WHEN BUSINESS LICENSING LAW AND IMMIGRATION COLLIDE: SUB-FEDERAL EMPLOYER SANCTIONS LEGISLATION IN THE WAKE OF *CHAMBER OF COMMERCE V. WHITTING*

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I. INTRODUCTION

A license is defined as any "right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful."[1] Generally, business licenses form a relatively benign background to state and local economies. Depending on the state, licensing may control everything from ability to hire to the permission to operate a business at all. Thus, licenses allow states to wield a tremendous amount of economic and political control.

However, a recent surge in state-level immigration legislation has brought licenses into the forefront of the national immigration debate. An increasing number of states have passed legislation conditioning business licenses on compliance with local immigration laws. The Supreme Court recently approved this use of licensing in *Chamber of Commerce v. Whiting* ("*Whiting*").[2]

This note focuses on the use of business licensing as a state-level tool in immigration legislation. Many reacted negatively to the Court's approval of such laws, characterizing it as a political

[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002); Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011).

[2] *See Whiting*, 131 S. Ct. at 1973.

victory over economic and human rights interests.[3] At its core, this note seeks to improve the current framework used in applying the Court's holding in *Whiting* to state-level immigration laws.

This note examines the current state of employer sanctions legislation, analyzing the influences and structure of these laws, referred to collectively as "sub-federal employer sanctions laws."[4] It will evaluate current legislation based on three categories: (1) how licensing is used; (2) how language and standards compare to federal law counterparts; and (3) whether substantive requirements complement federal law. This note argues that *Whiting applies* only if the employer sanction law uses licensing as a procedural enforcement mechanism, and that the sub-federal law is *permissible* only if it pays deference to the language, definitions, and policy goals of federal law.

II. HISTORY OF *CHAMBER OF COMMERCE V. WHITING*

A. ORIGINS OF THE IRCA SAVINGS CLAUSE

In response to the perceived failure of the Immigration and Nationality Act of 1952 ("INA")[5] to address employer

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[3] *See, e.g.*, Abigail E. Langer, *"Men Made It, but They Can't Control It": Immigration Policy During the Great Depression, Its Parallels to Policy Today, and the Future Implications of the Supreme Court's Decision in Chamber of Commerce v. Whiting*, 43 CONN. L. REV. 1645, 1668 (2011) (The holding in *Whiting* "allows the states to take advantage of . . . the gaping loophole in IRCA's savings clause and to impose their own ideas as to what their economies can withstand and exploit.") (internal citations and quotation marks omitted).

[4] Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 390 (2011).

[5] 8 U.S.C. § 1101 (2012). The INA established a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." DeCanas v. Bica, 424 U.S. 351, 353, 359 (1976).

restrictions in hiring undocumented aliens,[6] Congress passed the Immigration Reform and Control Act ("IRCA") in 1986.[7] IRCA put immigration enforcement firmly in the federal domain and sought to reduce the draw stemming from the opportunity for gainful employment.[8] This new federal approach to controlling illegal immigration through employment law was seen as "the most humane, credible and effective way" of affecting the movement of undocumented aliens into the United States.[9]

In part, IRCA sanctions employers for knowingly hiring or employing undocumented workers,[10] and it requires employers to use either the I-9 employee verification procedure or E-Verify, which is an electronic employee verification system.[11] However, IRCA also includes an exception for sub-federal regulation of employment through licensing law. In relevant part, IRCA provides that "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."[12]

Although the power to regulate employment is traditionally a state police power,[13] by including this provision, Congress

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[6] *See* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 230–31 (2d Cir. 2006) (discussing the failure of INA to address the issue of employment in dealing with illegal immigration).

[7] *See id.* at 231; Immigration Reform and Control Act ("IRCA") of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

[8] *See* H.R. REP. No. 99-682(I), at 5649–50 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649.

[9] *Id.* at 46.

[10] 8 U.S.C. § 1324a(a)(1)(A) (2012). Potential sanctions for violations include monetary civil sanctions or, in more serious cases, criminal sanctions. § 1324a(f).

[11] Patrick S. Cunningham, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?,* 42 ARIZ. ST. L.J. 411, 420 (2010).

[12] § 1324a(h)(2) (emphasis added).

[13] *See* David Angueira & David Conforto, *Without a Remedy: The Massachusetts Whistleblower's Brush with ERISA*, 39 SUFFOLK U. L. REV.

essentially removed the states' authority to make employment laws impacting federal immigration policy. The exception for licensing and similar laws was included for a variety of reasons, not the least of which was the states' strong interest in retaining traditional control over certain aspects of their economies.[14]

Thus the states did retain some legislative power, a product amplified by the latent ambiguity of the preemption provision. Competing court interpretations of the provision have undermined the force of federal law, in some cases permitting state and local entities to enact their own immigration legislation in conflict with IRCA.[15] The continuing controversy surrounding immigration reform has continued to pit states against the federal government, leading to an increase in state laws testing the boundaries.[16]

B. THE LEGAL ARIZONA WORKERS ACT: PASSAGE AND GOALS

The Legal Arizona Workers Act ("LAWA")[17] is generally framed as a state-level response to frustration with the ineffectiveness of IRCA, as exacerbated by Congress's failure to pass meaningful immigration reform.[18] Enacted in 2007, the statute imposes sanctions on those who employ undocumented workers, rather than the workers themselves, in an attempt to

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955, 959 (2006) (noting "federal preemption of state employment standards should not be lightly inferred since this area lies within the traditional police power of the State") (internal citation and quotation marks omitted).

[14] *See* Cunningham, *supra* note 11, at 417-18; § 1324a(h)(2).

[15] Cunningham, *supra* note 11, at 419–21.

[16] *See generally Immigration Policy Report*: *2011 Immigration-Related Laws and Resolutions in the States (Jan. 1-Dec. 7, 2011)*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx (last visited Apr. 12, 2013).

[17] ARIZ. REV. STAT. ANN. § 23-212 (2010).

[18] *See, e.g.*, Cunningham, *supra* note 11, at 418 (noting that LAWA's enactment was, in part, a response to the failure of the 110th Congress to pass the Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007).

increase accountability on the demand side of the market for undocumented labor.[19] LAWA quickly came under fire for conflicting with federal supremacy over immigration law.[20]

The language of LAWA illustrates the delicate balance between Arizona's need for more effective immigration policy and the threat of preemption by federal law. Arizona lawmakers sought to take advantage of the savings clause for licensing law in IRCA,[21] primarily by establishing sanctions in the form of licensing suspension and revocation.[22] However, there are other similarities between the two laws. Like IRCA, under LAWA it is a violation to knowingly employ undocumented aliens.[23] Furthermore, LAWA employs the federal government definition of unauthorized alien, as well as the federal standards of determining who is an unauthorized alien.[24]

Despite these similarities, LAWA does not reflect federal law in all aspects. For a first-time violation of LAWA,[25] the

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[19] § 23-212(A) provides:
An employer shall not knowingly employ an unauthorized alien. If, in the case when an employee uses a contract, subcontract, or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with the unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

[20] *See, e.g.*, Ariz. Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008).

[21] 8 U.S.C. § 1324a(h)(2) (2012).

[22] § 23-212(F); § 1324a(f)(2).

[23] ARIZ. REV. STAT. ANN. § 23-212(A) (2010). It is also a violation of LAWA for an employer to intentionally employ undocumented aliens. § 23-212.01(A). Sanctions under the intentionally standard are harsher than sanctions under the knowingly standard but are substantively similar. *Compare* § 23-212.01(F)(1)(b) ("Order the employer to be subject to a five year probationary period for the business location where the unauthorized alien performed work."), *with* § 23-212 (F)(1)(b) ("Shall order the employer to be subject to a three year probationary period for the business location where the unauthorized alien performed work.").

[24] *See infra* note 49 and accompanying text.

[25] Violations may be reported by official complaint to the Arizona Attorney General or county attorneys. § 23-212(B). Complaints can be anonymous, but complaints based solely on race, color, or national origin will not be

consequences are a three-year probationary period, during which the employer must file quarterly reports providing notice of new hires, an affidavit affirming the termination of all undocumented workers and the employer's commitment not to violate the law again, and a discretionary ten-day suspension of the employer's business license.[26]

The discretion to suspend an employer's business license is subject to a variety of considerations, including: (1) the number of undocumented workers employed; (2) prior misconduct on the part of the employer; (3) the nature and degree of injury resulting from the violation; (4) whether the employer made a good faith effort to comply; (5) the temporal length of the violation; (6) the role of any principals, officers, or directors of the employer in the violation; and (7) any other factor that the court finds appropriate.[27]

If an employer is found to be in violation of LAWA a second time,[28] the consequence is mandatory revocation of all licenses at the business location where the unauthorized alien performed work.[29]

In addition to these sanctions, LAWA also requires employers to participate in the E-Verify system.[30] Participation in this verification process gives an employer a rebuttable presumption that they did not knowingly employ an

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investigated. *Id.* Moreover, knowingly submitting a false and frivolous complaint is punishable as a class three misdemeanor. *Id.*

[26] § 23-212(F).

[27] § 23-212(F)(1)(d)(i–vi).

[28] § 23-212(F)(2). In order to be considered a "second violation" under the statute, the violation must occur during the three-year probationary period from a first violation. § 23-212(F). If a second violation occurs outside of this period, it will be considered another "first violation" under the statute. § 23-212(F)(3)(b).

[29] ARIZ. REV. STAT. ANN. § 23-212(F)(2) (2010).

[30] § 23-214. E-Verify was created by Congress in 1996 as a complement to the I-9 process. Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1042 (D. Ariz. 2008). It is an "internet-based system that allows an employer to verify an employee's work-authorization status." Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 862 (9th Cir. 2009).

unauthorized alien.[31] Failure to participate is punishable by automatic disqualification from State grants, loans, or incentive programs.[32] This system effectively replaces the I-9 system as established under IRCA.[33]

The dissimilarities between IRCA and LAWA reflect the distance between state-level and national discussions on immigration. Although Arizona may feel a need for a more effective immigration policy, it must still yield to the federal government in areas specifically reserved for federal regulation, such as immigration.[34]

The passage of LAWA represents, in some respects, a turning point in the nature of American immigration law. Whereas states have devoted much effort to pursuing more traditional paths to changing immigration law, LAWA, as well as similar laws in other states, has broken the proverbial seal with regard to sub-federal immigration legislation.[35]

To summarize, LAWA aimed (1) to regulate the employment of undocumented aliens by sanctioning employers; and (2) to take advantage of IRCA's savings clause for licensing law.

C. *CHAMBER OF COMMERCE V. WHITING*

Perhaps the most important development in the judicial interpretation of IRCA's licensing savings clause was *Chamber of Commerce v. Whiting*, which determined that LAWA was a licensing statute within the meaning of the savings clause and that LAWA did not otherwise conflict with federal law and, as such, was not federally preempted.[36]

Following LAWA's passage, the Chamber of Commerce of the United States, along with various businesses and civil rights

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[31] § 23-212(I).

[32] § 23-214(B)(1).

[33] *See generally Immigration Policy Report*, *supra* note 16 and accompanying text.

[34] *See* U.S. CONST. art. I, § 8, cl. 4.

[35] This is evidenced by the flood of state-level immigration laws following LAWA's passage. *See supra* note 16 and accompanying text.

[36] Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1973 (2011).

organizations,[37] filed a pre-enforcement suit in federal court against parties charged with administering the law.[38] The District Court held that Arizona's law was not preempted by federal law.[39] The court of appeals affirmed in all respects, holding that LAWA was indeed a licensing law within the meaning of IRCA's savings clause, and none of the challenged provisions were expressly or impliedly preempted by federal policy.[40] The Supreme Court subsequently affirmed in a five to three decision.[41]

Rather than focus on the likely social and economic ramifications of its decision, the Court concentrated its efforts on outlining the textual similarities between LAWA and IRCA

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[37] These parties are referred to collectively as "Chamber of Commerce."

[38] *Whiting*, 131 S. Ct. at 1977. These parties included "over a dozen Arizona county attorneys, the Governor of Arizona, the Arizona attorney general, the Arizona registrar of contractors, and the director of the Arizona Department of Revenue[.]" *Id.* They are referred to collectively as "Arizona." As of the filing date of the complaint, no suits had yet been brought under LAWA, and, by the time Arizona submitted its merits brief to the Supreme Court, only three enforcement actions had been pursued against employers. *See Whiting*, 131 S. Ct. at 1977 n.4 (citing Ariz. v. Waterworld Ltd. P'ship, No. CV2009-038848 (Maricopa Cty. Super. Ct., filed Dec. 21, 2009) (resolved by consent judgment); Ariz. v. Danny's Subway Inc., No. CV2010-005886 (Maricopa Cty. Super. Ct., filed Mar. 9, 2010) (resolved by consent decree); Ariz. v. Scottsdale Art Factory, LLC, No. CV2009-036359 (Maricopa Cty. Super. Ct., filed Nov. 18, 2009) (pending)).

[39] *See* Ariz. Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1055 (D. Ariz. 2008). The District Court found, according to the plain language of IRCA's preemption clause, LAWA was not preempted, as it did no more than impose licensing conditions on businesses operating within the state. *Id.* at 1045–46. As to LAWA's E-Verify requirement, the district court concluded that although the program was voluntary at the national level, Congress expressed no intent to prevent states from mandating participation. *Id.* at 1055–57.

[40] *See* Chicanos Por La Causa v. Napolitano, 558 F.3d 856, 860–61, 866 (9th Cir. 2009).

[41] Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1973 (2011). Chief Justice Roberts delivered the opinion of the Court; Justices Scalia, Kennedy, and Alito joined in full; Justice Thomas joined in part and concurred in the judgment; Justice Breyer filed a dissenting opinion, in which he was joined by Justice Ginsburg; Justice Sotomayor also filed a dissenting opinion; and Justice Kagan took no part in the consideration or decision. *Id.* at 1972.

and decided the case strictly on the plain meaning of the law.[42] In deciding whether LAWA was expressly preempted, the Court first compared the Arizona law's definition of a license with the federal definition, finding that the former largely tracked the latter.[43] As such, the Court reasoned that LAWA did indeed operate to suspend or revoke licenses and was therefore a licensing law.

The Court rejected the argument that a licensing law must also operate to grant licenses, reasoning that such a construction would run contrary not only to the definition codified by Congress[44] but also to common sense.[45] Arguments based on the legislative history and context of IRCA were also rejected, with the Court noting, "[a]bsent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause."[46] The majority was not troubled by this broad interpretation of "licensing," although Justice Breyer in his dissent expressed concern that such a broad exemption would eviscerate the original preemption.[47]

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[42] *Id.* at 1977 (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) ("When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.") (internal quotation marks omitted).

[43] *Whiting*, 131 S.Ct. at 1978. LAWA defines a license as "any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business." ARIZ. REV. STAT. ANN. § 23-211(9)(a) (2008). Similarly, the federal Administrative Procedure Act's definition of a license "includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission." 5 U.S.C. § 551(8) (2011). The Court additionally noted "[a]s for state-issued authorizations for foreign businesses to operate within a State, we have repeatedly referred to those as 'licenses.'" *Whiting*, 131 S. Ct. at 1978 (citations omitted).

[44] *Whiting*, 131 S. Ct. at 1979; 5 U.S.C. § 551(9) (2011) ("'licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment . . . or conditioning of a license").

[45] *Whiting*, 131 S. Ct at 1979.

[46] Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1980 (2011).

[47] *Id.* at 1993 (Breyer. J., dissenting).

The Court went on to address the argument that Arizona's law was implicitly preempted by the exclusively federal nature of immigration law.[48] The Court noted that LAWA adopts the federal definition of who qualifies as an unauthorized alien[49] and restricts consideration by investigators and courts to the federal government's determination on work authorization.[50] The Court reasoned, "there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage."[51] As the Court explained, "Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority."[52]

Lastly, the Court addressed the argument that, because E-verify is considered an optional employment verification procedure by the federal government, requiring employers to use E-Verify hinders the purpose of federal immigration law.[53]

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[48] *Id.* at 1981.

[49] *Id.* (comparing 8 U.S.C. § 1324a(h)(3) (2011) ([A]n "unauthorized alien" is an alien not "lawfully admitted for permanent residence" or not otherwise authorized by federal law to be employed) (internal quotation marks omitted), *with* ARIZ. REV. STAT. ANN. § 23–211(11) (2008) (adopting the federal definition of "unauthorized alien")).

[50] *Whiting*, 131 S. Ct. at 1981. (noting that under LAWA, state investigators "'shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States'") (quoting ARIZ. REV. STAT. ANN. § 23–212(B) (2011)). Additionally, "a state court 'shall consider *only* the federal government's determination' when deciding 'whether an employee is an unauthorized alien.'" *Id.* (emphasis in original) (quoting ARIZ. REV. STAT. ANN. § 23-212(H) (2011)).

[51] *Whiting*, 131 S. Ct. at 1981; *see also* DeCanas v. Bica, 424 U.S. 351, 363 (1976) (finding a state law that operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country" is not preempted).

[52] Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1981 (2011). The Court went on to note that both LAWA and IRCA employ the "knowingly" employ standard and provide a rebuttable presumption of compliance for using E-Verify. *Id.* at 1982.

[53] *Id.* at 1985.

In rejecting this argument, the Court cited the federal government's consistent reliance on and growing support of E-Verify,[54] as well as the fact that federal law restricts only the Secretary of Homeland Security in requiring use of the program.[55] In short, the Court found that LAWA does not conflict with federal immigration law, but rather complements it.

Shortly after the decision, it was opined that "[i]t is now clear that as long as the state activity is linked to licensing, a state statute will likely be upheld,"[56] and that the ruling "will likely drive additional states to adopt similar legislation. States that are considering similar legislation should heed the Court's advice about closely tracking the federal requirements to ensure that the legislation satisfies legal requirements."[57] But what does *Whiting* mean beyond holding that LAWA is a "licensing law," and how exactly does this translate to similar legislation? Will it restrict the use of the savings clause to legislation identical to LAWA, or is the Court saying that it is okay for states to legislate in areas of law reserved to the federal government, so long as the content of the statutes themselves is nearly identical?[58] The Court may have reached the correct result, but, unfortunately, as this note argues, *Whiting* did too little to clarify the criteria for qualification under the IRCA savings clause, resulting in growing confusion.

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[54] *Id.* at 1986.

[55] *Id.* at 1985.

[56] Sharon S. Moyer & Adrian L. Barton, *U.S. Supreme Court Rejects Challenge to Legal Arizona Workers Act*, 2011 LEXISNEXIS EMERGING ISSUES 6020 (2011).

[57] Julie Myers Wood, *Supreme Court Affirms a State Immigration Law—What It Means*, 2011 LEXISNEXIS EMERGING ISSUES 5686 (2011).

[58] Indeed, "the idea that states can pass immigration laws based on federal standards has achieved astonishing acceptance in the general political culture . . . with ordinary citizens asking how the federal government can complain that its own laws are actually being enforced." Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 255–57 (2011) (footnotes omitted).

III. THE PROBLEMATIC AMBIGUITY OF THE *WHITING* STANDARD

A. THE *WHITING* STANDARD REITERATED

As it stands, the nature of the inquiry as to whether a sub-federal employer sanctions statute is federally preempted is too amorphous and uncertain. This uncertainty leaves states unsure of whether they can tailor a LAWA-style law to meet local needs, and it also makes it more difficult for employers to evaluate the risks associated with federal and state requirements. This uncertainty also jeopardizes the restricted nature of the IRCA licensing exception.[59] Greater certainty in the law would be beneficial to both lawmakers and businesses. Additionally, as this note will argue in Section IV, there are compelling economic and jurisprudential reasons to limit the application of the savings clause.

The current standard under *Whiting* for analyzing sub-federal laws within the savings clause is as follows: first, the law must function to alter business licenses in an adequate manner.[60] The acceptable forms of alteration, as well as what qualifies as a license, stem from federal definitions.[61] Second, the law must closely mirror certain federal definitions and standards, and it must defer to any federal determinations as to unauthorized status.[62] Finally, any requirements that the state law imposes must complement, or at least not conflict with, federal programs.[63] These three standards are supposed to

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[59] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1993 (2011) (Breyer, J., dissenting) (noting the danger in reading the federal licensing exception "as authorizing a State to undermine, if not to swallow up, the federal pre-emption rule").

[60] *See supra* notes 44–45 and accompanying text. For the purposes of this note, this will be referred to as the "express preemption test."

[61] *See supra* notes 43–44 and accompanying text.

[62] *See supra* notes 49–52 and accompanying text. For the purposes of this note, this will be referred to as the "implied preemption test."

[63] *See supra* notes 54–55 and accompanying text. For the purposes of this note, this will be referred to as the "implied preemption test for substantive requirements."

delineate those state laws that federal law expressly or impliedly preempts.

The main problem with the *Whiting* standard is the vagueness of the two implied preemption tests. Since the Court's decision was so narrowly circumscribed to the facts involved, lower courts will likely be left without the guidance necessary to evaluate similar but not identical statutes.[64] What may seem like an important definition or standard under the statutory structure of LAWA may seem trivial under another state's version of a law that sanctions employers. This leaves a great deal of uncertainty in the law and makes businesses reluctant to follow laws that are not substantially identical to LAWA. Whether an employer sanction law is implicitly preempted under *Whiting* essentially becomes argument by analogy: How similar is the law to LAWA?

B. ATTEMPTS AT CLARIFICATION

The ambiguity of the *Whiting* standard is especially troublesome given the volume of similar laws, many of which will likely face challenges in federal courts.[65] In addition to the abundance of statutes nearly identical to LAWA, courts are also facing a wide range of variations on the LAWA model, many of which do not facilitate a neat application of the *Whiting* standard.

The different types of state and local laws regulating employment of unauthorized workers often fall within one of the following statutory formulations: (1) prohibiting hiring or employing of unauthorized immigrants; (2) requiring employers to affirm that they do not hire unauthorized immigrants; (3) prohibiting contractors who provide goods or services to state or local governments from employing unauthorized immigrants; (4) requiring all employers to enroll in the federal E-Verify program; (5) making receipt of public contracts contingent on

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[64] *Whiting*, 131 S. Ct. at 1973–87 (describing LAWA and its provisions in detail and comparing it to corresponding federal law and policies).

[65] *See, e.g.*, City of Hazleton v. Lozano, 131 S. Ct. 2958 (2011) (vacating the judgment of the Court of Appeals for the Third Circuit and remanding for further consideration in light of *Whiting*).

enrollment in E-Verify; (6) suspending or revoking business licenses of employers who hire unauthorized workers; (7) imposing civil fines on noncompliant employers; (8) prohibiting employers from enrolling in E-Verify; and (9) creating new causes of action for damages for US citizens discharged by employers who employ unauthorized immigrants.[66]

In deciding *Whiting*, the Court was aware of the prospective influence of its decision. In evaluating LAWA, the Court noted that several states had recently enacted similar laws that sanctioned employment of unauthorized aliens through, *inter alia*, "licensing and similar laws."[67] Presumably, the Court was implying that these statues are sufficiently similar to LAWA to withstand preemption analysis. However, upon closer inspection, the similarities between these laws and LAWA are not nearly as clear or as uniform as the Court seems to suggest.

Along with LAWA, the list of laws sanctioning employment of unauthorized aliens through "licensing and similar laws" includes laws from eight states.[68] The first law noted is Colorado's 2008 law regarding the knowing employment of unauthorized aliens by contractors or subcontractors working under public contracts.[69] Interestingly, this law does not require contractors to use E-Verify,[70] and the consequences for a

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[66] Cristina Rodríguez, Muzaffar Chishti & Kimberly Nortman, *Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures,* MIGRATION POLICY INSTITUTE, SIDEBAR 2, 8 (2007), *available at* http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf.

[67] Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1975 (2011) (quoting 8 U.S.C. § 1324a(h)(2) (2012)).

[68] *Whiting*, 131 S. Ct. at 1975 n.2.

[69] *See id.*; COLO. REV. STAT. ANN. § 8–17.5–102 (West 2008).

[70] § 8-17.5-102(2)(b)(I) (requiring contractors to confirm the employment eligibility of employees to perform work under the public contract "through participation in either the e-verify program or the department program").

violation do not involve licensing.[71] However, in investigating suspected violations, "[t]he department is authorized to promulgate rules in accordance with article 4 of title 24, C.R.S., [governing rule-making and licensing procedures by state agencies] to implement the provisions of this subsection."[72]

The Court also noted the Mississippi Employment Protection Act.[73] This law has closer similarity to LAWA than the Colorado law, in that it explicitly defers to the federal definition of unauthorized alien[74] and requires the use of E-Verify by all employers.[75] However, under the Mississippi law, it is a felony to knowingly or recklessly employ an unauthorized alien punishable by imprisonment and/or fines.[76] No explicit reference is made to licensing consequences.

Also listed is Missouri's legislation regarding the employment of unauthorized aliens, which has even more in common with LAWA.[77] The Missouri law also explicitly defers to the federal definition of unauthorized alien,[78] requires the use

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[71] § 8-17.5-102(3)–(4) (noting that a violation (1) permits the state agency or political subdivision to terminate the contract for breach and (2) allows the name of the contractor to be added to a publicly available list).

[72] § 8-17.5-102(5)(a).

[73] *See Whiting*, 131 S. Ct. at 1975 n.2; MISS. CODE ANN. § 71-11-3 (West 2008).

[74] § 71-11-3(3)(e) (an "'[u]nauthorized alien' means an alien as defined in Section 1324a(h)(3) of Title 8 of the United States Code").

[75] § 71-11-3(4)(b)(i).

[76] § 71–11–3(8)(c)(i) ("It shall be a felony for any person to accept or perform employment for compensation knowing or in reckless disregard that the person is an unauthorized alien . . . . Upon conviction, a violator shall be subject to imprisonment . . .a fine . . . or both.").

[77] Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1975 n.2 (2011); MO. ANN. STAT. §§ 285.525, 285.535 (West 2009). The *Whiting* Court did not cite Section 285.530, the section prohibiting the knowing employment of an unauthorized alien and requiring participation in E-Verify. *See Whiting*, 131 S. Ct. at 1975 n.2. It is not clear whether this omission was purposeful. Although the sections that are actually cited by the Court explicitly rely on the inclusion of the omitted section, this note will assume that this omission was purposeful, in that it did not intend to imply the Court's approval.

[78] § 285.525(10).

of E-Verify,[79] and punishes any business entity that knowingly employs an unauthorized alien by "suspend[ing] the business permit, if such exists, and any applicable licenses or exemptions of such business entity for fourteen days. Permits, licenses, and exemptions shall be reinstated for entities who [are in compliance] with . . . this section at the end of the fourteen day period."[80]

The Court also includes Pennsylvania's Keystone Opportunity Zone Act, which prohibits any "person or business that receives a tax exemption, deduction, abatement, or credit under this act . . . [to] knowingly permit the labor services of an illegal alien . . . in the applicable keystone opportunity zone."[81] Notably, this law does not require direct employment of an unauthorized alien, but rather extends to any employment under a Keystone Opportunity Zone contract.[82] Punishment consists of repaying the entire value of the "exemption, deduction, abatement, or credit."[83] However, requiring repayment is conditional on the person or business being "sentenced under Federal law for an offense involving knowing use of labor by an illegal alien under the contract."[84] While the law does not explicitly defer to the federal definition of unauthorized alien,[85] it is an affirmative defense if the person or

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[79] *See supra* note 77 and accompanying text.

[80] § 285.535(5)(2)(b). Additionally, if the business entity is found not to have knowingly violated the statute, but a violation nonetheless exists, the employer shall have fifteen days to comply. § 285.535(5)(2)(a). If the employer is not in compliance at the end of that time, then any applicable licenses or exemptions shall be suspended until the employer complies. *Id.*

[81] *See Whiting*, 131 S. Ct. at 1975 n.2; 73 PA. CONS. STAT. ANN. § 820.311(a) (West 2008).

[82] § 820.311(a).

[83] § 820.311(b)–(c)(1).

[84] § 820.311(c)(1)(i).

[85] § 820.311(d) ("'illegal alien' means a noncitizen of the United States who is violating Federal immigration laws and is providing compensated labor within this Commonwealth").

business has required the contractor to certify compliance with IRCA.[86]

The fifth sub-federal statute cited by the *Whiting* Court is South Carolina's law governing illegal aliens and private employment.[87] In the specific section cited by the Court, the South Carolina statute punishes the first violation of the law—which prohibits the knowing or intentional employment of an unauthorized alien—with a suspension of all licenses for a period of ten-to-thirty days.[88] All business-related operations must cease during that time.[89] At the end of the period, licenses must be reinstated if the employer (1) can demonstrate that the unauthorized alien has been terminated[90] and (2) pays a "reinstatement fee."[91]

The sixth law cited is an individual provision of Tennessee law, stating that a person has not violated the prohibition on knowing employment of illegal aliens if that person verified the employee's work authorization status using E-Verify.[92]

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[86] § 820.311(c)(3).

[87] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1975 n.2 (2011); S.C. CODE ANN. § 41-8-50(D)(2) (2008) (amended by 2011 S.C. Act No. 69, § 12). Although the Court only cited this one provision, South Carolina law also adopts the federal definition of an unauthorized alien. § 41-8-10(F). It also creates a statewide "South Carolina employment license," which all private employers are required to hold in order to employ a person. § 41-8-20(A). All private employers are also required to use E-Verify. § 41-8-20(B).

[88] See *Whiting*, 131 S. Ct. at 1975 n.2; § 41-8-50(D)(2).

[89] § 41-8-50(D)(2).

[90] § 41-850(D)(2)(a).

[91] § 41-8-50(D)(2)(b) (the reinstatement fee is "equal to the cost of investigating and enforcing the matter, provided that the reinstatement fee must not exceed one thousand dollars").

[92] *See Whiting*, 131 S. Ct. at 1975 n.2; TENN. CODE ANN. § 50-1-103(d) (West 2012). Although not cited by the Court, Tennessee's definition of an "illegal alien" is based on federal authorization status. § 501-103(a)(4). A license is defined as "any certificate, approval, registration or similar form of permission required by law." § 50-1-103(a)(7). If it is determined an employer did knowingly employ an illegal alien, their business licenses will be revoked, suspended, or denied. § 50-1-103(e)(1).

Next is a provision under Virginia's Public Procurement Act, which merely states, "[a]ll public bodies shall provide in every written contract that the contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in [IRCA]."[93] Notably, this statute does not apply to private employers.

Lastly, the Court included West Virginia's legislation relating to suspension or revocation of licenses in light of the employment status of workers.[94] While initial violations of West Virginia's prohibition on knowingly employing unauthorized workers are punished with fines,[95] the provision cited by the Court additionally punishes subsequent violations with permanent revocation or temporary suspension of licenses.[96] It is worth noting that West Virginia defines an "unauthorized worker" as "a person who does not have the legal right to be employed or is employed in violation of law."[97] The law does not appear to differentiate between federal and state violations.[98]

In sum, the Court provided lawmakers, courts, and employers with a conflicting, fragmented list of model legislation. Where the *Whiting* decision initially appeared to at least marginally clarify the requirements for use of licensing, the inclusion of the Colorado[99] and Mississippi[100] statutes further convoluted the equation. Additionally, the list includes laws that have their own definitions of "unauthorized status" or do not explicitly defer to federal determinations, which may lead to

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[93] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1970, 1975 n.2 (2011); VA. CODE ANN. § 2.2-4311.1 (West 2008).

[94] *See Whiting*, 131 S. Ct. at 1975 n.2; W. VA. CODE ANN. § 21-1B-7 (West 2010).

[95] § 21-1B-5(b)(1).

[96] *See Whiting*, 131 S. Ct. at 1975 n.2; § 21-1B-7(a)(1), (2).

[97] § 21-1B-2(c).

[98] However, as the Court in *Whiting* explicitly omitted this provision in their citation, this note will assume that the Court was not implying approval. *See supra* note 77 and accompanying text.

[99] *See supra* notes 69–72 and accompanying text.

[100] *See supra* notes 73–76 and accompanying text.

conflicts between federal and state determinations.[101] By placing these statutes in the same category as LAWA, the Court's holding turns out to be even more nebulous.

IV. PROPOSED SOLUTION

Any acceptable solution must fill in the gaps left by the Court's decision in *Whiting*, which means that a solution should serve to clarify and enhance the holding while still respecting the Court's structures and rationales. Accordingly, this note proposes that employer sanction laws can generally be evaluated based on the following three features: (1) how licensing is used within the structure of the statute; (2) how language and standards compare to federal law counterparts; and (3) how well substantive requirements align with federal law.

Within that three-part inquiry, this note further suggests that any sub-federal employer sanctions legislation, in order to be acceptable under *Whiting*, should satisfy the following: (1) licensing should be used as the primary procedural enforcement mechanism; (2) any definitions and/or standards should either mirror their federal counterparts or cast a smaller net; and (3) substantive requirements should be objectively consistent with federal immigration policies.

A. NATURE OF THE STATUTORY USE OF LICENSING

The *Whiting* decision determined that LAWA was indeed a "licensing law" because it served to suspend or revoke licenses within the meaning of federal law.[102] However, this leaves open the possibility that even the slightest inclusion of licensing consequences will turn an entire statute into a "licensing law."[103]

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[101] *See supra* notes 70, 85, 97–98.

[102] *See supra* notes 43–45 and accompanying text.

[103] *See, e.g.*, *supra* note 72 and accompanying text (describing Colorado's use of licensing in their employer sanctions statute, *i.e.* a vague permission to use licensing in implementing the law).

Such an interpretation would make the rationale behind the savings clause meaningless and would lend itself to abuse.[104]

One potential solution to this shortcoming is to interpret IRCA's savings clause as requiring licensing to be used as the primary procedural enforcement mechanism, as was the case with LAWA. Licensing need not be the exclusive procedural enforcement mechanism, but licensing consequences should not be included as an afterthought.[105] Nor should these consequences be of such minor scope or duration as to have no deterrence value when compared to the other incorporated penalties.[106] Such maneuvering suggests an intentional end-run around both IRCA and *Whiting*.

Clarifying the required role of licensing would make it much easier to evaluate whether a statute fits within the savings clause, especially as states stray from the procedural enforcement structure approved in *Whiting*.

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[104] It is important to note that this issue is separate from the definition of what falls under the state's definition of a license. The dissent in *Whiting* was extremely concerned with the majority's expansive definition of a license. As Justice Breyer noted in his dissent, "[t]o read the exception as covering laws governing corporate charters and partnership certificates (which are not usually called 'licensing' laws) is to permit States to turn virtually every permission-related state law into an employment-related 'licensing' law." *Whiting*, 131 S. Ct. at 1993 (Breyer, J., dissenting). While this is indeed a valid concern, it was overruled by the majority's use of the definition enacted in the federal Administrative Procedure Act. *See supra* note 44 and accompanying text. The majority did not, however, sufficiently address the role of licensing within the statutory structure of a sub-federal employer sanctions law.

[105] *See, e.g., supra* notes 87–91 and accompanying text (describing South Carolina's law, which only included licensing consequences later on, and even then, in a separate provision, rather than the main list of consequences).

[106] Although the test articulated in *Whiting* merely requires some alteration in the status of a license, *see supra* note 44 (listing permissible status alterations, including grant, renewal, denial, revocation, suspension, annulment, or conditioning of a license), these consequences should represent a direct and significant impact of the law.

B. CONGRUENCE WITH FEDERAL LANGUAGE AND DEFINITIONS

The main concern with regard to variation between state and federal definitions is the potential for conflicting outcomes.[107] The *Whiting* Court clearly explained how the language of LAWA prevented such a clash.[108] However, if a statute is not identical to LAWA, the analysis is less precise, especially where the statute functionally depends on different terms.[109]

Ideally, the sub-federal statute would either substantially mirror the federal language[110] or explicitly cite to it.[111] The language of IRCA has played an important role in the construction of many of the relevant employer sanctions laws, most notably in LAWA. By sticking closely to the federal text and definitions, states hope it will be less likely for courts to find laws either explicitly or implicitly federally preempted. Indeed, in *Whiting* the Court approved the fact that the language of LAWA is very close to that of IRCA.[112] Accordingly, in the wake of the Court's approval of LAWA, such language represents a safe bet for state lawmakers contemplating their own employer sanctions laws.

Although many states have chosen that path, there has also been a great deal of variation. For a variety of reasons, a state

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[107] *See supra* note 51 and accompanying text.

[108] *See supra* notes 49–51 and accompanying text.

[109] Basically, there are two possible interpretations of where definitions and standards in sub-federal employer sanctions laws should come from. First, the majority's wide approval of the use of federal definitions could be seen as creating a standard for future contested terms. *See supra* notes 74, 78, 87, 93. Second, the Court's concern with preventing a conflict between state and federal outcomes could be seen as the primary concern. *See supra* notes 49–51 and accompanying text. This note argues in favor of the latter.

[110] *See supra* notes 43, 49 and accompanying text (approving LAWA's definitions of certain terms as being sufficiently similar to the federal version).

[111] *See, e.g., supra* notes 74, 78, 87, 93 and accompanying text (noting that the employer sanctions laws from Mississippi, Missouri, South Carolina, and Virginia all cite directly to the federal definition of "unauthorized alien").

[112] *See supra* note 52 and accompanying text. Indeed, throughout the Court's decision, the similarity to federal law was an underlying rationale supporting approval. *See, e.g., supra* note 54.

may choose to use a narrower definition of "unauthorized alien"[113] or "employment." For example, a narrower definition, or one that casts a smaller net than the federal definition, would make it nearly impossible, *ceteris paribus*, for an employer to be subject to sanctions on the state level but not the federal level.[114] While it would be possible for an employer to be found in violation of federal law, but not state law, such a situation is unlikely to create preemption concerns.[115]

It makes sense, therefore, to permit a state's version of a definition, so long as it functions to subject employers to less liability than the applicable federal version. However, if the state's version casts a wider net than the federal version, this would likely invite conflicting outcomes and therefore should not be permitted.

C. SUBSTANTIVE REQUIREMENTS

In approving LAWA's use of E-Verify, the Court in *Whiting* centered much of its discussion specifically on the nature of E-Verify itself.[116] While many employer sanctions laws do require participation in E-Verify, a significant number use different formulations that do not fall so neatly under the Court's holding.

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[113] *See, e.g., supra* note 85 and accompanying text (noting that the Pennsylvania employer sanctions law defines an unauthorized alien as being in violation of federal immigration law); *but see supra* note 97 and accompanying text (noting that West Virginia opts for a very broad definition, defining an unauthorized alien as having no legal right to be employed or as being employed in violation of the law).

[114] This solution assumes that the state law requires deference to federal determinations as to work authorization status. Indeed, without such deference, a statute would be nearly inoperable.

[115] This solution also assumes that states do not attempt to supplant federal determinations or consequences. Such a law would clearly be in conflict with federal law and would very likely be preempted. *See* Ga. Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317, 1336 (N.D. Ga. 2011) (noting that sub-federal immigration laws are restricted to the federal carve-out, in applying *Whiting* to a Georgia state law).

[116] *See supra* notes 53–55 and accompanying text (explaining why LAWA's mandatory E-Verify requirement does not impliedly preempt federal law).

Frequently, sub-federal employer sanction laws impose the following substantive requirements: (1) required participation in E-Verify; and/or (2) prohibition on knowingly employing an unauthorized alien. A significant number of states combine different elements of these two main requirements, *e.g.* giving employers using E-Verify a rebuttable presumption if they are found to be employing unauthorized workers.[117] Additionally, as technology has improved and state law enforcement budgets have shrank, E-Verify has become an increasingly palatable proxy for impacting the employment of undocumented workers.[118]

However, where a state strays from this type of formulation, the preemption analysis, as applied in *Whiting*, becomes more difficult to evaluate. Some states have developed their own miniature versions of E-Verify,[119] while others do not impose any knowledge requirement at all.[120]

In light of such variation it is tempting to argue that the substantive requirement should be within federal control, *i.e.* states should be discouraged from creating their own systems, as this would lead to vast inconsistencies between states and would appear to conflict with the federal system. Such an argument would also appear to be in line with the Court's analysis in *Whiting*. However, this argument ignores the basic rationale behind sub-federal employer sanctions laws—that each state's law is a response to local needs rather than national ones. These laws reflect the needs, politics, and challenges associated with the individual state. Accordingly, extending federal influence too far into these laws is not always a helpful option.

A more effective analysis of substantive requirements may lie in evaluating external effects. Additional concern has emerged

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[117] *See supra* note 30 (describing the rebuttable presumption of compliance that employers receive for participation in E-Verify under LAWA).

[118] Although many concerns regarding the accuracy and feasibility of widespread use of E-Verify remain, *see Whiting*, 131 S. Ct. at 1996 (Breyer, J., dissenting), the Court nonetheless approved sub-federal mandatory use by employers, and as such this note does not contest it in this context.

[119] *See supra* note 70 (noting that the Colorado statute allows participation in a state-level "department program" as an alternative to E-Verify).

[120] *See, e.g.*, LA. REV. STAT. ANN. § 23:992 (2012).

in the wake of *Whiting* regarding the effect that these sub-federal laws will have outside of state borders.[121] There is concern not only regarding population flows and corresponding economic adjustment as workers pursue favorable employment conditions,[122] but also regarding how employer sanctions laws will affect businesses that operate in multiple states. While the Court in *Whiting* may have considered the exportation of costs to the federal government and citizens,[123] it certainly did not address the problem satisfactorily.

Accordingly, states should make an effort to minimize external economic effects of substantive requirements. One option would be to make sure that state lines are effective in limiting the substantive requirements of legislation. LAWA arguably did so by directing sanctions only on the site of the violation.[124] By ignoring the economic reality that many businesses do not restrict operations to one state, states run the risk of exporting the substantive requirements of their laws beyond their borders, which goes against the nature of the state police power in which these laws are based.[125]

V. CONCLUSION

The IRCA savings clause for sub-federal licensing laws allows states to wield a tremendous amount of economic and political control. With the increasing number of states that have passed legislation conditioning business licenses on compliance with

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[121] *See generally* Keith Cunningham-Parmeter, *Forced Federalism: States As Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011).

[122] Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1126 (2009) (describing shifts in immigrant population from Arizona following the passage of sub-federal immigration legislation).

[123] *See* Cunningham-Parmeter, *supra* note 121, at 1704 ("[T]he *Whiting* majority . . . found that Arizona's verification law did not interfere with federal priorities . . . . In other words, the state law was acceptable from the perspective of experimental federalism because it did not export costs to citizens or the United States.").

[124] *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-212(F) (2010).

[125] *See* Cunningham-Parmeter, *supra* note 121, at 1726–27.

local immigration laws and the growing variation within this type of legislation, the risk of infringing on the federal immigration arena has grown.

However, sub-federal employer sanctions legislation is now facing a new, relatively uniform influence, stemming from the Court's holding in *Whiting*. Although this decision has indeed clarified what a non-preempted employer sanctions law looks like, it has left some areas of the law cloudier than before. In an effort to fill in these holes left by *Whiting*, courts should evaluate current legislation based on three categories: (1) how licensing is used; (2) how language and standards compare to federal law counterparts; and (3) whether substantive requirements complement federal law.

Within that three-part inquiry, any sub-federal employer sanctions legislation, in order to be acceptable under *Whiting*, should satisfy the following: (1) licensing should be used as the primary procedural enforcement mechanism; (2) any definitions and/or standards should either mirror their federal counterparts or cast a smaller net; and (3) the external effects of substantive requirements should be limited.

The limitation of the *Whiting* holding is that it applies only to licensing laws that sanction employers and not much further; any further application would be reaching too far beyond IRCA's savings clause. However, the influence of *Whiting* on the states' use of their licensing power remains to be seen.