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## 2003 Handbook of Employment Regulations Affecting Florida Farm Employers and Workers: Immigration Reform Programs [Federal]<sup>1</sup>

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### Purpose

A national policy on immigration is established which requires that all employers hire only those persons legally entitled to work in the United States.

### Who Must Comply

There are no small employer or agricultural employer exemptions. All employers, including employers of permanent, year-round workers, as well as seasonal workers, are subject to civil and criminal penalties for violation of federal immigration policies.

### Immigration Reform and Control Act (IRCA) of 1986

- IRCA makes it unlawful for an employer to hire, recruit, or refer for a fee two types of persons. First is an alien the employer knew (or should have known) was unauthorized to work in the United States. Second is any individual for whom the employer has not completed and retained an employment authorization form (Form I-9).
- IRCA prohibits employers from continuing to employ aliens found to be unauthorized after they were hired.

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- IRCA imposes record-keeping requirements for verification of the identity and employment eligibility of every employee. If an employer ignores this responsibility and knowingly hires workers not authorized to work in the United States, he or she is subject to a range of fines and possible criminal penalties.
- The definition of knowingly hiring has been expanded under IRCA to hold liable an employer for hiring undocumented aliens if it can be proven that the employer should have known an individual was unauthorized (i.e., constructive knowledge).
- IRCA contains strict prohibitions on discriminating against any individual based on national origin or citizenship status.

### **Employers Must**

- Have employees and prospective employees complete their part of Form I-9 when they start to work. Employers must then check the form for completeness.
- Inspect the employee's documents establishing the employee's identity and eligibility to work, noting the employee's document ID number and expiration date.
- Properly complete the employer's part of Form I-9. This must be completed within three business days or at the time of hire if employment is for less than three days.
- Retain Form I-9 for at least three years or one year after the employee leaves, whichever is longer.
- Present Form I-9 for inspection when requested by an INS, DOL or OSC officer. Inspection officers are required to give at least three days advance notice before an inspection.

### **Exceptions to Form I-9 Requirements**

There are limited exceptions to the Form I-9 record-keeping requirements. I-9 forms do not need to

be completed for household employees who work on an intermittent basis.

I-9 forms are not required for persons provided by a contractor providing contract services (such as employee leasing). I-9 forms do not need to be completed for independent contractors or their employees.

You may rely on a state employment service to complete I-9 forms for persons referred by the state employment agency if the agency performs that service. (The Florida Jobs and Benefits Center will complete and retain the I-9 form only if requested to do so by the individual employer.)

However, employers have, in some cases, found that workers referred by state agencies were actually illegal. The fact that a worker was referred by the Jobs and Benefit Center office does not necessarily relieve an employer of liability under IRCA for hiring an illegal alien, although using this office does relieve much of the liabilities.

If an employer relies on a state employment service (SES) for I-9 services, certification must be retained by the employer in the same manner as an I-9 form and presented for inspection if requested. Using an SES I-9 service relieves an employer from liability for knowingly hiring an illegal alien.

Some grower organizations have set-up I-9 offices to serve as agents for their members in completing and retaining I-9 forms. Generally, the worker is issued a picture ID card that he or she presents to the member employer when hired. It should be noted that the employer is still responsible for compliance and may be liable for violations of the law if the I-9 office errs.

### **Enforcement**

IRCA charges the INS with primary enforcement of the law. However, INS has entered into an agreement with the United States Department of Labor (DOL) which is authorized to inspect I-9 record keeping. Most IRCA compliance / I-9 inspections take place during regular DOL wage/hour inspections. If DOL suspects the employer of knowingly hiring illegal aliens, inspectors will alert

the INS. Agencies must give employers three days' notice of IRCA inspections. Note: In 1996, DOL's budget was increased substantially for these inspections.

IRCA sharply limited the INS's ability to conduct open field searches. The INS is currently required to obtain a search warrant to enter farms, orchards, groves, ranch lands, or other open agricultural properties without the owner's consent. This restriction does not apply within twenty-five miles of the United States border or in cases of hot pursuit.

Civil money penalties and criminal penalties may be levied against employers for failure to comply with IRCA. These include:

- **Hiring, recruitment, and referral violations:** Employers will be subject to a cease-and-desist order and fined according to the following scale:
  - \$250 - \$2,000 for each alien for the first offense.
  - \$2,000 - \$5,000 for each alien for the second offense.
  - \$3,000 - \$5,000 for each alien for the third and subsequent offenses.
- **Record keeping / I-9 verification violations:** Employers will be subject to a cease-and-desist order and fined according to the following scale:
  - \$100 - \$1,000 for each individual, regardless of whether or not the person is illegally employed.
- **Bonding violations:** If it is found that an employer required employees to post bonds against liability for employer sanctions, the fines are \$1,000 for each employee.
- **Document fraud:** Any individual who has knowingly engaged in or used, accepted, or received any forged or counterfeited documents is subject to fines ranging from \$250 to \$5,000 for each instance of use, acceptance or creation of a document.

In cases that can establish a pattern and practice of violating IRCA's hiring and referral provisions, fines are \$3,000 per illegal alien plus up to six months in prison.

## Discrimination

Employers of four or more employees may not discriminate against any person (other than an unauthorized alien) in hiring, discharging, recruiting, or referring for a fee because of national origin or citizenship status. Because Title VII of the Civil Rights Act of 1964 is in effect for employers of fifteen or more employees, discrimination complaints involving national origin will be reported as follows: (1) one to three employees, not covered; (2) four to fourteen employees, to the Office of Special Counsel, Department of Justice, and (3) fifteen or more employees, to the Equal Employment Opportunity Commission. (For Florida deferral agencies, see EDIS document FE393, *Civil Rights and Antidiscrimination [Federal]*.) Discrimination complaints involving citizenship status against employers of four or more employees will be filed with the Department of Justice.

## Recruiters and Referrers for a Fee

Recruiters/referrers for a fee should complete a Form I-9 for any person they refer who is hired by an employer. The Form I-9 should be completed within three business days of hiring.

The recruiters or referrers may designate agents to complete the verification process on their behalf, but they are still responsible for obtaining and filing a copy of the Form I-9, and are still responsible and liable for compliance with the law. Recruiters and referrers must retain the Form I-9 for three years after the date the referred individual was hired by the employer.

## Independent Contractors

Employers can be held liable for the actions of an independent contractor if an unauthorized alien is hired and the user of the independent contractor has actual knowledge of the lack of work authorization. Independent contractor is redefined as follows: "The term independent contractor includes individuals or

entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results."

Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls himself/herself/itself, will be determined on a case-by-case basis.

### **Three Pilot Employment Eligibility Verification Programs**

The 1996 Illegal Immigration Reform law permits a limited number of employers to contact INS to verify an employee's immigration status. This law established three four-year pilot programs, which are voluntary on the part of the employers. However, employers, in pilot states, who violate employer sanctions are required to participate in the pilot programs.

The first pilot program, the Basic pilot program, requires participating employers to seek INS confirmation of a new employee's employment eligibility within three days of hiring, by way of a toll-free telephone number or some other electronic medium. The INS is then supposed to confirm within three working days whether or not the employee under inquiry is eligible for employment.

If the inquiry comes back as tentative non-confirmation, the applicant has ten days to contest the decision. However, the employer may terminate the employee for other lawful reasons. If the employee contests the non-confirmation, the employer may not terminate the employment during this time period. If the employee does not contest a tentative non-confirmation within ten working days, the employer is free to fire the employee.

The second pilot program, the Citizenship Attestation pilot program, follows the same concept as the Basic program, except participating employers will not have to seek any documents from workers claiming to be United States citizens. Employers can only participate in this pilot program with the permission of the Attorney General. This program is also limited to 1,000 employers.

The third pilot program, the Machine-Readable Document pilot program, operates like the Basic pilot program. However, if a new employee presents a driver's license or other state-issued identification document that includes a machine-readable social security number, the employer will be required to scan the document through a machine-readable confirmation device.

Employers participating in the pilot programs are shielded from civil and criminal liability for actions taken in good faith reliance on the information provided through the confirmation system.

### **Correction of I-9 Forms**

The 1996 law provides that an employer, who, in good faith, makes a technical or procedural error in completing the I-9 form, will have an opportunity to correct the error without penalty.

The only employers not allowed to utilize this good faith defense are those who fail to correct their non-compliance within ten working days of receiving an explanation from INS that the agency found them out of compliance, or employers who engage in a pattern and practice of violations.

### **Reduction in Number of I-9 Documents**

The 1996 law generally reduces the number of documents that can be used to establish an individual's employment authorization and/or identify for I-9 purposes. However, as of June 1997, INS has not yet decided which documents may be used.

Under the new Act, the following can be used by employees to establish both employment authorization and identity:

- United States Passport.
- Resident Alien Card.
- Other documents designated by Attorney General (unexpired foreign passport or visa).

To establish employment authorization, individuals may present the following:

- Social Security card.
- Other documents acceptable to Attorney General.

### **Unfair Immigration-Related Employment Procedures**

Under the 1996 law, an employer's request for more or different documents than are required to confirm an employee's identity and authorization to work or an employer's refusal to honor documents that reasonably appear to be genuine will only be considered document abuse if made for the purpose, or with the intent, of unlawfully discriminating against the employee on the basis of citizenship status or national origin.

### **Unauthorized Use of Social Security Numbers**

With the 1996 law, the Commissioner of Social Security is required to inform INS of aliens who have a social security number when they are not authorized to work. The purpose of this requirement is to assist INS in building a database of employers who are employing illegal aliens.

### **Expansion of Document Fraud**

The 1996 Act substantially increases the criminal penalties for fraudulent use of government documents. Thus, putting false information on an I-9 form may now constitute document fraud.

### **Additional Information**

- Handbook for Employers: Instructions for Completing Form I-9, U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., November 1991.
- Labor Bulletin No. 444, Florida Fruit and Vegetable Association, Orlando, FL, November 7, 1986.
- Labor Bulletin No. 448, Florida Fruit and Vegetable Association, Orlando, FL, April 3, 1987.

- Labor Bulletin No. 463, Florida Fruit and Vegetable Association, Orlando, FL, November 15, 1988.
- Labor Relations Bulletin No. 512, Florida Fruit and Vegetable Association, Orlando, FL, October 31, 1996.
- Labor Relations Bulletin No. 531, Florida Fruit and Vegetable Association, Orlando, FL, March 4, 1999.
- Labor Relations Bulletin No. 537, Florida Fruit and Vegetable Association, Orlando, FL, November 16, 1999.
- Labor Relations Bulletin No. 548, Florida Fruit and Vegetable Association, Orlando, FL, April 18, 2001.
- Labor Relations Bulletin No. 549, Florida Fruit and Vegetable Association, Orlando, FL, June 22, 2001.
- Labor Relations Bulletin No. 555, Florida Fruit and Vegetable Association, Orlando, FL, May 10, 2002.

### **Responsible Agency**

U.S. Department of Justice

Immigration and Naturalization Service

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Washington, D.C. 20536

1(800) 375-5283

<http://www.ins.usdoj.gov/graphics.index.htm>

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