# State Immigration Laws and Their Impact on Agricultural Labor

California State Board of Food & Agriculture Meeting
August 7, 2012
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# Overview of State Laws

- Frustration with Congressional inaction has led numerous states to pass laws attempting to control illegal immigration in a variety of ways
- 6 states have enacted broad laws similar to that of Arizona's SB 1070, which was recently considered by the US Supreme Court: Alabama, Arizona, Georgia, Indiana, South Carolina and Utah
- Typical enforcement provisions include use of E-Verify in some form:
  - 16 states require employers to use E-Verify in some form
    - 6 states require nearly all employers to use the program (AL, AZ, GA, MS, NC and SC)
    - 5 requires for public employers and contractors (IN, MO, NE, OK and VA)
    - 3 only public contractors (LA, MN and PA)
    - 2 only public employers (ID and FL)
    - CO, TN, and UT encourage E-Verify use but allow for other methods of verification
  - Failure to register as an alien is a crime

# The State "Poster Children"

- Enforcement-Oriented State Laws
  - Arizona, Georgia and Alabama
    - All have mandatory E-Verify laws that use access to and loss of business licenses as the compliance mechanism
    - Criminalization of failure to register as an alien (AZ and AL)
    - Criminalization of illegal alien status (AZ and AL)
    - Warrantless arrest of those suspected of committing a removable offense (AZ and AL)
    - Requires checks of immigration status after probable cause to detain person on other grounds (AZ, AL, and GA)

# The State "Poster Children"

- Enforcement-Oriented State Laws
  - Criminalization of harboring and transportation of undocumented workers (AL and GA)
  - Criminalization of inducing a person into the state knowing the person is an undocumented alien
  - Require proof of legal status to obtain state benefits, such as public education
- Solution-Oriented State Laws
  - UTAH
    - In 2011 passed its own guest worker program granting work permits to undocumented aliens allowing them to continue to live and work in the state
    - Participants must live in state, pay a fee, pass a background check and have health insurance

# The State "Poster Children"

- Solution-Oriented State Laws
  - UTAH
    - No path to permanent residency or citizenship
    - Law has not been implemented yet because it requires a federal waiver
  - COLORADO
    - In 2008 the CO Department of Labor established a pilot non-immigrant agricultural seasonal worker program
    - Authorized pre-qualified lawyers, agents and service companies to provide services under the pilot program to help farmers cut the H-2A program's red-tape

# The State "Poster Children"

- CALIFORNIA
  - AB 1544: a proposal that would allow undocumented farm and service-sector workers to remain and work in state if they can show they have worked in state for extended time, clear criminal records checks, show English proficiency, as well as pay a fee.
  - Critics call the bill a guest worker program and criticize it for not providing a path to citizenship

# Are State Laws Preempted Under Federal Law?

- The U.S. Supreme Court has addressed federal preemption of enforcement-related laws during the past two years.
  - E-Verify. In a challenge to Arizona's E-Verify law, the Supreme Court held that federal immigration law does not preempt state E-Verify laws that conform to federal E-Verify standards and limit sanctions for non-compliance to denial or revocation of business licenses. *Chamber of Commerce v. Whiting,* 131 S. Ct. 1968 (2011)

# Are State Laws Preempted Under Federal Law?

- Sweeping Enforcement Laws Like Arizona Law S.B. 1070
  - The Supreme Court in *Arizona v. U.S.*, 132 S. Ct. 2492 (2012) struck down 3 major provisions of the AZ law:
    - A state law requiring registration of aliens is preempted under federal law
    - State criminalization of illegal status is preempted by federal law (IRCA)
    - The warrantless arrest of those suspected of coming an offense that would make a person removable from the U.S. is preempted

# Are State Laws Preempted Under Federal Law?

- The Court in *Arizona v. U.S*. upheld 1 provision:
  - It is permissible to require law enforcement officers to make a reasonable attempt to check immigration status after there is probable cause to detain an individual on other grounds
  - The Court deferred judgment as to whether the law will be implemented in the future in a manner consistent with federal law and which protects the civil rights of all persons

# Are States Preempted Under Federal Law?

- Challenges to other state laws, such as GA and AL, have been put on hold pending issuance of the Supreme Court's decision in *Arizona v. U.S.,* and clarity may be forthcoming on some of the other provisions of those laws involving transportation, harboring and eligibility for public benefits such as education

# Are States Preempted Under Federal Law?

- What about worker solutions like those adopted in Utah and Colorado and proposed in California?
  - Such programs are likely preempted by federal law unless, like in Colorado, there is no conflict with federal law, only attempted enhancement of an existing non-immigrant program
  - Otherwise, a waiver from the federal government would be required

# Conclusion

- Mandatory E-Verify is Permissible Under State Law—most states are conforming to the Supreme Court standard
  - State E-Verify laws and the prospect of such laws have had an adverse impact on agricultural employers, especially in combination with immigration control provisions
    - GA and AL farmers have suffered millions in economic losses as a result

# Conclusion

- Broad state laws (going beyond E-Verify) like those in GA and AL discourage the migrant farm work force from coming to the States and encourage those in the States to leave, creating farm labor shortages
- Depending on how courts apply the Supreme Court decision in *Arizona v. U.S.*, other provisions that affect farm employers and contractors, such as transportation, harboring (use of farm labor housing), and inducing undocumented workers to come into a state could have a further chilling effect on the farm work force

# Conclusion

- The only solution to this problem is federal preemption of all of these provisions through enactment of immigration reform legislation by Congress
- Immigration law should remain an exclusively federal issue
- Agriculture needs an alternative to the current H-2A program as part of any reform effort