

Florida Citrus Industry Annual Conference

Labor, Immigration, and Your Grove

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List of Topics To Be Covered in Today's Presentation

1. THE REVISED I-9 FORM – WHAT'S NEW?
2. STATUS OF DHS'S "NO MATCH RULE"
3. DHS and WORKSITE ENFORCEMENT
4. OVERVIEW OF PRIVATE RICO LAWSUITS BASED ON LACK OF IMMIGRATION LAW COMPLIANCE
5. H-2A TEMPORARY ALIEN FARM WORKER REGULATORY REFORM
6. STATE AND LOCAL LAWS REGULATING EMPLOYMENT IN THE IMMIGRATION CONTEXT
7. STATUS OF FEDERAL IMMIGRATION REFORM LEGISLATION

The Revised I-9 Form - What's New?

- ◆ New I-9 Form must now be used
- ◆ New I-9 Form can be identified and distinguished from prior forms because it lists the date 2-2-09 on the bottom right corner of each page
- ◆ The new I-9 Form and accompanying “Handbook for Employers (Instructions for Completing the Form I-9”) can be obtained as downloadable PDFs at www.uscis.gov or can be ordered at the U.S. Citizenship and Immigration Services (USCIS), a branch of DHS, at 1-800-375-5283

The Revised I-9 Form - What's New?

- ◆ The five documents listed below have been removed from List A of the List of Acceptable Documents:
 - ◆ Certificate of U.S. citizenship (Form N-560 or N-561)
 - ◆ Certificate of Naturalization (Form N-550 or N-570)
 - ◆ Alien Registration receipt Card (I-151)
 - ◆ Unexpired Reentry Permit (Form I-327)
 - ◆ Unexpired Refugee Travel Document (Form I-571)

Status of DHS “No Match” Rule

- ◆ On August 15th, 2007, DHS published its final “no-match” rule in the Federal Register
- ◆ Implementation of DHS’ final rule was initially enjoined by a federal judge; in response, DHS reissued a proposed supplementary rule on March 26, 2008 to overcome judge’s objections
- ◆ Proposed supplemental rule does not change procedures or substantive requirements of original rule
- ◆ Final revised “no-match” rule published on October 28, 2008.

Summary of the Final DHS Rule

Key components of the enjoined rule include the following:

- ◆ Upon receipt of a no match letter from the DHS or SSA, an employer would have to review the letter within 30 days of its receipt to determine whether it properly recorded the listed employees' names and social security number (SSN) or alien document number
- ◆ If the employer reported the information correctly on its I-9 or W-2 forms, it must confirm with the employee that the employee provided accurate information. If the employee did report the information accurately, the employer must ask the employee to ascertain and correct the problem with the appropriate agency

Summary of the Final DHS Rule

- ◆ The employer and employee have 90 days from the receipt of the agency letter within which to complete this process
- ◆ If during the 90-day period the employee provides corrected information, the employer is responsible for verifying the correction with DHS or SSA
- ◆ If at the end of the 90-day period the employer cannot obtain verification from DHS or SSA that the document in question is acceptable, then the employer will have to take action to terminate the employee or face the risk that DHS may find that it had constructive knowledge that the employee was unauthorized

Summary of the Final DHS Rule

- ◆ If at the end of the 90 days the employer cannot obtain verification, it has an additional 3 days within which to complete a new I-9 Form for the employee, using the same procedures as if the employee were newly hired
- ◆ The employer may not accept any document referenced in the written notice that is disputed. The employer must require that a document establishing identity or identity and work authorization contain a photograph.

Summary of the Final DHS Rule

- ◆ An employer that follows DHS' procedures would have a "safe harbor." It would not be considered by DHS to have constructive knowledge that it employed unauthorized workers
- ◆ An employer that fails to follow the procedures set forth in DHS' rule would be considered by DHS to have constructive knowledge that it employed unauthorized workers.

Summary of the Final DHS Rule

- ◆ DHS' supplemental final rule removes the section that stated that employers who re-verify documents listed in no match letters would have a defense against discrimination allegations based on document abuse provisions of current immigration law.
- ◆ Correction of SSNs can be verified through the Social Security Number Verification System. It can be accessed through <http://www.ssa.gov/employer/ssnv.htm> or by telephone at 1-800-772-6270. DHS can be contacted through its website at <http://www.ice.gov> or telephonically at 1-800-421-7105.


Common Scenarios Likely Faced by Employers under DHS' Final Safe Harbor Rule

- 1) Employer receives no match letter and signs it
- 2) Employer receives no match letter but employee used SSN in Section 1 of the I-9 Form only and didn't use it as a work authorization document
- 3) Employer receives no match letter and employee used SSN as work authorization document
- 4) Employer receives a no match letter for female employee who now is married but who did not change the name on her SSN

Common Scenarios Likely Faced by Employers under DHS' Final Safe Harbor Rule

- 5) Employer receives a no match letter for an employee who was unauthorized to work when hired but now claims to be authorized
- 6) Employer receives no match letter which lists a number of seasonal employees who are not employed at the time the letter is received
- 7) Employer hires a labor contractor that fails to comply with the no match rule
- 8) Employee not listed on a no match letter but employer receives independent information that the employee is not authorized to work

**BEST PRACTICES - SSA
AND DHS “NO MATCH”
REQUIREMENTS**

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Best Practices

SSA “No Match” Letters

- ◆ Follow the directions in the letter from SSA
- ◆ Act upon the “no match” letter. Employers face potential penalties from the IRS for failure to take steps to correct W-2 Form filings.
- ◆ Provide listed employees with written notice of the “mismatch” and confirm whether their names and SSNs were accurately reported
- ◆ If a clerical mistake was made, correct it by filing Form-W-2c
- ◆ If the name and SSN were reported accurately, require the employee to follow up with SSA and resolve the problem

Best Practices

SSA “No Match” Letters

- ◆ If employees fail to correct the problem with SSA and show up again in another “no match” letter, consider disciplinary action or termination, unless a reasonable explanation is provided by employee
- ◆ If the employer has a policy requiring applicant to provide true and accurate information in completing employment information, such as the W-2 Form, this may provide a basis for termination for non-compliant employees
- ◆ Document all steps taken to comply with the “no match” letter, including responding to SSA, notifying employees, and steps taken to ensure employee compliance

DHS WORKSITE ENFORCEMENT

Bush Administration

- ◆ Significant increase in enforcement during the past several years
 - ◆ August 2008 alone:
 - Howard Industries – 595 arrests
 - Dulles International Airport – 42 arrests
 - Mills Manufacturing Company, Asheville, NC – 57 arrests
- ◆ Image program
- ◆ E-Verify program
- ◆ Worksite enforcement directed at unauthorized aliens

DHS WORKSITE ENFORCEMENT

Obama Administration

- ◆ A "No Match" regulation will help employers ensure workers are legal and help the government crack down on employers who knowingly hire illegal workers.
- ◆ Expanding criminal investigations against employers who knowingly hire large numbers of illegal aliens.

**OVERVIEW OF PRIVATE
LAWSUITS BASED ON LACK OF
IMMIGRATION LAW
COMPLIANCE**

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Traditional Federal Claims

- ◆ Migrant and Seasonal Agricultural Worker Protection Act 29 U.S.C. §§1801 *et.seq.* (“MSPA”)
- ◆ Fair Labor Standards Act, 29 U.S.C. §§ 201 *et.seq.* (“FLSA”)

Traditional Federal Claims

◆ MSPA Damages

- ◆ Actual damages
- ◆ Statutory damages of up to \$500/person per season (\$500,000 cap)
- ◆ No Attorney's fees

◆ FLSA Damages

- ◆ Minimum wages
- ◆ Liquidated damages
- ◆ Attorney's fees

Racketeer Influenced Corrupt Organizations Act (RICO) Lawsuits

- ◆ RICO is a federal law that is used by the federal government to bring criminal charges against entities alleged to be engaged in corrupt practices
- ◆ RICO also allows private parties to bring civil lawsuits against individuals and organizations alleged to have conspired to violate certain criminal statutes, thereby causing economic harm to others
- ◆ RICO has been used by private parties to sue employers based on allegations that the employer violated federal immigration laws

Incentives for Private Lawyers to Bring RICO Lawsuits

- ◆ Typically involves class actions involving a large number of employees based on allegations of policies and practices that are company-wide
- ◆ A large class of workers can receive triple proven damages
- ◆ Plaintiffs' lawyers can receive attorneys fees from company if they are successful

Typical Claims in RICO Lawsuits

- ◆ Legally authorized workers allege that employer hired illegal aliens in order to depress wages, thus injuring the legal workers who received less wages
- ◆ A business competitor alleges that a rival undercut a competitive bidding process by hiring illegal aliens, thereby enabling it to underbid and get a contract
- ◆ Employer and its labor contractor or employment agency conspire to hire illegal aliens and harbor them by providing housing and do so to depress wages of all workers, thereby increasing profits
- ◆ Employer and a labor contractor conspire to bring alien workers into the U.S. under the incorrect temporary and seasonal guest worker program in order to pay lesser wages and program costs, thereby depriving the guest workers of their proper wages and benefits

Employment Practices and Documents Scrutinized in RICO Lawsuits

- ◆ Lawyers bringing RICO lawsuits seek documents and records related to the hiring practices of employer
- ◆ Seek copies of all I-9 Forms for 4 year period prior to filing of lawsuit
- ◆ Seek copies of Social Security “no match” letters
- ◆ Seek copies of employment applications, policies, and forms signed by employees
- ◆ Evaluate whether employees completing employment forms read or write English or use a translator
- ◆ Seek information related to whether the employer provides housing to workers

Recent Example – United States District Court for the District of Colorado

- ◆ John Does I – V v. Moises Rodriguez and Maria Rodriguez
 - ◆ Five migrant farmworkers illegally working in the United States were recently awarded \$7.8 million in damages as a result of
 - A failure to receive required minimum wage
 - Violations under the AWPA
 - Violations of racketeering as spelled out in the RICO act
 - Forced labor claims
 - ◆ Grant Family Farms also settled for \$2,000 for each worker (\$10,000 total)

Best Practices – How to Best Place the Company in a Defensible Position in Case a RICO Lawsuit is Filed

- ◆ Periodically review your I-9 Procedures to ensure that forms are completely filled out
- ◆ Review your record retention policies and practices
- ◆ Train all new employees involved in the hiring process in all immigration-related hiring compliance requirements and provide refresher courses to experienced employees

Best Practices – How to Best Place the Company in a Defensible Position in Case a RICO Lawsuit is Filed

- ◆ Establish a “no match” policy with regard to communications from DHS and the Social Security Administration (SSA) regarding issues in employment authorization document authenticity
- ◆ Implement the “no match” policy, whether it is pursuant to a final DHS safe harbor rule or future notifications from SSA regarding social security numbers and names that do not match in SSA’s database
- ◆ Document the steps you take to follow-up with employees who are listed in no-match letters that you have received from DHS or SSA

Best Practices – How to Best Place the Company in a Defensible Position in Case a RICO Lawsuit is Filed

- ◆ Communications and follow-up with employees should be documented in the employees' personnel files
- ◆ Document all communications with representatives of the government, including SSA and DHS, including the date, time, name, and title of the person spoken with and a summary of the conversation
- ◆ Establish “tickler” systems to remind you of compliance deadlines established through company policy or government regulation

H-2A Regulatory Reform

- ◆ Failure of comprehensive immigration reform and “no match” rule prompted White House to promise regulatory reform proposals in August 2007
- ◆ Bush Administration’s Proposed H-2A Reform was expansive in scope
 - Recruitment, wages, housing all addressed
- ◆ Farm worker groups threatened litigation over changes
- ◆ Final rule issued December 18, 2008, and went into effect on January 17, 2009

H-2A Regulatory Reform

- ◆ On May 29, 2009, Obama Administration (via USDOL) suspended new H-2A Regulations issued December 18, 2008; reinstates prior regulations as in effect as of January 16, 2009
- ◆ Suspension of new H-2A Regulations is scheduled to go into effect on June 29, 2009, absent judicial relief
- ◆ Legal challenge has been filed recently in North Carolina (Filed June 9, 2009)

**IMPACT OF STATE AND LOCAL
LAWS REGULATING
EMPLOYMENT IN THE
IMMIGRATION CONTEXT**

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Background

- ◆ Federal preemption
 - ◆ Enactment and enforcement of immigration law historically has been exclusively a federal issue
 - ◆ The current employment eligibility verification law enacted as part of IRCA in 1986 contains clear language preempting state and local enforcement of employer sanctions laws
 - ◆ Nevertheless, a number of State and local governments have enacted laws that ignore or attempt to skirt the express intent of Congress to regulate employment in the immigration context

Congressional Inaction

- ◆ Estimates indicate that between 10 and 12 million aliens are living and working in the U.S. in illegal status
- ◆ For the past several years, Congress has failed in its efforts to pass comprehensive immigration reform that would address inadequacies in the current employment verification laws and “crack down” on the employment of undocumented workers
- ◆ Anti-immigrant groups in a number of States and localities have seized upon the congressional inability to solve the illegal alien problem and pushed for enactment of State and local laws and regulate the conduct of employers
- ◆ A number of States and local governments have enacted laws that duplicate and go beyond current federal immigration laws that relate to employment
- ◆ As of September, there were more than 170 state and local laws relating to immigration and employment

Status of Federal Regulation

- ◆ AgJOBS Legislation
 - ◆ Passed Senate twice
 - ◆ Included in Comprehensive Bill in 2007
 - ◆ Has now been re-filed in Senate
 - ◆ Contains H-2A Reforms
 - Streamline labor certification process
 - Relief from adverse effect wage rate
 - Control litigation

AgJOBS

- ◆ Earned adjustment of status for experienced farm workers
 - ◆ 150 days (or 863 hours) of farm work in 24 month period prior to 12-31-06
 - ◆ Get temporary resident (blue card) status
 - ◆ Must work required number of days in agriculture during 3 to 5 years after enactment to get permanent resident (green card) status

AgJOBS

- ◆ Labor shortages, increased DHS enforcement, the “no match rule,” and RICO lawsuits make enactment of AgJOBS imperative
- ◆ You can make a difference!
 - ◆ Encourage your company, its suppliers and customers and your agricultural associations to lobby your congressional representatives and Senators to support AgJOBS now!!

Practical Guidance

- ◆ The DHS Website offers information, links, and FAQ's concerning the new rule...

www.dhs.gov

- ◆ Also, the Immigration and Customs Enforcement Website has some helpful tips...

www.ice.gov

Recommendations

- ◆ DHS's Safe Harbor Regulation is now effective; SSA mismatch letters likely later this year
- ◆ Amend existing templates previously used for dealing effectively with mismatch letters
- ◆ Prepare now for effective "plan b" to solve labor supply concerns
- ◆ Stay Tuned for Future Updates

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