Testimony in Opposition to HB 1291

Chairman Wobbema and members of the committee.

I stand in opposition to the bill in front of you. My name is Anna Marie Stenson. I am a licensed attorney in North Dakota.

If there would be a theme to my testimony, it would likely be “How not to testify before a legislative committee.” In the alternative, maybe what this bill is not.

My practice focuses primarily on immigration law. However, I do not practice employment based immigration law. That is a different area of immigration than my practice that focuses on family based immigration law. I also am not an immigration attorney who focuses on I-9 compliance. That is yet another specialized practice within the immigration bar.

My experience is not about an employer who may hire an unauthorized worker. I do receive those calls. This is from employers both big and small. A frequent example, an employer in the state has found what they consider someone who could be an exceptional worker for them. They ask how they go about helping an undocumented worker to obtain legal status to work for them. I politely say, it probably isn’t possible under our current immigration laws. This bill does not address the problems with our current immigration laws that make it difficult for many to obtain work authorization. It also does not address the immigration system that does not let an employer try and assist an unauthorized worker to obtain lawful employment status.

I can speak to employees who reach out to me because their employer is threatening to terminate them because the employer feels the worker is no longer authorized to work. In many instances, the employee is authorized to work but the immigration laws are so complex that the employer doesn’t understand the process. That is only for employees who know to reach out to an immigration attorney. What about the employees who do not know how to find an immigration attorney. Those authorized employees are being terminated because the employer does not know immigration law and the complexities of who is legally authorized to work under federal immigration law. This bill does not protect authorized workers from being terminated. In fact, one could argue the bill provides incentives to employers to falsely terminate employees. Under federal I-9, employment enforcement there are protections for unlawfully terminated employees, HB 1291 does not appear to provide those protections.

In a state with a severe workforce shortage, even turning away one authorized worker because of a concern for state penalties can have an economic impact for the state and the individual employer.

This bill also does not protect an unauthorized employee who is working for an employer for being exploited because of the employee's status. While targeting employers who employ unauthorized workers is definitely a step in trying to control unauthorized employment by targeting the employer rather than the undocumented individual, I do not believe the bill is well

thought out on not only how it would be applied and enforced but perhaps some of the unintended consequences.

The way that I read the language of HB 1291 there appears to be no requirement that the Attorney General's office verify with federal authorities whether the employee is recognized under federal law to be work authorized.

That leads to my last key point about what this bill is not. I do not believe this bill, as written, is constitutional. I am not a constitutional scholar but I can understand that there are certain actions that are within the purview of the federal government and others that are within the purview of the state government.

The U.S. Congress and federal courts, in recent history, have consistently held that the U.S. Constitution grants the federal government authority over immigration matters. The Immigration Reform and Control Act of 1986 (IRCA) explicitly regulates the employment of unauthorized workers. The U.S. Supreme Court has consistently held that immigration enforcement and policies related to unauthorized workers primarily fall under federal jurisdiction. States cannot impose regulations that conflict with or duplicate a federal law.

In Arizona v US, the Supreme Court very clearly found that state penalties for employment authorization were preempted by IRCA.

"When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject." Arizona v. United States, 567 U.S. 387, 404 (2012) (discussing De Canas v. Bica, 424 U.S. 351 (1976), which upheld a California state law regulating the employment of noncitizens). Before IRCA, "the Federal Government had expressed no more than 'a peripheral concern with [the] employment of illegal entrants.'" Arizona, 567 U.S. at 404 (quoting De Canas, 424 U.S. at 360).

Since IRCA, however, federal law has been "substantially different from the regime that prevailed when De Canas was decided." Id. Specifically, "Congress enacted IRCA as a comprehensive framework for 'combating the employment of [undocumented] aliens.'" Id. (emphasis added, quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002)); see generally id. at 404-05 (discussing various aspects of the comprehensive federal regulation of the employment of unauthorized workers).

Arizona held that a State's attempt to criminally penalize employees for unauthorized work—where Congress had deliberately chosen not to do so—was impliedly preempted as an obstacle to the "the careful balance struck by Congress with respect to unauthorized employment of [noncitizens]." Id. at 406. There, the challenged state law "attempt[ed] to achieve one of the same goals as federal law—the deterrence of unlawful employment"—yet it was preempted because of the conflict it presented "in the method of enforcement." Id.

Courts have recognized the state's ability to enforce unauthorized workers in limited circumstances, such as being tied to the state's authority to issue business licenses. That provision was purposely removed from the bill on the House side.

Thank you for the opportunity to speak in opposition to HB 1291.

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