GIBSON DUNN

July 6, 2018

UPDATE ON CALIFORNIA IMMIGRANT WORKER PROTECTION ACT (AB 450)

To Our Clients and Friends:

On July 5, 2018, Judge John A. Mendez of the Eastern District of California issued an important ruling involving California employers' legal obligations during federal immigration enforcement actions at the workplace. In the lawsuit at issue, the federal government seeks to invalidate a series of recent California "sanctuary" statutes, including AB 450, which imposes various restrictions and requirements on California employers, including that employers are not permitted to voluntarily consent to a federal agent's request to access the worksite and employee records without a warrant. In his 60-page order yesterday, Judge Mendez granted in part and denied in part the federal government's motion for preliminary injunction and forbade California and its officials from enforcing several portions of AB 450 during the pendency of the litigation.

While private California employers will not be subject to many of AB 450's requirements for the time being, the fight over AB 450 is likely to proceed, including at the appellate level. In the meantime, employers should make sure that they are knowledgeable about their obligations (and potential future obligations) under federal immigration law and AB 450 and seek counsel regarding how best to prepare for and ensure compliance with those obligations.

Background

California Governor Jerry Brown signed the Immigrant Worker Protection Act (also known as "Assembly Bill 450" or AB 450) into law on October 5, 2017. AB 450 became effective on January 1, 2018, and applies to both public and private employers. The statute prohibits employers from consenting to immigration enforcement agents' access to the workplace or to employee records (unless permitted by judicial warrant) and also requires that employers provide prompt notice to employees of any impending inspection. Violations of these requirements may result in penalties of between $2,000 and $5,000 for the first offense, and up to $10,000 for subsequent offenses. The law does not provide for a private right of action; rather it is enforced exclusively through civil action by California's Labor Commissioner or Attorney General, who recovers the penalties.

AB 450 Requirements, The Specifics

AB 450 sets forth several obligations (each of which is limited by the phrase, "except as otherwise required by federal law") on employers that can be grouped into three main categories detailed below. The California Labor Commissioner and Attorney General also provided joint guidance that

sheds additional light on the application of AB 450 available here: https://www.dir.ca.gov/dlse/AB_450_QA.pdf.

1. **Deny Access To Premises/Employee Records**. Under the new law, employers are prohibited from "provid[ing] voluntary consent to an immigration enforcement agent's [attempt] to enter any nonpublic areas of a place of labor." Employers may only permit access when the agent provides a judicial warrant.[1] A judicial warrant must be issued by a court and signed by a judge.[2]

   Similarly, employers may not "provide voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records." Again, the employer may permit access when the agent provides a judicial warrant or subpoena or when the employer is providing access to I-9 Employment Eligibility Verification forms or other documents for which a Notice of Inspection ("NOI") has been provided to the employer.[3]

   The state-provided guidance makes clear that "whether or not voluntary consent was given by the employer is a factual, case-by-case determination that will be made based on the totality of the circumstances in each specific situation," but, at minimum, the new law "does not require physically blocking or physically interfering with an immigration enforcement agent in order to show that voluntary consent was not provided."

2. **Provide Employees Notice**. AB 450 requires employers to provide each current employee notice of any upcoming inspections of I-9 records or other employment records within 72 hours of receiving an NOI.[4] Notice must be posted in the language the employer normally communicates with its employees and contain (at minimum): (i) the name of the immigration agency conducting the inspection; (ii) the date the employer received the NOI; (iii) the nature of the inspection; and (iv) a copy of the NOI.

   After an inspection has been completed, employers must provide any affected employees (employees identified by the agency as potentially lacking work authorization or having deficiencies in their authorization documents) with notice of that information.[5] Specifically, the affected employee (and his/her authorized representative) must receive a copy of the agency's notice providing the results of the inspection and written notice of the employer's and employee's obligations resulting from the inspection within 72 hours of its receipt. Employers must provide this notice by hand at work, if possible, or otherwise via both mail and email.

3. **Limit Reverification Of Current Employees**. Finally, the law penalizes employers for the reverification of the employment eligibility of a current employee "at a time or in a manner not required by [federal law.]"[6]

Federal Government Response

Within weeks of AB 450 becoming law, ICE's Acting Director Thomas Homan responded by announcing that the agency planned to increase significantly the number of worksite-related investigations it initiated nationwide during 2018. Homan later called AB 450 and Senate Bill 54, a

related statute enacted at the same time as AB 450 that seeks to limits permissible cooperation between California agencies and federal immigration authorities, "terrible." And he stated that Californians "better hold on tight."

On March 6, 2018, the U.S. Department of Justice filed legal action against the state of California, Governor Jerry Brown, and Attorney General of California Xavier Becerra in federal court, requesting that the Court invalidate AB 450 and other so-called sanctuary laws on the ground, in part, that they are preempted by federal immigration law and are therefore unconstitutional.[7] The federal government also moved for a preliminary injunction forbidding enforcement of AB 450 during the pendency of the lawsuit.[8] In short, the federal government contends that the laws intentionally obstruct federal law and impermissibly interfere with federal immigration authorities' ability to carry out their lawful duties and, thereby violate the Supremacy Clause of the United States Constitution.

The lawsuit generated significant interest, including no fewer than sixteen *amici curiae* briefs in support of both sides and multiple (unsuccessful) motions to intervene. The California defendants' motion to dismiss the case, filed on May 4, 2018, is pending before the Court.

The district court heard argument on the federal government's preliminary injunction motion on June 20, 2018, in Sacramento, California. Yesterday, the Court found in the federal government's favor (in part), enjoining California and its officials from enforcing all provisions of AB 450 except for the provisions relating to employee notice.[9]

The Court noted that the lawsuit involves several "unique and novel constitutional issues," including "whether state sovereignty includes the power to forbid state agents and private citizens from voluntarily complying with a federal program." In a detailed legal analysis, noting that it "expresse[d] no views on the soundness of the policies or statutes involved," the Court found:

1. That the federal government is likely to prevail in its arguments against the provisions of AB 450 that impose penalties on private employers who "voluntarily consent to federal immigration enforcement's entry into nonpublic areas of their place of business or access to their employment records" because they "impermissibly discriminate[] against those who choose to deal with the Federal Government;"

2. That the federal government is likely to prevail in its arguments against AB 450's prohibition on reverification of employee eligibility, albeit "with the caveat that a more complete evidentiary record could impact the Court's analysis at a later stage of th[e] litigation;" and

3. That the federal government is not likely to prevail in its arguments against AB 450's notice requirements adopted in Cal. Labor Code section 90.2. The Court explained that "notice provides employees with an opportunity to cure any deficiency in their paperwork or employment eligibility" and does not impermissibly impede the federal government's interests.

As a result, the Court enjoined California from enforcing all provisions of AB 450 as applied to private employers except those regarding employee notice. Private employers therefore only need to ensure compliance with those notice requirements for the time being. As the Court itself noted, however, its

ruling was only as to the likelihood of success at this early stage of the litigation and is subject to further review and a final determination on the merits after additional evidence is presented, as well as to further potential review by the Ninth Circuit Court of Appeals.

Practical Considerations & Best Practices

While yesterday's ruling enjoins enforcement of most of the obligations imposed by AB 450, the ruling is only temporary and employers should seek counsel from immigration and/or employment counsel and should determine in advance how they will comply with these obligations, should AB 450 go into full effect. Among other measures, employers should consider:

- Preparing facility managers and other employees most likely to encounter an immigration enforcement agent seeking access to the worksite or records on the proper procedures for handling an inspection, including how to determine whether the agent has a valid judicial warrant (as opposed, for example, to an administrative subpoena) and to consult immediately with counsel;

- Implementing procedures for handling notice to employees on an expedited basis, including a template to ensure all necessary information is provided (the state Labor Commissioner has provided a form template available here: https://www.dir.ca.gov/DLSE/LC_90.2_EE_Notice.pdf); and

- Ensuring any reverification of employment eligibility complies with federal legal obligations and conducting training on the verification and reverification process.

---

[1] Cal. Gov. Code § 7285.1(a), (e).

[2] Guidance No. 11, *available at* https://www.dir.ca.gov/dlse/AB_450_QA.pdf.

[3] Cal. Gov. Code § 7285.2(a)(1), (a)(2).

[4] Cal. Labor Code § 90.2(a).

[5] Cal. Labor Code § 90.2(b).

[6] Cal. Labor Code § 1019.2(a).

[7] *U.S. v. State of California*, Case No. 1:18-cv-00490-JAM-KJN, Dkt. No. 1 (E.D. Cal. Mar. 6, 2018), *available at* https://www.justice.gov/opa/press-release/file/1041431/download.

[8] *Id.* at Dkt. No. 2, available at https://www.justice.gov/opa/press-release/file/1041436/download.

[9] *Id.* at Dkt. No. 193 (E.D.Cal. July 5, 2018).

The following Gibson Dunn lawyers assisted in preparing this client update: Jesse Cripps and Ryan Stewart.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding the issues discussed above. Please contact the Gibson Dunn lawyer with whom you usually work, or any of the following in the firm's Labor and Employment practice group:

Catherine A. Conway - Co-Chair, Los Angeles (+1 213-229-7822, cconway@gibsondunn.com)
Jason C. Schwartz - Co-Chair, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)
Rachel S. Brass - San Francisco (+1 415-393-8293, rbrass@gibsondunn.com)
Jesse A. Cripps - Los Angeles (+1 213-229-7792, jcripps@gibsondunn.com)
Michele L. Maryott - Orange County (+1 949-451-3945, mmaryott@gibsondunn.com)
Katherine V.A. Smith - Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)