Employment of Illegal Aliens

Number: INFORMAL

Date: September 07, 2007

The Honorable Frank McKeithen
Bay County Sheriff
3421 North Highway 77
Panama City, Florida 32405

Dear Sheriff McKeithen:

You have asked for an informal opinion or case law relating to section 448.09, Florida Statutes.

Section 448.09, Florida Statutes, provides:

"(1) It shall be unlawful for any person knowingly to employ, hire, recruit, or refer, either for herself or himself or on behalf of another, for private or public employment within the state, an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States.
(2) The first violation of subsection (1) shall be a noncriminal violation as defined in s. 775.08(3) and, upon conviction, shall be punishable as provided in s. 775.082(5) by a civil fine of not more than $500, regardless of the number of aliens with respect to whom the violation occurred.
(3) Any person who has been previously convicted for a violation of subsection (1) and who thereafter violates subsection (1), shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Any such subsequent violation of this section shall constitute a separate offense with respect to each unauthorized alien."

This office is aware of only one Florida appellate case which refers to section 448.09, Florida Statutes. In *Cenvill Development Corporation v. Candelo*,[1] the court considered whether the status of an unauthorized alien could be considered in determining whether a work search was adequate to entitle the claimant to wage loss benefits. The court disagreed with the deputy commissioner, who placed a burden on the employer pursuant to section 448.09, Florida Statutes, to verify alien registration numbers or be estopped from asserting the status of the unauthorized alien, holding instead that the employer is estopped from asserting the status of an unauthorized alien only where he knew or should have known of the true status of the employee. A copy of the case is enclosed for your review.

While this office cannot declare a statute invalid, I would note that 8 United States Code 1324a prohibits the unlawful employment of aliens. Subsection (a)(1) and (2) provide:

"(a) Making employment of unauthorized aliens unlawful.
(1) In general. It is unlawful for a person or other entity
(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act [29 U.S.C. 1802], to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b).
(2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

Thus, both section 448.09, Florida Statutes, and 8 United States Code 1324a make it illegal to knowingly hire, recruit, or employ an illegal alien as well as refer an illegal alien for employment.[2]

Title 8 United States Code 1324a(h)(2), however, expressly states:

"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."

Where a federal statute expressly preempts a field and operates to bar specified acts or conduct, the Supremacy Clause of the United States Constitution provides that the federal law will prevail and exclusively control such matters.[3] The United States Supreme Court in *DeCanas v. Bica*[4] considered a number of factors in determining whether a state or local law is preempted by federal law. The Court cautioned that preemption is not based on the mere fact that state and federal laws address the same general subject matter. The *DeCanas* Court determined that the clearest examples of preemption involve instances where Congress has explicitly stated its intent that, in enacting federal laws, it has preempted state and local regulations in the same area. Where "Congress has unmistakably so ordained," or in those instances where preemption is "the clear and manifest purpose of Congress," state and local laws are preempted by the federal law.[5]

The express statement of preemption in 8 United States Code 1324a(h)(2) represents Congress' clear intent to preempt state and local laws imposing civil or criminal sanctions on those who employ, or recruit or refer for a fee for employment, unauthorized aliens. This office would note that in the case of *State v. Alvidrez*,[6] in which Mr. Alvidrez was charged with violating section 448.09, Florida Statutes, the attorney for the defendant cited the above preemption provisions and you advised the court that you had "no counter argument or case law which would provide us with sufficient grounds to legitimately oppose this motion" and that the federal statute is "identical to Florida Statute, has preempted the enforcement of Florida Statute 448.09."[7]

I trust that the above informal comments may be of assistance to you in resolving the issues which you raise in your letter of July 24, 2007.

Sincerely,

Bill McCollum
Attorney General

BM/tjw

Enclosure: *Cenvill Development Corporation v. Candelo*

---

[1] 478 So. 2d 1168 (Fla. 1st DCA 1985), *review denied*, 488 So. 2d 67 (Fla. 1986).

[2] There is a slight difference in the conduct prescribed by the state statute and the federal act. Section 448.09, Fla. Stat., includes referring an alien for employment while the federal act applies to referring an illegal alien for employment "for a fee." While this distinction might be relevant to another inquiry, it has no impact on the instant inquiry.

[3] *See* Art. VI, cl. 2, U.S. Const., which provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

And see Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195; 162 L. Ed. 2d 1 (2005) (Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail).

[4] 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).

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

[6] Case No. 2007-0265-TOMA (Bay Co. Ct. 2007).

[7] Letter from Sheriff Frank McKeithen to Judge Welch, dated July 17, 2007.