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Do State and Local Immigration Laws Violate Federal Law?

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Faced with what they consider a lack of comprehensive immigration reform at the federal level, many states and localities are enacting their own immigration-related laws and ordinances. Many of these laws[1] impose restrictions on unauthorized immigrant[2] populations, while some aim to promote immigrant integration. Such laws raise a number of constitutional issues, including federal preemption issues. Is state or local action permitted in this area by the U.S. Constitution? What is the permissible scope of state and local action? When are state and local immigration laws preempted by federal law?

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1. The term "laws" is used broadly in this bulletin to describe state laws and local ordinances, resolutions, and policies.

2. The term "unauthorized immigrant" is used in this bulletin to describe an individual who is not lawfully present in the United States. *See generally* 8 U.S.C. § 1227(a)(1)(B); 8 C.F.R. § 103.12.

This area of the law is largely unsettled. Only a few cases directly speak to these issues, and some of the existing authority is directly conflicting. More guidance is expected in the months to come, as a few of these cases are under review by the federal appellate courts.

This bulletin explains general preemption principles and provides an analytical tool for determining whether proposed or enacted immigration-related laws may be preempted (and thus invalidated) by federal laws. This bulletin also briefly discusses free speech and civil rights laws that may be implicated by local and state immigration laws. Such laws may also raise due process and equal protection concerns, but this bulletin does not cover those areas of the law.

I. How to Use This Bulletin

This bulletin first provides a legal framework for preemption analysis and describes how immigration-related laws can be preempted in three different ways. The bulletin then explains how this legal framework applies to the following areas that have been the subject of state and local regulation:[3]

- housing
- employment
- public benefits
- education
- language policy

In each of these areas, this bulletin provides a detailed preemption analysis and closes with a summary addressing the legality of specific regulation provisions.

II. General Preemption Principles

Under the Supremacy Clause of the U.S. Constitution, federal law is the supreme law of the land.[4] State and local governments are "preempted" from enacting legislation in areas where Congress has asserted its exclusive authority or that would conflict with federal legislation. In the immigration field, the U.S. Supreme Court has recognized three tests to determine whether federal law preempts a state or local law: 1) constitutional preemption, 2) field preemption, and 3) conflict preemption.[5] A state or local law related to immigration that fails any one of these three tests is preempted by federal law and therefore unconstitutional and invalid.[6]

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3. The author focused on laws in these areas because they have been the subject of preemption challenges or appeared to be of particular interest to lawmakers in North Carolina.

4. Article 6, Clause 2, of the United States Constitution.

5. DeCanas v. Bica, 424 U.S. 351 (1976).

6. The U.S. Supreme Court has previously struck down state laws relating to immigrants on one or more of these preemption grounds. *See, e.g.,* Toll v. Moreno, 458 U.S. 1, 10 (1982) (invalidating state denial of resident tuition benefits to certain visa holders); Graham v. Richardson, 403 U.S. 365, 377–80 (1971) (invalidating state welfare restriction); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948) (invalidating state denial of commercial fishing licenses); Hines v. Davidowitz, 312 U.S. 52, 62–68 (1941) (invalidating state alien registration scheme).

What is constitutional preemption? The U.S. Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration.[7] A state or local law will be *constitutionally* preempted if it is an attempt to regulate immigration. Under this test, the relevant question is: Does the state or local law regulate immigration—does the law make a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain—or does it simply *pertain* to immigrants?[8] State and local laws that attempt to regulate immigration violate the Supremacy Clause of the U.S. Constitution and are therefore preempted by federal law, even in the absence of federal legislation.

What is field preemption? Even if the state or local law is not an impermissible regulation of immigration, it may still be *field* preempted if it attempts to operate in a field already occupied by federal law, either expressly or impliedly. Under this test, the relevant question is whether Congress intended a "complete ouster" of state power in the field of legislation.[9] Or did Congress intend for states to regulate in the area, to the extent consistent with federal law? If Congress intended to occupy the field of regulation, then a local or state law will be preempted, even if it mirrors federal law. Often, it is necessary to look at the statutory language or legislative history of the federal law to make such a determination.

What is conflict preemption? Even if Congress has not occupied the field of regulation, a state or local law may still be *conflict* preempted if it burdens or conflicts with federal law. A conflict exists when it is impossible to comply with both federal and state or local law,[10] or if the state or local law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal legislation.[11] Conflict preemption requires an analysis of the specific provisions of the law at issue.

Issues concerning each of the three types of preemption may arise when state and local governments enact laws related to immigration.

III. Preemption in the Context of Housing Laws

Some state and local governments have proposed or enacted laws that prohibit and penalize property owners from renting or leasing property to unauthorized immigrants (such laws are labeled as housing laws in this bulletin). Some of these laws require property owners or landlords to determine the immigration status of potential renters. Such laws have been challenged on federal preemption grounds. Are they preempted by federal law? Courts that have examined such housing laws have found that they carry serious concerns of federal preemption.[12]

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7. *See, e.g., DeCanas*, 424 U.S. at 354–55 ("Power to regulate immigration is unquestionably exclusively a federal power.").

8. *Id.* at 355.

9. *Id.* at 356–57.

10. *See* Michigan Canners & Freezers v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469 (1984); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963).

11. *See DeCanas*, 424 U.S. at 363.

12. *See, e.g.,* Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (striking down a local housing law on preemption grounds); Villas at Parkside Partners v. City of Farmers Branch, 2008 WL 2201980, ____ F. Supp. 2d ____ (N.D. Tex. May 28, 2008) (finding a local housing law to be preempted and granting a permanent injunction against its enforcement); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting a temporary restraining order against a local housing law that raised serious concerns of federal preemption); *cf.* Reynolds v. City of Valley Park, Mo., No. 06-CC-3802 (St. Louis Cty. Cir. Ct.

A. Are Housing Laws Constitutionally Preempted?

Are housing laws preempted under the test of constitutional preemption? Are they considered a regulation of immigration? The answer depends on how such laws are constructed. Any type of state or local law (including a housing law) that creates or adopts standards different from federal standards to classify immigrants as lawfully present or unlawfully present will probably be deemed a regulation of immigration and thus preempted.[13] The authority to create standards determining a person's immigration status belongs exclusively to the federal government.[14] For example, a housing law in Farmers Branch, Texas, was found to be an impermissible regulation of immigration, where the law classified a tenant's immigration status based on federal housing regulations (that outlined restrictions on federal housing subsidies to immigrants), instead of federal immigration law.[15] The court found that the standards adopted by the local law prohibited several classes of authorized immigrants—who *lawfully* reside in the United States but are ineligible for federal housing assistance, such as student visa holders—from renting an apartment in Farmer's Branch.

Further, any sort of state or local law that authorizes a local or state entity to make an independent assessment of an individual's immigration status may also be deemed an impermissible regulation of immigration and preempted by federal immigration law.[16] Immigration law generally vests authority in the attorney general and secretary of Homeland Security to administer and enforce all laws relating to immigration and naturalization, including determinations regarding the immigration status of individuals (though such determinations are subject to judicial review in many circumstances). For example, in the Farmers Branch case, the court suggested that the law was also preempted because it required private persons and city officials to make independent judgments regarding the immigration status of potential renters, instead of verifying status with federal authorities or under federal guidance.[17]

March 12, 2007) (finding that a housing ordinance enacted by the city of Valley Park was unlawful because it conflicted with state law).

13. *See, e.g.*, Equal Access Education v. Merten, 305 F. Supp. 2d 585, 602–03 (E.D. Va. 2004) (finding that a college admissions policy in Virginia may be invalid if, instead of adopting federal standards, it created and applied state standards to assess the immigration status of college applicants); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 768–70 (C.D. Cal. 1995) (invalidating state law provisions that created its own set of standards to classify the immigration status of applicants).

14. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government."); *see also Equal Access Education,* 305 F. Supp. 2d at 602–03 (explaining that states cannot formulate their own standards for determining a person's immigration status, which are "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," and thus an impermissible regulation of immigration).

15. Villas at Parkside Partners v. City of Farmers Branch, 2008 WL 2201980 at 7–10, ____ F. Supp. 2d ____ (N.D. Tex. May 28, 2008) (finding ordinance to be constitutionally preempted and granting a permanent injunction enjoining the city from effectuating or enforcing Ordinance 2903).

16. *See, e.g., League of United Latin American Citizens,* 908 F. Supp. at 769–70 ("State agents are . . . . unauthorized to make independent determinations of immigration status . . . .; [such] determinations . . . . amount to immigration regulation").

17. *Villas at Parkside Partners,* 2008 WL 2201980, at *11–13.

B. Are Housing Laws Field Preempted?

A housing law that is not a regulation of immigration may still fail the test of field preemption.[18] The issue is whether such laws are an attempt to legislate in a field that is occupied by the federal government. Even where state and local laws are consistent with federal objectives, they may be preempted where Congress has occupied the field.

The federal government has established a system of laws, regulations, procedures, and administrative agencies to determine, subject to administrative and judicial review, whether and under what conditions a given individual may enter, stay in, and work in the United States. The federal government has not imposed any sanctions on landlords for renting to unauthorized immigrants, but it does regulate and impose penalties on various forms of assistance to unauthorized immigrants, including "harboring" an unauthorized immigrant. Specifically, federal immigration law penalizes individuals who knowingly or recklessly "conceal, harbor, or shield from detection" any individual not lawfully present in the United States.[19] Some courts have interpreted the scope of this provision broadly, and have found it to cover the act of providing shelter to an individual knowing or in reckless disregard of the immigrant's unauthorized status, regardless of whether it was done surreptitiously.[20]

The federal immigration laws do not expressly preempt states and localities from imposing additional penalties on persons who harbor or provide shelter to unauthorized immigrants. However, by legislating in this area, it may be that the federal government has nonetheless occupied the field and preempted state or local laws that prohibit property owners from renting to unauthorized immigrants. It depends on whether Congress intended a complete ouster of state or local power. One court has found that a local law in Escondido, California, that penalized property owners who "harbor" (rent an apartment to) unauthorized immigrants raised serious concerns of field preemption.[21] In granting a temporary restraining order against the proposed law, the court found that the federal immigration laws proscribing harboring may occupy the same field in which the local law attempted to legislate.[22]

C. Are Housing Laws Conflict Preempted?

Are housing laws preempted under the test of conflict preemption? A state or local law is conflict preempted if it conflicts with federal law or if it stands as an obstacle to the accomplishment

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18. *See* Garrett v. City of Escondido**,** 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (finding that although local housing ordinance was likely not a regulation of immigration because it relied on federal immigration standards to classify the immigration status of rental applicants, it may still be field preempted).

19. 8 U.S.C. § 1324(a)(1)(iii). Federal immigration law also penalizes related activities, including the bringing in, the transporting, and the encouragement or inducement of unauthorized immigrants to reside in the U.S. 8 U.S.C. § 1324(a)(1)(A)(i) - (iv). It is also a criminal offense to aid or abet the commission of these offenses. 8 U.S.C. § 1324(a)(1)(A)(v).

20. *See, e.g.,* U.S. v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (finding that a church official violated the harboring provision when he invited an unauthorized immigrant to stay in an apartment behind his church); U.S. v. Rubio-Gonzalez, 674 F.2d 1067, 1072 (5th Cir. 1982) (indicating that harboring does not require any "trick or artifice"); U.S. v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976) (finding a defendant liable for providing unauthorized immigrants with an apartment and defining "harboring" as "afford[ing] shelter," regardless of intent to avoid detection).

21. *Garrett,* 465 F. Supp. 2d at 1056.

22. The City of Escondido then agreed to a permanent injunction against enforcement of the ordinance, entered on December 15, 2006.

and execution of the full purposes and objectives of Congress. What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects.[23] Conflict preemption analysis also requires an examination of the particular provisions of the state or local law.

A housing law may be in conflict with provisions of federal immigration law if it prohibits certain immigrants legally authorized to work in the United States from residing in its jurisdiction. The federal government permits several categories of persons to legally work and presumably live in the United States, even though they may be technically violating immigration laws. For example, an individual who has filed an application for a green card or for asylum technically does not have a lawful immigration status until the application is granted, but may obtain interim permission to work in the United States while that application is pending.[24] One court has used this analysis to invalidate a local ordinance. The city of Hazleton, Pennsylvania, passed a law that in part prohibited property owners from renting a dwelling unit to an unlawfully present immigrant. A reviewing federal court found the housing provisions of the law in conflict with federal law and therefore preempted because the provisions denied housing in Hazleton to a number of individuals who were authorized to work and implicitly to remain in the United States under federal immigration laws.[25]

Even where a state or local law does not explicitly conflict with a specific provision of federal law, it may still be preempted under this analysis if it creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. When Congress has enacted a federal policy, a state or local law imposing different sanctions or punishing different individuals for the same conduct may interfere with the objectives of Congress.[26] Congress does not require landlords or others to actively ascertain the immigration status of potential tenants. State and local housing laws that do so and that implement their own enforcement mechanisms, sanctions, and interpretations may be viewed by a court as upsetting the balance struck by Congress regarding the reach of the federal harboring law and applicability of its penalties.[27] Under such a view, state and local housing laws may be conflict preempted.

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23. *See* Crosby v. National Foreign Trade Council, 530 United States 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.").

24. The federal government may also grant work authorization to certain individuals who may not have a lawful immigration status, but have permission to remain in the United States for humanitarian or equitable reasons. *See, e.g.,* 8 C.F.R. §§ 274a.12(c)(11), (14).

25. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007). The court also found that Hazleton's requirement that city employees examine immigration documents and determine whether immigrants are lawfully present in the United States conflicted with federal law, because only the federal government can determine conclusively who may remain in the United States through formal removal (deportation) hearings.

26. *See Crosby,* 530 U.S. at 378–80.

27. Congress has occasionally amended the statute to narrow or broaden its reach. For example, in 1952 Congress amended the statute and added a proviso that routine employment practices in hiring unauthorized immigrants would not be considered harboring. Congress amended the statute again in 1986 and removed that proviso. *See* U.S. v. Kim, 193 F.3d 567, 573–74 (2d Cir. 1999); U.S. v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976).

D. Housing Laws and Federal Civil Rights Laws

Housing laws have also been challenged under existing federal anti-discrimination laws such as the Fair Housing Act (FHA). The FHA prohibits discrimination on the basis of race, color, or national origin in the sale or rental of housing.[28] Courts have found that discrimination on the basis of immigration status alone does not constitute discrimination on the basis of national origin, which refers to a person's country of birth or ancestry.[29] Thus a law that denies housing to unauthorized immigrants in its municipality may not, on its face, conflict with the FHA.[30]

It is also possible that a housing law could give rise to violations of 42 U.S.C. § 1981, which forbids discrimination in a contractual relationship.[31] The U.S. Supreme Court has held that § 1981 prohibits discrimination against immigrants by governmental actors.[32] The Fourth Circuit Court of Appeals has found that § 1981 also bars private discrimination against immigrants.[33] Neither court has specifically addressed whether the protections of § 1981 extend to unauthorized immigrants. One federal court, however, has held that a local housing law that barred property owners and landlords from renting to and contracting with unauthorized immigrants violated § 1981.[34]

E. Summary of Impact on State and Local Housing Laws

Taken together, the three types of preemption analysis have the following impact on state and local housing laws that prohibit landlords from renting property to unauthorized immigrants. Reviewing courts have found that immigrant housing laws raise serious preemption issues and have struck down these laws. It is not clear that any immigrant housing law would survive a preemption challenge because it may be an area where state and local governments cannot regulate or where such a law may inherently conflict with the reach and purpose of federal immigration law. However, an immigrant housing law carries less risk of being invalidated on the basis of

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28. 42 U.S.C. § 3604(a). The Fair Housing Act (FHA) contains a preemption provision that states, "Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.C. § 3615.

29. *See* Espinoza v Farah Manufacturing Co., 414 U.S. 86, 88–91 (1973); Espinoza v. Hillwood Square Mut. Assoc., 522 F. Supp. 559, 568 (D. Va. 1981).

30. *See Lozano*, 496 F. Supp. 2d at 477 (finding that housing law did not facially violate FHA). It is possible, however, that a housing law could, *when applied*, result in violations of the FHA in situations where discrimination on the basis of immigration status would have the effect or purpose of discriminating on the basis of national origin. *See Espinoza,* 522 F. Supp. 559. For example, landlords who are concerned about inadvertently renting to unauthorized immigrants may become reluctant to rent to any individual from certain ethnic backgrounds, including U.S. citizens and legal immigrants. Such a practice could have the unlawful effect of discriminating on the basis of national origin.

31. 42 U.S.C. § 1981 states that:"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

32. Takahashi v. Fish & Game Com., 334 U.S. 410, 419 (1948).

33. Duane v. Government Employees Ins. Co., 37 F.3d 1036, 1042–43 (4th Cir. 1994).

34. *Lozano,* 496 F. Supp. 2d at 547–48.

preemption if it adopts the federal definitions of immigration status and requires verification of the immigration status of renters with federal authorities.

IV. Preemption in the Context of Employment Laws

Some local and state governments have enacted laws that prohibit the hiring or employment of unauthorized workers and penalize employers for doing so through a variety of sanctions (such laws are labeled as employment laws in this bulletin). Some of these laws have been challenged on federal preemption grounds. Are such laws preempted by federal law? Three recent cases have ruled on the legality of such laws—a state law in Arizona and local laws in Hazleton, Pennsylvania, and Valley Park, Missouri.[35] The Hazleton decision suggests that almost any type of employment law regulating unauthorized workers is probably preempted by federal law, while the Arizona and Valley Park cases suggest that certain employment laws, depending on how they are constructed, may be valid under the Supremacy Clause. A ruling regarding the legality of a state law in Oklahoma is pending, but the opinion granting a preliminary injunction indicated the employment law is likely preempted by federal law.[36]

A. Are Employment Laws Constitutionally Preempted?

Are employment laws constitutionally preempted—are they considered a regulation of immigration? The U.S. Supreme Court has held that a state employment law was not a regulation of immigration because it did not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[37] An employment law will probably not be considered a regulation of immigration as long as it adopts the federal government's standards to classify immigration status and requires verification of an employee's work authorization with federal authorities.[38] For example, the court in the Arizona case found that the state employment law was not a regulation of immigration because the law adopted the federal government's classifications of immigration status and relied on the federal government's verification of an individual's immigration status and employment authorization.[39]

B. Are Employment Laws Field Preempted?

Are employment laws preempted under the test of field preemption? A state or local law is field preempted if it is an attempt to legislate in a field that is occupied by the federal government, either expressly or impliedly. In 1986, Congress enacted the Immigration Reform and Control

35. Arizona Contractors Ass'n., Inc. v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Gray v. City of Valley Park, Mo., 2008 WL 294294, ____ F. Supp. 2d ____ (E.D. Mo. January 31, 2008).

36. Chamber of Commerce of the U.S. v. Henry, 2008 WL 2329164, ____ F. Supp. 2d ____ (W.D. Okla. June 4, 2008).

37. DeCanas v. Bica, 424 U.S. 351, 354–55 (1976).

38. *See supra* Part III.A.

39. *Arizona Contractors Ass'n., Inc.,* 534 F. Supp. 2d at 1051–52; *see also Lozano,* 496 F. Supp. 2d at 524 n.45 (finding that based on the *DeCanas* Court's definition, the employment ordinance was not a regulation of immigration).

Act (IRCA).[40] IRCA prohibits the employment of unauthorized immigrants,[41] while safeguarding against employment discrimination as this prohibition is enforced. The law sets out the process to verify work eligibility, and penalties include cease and desist orders, civil and criminal fines, and imprisonment. IRCA also contains an express preemption clause: "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."[42]

Express preemption. Where a federal law contains an express preemption provision, states and localities cannot regulate in that field, even if their efforts complement or further federal objectives.[43] Thus IRCA's express preemption provision preempts any state or local law that imposes criminal or civil sanctions (other than through licensing and similar laws) on employers of unauthorized immigrants. One reviewing federal court has found that civil sanctions include the penalties of an increased tax rate, a loss of contract, and civil liability, and that the regulation of unauthorized workers through such sanctions is likely expressly preempted by IRCA.[44]

It appears that states and localities may be able to independently regulate the employment of unauthorized workers through *licensing and similar laws*, because of the specific exemption in the preemption clause. What types of "licensing and similar laws" are covered by the exception? The courts in the Arizona and Valley Park cases construed this exception broadly, indicating that states and localities can enact laws that deny or suspend the business license of employers who knowingly or intentionally employ unauthorized immigrants.[45] The court in the Hazleton case, however, construed the provision narrowly, finding a similar business license law to be preempted.[46]

Implied preemption. Even if a licensing law related to the employment of unauthorized workers is not expressly preempted (as per the courts in the Arizona and Valley Park cases), such a law may be impliedly preempted by IRCA if Congress intended to occupy the field.

The U.S. Supreme Court has described IRCA as a "comprehensive scheme" that "made combating the employment of illegal aliens in the United States central to the policy of immigration law."[47] IRCA regulates every area of immigrant employment: who can be employed, who cannot be employed, the punishment for employing unauthorized workers, and the appeals process. On the one hand, it may be that IRCA is so comprehensive that any state or local law seeking to regulate

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40. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (employer sanctions provisions codified at 8 U.S.C. § 1324a to 1324c).

41. The law specifically prohibits the employment of "unauthorized" immigrants, who are neither admitted for permanent residence nor authorized under federal law to work in the U.S. 8 U.S.C. § 1324a(h)(3).

42. 8 U.S.C. § 1324a(h)(2).

43. *See, e.g.,* Morales v. TWA, 504 U.S. 374, 387 (1992) (stating that an express preemption provision may displace "all state laws that fall within its sphere, even state laws that are consistent with [the federal law's] substantive requirements").

44. Chamber of Commerce of the U.S. v. Henry, 2008 WL 2329164, ____ F. Supp. 2d ____ (W.D. Okla. June 4, 2008) (granting preliminary injunction against employment verification provisions of state law that are likely expressly preempted by federal law).

45. *Arizona Contractors Ass'n., Inc.,* 534 F. Supp. 2d at 1046–48; Gray v. City of Valley Park, Mo., 2008 WL 294294, at *10–12 (E.D. Mo. January 31, 2008).

46. *Lozano*, 496 F. Supp. 2d at 519–20 (finding that Hazleton business permit suspension law did not fall into the "licensing" exception and was a pretext to locally regulate the employment of unauthorized workers, which is expressly preempted by IRCA).

47. Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002).

workers based on immigration status would be duplicative of the federal law or conflict with the federal law.[48] The opposing argument is that, by enacting the specific exemption allowing some licensing regulations to exist, Congress did not intend to preempt the entire field of employment regulation of unauthorized workers.[49]

C. Are Employment Laws Conflict Preempted?

Are employment laws preempted under the test of conflict preemption? As discussed above, state and local employment laws relating to unauthorized workers are expressly preempted by IRCA, with the exception of licensing laws. It is possible that a licensing law may still be preempted if its specific provisions conflict with or burden the federal law.

Some local and state licensing laws contain provisions that may be inconsistent with those of IRCA, such as the following:

- a stricter standard of conduct, such as strict liability for employment of unauthorized workers (vs. the federal law prohibition of *knowingly* employing unauthorized workers);
- a new system of verifying work eligibility (vs. the federal law I-9 verification scheme, which places the responsibility on the employer);
- a requirement that all categories of employees be screened for work eligibility (vs. the federal law exemptions for some independent contractors and domestic workers);
- no employee right to appeal an eligibility determination (vs. the federal law employee right to appeal);
- no anti-discrimination provisions (vs. federal law anti-discrimination measures to prevent discrimination against legal immigrants); and
- creation of new remedies such as a civil cause of action against violators of the law (where no such remedy is created by the federal law).

The three cases addressing these issues reached varying conclusions over whether such provisions resulted in conflict preemption. In Hazleton, the court found that because these types of employment provisions created a new system of verification, compliance, and enforcement, they conflicted with IRCA and were therefore preempted.[50] The court explained that while the federal and local laws shared a similar purpose—to deter the employment of unauthorized workers, without overburdening employers and increasing discrimination—the local law struck a different balance between those interests. The courts in the Arizona and Valley Park cases reached a different result, finding that no actual conflict existed.[51] Both courts found that the proposed laws did not conflict with the objective of Congress—to regulate the employment of unauthorized workers—and that any differences with the federal law were insignificant.

Are laws that mandate the use of E-Verify conflict preempted? Several local and state licensing laws require the use of E-Verify (formerly known as Basic Pilot), an Internet-based system that allows employers to electronically verify the employment eligibility of their newly hired employees. E-Verify is a voluntary program operated by the Department of Homeland Security

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48. *See Lozano,* 496 F. Supp. 2d at 523 (finding that IRCA occupies the field to the exclusion of state or local laws regarding the employment of unauthorized immigrants).

49. *Gray,* 2008 WL 294294, at *13 (finding that Congress' inclusion of a provision allowing for some state licensing regulations clearly conflicts with an intent to preempt the entire field of employment regulation).

50. *Lozano,* 496 F. Supp. 2d at 525–29.

51. *Arizona Contractors Ass'n., Inc.,* 534 F. Supp. 2d at 1053 ("a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act . . ."); *Gray,* 2008 WL 294294, at *13–19.

in partnership with the Social Security Administration. The Department of Homeland Security encourages the use of E-Verify but, by federal law, cannot require employers to use it.[52] There are ongoing concerns about the accuracy of the program.[53]

Some local and state license laws have made the use of E-Verify mandatory for all businesses that are required to have a business license to operate in the jurisdiction. Are such laws preempted by the federal law that makes participation in the program voluntary?[54] Under the Hazelton court's analysis, such a provision conflicts with federal law.[55] However, the Arizona and Valley Park courts, dealing with the very question, found no conflict. These courts reasoned that while E-Verify cannot be made mandatory at the national level, there was no indication that Congress intended to prevent the states from requiring the use of the system in their licensing laws.[56]

D. Summary of Impact on State and Local Employment Laws

Taken together, the three types of preemption analysis have the following impact on state and local laws that prohibit the employment of unauthorized immigrants. It is clear that a state or local law regulating the employment of unauthorized immigrants through criminal sanctions, fines, or other non-licensing sanctions is preempted by federal law. A state or local law regulating the employment of unauthorized immigrants through licensing provisions may or may not be preempted by federal law—the existing case law is directly conflicting on the legality of such licensing laws. One case suggests that most licensing laws are probably preempted, and two cases suggest that licensing laws may be valid if they adopt federal immigration classifications, require verification of immigration status and work authorization with the federal government, and are consistent with the provisions of the federal law (IRCA) in significant respects.

V. Preemption in the Context of Public Benefit Laws

Some state and local governments have enacted laws setting out immigration eligibility rules for state and local public benefits programs (such laws are labeled as public benefit laws in this bulletin). Are such laws preempted by federal law? There has not been much litigation in this area, but such laws are probably preempted if they diverge from the federal welfare law.

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52. Pub. L. No. 104-208, § 402(a), 110 Stat. at 3009-656 (1996) ("the Attorney General may not require any person or other entity to participate in [E-Verify].").

53. For example, in a September 2007 evaluation of the E-Verify program commissioned by the Department of Homeland Security, the evaluators concluded that "the database used for verification is still not sufficiently up to date to meet the [federal law] requirement for accurate verification, especially for naturalized citizens." *See* Findings of the Web Basic Pilot Evaluation, September 2007, *available at* www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

54. For a more detailed analysis regarding preemption of E-Verify laws, *see* Ben Stanley, *Preemption Issues Arising from State and Local Laws Mandating Use of the Federal E-Verify Program,* 6 The Public Servant 1 (March 2008).

55. *Lozano,* 496 F. Supp. 2d at 526–27.

56. *Arizona Contractors Ass'n., Inc.,* 534 F. Supp. 2d at 1055–57; *Gray,* 2008 WL 294294, at *17–19 ("The Court does not see Congress's decision not to make the program mandatory as restricting a state or local government's authority under the police powers.").

A. Are Public Benefit Laws Constitutionally Preempted?

Are public benefit laws constitutionally preempted—are they considered a regulation of immigration? A public benefit law will probably not be considered a regulation of immigration as long as it specifically adopts federal standards to classify and verify the immigration status of applicants.[57] One federal court has held that a public benefit law is not a regulation of immigration because it does not amount to a determination of who should or should not be admitted into the country.[58]

B. Are Public Benefit Laws Field Preempted?

Are public benefit laws preempted under the test of field preemption? Are they attempts to legislate in a field that is occupied by the federal government?

In 1996, Congress passed a federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act.[59] The federal welfare law created a statutory scheme for determining and verifying immigrant eligibility for most federal, state, and local benefits. In the law, Congress expressly stated a national policy of restricting the availability of public benefits to immigrants.[60] The law defined the benefits covered, and it created two categories of immigrants for benefits eligibility purposes: "qualified" and "not qualified." The law also specifically designated the limited types of legislative actions states can take in the area of immigrant eligibility for federal, state, or local benefits.[61]

In striking down a state public benefit law in California, a federal court found that the federal welfare law occupied the field of regulation of public benefits to immigrants, but allowed for instances in which states have the right to determine immigrant eligibility for state or local public benefits.[62]

Under that court's analysis, states and localities are permitted to take the following actions in this area:

- States and localities are permitted to directly implement the federal welfare law. For example, in California, the court found that the state was permitted to promulgate regulations implementing the federal welfare law.[63]
- The federal law specifically allows states to further *restrict* the eligibility of certain groups of *authorized* immigrants (certain "qualified" immigrants) for designated federal and state public benefits.[64] For example, the states of Alabama, Mississippi, North Dakota, Ohio, Texas, and Virginia do not provide Medicaid to certain groups of eligible qualified immigrants (lawful permanent residents who entered the United States after August 22, 1996, and have

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57. *See supra* Part III.A; *see also* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Cal. 1995) (finding that certain provisions of a state public benefit law amounted to a regulation of immigration where the law created its own, independent standards to classify and verify the immigration status of applicants).

58. League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244, 1253 (C.D. Cal. 1997).

59. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as 8 U.S.C. § 1601 *et. seq.*).

60. 8 U.S.C. § 1601.

61. 8 U.S.C. §§ 1612(b), 1621(d), 1622(a).

62. *League of United Latin American Citizens*, 997 F. Supp. at 1253–55 (finding that Congress had intended to displace state power in the field with limited exceptions).

63. *Id.* at 1255.

64. 8 U.S.C. §§ 1612(b), 1622(a).

completed the five-year waiting period).[65] However, a similar state law was struck down in Arizona on equal protection grounds.[66] Thus state laws that further restrict designated public benefits for certain qualified immigrants are not federally preempted, but may raise equal protection concerns.

- Under the federal law, unauthorized immigrants are ineligible to receive state or local public benefits with certain, limited exceptions. However, states can choose to *extend* state and local benefits to *unauthorized* immigrants by enacting a state law that provides for such eligibility.[67] For example, the states of Illinois, New York, and Washington have enacted laws to provide state-funded medical insurance to all children, including unauthorized immigrants.[68]

C. Are Public Benefit Laws Conflict Preempted?

Are public benefit laws preempted under the test of conflict preemption? A conflict exists when it is impossible to comply with both federal and state or local law, or if the state or local law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

State or local laws that diverge from the 1996 federal welfare law by creating their own immigration classifications or eligibility schemes are most likely preempted by federal law. For example, in California, the court found certain provisions of the state law conflict preempted because they restricted benefits to somewhat different categories of individuals than the federal welfare law, and made compliance with both impossible.[69]

A state or local law that calls for broader restrictions than the federal law is probably preempted by the federal welfare law, as well. For example, in California, the court also found provisions of the state law conflict preempted because they called for broader restrictions on unauthorized immigrants than imposed by the federal law.[70] Specifically, the court found that the state law, which denied all benefits to unauthorized immigrants, conflicted with the federal law, which made certain limited benefits available to unauthorized immigrants, such as Emergency Medicaid.

D. Summary of Impact on State and Local Public Benefit Laws

Taken together, the three types of preemption analysis have the following impact on state and local laws relating to immigrant eligibility for federal, state, and local public benefits programs. State or local laws that diverge from the federal welfare law by creating their own immigration classifications or eligibility schemes are likely preempted. Laws that create greater restrictions than the federal law (with the second exception mentioned below) are also likely preempted. States and localities are permitted to take the following legislative actions in the area of public benefits:

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65. *See* National Immigration Law Center, *Overview of Immigrant Eligibility for Federal Programs, Table 1*, March 2005, *available at* www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf.

66. Kurti v. Maricopa County, 33 P.3d 499 (Ariz. Ct. App. 2001) (finding that a state law that permanently restricted the eligibility of qualified immigrants entering the United States after August 22, 1996, for indigent health care benefits violated the Equal Protection Clause of the U.S. Constitution).

67. 8 U.S.C. § 1621(d).

68. *See* 215 ILCS 170 (2006) (All Kids, Illinois); N.Y. Public Health Law § 2511 (Child Health Plus, New York); and RCWA §§74.09.470, 74.09.402 (Washington).

69. *League of United Latin American Citizens*, 997 F. Supp. at 1256–57 (finding that state classification of "alien in the United States in violation of federal law" differed from the federal classification of an immigrant who is "not qualified").

70. *Id.* at 1257.

- States and localities can enact a regulation to directly implement the federal welfare law.
- States can enact a law to further *restrict* the eligibility of certain groups of *authorized* immigrants for designated federal and state public benefits (although such a law may violate the equal protection clause).
- States can enact a law to *extend* state and local benefits to *unauthorized* immigrants, even though they would be ineligible for most benefits under the federal law.

VI. Preemption in the Context of Education Laws

Some states have proposed or enacted laws relating to whether unauthorized immigrants can be admitted to public colleges and universities and whether they can receive tuition benefits (such laws are labeled as education laws in this bulletin). Are such laws preempted by federal law? There has not been much litigation in this area, but it appears that college admissions laws are likely not federally preempted. Tuition benefit laws may or may not be preempted, depending on how the law is constructed. Education laws may also raise other legal issues.

A. Are K-12 Education Laws Prohibited?

All children, including unauthorized immigrants, are entitled to attend K-12 public schools under federal law. In *Plyler v. Doe,* the U.S. Supreme Court established that elementary and secondary public schools may not deny services or enrollment to individuals on the basis of their immigration status under the Equal Protection Clause of the 14th Amendment.[71] Thus it is well-established that states and localities cannot deny access to elementary and secondary public education on the basis of immigration status.

B. Are Higher Education Laws Constitutionally Preempted?

Can unauthorized immigrants be admitted to public institutions of higher education? Can they be restricted from attending state colleges and universities? Can in-state tuition be provided? Can in-state tuition be restricted? Many states have enacted legislation that relates to these issues.

Are higher education laws constitutionally preempted—are they considered a regulation of immigration? A higher education law will probably not be considered a regulation of immigration as long as it specifically adopts the federal government's standards to classify the immigration status of applicants.[72] One federal court has held that a university admissions policy that denied admission to unauthorized immigrants was not a regulation of immigration, as long as federal immigration standards were adopted.[73]

C. Are Higher Education Laws Field Preempted?

Are higher education laws field preempted—are they an attempt to legislate in a field that is occupied by the federal government? The section considers two types of higher education laws: 1) laws

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71. 457 U.S. 202 (1982) (striking down a Texas law that would have prohibited unauthorized immigrants from receiving a free public elementary and secondary education).

72. *See supra* Part III.A.

73. Equal Access Education v. Merten, 305 F. Supp. 2d 585, 601–03 (E.D. Va. 2004).

that govern admission to state universities and colleges and 2) laws that provide tuition benefits. Each requires its own analysis.

Are admission laws field preempted? There are two federal laws that are relevant to the area of higher education benefits—the 1996 federal welfare law and a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (codified as 8 U.S.C. § 1623).[74]

Under the federal welfare law, unauthorized immigrants are ineligible to receive state or local public benefits unless the state enacts legislation to specifically provide such benefits to unauthorized immigrants.[75] State and local public benefits are defined to include "postsecondary education . . . or any other similar benefit for which *payments* or *assistance* are provided to an individual, household, or family eligibility unit by an agency of a state or local government . . ."[76]

Is admission to a state university or college a public benefit restricted under this provision? Existing cases generally support the interpretation that mere admission to a postsecondary institution is not a public benefit restricted by the federal welfare law, as it is broadly available to qualified and fee-paying members of the public.[77] In particular, a federal court in Virginia explained that in the area of postsecondary education, the federal welfare law denies only financial assistance to unauthorized immigrant students, not admission to higher educational institutions.[78] The Department of Homeland Security, the federal agency charged with the enforcement of federal immigration laws, also interprets federal law as not restricting the admission of unauthorized immigrants to public universities and colleges.[79] In accordance with the interpretation of the Department of Homeland Security, the North Carolina Department of Justice has issued a letter

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74. Pub. L. No. 104-208, § 402(a), 110 Stat. at 3009–546 (1996).

75. 8 U.S.C. § 1621(a), 1621(d).

76. 8 U.S.C. § 1621(c)(1)(B) (emphasis added). The full clause reads: "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government."

77. *See, e.g., Equal Access Education,* 305 F. Supp. 2d at 601–03; Caballero v. Martinez, 897 A.2d 1026, 1031 (N.J. 2006) (explaining that benefits restricted by federal welfare law in § 1621(c)(1)(B) are those in which an applicant's eligibility is needs-based and determined by his or her income level, and finding that a fund for car accident victims does not constitute such a benefit); Rajeh v. Steel City Corp, 813 N.E.2d 697, 707 (Ohio App. 2004) (explaining that benefits restricted in § 1621(c)(1)(B) are those that are needs-based or earned, and finding that worker's compensation benefits do not constitute such a benefit); County of Alameda v. Agustin, 2007 WL 2759474, at *3 (Cal. App. 1 Dist. September 24, 2007) (unpublished) (explaining that all the benefits covered by § 1621(c)(1)(B) "are all either direct income support payments or services intended to meet the daily needs of disadvantaged persons").

78. *Equal Access Education,* 305 F. Supp. 2d at 605 n.18 ("It is clear, therefore, that [the federal welfare law] does not consider mere admission or attendance at a public post-secondary institution to be a public benefit.").

79. *See* Department of Homeland Security, U.S. Immigration and Customs Enforcement letter responding to query by North Carolina Department of Justice, July 9, 2008, *available at* http://www.newsobserver.com/content/media/2008/7/25/20080725_homelandsecurityletter.pdf ("[A]dmission to public post-secondary educational institutions is not a public benefit under the [federal welfare law] …. Therefore, the individual states must decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions.").

advising community colleges that federal law does not prohibit the admission of unauthorized immigrants.[80]

The second law, 8 U.S.C. § 1623, states that unauthorized immigrants are not eligible on the basis of state residence for any state postsecondary educational benefit unless equal benefits are made available to all U.S. citizens, regardless of residency.[81] The Virginia court interpreted this provision to mean that a state university or college may not grant in-state tuition benefits to unauthorized immigrants unless it also grants in-state tuition to out-of-state United States citizens.[82] But the court found that this provision does *not* regulate the admission of unauthorized immigrants to post-secondary educational institutions.[83]

Neither of these laws—the federal welfare law or § 1623—appear to occupy the field of postsecondary admissions. Thus, state laws either allowing or restricting the admission of unauthorized immigrants to postsecondary educational institutions are likely not field preempted.

Are tuition laws field preempted? A state court in California concluded that neither the federal welfare law nor 8 U.S.C. § 1623 occupies the field of determining resident tuition rates at public universities and colleges, as both laws appear to contemplate some state action in this area.[84] The court noted that the federal welfare law permits states to act to provide tuition benefits to unauthorized immigrants. While § 1623 imposes some restrictions on states, the law allows for some state action in this field. Under the California court's analysis, tuition laws are not field preempted.

D. Are Higher Education Laws Conflict Preempted?

Are higher education laws preempted under the test of conflict preemption? A conflict exists when it is impossible to comply with both federal and state or local law, or if the state or local law interferes with the purposes and objectives of Congress.

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80. N.C. Attorney General's Letter to North Carolina Community College System, July 24, 2008, *available at* http://www.newsobserver.com/content/media/2008/7/25/20080725_immigrationdoc.pdf. Prior to receiving guidance from the Department of Homeland Security, the North Carolina Attorney General's Office had issued an advisory letter stating that the law is unsettled as to whether postsecondary admission is a public benefit prohibited by the federal welfare law. *See* N.C. Attorney General's Advisory Letter to North Carolina Community College System, May 6, 2008, *available at* http://www.newsobserver.com/content/news/story_graphics/20080507_communitycollegeletter.pdf.

81. The provision reads, "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623(a).

82. *Equal Access Education*, 305 F. Supp. 2d at 606.

83. *Id.* at 607. *See also* Department of Homeland Security, U.S. Immigration and Customs Enforcement letter responding to query by North Carolina Department of Justice, July 9, 2008, *available at* http://www.newsobserver.com/content/media/2008/7/25/20080725_homelandsecurityletter.pdf (noting that § 1623 does not regulate the admission of unauthorized immigrants to postsecondary educational institutions).

84. Martinez v. Regents of the Univ. of Cal., No. CV 05-2064, 2006 WL 2974303, at *3 (Cal. Super. Ct. October 4, 2006) (Order on Demurrers, Motion to Strike, and Motions by Proposed Intervenors).

Are admission laws conflict preempted? As discussed above, the relevant federal laws do not appear to prohibit or require admission to state universities and colleges. Thus state laws that address admission criteria are likely not conflict preempted.[85]

Are tuition laws conflict preempted? It is unclear whether state tuition laws are conflict preempted. Such laws do not conflict with the federal welfare law, which permits states to enact legislation providing tuition benefits to unauthorized immigrants.[86]

Tuition laws may conflict with 8 U.S.C. § 1623. A law that provides in-state tuition to unauthorized immigrants explicitly based on state residency without providing such benefits to out-of-state U.S. citizens appears to directly conflict with 8 U.S.C. § 1623. It is unclear, however, whether a law providing tuition benefits to unauthorized immigrants on a basis other than residency, such as school attendance, is conflict preempted. At least ten states have enacted laws that generally provide tuition at in-state rates to anyone who has attended and graduated from a high school in the state, including unauthorized immigrants.[87] Proponents of these tuition laws argue that by using eligibility criteria other than state residency—that would also entitle non-resident U.S. citizens to the in-state rate—these laws are not in conflict with § 1623. Opponents of these laws argue that such criteria essentially serve as a proxy for state residency and therefore conflict with §1623.

To date, the only courts to consider the legality of tuition benefit laws have both rejected preemption challenges to the laws. In California a state court found that the state tuition law was not conflict preempted and dismissed the claim.[88] Because non-California residents may attend high school in the state, the court found that the state tuition law did not confer a benefit based on state residency, and thus did not conflict with § 1623. In a challenge to the Kansas tuition law, the U.S. Court of Appeals for the Tenth Circuit dismissed the preemption claim brought by individual plaintiffs based on a lack of cause of action.[89] The court found that only the federal government could raise a statutory preemption claim under § 1623, not individual plaintiffs.

E. Summary of Impact on State and Local Education Laws

Taken together, the various laws have the following impact on state and local laws that relate to the admission and provision of tuition benefits to unauthorized immigrants. It is clear that states or localities cannot deny unauthorized immigrants access to elementary and secondary education. State laws relating to the admission of unauthorized immigrants to postsecondary educational institutions are likely not preempted, assuming that such laws adopt federal standards to determine immigration status. States do not appear to be able to grant the equivalent of in-state tuition benefits to unauthorized immigrants on the basis of residency, but they may be able to do so on the basis of other criteria, such as high school attendance in the state.

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85. *See Equal Access Education*, 305 F. Supp. 2d at 607–08.

86. *See Martinez*, 2006 WL 2974303, at *3.

87. *See* Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *aff'd sub nom.* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) (In addition to Kansas, "the court is aware of least seven other states that have passed legislation to provide in-state tuition rates to illegal aliens: California, Illinois, New York, Oklahoma, Texas, Utah and Washington."). The states of New Mexico and Nebraska have also passed similar legislation. Neb. Rev. Stat. Ann. § 85-502; N.M. Stat. Ann. § 21-1-4.6.

88. *Martinez*, 2006 WL 2974303, at *3.

89. Day v. Bond, 500 F.3d 1127 (10th Cir. 2007).

VII. Official English Laws

A number of state and local governments have proposed or enacted laws making English the official language of the jurisdiction (such laws are labeled as official English laws in this bulletin). Some of these laws prohibit the use of languages other than English, while many do not. Such laws do not raise federal preemption issues, but may raise other legal issues.

A. First Amendment Concerns

An official English law may raise First Amendment concerns if it prohibits the use of foreign languages. A number of states have enacted official English laws,[90] including North Carolina.[91] A number of local governments across the United States have also enacted official English laws,[92] including the North Carolina counties of Beaufort,[93] Dare,[94] and Davidson[95] and town of Landis.[96] The content of these laws varies significantly. Some are simply statements that English is the state or locality's official language. Others designate English as the language of all official public documents, records, or meetings. A few laws have required that English be the *only* language used by government officials and employees in the course of all governmental actions, banning the use of other languages.[97] Laws in the last category have been struck down in the states of Arizona, Oklahoma, and Alaska as violating the First Amendment rights of non-English-speaking persons to participate in and have access to government and of elected officials and public employees to communicate with their constituents and with the public.[98] Official English laws that ban the use of foreign languages might also be subject to legal challenge on state preemption grounds where exceptions are not made to comply with state law.[99]

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90. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 189 (Alaska 2007) ("There are now English-only laws in twenty-four states.").

91. N.C. Gen. Stat. § 145-12 (1987) (hereinafter G.S.) (stating only that "English is the official language of the State of North Carolina.").

92. *See* Ruiz v. Hull, 957 P.2d 984, 994 (Ariz. 1998) (". . . forty municipalities have official English statutes.").

93. *See* Jerry Allegood, "Not in English? Not in our county, Beaufort says," *Raleigh News & Observer*, February 18, 2007.

94. *See* Minutes of Dare County Board of Commissioners, April 7, 2008, *available at* www.co.dare.nc.us/BOC/Minutes/2008/OM040708.pdf.

95. *See* Minutes of Davidson County Board of Commissioners, November 14, 2006, *available at* www.co.davidson.nc.us/media/pdfs/32/4045.pdf.

96. *See* Official English Resolution, Town of Landis (adopted on September 11, 2006) (on file with author).

97. These laws generally provide for exceptions in instances where foreign language use is required to ensure compliance with federal laws, such as federal voting laws.

98. Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007) (finding that portion of state law that required use of English by all government officers and employees in all government functions violated federal and state free speech rights of government officers and employees and of citizens with limited English proficiency to petition their government); In re Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002) (finding that proposed state law that restricted all governmental communications to the English language was unconstitutional on state free speech grounds); Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998) (striking down on First Amendment and Fourteenth Amendment grounds law that required all government officials and employees in Arizona to use only English during the performance of all government duties).

99. *See generally, e.g.,* In re Application of Melkonian, 85 N.C. App. 351, 355 S.E.2d 503 (1987) ("G.S. 160A-174 establishes . . . that local ordinances are preempted by North Carolina State law when local ordinances are not consistent with State law.").

B. National Origin Discrimination Concerns

Certain official English laws may raise concerns of national origin discrimination under Title VI of the Civil Rights Act of 1964.[100] Title VI prohibits recipients of federal funding from discriminating against individuals on the basis of national origin, an obligation that includes providing reasonable language assistance to limited English proficient populations.[101] Official English policies that prevent agencies, programs, and services that receive federal funds from complying with these language assistance requirements may violate Title VI.[102]

C. Summary of Impact on Official English Laws

Taken together, various laws have the following impact on official English laws. An official English law that bars the use of foreign languages in the course of governmental business may violate state and federal free speech laws. An official English law is more likely to withstand a legal challenge if it does not restrict the use of foreign languages in the performance of government activity and if it is in compliance with federal and state laws, including the language assistance requirements of Title VI.

VIII. Conclusion

North Carolina state and local government officials often question whether state and local laws relating to unauthorized immigrant populations are preempted or invalidated by federal law. There is no across-the-board answer to this question, as the analysis varies across different areas of regulation. This bulletin provides an analytical framework for determining whether proposed or enacted state and local laws in the areas of housing, employment, public benefits, education, and language policy are at risk of preemption. Each section provides some guidance as to the permissible scope of state and local action in that particular area. Future cases, including pending appeals in federal courts concerning regulation of immigrant housing and employment, may provide clearer direction.

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100. 42 U.S.C. § 2000d.

101. *See* Lau v. Nichols, 414 U.S. 563 (1974) (holding that a public school system's failure to provide English language instruction to Chinese students who did not speak English discriminated on the basis of national origin, in violation of Title VI); *see also* Exec. Order No. 13166—Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002).

102. *See* Enforcement of Title VI of the Civil Rights Act of 1964 —National Origin Discrimination Against Persons with Limited English Proficiency, 65 Fed. Reg. 50123 (Aug. 16, 2000). There are multiple sources of guidance depending on the sources of the agency's funding. Most of the information is *available at* www.lep.gov.

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