S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 Fifth Avenue North
NASHVILLE, TENNESSEE 37243-0497

May 23, 2007

Opinion No. 07-79

Whether the Criminal or Civil Penalties Set Forth in Tenn. Code Ann. § 50-1-103 are preempted by 8 U.S.C. § 1324a(h)(2)

QUESTION

Do the provisions of 8 U.S.C. § 1324a(h)(2) preempt either the criminal penalty or the civil penalty set forth in Tenn. Code Ann. § 50-1-103?

OPINION

The provisions of 8 U.S.C. § 1324a(h)(2) preempt only the criminal penalty set forth in Tenn. Code Ann. § 50-1-103. The civil penalty set forth in Tenn. Code Ann. § 50-1-103, that of license revocation, is exempted from the terms of 8 U.S.C. § 1324a(h)(2) .

ANALYSIS[1]

Tenn. Code Ann. § 50-1-103 states:

> **§ 50-1-103. Illegal aliens**
>
> (a) It is unlawful for any person, unless granted an exemption by the United States department of labor pursuant to its rulemaking authority, to knowingly employ or refer for employment any individual who has illegally entered the United States.
>
> (b) For the purposes of this section, "person" includes any individual, partnership, association, company, business or corporation regulated by, doing business in, or using the services of employees in the state, and also includes any employment agency, contract labor provider, or organized employee organization that refers prospective employees to employers.

[1]We recently issued Op. Tenn. Atty. Gen. 07-64 (May 10, 2007)(copy attached), which deals with a closely related issue of federal preemption and state immigration law. The analysis of the current opinion will therefore parallel the analysis in the previous opinion.

> (c) No person, employment agency, contract labor provider, organized employee organization who refers prospective employees to employers, or corporation shall be considered to be in knowing and willful violation of this section in any case in which a prospective employee presented a social security card, driver license, birth certificate, vehicle registration or work visa that demonstrated that such prospective employee is not an illegal alien.
>
> (d) A knowing and willful violation of this section is a Class B misdemeanor. In addition, the license of any person violating this section shall be revoked and such person shall be forever barred from doing business in this state.
>
> (e)(1) The provisions of this section shall be enforced by the department.
>
> (2) The department is authorized to promulgate rules and regulations pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, to effectuate the purposes of this section. The commissioner of agriculture shall approve all proposed rules and regulations relative to agriculture before promulgation by the department. For the purposes of this section, a nursery is considered an agricultural employer.

Your question concerns paragraph (d) of this statute, which establishes both a criminal sanction ("[a] knowing and willful violation of the statute is a Class B misdemeanor") and a civil penalty ("the license of any person violating this section shall be revoked and such person shall be forever barred from doing business in this state.").

A federal statute, 8 U.S.C. § 1324a(a)(1)(A) and (B), makes it unlawful either to "hire, or . . . recruit or refer for a fee, . . . an alien knowing the alien is an unauthorized alien," or to "hire or recruit for a fee, for employment . . . an individual without [verifying the individual's citizenship] . . .." This federal statute therefore mirrors the provisions of Tenn. Code Ann. § 50-1-103. Both statutes make it illegal to knowingly hire or employ an illegal alien, and both statutes also prohibit "referring" an illegal alien for employment.[2] In addition, the meaning of "recruit" as employed in the federal statute[3] overlaps with the meaning of "refer for employment" in the state

[2]We note that the state statute prohibits a slightly broader category of conduct, that of merely "referring" an illegal alien for employment, while the federal statute prohibits a more qualified type of conduct, that of referring an illegal alien for employment "for a fee." While this distinction might be of importance in certain circumstances, it has no effect on the issue addressed in this opinion.

[3]A separate federal statute, 8 U.S.C. § 1324(a)(1)(A), prohibits knowingly bringing, transporting, concealing, harboring, or shielding from detection, an illegal alien, and further prohibits encouraging or inducing an illegal alien to come to, enter, or reside in the United States, while knowing that these acts will be a violation of law. 8 U.S.C. §

statute.[4] U.S.C. § 1324a contains the explicit preemption proviso, 8 U.S.C. § 1324a(h)(2), that you cite in your opinion request:

> (2) Preemption
>
> The 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 fee for employment, unauthorized aliens.

As we discussed in our recent opinion, Op. Tenn. Atty. Gen. 07-64 (May 10, 2007):

> In the United States Supreme Court decision, *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), the Court examined a number of factors to be taken into consideration by a court in determining whether a state or local law is preempted by federal law. While cautioning that preemption must be based upon more than the mere fact that state and federal laws address the same general subject matter, the Court held that the clearest examples of preemptions include instances where Congress has explicitly stated its intent, in enacting federal laws, to preempt state or local laws in the same areas. Where "Congress has unmistakably so ordained," or in instances where preemption is "the clear and manifest purpose of Congress," however, state and local laws will be preempted by federal law.[5]

The terms of the explicit "Preemption" provision of 8 U.S.C. § 1324a(h)(2) quoted above constitute Congress' statement of its "clear and manifest purpose" to 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." The criminal sanctions of Tenn. Code Ann. § 50-1-103(d) are therefore clearly preempted by federal law and are thus

---

1324a is therefore more specifically directed at the particular acts that are targeted by Tenn. Code Ann. § 50-1-103.

[4]*See Webster's New Collegiate Dictionary*, 966 (G. & C. Merriam Co., ed. 1977), listing among the definitions for the verb "recruit" (1) "to fill up the number . . . with new members" (2) "to secure the services of: ENGAGE, HIRE" (3) "to enroll or seek to enroll," and (4) "to enlist new members." The same source lists among the definitions of the verb "refer" (1) "to send or direct for treatment, aid, information, or decision < ~ a patient to a specialist>" (2) "to direct for testimony or guaranty as to character or ability," and (3) "to direct attention usu. by clear and specific mention." *Id*. at 970. Given the proper factual scenario, "recruiting" a person for employment could thus be synonymous with "referring" the person for employment.

[5]*DeCanas*, 424 U.S. at 356-357, 96 S.Ct. at 937, *quoting Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, at 142, 146, 83 S.Ct. 1210, at 1217, 1219, 10 L.Ed.2d 248 (1963).

invalid under the Supremacy Clause (Article VI, cl. 2) of the United States Constitution. Tenn. Code Ann. § 50-1-103(d)'s criminal sanctions conflict with Congress' clearly stated intent to "occupy the field"[6] in this area of immigration regulation.

As to the civil sanctions of Tenn. Code Ann. § 50-1-103(d), which provide that "the license of any person violating this section shall be revoked and such person shall be forever barred from doing business in this state," a different conclusion ensues. The federal preemption provision, 8 U.S.C. § 1324a(h)(2), specifically excludes preemption of state penalties for employing, recruiting, or referring for employment, unauthorized aliens "through licensing and similar laws." While there appears to be little or no case law construing this exemption, we conclude that the license revocation penalty set forth in Tenn. Code Ann. § 50-1-103(d) is likely the kind of state immigration law Congress intended to leave unaffected by federal immigration law.

Accordingly, the provisions of 8 U.S.C. § 1324a(h)(2) preempt only the criminal penalty set forth in Tenn. Code Ann. § 50-1-103(d). The civil penalty of license revocation set forth in Tenn. Code Ann. § 50-1-103(d) appears to be exempted from the terms of 8 U.S.C. § 1324a(h)(2) and therefore is not preempted.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

KEVIN STEILING
Deputy Attorney General

[6] *Id.*, 424 U.S. at 358, 96 S.Ct. at 938.

Requested by:

Senator Bill Ketron
309 War Memorial Building
Nashville, Tennessee 37243-0227