

# Judge bars criminal identity theft enforcement in workplace

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*Courts have not been kind to Arizona's attempts to criminalize employment by undocumented immigrants. The latest ruling against Arizona's legislative efforts to regulate immigration in the workplace came in a January 5, 2015, order barring the enforcement of parts of the state's identity theft statutes.*

## **Targeting workers**

Arizona first made identity theft a crime in 1996 and has amended its statutes several times to expand the definition of identity theft. In 2007, as part of the Legal Arizona Workers Act (LAWA), the Arizona Legislature amended the aggravated identity theft statute to make it a felony to steal the identity of another person—real or fictitious—with the intent to obtain employment.

You may remember that the U.S. Supreme Court found that some of the key provisions of the LAWA were constitutional in a 2011 case, *Chamber of Commerce v. Whiting*. The LAWA provisions considered by the Supreme Court required employers to use the federal government's E-Verify program to prove they were not trying to hire undocumented immigrants and made the suspension of employers' business licenses a potential penalty for noncompliance.

In 2008, the Arizona Legislature fine-tuned the LAWA with a bill titled "Employment of Unauthorized Aliens." The bill reinforced the requirement to use E-Verify and amended Arizona's identity theft statute to prohibit workers from taking the identity of another person—real or fictitious—with the intent to obtain or continue employment.

Maricopa County is the only county in Arizona where the identity theft laws have been used to conduct worksite raids that overwhelmingly targeted workers. Maricopa County Sheriff Joe Arpaio has raided 83 businesses since 2008, resulting in felony charges against more than 700 undocumented immigrants charged with using fake or stolen IDs to get jobs. The American Civil Liberties Union of Arizona asserts that the criminal cases have followed a similar pattern, with defendants pleading guilty to felonies for which they frequently face deportation. After they plead guilty, they are unable to reenter the United States legally.

## **Arpaio disbands unit**

Arpaio created a criminal employment unit (CEU) to conduct the workplace raids. Perhaps sensing that an adverse court ruling was imminent, the Maricopa County Sheriff's Office announced on December 15, 2014, that it "will be voluntarily [stopping itself] from investigating identity theft for the purposes of gaining employment." The announcement came in an internal memorandum that stated that "after thorough discussion with Command Staff," the sheriff's office decided to disband the CEU in late January or early February 2015 after an ongoing identity theft investigation concludes.

The memorandum blamed the decision on federal court rulings enjoining (stopping) the enforcement of some laws enacted by the state. The only recent federal court ruling enjoining the enforcement of an Arizona law came in November 2014. The case involved the denial of bail to undocumented immigrants charged with serious crimes (the provision that kept identity theft defendants behind bars until they pleaded guilty).

Also, Arpaio's office is operating under a consent decree—and faces a possible contempt citation for violating the decree—issued after a May 2013 federal court ruled that it systematically profiled Latinos in regular traffic and special immigration patrols. Arpaio continues to refute the court's conclusions.

### ***A different judge***

Judge David G. Campbell is not the judge currently considering a contempt citation against Arpaio's office. Judge Campbell, who was appointed by President George W. Bush, determined that a group of plaintiffs probably would win their class action lawsuit alleging that the employment aspects of Arizona's identity theft laws were preempted by federal law. Judge Campbell relied heavily on the Supreme Court's 2012 decision in throwing out much of Arizona's 2010 immigration legislation, commonly known by its bill identifier—Senate Bill 1070.

Judge Campbell noted that the identity theft laws apply equally to unauthorized aliens and U.S. citizens. Nevertheless, he found that "a primary purpose and effect of the identity theft laws is to impose criminal penalties on unauthorized aliens who seek or engage in unauthorized employment." Judge Campbell used Arpaio's press releases against him, including a release that stated that "100 percent of all suspects found to be committing identity theft to gain employment were illegal aliens."

Judge Campbell found a clear intent to regulate the employment of unauthorized aliens in the titles given to the 2007 and 2008 laws by legislators. Also, in the legislative history of the bills, he found abundant evidence of the goal to regulate unauthorized aliens who seek employment. Those findings were fatal to the legislative enactments because "Congress has imposed every kind of penalty that can arise from an unauthorized alien's use of false documents to secure employment" and thus has "occupied the field," leaving no room for state regulation under the Supremacy Clause of the U.S. Constitution.

Maricopa County Attorney Bill Montgomery has said his office is considering filing an appeal. In a statement, Montgomery said Judge Campbell's ruling:

Underscores yet again the consequences of federal inaction and the Obama administration's indifference to the effects of unlawful immigration practices. While pretending to address the concerns of people admittedly violating the law, the victims of identity theft are deprived of the state of Arizona's protection.

### ***Comply with I-9 requirements, and use E-Verify***

Although the sheriff's office's worksite raids are over, federal authorities continue to target employers that fail to comply with federal regulations. Arizona employers should make sure they are following I-9 procedures and running new hires through the federal E-Verify system to do their part to ensure that only legally authorized workers are hired.

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