

STAFF REPORT
City of Lancaster, California

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10/13/09
MVB

Date: October 13, 2009

To: Mayor Parris and City Council Members

From: David R. McEwen, City Attorney

Subject: **Introduction of an Ordinance adding Chapter 5.50 to the Lancaster Municipal Code relating to the employment of undocumented workers**

Recommendation:

Introduce **Ordinance No. 934**, adding Chapter 5.50 to the Lancaster Municipal Code relating to the employment of undocumented workers.

Fiscal Impact:

Unknown

Discussion:

Existing Municipal Code Provisions Relating to the Employment of Undocumented Workers

Section 5.04.170 of the Lancaster Municipal Code currently provides that the city manager may revoke any license issued under Chapter 5.04 of the Lancaster Municipal Code (i.e., a business license) if it is determined that the licensee has obtained the license by misrepresentation or has failed to comply with the provisions of Chapter 5.04, which includes a requirement (as set forth in Section 5.04.190) that licensees comply with all requirements of Chapter 5.04 and any other applicable federal, state, or local regulation pertaining to such business. Consequently, a licensee must comply with the requirements of federal law concerning such things as the verification of employment eligibility of newly hired employees. A violation of federal law, including those pertaining to the employment eligibility of employees, constitutes a violation of Section 5.04.190 of the Lancaster Municipal Code and is a sufficient basis upon which the city manager may revoke a business license.

Ordinance No. 934

The Ordinance provides that the hiring of undocumented workers (as defined in the Ordinance) may result in the revocation of a license issued pursuant to Title 5 of the Lancaster Municipal Code (including a business license issued pursuant to Chapter 5.04). This clarifies existing provisions of the Lancaster Municipal Code (as discussed above). The Ordinance also mandates that employers (as defined in the Ordinance) use the e-verify program to verify the employment eligibility of employees hired after December 31, 2009, which is not currently required by any

federal, state or local law or ordinance. If an employer violates the provisions of the Ordinance, the city manager is required to demand that such employer terminate any undocumented workers and execute a declaration stating that the employer has terminated all undocumented workers and will comply with the requirements of the Ordinance. If an employer violates the provisions of the Ordinance more than once within a twenty-four (24) month period, the city manager may revoke any license that has been issued to the employer pursuant to Title 5 of the Lancaster Municipal Code (which includes, without limitation, a business license issued pursuant to Chapter 5.04). Aggrieved employers have the right to appeal any decision of the city manager by submitting a notice of appeal to the city clerk. The appeal will be heard and decided by a hearing officer selected by the city clerk. If the hearing officer affirms the city manager's decision regarding the finding of a violation or the revocation of a license issued pursuant to Title 5 of the Lancaster Municipal Code, the aggrieved employer may then appeal pursuant to the uniform appeal procedure set forth in Chapter 2.44 of the Lancaster Municipal Code.

The E-Verify Program—Generally

E-verify is a free and simple to use Internet-based system that electronically verifies the employment eligibility of newly hired employees. E-verify is a partnership between the United States Department of Homeland Security (“DHS”) and the United States Social Security Administration (“SSA”). United States Citizenship and Immigration Services oversees the program.

E-Verify works by allowing participating employers to electronically compare employee information taken from the Form I-9 (the paper-based employee eligibility verification form used for all new hires) against more than 449 million records in SSA's database and more than 80 million records in DHS immigration databases. Results are returned in seconds. Participation in e-verify is currently voluntary and free to employers. E-verify is accessible through any Internet-capable computer with a Web browser of Internet Explorer 5.5 or Netscape 4.7 or higher (with the exception of Netscape 7.0). To participate, an employer must register online and accept the electronic Memorandum of Understanding that details the responsibilities of SSA, DHS, and the employer.

E-verify reduces unauthorized employment, minimizes verification-related discrimination, is quick and non-burdensome to employers, and protects civil liberties and employee privacy.

Legal Basis for the Ordinance

The California Constitution provides that “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const., Art. XI, § 7. “Although the exercise of the police power must be confined to *local* regulations and is subject to general laws, it is otherwise as broad as that of the Legislature.” Witkin, *Summary of California Law*, Constitutional Law § 984, p. 548 (10th Ed. 2005) (citations omitted; emphasis in original). Although there is no clear definition of what constitutes an exercise of the police power, courts have routinely referred to the legislative judgment. It has long been recognized that “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia...or the States legislating concerning local affairs.” *Berman v. Parker*, 348 U.S. 26 (1954). More recently, the California Court of Appeal recognized that “[a] law is a valid exercise of the police power unless the law is manifestly unreasonable, arbitrary or capricious, and has no real or substantial relation to the public health, safety, morals or general welfare.”

Massingill v. Department of Food & Agriculture, 102 Cal. App. 4th 498, 504 (2002). The court will presume a law to be a valid exercise of the police power and the challenging party has the burden of establishing that it is not reasonably related to a legitimate government concern. *Id.*

Therefore, the City may prohibit the employment of undocumented workers and mandate that employers use e-verify so long as the prohibition/mandate (i) is not unreasonable, arbitrary or capricious, and (ii) is reasonably related to the public health, safety, morals or general welfare.

State and/or Federal Preemption

State Law Preemption

In California, “[a] local ordinance will be preempted if it conflicts with state law, and a conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” *County of Santa Cruz v. Waterhouse*, 127 Cal. App. 4th 1483, 1488-1489 (internal citations omitted; internal quotations omitted) (quoting *Sherwin-Williams Company v. City of Los Angeles*, 4 Cal. 4th 893 (1993)).

The Ordinance does not duplicate the general law because the state law does not currently require employers to use e-verify. Similarly, the Ordinance does not contradict the general law because the state law does not currently prohibit employers from using e-verify. Full occupation of the field is demonstrated by the Legislature’s express manifestation of its intent to occupy the field, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. The Legislature has not expressly stated that it intends to occupy the field covered by the Ordinance and the forgoing indicia of intent are not present.

Based on the forgoing, the Ordinance is not preempted by state law.

Federal Law Preemption

In *Chicanos Por La Causa, Inc. (CPLC) v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), the Ninth Circuit Court of Appeals recently held that an Arizona state law mandating, among other things, that employers use e-verify was not preempted by applicable federal law (*i.e.*, the Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). It should be noted that the court specifically pointed out that the Arizona law did not impose any civil fines and/or criminal sanctions (which would have been expressly preempted by federal law); instead, the only consequence under the Arizona law for failure to comply with the e-verify mandate is revocation of a business license, which the court held is not preempted because it is merely a licensing action. *Id.* at 865-866.

Based on the foregoing, the Ordinance is not preempted by federal law.

Attachment:

Ordinance No. 934