

2009 Handbook of Employment Regulations Affecting Florida Farm Employers and Workers: Immigration Reform Programs [Federal]¹

Fritz Roka, Michael Olexa, Katherine Smallwood, Leo Polopolus, and Carol Fountain²

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 (I-9 form).
- IRCA prohibits employers from continuing to employ aliens found to be unauthorized after they were hired.

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2. Fritz Roka, associate professor, Food and Resource Economics Department, University of Florida, Southwest Florida Research and Education Center, Immokalee, FL; Michael Olexa, professor, Food and Resource Economics Department, University of Florida, Gainesville, FL; Katherine Smallwood, student, Levin College of Law, University of Florida, Gainesville, FL; Leo Polopolus, professor emeritus, Food and Resource Economics Department, University of Florida, Gainesville, FL; and Carol Fountain, editor, Food and Resource Economics Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida, Gainesville, FL.

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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 the I-9 form when they start to work. Employers must then check the I-9 form for completeness. The I-9 form can be found online at <http://www.uscis.gov/files/form/i-9.pf>.
- Inspect the employee's documents establishing the employee's identity and eligibility to work, noting the employee's document identification (ID) number and expiration date.
- Properly complete the employer's part of the I-9 form. This must be completed within three business days or at the time of hire if employment is for less than three days.
- Retain the I-9 form for at least three years or one year after the employee leaves, whichever is longer.
- Present the I-9 form for inspection when requested by a USCIS, DOL, or OSC officer. Inspection officers are required to give at least three days advance notice before an inspection.

Exceptions to I-9 Form Requirements

There are limited exceptions to the I-9 form 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.

I-9 forms are available from the United States Citizenship and Immigration Services (USCIS). You can obtain I-9 forms online from USCIS at <http://www.uscis.gov> or by calling USCIS at 1-800-375-5283, or by calling the Bureau of

Citizenship and Immigration Services Forms Request Line at 1-800-870-3676.

Enforcement

IRCA charges the USCIS with primary enforcement of the law. However, USCIS has entered into an agreement with the U.S. 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 USCIS. Agencies must give employers three-days' notice of IRCA inspections.

IRCA sharply limited the USCIS's ability to conduct open field searches. The USCIS 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 an I-9 form for any person they refer who is hired by an employer. The I-9 form 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 I-9 form, and are still responsible and liable for compliance with the law. Recruiters and

referrers must retain the I-9 form 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.

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.

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 (<http://www.justice.gov/crt/osc/>).

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

- USCIS Handbook for Employers: Instructions for Completing Form I-9 (Form M-274), U.S. Department of Department of Homeland Security, U.S. Citizenship and Immigration Services, Washington, D.C., January 2009
- The text of the Immigration Reform and Control Act of 1986 can be found in 8 U.S.C. § 1101

Responsible Agency

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.

Washington, D.C. 20529

1(800) 375-5283

<http://www.uscis.gov/portal/site/uscis>

State Offices

5524 West Cypress Street

Tampa, FL 33607-1708

(813) 228-2138

4121 Southpoint Boulevard

Jacksonville, FL 32216

(904) 791-2624

6680 Corporate Centre

Orlando, FL 32822

(407) 6816-4670