



BNA, Inc.

The United States  
**Law Week**®

Volume 76 Number 5  
Tuesday, August 7, 2007  
ISSN 1522-4317

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## Summary & Analysis

### Immigration--Alien Workers

#### Local Laws Barring 'Illegal Aliens' From Jobs, Housing Are Preempted, Violate Due Process

Ordinances enacted by the city of Hazleton, Pa., to regulate the rental housing and employment of illegal aliens are preempted by federal law and violate procedural due process and 42 U.S.C. § 1981, the U.S. District Court for the Middle District of Pennsylvania held July 26 (*Lozano v. Hazleton, Pa.*, M.D. Pa., No. 3:06cv1586, 7/26/07).

In response to perceived federal inaction on issues posed by the presence of 12 million undocumented aliens nationwide, some local governments, concerned about the costs of providing services, have sought to enact their own restrictions on aliens' access to jobs, housing, and benefits. The Hazleton ordinances were enacted in the wake of an influx of Latino families from New York and New Jersey seeking a better life, jobs, and affordable housing after the terrorist attacks of Sept. 11, 2001, according to the court. The ordinances prohibit employment and housing of "illegal aliens."

But Judge James M. Munley ruled that the employment ban is both expressly and impliedly preempted by the 1986 Immigration Reform and Control Act, which regulates the employment of aliens. The housing provisions bar knowingly leasing to or permitting occupancy by an "illegal alien," and require apartment dwellers to obtain an occupancy permit by presenting proof that they are citizens or lawful residents. These provisions conflict with federal immigration law by incorrectly assuming that the federal government seeks removal of all aliens who lack legal status, and that a conclusive determination of illegal status can be obtained outside of a formal removal hearing before a federal immigration judge, the court said.

The city argued at the outset that certain John Doe plaintiffs who sued

anonymously out of fear that the city might disclose their uncertain immigration status to the federal government lacked standing because they do not have authorization to reside in the United States and have not suffered an injury for which they could gain relief. Those plaintiffs have not yet been denied residency permits under the Hazleton ordinance, and even if they had been, it does not follow that they lack authorization to live anywhere in the nation, the court said. Under *Plyler v. Doe*, 457 U.S. 202 (1982), even unlawfully present aliens are "persons" entitled to due process under the Fifth and 14th Amendments before they may be stripped of their rights, it stressed. It ruled that they had standing and could proceed anonymously.

### **Employment Ban**

Hazleton's ban on employing undocumented aliens violates the express preemption provision of IRCA, 8 U.S.C. § 1324a(h)(2), the court ruled. That statute preempts "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." The city argued that its ban fell within the exception for "licensing and similar laws," because it penalizes businesses for employing unauthorized aliens by suspending their business permits. But the court said that the city's interpretation made no sense, because revoking the right to do business is the "ultimate sanction," and the exemption is for suspension of licenses for violations of IRCA, not for violations of local ordinances.

The employment ban is also impliedly preempted by IRCA, the court held. IRCA is a "comprehensive scheme" that occupies the field of employment of unauthorized aliens, the court said. Its various prohibitions, exceptions, remedies, and penalties "leave[ ] no room for state regulation," it said. The Hazleton ordinance is not only field preempted, but also conflict preempted, the court said.

The main conflict is that, while IRCA gives employers the responsibility to review workers' documents, the ordinance requires employers to present the documents to the city's Code Enforcement Office, which contacts the federal government to determine the worker's status, the court said. In addition, while IRCA only bars knowingly hiring or employing unauthorized aliens, the ordinance provides strict civil liability for such actions. The ordinance's enforcement time frames also differ from IRCA's, and it lacks provisions similar to IRCA's barring hiring and recruitment discrimination based on national origin or citizenship status, the court said.

### **Housing Ban, Due Process**

Hazleton's housing ban violates federal immigration law because, while federal

law authorizes various unlawful aliens, such as those seeking asylum or suspension of deportation, to receive permission to work, the Hazleton ordinance would deny them housing, the court said. In addition, while the ordinance defines "illegal aliens" by reference to the Immigration and Nationality Act, that statute does not define the term, but provides a complex scheme for changing status from authorized to unauthorized, the court said. The ordinance's provision requiring examination of documents by the city's Code Enforcement Office conflicts with 8 U.S.C. § 1229a(a)(1), which provides that immigration status can only be determined by an immigration judge, the court added.

Both the employment and housing bans violate procedural due process, the court ruled. The rights to work for a living and to enter leases are both liberty interests protected under the due process clause, the court said. The employment ordinance fails to provide employers with adequate notice of the undefined worker "identity information" that they must provide, and fails to specify any procedure for verifying documents, the court said. The housing ban affords no notice to tenants subject to eviction, it noted. Further, the final level of "hearing" afforded employers and employees in Pennsylvania state court is inadequate, because immigration status may only be determined by an immigration judge, it ruled.

The housing ban also violates 42 U.S.C. § 1981, which guarantees all persons to the same right to enter contracts (including leases) as white citizens, the court said. Although the U.S. Supreme Court has not yet ruled on whether Section 1981 extends to undocumented aliens, its holding in *Plyler* that they are "persons" protected by the 14th Amendment applies equally to Section 1981, it ruled.

The court rejected equal protection, privacy, and Fair Housing Act claims.

Andrew B. Adair, Deasey, Mahoney & Bender, Philadelphia, represented the city. Jennifer C. Chang, American Civil Liberties Union Foundation, San Francisco, was among counsel representing the plaintiffs.

Full text at <http://pub.bna.com/lw/306cv1586.pdf>. 

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ISSN 1522-4317

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