



NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS **ANALYSIS MEMORANDUM**

HOW DO YOU RESPOND WHEN THE DEPARTMENT OF HOMELAND SECURITY (DHS) SHOWS UP AT YOUR FARM, RANCH OR BUSINESS? April 26, 2006

by Monte B. Lake*

On April 19, 2006, DHS Secretary Michael Chertoff announced in a news conference the details of the DHS' Immigration and Customs Enforcement (ICE) division's multi-state raids on a company that produces pallets. Approximately 1,187 illegal workers were arrested, along with a number of the company's management personnel. At the same time, ICE announced a new interior enforcement strategy that includes: 1) a strategic shift to target employers knowingly and recklessly employing illegal aliens; 2) eliminating Social Security abuses that support illegal immigration; and 3) working with Congress to build employer compliance systems.

In the days following DHS's enforcement announcements, NCAE has received numerous calls from its members throughout the U.S. indicating that ICE agents have been actively detaining illegal aliens in the area or visiting agricultural operations seeking to arrest illegal aliens. NCAE members are asking for advice as to how employers can prepare for possible visits by ICE and what they should do if they are visited. To respond to these concerns, NCAE asked its Washington, D.C. legal counsel to update a summary of the practical and legal issues that agricultural employers should consider if they receive a visit from the DHS or another government agency regarding their compliance with immigration laws.¹ As a result, NCAE has provided this updated document that was prepared several years ago during the last period of extensive immigration enforcement activity.

This memorandum first examines some of the more general and practical issues that agricultural employers should consider if they are visited by DHS or DOL representatives with regard to compliance with federal immigration laws. After providing some practical tips, the memorandum provides guidance regarding the two most common circumstances wherein an employer will encounter the DHS. The first involves a routine employment eligibility verification (I-9 Form) audit. The second involves more serious and possible criminal investigations where a search warrant may have been acquired.

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¹ The following summary is intended to provide general guidance regarding investigations common to the agricultural workplace. The reader should recognize that every investigation has its own unique circumstances and if one is uncertain as to what his\her rights and responsibilities are, help from an expert or lawyer should be sought.

PRACTICAL CONSIDERATIONS FOR AGRICULTURAL EMPLOYERS PRIOR TO AN AUDIT OR SEARCH AND SEIZURE BY DHS

An inspection by DHS is not unlike an inspection by your doctor or auto mechanic. If you haven't practiced preventative maintenance by the time you have your visit, it is probably too late to avoid the bad news. Unlike the case of a vehicle that runs poorly or a body that does not feel well, where one can control the timing of his/her visit to the mechanic or doctor, one seldom can anticipate when the local DHS inspector is going to show up at your office or on your property. The following are some preventative steps that can be taken and should be considered before you receive the unexpected visit by DHS.

- Review your current employment practices and procedures. Do they comply with the law?
 - Periodically interview your staff to make sure that they are correctly carrying out your I-9 Form and employment eligibility verification policies and procedures.
- Review your record keeping policies and practices. Make sure that you are keeping the proper records for the proper periods of time as required by law. Complete and correctly filled out records are an employer's best defense. By the same token, incomplete and/or improperly completed forms (i.e., I-9 Form) can ensure liability.
 - Periodically perform a spot check on I-9 Forms and other employment documents to make sure they are being properly and consistently completed by responsible personnel.
- Designate a management representative who is authorized to meet and talk to DHS or DOL personnel when they visit your business.
 - Educate the designated representative about appropriate procedures, including when to call the owner and/or the company's attorney or labor consultant or association.
 - Make sure other employees and supervisors know to refer inquiries from DHS or DOL representatives to the designated company representative.
 - No employee or supervisor should submit to an interview with DHS or DOL or provide requested documents without conferring with the designated company representative.
- The designated company representative should always be polite and assume an attitude of cooperation with DHS and DOL. If the DHS or DOL inspector does not offer identification, it should be asked for.
- A decision should be made regarding how much to cooperate.
 - DHS personnel are often flexible in arranging routine I -9 Form audits and the company should likewise try to be flexible.

- If a criminal or other than routine audit is suspected, you may wish to seek the advice of counsel before cooperating with regard to document and interview requests. A judgment may be made at this time as to whether a search warrant or subpoena is required, if one has not already been presented by DHS.
 - To the extent possible, the breadth of information sought should be narrowed and, if records are sought, the company may consider offering to deliver them, after making copies of what is to be delivered.
- The designated company representative should keep records of all information sought by DHS or DOL and the questions DHS asks and answers the company representative gives. To the extent possible, copies of all documents given to DHS should be made and retained and an inventory list kept.

WHAT SHOULD AN EMPLOYER DO WHEN THE DHS ASKS TO AUDIT ITS I-9 FORMS?²

Typically, a representative of the DHS will contact an employer by telephone or letter and request to visit the employer's worksite to review its employment records to determine whether the employer is complying with federal immigration laws. Occasionally, a DHS representative will show up at the employer's office without prior notice. What do you do when you get the phone call, letter or onsite visit? Summarized below is a brief review of an employer's obligations related to the employment eligibility verification process using the I-9 Form, as well as an employer's rights once DHS announces it wants to audit that process.

What are an employer's legal obligations that relate to I-9 Forms and employment eligibility verification?

1. *Employers must complete an I-9 Form for every new hire and former employee rehired more than three years after the previous date of hire.*
2. *Employers must reverify employees rehired within three years of the previous date of hire.*
3. *Employers must retain each I-9 Form for three years after the date of hire, or one year after an employee terminates his/her employment, whichever is later.*
4. *Employers must provide their I-9 Forms to the DHS for inspection, upon three business days notice, without demanding a subpoena or search warrant.*

² The U.S. Department of Labor (DOL) also has the authority to review I-9 Forms. DOL does not need a search warrant or subpoena to do so. It must give the employer 3 days notice before requesting to review I-9 Forms. Typically, DOL will ask to review I-9 Forms in conjunction with a general labor audit of federal wage and hour, and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) compliance. DOL does not have the authority to enforce compliance with immigration laws. It turns over the results of its I-9 Form audits to DHS, which does have the authority to enforce the immigration laws against employers. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) also has the right to inspect I-9 Forms without a subpoena or warrant. OSC enforces the anti-discrimination and document abuse provisions of the immigration law.

What are your legal rights in a DHS or DOL employment eligibility verification audit?

1. Must you be given notice prior to an audit?

Under the law, an employer must be given three days notice by the DHS office before the DHS may inspect its I-9 forms. The inspection can take place at the employer's office or at the DHS office. DHS generally gives employers three days notice. As a practical matter, a mutually convenient time can usually be arranged between the DHS and the employer. If, however, a DHS representative shows up at your office and requests to see your I-9 Forms without any prior notice and it is not convenient for you to produce the I-9 Forms that day, you may demand to be given three days notice to prepare for the audit.³

2. Must DHS have a subpoena or search warrant before it can examine your I-9 Forms and related document?

DHS does not need a subpoena or search warrant in order to see your I-9 Forms pursuant to a routine audit. It simply must request to see them and give you at least three days notice.

3. May you limit the documents that you provide to the DHS?

DHS may only request to see I-9 Forms and a list of current and past employees and their Social Security numbers. Without a subpoena, DHS may not request personnel files that contain information beyond that which it needs to determine whether I-9 Forms exist for all current and former employees for whom the employer has an I-9 Form recordkeeping obligation. If an employer copies documents provided by employees to establish employment eligibility and identity for purposes of completing the I-9 Form, DHS is entitled to examine and obtain copies of both the I-9 Form and the attached copies of the documents.

An employer is entitled to retain copies of all documents that it provides to the DHS. One of the benefits afforded to employers by the three-day notice requirement is that they have the time to copy requested documents. We strongly recommend that employers make copies of documents that they provide to the DHS, especially if DHS takes I-9 Forms and related records off the premises. An inventory of all documents taken by the DHS should be maintained.

It should be noted that DOL investigators also have the authority to review I-9 Forms. They will normally do so during the course of a wage and hour or other labor-related investigation. With respect to auditing an employer's I-9 forms, DOL is governed

³ 29 C.F.R. §274a.2(b)(2)(ii).

by the rules described above that relate to the DHS; however, you should be aware that DOL is not required to give three days notice for its audit of payroll and other records for which it has separate authority to examine without three days notice. Thus, an employer can demand that DOL afford it three days notice for I-9 inspections, even though it cannot do so regarding other personnel records subject to DOL's jurisdiction.

4. *What should you do if you discover errors on I-9 Forms or missing forms after you receive notice of an I-9 Form audit?*

Employers often discover in preparation for an I-9 Form audit that some of their I-9 Forms are not completely filled out, or in some cases, that I-9 Forms have not been completed for some employees. They then confront the question of what, if any, steps they can take to correct the mistakes or omissions they discover. First, it should be made clear that if an I-9 Form has not been completed, one should be completed right away if the worker is still an employee. The I-9 Form should be signed and dated on the date that it was actually completed--not the date the worker actually began working. The correct date that the worker began work should be noted on the I-9 Form. The signature line for the employer or its representative on the I-9 Form should not be back dated. While this later completion of the I-9 Form may not present a defense to the failure to complete the form at the time of hire, it puts the employer in a better light by showing that it immediately corrected its mistake once it was discovered. Of course, if the employee for whom an I-9 form is missing is no longer on the payroll, there is nothing the employer can do to fix the situation.

It is more difficult to answer the question about correcting minor mistakes on the I-9 Form. A common situation is for an employee completing Section 1 of the I-9 Form at the time of hire to write his/her Social Security number in Section 1 where requested and also offer the Social Security card as a List B document in Section 2 to establish employment eligibility. The employer checks the Social Security card box in Section 2 but fails to write in the Social Security card number in section 2. This is a technical mistake. Can an employer later fill in the Social Security card number in Section 2, since the number was listed in Section 1 already by the employee? An argument can be made that such a practice is acceptable since no new facts are added to the I-9 Form. The safest approach would be not to add new information to the I-9 form that was not on it at the time it was originally completed. The 1996 amendments to the immigration law provide that employers will be given 10 business days after notification by DHS to correct technical I-9 Form compliance problems.⁴ The above example is one that probably could be corrected prior to the DHS audit.

⁴ 8 U.S.C. § 1324(a)(b)(6).

WHAT SHOULD AN EMPLOYER DO WHEN DHS COMES ONTO ITS PROPERTY, DEMANDS TO CHECK WORK AUTHORIZATION DOCUMENTS OF ITS WORKERS, AND TO SEIZE PERSONNEL RECORDS AND OTHER DOCUMENTS FROM THE EMPLOYER'S OFFICE?

The above-described circumstances wherein DHS or DOL investigators request to review an employer's eligibility verification procedures and related I-9 Forms are increasingly common in agricultural and other worksites. Uncommon in the past, but increasingly common, are DHS investigations based on information in its possession suggesting that an employer or the agent of an employer may be involved in the knowing hiring of illegal aliens and/or the smuggling and harboring of illegal aliens.⁵ This type of situation poses more serious considerations for an employer. Two typical situations occur. DHS may come into your open fields and start interviewing your workers and asking them for work authorization documents. DHS also may come into your office and demand to take your personnel records, computer data and other documents. Following is a summary of some of the legal and practical issues that should be considered by an employer if these circumstances occur.

What are an agricultural employer's legal rights when DHS enters its property and demands to question its employees regarding whether they are legally authorized to work?

The Immigration Reform and Control Act of 1986 (IRCA) requires officers and employees of the DHS to possess a search warrant to enter open agricultural property without the owner's consent to question agricultural workers as to their identity and national origin or their right to be in or to remain in the United States.⁶ The search warrant provision is not intended to have broad application. It applies only to searches by DHS officers and employees. The areas protected from DHS' warrantless entry are the premises of the farm or other outdoor agricultural operation.

A search warrant is not required under the following circumstances:

- If consent is given to enter the property by an owner or his agent;
- If the property is not being used for agricultural purposes;
- If the DHS is in "hot pursuit" of an illegal alien who has violated some other provision of the immigration laws; or
- The property is within 25 miles of the United States border.

⁵ DHS often will obtain a search warrant in order to question suspected illegal aliens in an agricultural workforce and to seize employment related documents from an employer's office if it has probable cause to believe that the employer is engaged in employing illegal aliens and/or smuggling and harboring them. The hiring of illegal aliens can be both a civil violation, for which fines are appropriate or, if it involves a pattern and practice of hiring illegal aliens a criminal offense. Smuggling and harboring are criminal offenses. Smuggling often involves proof that the employer knowingly brought or encouraged illegal aliens to enter the U.S. to work in its business. In the agricultural setting, harboring might be established by showing the employer provided workers it knew were illegal aliens housing on its property. *See* 8 U.S.C. § 1324(a), amended by section 203 of IIRIRA.

⁶ Immigration and Nationality Act Section 287(e). Efforts failed in 1996 to repeal the agricultural search warrant act requirement during congressional consideration of the recently enacted Illegal Reform and Immigrant Responsibility Act. NCAE played a major role in defeating the effort to repeal the search warrant requirement.

What are an employer's legal rights when DHS demands to search its office or other buildings for the purpose of obtaining documents, computer data, and other evidence related to the employment of illegal aliens?

DHS, just like other law enforcement agencies, is required to obtain a search warrant before it can come into an agricultural employer's business office or other buildings for the purpose of confiscating personnel files, computers, computer discs and generated data, employment policies and procedures and other documents it believes may provide evidence that an employer is involved in the hiring, smuggling or harboring of illegal aliens. In order to obtain a search warrant, the DHS must go before a federal judge or magistrate and show it has probable cause to believe that the employer may be engaged in such illegal activities. Typically, such probable cause can be shown through the statements of employees or farm labor contractors who have given statements to DHS about the employer's employment practices after they have been apprehended and interrogated by the agency.

If DHS comes upon your property for the purpose of searching and seizing your records and documents and/or to interrogate workers in the field or in a packing or processing facility, it must provide the owner of the property or his/her supervisor or agent, a copy of the search warrant authorizing such activities. This is distinct from the routine audit of I-9 Forms discussed above, for which DHS does not need a search warrant or subpoena but must give three business days notice. In addition, DHS can serve an employer with a subpoena and request that it produce documents that may show whether it is employing illegal aliens.⁷

While there is always a practical judgment to be made, if DHS does not present an employer with a search warrant prior to checking the work authorization documents of its employees or in searching and seizing records and computer materials from its office, the employer has the right to ask DHS to cease its activities and leave the employer's property until DHS provides the employer with a warrant. This is the type of situation in which it is prudent to assert the right to call an attorney or to seek expert advice.

What rights does an employer have with respect to property seized from its business pursuant to a search warrant?

An employer has a right to obtain a copy of the search warrant from DHS. In addition, the employer may request and obtain an inventory of all property and documents taken by DHS from its property. If personnel records or other documents are taken which the employer needs to carry on its business, it can make arrangements through its attorney or otherwise to obtain copies of such documents from the DHS. The government will maintain control of the seized property until the investigation is resolved.

⁷ See 8 U.S.C. § 1225.

Does the fact that DHS comes onto an agricultural employer's property with a search warrant mean that the employer will be charged with a crime?

No. It simply means that DHS has a reasonable basis to believe the employer may be in violation of the law and it believes that it has a duty to follow up on information provided to it by informants or other sources. As a result, it is always prudent for an employer who has been served with a warrant to act, within limits discussed above, in a cooperative manner with DHS and any other law enforcement agencies that may be involved. In some cases, especially where the employer has properly completed and maintained I-9 Forms, employers are not charged with criminal or civil violations after a search of its employees and records. DHS may, however, apprehend and offer summary deportation to those employees found during a search of the agricultural property not to have been in the U.S. legally and with proper work authorization. In such cases, it is the employer's loss of a significant part of its workforce during a peak period that may cause the greatest harm.

Should an employer submit to an interview or allow its management employees to submit to an interview at the worksite during a DHS execution of a search warrant?

This is always a difficult question to answer. From the standpoint of establishing a cooperative relationship with DHS, especially if an employer believes that it has made a good faith effort to comply with the law and has not knowingly hired or authorized the hiring, smuggling or harboring of illegal aliens, there is a natural inclination to answer questions posed by the DHS. On the other hand, the fact that DHS has gotten a search warrant indicates it believes that your business may be involved in criminal activity. An employer has a constitutional right not to answer questions during a criminal investigation. Moreover, while an employer cannot obstruct an investigation, it is not required to make its managers or employees speak to the law enforcement agencies once such an investigation and search is under way. Under such circumstances, it may be prudent to consult with a legal advisor and to advise any of your employees whom DHS wishes to interrogate to do the same.

WHAT SHOULD AN EMPLOYER DO AFTER A DHS AUDIT OR INVESTIGATION PURSUANT TO A WARRANT IF THE DHS INFORMS THE EMPLOYER THAT CERTAIN EMPLOYEES HAVE PROVIDED THE EMPLOYER INVALID WORK AUTHORIZATION DOCUMENTS?

Once DHS obtains an employer's I-9 Forms and related documents pursuant to a routine audit or pursuant to a warrant, it will determine whether the document numbers on the I-9 Forms are valid and/or relate to the name associated with them. DHS can check such documents with its own database of DHS-issued documents and with the Social Security Administration. Unless they participate in one of the pilot telephonic and electronic verification programs, employers are neither required nor able to independently verify the validity of employment documents given them by job applicants.

After checking the validity of documents, DHS will notify the employer if some of the workers have given invalid documents. Usually, such notification is given in writing; however, there have been instances in the past where DHS has provided such information to an employer by telephone or verbally onsite.

Should an employer always request written direction from DHS indicating which workers are not work authorized?

Yes. An employer should insist it be given written instruction from the DHS that certain employees have provided invalid documents. Without written confirmation, an employer faces the risk of a discrimination charge from an employee terminated as a result of incorrect information provided by DHS who is, in fact, authorized to work.⁸ By having a written communication from the DHS, an employer is in a more defensible position.

What should an employer do once it receives written notice from the DHS that certain employees have provided invalid work authorization documents?

Once an employer receives written notice from the DHS that some of its employees have provided invalid work authorization documents, it is put in the position of having knowledge that it may be employing illegal aliens. Given that knowledge, the employer must take reasonable steps to resolve the employment status of the named employees. Failure to do so will subject the employer to charges of knowingly employing an illegal alien.

An employer should inform each employee that DHS has identified them as having provided invalid work authorization documents. The experience of many employers suggests that most employees, confronted with the allegation by DHS that they have provided invalid documents, will voluntarily leave the job and not return. The employee, nonetheless, should be offered a chance to explain any problems or to obtain documentation that further evidences their work eligibility. The employee should be given a limited period of time to produce the documentation. If an employee does follow up with additional work authorization documents, the employer should follow up with DHS to determine whether the new documentation is valid. If DHS indicates that it is not, the employer is in a position to terminate the employee.

We urge caution in this area. If employers fail to act on information provided by DHS, they face employer sanctions charges. If they act too quickly upon it without giving the employee a chance to address the problem, they face discrimination charges. There are a number of cases where the DHS has incorrectly informed employers that certain employment authorization documentation is invalid. After the workers have been terminated based on that information, the workers will sue the employer, alleging they were discriminated against on the

⁸ The Immigration & Nationality Act prohibits an employer from discriminating against job applicants and employees in hiring or firing based on their national origin and citizenship status 8 U.S.C. § 1324(b)(a)(1). Employers also are prohibited from requesting from job applicants and employees more or different documents than are required under the law, or from refusing to accept documents that on their face appear to be genuine. An employer who relies on oral advice from DHS that an employee's documents are invalid, when it later turns out the documents are valid, is vulnerable to a discrimination charge, since it can be argued the employer refused to accept documents that on their face appeared to be genuine.

basis of citizenship status. By giving the employee a chance to rectify any information provided by DHS that turns out to be wrong, an employer makes its defense against a discrimination charge stronger.

Should employers compare lists of employees with invalid work authorization document numbers provided by DHS with the names of future applicants for employment?

Yes. As noted above, once DHS provides an employer with lists of individuals whose work authorization cannot be established, the employer is on notice that it may be employing illegal aliens. Once the employer confronts the individual employees with such information, and they subsequently are let go or fail to return to work, the employer's duty is not over. It is wise for employers to compare the names and employment document numbers provided by DHS on its list with the names and document numbers provided by future applicants for work. If they match, the employer should not re-hire the individuals until their work eligibility status is resolved.

There are examples in agricultural employment where, because of the rapid turnover of seasonal workers, employers who have terminated workers identified by DHS as having given invalid documents have unknowingly rehired them in a subsequent season. Because of the large number of seasonal hires and foremen involved in hiring, the office manager completing the I-9 Form may not remember that the worker reapplying was previously terminated for false documents and accept his/her documents. If the person completing the I-9 Form does not compare the DHS list of unauthorized workers and their document numbers, with the name and document numbers of each new hire, it is possible to inadvertently hire such person during the next hiring season. If an employer is subject to a follow up audit by DHS during the next season and DHS finds an individual on the list it previously provided is still employed or reemployed, it is likely it will charge the employer with knowingly hiring an illegal alien.

This situation is illustrated in a criminal case brought against an agricultural employer whose office rehired several workers previously let go as a result of a DHS audit identifying the persons as having invalid work authorization documents. While the persons changed the names on Social Security cards they offered as work eligibility documents when they reapplied to work at the farm the next year, they retained the same invalid Social Security numbers. When DHS showed up for another audit and found that the persons had been rehired, albeit with different names but the same Social Security numbers, it indicted the owner of the farm for criminal harboring of illegal aliens. The farmer stated that it checked the names on the DHS list but did not compare the Social Security numbers. DHS apparently believes the owner should have checked both the names and Social Security numbers and has concluded that the employer knowingly hired unauthorized workers and, by providing them with farm labor housing, also harbored them.

Conclusion

This memorandum describes some of the common circumstances employers face during DHS and DOL investigations and the advice provided applies generally to those circumstances. It is nonetheless important that employers facing an investigation contact their own counsel for advice that is tailored to their unique circumstances.