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FE406

EXTENSION

Institute of Food and Agricultural Sciences

2003 Handbook of Employment Regulations Affecting Florida Farm Employers and Workers: Migrant and Seasonal Agricultural Worker Protection Act (MSPA) [Federal]¹

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Purpose

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) establishes federal standards specific to farmworkers. (No other U.S. industry has a labor standard that applies solely to its workforce.)

The original intent behind MSPA was to ensure that migrant and seasonal workers received information and standards on pay rates and deductions, working conditions, insured transportation, and employment activities.

Who Must Comply

MSPA applies to any agricultural employer:

- Who owns or operates a farm, ranch, processing facility, cannery, gin, packing shed, or nursery.
- Who produces or conditions seed.
- Who recruits, selects, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker, unless otherwise exempt.

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Definitions

- *Migrant Agricultural Worker.* Is a person who is in agricultural employment of a seasonal or other temporary nature and who is absent overnight from his or her permanent place of residence.
- *Seasonal Worker.* Is a person who is similarly employed but does not have to be away from his or her permanent residence overnight.
- *Agricultural Employers / Agricultural Associations.* Are not required to register as farm labor contractors.
- *Farm Labor Contractors.* Must be registered before any solicitation or recruitment of workers or any other covered activity. Also, any of his or her employees engaged in labor contracting activities must be registered. Registration must include *all* expected farm labor contracting activities.
- *Agricultural Employment.* While tractor drivers are not covered under MSPA, tractor drivers who also do field work such as manually pruning fruit trees during the summer are covered.
- *Joint Employment.* The Wage and Hour Division of the U.S. Department of Labor amended its definition of joint employment on March 12, 1997, as follows:

“The definition of the term *employ* includes the joint *employment* principles applicable under the Fair Labor Standards Act. The term *joint employment* means a condition in which a single individual is regarded under law as an employee of two or more persons at the same time.”

A determination of whether the employment is to be considered joint employment depends on all the facts in that particular case.

If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist. When employers share responsibility for activities set out in the following factors or in other relevant facts, this is

an indication that these employers are not completely disassociated with respect to the employment and that the agricultural worker may be economically dependent on both persons.

If it is determined that a farm labor contractor is an independent contractor, it still must be determined whether or not the employees of the farm labor contractor are also jointly employed by the agricultural employer/association. Joint employment under the Fair Labor Standard Act is joint employment under MSPA.

In determining whether or not an employment relationship exists between the agricultural employer/association and the agricultural worker, the ultimate question to be determined is the economic reality of whether the worker is so economically dependent upon the agricultural employer/association as to be considered his/her/its employee.

Factors to be considered in determining whether or not an employment relationship exists include:

- Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor, to direct, control or supervise the worker(s) or the work performed.
- Whether the agricultural employer/association has the power, alone or in addition to another employer/association, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or methods of wage payment for the worker(s).
- The degree of permanency and duration of the relationship of the parties in the context of the agricultural activity at issue.
- The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training.
- Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association.

- Whether the work is performed on the premises of the agricultural employer/association, rather than on premises owned or controlled by another business entity.
- Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing/making payroll records; preparing/issuing pay checks; paying FICA taxes; providing Workers' Compensation insurance; providing field sanitation facilities, housing, or transportation; or providing tools and equipment or materials required for the job.

Disclosure Requirements

MSPA requires employers to disclose a variety of employment terms and conditions to migrant and seasonal workers. The disclosure burden is greater for employers with migrant workers. All disclosures must be in English, Spanish, or another language understood by the workers. The United States Department of Labor (DOL) has disclosure forms available in English, Spanish, and Haitian Creole. Farm labor contractors must also provide a written disclosure statement to workers, regardless of the type of worker.

Among the requirements:

- Migrant workers must be provided with written disclosure of the terms and conditions of employment at the time of recruitment.
- Written disclosure must be provided to seasonal workers upon request.
- Day-haul seasonal workers in the canning, packing, ginning, or seed conditioning industries must receive written disclosure of terms and conditions of employment at the place and time of recruitment.

Farm labor contractors, agricultural employers, and agricultural associations are all subject to MSPA's disclosure requirements. Using DOL Form WH-516 is recommended.

Disclosure must cover these items:

- Place of employment.
- Wage rates (including piece rates) to be paid.
- Crops and kinds of work.
- Period of employment.
- Transportation, housing, and any other benefits provided (plus cost to the worker).
- Whether Workers' Compensation and unemployment insurance are provided.
- Whether a strike or work stoppage is in progress.
- Any commission (kickback) arrangement between the employer and any local merchant selling to employees.

Following Congressional action with the *Adams Fruit Bill* in 1996, disclosure requirements pertaining to Workers' Compensation were substantially expanded. Growers must disclose whether Workers' Compensation is provided and, if so, the name of the Workers' Compensation insurance carrier, the name of the policy holder, the name and telephone number of each person who must be notified of an injury or death, and the time period within which the notice must be given. Optional Form WH-516 has been revised accordingly.

The Workers' Compensation disclosure requirement can alternatively be met by the employer providing the worker with a photocopy of any notice regarding Workers' Compensation insurance required by state law.

When properly used, the disclosure form can be a useful tool for employers in hiring/replacing workers. Generally, stating on the disclosure form that no guarantees exist as to the length of employment (season) and employment activities and practices protects the employer from breach of contract claims.

Note: The MSPA regulations prescribe fines and penalties for false or misleading statements (29 C.F.R. 500.77). An employer who promised one rate of pay in the WH-516, but pays another, lower rate may be assessed penalties not only for showing a false

rate of pay, but may also be assessed back wages for the difference in the two rates. The same occurs for deductions. An employer who does not list specific deductions from pay for items such as picking sacks or transportation costs will be penalized for not disclosing this information and will be required to refund the deductions.

Exemptions

The two major MSPA exemptions are the family farm and small business exemptions. A farm operator must meet only one of the two tests, not both. If he or she meets the test for a family business, even though he or she hires over 500 man-days of labor, he or she is exempt from MSPA. (A man-day is any day in which one nonfamily worker works one hour.)

Under the family business exemption, a person who engages in a farm labor contracting activity on behalf of a farm that is owned or operated exclusively by that person or by an immediate family member is exempt from MSPA.

Immediate family members include spouses, children, stepchildren, parents, stepparents, brothers, and sisters. The exemption does not apply if anyone other than those people engages in MSPA activities (recruiting, soliciting, hiring, employing, furnishing, or transporting), even if it is at the direction of an immediate family member.

Note: The DOL contends that a referral from the Jobs and Benefits Center breaches the family exemption.

The family business exemption also does not apply if a licensed or unlicensed farm labor contractor is used at any time during the year.

The small business exemption exempts from MSPA coverage agricultural employers who did not use more than 500 man-days of agricultural labor during any calendar quarter of the previous year. All labor performed on the farm, whether seasonal or full-time, counts toward calculation of the 500 man-day test.

In a joint employment relationship, the man-days worked are counted toward each employer for purposes of the man-day test.

Other MSPA exemptions include:

- *Local short-term contractors.* A person engaging in farm labor contracting activities solely within a 25-mile intrastate radius of his or her permanent place of residence for thirteen or fewer weeks per year is exempt from MSPA. If this person uses U.S. mail; a telephone; or advertising to recruit, solicit, hire, or furnish workers from outside the twenty-five miles or across a state line, the exemption does not apply. If the person exceeds the limit of weeks in a calendar year, he or she immediately loses the exemption and is subject to MSPA the following year.
- *Specific industry exemptions.* These include some custom combine operations, hay harvesting, sheep shearing, custom poultry operations, seed production operations, and shade-grown tobacco.
- *Local packinghouse workers.* Packing house and grading shed workers who do no field work and who return to their permanent home or residence each night are not covered under MSPA so long as they are not day-haul workers. The first day a worker is transported and hired in this manner makes him or her a day-haul seasonal worker and, therefore, subject to MSPA requirements.

Posting Requirements

The yellow MSPA poster (DOL Form 1376) must be posted in a conspicuous place where migrant and seasonal workers are employed. This poster outlines workers' rights and protections. In joint employment situations, both parties are equally responsible for displaying the poster. The poster should be secured so it cannot easily be removed.

Where there might be a language problem, DOL Form WH-516, the yellow MSPA poster (Form 1376), and Form WH-521 (housing) must be in a language spoken by the workers. The DOL's Wage and Hour Division also has Form WH-501 (wages and payroll available in Spanish), but it is an optional form.

Farm Labor Contractors

Farm labor contractors (FLC) must be registered for all activities in which they will be engaged before being engaged in those activities. This includes registration for license to hire and employ, as well as housing, transportation, and driving authorization.

The FLC's license should indicate all activities likely to be performed and all housing and vehicles authorized to use. Employees of FLCs engaged in such activities must be licensed as well.

FLCs and their registered employees must carry their certificates of registration at all times and upon request exhibit the certificates.

FLCs must seek to amend their certificates of registration each time changes occur in address, vehicles, and/or housing to be used.

Copies of all payroll records of FLCs must be provided to the grower, processor, or packer for each place of employment.

A licensed employee of an FLC may have what is known as an "E" certificate. This type of license means that the individual may only work on behalf of the FLC shown on his or her license. The individual with an "E" certificate may not work for, or represent any other FLC, nor work as an FLC in his or her own right.

Anyone using an FLC who will be transporting should closely check that all transportation vehicles to be used are listed on the license. The transportation authorization also has its own expiration date and it is usually different from that of the license itself. Most FLCs meet the insurance requirements for transportation authorization by having Workers' Compensation. The name of the policy holder is on the bottom of the FLC's federal license. The contractor and Workers' Compensation holder should be in the same name, unless the grower using the FLC will provide the Workers' Compensation coverage. In that case, the name of the growers as well as the Workers' Compensation holder will be on the federal license.

If the FLC is providing housing, the name of the facility and location will be indicated on the FLC federal license.

Wage and Payroll Records

Employees must be given complete wage statements when paid (no less than semi-monthly).

FLCs and/or agricultural employers must produce for each employee specific information (Form WH-501). The following information must be made, kept, and preserved for three years:

- Basis on which wages are paid (piece work or hourly).
- Number of piece-work units earned (if paid on piece rate).
- Number of hours worked.
- Total pay period earnings.
- Specific sums withheld and purpose for each sum withheld.
- Net pay.
- Employee's name.
- Employee's permanent address.
- Employee's social security number.
- Employer's name.
- Employer's address.
- Employer's IRS identification number.

Housing Safety and Health Standards

- Housing requirements apply only to migrant agricultural workers.
- Each person who owns or controls a facility or real property used as housing for migrant agricultural workers must ensure that the facility or real property complies with all substantive Federal and State safety and health standards applicable to such housing. Thus, an inspection certificate is required. The joint employment

(responsibility) concept applies when more than one person is involved in providing housing for migrant agricultural workers.

- Substantive Federal Standards are provided by the Employment and Training Administration (ETA) and the Occupational Safety and Health Administration (OSHA). (See EDIS document FE404, *Migrant Farm Labor Camps [Federal]*.)
- Substantive State of Florida standards are in Chapter 381: Public Health, Florida Statutes, and Florida Administrative Code. (See EDIS document FE405, *Migrant Labor Housing [State]*.)
- Housing must be certified by state or local health authorities or other appropriate agency that the housing meets applicable safety and health standards. A copy of the certificate of occupancy must be posted at the housing site and the certificate must be retained for three years.
- Each farm labor contractor, agricultural employer, or agricultural association providing housing for any migrant agricultural worker must post in a conspicuous place at the housing site for the entire period of occupancy or present a written statement to the worker at the time of recruitment the following information on the terms and conditions of occupancy (WH-521):
 - Name and address of the employer(s) providing the housing.
 - Name and address of person(s) in charge of the housing.
 - Mailing address and phone number where occupants can be reached.
 - Who may live in the housing.
 - The charge (rent) to be made for the housing.
 - Meals to be provided and the cost to workers.
 - Charges for utilities.

- Any other charges or conditions of occupancy.

- *Exemptions to Housing Standards.* MSPA housing standards do not apply to any person who, in the ordinary course of business, regularly provides housing to the general public and who provides housing to any migrant agricultural worker on the same or comparable terms and conditions.
- *Special Notes.* Persons providing housing subject to this Act should develop and implement procedures to make certain compliance is maintained in the housing. Growers face increased risk of negligence claims for accidents arising at housing they provide. Even if there is Workers' Compensation applicability and coverage in connection with a labor camp injury, the worker may nevertheless seek statutory damages for MSPA violations.

Driver, Vehicle, and Insurance Requirements

These regulations apply to farm labor contractors and growers who provide transportation of any migrant or seasonal agricultural worker. These regulations do not cover tractors, harvesting, or similar equipment while the equipment is engaged in planting, cultivating, or harvesting.

Car Pooling. New DOL regulations (May 1996) explain how car-pooling situations are treated where neither the grower nor FLC has anything whatsoever to do with arrangements between individual workers and an unregistered person who uses his or her own vehicle to transport workers:

- To be exempt from MSPA-covered transportation arrangements, car-pooling must be on a voluntary basis. If growers help to organize car pools, they likely will lose their exempt status. The workers themselves must pay the driver any cost reimbursement amount they work out. It is permissible, however, for a grower to provide workers a travel advance to cover travel to the worksite without creating MSPA coverage.

- If the driver in a voluntary car-pool situation is to avoid becoming a farm labor contractor within the meaning of MSPA, he or she must collect from his or her fellow workers no more than an amount which reasonably reflects the actual costs of shared transportation.

Vehicle Standards. Transportation standards apply whether on the farm or on the road. DOL has standards in effect that cover passenger automobiles, station wagons, and the cabs of pick-ups regardless of the distance they travel in connection with transportation of migrant or seasonal workers and regardless of the type of workers carried. These regulations apply also to other vehicles if the round-trip distance over which migrant or seasonal workers are transported is less than seventy-five miles and if the vehicle is not used for a day-haul operation.

Vehicles used for day-haul and vehicles used or intended to be used for transportation of migrant or seasonal agricultural workers for a round-trip distance greater than seventy-five miles must meet the regulations issued by the Interstate Commerce Commission. These include driver qualification and driving standards, as well as vehicle standards.

Qualification of Drivers

- Every driver and everyone responsible for hiring, supervising, training, assigning, and dispatching drivers must comply with and be conversant with the requirements applicable to drivers.
- Drivers must meet DOT physical requirements and have obtained a medical examination of such compliance and certification within the immediately preceding 36-month period [Form WH-515]. Copies must be maintained. The driver must carry proof of certification with him or her when driving. The employer must maintain a copy of his or her principal place of business.
- Drivers must be at least twenty-one years of age, with at least one year of driving experience.

- Drivers must be able to read and speak English sufficiently to understand traffic signals in English and to respond to official inquiries.
- Drivers must possess a valid permit qualifying the driver to operate the type of vehicle driven by him or her.

Driving of Motor Vehicles

- Drivers must be instructed to and must in fact drive in accordance with the law and regulations as well as be conversant with the requirements of the regulations.
- Drivers may not drive under the influence of alcoholic beverages nor, regardless of alcoholic content, drink any such beverage or liquor while on duty.
- No person shall permit or require operation of vehicles between such points in such a period of time so as to allow or necessitate operation of vehicle in excess of applicable speed limits.
- Drivers may not operate any vehicle until they have satisfied themselves that prescribed parts, accessories, and emergency devices are in good working order.
- Drivers may not operate vehicles loaded so heavily or so improperly distributed or inadequately secured as to prevent safe operation of vehicles.
- Tailgates and doors must be securely in place during operation.
- No objects may obscure a driver's view or freedom of motion or prevent ready exit in emergency.
- Vehicles may not carry more passengers than seating capacity; passengers must remain seated.
- Every person shall provide for meal stops at intervals not to exceed six hours and for a period of not less than thirty minutes duration. There must be at least one rest stop between each meal stop.

- No person shall drive nor shall any person permit or require a driver to drive for more than ten hours in the aggregate (excluding rest stops and stops for meals) in any 24-hour consecutive period unless the driver has been afforded eight consecutive hours' rest immediately following the ten hours' aggregate driving.

Vehicle Use Restrictions. Vehicles transporting workers include only buses, trucks without trailers attached, and one semi-trailer attached to a truck tractor with no other trailer attached. Closed vans without windows or ventilation may not be used. Trucks must meet compartment requirements: fixed seats, ventilators, etc.:

- Any truck used for transporting workers over 600 miles must be stopped for a period not less than eight consecutive hours before or upon completion of 600 miles travel and any subsequent 600-mile intervals.
- Required lamps and reflectors cannot be obscured and must be operational.
- Drivers must take prescribed steps to avoid fuel ignition, including turning off engine to fuel vehicle and not smoking near vehicles being fueled. Drivers may not carry reserve fuel except in properly mounted fuel tanks.
- Except in an emergency, no driver shall permit any unauthorized person to drive his or her vehicle.
- Protection of passengers from weather must be provided.
- Driver must set parking brake and block wheels on leaving vehicle.
- Rear of vehicle should display "This vehicle stops at railroad crossing" signs and comply with all regulations pertaining to railroad crossings.

Note: Any driver operating a vehicle with sixteen or more passengers must have a Commercial Driver's License (CDL). (See EDIS document FE418, *Transportation - Motor Carrier Safety Regulations for Transporting Migrant Farm Workers [Federal]*.)

Also, DOT Physical Examination Form CO-730, valid for twenty-four months, is an acceptable substitute for Form WH-515.

Insurance and Liability Bond Requirements

Neither farm labor contractors nor agricultural employers may transport any migrant or seasonal agricultural worker nor his or her property in any vehicle unless they have insurance policies or liability bonds in effect at specified minimum levels based on seating capacity of each particular vehicle. Vehicle liability cannot be less than \$100,000 for each seat, but the total insurance is not required to be more than \$5,000,000, regardless of the seating capacity of the vehicle. Insurance requirements may be met by having Workers' Compensation insurance, a certificate of liability insurance in the seat-based required amount covering transportation of all passengers who are not employees and workers whose transportation is not covered by Workers' Compensation insurance, property damage insurance in the minimum amount of \$50,000 for the property of others, or a general liability policy for the same protection. Also, the grower should be insured, if possible, in the crew leader's insurance certificate. Under the 1996 Adams Fruit Bill, Workers' Compensation is defined as sole relief and workers may not seek additional damage claims against their employer.

Grower Obligations Regarding Registration

No grower or packer subject to the law may utilize a farm labor contractor's services to supply migrant or seasonal agricultural workers unless he or she first takes reasonable steps to determine that a contractor possesses a valid certificate of registration authorizing activities for which the contractor may be utilized. To check a labor contractor's status, telephone the Division of Professions of the Florida Department of Business and Professional Regulation in Tallahassee.

Where you know or would reasonably be expected to know that a labor contractor with whom you are dealing is providing housing or transportation

to his or her crew members, you must ascertain that he or she has transportation and housing registration certificates for the vehicles and housing he or she is using. Under the law, he or she must have a valid certificate before he or she engages in any covered activity. All paperwork should be complete before recruiting workers and certainly before crew members move into housing controlled by the crew leader or begin work.

Enforcement

Criminal Sanctions

- Any person who willfully and knowingly violates the Act or any regulation may be fined up to \$1,000 or sentenced to a prison term not to exceed one year, or both. For any subsequent conviction, the defendant may be fined up to \$10,000 or sentenced to a prison term not to exceed three years, or both.
- A Farm Labor Contractor working without a certificate may be fined up to \$10,000 or sentenced to up to three years in prison, or both.

U.S. Department of Labor Enforcement

- The U.S. Secretary of Labor may petition a Federal District Court for a temporary or permanent injunction if the Secretary determines that the Act has been violated.
- The U.S. Secretary of Labor may fine any person who commits a violation of the Act or regulations a penalty of up to \$1,000 for each violation after notice of penalty, opportunity for agency hearing, etc. Unless a hearing is requested within thirty days or otherwise pursuant to regulations, the U.S. Secretary of Labor's assessment is a final and unappealable order. However, if the hearing procedure is utilized, the person against whom a penalty has been ordered may obtain limited review by a Federal District Court by following applicable procedures.

Private Right of Action by Workers Represented by Legal Aid Attorney or Private Attorneys

Any person claiming violation of the Act or regulations by a farm labor contractor or agricultural employer or other person (including housing owner or person who controls housing) may file suit in Federal District Court. Upon a finding that the defendant violated the Act without bodily injury or death, each plaintiff may be awarded actual damages or statutory damages of up to \$500 per violation. If the MSPA violation caused death or bodily injury and there is Workers' Compensation coverage and applicability, the employee may recover under the Workers' Compensation law and sue for MSPA statutory damages and equitable relief. Statutory liability for most violations is \$500 per violation. However, in the amendments passed in 1995, Congress allowed the possibility of up to \$10,000 for certain violations of the transportation safety provisions of the Act.

Liability, in a class action not involving a \$10,000 statutory claim, limits Court awards to no more than the lesser of up to \$500 per plaintiff/violation, or up to \$500,000 damages or equitable relief. For violations where \$10,000 statutory penalties are available, multiple infractions of a single provision of the Act constitute only one violation for purposes of determining available statutory damages. A \$500,000 cap on class action damages applies in addition to Workers' Compensation remedies. Full judgment may be collected against any joint employer/defendant found liable.

Discrimination Prohibited

No one may intimidate, threaten, restrain, coerce, blacklist, discharge, or discriminate against any migrant or seasonal worker because he or she, with just cause, filed a complaint, testified about a complaint, or exercised any right or protection under MSPA. A worker who is so discriminated against may obtain back pay, damages, and other relief.

Additional Information

- Migrant and Seasonal Agricultural Worker Protection Act (Public Law 97-470) 29 U.S.C. 1801.
- Regulations, Part 500: Migrant and Seasonal Agricultural Worker Protection, WH Publication 1455 (Revised 12/94), U.S. Department of Labor, Wage and Hour Division.
- Labor Bulletin No. 416, Florida Fruit and Vegetable Association, Orlando, FL, May 15, 1983.
- Labor Bulletin No. 419, Florida Fruit and Vegetable Association, Orlando, FL, August 23, 1983.
- Labor Bulletin No. 501, Florida Fruit and Vegetable Association, Orlando, FL, November 17, 1994.
- Labor Relations Bulletin No. 507, Florida Fruit and Vegetable Association, Orlando, FL, November 30, 1995.
- Labor Relations Bulletin No. 509, Florida Fruit and Vegetable Association, Orlando, FL, May 31, 1996.
- Labor Relations Bulletin No. 511, Florida Fruit and Vegetable Association, Orlando, FL, September 12, 1996.
- Labor Relations Bulletin No. 557, Florida Fruit and Vegetable Association, Orlando, FL, July 16, 2002.
- The National Farmworker Jobs Program. Washington, D.C. <http://wdsc.doleta.gov/msfw>.

Responsible Agency

Florida Labor Contractor REGISTRATION is obtained from the local offices of the

Florida Department of Business and Professional Regulation

Division of Professions

Post Office Box 1698

Tallahassee, FL 32302-1698

(850) 488-3131

<http://fcn.state.fl.us/dbpr>

For local offices, see the telephone directory for

- Florida, State of
- Business and Professional Regulation, Department of
- Professions, Division of
- Florida, Jobs and Benefits Center

Farm Labor Contractor COMPLIANCE AND ENFORCEMENT is by the

U.S. Department of Labor

ESA Wage and Hour Regional Office

61 Forsyth Street, Room 6M12

Atlanta, GA 30303

(404) 562-2092

<http://www.doleta.gov/regions/reg03>

For local offices, see the telephone directory for

- U.S. Government
- Labor, Department of
- Wage and Hour Division

Farm Labor Specialists are located at the following offices:

<http://www.dol.gov/esa/contacts/whd/america2.htm#Florida>

3444 McCrory Place, Suite 155

Orlando, FL 32803-3712

(407) 648-6471

4905 West Laurel Avenue, Suite 300

Tampa, FL 33607

(813) 228-1242

10300 Sunset Drive, Room 255

Miami, FL 33173-3083

(305) 598-6607 [English]

(305) 598-7471 [Spanish]

3728 Phillips Highway, Suite 219

Jacksonville, FL 32207

(904) 232-2489