

State and Local Initiatives Targeting the Undocumented: Can They Withstand Legal Scrutiny?

State and local laws that target immigrants raise a number of Constitutional issues, including federal preemption, procedural due process, and equal protection of the laws. While certain federal laws and regulations require states and municipalities to verify immigration status (for example, in applications for public benefits or driver's licenses), many new state and local laws require immigrants to prove their lawful status in situations where such verification is not required by federal law, such as enrolling in school or renting an apartment. Determining if an ordinance will be found unconstitutional requires a complex analysis of the ordinance's language.

This article provides an outline of some of the questions that advocates can ask when determining whether an ordinance or legislative proposal is consistent with the U.S. Constitution. The information contained in this document is for general informational purposes only. It is not intended to serve as legal advice and it does not substitute for legal counsel. For additional assistance in analyzing anti-immigrant legislation, please contact Helen Harnett at CLINIC. Helen can provide a detailed legal analysis of such measures and can share examples of successful advocacy efforts. She can be reached at (202) 756-5523 or hharnett@cliniclegal.org.

I. Federal Preemption

Under the United States Constitution, federal law is the supreme law of the land. States and municipalities are "pre-empted" from enacting legislation in areas where Congress has enacted comprehensive legislation or in areas that would conflict or duplicate federal legislation. In the immigration field, there are a number of different ways in which a state or local law could be preempted by federal law.

• State Laws or Local Ordinances that Attempt to Regulate Immigration

Federal courts have consistently held that only the federal government can regulate immigration. The question for state and local laws becomes: Is this law regulating immigration or does it merely refer to immigrants? There are two different ways in which local laws might be found to "regulate immigration."

1. A local law that attempts to define who is a lawfully present immigrant (and who is not) is regulating immigration and therefore will likely be found unconstitutional.

Most anti-immigrant ordinances define who is a lawful immigrant. However, these ordinances frequently exclude many lawfully present immigrants from their definitions. For example, an ordinance might define lawful immigrants as Green Card holders, but there are many other categories of lawful immigrants (asylees, refugees, those with Temporary Protected Status, etc.).

An ordinance that attempts to impose its own criteria for classifying immigrants may be preempted as a “regulation of immigration.” Therefore, to be constitutional, a local ordinance must adopt the federal standards that define lawful immigrant.

2. A local law that attempts to deny housing to lawful immigrants would likely be considered a regulation of immigration.

The Supreme Court has consistently held that state laws that burden the residence of lawfully present immigrants are attempts to regulate immigration, and are therefore unconstitutional.

Local anti-immigrant laws can affect immigrants who are lawfully present in the United States, either because they live with undocumented relatives or because local officials do not understand their immigration status. A local law that denied housing to these lawful immigrants as a means to enforce immigration law may be found to be an unconstitutional regulation of immigration.

- **Express Preemption**

If a federal law has a clause that explicitly prohibits states and municipalities from legislating in that area, then municipalities are clearly preempted from legislating in that area.

- For example, the Immigration Reform and Control Act (IRCA) contains the following 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.”¹ Therefore, a local ordinance that attempted to regulate the employment of immigrants would likely be preempted by IRCA.

- **Implied Preemption**

Even if a federal law does not explicitly prohibit states from legislating in a particular area, courts have found that certain federal laws impliedly preempt state action. There are two kinds of implied preemption: field preemption and conflict preemption.

- Field Preemption: Sometimes a federal law does not have an explicit preemption clause, but its regulations are so comprehensive that it is clear that Congress intended to fully occupy the field.

¹ 8 USC § 1324a(h)(2). Some anti-immigrant ordinances refer to their punitive anti-immigrant hiring laws as “licensing,” in an attempt to fit in the “licensing and similar laws” exception to IRCA’s preemption clause. However, IRCA only allows states to penalize (through license revocation) employers and labor contractors who have been found by the federal government to have violated IRCA. Judge Munley, in his Hazleton decision, pointed out that this is a narrow exception—a state cannot just call any law a “license” and consider it not preempted. See House Comm. on Educ. and Labor, H.R. Rep. No. 99-682(I) at 5662, reprinted in 1986 U.S.C.C.A.N. 5649.

- For example, Congress, through the IRCA, created a comprehensive federal system regulating immigrant employment. The IRCA regulates every area of immigrant employment: who can be employed, who cannot be employed, the punishment for employing undocumented workers, and the appeals process. IRCA is so comprehensive that any state law trying to regulate workers based on immigration status would either be duplicative of the federal law or conflict with the federal law. Therefore, a state law regulating immigrant workers would likely be preempted by federal law.
- Conflict Preemption: A state law may be preempted by federal law if the state law would pose an obstacle to accomplishing the purpose of the federal law or when it would be impossible for a person or business to comply with both the federal and state law.
 - For example, a state law attempting to regulate workers based on their immigration status that had different appeals' deadlines or a different standard of proof than the IRCA would likely be preempted by the federal law.

Analyzing Whether a Specific Local Ordinance is Preempted By Federal Law

In determining whether a specific local law is preempted, one should consider:

- Whether the ordinance imposes its own criteria classifying immigrants or if it adopts the federal standards defining immigration status;
- Whether the ordinance attempts to legislate in an area where Congress has already legislated;
- If the relevant federal law has an explicit preemption clause;
- If the relevant federal law provides a comprehensive regulatory scheme, showing the Congress intended to be the sole authority in this field; and
- If the terms of the local law conflict with those of the federal law, for example, providing for different filing deadlines or using different terminology.

II. Due Process

State and local anti-immigrant ordinances also raise concerns regarding due process. Due process means that government must provide a fair, transparent process before it can deprive someone of a basic right. The Fourteenth Amendment to the U.S. Constitution forbids states from depriving “any person of life, liberty, or property, without due process of law.” Note that the Fourteenth Amendment applies to “persons,” not only citizens or legal immigrants.

In analyzing whether a law provides due process, courts have examined (1) whether the interests involve life, liberty or property, and (2) whether the process provided was adequate.

Protected Interest

Courts have found a wide range of areas to be protected interests which involve life, liberty or property. For example, courts have found that both tenants and landlords have property interests, and that both employers and employees have liberty interests. Once a court finds that a state law impinges on a protected liberty or property interest, it then looks to see whether the state law provides adequate and fair procedures.

Adequate Process

Neither the U.S. Constitution nor federal law provides a specific definition of what constitutes “adequate” due process. This determination requires a fact-intensive inquiry of each state or local law. At a fundamental level, a fair process requires notice and a meaningful opportunity to be heard. For example, to be evicted a tenant must be provided with a notice of eviction and with an opportunity to plead her case before an impartial decision-maker.

The standard balancing test that courts apply when deciding whether a law provides adequate process involves three factors²:

1. The importance of the interest involved to the individual,
2. The risk that the current procedural safeguards do not adequately protect the affected rights, as well as whether additional procedural safeguards would provide valuable protection, and
3. The increased fiscal and administrative costs on the government if more procedural safeguards were required.

Analyzing Whether a Specific Local Ordinance Violates the Due Process Clause of the Constitution

In determining whether a specific local law violates due process, one should consider:

- Whether the rules and standards it imposes are clear and straight-forward:
 - Are the requirements of the law so vague that an employer or landlord would not reasonably be able to comply?
 - Does the ordinance explicitly define who is covered by the law?
 - Does it explain exactly how one can prove lawful immigration status or does it vaguely require immigrants to show “official documentation”?
- Whether a hearing process is established:
 - Those affected by the law must have an opportunity to be heard. If a landlord is told that he is renting to an undocumented immigrant, is there a forum where the landlord and the immigrant can present their sides of the story? Is the hearing before an impartial decision-maker? Does the ordinance allow enough time for a landlord or tenant to present their case?

III. Equal Protection

² Mathews v. Eldridge, 424 U.S. 319 (1976).

State and local anti-immigrant ordinances also raise concerns that some persons will not be provided with equal protection under the law. Equal protection is rooted in the fundamental idea of fairness in application of the laws to all persons equally. The Fourteenth Amendment to the U.S. Constitution forbids states from denying “to any person within its jurisdiction the equal protection of the laws.”

Equal protection concerns are raised when a law seems to provide different treatment to two different classes of people. Many laws necessarily create different classes of people who are treated differently. For example, children under sixteen are not allowed to drive. However, when those classifications restrict a fundamental right (such as voting or interstate travel) or are based on suspect classifications (such as race or national origin) the right to equal protection may be violated.

Do local anti-immigrant ordinances violate the right to Equal Protection?

This would depend on the language of the ordinance.

- For example, say that a small town has a large number of undocumented Latino day laborers, many of whom live in crowded apartments. The town council wants to find a legal way to deny housing to those undocumented immigrants.
 - If the town council drafted an ordinance that required only Latino tenants to prove that they are lawfully present, that law would likely violate Equal Protection, as it differentiates between tenants based on ethnicity, which is unrelated to any legitimate governmental interest.
 - However, the town council could draft an ordinance that was neutral on its face—did not refer to ethnicity or immigration status—that would likely withstand Equal Protection scrutiny. For example, an ordinance banning more than three unrelated adults living in the same apartment would likely not violate Equal Protection. This law might primarily affect Latino day laborers, but because it is neutral on its face, a litigant would have to prove that the town council intended to discriminate against Latinos to overturn the law in court based on a violation of Equal Protection.

IV. Conclusion

Although the ordinances passed in Hazleton, Pennsylvania were struck down by a federal judge, more state and local anti-immigration legislation continues to be proposed throughout the country. Anti-immigrant lawyers and advocacy groups are assisting in drafting this legislation. Analysis of this proposed legislation requires careful reading of the ordinances and application of federal law.

For further information about anti-immigrant ordinances, please contact Helen Harnett, a CLINIC staff attorney whose work focuses on state and local anti-immigrant measures. She can be reached at (202) 756-5523 or hharnett@cliniclegal.org.

Last updated October 2007