



NATIONAL COUNCIL OF
AGRICULTURAL EMPLOYERS
ALERT MEMORANDUM

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To: NCAE Members

From: Sharon M. Hughes, CAE
Executive Vice President

Subject:

- 1. Leasing Companies Indicted for Providing Undocumented Alien Workers to Agricultural Employers;**
- 2. Stepped-Up Border Security and Immigration Enforcement Efforts Encouraged by Senate Republican Policy Committee Policy Paper;**
- 3. Interim Guidelines Issued on Electronic I-9 Forms;**
- 4. Unprecedented NAFTA Complaint Alleges Labor Rights Violations Based on Denial of Access to Legal Services in H-2B Program.**

SUMMARY

Various immigration-related developments of relevance to agricultural employers are addressed below. The federal government recently indicted six individuals for allegedly using leasing companies to provide hundreds of undocumented aliens to work for unsuspecting companies, including agricultural employers, in the U.S. In another enforcement development, the Senate Republican Policy Committee issued a policy paper indicating that stepped-up enforcement efforts to control illegal immigration must be part of any immigration reform. Also, interim guidelines have been issued by the government regarding electronic signatures and storage of I-9 Forms.

Labor rights continue to be major issues in trade agreements. Temporary migrant H-2B workers have filed a labor rights complaint under NAFTA with the Mexican government alleging denial of access to Legal Services attorneys under U.S. law. This is the most recent in a series of complaints brought on behalf of agricultural and migrant workers under the labor-side agreement provision in NAFTA.

Leasing Companies Indicted for Providing Undocumented Workers to Agricultural Employers

A federal grand jury indictment was recently issued in the U.S. District Court for the Southern District of Florida charging six people in connection with a Florida-based employee-leasing scheme that allegedly provided illegal aliens to work in the U.S. (*United States v. Sawczuk*, S.D. Fla., No. 05-60010-CR-Marra, 4/12/05.) According to the indictment, defendants, six current and former Eastern European citizens, operated at least ten Florida-based employee

leasing companies that contracted with U.S. businesses to provide supposedly legally-authorized foreign workers. Through these leasing companies, defendants allegedly arranged jobs for some 550 unauthorized alien workers on farms, dairies and factories across the U.S. The indictment alleges that most of these individuals were Eastern Europeans who entered the U.S. on tourist visas that did not permit them to work.

The indictment indicates that the agreements between the leasing companies and the companies that hired the workers called for the leasing firms to pay the employees, deduct their federal income, unemployment, Social Security, Medicare, and other payroll taxes as well as to provide them with workers' compensation insurance. However, with regard to the 550 unauthorized alien workers, the indictment charges that defendants failed to withhold payroll taxes, including Social Security, or provide worker's compensation insurance. Defendants also allegedly kept close to \$6 million that should have been paid for payroll taxes and laundered more than \$20 million. The criminal charges against defendants include conspiracy to commit visa fraud, wire fraud, and mail fraud, money laundering, and tax fraud. If convicted, defendants face maximum penalties of up to 20 years in prison and fines of up to \$500,000. In addition, the government is seeking forfeiture of the defendants' assets.

Notably, none of the companies that hired the unauthorized alien workers were charged in the indictment. For example, among the companies that hired workers from the leasing firms was Perdue Farms Inc., which claimed no knowledge of the defendants' violations and cooperated fully with the U.S. Department of Justice's investigation. It thus appears that the U.S. Department of Justice determined that the companies that hired the workers were unaware that defendants were violating federal immigration and labor law.

Congress Is Increasingly Focusing On Stepped-Up Border Security and Immigration Enforcement Efforts

On April 15, 2005, the Senate Republican Policy Committee (RPC) issued a policy paper titled "Necessary Conditions for Immigration Reform."¹ The Executive Summary of the policy paper sets forth the following contentions:

- The federal government has failed in its basic duty to secure and protect its borders and to enforce immigration laws in the nation's interior.
- As a result, many Americans are increasingly cynical about the willingness – or ability – of the government to live up to its enforcement obligations and uphold the Rule of Law.
- These enforcement failures have enabled the illegal alien population in the United States to grow to at least 11 million people.

The policy paper proposes that the federal government should address these challenges by: (1) making a greater financial commitment to border security; (2) demonstrating through resources and effort that it intends to enforce immigration laws in the interior; (3) demanding

¹ The RPC and the Democratic Policy Committee (DPC) were established almost 60 years ago to establish separate policy committees in the U.S. Senate to coordinate and enhance legislative policymaking.

better cooperation from the Mexican government; and (4) compensating states and localities for the financial burdens that illegal immigration places on their communities. According to the policy paper, if Congress and the Administration do not demonstrate a genuine commitment to securing our nation's borders and proving that our immigration laws will be enforced, it will be very difficult to develop the political consensus for temporary worker or comprehensive immigration reform, and such an effort would be a practical failure.

The policy paper strongly suggests that pressure is mounting for stepped-up enforcement efforts regarding illegal immigration.² The paper suggests that stepped-up enforcement against employers is a condition to enactment of any guest worker program reform, such as the AgJOBS legislation. Legislative efforts regarding immigration enforcement are on an upswing. For example, H.R. 98, a bill proposed by Representative David Dreier (R-CA), would require Social Security cards with digitized photos and electronic verification strips; require employers to verify that anyone applying for a job possesses such a card and check their work eligibility status with Homeland Security; and, subject employers who fail to verify work eligibility to fines up to \$50,000 and jail terms up to five years, even if no undocumented workers are hired. Additionally, Congress recently passed as part of the Iraq Supplemental spending bill (H.R. 1268) the REAL ID Act, legislation creating uniform standards that states must meet when issuing drivers' licenses if the licenses are to be used for federal identification purposes.³ The REAL ID Act will make it impossible for many aliens to obtain drivers' licenses and will complicate the I-9 process for employers. Under the current legislative climate, discussed above, supporters of AgJOBS and other comprehensive reform measures, such as the recently introduced McCain/Kennedy bill (S. 1033), are likely to face efforts to add enhanced enforcement provisions to their legislation.

Interim Guidelines Issued on New Law Allowing Electronic I-9 Form Signatures and Storage, But Implementing Regulations Not Yet Available

New legislation giving employers the option of completing and retaining their I-9 Forms electronically went into effect on April 29, 2005.⁴ However, implementing regulations providing guidance to employers for compliance with the new law likely will not be issued for several months. Though implementing regulations are not yet available, the U.S. Immigration and Customs Enforcement (ICE), an investigative arm of the Department of Homeland Security (DHS), has issued some helpful "interim guidelines" for using electronic I-9 Forms.

The interim guidelines indicate that the final implementing regulations will provide employers with a good deal of flexibility regarding the completing and storage of I-9 Forms electronically in order to comply with the employment eligibility requirements established by the Immigration Reform and Control Act. Under the guidelines, for instance, an employer may complete I-9 Forms on paper and store the forms electronically, or complete and store the forms

² This pressure is building not only politically, but also in grass roots movements such as the Minutemen, a group of citizens unaffiliated with the government who have started patrolling the borders of the Southwest U.S. in an effort to enforce border security. They have threatened to target employers suspected of employing illegal aliens.

³ See *NCAE Alert Memo* 03-05, May 18, 2005.

⁴ See *NCAE Alert Memo* 11-04, October 20, 2004.

electronically. Moreover, the guidelines provide specific guidance as to use of accepted electronic signatures and storage standards.

The guidelines state that the signatures should be generated through the use of a system that includes a method to acknowledge that new hires completing the I-9 Form have read the attestation and that the electronic signatures are attached to the completed electronic I-9 Form at the time of the transactions. ICE lists as acceptable methods electronic signature pads, Personal Identification Numbers, “click to accept” dialog boxes and biometrics. The guidelines also state that employers should include a “quality assurance program” that includes regular evaluations of the system. Additionally, the guidelines suggest that employers should consider an electronic storage system that includes an “indexing” system that will generate “legible and readable” hard copies of the I-9 Forms for government inspection purposes.

As ICE’s interim guidelines suggest, there are potential advantages to employers who opt to use electronic I-9 Forms. Many employers may experience cost savings by storing these forms electronically rather than using conventional filing and storage of paper copies or transferring the forms to microfilm or microfiche. Electronic completion and storage may also render the I-9 process less prone to error. Additionally, electronically retained I-9 Forms are more easily searchable, which is important for re-verification and inspection purposes, and is especially helpful for agricultural employers, who tend to have high employee turnover rates as well as audits by the U.S. Department of Labor.

Ultimately, while electronic completion and storage of I-9 Forms may not be practical for all agricultural employers, the guidelines suggest that the new law gives employers greater flexibility than in the past to adopt practices that best fit their particular circumstances. NCAE will update you when the implementing regulations are issued.

Former Temporary Migrant H-2B Workers Allege Violations of NAFTA Based on the Denial of Access to Legal Services Attorneys

On April 13, 2005, sixteen workers from Mexico and Central America who were in the U.S. on H-2B temporary work visas through U.S. companies filed a labor rights complaint with the Mexican government under the North American Agreement for Labor Cooperation (NAALC), the labor side-accord to the NAFTA.⁵ The complaint alleges that the sixteen migrant non-agricultural workers suffered labor abuses in the U.S., including violations of the workers’ right to earn a minimum wage, to safe working conditions, to compensation for occupational injuries, to disclosure of the conditions of their employment at the time of hiring, to adherence by the employer to the promised conditions of employment, and to safe transportation and sanitary housing when provided by the employer. The complaint further maintains – in an unprecedented argument in a NAFTA proceeding – that restrictions on funding imposed by the Legal Services

⁵ When NAFTA became effective in 1994 as a free trade agreement between the U.S., Mexico and Canada, the function of NAFTA’s labor side-accord, NAALC, was to improve conditions and living standards, to promote a set of guiding labor principles, and to encourage cooperation to promote innovation and rising levels of productivity and quality. NCAE has previously examined labor protections under NAALC more fully in its analysis of the U.S.’s various free trade agreements. See *NCAE Analysis Memo M 04-04*, June 30, 2004.

Corporation⁶ prevent lawyers from representing non-agricultural temporary workers, thus effectively denying legal immigrants any way to enforce their labor rights and violating NAFTA. The complaint is the first to allege a NAFTA violation based on migrant workers' denial of access to federally funded Legal Services attorneys.

The complaint was filed with the assistance of nearly a dozen American and Mexican labor and migrant organizations, and calls on the Mexican government to seek stronger enforcement by the U.S. of its labor laws. The workers' counsel have indicated that they hope the Mexican government will hold hearings to investigate the reports of the alleged abuses, while allowing legal aid providers to extend representation to more migrant workers. Currently, the Legal Services Corporation offers legal representation to agricultural H-2A workers, but not non-agricultural H-2B workers. Extending Legal Services attorneys' services to migrant workers as sought in the complaint could impact employers of H-2B workers, who should expect lawsuits against them to increase significantly.

Since the complaint was filed with the Mexican National Administrative Office (NAO) of the NAALC, the next step is for the NAO to file a written report on the complaint.⁷ However, the NAO has no deadline for filing this report. NCAE will continue to monitor the NAO for the required report and update you accordingly on this novel NAFTA matter.

⁶ The Legal Services Corporation is the private, non-profit corporation established by Congress to provide free legal assistance to indigent Americans through the funding of "legal services offices." These legal services offices have represented temporary agricultural workers holding H-2A visas, but generally do not represent non-agricultural workers holding H-2B visas. Moreover, legal services offices are barred from using federal government money to represent non-eligible immigrants, and also cannot use money from state or local governments or from private donors to provide representation to non-eligible immigrants.

⁷ NCAE has previously addressed NAFTA complaints filed with the Mexican NAO of the NAALC by third parties against North Carolina Growers Association and the Washington State apple growers. See *NCAE Analysis Memo M 04-04*, June 30, 2004.