Congress Fails to Reform Immigration: How that Changes the Law for Dairy Farmers

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SUMMARY

Congress has failed to reform the immigration laws. The current visa programs are inadequate both in terms of numbers of available visas as well as the unworkablility of the process. Dairy farmers, as agricultural employers, depend upon a mostly Hispanic work force. Some of these employees may not be authorized to work in the United States (undocumented workers) but are able to obtain employment by falsely filling out Form I-9 or providing forged documents in support of their claims. An employer cannot be sure whether or not an employee is authorized. It is illegal to hire alien workers that are not properly documented. Current Federal law provides employers protections. However the law does not protect employers from losing valuable employees as a result of government raids, arrests, and other efforts to identify and remove undocumented alien workers. In the vacuum of reform of the Federal law, Immigration Control and Enforcement **(ICE)** is seeking tougher and tougher enforcement of existing law. Further, states and local governments are entering into the area of civil enforcement of immigration laws with Draconian measures. This presentation will provide a detailed look at how an employer should comply with Federal law, explain the changes in Federal regulations, examine the proposed Federal legislative and regulatory changes, and examine recent efforts at state regulation, such as in Arizona and Oklahoma.

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BACKGROUND

In the High Plains states of Arizona, Colorado, Kansas, Oklahoma, New Mexico, and Texas, the use of Hispanic laborers is widespread and generally viewed as the preferred method of staffing dairy farms. [This is because of their high work ethic, attention to details during repetitive tasks, reliability, and trustworthiness.] Contrary to popular culture and media suggestions otherwise, misstatements, compensation for these workers typically includes benefits, housing, and a competitive wage. The compensation package compares favorably with other jobs in the community for workers with similar skill sets.

These workers include native born American citizens; lawful and fully documented alien workers from Mexico, Guatemala, and other Latin American countries; and improperly documented workers. The distribution of these categories, among all of the dairy workers, is not known. Distribution at individual dairy farms is even harder to know. Speculation runs from none to all with all percentages in between. The two extremes cannot be true. It is safe to say, however, that there are some undocumented alien workers among the work force.

Who is and who is not an authorized worker cannot be known by merely looking at the individual. At the same time, Federal law severely limits the amount of information an employer needs to conform to existing Federal immigration laws. From the stand point of a dairy farmer employer who fully complies with the Federal rules, all of its workers are properly documented workers, alien or citizen. But compliance with Federal law is only part of the issue for a dairy producer.

Even if the employer is in full compliance, that does not mean the employees are. Any authorized alien is subject to removal from employment, not uncommonly in raids by Immigration Control and Enforcement (**ICE**) officers. Such actions not only can unexpectedly and severely deplete the work force of a dairy producer, but will also frighten those who are lawfully here. This leaves gaps in the filling of key skilled positions and the inability to fill those gaps.

Since Congress has failed to adequately address this situation, the agencies have taken harder stances on the existing law. The issue is not only being fought in the legislatures and agencies, but in the courts as well. Recently, a San Francisco court stopped enforcement of tougher regulations on "No Match". To make things worse, many states and localities have passed bills addressed at unlawful alien workers. These often draconian measures further interfere with filling skilled positions by depleting the workforce and scaring the remaining workers away.

THE LAW

It is unlawful to hire an alien who is not authorized to work. On its surface, it is an easily understood law.

> *It is unlawful for a person or other entity-(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment,*[2]

More to the status of dairy farmer employers, it is unlawful to fail in complying with Form I-9 procedures:

> *It is unlawful for a person or other entity. . . if the person or entity is an,*

[2] 8 U.S.C. A. §1324a(a)(1)(A)

agricultural employer, . . .to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.[3]

Violations of either section can be costly. Fines for violating the paperwork requirements of Form I-9 run from $100 to $1000 for each individual employee in which the paperwork is not in order.[4] Factors to be considered are the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.[5]

Criminal penalties for violation of hiring an unauthorized alien or continuing to hire one after it is known that he is not authorized are up to $3000 per unauthorized alien and up to 6 mo imprisonment for the entire practice or pattern regardless of the number of aliens.[6] Injunctive relief can also be issued.[7] There are no criminal violations for failure to comply with section (1)(B).

Good faith compliance with Form I-9 is a defense to the prohibition to hire an unauthorized alien. The regulations for subsection (b) of the statute are embodied in rules found at 8 CFR 274a.[8] These are described in more detail later.

The result is that for employers it is the failure to comply with documentation procedures that creates the liability.

[3] 8 U.S.C. A. §1324a(a)(1)(B)
[4] 8 U.S.C.A. §1324a(a)(5)
[5] 8 U.S.C.A. §1324a(a)(5)
[6] 8 U.S.C.A. §1324a(f).
[7] 8 U.S.C.A. §1324a(f)(2)
[8] 8 CFR Part 274a, CONTROL OF EMPLOYMENT OF ALIENS.

SAFE HARBOR PROVISIONS

Employers who follow the procedures required for Form I-9 will find themselves protected from both civil and criminal prosecution for either violation of (1)(a), (1)(b) or (2). The steps to fit in this "safe harbor" are as follows:

- Use the current Form I-9 (11-07-2007).
- Have a new employee fill out the I-9 within 3 days of hire.
- Employee provides documents that identify her or him and show that she or he is eligible for employment.
- Employee fills out the Section I "Employee Information and Verification".
- Employee verifies it is true by signing.
- Employer inspects and reviews the identification and eligibility documents. If they are what they purport to be, employer has complied.
- The employer completes Section II, again within 3 days of hire, after employee has completed the Section I.
- Employer keeps form. The employer does not file Form I-9 with the Immigration Service.

These documents should be kept for 3 yr or until 1 yr after the employee is terminated, whichever is later.

There is a controversy over whether or not to photocopy the documents presented. This is a decision which each employer must make. In making the decision, the employer must consider a number of factors. First,

these documents can only be used for the I-9 and cannot be used for any other purpose, including numbers and addresses for employee compensation. Second, there is no requirement that the documents be copied. Failure to copy will not subject the employer to any sanction. Third, having copies of the documents cannot help or augment an employer's defense.

Making copies does have its risks. First, all employees must be treated the same. Having copies of some, but not all, employees can be the basis of an illegal discrimination claim. Second, facially the documents may not, in good faith, be what they purport to be. Having copies will provide authorities documents to challenge the employer's good faith. Third, having some documents, but not all, could be interpreted to mean the employer did not really have the documents in hand at any time for those it does not have copies. Fourth, the documents can be used as prosecution of the employers' employees and provide grounds for warrants and further investigation. In summary, there is neither necessity nor benefit to have copies, but plenty of risk.

The Form I-9s can be stored electronically. Whether electronically or physically, the I-9s and a list of employees should be kept in one file folder and not among all of the employees' files or records individually.

The Form I-9 is available in Spanish at the ICE website. Only employers in Puerto Rico can use the form. However, it may be useful to provide the Spanish version to employees to see what they are filling out.

DOCUMENTS TO BE USED

A would-be employee must provide documents that establish identity and eligibility. The Department of Homeland Security (**DHS**) has provided three lists (List A, B, and C) of proper documents. List A includes documents that provide both identity and eligibility. These are US Passport (expired or not), Alien Registration Receipt Card or Permanent Resident Card (Form I-551), unexpired foreign passport with temporary I-551 stamp, unexpired Employment Authorization Document issued by United States Citizenship and Immigration Services (**USCIS**, formerly INS) containing photograph, or unexpired foreign passport with Form I-94. If a worker provides one of those documents, then all requirements of the Employee under I-9 are satisfied.

If the employee does not have a document from List A, then he must provide two documents–one from each of List B and List C. List B is an identity only document and includes driver's license or ID with photograph or with name, date of birth (**DOB**), sex, height, color of eyes, and address; a school ID with photo; a voter's registration card; US military card or draft record; military dependent's ID card; U.S. Coast Guard Merchant Mariner card; a Native American tribal document; or a Canadian driver's license. A driver's license issued by any governmental identity from Mexico is not valid under List B.

Employment authorization only documents (List C) include Social Security card without "not valid for employment purposes" statement; Certification of Birth Abroad; original or certified birth certificate; Native American tribal document; US Citizen's ID Card; Resident Citizen ID

Card; or unexpired employment authorization document by DHS.[9]

If the individual cannot provide the required documents because they were damaged, destroyed, or stolen; then the individual can still comply by providing a receipt that shows replacement documents have been requested and, within 90 days, supplying the replacement document.

Minors and handicapped individuals must supply the same documents; but their application can be signed by their power of attorney, parent, or guardian.

CHANGES IN THE "NO MATCH" RULES

There are cases of constructive notice which can remove the employer from the "safe harbor" provisions. These include "No Match Letters", which inform the employer that the documents submitted are not true documents. From Social Security Administration (**SSA**) employers may receive "Employer Correction Request" in matching annual W-2 reports with the database. Or from the DHS – ("Notice of Suspect Documents") which will come after an ICE audit of the employer's I-9 records.

If the "No Match Letter" is due to clerical error, within 30 days the employer should make sure that its records are correct and there are no typographical, transcription, or clerical errors. If there are clerical errors they should be corrected, an amended W-4 transmitted to SSA, and the corrected numbers reported to SSA or DHS as the case may be. Verification of SSA numbers can be done electronically through E-Verify.

If the "No Match Letter" is due to employee error, within 30 days verify with employee that the information employer has agrees with employee. If it does not, then correct the errors, file the amended transmittal of W-4, verify they are correct, and report to the SSA or DHS.

If the discrepancy is not resolved within 93 days of receipt of the letter, then the employee must file a new I-9 and the employer comply with the I-9 rules. The employee cannot use any document with the number being challenged and identification must be by photograph.

Homeland Security issued a rule intended to strengthen the obligation of employers to recheck those documents presented in support of authorization. These regulations would mandate conduct in response to the "No Match" rules. In response a lawsuit was filed seeking injunctive relief against enforcement.[10] The court issued a preliminary injunction and set a date for a hearing on a permanent injunction. Rather than appeal the decision, the government agreed to an extended injunction as it considers rewriting the rules and upgrading the SSA system to insure accuracy of the name and social security number (**SSN**) matches.

STATE ENFORCEMENT OF CRIMINAL AND CIVIL IMMIGRATION LAWS

In the past states have had the ability and often aided in the enforcement of criminal laws regarding alien employment. In the absence of Federal efforts and as populist opposition to foreign workers grows, more

[9] 8 C.F.R. 274a.2

[10] AFL-CIO v. Chertoff American Federation of Labor v. Chertoff, 2007 WL 2972952 (ND Cal. 2007).

and more states are becoming involved in civil enforcement. The most recent of these are Arizona's "Legal Arizona Workers Act"[11] and Oklahoma's "Oklahoma Taxpayer and Citizen Protection Act of 2007"[12].

Under the Arizona statute, which took effect at the beginning of 2008, all employers are required to participate in the basic pilot program offered by DHS.[13] Under this program, employers register with DHS and enter into an agreement; whereby, they will pre-screen all employees for compliance with worker authorization. In simple terms, through use of the internet, employers can enter names and social security or employment authorization numbers and have these verified in real time. With verification, the employee is authorized, otherwise not. All employees must be subject to E-Verify. Complaints that the database behind the E-Verify program is subject to gross error is the basis of the injunction pending against the Federal rules for "No Match Letters."

Although the Arizona act does require participation in the Federal basic pilot program, there appears to be no penalty for failure to do so. As an affirmative rebuttable presumption that an employer did not intentionally employ an unauthorized alien, an employer may raise the defense available under the Federal statute that good faith compliance with the I-9 program is an affirmative defense.[14]

In Arizona if a business is found to have intentionally hired an illegal alien, then among other things its right to continue as a business can be suspended for up to 10 days. The implications of this are enormous. Anyone can report suspicions to law enforcement officers and upon receipt of such a complaint, the agency is required to investigate.[15] In substance the Arizona statute appears to have created an obligation on the state enforcement agencies to enforce civil compliance with immigration laws and, where the law has been violated, exact state punishment as well. The psychological effect may be much greater, as shown by reports of businesses shutting down and aliens fleeing the state in anticipation of the law.[16] The law is being challenged in the courts.[17] The court in Arizona recently dismissed the challenge on narrow grounds and it is now pending in the Court of Appeals in San Francisco.

The Oklahoma statute goes beyond the Arizona act. In addition to employment related actions, it prohibits the transporting or harboring of aliens or "reckless disregard" of such fact. Punishment is no less than 1 yr imprisonment and $1000 fine.[18] Because these are not "employment actions" there is no "safe harbor". An employer, otherwise immune from prosecution for hiring an unauthorized alien, could be guilty of transporting or harboring them if they provide transportation of any kind or housing.

State agencies in Oklahoma are prohibited from providing identification cards to unauthorized aliens.[19]

[11] Arizona Laws 2007, Ch. 279, AZ St. §§23-211 to 23-214

[12] Oklahoma Sess. Law Serv. Ch. 112 (H.B. 1804)

[13] AZ St §23-214

[14] AZ ST §23-212(I)

[15] AZ ST §23-212(B) & (C)

[16] Blog Entry: Arizona Illegal Alien Employment Law Having an Impact, http://bordersense.com/blog_details.asp?blogid=55 (January 7, 2008)

[17] *Arizona Contractors Assoc., Inc., et al. v. Candelaria, et al.* ("Arizona Contractors II") [cite]

[18] OK ST T. 21 §446

[19] OK ST T. 21 §1550.42

As relevant to dairy farmers, Oklahoma requires that employers participate in the E-Verify program beginning July 1, 2008 to verify employment. [20] The punishment is that any employer who has hired an unauthorized alien cannot discharge any employee to do so means the employee has been improperly discharged.[21] The presumption is that the reason for the discharge is because the employer has hired an unauthorized employee.

FORTHCOMING LEGISLATION

In the midst of this stalemate, Congress has before it the "Agricultural Job Opportunity, Benefits, and Security (**AgJOBS**) Act." This would be a pilot program allowing those who have worked in agriculture for 3 to 5 yr to get green cards and ultimately citizenship. The key is to permit them to work here for you. Although it still has strong support in the Senate, given the current political atmosphere and tendency by presidential candidates of both parties to use immigration as a tool to election, it is not likely that it will be passed.

The reality is that Congress needs to hear from you and what you need to maintain economic vitality today.

It is expected that the agency will continue to find ways to reduce the availability of the safe harbor now used by employers. In addition to the "No Match" letters, DHS has indicated it will continue to find ways to find that current practices constitute "recklessness" and thus void the safe harbor.

As the government succeeds in making the SSA name and number matching program effective, employers on a national level will be required to use E-Verify. Under E-Verify employers are required to verify either the SSN or the work authorization number before employment. At the same time the "No-Match" rules will be fully implemented regarding existing employees.

The states will continue to expand their role in enforcing immigration laws, not only criminally, but civilly.

CONCLUSION: WHAT'S A DAIRYMAN TO DO?

Actively participate in the legislative reforms.

For the time being, dairy farmers need to follow the safe harbor provisions carefully. This will provide them protection from hiring unauthorized aliens, but will not protect them from the loss of staff who are not authorized. Nor will it provide employers with a sufficient supply of workers to meet the skilled needs of modern dairy farming.

Employers cannot totally rely on the procedures of I-9, but when they receive "No Match" letters they must correctly and timely respond. If actual notice of illegal alien status is learned, then an employer must terminate the employee.

Due to the risk both as an employer and as to loss of employees, do not talk about the status of your employees to others. Loose lips can sink ships.

USEFUL RESOURCES

Copy of I-9 Form and instructions http://www.uscis.gov/files/nativedocuments/m-274.pdf

[20] OK ST. T. 21 §1313
[21] Ibid.

National Farm Worker Ministry

- an interfaith organization supporting farm workers as they organize for justice
- member organizations include nearly 40 national, state and local religious bodies

http://www.nfwm.org/campaigns/agjobs.shtml

You can get a copy of AgJOBS by going to www.thomas.gov and searching for S. 340 or H.R. 371

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