**S T A T E O F T E N N E S S E E**
OFFICE OF THE
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May 10, 2007

Opinion No. 07-64

Whether Senate Bill 202, as Amended by Senate Commerce, Labor & Agriculture Amendment No. 1, is preempted by federal law

## QUESTIONS

1. Section 101 of the Immigration Reform and Control Act of 1986, codified at 8 U.S.C. § 1324a(h)(2), provides that, "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." If Senate Bill 202, as amended, were to become law, would it be preempted by federal law?

2. U.S. Immigrations and Customs Enforcement and Department of Homeland Security officials are empowered to enforce penalties against employers of illegal aliens, and the undocumented workers themselves pursuant to 8 U.S.C. § 1324(a)(1), (2), (f)(1), 8 U.S.C. § 1324a(e)(4)-(5), (f)(1)-(3), and 18 U.S.C. § 1546(b). If Senate bill 202, as amended, were to become law, would it be preempted by federal law?

## OPINIONS

1. If Senate Bill 202 were to become law, it would be preempted pursuant to 8 U.S.C. § 1324a(h)(2).

2. This question is pretermitted by our response to your previous question.

## ANALYSIS

Senate Bill 202 (SB202), as amended by Senate Commerce, Labor & Agriculture Amendment No. 1, states as follows:

SENATE COMMERCE, LABOR & AGRICULTURE
Amendment #1
Amendment No. 1 to SB0202
Southerland

AMEND Senate Bill No. 202 House Bill No. 729

by deleting all language following the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 39, Chapter 17, Part 1, is amended by inserting the following as a new, appropriately designated section thereto:

(a) As used in this section, unless the context otherwise requires:

(1) "Illegal alien" means a person who is not entitled to lawful residence in the United States pursuant to the federal Immigration and Naturalization Act.

(2) "Lawful resident alien" means a person who is entitled to lawful residence in the United States pursuant to the federal Immigration and Naturalization Act.

(3) "Lawful resident verification information" means the documentation that is required by the United States department of homeland security when completing the employment eligibility verification form commonly referred to as the federal "Form I-9". For the purpose of this section, that documentation must be maintained for the entire period of employment and for no less than two (2) years thereafter. Documentation that later proves to be falsified, but that at the time of employment satisfies the requirements of the "Form I-9", is lawful resident verification information.

(b) It is an offense to knowingly employ an illegal alien.

(c) It is an offense to knowingly encourage or induce an illegal alien to come into this state for the purpose of employing such illegal alien.

(d) A person has not violated subsection (b) with respect to a particular employee if the person:

(1) Requested from the employee, received, and documented in the employee record, prior to the commencement of employment, lawful resident verification information; and

(2) The lawful resident verification information provided by the person later proved to be falsified.

(e) A person has not violated subsection (b) with respect to a particular employee if the person verified the immigrant status of the

> person prior to employment by using the federal electronic work authorization verification service provided by the United States department of homeland security pursuant to the federal Basic Pilot Program Extension and Expansion Act of 2003.
>
> (f) A violation of subsection (b) is a Class E felony punishable only by a fine not to exceed ten thousand dollars ($10,000).
>
> (g) A violation of subsection (c) is a Class D felony punishable only by a fine not to exceed fifty thousand dollars ($50,000).
>
> SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.
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> SECTION 3. This act shall take effect July 1, 2007, the public welfare requiring it.

The core of this bill lies in paragraphs (b) and (c) of Section 1, which prohibit knowingly employing an illegal alien, and knowingly encouraging or inducing an illegal alien to come into this state for the purpose of employing such illegal alien. This proposed legislation, if enacted, would very closely parallel the provisions of 8 U.S.C. § 1324a(a)(1)(A) and (B), which, respectively, make it unlawful to either "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] . . .."

Both statutes make it illegal to knowingly hire or employ an illegal alien, and the plain meaning of "recruit" as employed in the federal statute[1] is synonymous with "induce or encourage to come into this state for the purpose of employment" as employed in SB202.[2] The federal statute, U.S.C. § 1324a, however, contains an explicit preemption proviso:

> (2) Preemption
>
> The provisions of this section preempt any State or local law

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[1]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. § 1324a is therefore more specifically directed at the particular acts that are also targeted by SB 202.

[2]*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."

> 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.[3]

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.[4]

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." SB202, if enacted, would do just that, running afoul of Congress' clearly stated intent to "occupy the field"[5] in this area of immigration regulation. Accordingly, we conclude that, if enacted, SB 202, as amended, would be preempted by federal law and thus invalid under the Supremacy Clause (Article VI, cl. 2) of the U.S. Constitution.

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Attorney General and Reporter

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[3] 8 U.S.C. § 1324a(h)(2).

[4] *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).

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

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