



NATIONAL COUNCIL OF
AGRICULTURAL EMPLOYERS
ALERT MEMORANDUM

AL 03_08

Date: February 29, 2008
To: NCAE Members
From: Mike Gempler, NCAE President
Re: Recent Immigration-Related Developments Affecting Ag Employers

The last few months have seen a number of developments in immigration law affecting agricultural employers. This memorandum is intended to provide a brief update of some of these developments.

DHS Issues New Regulation Increasing Fines for Hiring Undocumented Aliens

Several recent actions by the Department of Homeland Security will potentially affect agricultural employers. On February 25, 2008, the DHS published a new regulation increasing a wide range of civil money penalties which employers will face if they run afoul of the employer sanctions provisions of the Immigration Reform and Control Act of 1986. According to DHS, the new amounts were calculated in accordance with a detailed statutory formula for adjusting civil penalties to take inflation into account. As a result, the fines for hiring undocumented aliens rose for the first, second, and third and subsequent offenses. Under the new regulation, the range of possible fines for the first offense is from a minimum of \$375.00 per violation to \$3,200.00 per violation. For a second offense, the range is from \$3,200.00 to \$6,500.00. For third and subsequent offenses, the range is from \$4,300.00 to \$16,000.00. These penalties can add up very quickly and make any gap in an employer's compliance program more potentially costly.

Expanded I-9 Form Updated

For many years, the I-9 form published by the INS, and later, the DHS, did not correctly reflect the requirements of the applicable law and regulations. On November 7, 2007, DHS published an amended I-9 form that it believes conforms with applicable law. Shortly thereafter, DHS published instructions about the use of the correct form and required employers to use it after December 26, 2007. Employers can identify the correct form by its revision date, which can be found in the bottom right hand corner of the form. The only permissible form has the

following: “Form I-9 (Rev. 06/05/07) N,” which are available at the DHS website. DHS also modified the handbook providing guidance to employers about these changes.

The changes to the new form include modifications to the list of acceptable documents for establishing both identity and citizenship by removing five previously listed documents and retaining others. The instructions to the amended I-9 form notify employers that providing a social security number in Section 1 (“Employee Information”) is voluntary unless the employer participates in E-Verify (formerly “Basic PILOT”). However, if an employee uses a social security card to establish employment eligibility, the number still must be recorded in Section 2 (“Employer Review”). In addition, an employer may now sign and retain I-9 forms electronically.

Pending DHS Regulation of Federal Contractors’ Employment Verification

DHS is also readying two proposals for publication as proposed regulations. The first would require federal contractors and vendors to use the federal government’s E-Verify system (formerly known as “Basic Pilot”) to confirm the employment eligibility of their employees electronically or telephonically. The full scope of the new requirement will not be known until the regulations are finalized, but it could impact agricultural cooperatives and entities that sell products to the school lunch program as well as anyone else who does business with the federal government.

Status of “No-Match” Rule

As you may recall, DHS proposed regulations establishing what it called a “safe harbor” for employers who receive no-match letters from the Social Security Administration. Shortly afterwards, a United States District Court blocked the regulations from taking effect because they were unlawful as proposed. After the federal court in San Francisco enjoined the implementation of the no match rule, DHS agreed to revise it in an attempt to satisfy the court’s concerns. DHS reports that the revisions to the rule should be released by the Office of Management and Budget any day. It is expected that the public will have a 30-day period in which to comment. Meanwhile, DHS has appealed the federal court’s injunction and the case is currently stayed until March 28, 2008, pending DHS’ re-issuance of the new rule.

Developments in Court

1. The Employment Rights of Undocumented Workers

In addition to developments before federal agencies, there have been significant immigration-related developments in the courts. One continuing theme is that employers who employ undocumented workers must still comply with all applicable labor laws. For example, the District of Columbia Circuit Court of Appeals recently reviewed an order of the National Labor Relations Board that required a company to bargain with a union, even though the votes of undocumented workers allowed the union to win the representation election. In the case of *Agri-Processor, Inc. v. National Labor Relations Board*, ___ F.3d ___; 2008 WL 53879 (D.C. Cir. Jan. 4, 2008), the Court of Appeals in a 2-1 decision upheld what two of the judges described as

a “peculiar result” based on Supreme Court precedent that the immigration laws did not necessarily repeal or limit any other workplace protection law. This was true even though the employer was not allowed to employ those workers in the first place.

2. Arriaga-related Developments

For many years, NCAE has been monitoring the spread of the *Glassboro/Arriaga* rule¹ that the federal minimum wage law requires that an employer pay, at the end of a worker’s first week, for his or her in-bound transportation and related expenses when those expenses are “for the primary benefit of the employer” and reduce the worker’s wage to below the minimum wage. Originally, legal services attorneys focused their arguments against users of the H-2A program. Now, they have begun using *Glassboro/Arriaga*-type arguments against users of the H-2B program and have had some success. However, the limitations on these arguments are beginning to appear. In *Rivera v. The Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008), a federal district court in Pennsylvania generally held that the *Glassboro/Arriaga* rule could be applied to H-2B workers recruited in foreign countries. However, it distinguished foreign recruiting from long-distance recruiting within the United States and stated that travel within the United States would likely not be covered under this doctrine. This decision may point the way to further limitations on the *Glassboro/Arriaga* rule.

Immigration law impacts every employer, especially agricultural employers. Recent developments in the federal agencies continue a strong pro-enforcement trend while recent developments in the courts continue a trend strongly protective of documented and undocumented workers. In this challenging environment, NCAE will continue to monitor developments and provide timely updates as important changes occur.

¹ AL 12-02 dated November 19, 2002; AL 10-02 dated October 11, 2002; AL 1-01 (undated).