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INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

Employer's attempts to verify employee's right to work and Title VII

Under the Immigration and Nationality Act ("INA"), it is unlawful for an employer to knowingly recruit, hire or continue to employ an alien who is not authorized to work in the United States. The Immigration Reform and Control Act of 1986 ("IRCA") requires employers to examine documents presented by new hires to verify identity and work eligibility and to complete and retain the Form I-9.

Complying with IRCA has become increasingly more difficult for employers given the renewed legislative focus on immigration reform and attention to criminal enforcement of the IRCA, post-9/11. In a recent case, *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007), the Tenth Circuit Court of Appeals addressed whether an employer unlawfully discriminated against an employee because of race and national origin on the basis that it suspended him from work until he presented proof of his right to work in the U.S. and then terminated him after he demanded an apology. The case illustrates the potential "Catch-22" an employer might face when attempting to verify identity and work eligibility of employees and hires.

Elite Logistics, Inc. ("Elite") operates a grocery warehouse in Kansas City, Missouri. Ramon Zamora ("Zamora") was an employee for Elite. As part of the pre-employment process Zamora presented Elite with his social security card and alien registration card, demonstrating proof of the right to work in the U.S. in compliance with the IRCA. Zamora also accurately completed an I-9 form indicating that he was a Mexican citizen and a lawful permanent resident of the U.S.

Four months after being hired, Elite received a tip that the Immigration and Naturalization Service ("INS") would be investigating companies in the area for compliance with IRCA. In response, Elite, through independent contractors, checked the social security numbers of all 650 Elite employees. The check revealed that someone other than Zamora had been using the social security number Zamora presented when hired. Thirty-five other employees had discrepancies. Most of those other employees simply quit when Elite attempted to follow up.

As for Zamora, Elite, as it did with the other employees whose social security numbers were investigated, issued a memorandum that gave him ten days in which to show

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Important rulings to the grape-growing industry

Two recent rulings, one by the U.S. Tax Court, and the other by the IRS, are of importance to the grape-growing industry. While the industry is very significant in California, it is growing in importance in other areas of the country. The Tax Court opinion has been anticipated since last fall and could also have implications beyond the grape-growing industry to agriculture in general.

The case involved a Sonoma County, California, vineyard and a dispute over the appropriate depreciation of trellises and irrigation systems. The case had been watched closely not only by the grape-growing industry, but by agriculture in general. IRS had taken the position that vineyard trellises and above-ground irrigation systems were depreciable land improvements rather than depreciable agricultural equipment. Land improvements are depreciable over 15 years as property with a 20-year class life, while ag equipment is depreciable over 7 years with a 10-year class life. The taxpayers treated all of the property (trellises, drip irrigation systems and a well) as ag equipment, and depreciated the property over seven years. The impact of the IRS position on the taxpayer meant that they owed an additional $30,000 on their 2002 tax return.

Both IRS and the taxpayer cited the same 1975 Tax Court case for the tests to be utilized in determining whether an item is depreciable tangible personal property. There are six factors for consideration – (1) whether the property is capable of being moved; (2) whether the property is designed or constructed to remain permanently in place; (3) whether there are circumstances that show that the property may or will have to be

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"proper evidence of your identity and employment eligibility." Then, Zamora failed to present such "evidence" within the ten-day period.

As a result, Elite's Human Resources Manager, Larry Tucker ("Tucker"), informed Zamora that he could not work without proper documentation. Zamora returned with a Social Security Administration ("SSA") document showing wage earnings for a period of seven years under the name "R. Zamora" and a social security number matching the one presented by Zamora when initially hired by Elite. However, the same document also showed a birth date different than Zamora's, which led Tucker to reject it. Even though Zamora also presented a naturalization certificate and told Tucker he was now a U.S. citizen, Tucker rejected that as well.

The next day, Zamora produced a document from the SSA. Followup by Elite indicated that the Zamora's social security number was valid, and six days later Elite asked him to return to work. However, Zamora made two demands: "(1) an apology in writing, and (2) a complete explanation of why I was terminated." Tucker conceded that he told Zamora to "get the hell out." Zamora alleged that Tucker also told him he was fired.

Zamora sued the company alleging that Elite violated Title VII by first suspending him and then terminating Zamora because of his race and national origin.

The district court granted Elite summary judgment on both claims, and the case was appealed to the Court of Appeals for the Tenth Circuit.

Appellate court's analysis of case

A divided panel of the Tenth Circuit reversed the trial court's decision. After rehearing the appeal en banc, the court vacated the panel's decision.

The majority decision

The en banc court was evenly divided as to whether Elite was entitled to summary judgment on his unlawful suspension claim, and therefore simply affirmed the district court's granting of summary judgment in favor of Elite.

As to the unlawful termination claim, a majority of the court affirmed summary judgment in favor of Elite after finding that Zamora did not create a genuine issue of material fact on whether the termination was because of Zamora's race or national origin.

Specifically, the majority found nothing in the record to suggest that Tucker did not want Zamora to return to work. It found that Tucker did not terminate Zamora until Zamora requested a written explanation and apology as a condition for his returning to work. Finally, the majority found that there was no evidence that Tucker had ever treated similarly-situated employees who were not Hispanic or Mexican-born any differently.

The majority rejected the notion that vigorous questioning of the legitimacy of Zamora's documents, under the facts of the case, could be equated to pretext for unlawful discrimination even if such efforts were "flawed." The Court noted:

> IRCA is relevant here in two respects. First, the statute prohibits the knowing employment of unauthorized aliens and places affirmative burdens on employers to verify the identity and employment eligibility of employees, at the hiring stage, by examining certain documents specified by statute and regulation.... The statute provides that, at the time of initial hiring, compliance "in good faith with the[se] requirements . . . with respect to the hiring ... for employment of an alien in the United States ... establish[es] an affirmative defense that [the employer] has not violated" the above provisions. IRCA also makes it unlawful for an employer "to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." It is this latter obligation—combined with the range of civil and criminal penalties that await employers who violate IRCA, —that Elite claims prompted its actions in this case.

Accordingly, the majority court concluded that Tucker's "attempt to resolve known SSN discrepancies was entirely reasonable under IRCA and relevant case law. Further, Tucker's continued insistence on resolving that problem was consistent with what Zamora was told. Finally, the majority found a complete absence of any "evidence that Elite harbored any animosity toward persons of Mexican extraction."

The dissent

The dissent vigorously argued that the majority's decision would effectively create a "safe-harbor against Title VII claims" and insulate employers from national origin discrimination claims "so long as they cite IRCA to defend their actions."

The dissent noted that Zamora produced a copy of his naturalization certificate, which Elite had identified as sufficient to show lawful work status in its memorandum. Yet, Tucker rejected the certificate and "accused Zamora of stealing someone else's SSN." While Zamora brought in a letter from the SSA bearing the stamp of the agency and verifying that the SSN he provided was assigned to the name Zamora had given Elite at hiring, Tucker was not satisfied until Elite confirmed the legitimacy of the letter with the SSA.

Finally, the dissent argued that Tucker admitted not being concerned over Zamora's right to work. While noting that employers may be charged with "constructive knowledge" of an employee's unauthorized work status, the dissent rejected the argument that Elite's concerns over the documentation produced by Zamora were reasonable. "No court has held that a credit check revealing only that an employee's SSN was used by another person constitutes `constructive knowledge' of a person's unauthorized work status.... Only the SSA can conclusively identify the proper holder of a given SSN."

Accordingly, the dissent concluded that summary judgment should not be granted and that the matter should be sent to trial because the "evidence demonstrates `weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in Elite's proffered reason of IRCA compliance, such that a reasonable factfinder could find that reason `unworthy of credence.'"

Lessons learned

This case provides several "lessons" for employers who want to avoid problems.

1. Understand what documents are sufficient to establish identity and work autho-

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What farmers should know about employing migrant and seasonal workers

By Elizabeth Haws Connally

Among the many hats a farmer wears each day is one that says "Boss." Most farmers are employers, and many of their employees, particularly seasonal employees, are migrant workers and/or foreign workers. Consequently, as farmers tune up their equipment for spring planting, they should also make sure their "employment tool-kit is fully equipped to receive the migrant and foreign workers they may be hiring.

Farmers, like most employers, are expected to comply with a host of federal and state labor and employment laws. However, farmers who employ migrant workers and foreign workers must pay particular attention to the following federal employment laws:

· Immigration and Nationality Act, 8 U.S.C. §§1101,1184 and 1188, 20 CFR 655 Subpart B, 29 CFR Part 501);

· Immigration Reform Control Act of 1986, 8 U.S.C. §§ 1324a(a)(1)(A)-(B), 1324a(b); 8 CFR § 274a2(b)(1)(ii) &(v);

· Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201,et. seq, 29 CFR Part 500;

· Migrant and Seasonal Worker Protection Act, as amended, 29 U.S.C. §1801; and

· Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq, 29 CFR Parts 1900-2400.

The U.S. Citizenship and Immigration Services agency administers and enforces INA and the IRCA. The U.S. Department of Labor ("DOL") Wage and Hour Division ("WHD") is responsible for administering and enforcing the FLSA, MSPA and the field sanitation standards of OSHA. The Occupational Safety and Health Administration of DOL administers and enforces the other OSHA requirements.

This article provides an overview of the federal employment laws listed above. More detailed information can be found on the DOL website at www.dol.gov.

Immigration and Nationality Act ("INA")

The INA covers agricultural employers who seek to hire temporary agricultural workers under H-2A visas. The H-2A temporary agricultural visa is a nonimmigrant visa that allows foreign nationals to enter into the U.S. to perform agricultural labor or services of a temporary or seasonal nature, such as harvesting a crop.

Labor certifications

Employers may not import foreign workers under H-2A visas unless they have applied to the Employment and Training Administration ("ETA") for permission to do so. The ETA is responsible for determining whether the employer: (1) conducted a proper recruitment; (2) has agreed to pay the foreign worker the appropriate wage rate; (3) has arranged to provide the foreign worker with transportation.; and (4) has entered into a written contract with the foreign worker..

1. Recruitment. Any employer who applies for H-2A certification must first attempt to recruit U.S. workers to fill the openings, and must continue to make these recruitment efforts until the foreign workers depart. In addition, even after the H-2A workers arrive and begin working, the employer must agree to accept U.S. workers, until 50 percent of the contract period has passed.

2. Wages. During the course of the H-2A worker's employment, the employer must agree to pay the H-2A worker the higher of: (a) the Adverse Effect Wage Rate ("AEWR"), which is the weighted average hourly rate for field and livestock workers in 19 regions established by the U.S. Department of Agriculture ("USDA"); (b) the Prevailing Rate for a given crop in the area; or (c) the legal state minimum wage. In addition, the employer must agree to provide each H-2A worker an offer of employment for at least 75 percent of the workdays in the contract period.

3. Transportation. Every non-local worker employed on an H-2A contract is entitled to be paid all transportation costs related to travel from the place where the worker was recruited to the jobsite, and back to the worker's residence. Both foreign and U.S. workers are entitled to such payments. The DOL defines workers as "non-local" if they cannot return to their permanent residence each night. The employer must reimburse the following expenses: (a) transportation costs to the place of employment must be paid when 50 percent of the contract has been completed; and (b) transportation "home" when the worker has completed the contract. The employer has no obligation to pay return expenses if the employee abandons the job unless there is a provision in the worker's contract.

4. Written contract. The INA requires the employer to provide every worker a copy of the worker contract or at least a copy of the job clearance order, which must be submitted and approved by the U.S. Department of Labor. The job contract/clearance order must state the following:

· The beginning and end dates of the contract period;

· All significant conditions of employment, such as payment for transportation expenses, housing and meals, specific days when the workers are not required to work;

· The hours per day and the days per week each worker will be expected to work during the contract period;

· The crop(s) included and the rate of pay for each crop/job;

· Any tools required, with an indication the employer pays for them; and

· Verification that worker's compensation will be provided according to the law of the state where the work is performed.

Once the DOL is satisfied that the employer has met the foregoing requirements, the DOL will issue a "certification" to the employer confirming that: (1) there are not sufficient workers who are willing, able, qualified, and available to perform the work; and (2) the employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S. The certification will enable the employer to go forward with hiring the foreign worker.

The application for certification should be filed at both the ETA office and the office of the workforce agency in the state where the foreign workers will be employed. Regulations addressing issuance and denial of certification are found at 20 CFR 655 Subpart B. Farmer/employers should note that it takes about 45 days to obtain the certification.

Proper documentation to work.

Under the INA, employers must also determine if the non-U.S. worker is authorized to be in the U.S. and have proper documentation prior to starting on the job. Employers must verify the identity and employment eligibility of the worker within three business days of the date employment begins. The worker and employer must also complete the Employment Eligibility Verification Form I-9. Employers are required to keep the completed Form I-9s on file for the longer of; three years or one year after employment ends.

The documents reviewed by the employer must be recorded at Section 2 of the Form I-9. The employer must certify under penalty of perjury that he has examined the documents. A list of acceptable documents that establish identify and employment eligibility appears on the Form I-9. Although the employer is not required to photocopy the documents shown for verification, it is recommended. The photocopies should be attached to the worker's Form I-9. Employers can obtain the Form I-9 from the USCIS website at: http://www.uscis.gov/portal/

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site/uscis/menuitem, then enter "Form I-9" in the search box.

Employers may want to consider participating in the federal government's Employment Eligibility verification (EEV)/Basic Pilot Program ("Basic Pilot"). The EEV is currently a voluntary program through the U.S. Department of Citizenship and Immigration Services ("USCIS"). It is anticipated the program will become mandatory in the near future. EEV electronically verifies the employment eligibility of their newly hired employees. The employer should be aware that use of the EEV program places some additional requirements on the employer. The employer should carefully read the compliance procedures before utilizing the EEV. More information regarding the EEV can be obtained from the USCIS website: http://www.uscis.gov/portal/site/uscis, then enter "EEV" into the search box.

Farmer/employers should also note that Immigration Reform and Control Act ("IRCA") makes it unlawful for an employer "to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.." 8 U.S.C. § 1324a (a) (2). Consequently, if a new worker is unable to produce the documents needed to complete the I-9 form within three days of hiring, or the employee is unable to present a receipt from the USCIS verifying that he/she applied for replacement documents (which must then be provided to the employer within 90 days of hire), the new worker must be terminated.

Record keeping for certified H-2A employer

Certified H-2A employers must keep detailed work records for each worker. The records must indicate the number of hours actually worked, the number of hours offered, and the number of hours refused. Each worker must also receive a wage statement that states the number of hours worked, number of hours offered, number of hours refused, the pay for each type of crop, and the basis for the pay (i.e. whether paid by the hour, by the piece, or by the task). The wage statement must indicate the total earnings for the pay period and all deductions from the wages, with a statement explaining why the deductions were made.

Terminated workers

Employers must also maintain records of any workers voluntarily or involuntarily leaving the job. To prevent further liability for wages and benefits to the worker, the employer must notify the local job service of the state workforce agency in writing of either the termination or abandonment of the worker. The report should state the date of the termination or abandonment and the reason. The employer should also state if he wants to replace the worker.

To assist H-2A Certified Employers to comply with the above requirement, the DOL has established a questionnaire to provide guidance. The full questionnaire can be viewed at http://www.dol.gov/esa/regs/compliance/whd/h2A.htm

Fair Labor Standard Act ("FLSA")

The FLSA applies to all enterprises engaged in interstate commerce, or that produce goods or materials moved in or produced for interstate commerce. Thus, the FLSA covers virtually all agricultural employees.

Exemptions from FLSA requirements

Most employers are aware that the FLSA requires employers to pay employees a "minimum wage." The law also specifies that any work performed in excess of the "maximum work hours" for a work week (i.e. 40 hours in a 7-day period) must be paid at an "overtime" rate equivalent to 1.5 times the employee's regular rate of pay for all hours worked in excess of the maximum. However, few employers may know or understand that there are certain exemptions in the FLSA that may benefit farmers.

Agricultural workers involved in the farming operation are exempt from overtime pay provisions. Also, any farmer/employer who does not utilize more than 500 "man days" of agricultural labor in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA for the current calendar year. A "man day" is defined as any day during which an employee performs agricultural work for at least one hour.

The following are additional exemptions from the minimum wage and overtime provisions of the FLSA for agricultural employees:

· Agricultural employees who are immediate family members of their employer;

· Those principally engaged on the range in production livestock;

· Local hand harvest laborers who commute daily from their permanent residence, and are paid on a piece rate basis; and

· Local hand harvest laborers who: (1) commute daily from their permanent residence, (2) are paid on a piece rate basis in traditionally piece-rated occupations, and (3) were engaged in agriculture less than thirteen weeks during the preceding calendar year.

The DOL provides a reference guide for the FLSA at http://www.dol.gov/esa/regs/compliance/whd/hrg.htm#8 and specific guidance for agricultural employers at: http://www.dol.gov/esa/regs/compliance/whd/whdfs12.htm.

Child labor and hazardous occupations.

The FLSA also sets the standards for child labor and hazardous occupations for minors working in agriculture. If the employer hires youths under 16 years of age, he should be aware of the FLSA restrictions relating to employment of youth and the types of activities they may perform. For more information relating to the child labor restrictions, see http://www.dol.gov/esa/regs/compliance/whd/whdfs40.htm. Of course, youths of any age may work at any time in any job on a farm owned or operated by their parents.

Migrant and Seasonal Worker Protection Act ("MSPA")

The MSPA governs safety and health standards for migrant and seasonal workers, transportation safety, disclosing the terms and conditions of employment to the migrant and seasonal workers, paying proper wages to the workers, and the required record keeping. Under MSPA, a migrant agricultural worker is defined as a worker employed in agricultural work of seasonal or temporary nature who cannot return to their permanent residence at night. The MSPA defines seasonal workers as workers who are employed in agricultural work of a seasonal or temporary nature, but who are able to return to their permanent residence at night.

Employers must assure that vehicles used to transport workers are properly insured, operated by licensed drivers, and meet federal and state safety standards. Under MSPA, transportation safety standards are either DOL standards or the Department of Transportation ("DOT") standards incorporated by DOL into MSPA. The type of vehicle, how it is used, and the distance it is driven, dictates the applicable standard.

For passenger vehicles used for transporting workers less than seventy-five miles, the safety regulations include: the vehicle must have proper external lights, be properly equipped with brakes, and tires must have at least 2/32 inch tread depth and no cracks in the sidewalls.

There are additional requirements for vehicles driven more than seventy-five miles. For additional information regarding the transportation safety restrictions, please see: http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_500/29CFR500.104.htm and http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_500/29CFR500.105.htm. For additional information regarding MSPA compliance assistance, go to: http://www.dol.gov/compliance/laws/comp-msawpa.htm

Occupational Safety and Health Act ("OSHA")

OSHA covers all employers "engaged in a business affecting commerce who has employees." Therefore, it applies to agricultural employers. However, OSHA does not apply to farms that employ only immediate family members of the farmer/employer.

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Migrant and seasonal workers/ cont. from p. 5

General requirements

Under OSHA, employers are required to provide personal protective equipment to the employees and ensure they are properly trained to use the equipment. Employers must also use material safety data sheets ("MSDS") to train the employees to recognize and avoid hazardous material. OSHA also gives an employee the right to obtain information related to that employee's exposure to toxic substances.

Sanitation regulations

In 1987, the Occupational Safety and Health Administration issued regulations establishing minimum standards for field sanitation in covered agricultural settings. Authority for enforcing these field sanitation standards in most states has been delegated to the Wage and Hour Division of the DOL.

The OSHA field sanitation standards require covered employers to provide: toilets, potable drinking water, and hand-washing facilities to hand-laborers in the field. Covered employers who fail to comply with the statute or regulations may be subjected to a range of sanctions, including the administrative assessment of civil money penalties and civil or criminal legal action.

In general, the field sanitation standards apply to any agricultural establishment employing 11 or more workers on any one day during the previous 12 months, to perform "hand labor" field work. "Hand labor" includes hand-cultivation, hand-weeding, hand-planting, and hand-harvesting of vegetables, nuts, fruits, seedlings, or other crops, including mushrooms, and the hand-packing of produce in the field into containers, whether performed on the ground, on moving machinery, or in a shed. "Hand labor" does not include the care and feeding of livestock.

Employers must provide potable drinking water, suitably cool and in sufficient amounts, dispensed in single-use cups or by fountains, readily accessible to all employees. In addition, employers must provide one toilet and hand washing facility for every 20 employees, located within a quarter-mile walk, or if not feasible, at the closest point of vehicular access.

Recordkeeping requirements

Every employer covered by OSHA with more than 10 employees, must maintain three types of OHSA specific records of job related injures and illness: OSHA Form 300 – injury/illness log and Form 300 A - a summary of the previous year's work related injuries, which must be posted in the workplace by February 1. The third document is OSHA Form 301 – the individual incident report that provides details about the specific recordable injury or illness.

Each employer must advise the nearest OSHA office within eight hour of the occurrence of any accident that results in one or more fatalities or hospitalization of three or more employees.

Bottom line for farmer/employer

Employment of migrant and/or foreign workers can get complicated because of the many laws that govern an employer of such workers. Employers must comply with these and other labor and employment laws or risk administrative penalties, civil lawsuits filed by their workers, and even criminal sanctions in certain situations. Consequently, the best thing to do is learn what is required and how to comply.

Grapes/Cont. from p. 1

moved; (4) how difficult and time-consuming it is to move the property; (5) how much damage the property will sustain if moved; and (6) how the property is affixed to the land. The taxpayer argued that the trellises and above-ground irrigation systems are not inherently permanent and are used as an integral part of the taxpayer's production activity. IRS argued that the trellises and irrigation systems, as a whole, are not moveable and are, therefore, land improvements with the same 20-plus-year lifespan as the vines. IRS pointed to the industry-standard long-term vineyard leases that protect the large investment in such systems and describe them as land improvements. Key to the IRS argument was that to move the system, the taxpayer had to take the entire system apart and, in the process of taking it apart, pieces of the trellises and irrigation system are destroyed.

The Tax Court agreed with the IRS as to the irrigation system and the well. The evidence established that the well, which was permanently affixed to and not readily removable from the earth, was a permanent land improvement that could be expected to work for a long time–approximately 30 years. While some of the irrigation system components were above-ground and could be removed, repaired, and maintained, land improvement categorization was overall supported by the fact that the systems in great part were buried underground. As such, the court viewed them as permanent structures that were not readily movable. So, the entire irrigation system, including the above-ground drip lines were held to be land improvements that are depreciable over 15 years.

However, the court held that the trellises were depreciable ag equipment. The court reasoned that trellises are synonymous with fencing (fencing is ag equipment) in that they use posts that are not affixed in concrete (even posts affixed in concrete have been held to *not* be land improvements). The trellises could also be dismantled and moved, the court noted, and the taxpayer had actually done so in the past. The court also reasoned that the trellises were like machines inasmuch as the posts, stakes, and wires could be adjusted to train grapevines to produce high-quality grapes.

The court's holding that trellises can be depreciated as farm equipment is a big win for the wine industry. Indeed, that was the most expensive part of the case for the taxpayers. If the Tax Court's opinion is appealed, the main focus of the case may be on the proper classification of the above-ground irrigation drip lines. Also, the appellate court may address the potential application of a 1974 U.S. Court of Claims opinion where the court held that something as permanent as a whiskey maturation facility (warehouse), when integral to the production of the product, is tangible personal property. The Tax Court did not address the potential application of that case (it was raised in the taxpayer's brief, however). If it were deemed applicable, that could mean that all of the items at issue are depreciable as ag equipment. Now, that would really be big news. *Trentadue v. Comr.*, 128 T.C. No. 8 (2007).

The second development is an IRS ruling involving the uniform capitalization rules as applied to grapes. Those rules apply to taxpayers that have a long-term crop with more than a two-year pre-productive period, and operate to bar deductions for the costs associated with that crop during the pre-productive period. Instead, the taxpayer has to add the associated costs to their tax basis in the crop. Production costs can include everything from direct labor and material costs to indirect rents, taxes, and other costs.

The rule is a big deal for farmers in the nursery business, and almost all tree, vine, or bush crops that require at least two years to reach production. For plants, the pre-productive period begins when the seed is planted or the plant is first acquired by the taxpayer. The pre-productive period ends when the plant is ready to be produced in marketable quantities or when the plant can reasonably be expected to be sold or otherwise disposed of. The pre-productive period, however, is determined not in light of the taxpayer's personal experience but in light of the weighted average pre-productive period determined on a nationwide basis. The IRS has provided a list of plants grown in commercial quantities in the U.S. that have a nationwide weighted average pre-productive period in excess of two years.

The rule is particularly problematic for grape growers. One question has been whether they have to capitalize all of their expenses up until the time the wine is sold. That would be a really tough rule for wineries because the wine-making process can take many years. But, a recent IRS ruling softens the blow. The ruling says that the IRS will treat grape growing and winery functions as separate businesses. That's the case, even though (1) the grapes are never subject to sale or other disposition

Cont. on page 7

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The National AgLaw Center website <http://www.nationalaglawcenter.org>http://www.aglaw-assn.org has a very extensive Agricultural Law Bibliography. If you are looking for agricultural law articles, please consult this bibliographic resource on the National AgLaw Center website.

–Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Employer's attempts/Cont. from page 2

rization. The *Zamora* decision demonstrates that well-meaning employers that attempt to comply with IRCA could run afoul of both IRCA *and* Title VII's anti-discrimination provisions. Indeed, in *Zamora* the employer was initially presented with *both* a social security card and alien registration card when it hired Zamora, which is more than what the current I-9 form requires. Requiring presentation of both documents could form a basis for a discrimination claim under both IRCA and Title VII.

2. Understand that the process of verifying acceptable I-9 documents could trigger the anti-discrimination provisions in IRCA and Title VII. While it is not uncommon for an employer to discover that an undocumented worker has been hired, it is critical that the employer understand the limits on its ability to investigate the legitimacy of documents establishing identity and employment eligibility.

While in *Zamora,* Elite's investigation was ultimately vindicated by the Tenth Circuit, employers need to understand the issues could be viewed differently in other jurisdictions, especially considering Elite's rejection of Zamora's naturalization certificate, which Elite had identified as sufficient to show lawful work status in its memorandum.

3. Understand the company's responsibility in determining the authenticity of I-9 documents. The controversy in *Zamora* quickly developed when Elite attempted to validate the authenticity of the documents initially submitted by Zamora. Under the law, an employer must examine the document(s) and accept them if they reasonably appear on their face to be genuine and relate to the person presenting them. Not accepting documents that reasonably appear genuine violates IRCA and in some cases Title VII. Conversely, an employer violates IRCA by accepting documents that do not reasonably appear to be genuine. If there is any question regarding the validity of the documents, the employer should contact the Bureau of Immigration and Customs Enforcement for guidance.

4. Keep your house in order. Employers should take a proactive approach regarding pre-employment hiring practices, including establishing procedures and policies on the processing of I-9 forms. Since the federal government and public interest groups have taken a renewed interest in immigration issues, employers should regularly train supervisors on IRCA-related issues and regularly audit their I-9 forms. "Keeping your house in order" should include training on Title VII and IRCA's non-discrimination provision, which prohibits discrimination "against any individual ... with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment."

5. Be aware of the latest developments affecting the hiring of immigrant employees. Employers should continue to educate themselves on the latest immigration-related developments, including legislation. One area that deserves increased attention involves Social Security mismatch letters and the safe harbor rule proposed by the Department of Homeland Security ("DHS) and Bureau of Immigration and Customs Enforcement ("ICE").

SSA sends mismatch letters to employers whose employee name and Social Security number combinations do not match SSA records. The proposed rule contains a safe harbor provision on SSA mismatch letters. The proposed rule would require employers to check their records for clerical mistakes within 14 days of receiving a mismatch letter, to correct the error and verify the resolution with SSA.

If the issue is not resolved within 60 days of receipt of the mismatch, the proposed rule would require the employer, within three days, to complete new paper work using only documents issued with a photo and not containing the questioned social security number, or to terminate the employment. The method for doing this would be to process a new I-9 form, with the stated conditions.

Even if the employee turns out to be an unauthorized worker, the government will not deem employers that follow this procedure to have "constructive knowledge" of that fact.

–Roman F. Amaguin, Honolulu, Hawaii

Grapes/Cont. from page 6

(as those terms are used in tax law); and (2) the taxpayer does not operate their business as two separate and distinct businesses.

In conjunction with that reasoning, the IRS ruled that the actual pre-productive period of a grape crop grown for self-use ends no later than the crushing of the grapes. Extending the pre-productive period beyond crushing would result in the capitalization of inappropriate costs into a crop that no longer exists.

As for the costs incurred between the harvest of the grapes and blossoming of a later crop, IRS ruled that a taxpayer must capitalize the direct costs and an allocable portion of the indirect costs of producing the vine (such direct and indirect costs would include, for example, administration costs, depreciation and repairs on farm buildings and farm overhead). A special exception for "field costs" (irrigating, fertilizing, spraying and pruning) applies to the period between harvesting and the sale of the crop. These costs are not required to be capitalized because they don't benefit, and are unrelated to, the harvested crop. They merely maintain and improve the health of the vines, but they don't provide any benefits to the crop (which has already been severed from the vines). That field crop exception, however, ends when the pre-productive period of the crop ends, which is the onset of the crush. So, IRS concluded that pre-productive period costs incurred between the end of the pre-productive period and the blossoming of the later crop are generally deductible as the cost of maintaining the vine.

The bottom line, therefore, is that costs incurred between the harvest of the crop and the end of the pre-productive period must be capitalized unless they are "field costs" that provide no benefit to the already severed crop. *ILM 2007 13023* (Nov. 20, 2006).

–Roger A. McEowen, Iowa State University, Ames, IA.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Board Nominations

The AALA Board Nominations Committee is seeking suggestions for nomination for the 2008-2010 board and the 2008 president-elect. Please contact Don Uchtmann, e-mail: uchtmann@uiuc.edu by May 1, 2007.

2007 Annual Conference

President-elect Roger McEowen has almost completed the planning of an excellent program for the 2007 Annual Agricultural Law Symposium at the Westin San Diego Hotel in sunny downtown San Diego, CA, October 19-20, 2007. As soon as the program is virtually complete, we will post it on the AALA web site. Mark your calendars and plan a trip to enjoy the sights, sounds, animals and sunshine. Brochures will be printed and mailed as soon as the program plans are complete.

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Didn't attend the conference in Savannah but still want a copy of the papers? Get the entire written handbook plus the 1998-2006 past issues of the *Agricultural Law Update* on CD. The files are in searchable PDF with a table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. Box 2025, Eugene, OR 97402 or e-mail RobertA@aglaw-assn.org Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2006 conference registration form on the AALA web site.

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