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Opinion No. 08-88

Constitutionality of House Bill 66/Senate Bill 252 – Forfeiture of Property of Individuals Who Have Illegally Entered the Country

QUESTIONS

1. Given the pervasive federal regulatory system in the area of employment of non-citizens and persons who have entered the country illegally, is House Bill 66/Senate Bill 252 (HB66/SB252) invalid under the Supremacy Clause of the U.S. Constitution?

2. Would the provision in HB66/SB252 that states that "property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture," violate the 13th Amendment's prohibition of slavery?

3. Would the provision in HB66/SB252 that states that "[a]ll property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture," violate the 14th Amendment's requirement that no person may be deprived of property without due process of law and violate Article I, Section 21 of the Tennessee Constitution, which provides "that no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefore?"

OPINIONS

1. Yes. This Office concludes that a court would likely decide that HB66/SB252 is invalid under the Supremacy Clause of the U.S. Constitution because the implementation of the bill would conflict with the federal Fair Labor Standards Act, which protects employees' rights to receive minimum and overtime wages for work performed. 29 U.S.C. §§ 201-219. Federal courts have held that these protections of the Fair Labor Standards Act apply regardless of immigration status and that all workers are entitled to be paid for work that they have performed. Thus, it appears that the implementation of HB66/SB252 would conflict and interfere with federal labor laws, and a court would likely conclude that HB66/SB252 is invalid under the Supremacy Clause of the U.S. Constitution. In addition, a court could well conclude that HB66/SB252 may be vulnerable to a preemption challenge under federal immigration laws.

2. No. HB66/SB252 would not violate the 13th Amendment's prohibition of slavery because the bill does not "enslave" any person.

3. Yes. The provision in HB66/SB252 that states that "[a]ll property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture" would likely violate both the 14th Amendment of the United States Constitution and Article I, Section 21 of the Tennessee Constitution because the scope of the forfeiture provision goes beyond what the government could take under due process pursuant to Tenn. Code Ann. §§ 39-11-701, *et seq*.

ANALYSIS

1. HB66/SB252 would create the Class B misdemeanor offense of a person who has illegally entered the country knowingly receiving compensation for performing work in Tennessee, unless granted an exemption by the U.S. Department of Labor. The bill specifies that any money derived from such unlawful employment is subject to the criminal forfeiture provisions in Tenn. Code Ann. § 39-11-701, *et seq.* The bill provides:

> (a) It is an offense for any individual who has illegally entered the United States to knowingly receive compensation for performing work in this state, unless granted an exemption by the United States department of labor pursuant to its rulemaking authority.
>
> (b) A violation of this section is a Class B misdemeanor.
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> (c) All property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture in accordance with the forfeiture provisions codified in title 39, chapter 11, part 7.

H.B. 66 106th Gen. Assembly, 1st Reg. Sess. (Tenn. 2008).

We are asked whether the proposed criminalization of a person who has illegally entered the country for knowingly receiving compensation for performing work in Tennessee, along with the forfeiture provision, would be preempted by federal labor and immigration laws. Such preemption may be either express or implied. *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 216 (3d Cir. 1993). If no express preemption provision is included in the federal law, the state statute may still be preempted. "[T]he Supremacy clause of the United States Constitution invalidates state laws that 'interfere with or are contrary to' federal law." *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241-42 (3d Cir. 2002) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

The Tenth Circuit Court of Appeals summarized the constitutional doctrine of preemption in the following words:

> Congress' power to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2. Congressional intent is paramount in preemption analysis. *See Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998). Preemption may be either (1) expressed or (2) implied from a statute's structure and purpose. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L.Ed.2d 604 (1977). Nevertheless, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer pre-emption." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297 (10th Cir. 1999) (footnote omitted).

This Office concludes that a court would likely find that HB66/SB252 is preempted by federal labor laws because it criminalizes an undocumented alien's receipt of pay and also requires forfeiture of pay and property. These provisions conflict with the federal Fair Labor Standards Act, which protects employees' rights to receive minimum and overtime wages for work performed. 29 U.S.C. §§ 201-219. Federal courts have held that these protections of the Fair Labor Standards Act apply regardless of immigration status and that all workers are entitled to be paid for work that they have performed. *See Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 891, 104 S.Ct. 2803 (1984) (holding that undocumented aliens are "employees" within the meaning of the National Labor Relations Act and finding that the Act applies to unfair labor practices committed against undocumented aliens); *Patel v. Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988) (holding that "undocumented workers are 'employees' within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages"); *Chellen v. John Pickle Co., Inc.*, 344 F.Supp.2d 1278, 1293-94 (N.D. Okla. 2004) (holding that "undocumented aliens may be considered employees under federal labor law"); *Flores v. Amigon*, 233 F.Supp.2d 462, 463 (E.D.N.Y. 2002) (holding that "[n]umerous lower courts have held that all employees, regardless of their immigration status, are protected by the provisions of the FLSA"); *Liu v. Donna Daran Int'l, Inc.*, 207 F.Supp.2d 191 (S.D. N.Y. 2002) (holding that plaintiffs' immigration status was not relevant to their claims under the FLSA that they had been paid less than the minimum wage for work performed); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053, 1056 (N.D. Cal. 1998) (citing *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987)) (holding "[t]here is no question that the protections provided by the FLSA apply to undocumented aliens").

HB66/SB252 would make it an offense for an undocumented alien to receive pay in Tennessee, and the forfeiture provision of the bill would take away the wages an undocumented alien earns from his or her employment, even though those wages are mandated under the Fair Labor Standards Act. Implementation of HB66/SB252 would be an obstacle to, and burden or conflict with, federal labor law, such as 29 U.S.C. §§ 201-219, because it would make it an offense for an undocumented alien to receive pay in the State and subject an undocumented alien's earned wages to seizure and forfeiture under Tenn. Code Ann. §§ 39-11-701, *et seq.* *DeCanas v. Bica*, 424 U.S. 351, 354, 362-363, 96 S.Ct. 933 (1976). For example, the minimum wage section of the Fair Labor Standards Act provides:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) except as otherwise provided in this section, not less than--
>
> (A) $5.85 an hour, beginning on the 60th day after May 25, 2007;
>
> (B) $6.55 an hour, beginning 12 months after that 60th day; and
>
> (C) $7.25 an hour, beginning 24 months after that 60th day;

29 U.S.C.A. § 206(a)(1). Thus, every employee, including undocumented aliens, must be paid at least minimum wage pursuant to the Fair Labor Standards Act. *Id.* Moreover, the maximum hours provision of the Act provides:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C.A. § 207(a)(1). Under this section, every employee, including undocumented aliens, must be paid an overtime rate of wages "not less than one and one-half times the regular rate at which he is employed" if that employee works longer than forty hours in a workweek. *Id.*

Accordingly, because undocumented aliens are "employees" under federal labor law and are protected by the provisions of the Fair Labor Standards Act, a court would likely determine that HB66/SB252 conflicts with federal labor law and is therefore invalid under the Supremacy Clause of the U.S. Constitution.

In addition, this Office concludes that HB66/SB252 may be vulnerable to a preemption challenge because the implementation of the bill may burden or conflict with federal immigration laws. 8 U.S.C. 1324a is the federal law regarding unlawful employment of undocumented aliens. This section of the federal code makes it unlawful generally "to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . . ." 8 U.S.C. 1324a(a)(1)(A). This section of the federal code goes on to state explicitly 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." 8 U.S.C. 1324a(h)(2). This explicit preemptive language indicates the clear intent of Congress that regulation of unlawful employment of unauthorized aliens shall be the exclusive domain of the federal government and that any state or local law on the subject is preempted.

This Office has recently discussed the relationship between state and federal law on the subject of immigration. Op. Tenn. Att'y Gen. 08-18 (Feb. 1, 2008); Op. Tenn. Att'y Gen. 07-64 (May 10, 2007); Op. Tenn. Att'y Gen. 07-69 (May 15, 2007). These opinions point out that the United States Supreme Court, while recognizing that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," has found that there is no *per se* preemption of state statutes where aliens are a subject matter of the legislation. "[S]tanding alone, the fact that aliens are a subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355, 96 S.Ct. 933.[1]

Instead, the Supreme Court established three ways in which a state statute may be preempted by federal law: 1) where the local law attempts to regulate immigration; 2) where the local law attempts to operate in an area occupied by federal law; and 3) where implementation of the local law is an obstacle or "burdens or conflicts in any manner with any federal laws or treaties." *Id*. at 354, 362-63, 96 S.Ct. 933. Applying the three factors set forth by the *DeCanas* Court to the content of HB66/SB252, it appears that implementation of the bill may be an obstacle to, and burden or conflict with, federal immigration laws.

In *DeCanas*, the Supreme Court found that preemption of a state employment regulation did not occur "in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Id*., 424 U.S. at 356, 96 S. Ct. 933. The Court found that Congress, through the Immigration and Naturalization Act, did not intend to affect "state regulation[s] touching on aliens in general, or the employment of illegal aliens in particular," noting in particular that respondents could not point to any specific wording or legislative intention in support of preemption. *Id.* at 358, 96 S. Ct. 933. As previously noted, Congress has added preemptive language to 8 U.S.C. 1324a since the decision in *DeCanas*, thus unmistakably expressing its intention that state laws criminalizing the employment of aliens should be preempted.

[1]As one federal district court has cautioned in a recent case, however, additional federal immigration laws passed by Congress after the Supreme Court decided *DeCanas v. Bica* have further narrowed the states authority to legislate on certain immigration matters. *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 524 (M.D. Pa. 2007).

Through the Immigration Reform and Control Act of 1986, the United States Congress has extensively regulated the area of employment of non-citizens and undocumented aliens and has chosen to focus on employer sanctions rather than on penalizing workers through forfeiture of wages. *See* 8 U.S.C. § 1324a. Because HB66/SB252 punishes undocumented alien workers and seeks forfeiture of their property, the bill appears to complement federal immigration laws by deterring undocumented aliens from working in Tennessee. However, applying the three factors set forth by the *DeCanas* Court to the content of HB66/SB252, it appears that implementation of HB66/SB252 could be construed as an obstacle to, and to burden or conflict with, federal immigration law, such as 8 U.S.C. 1324a. *DeCanas*, 424 U.S. at 354, 362-363, 96 S.Ct. 933. Accordingly, a court might well decide that HB66/SB252 would be invalid under the Supremacy Clause of the U.S. Constitution. U.S. Const. Art. VI, cl.2.

In addition, HB66/SB252 may be preempted by other federal immigration laws. HB66/SB252 would make it an offense "for any individual who has illegally entered the United States to knowingly receive compensation for performing work in this state, unless granted an exemption by the United States Department of Labor pursuant to its rulemaking authority." In direct conflict with 8 U.S.C. § 1255(i)-(m), this provision would apply to numerous individuals – including persons who are now citizens, lawful permanent residents, and asylum seekers – who may have entered the United States without authorization but who later adjusted to a lawful immigration status. Implementation of HB66/SB252 thus could be construed as an obstacle to, and to burden or conflict with, federal immigration law, such as 8 U.S.C. § 1255(i)-(m). *DeCanas*, 424 U.S. at 354, 362-363, 96 S.Ct. 933. Thus, a court might well decide that HB66/SB252 would be invalid under the Supremacy Clause of the U.S. Constitution.

2. The second question is whether the provision in HB66/SB252 that states that "[a]ll property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture" violates the prohibition of slavery found in the 13th Amendment of the United States Constitution. Because the bill does not "enslave" any person, HB66/SB252 would not violate the 13th Amendment's prohibition of slavery.

In *U.S. v. Kozminski*, the United States Supreme Court commented on the 13th Amendment's abolition of slavery:

> The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances," *Civil Rights Cases*, 109 U.S. 3, 20, 3 S.Ct. 18, 28, 27 L.Ed. 835 (1883), and thus establishes a constitutional guarantee that is protected by § 241. *See Price, supra*, 383 U.S., at 805, 86 S.Ct., at 1162-1163. The primary purpose of the Amendment was to abolish the institution of African slavery as it

> had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose; the phrase "involuntary servitude" was intended to extend "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 332, 36 S.Ct. 258, 259, 60 L.Ed. 672 (1916). *See also Robertson v. Baldwin*, 165 U.S. 275, 282, 17 S.Ct. 326, 329, 41 L.Ed. 715 (1897); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 21 L.Ed. 394 (1873).

U.S. v. Kozminski, 487 U.S. 931, 942, 108 S.Ct. 2751, 2759 (1988).

It appears that the language of HB66/SB252 does not have the effect of enslaving any person. HB66/SB252 would create the Class B misdemeanor offense of an undocumented alien's knowingly receiving compensation for performing work in Tennessee, unless granted an exemption by the U.S. Department of Labor. The bill specifies that any money derived from such unlawful employment is subject to the criminal forfeiture provisions in Tenn. Code Ann. § 39-11-701, *et seq.* The bill does not appear to run afoul of the 13th Amendment because it does not enslave any person. It would criminalize an undocumented alien's knowing receipt of compensation for performing work in Tennessee, after that undocumented alien has already voluntarily worked in Tennessee, and then subjects to forfeiture his or her property under the procedures of Tenn. Code Ann. §§ 39-11-701, *et seq.* This does not constitute slavery under the 13th Amendment. Accordingly, it appears that HB66/SB252 does not violate the 13th Amendment's prohibition of slavery.

3. The third question is whether the provision in HB66/SB252 that states that "[a]ll property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture," violates the 14th Amendment's requirement that no person may be deprived of property without due process of law and violates Article I, Section 21 of the Tennessee Constitution which provides "that no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefore." This Office concludes that the forfeiture provision in HB66/SB252 would likely violate both the 14th Amendment of the United States Constitution and Article I, Section 21 of the Tennessee Constitution because the scope of the forfeiture provision goes beyond what the government could take under due process pursuant to Tenn. Code Ann. 39-11-701, *et seq*.

The Fourteenth Amendment provides, in part, that "[n]o State shall. . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The due process clause contains both a procedural and a substantive component. When a person has a property interest, procedural due process generally requires that the state provide that person with notice and an opportunity to be heard before depriving the person of that interest. *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("Courts have long recognized that the Fourteenth Amendment requires that an individual who is deprived of an interest in liberty or property be given notice and a hearing."). Pursuant to Article I, § 8 of the Tennessee Constitution, "no man shall be . . . deprived of his life, liberty, or property, but by the judgment

of his peers or the law of the land." Pursuant to Article I, § 21 of the Tennessee Constitution, "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." "Courts have held that these articles apply to the taking of private property for both public and private use." *Barge v. Sadler*, 70 S.W.3d 683, 687 (Tenn. 2002) (citing *Cross v. McCurry*, 859 S.W.2d 349, 353 (Tenn. Ct. App. 1993) ("It has generally been held that the state does not have the power to authorize the taking of the property of an individual without his consent for the private use of another, even on the payment of full compensation."); *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 120 Tenn. 260, 113 S.W. 410, 415 (1907)).

The forfeiture provision in HB66/SB252 states that "[a]ll property, real or personal, including money derived from or realized through conduct in violation of this section, shall be subject to seizure, confiscation and forfeiture in accordance with the forfeiture provisions codified in" Tenn. Code Ann. 39-11-701, *et seq*. These Title 39 provisions, however, pertain only to the forfeiture of proceeds of the illegal activities. Nevertheless, the forfeiture provision of HB66/SB252 would apply regardless of whether the person's property was obtained with money received while performing work in Tennessee in violation of part (a) of the statute. Thus, the forfeiture provision of HB66/SB252 would go beyond the scope of the criminal forfeiture provisions in Tenn. Code Ann. 39-11-701, *et seq*., because it would make all real or personal property of an undocumented alien subject to forfeiture.[2]

[2] Tenn. Code Ann. § 39-11-701 provides:

> (a) The general assembly finds and declares that an effective means of deterring criminal acts committed for financial gain is through the forfeiture of profits and proceeds acquired and accumulated as a result of such criminal activities.
>
> (b) It is the intent of the general assembly to provide the necessary tools to law enforcement agencies and district attorneys general to punish and deter the criminal activities of professional criminals and organized crime through the unitary enforcement of effective forfeiture and penal laws. It is the intent of the general assembly, consistent with due process of law, that all property acquired and accumulated as a result of criminal offenses be forfeited to the state of Tennessee, and that the proceeds be used to fund further law enforcement efforts in this state.
>
> (c) It is further the intent of the general assembly to protect bona fide interest holders and innocent owners of property under this part. It is the intent of the general assembly to provide for the forfeiture of illegal profits without unduly interfering with commercially protected interests.

Furthermore, Tenn. Code Ann. § 39-11-703(a) provides:

> Any property, real or personal, directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture, and all right, title, and interest in any such property shall vest in the state upon commission of the act giving rise to forfeiture.

Therefore, through the implementation of HB66/SB252, it is conceivable that government officials might attempt to seize all real or personal property of an undocumented alien, including property that is not in any way related to that person's compensation for illegally working in the State, and the undocumented alien would not receive any compensation for the taking of this property. An undocumented alien prosecuted under HB66/SB252 would not receive due process under the bill because prosecutors would be authorized to take "[a]ll property, real or personal," regardless of whether that property was obtained with money received while performing work in Tennessee. Such a taking of property by the government would violate due process because the government has no right to take as a forfeiture property that is not directly or indirectly acquired by or received in violation of a criminal statute. *See* Tenn. Code Ann. 39-11-703(a). Accordingly, for these reasons, this Office concludes that the forfeiture provision of HB66/SB252 would likely violate both the 14th Amendment of the United States Constitution and Article I, Section 21 of the Tennessee Constitution because the scope of the provision goes beyond what the government could take as a forfeiture pursuant to Tenn. Code Ann. 39-11-701, *et seq*., and would instead amount to a taking of unrelated property without compensation.

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