous reliance on the information on the I-9 forms, recognizing that reliance on that information was preempted by federal law. However, the State of Kansas moved forward with the prosecutions, relying solely on the state tax-withholding forms.

The individuals argued that even if the State of Kansas did not rely on the I-9 forms themselves, they could not rely on the same information found on other forms, because those were filled out as part of the process of obtaining employment and, therefore, were preempted by federal law, i.e., the Immigration Reform and Control Act of 1986 (IRCA). (For more, see our article, [Preemption Issues High Court is Considering in I-9 Fraud Case.](#))

IRCA prohibits employers from hiring and employing individuals while knowing they are not authorized to work. IRCA also established the Form I-9 Employment Eligibility Verification process.

Supreme Court Decision

Justice Samuel Alito, writing for the majority of the Court, found there is no express or implied preemption of state law by IRCA. He explained that, while states could not rely on information in the I-9 form itself, that did not mean they could not rely on the same information in prosecuting individuals if the information could be found elsewhere. According to Justice Alito, any other interpretation would lead to ludicrous results because I-9 forms contain so much basic information that is readily available elsewhere, including names, addresses, dates of birth, email, and telephone contact information.

In addition, Justice Alito wrote that the use of Social Security numbers was not preempted by implication under IRCA, because submitting tax-withholding forms was not part of the federal employment verification scheme.

Dissent

Justice Stephen Breyer wrote for himself and Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Concurring in part and dissenting in part, he agreed that federal law did not expressly preempt Kansas' criminal laws in this case, but he disagreed on whether preemption is implied in IRCA.

In his opinion, the three individuals were prosecuted for making misrepresentations in order to obtain employment and this “fell squarely within the field that ... the federal Act (IRCA) preempts.” He wrote that the Court majority was opening a “colossal loophole” for the states:

Starting a new job almost always involves filling out tax-withholding forms alongside an I-9. So unless they want to give themselves away, people hoping to hide their federal work-authorization status from their employer will put the same false information on their tax-withholding forms as they do on their I-9. To let the States prosecute such people for the former is, in practical effect, to let the States police the latter. And policing the latter is what the Act expressly forbids.

Implications

Following the Supreme Court decision, states may feel more empowered to police fraud in the employment verification process by prosecuting under identity theft-type statutes. This could become more prevalent in states that are particularly interested in finding and prosecuting undocumented workers. In these states, employers also may find that workers are being forced out of the workforce by fear of such prosecution. This most likely will affect industries that rely heavily on immigrants, including agriculture, food processing, hospitality, construction, and even home healthcare. In addition, in proactive states, employers may find themselves subject to more requests for documents (such as tax documents and even I-9 documents) from the government.

To prepare, employers should consider adopting policies on when and to whom I-9 and related documents may be produced. These policies will have to strike the appropriate balance between privacy laws and compliance with a governmental request.

If you have questions about how your workplace might be affected or about how to establish compliant document production policies, please contact a Jackson Lewis attorney.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.