

## Challenge to Gwinnett County's New Immigration Ordinance

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As many of you already know, Gwinnett County has now joined the State of Georgia in attempting to stiffen federal prohibitions against the employment of unauthorized alien workers. This month's column outlines the position that GUCA is taking in its effort to convince Gwinnett County to withdraw this ordinance.

Gwinnett County's new purchasing ordinance (4<sup>th</sup> Revision) passed the Board of Commissioners on June 26, 2007. In its current form, the ordinance requires contractors to verify that their employees are legal U.S. residents. It further empowers county auditors to periodically inspect the records of contractors and question their employees regarding their immigrant status.

GUCA is arguing that this new ordinance is unconstitutional on at least three grounds: First, the ordinance is preempted by the Immigration Reform Act of 1986 ("ICRA"), which currently occupies the field prohibiting the employment of illegal immigrants. The Supreme Court has held that local laws relating to immigration will be invalid if the local law: (1) impermissibly regulates immigration; or (2) addresses an area in which Congress has comprehensively legislated; or (3) frustrates or creates an obstacle to federal law. *DeCanas v. Bica*, 424 U.S. 351 (1976); *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 768 (C.D. Cal. 1995). Second, the ordinance is preempted because it requires local officials to regulate immigration, which is exclusively a federal power. Third, the ordinance violates contractors' due process rights. In addition to being unconstitutional, it is GUCA's position that the ordinance violates ICRA's express prohibition against localities imposing their own sanction schemes upon employers that hire illegal immigrants.

When Congress creates a federal law completely occupying a certain field, that law supersedes local laws because of the operation of the Supremacy Clause in the United States Constitution. Gwinnett County's ordinance is invalid because it addresses an area in which Congress has comprehensively legislated. According to the Supreme Court of the United States, ICRA creates "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147 (2002). Because ICRA creates "a comprehensive scheme," additional legislation with respect to the employment of illegal immigrants by Gwinnett County is unnecessary and, more importantly, is unconstitutional.

The Gwinnett County Purchasing Ordinance also violates ICRA because it illegally imposes sanctions against contractors. ICRA expressly prohibits localities from imposing their own sanction schemes against employers that hire workers who are not eligible to be employed in the United States. 8 U.S.C. § 1324a (2004) ("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."). Gwinnett County's ordinance requires a contractor "be sanctioned by termination of the contract, and . . . liable for all damages and delays occasioned to the County" if the contractor does not comply with the ordinance. Gwinnett County Purchasing Ordinance, Part 6, Section I, subsection D. In addition, the ordinance allows the County to place contractors that have employed illegal immigrants

on an ineligible source list for up to three years. Gwinnett County Purchasing Ordinance, Part 6, Section I, subsection D. The ordinance violates ICRA because it allows Gwinnett County, as well as the federal government, to impose sanctions on contractors for hiring illegal immigrants.

In addition to being preempted by ICRA and in violation of an express provision of ICRA, GUCA argues that the Gwinnett County ordinance is unconstitutional because it creates a separate scheme of reporting and investigating violations of immigration law. The Supreme Court has held that the power to regulate immigration is unquestionably an exclusive federal power. Verification of immigrant status is left to the federal government for good reason. For example, Gwinnett County's ordinance instructs county officials to rely on social security numbers to ensure that no unauthorized aliens will be employed. Gwinnett County Purchasing Ordinance, Part 6, Section I, subsection D. However, an immigrant may be authorized to work in the United States if he or she possesses a valid social security card or other documentation authorizing employment in the United States that the Attorney General deems acceptable.

Furthermore, GUCA asserts that the ordinance violates contractors' constitutional due process rights. The due process clause forbids ordinances that penalize employers without taking into consideration due diligence on the part of the employer. Although the current form of the ordinance does seem to require some due diligence on the part of the contractor, the ordinance's imposition of sanctions without allowing contractors to show a defense is, in and of itself, a violation of the due process clause.

***There are also practical reasons why the Board of Commissioners should seriously consider withdrawing the ordinance. Title VII of the Civil Rights Act of 1964 prohibits employers from refusing to hire persons whom they believe to be illegal immigrants based on their race, color, or national origin. 42 U.S.C. §§ 2000e - 2000e-16c. Contractors attempting to comply with the ordinance might find themselves in violation of state and federal law if they cease hiring individuals in certain ethnic groups or if they subject certain individuals to more rigorous scrutiny simply because they believe they might be illegal immigrants. Therefore, the ordinance puts contractors in the position of potentially violating federal civil rights law in order to comply with local law.***

***The ordinance will also have unintended negative effects on taxpaying citizens. This is because Gwinnett County's taxpayers will be responsible for bearing the cost of legal challenges that are likely to be brought against Gwinnett County as a result of the enactment of the ordinance. The amount of expense and time involved in defending a federal lawsuit should not be underestimated. Taxpayers' money could potentially be used to fund years of litigation in defense of an ordinance that will likely be struck down as unconstitutional and preempted by federal law.***

The ordinance most likely will be found unconstitutional and ultimately will have a negative effect on the people it purports to protect: the citizens and taxpayers of Gwinnett County. GUCA will keep members posted on the outcome of our challenge to Gwinnett County.