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MEMORANDUM

TO: House Labor and Industry Committee

FROM: Andy Hoover, Legislative Director
Witold J. Walczak, Legal Director

DATE: February 27, 2011

RE: OPPOSITION TO HOUSE BILL 439

On Monday, the House Labor and Industry Committee is scheduled to consider House Bill 439. This bill will create a new penalty for businesses licensed in the commonwealth that hire or employ an alien who does not have work authorization. Because the proposed law would conflict with the federal immigration law, it is unconstitutional under the U.S. Constitution's Supremacy Clause. The proposed law creates an extreme punishment scheme for businesses, i.e., loss of operating privileges, while providing no safeguards to protect against the likely increase in discrimination against ethnic minorities, a major concern underlying federal law. The American Civil Liberties Union of Pennsylvania opposes HB 439, and on behalf of the 18,000 members of the ACLU of Pennsylvania, I urge you to vote "no" on this bill.

As you may know, last fall the U.S. Court of Appeals for the Third Circuit ruled that a municipal ordinance making it illegal for employers to hire an undocumented immigrant was unconstitutional because it conflicted with federal immigration law. *Lozano et al. v. City of Hazleton*, 620 F.2d 170 (3d Cir. 2010). The Court ruled that Hazleton's Illegal Immigration Relief Act Ordinance was pre-empted by the federal Immigration Reform and Control Act of 1986, 8 U.S.C.A. § 1324a(h)(2), because the ordinance stood as an obstacle to the accomplishment and execution of federal immigration law by undermining the careful balance between effectively deterring employment of unauthorized aliens, minimizing resulting burden on employers, and protecting authorized aliens and citizens perceived as foreign from discrimination. *See Lozano*, 620 F.3d at 210-19. Decision of the U.S. Court of Appeals are, of course, binding precedent on Pennsylvania.

The Hazleton decision controls the fate of HB 439. Like the Hazleton ordinance, HB 439 attempts to avoid "express pre-emption" by federal immigration law by confining it to licensees. But like the Hazleton law, any effort to create a separate state employment scheme will be "conflict pre-empted." As the Court of Appeals ruled in *Lozano*, we "cannot fathom that Congress intended to tolerate the 'supplementing' of its carefully crafted system with independent state and local systems, which by their mere existence drastically increase burdens on employers." 620 F.3d at 213.

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Pre-emption law in Pennsylvania after *Lozano* is settled, at least for the time being. Hazleton has asked the U.S. Supreme Court to review the Third Circuit's decision, and another case involving Arizona's effort to regulate immigrant employment, *U.S. Chamber of Commerce v. Whiting*, has been argued and will be decided by the Court by the end of the term in June. But until and unless the Supreme Court's decision in *Chamber of Commerce* undermines *Lozano* or the Court accepts review of *Lozano* and overturns it next term, the Third Circuit's decision remains controlling.

Besides the significant constitutional concerns underlying HB 439, the bill creates economic disincentives that the Commonwealth can ill afford at this time of fiscal crisis. The bill levels a heavy sanction on a business for a single offense of hiring an ineligible worker. It is essentially the death penalty for a business to lose its license. Such an extreme penalty for what could be a mistake without nefarious intentions increases the likelihood that businesses will not only discriminate against naturalized U.S. citizens and legal workers, but that they will elect to take their businesses to states with more hospitable employment climates.

Finally, HB 439 fails to specify the procedures governing investigation, enforcement and remedies by the licensing bodies. Will licensing bodies be expected to conduct their own investigations, which would present a bureaucratic nightmare that turns members of the licensing bodies into agents of the federal government? And even if the enforcement applies only when the federal government identifies a violation, the license revocation mandated by the bill would be pre-empted.

HB 439 is pre-empted by federal immigration law. It creates a new, extreme penalty on businesses that will lead to increased discrimination in Pennsylvania, and the bill does not present a clear enforcement mechanism. The ACLU of Pennsylvania opposes HB 439. Please vote "no" on the legislation.