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To: ACIR Participants

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Subject: Frenzy of Congressional, Regulatory and Litigation Activity During the Past Several Weeks Reminds Us Why Enactment of AgJOBS is Imperative

Events have occurred so rapidly during the past several weeks that it has been almost impossible to keep up with them. The United States Senate passed three immigration enforcement amendments last week, and the Obama Department of Homeland Security (DHS) announced that finally it would implement the Bush Administration E-Verify rule for federal contractors, while simultaneously announcing that it would withdraw the Bush Social Security “no-match” rule. A federal judge in North Carolina issued a preliminary injunction against the Obama Administration’s suspension of the Bush H-2A regulations, while farm worker unions filed motions for partial summary judgment in a separate case in the District of Columbia seeking to have the Bush H-2A program rules enjoined as violating the Administrative Procedure Act.

Many have questioned from time to time why we have stayed the course in seeking enactment of legislative reform of the H-2A program and earned adjustment of status for experienced farm workers. It has been a long and often frustrating journey with successes and failures and innumerable delays. Yet, the concerns that motivated ACIR’s supporters to launch this legislative effort years ago remain more valid than ever and recent events suggest that only AgJOBS can avoid the legislative, regulatory and litigation chaos that characterizes the current immigration environment in which agricultural employers seek to run legally compliant businesses.

Recent Congressional Action

Last week, the U.S. Senate passed three enforcement-related amendments to the DHS appropriations bill being considered on the Senate floor, in spite of the opposition of the Senate leadership. Support for the amendments came largely from Republicans with about 10 Democrats joining them. The underlying DHS bill contained a 3-year extension of the current voluntary E-Verify program that enables participating employers to verify work authorization documents by comparison to government databases through an internet-based system. The following three Senate floor amendments were adopted.

The Sessions (R-AL) Amendment. This amendment has two parts. The first would replace the 3-year extension of the current voluntary E-Verify program in the base DHS

appropriations bill with a permanent E-Verify program. It would not have to be reauthorized in the future. The second component of the amendment would require that contractors with the federal government use the E-Verify program as a condition of doing business. This amendment would eliminate the discretion of the President to impose such requirements through its authority to regulate the federal procurement process. Up until last week, it was unclear whether the Obama DHS would implement or withdraw the Bush administration E-Verify rule applicable to federal contractors and subcontractors. Ironically, DHS announced last week that it would implement the Bush rule; however, the Sessions amendment mandates use of E-Verify by contractors and would not be subject to changes in attitudes in future Administrations.

While it is now clear that there will be an E-Verify requirement for federal contractors, what is uncertain is the effect the Sessions amendment, if enacted, would have on agricultural employers. The National Council of Agricultural Employers coordinated legal review and comments on the federal procurement rule, and NCAE and many ACIR participants commented on the Bush proposed E-Verify regulations for contractors. Those comments resulted in a clarification in the final rule that most contractors and subcontractors providing agricultural products to the federal government would not be subject to the rule. If the Sessions amendment is enacted, it likely will be subject to rulemaking and agriculture again would have to make the argument that it should be exempt.

The Grassley (R-IA) Amendment. Senator Grassley also offered an E-Verify amendment that would allow an employer the right to retroactively use E-Verify to reverify its existing workers who previously had completed an I-9 Form. Under current law, E-Verify can only be used to verify the employment authorization of new hires. This amendment also passed.

The Vitter (R-LA) Amendment. Senator Vitter offered an amendment that would prohibit DHS from using any funds in its appropriations bill to change the Bush Administration's "no-match" rule. Ironically, this amendment passed within a day of the Obama Administration's announcement that it was going to issue a rule withdrawing the Bush "no-match" rule. If enacted, the effect of this amendment would be to require employers to follow the procedures in the Bush rule, in short, to terminate within 90 days of the receipt of a no-match letter, any employee who could not provide legitimate documentation other than the rejected Social Security or DHS document.

Likelihood of Enactment of the Three Senate-Passed Amendments. The DHS appropriation passed by the House of Representatives contains a 2-year extension of the current E-Verify program and no provisions similar to those passed in the Senate that are described above. The Senate and House bills will be considered by a conference committee where differences will be worked out. While the Democratic leadership appears to oppose the piecemeal approach to immigration reform represented by the three Senate-passed amendments, conference committee outcomes are unpredictable. The Sessions amendment was done under a recorded vote, potentially making it even harder to strip in a conference.

Recent Regulatory Action

The Bush "No-match" Rule. As referenced above, the Obama Administration announced last week that it will withdraw the Social Security and DHS no-match rule issued by the Bush Administration in August 2007 and revised in 2008 after being enjoined by a federal district court judge in San Francisco for failure to meet Administrative Procedure Act (APA) requirements. Litigation is still pending on legal motions seeking to remove the injunction;

however, the Obama Administration announcement that it will rescind the rule resulted in the filing of a stipulation with the court by all parties to the lawsuit on July 9, 2009 to withdraw all pending legal motions before the court. The practical effect of the stipulation is to end the litigation, pending DHS's issuance of formal public notice in the Federal Register of the withdrawal of the Bush no-match rule.

To justify its rescission of the Bush no-match rule, DHS Secretary Napolitano's press statement indicated that the E-Verify system is a better enforcement alternative to the no-match rule. This statement fails to address the fundamental problem that employers will still receive no-match letters and their immigration-related compliance responsibilities will continue to be undefined with no bright-line compliance guidelines. Notwithstanding DHS' enthusiasm for the E-Verify system, it cannot be used to check the work authorization status of employees whose names appear on no-match letters if they had previously completed an I-9 Form, regardless of whether it was in conjunction with the E-Verify system.

The cessation of the litigation and the initiation of rulemaking to rescind the rule likely will not be slowed by the Senate passage of the Vitter amendment because that amendment has not been and may not be enacted. In other words, the latest on "no-match" is a good news/bad news story; the Obama administration announcement to rescind the rule is good news, but then there is the bad news: like most recent developments on the immigration front, employers will remain in a continued state of uncertainty as to their legal compliance obligations.

Mandatory Use of the E-Verify System by Federal Contractors. As noted above, DHS announced last week that it would implement the Bush procurement rule that requires certain contractors and subcontractors to use E-Verify. The rule will go into full effect on September 8, 2009. While the announcement did not elaborate on the nature of the rule, it implied that the final Bush regulations would be implemented. If this is the case, it will be beneficial to agricultural producers, who are largely exempt as contractors and subcontractors under the Bush rule.

While the Sessions amendment discussed above would result in a more permanent procurement requirement that could not be changed from Administration to Administration, its legislative fate is uncertain.

Recent Litigation Developments

Rescission of the Bush H-2A Regulations. Earlier this year, Secretary of Labor Hilda Solís engaged in rule-making to suspend for 9 months the Bush-issued rule reforming the H-2A regulations. Secretary Solís' rulemaking indicated that a review of the Bush rules would be undertaken during the 9 month suspension period and at the end of that period the Bush rules could be reinstated or DOL could engage in new rulemaking with regard to the H-2A regulations. The final rule would have suspended the Bush regulations, effective June 29, 2009, and reinstated the previous H-2A regulations issued in 1987 and the related adverse effect wage rate.

A number of agricultural organizations filed a lawsuit in North Carolina seeking to enjoin the suspension of the Bush regulations, alleging that DOL's suspension of them violated the APA. The federal district court agreed and issued an injunction on June 29, 2009, in effect, maintaining the Bush regulations until a final determination on the merits is made at some time

in the future, or the Secretary of Labor undertakes new rulemaking in an effort to cure the defects found by the court.

Farm Worker Legal Challenge to the Bush H-2A Regulations. Upon the issuance of the Bush H-2A regulations on December 18, 2008, farm worker advocates filed suit in the District of Columbia seeking to enjoin their implementation as being arbitrary and capricious and in violation of the APA. The court denied the injunction based on the speculative harm alleged. Farm worker advocates filed a partial motion for summary judgment on July 6, 2009 seeking to enjoin the regulations and certain agricultural organizations intervened in the litigation and have opposed such action. Resolution of the issues in this lawsuit likely will not occur for some time.

While these dueling lawsuits slowly move forward, farmers using or considering use of the H-2A program are confused about the applicability of the Bush rules, and as of now would be operating until January 1, 2010 under the transition rules that were to end on June 30, 2009. Moreover, until these lawsuits are resolved it will be difficult for farmers to plan long-term and anticipate which rules, wage rates, and other critical features of program administration will be applicable to them.

Conclusion

Legislation is the best solution to the current volatile and uncertain environment for farmers seeking stability in their workforces and assurances that they can hire a legal workforce. As recent experience has shown, regulatory requirements are subject to the whim of the Administration that is in power. The piecemeal approach taken in the Senate in attempting to enhance enforcement of the employer sanctions provisions of the law present the worst nightmare for the agricultural industry—expanded use of E-Verify and potential imposition of the no-match rule without any countervailing legislation to provide agriculture a legal workforce.

AgJOBS was developed to get ahead of the “worst case” scenario that is unfolding. It contains H-2A reform legislation that is extremely detailed with the intent of tying the hands of hostile regulators who might seek to impede its effective implementation, or seek to undermine the program in the future. It provides a bridge to the expanded usage of the reformed H-2A program by providing temporary and eventual permanent resident status to experienced farm workers who must work up to 5 years in the future and meet other requirements to earn that status. Hopefully, the commitment to comprehensive immigration reform late this year or early next year made by President Obama at the White House last month and recent similar statements by congressional leaders will finally afford agriculture the legislative solution it has long sought and the immediate need for which is vividly illustrated by current circumstances.

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