**AGENDA REPORT**
**January 22, 2019**

# Requesting the Attorney General's Office to Issue Opinion RE: E-Verify, District 3

**SUBJECT:**
Requesting the Attorney General's Office to issue an opinion regarding the authority of Brevard County to make the issuance and renewal of business tax receipts contingent on participation in E-Verify.

**DEPT/OFFICE:**
District 3

**REQUESTED ACTION:**
Direct the County Attorney's Office to request an opinion from the Florida Attorney General's Office on the following question:

Does Brevard County have the authority, under Florida law, to condition the issuance or renewal of a business tax receipt on participation and compliance in the federal E-Verify program?

**SUMMARY EXPLANATION and BACKGROUND:**
Pursuant to Fla. Stat. Sec. 16.01(3), the Board may request the Florida Office of the Attorney General to issue an official opinion on any question of law relating to its official duties. Upon receiving such a request, the Attorney General's Office has discretion on whether to issue an opinion, and whether to do so formally or informally.

The County Attorney's Office has identified several ambiguities in Florida law concerning the authority of Brevard County to make the issuance and renewal of business tax receipts (i.e. business licenses) contingent on participation in the federal E-Verify program.

While AGO opinions are non-binding, they can provide guidance to local governments and officials on interpretations of law. Should the Attorney General's Office choose to issue an opinion on this question, it could reasonably be utilized to inform a decision on this matter.

**ATTACHMENTS:**

**Description**

- **CAO Analysis E-Verify**

BREVARD County
BOARD OF COUNTY COMMISSIONERS

FLORIDA'S SPACE COAST

**Tammy Rowe,** Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

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January 23, 2019

MEMORANDUM

TO: Eden Bentley, County Attorney

RE: Item J.5., Requesting the Attorney General's Office to Issue an Opinion for E-Verify

The Board of County Commissioners, in regular session on January 22, 2019, directed you to request an opinion from the Florida Attorney General's Office, for the proposed question: Does Brevard County have the authority, under Florida Law, to condition the issuance or renewal of a business tax receipt on participation and compliance in the federal E-Verify program.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe

Tammy Rowe, Deputy Clerk

/kp

cc: Each Commissioner
County Manager

BOARD OF COUNTY COMMISSIONERS

County Attorney's Office
2725 Judge Fran Jamieson Way
Building C, Room 308
Viera, Florida 32940

TO: Commissioner John Tobia

THROUGH: Eden Bentley, County Attorney

FROM: Christine Reilly, Law Clerk

SUBJECT: Requiring E-Verify Compliance from All Employers -Summary

DATE: October 9, 2018

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Your office inquired whether it is legally permissible to make business licenses contingent on E-Verify compliance. This issue arose in the context of asking whether all county employees may be screened though E-Verify and whether the employees of the County's contractors and subcontractors can be screened through E-Verify. The answer to these two questions was yes, however, revocation or suspension of the license due to a failure to use E-verify may be subject to challenge. Fines are specifically prohibited under the case law.

Attached is a memo outlining the legal analysis and explanation as to how we have arrived at our answer to this question. See Legal Memorandum Exhibit "A." Our analysis was whether the County's proposed enactment requiring all businesses to be E-Verify compliant would be preempted by federal law, or violate due process, or in conflict and/or preempted by state law?

I. The Federal Issues- Preemption Analysis

The controlling law on the federal question of preemption is a Supreme Court case, *Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct. 1968 (2011). *Whiting* addressed whether a state law in Arizona was preempted by the Immigration Reform and Control Act of 1986 (the "IRCA") which prohibits all employers from hiring or employing workers who are not authorized to work in the U.S. (also referred to as "unauthorized aliens.) The Supreme Court in *Whiting* ruled that this Arizona state law which provided that employers who were found to have knowingly hired or employed an unauthorized alien could have their business licenses suspended and in some instances revoked was not preempted by the IRCA. *Id*, at 1981, 1982. The Supreme Court based its decision on how the Arizona law closely tracked the provisions in the

IRCA and that the Arizona law provided for the revocation of licenses only after it was proven in court that an employer had knowingly hired or employed an unauthorized alien for a second time in a three year period, in the same location. *Id* at 1971, 1972. The *Whiting* case held that state and local governments were not preempted in applying these sanctions as the IRCA, although preempting states and local governments from taking any other action, provided in the "savings clause" that state and local governments could act to enforce the IRCA through licensing and similar laws. *Id.* at 1981, 1982.

The *Whiting* case specifically held that state and local governments were no longer allowed to impose fines as sanctions; the case makes clear that the only sanctions that state and local governments could impose pursuant to the "savings clause" were the suspension or revocation of licenses. *Id.* at 1975, 1981, 1982, In *Whiting,* the Supreme Court also stated that although the IRCA does not require employers to use E-Verify, the requirement in the Arizona statute that all employers are required to use E-Verify was upheld as not preempted by the IRCA. *Id.* at 1976, 1985. The Supreme Court indicated that it based this decision on the fact that the only consequence for an employer for not using E-Verify was that the employer lost a "rebuttable presumption" that he had not knowingly hired or employed an unauthorized alien, if a complaint was filed against him/her. *Id.*

A. Therefore, requiring employers to use E-Verify and to be enrolled in E-Verify as a condition to having their business license issued or renewed appears to go beyond the controlling case law which provided that the only consequence for non-use of E-Verify was the loss of a rebuttable presumption for an employer being charged with knowingly hiring or employing an unauthorized alien. Unlike other cases reviewed,[1] in the *Whiting* case there were no facts indicating that an employer had to prove that he used E-Verify before he/she obtained a license. In addition, in *Whiting,* even if an employer was found to have knowingly hired an unauthorized alien for the first time, he/she did not lose his/her business license, nor do the facts indicate that he/she had to prove that he/she was using E-Verify to keep his/her business license or to renew his/her business license. As this proposed action appears to go beyond the ruling in *Whiting*, it could be challenged as preempted by the IRCA, as an attempt to regulate in the field of the employment of unauthorized aliens.

B. Similarly, suspending or revoking a business license if an employer fails to use

[1] See also *Keller v. City of Fremont, 853 F Supp. 2d 959* (D. 2012), which was decided after *Whiting,* and is not controlling in this jurisdiction, where a U.S. District Court in Nebraska upheld a city ordinance that mandated employers' use of E-Verify and provided for the revocation of an employer's business license if that employer fails to register in the E-Verify program or use the E-Verify program to verify the employee's authorization to work in the U.S. *Id.* at 971. In addition, in *City of Fremont*, each applicant for a business license is required to prove that the business is registered in the E-Verify Program before obtaining a business license. *Id.* at 965, 971.

E-Verify would go beyond the ruling in *Whiting,* and could be challenged as preempted by the IRCA.

C. Also, conditioning the issuance or renewal of a business license on an employer's signing an affidavit that he/she does not knowingly hire or employ employees who are not authorized to work in the U.S. could possibly be challenged, as it could be perceived as going beyond the ruling in *Whiting,* in that it could prevent an individual from obtaining a license without a court determination that he or she has knowingly hired or employed an unauthorized alien. However, there is the counter argument in that requiring an employer to sign an affidavit that he/she does not knowingly hire or employ employees who are not authorized to work in the U.S. is just asking an employer to sign a statement that he/she is complying with a law with which he or she is already obligated to comply.

D. Asking an employer to sign a statement that he/she does not knowingly employ unauthorized aliens, but not requiring it as a condition to renewing or obtaining a business license would not be characterized as "regulating in the area of the employment of unauthorized aliens" and may be a reasonable alternative.

E. However, if the state issues could be resolved (see below) and the County decided to fashion an ordinance that tracked the provisions in the IRCA and stayed within the ruling in *Whiting*, such an ordinance would have a better chance of not being challenged on federal law grounds as being preempted by the IRCA or for violating due process. From our reading of *Whiting*, the following type of provisions were important in the Supreme Court's decision to uphold the law and would appear to be necessary components of a local government enactment.

F. Provisions from the Ruling in Whiting. The following provisions were important to the Supreme Court in its decision that the Arizona statute was not preempted by the IRCA. In the Arizona statute, once a complaint is filed alleging that an employer has hired an unauthorized alien, the attorney general verifies the employee's authorization to work in the U.S. with the federal government pursuant to 8 U.S.C. Sec. 1373 (c). *Id.* at 1976. The attorney general only takes action against an employer if this inquiry reveals that the employee is an unauthorized alien. If the "inquiry reveals that the worker is an unauthorized alien, the attorney general ,,, (notifies) the U.S. Immigration and Customs Enforcement official and local law enforcement, and brings an action against the employer in court." (parenthetical added) *Id.* No local officials are permitted to attempt to independently make a determination whether the employee is an unauthorized alien, and the court can only consider the federal government's determination that the employee is an unauthorized alien. *Id.* Good-faith compliance with the federal Form I-9 process provides employers with an affirmative defense, and the use of E-Verify provides an employer with the rebuttable presumption that he/she did not knowingly hire an unauthorized alien. *Id.* at 1976,

The penalties are 1) "The 1st instance of knowingly employing an unauthorized alien requires the court to order the employer to terminate all unauthorized aliens and file quarterly reports on new hires for three years, and the court may also order all appropriate agencies to suspend all licenses for no more than 10 days", and 2) The 2nd instance of knowingly employing an unauthorized alien requires the following. If during the time the employer is on probation (those three years from the first violation), it is determined by the court that an employer knowingly hired or employed an unauthorized alien, at the same location as in the first violation, the court must order the permanent revocation of all business licenses. *Id.*

II. The State Issues –Conflict with Chapter 205, Florida Statutes.

We have reviewed whether the County's proposed ordinance which might provide for the possible suspension, revocation, non-issuance, or non-renewal of a business license for a business entity for not using E-Verify would conflict with state law or be preempted by state law. Chapter 205, Florida Statutes is the statute that authorizes local governments to levy a business tax and issue business licenses (also called "business tax receipts"). We question whether the "Preemption Analysis" applies to this type of statute, as the Preemption Analysis applies when the state and local government are regulating in the same field, such as the sale of fireworks, election laws, or the field of police investigations and discipline.

Since Chapter 205, Florida Statues is a state statute authorizing local governments to levy a "tax" we looked for other cases where a county's enactment might conflict with a state statute authorizing a tax. We located an interesting case where a county thought it unfair that certain real estate owners who had improvements on their properties that were substantially incomplete on January 1st would not be taxed until the following year, even for example, if there improvements were completed later in January or at any other time in that year. The county in this case enacted a fee upon these owners to make up for what the county considered was a windfall afforded to these owners. *Collier County v. State of Florida*, 733 So.2d 1012, 1015, 1016. (Fla. 1999) In this case[2] the Florida Supreme Court determined that the fee the county had enacted was not really a fee but actually a tax. *Id.* at 1016. The Florida Supreme Court had to determine if this "tax" was in conflict with the state statute authorizing local governments to levy ad valorem taxes. *Id.* at 1019. The Florida Supreme Court did not use the "Preemption Analysis" in determining that a conflict existed in this case. The Supreme Court determined that this county enactment conflicted with the state statute authorizing the ad valorem tax, as it contravened the legislature's scheme for the collection of ad valorem taxes and there is no ambiguity in the statute on this issue. *Id.*

In addition, we have found a Florida Supreme Court case that determined that a charter county's ordinance conflicted with Chapter 205, Florida Statutes, which is the

[2] *Collier County v. State of Florida*, 733 So. 2d 1012 (Fla. 1999)

statute involved in our situation.[3] The Florida Supreme Court did not apply the Preemption Analysis in this case. In *Boswell*, a Dade County ordinance provided that it would not issue business licenses or permits to fortune tellers, clairvoyants, or astrologers, etc. Board of County Commissioners of Dade County v. Boswell, 167 So.2d 866 (Fla. 1964). At that time Section 205.41, Florida Statutes stated "fortune tellers, clairvoyants, etc.....shall pay a license tax of $100", and Section 205.411, Florida Statutes provided that "no license required by Section 205.41, Florida Statutes (the business license) would be issued by the Board of County Commissioners unless such person was issued a permit. *Id.* This permit required that certain conditions were to be fulfilled, i.e., documents establishing residence and character affidavits were to be submitted and an investigation was to be conducted by the clerk. Upon, receipt of this information and report of the clerk, the Board would order the permit issued or denied. (paraphrase). *Id.*

The Florida Supreme Court held that (Chapter 205, Florida Statutes) "not only imposes a license tax on the occupations in question, but also prescribes the conditions which must be fulfilled before a permit is issued. The authority of the county officers in the administration of the act is to consider the application and the report of the clerk and order the permit either issued or denied." *Id.* at 867. The Florida Supreme Court held the ordinance was invalid stating, the county "prohibited the issuance of the permit, without regard to the statutory conditions", and that "the applicable general law ...declares that an order denying or issuing such permit, shall be based on a consideration of the conditions specified, and does not in terms permit contrary local provisions...." *Id.*

We also have located an Attorney General's opinion regarding Chapter 205, Florida Statutes. The Attorney General's opinion states that a city cannot enact an ordinance providing for the revocation of an occupational license (now referred to a "business tax receipt" or "business license") of an establishment found to be selling alcohol to minors, despite its broad powers as municipality, as Chapter 205, Florida Statutes only provides for one situation where a business license can be revoked, i.e., when a business is doing business with Cuba.[4]

As Chapter 205, Florida Statutes does not include any language permitting local governments to vary the prerequisites for issuance or renewal of a business license or for revoking a business license, a challenge might be made that the county's proposed ordinance conflicted with this state statute.

Assuming arguendo that the Preemption Analysis does apply to our situation, there is no express preemption language in Chapter 205, Florida Statutes. However, it is possible that a challenge could be made that Chapter 205, Florida Statutes preempts

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[3] *Board of County Commissioners of Dade County v. Boswell*, 167 So.2d 866 (Fla.1964)
[4] See 2001-44 Att'y Gen.(June 28, 2001)

the county's proposed enactment. In cases we have reviewed where implied preemption was not found, there was language in those state statutes involved providing that local governments were allowed to regulate or act in some manner. There is no language in Chapter 205, Florida Statutes that indicates that local governments are authorized to vary the conditions and prerequisites for issuing a business license. Chapter 205, Florida Statutes provides only one situation in which a business license may be revoked. Also it could be argued that the legislative scheme in Chapter 205, Florida Statutes is so pervasive as to evidence an intent to preempt this field, and there is a strong public policy favoring a finding of implied preemption, i.e., that the state and businesses would benefit by local governments taxing in accordance with the state's scheme, in an uniform manner, allowing predictability in the issuance of business licenses as the ability to obtain and hold onto a business license is e so vital for the financial well being of any business enterprise. However, it should be noted that implied preemption is a disfavored doctrine in Florida, and it is possible that the facts in our case may not be compelling enough for a finding of implied preemption. If there is a finding of no implied preemption in our situation, a court would apply the "No Co-Existence Test" i.e., this test is whether in order to comply with one enactment (the ordinance,) it requires a violating the other (the state statute). As an employer could comply with a proposed County ordinance requiring enrollment or use of E-Verify, without violating Chapter 205, Florida Statutes, then this enactment would pass the "No-Co Existence Test."

For all the reasons above, it should be noted that the proposed action by the County might be challenged as conflicting with or preempted by Chapter 205, Florida Statutes.

Other Concerns:

It should be noted that pursuant to Chapter 205, Florida Statutes and the County's ordinance regarding the issuance of business licenses, it is the Tax Collector not the Board of County Commissioners who actually issue business licenses. To effectuate the County's proposed actions this would necessitate the cooperation of the Tax Collector.

If a challenge is made on a federal law issue, in some instances the attorneys' fees for plaintiffs have been awarded. In one case, 1.38 million was awarded in attorneys' fees.

If the County were to move forward with its proposed action, there were be costs for enforcement and keeping data on various employers, training of personnel, and time and effort in establishing procedures and processes.

Options:

1. Request every employer sign a statement that he/she or the business entity is

not knowingly employing unauthorized aliens, but not requiring the statement as a condition for issuing a business license.

2. Petition the Governor and State Legislature to enact legislation amending Chapter 20, Florida Statues, to allow for certain additional prerequisites to be added, including that business licenses can be suspended and revoked if the business has been found to have knowingly hired or employed unauthorized aliens pursuant to the process upheld in the *Whiting* opinion.

3. Discuss if there are other ways to encourage all employers to use E-Verify. It would seem that using E-Verify would give an employer peace of mind that he/she is in compliance with federal law and since it is free, perhaps employers can be found who use the program and are find it very helpful, and through their insight and advice there may be ways to encourage others to voluntarily use it.

4. Take no action.