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Federal Judge Determines that California's Immigration Law Goes Too Far

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A federal district judge in California issued a preliminary injunction preventing the State of California from enforcing certain provisions of Assembly Bill (AB) 450, a state statute that, among other things, prohibits private employers from cooperating with federal immigration enforcement agencies in the absence of a judicial warrant or a subpoena. The law, which is also known as the Immigrant Worker Protection Act, went into effect on January 1, 2018. The U.S. Department of Justice (DOJ) filed a lawsuit in March 2018, alleging that AB 450, and two other California immigration statutes, preempt federal law and interfere with the government's ability to carry out its duties.

In his July 4, 2018 order, Judge John A. Mendez discussed the difficult position of the court in balancing the federal government's power to determine immigration law against state powers. Judge Mendez determined that three key parts of AB 450 "impermissibly infringed on the sovereignty of the United States" and discriminate against employers that voluntarily choose to work with the federal government. As a result, the judge granted the DOJ's motion for a preliminary injunction enjoining the enforcement of the three offending provisions. The judge did, however, uphold the law's notice requirements, finding that the rule did not interfere with the federal government's ability to enforce immigration laws.

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Impact on Employers

Until further notice, private employers in California will *not* be in violation of state law in the following circumstances:

- If the employer voluntarily consents and allows an immigration enforcement agent to enter nonpublic areas of a place of business, even if the agent does not have a warrant.
- If the employer voluntarily provides an immigration enforcement agent with access to employee records without a subpoena or court order.
- If the employer reverifies an employee's eligibility to work even when not strictly required by federal statutory law.

It is important to note that the notice requirements under AB 450 were upheld and are still in effect. The law's notice requirements are as follows.

Prior to Inspection

- The law requires employers to notify each current employee, within 72 hours of receiving notice of an inspection, that an immigration agency will be inspecting I-9 Employment Eligibility Verification forms or other records.
- The law requires employers to post the notice "in the language the employer normally uses to communicate employment-related information to the employee."

- The notice must include the following information:

1. “The name of the immigration agency conducting the inspections of I-9 Employment Eligibility Verification forms or other employment records.
2. The date that the employer received notice of the inspection.
3. The nature of the inspection to the extent known.
4. A copy of the Notice of Inspection of I-9 Employment Eligibility Verification forms for the inspection to be conducted.”

- The California Labor Commissioner’s Office released a template notice form to help employers comply with the posting requirements.

After Inspection

- “Except as otherwise required by federal law, an employer shall provide to each current affected employee, and to the employee’s authorized representative, if any, a copy of the written immigration agency notice that provides the results of the inspection of I-9 Employment Eligibility Verification forms or other employment records within 72 hours of receipt of the notice.”
- Employers must also provide “each affected employee, and to the affected employee’s authorized representative, if any, written notice of the obligations of the employer and the affected employee arising from the results of the inspection of I-9 Employment Eligibility Verification forms or other employment records.
- This notice is required to be hand delivered directly to the affected employee at the workplace, if possible. If hand delivery is not possible, the notice must be delivered by mail and email to the employee’s email address, if known, and to the employee’s authorized representative.
- “The notice shall contain the following information:

1. A description of any and all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee.
2. The time period for correcting any potential deficiencies identified by the immigration agency.
3. The time and date of any meeting with the employer to correct any identified deficiencies.
4. Notice that the employee has the right to representation during any meeting scheduled with the employer.”

Employers that fail to provide the required notices are subject to penalties of $2,000–5,000 for a first violation and $5,000–10,000 for each subsequent violation. AB 450 does not assess penalties against employers that fail to provide notice to employees at the express request of the federal government.

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