



# EASING THE LEGALESE

## with Hispanic Workers

Wondering if you are within your legal bounds with overtime or what the government might do to you regarding the legal status of your Hispanic workers? Before despair starts burrowing into your mind and furrowing your brow, find out what actions an industry attorney advises on dealing with some of the most-common challenges facing greenhouse employers.

**By Brandi D. McNally**

**I**n surveying the ethnic origins of your greenhouse employees, it probably comes as no surprise that one in eight people in the United States is of Hispanic origin, or 32.8 million, according to a 2000 U.S. Census Bureau report. Approximately 66.1 percent of this population comes from Mexico, where poverty levels are high and the promise of a better life lies just across the border. Mexicans and other Hispanics are industrious, nose-to-the-grindstone people who complain very little, and are spurred on by a deep sense of optimism that working in the United States will improve their own lives and those of their families. Your Hispanic employees are probably some of the best workers you've ever had — and some of them may be in this country illegally.

You may have invested many years of training in one or more of these individuals, earning their trust and loyalty, and allowing them to rise into important production positions in which they've carved a niche that you would be hard-pressed to find a replacement for. Despite your best efforts to conduct your business according to the law, however, there will always be factors out of your control. For example, you may be one of 750,000 recipients of a letter from the Social Security Administration (SSA) advising employers of mismatched Social Security numbers (SSN), and some of your most valued employees could be on this list.

James Huse, Jr., inspector general of the SSA, gave a testimony before the House Judiciary Subcommittee on June 25, 2002, regarding Social Security integrity and its importance in homeland security. He indicated that the undocumented population in the United States reached five million in 1996 and increases by approximately 275,000 people every year; many of these people have obtained SSNs fraudulently. The agricultural industry in particular appears to be under the microscope due to the disproportionately high number of employee mismatches within the industry. "SSA statistics show three industries (agriculture, food and beverage, and services) account for almost one-half of all wage items in SSA's Earnings Suspense file (ESF) for which employee names and SSNs fail to match SSA's records. Of these industries, agriculture is the largest contributor, representing about 17 percent of all ESP items. In fact, in one study of 20 agriculture employers, we determined that six of every 10 wage reports submitted by these employers had incorrect names or SSNs," said Huse in his testimony.

According to Fred Atterbury, legal consultant to the American Nursery & Landscape Association (ANLA) and others in the green industry on wage and hour, I-9 forms and related matters, there are four basic issues on his most-frequently-asked questions list by green industry members with Hispanic employees. Mismatched Social Security number issues top the list. The second most-common question has to do with employers discovering they have an illegal employee and wanting to know how to approach obtaining legal status for that employee. I-9 Form questions come in third, and fourth are wage and hour issues such as making deductions and overtime.

### SOCIAL SECURITY MISMATCHES

The SSA's form letter, which you may or may not have received, begins with an explanation as to why you have received the letter. "We are sending you this letter because some of the names and Social Security numbers that you reported on the Wage and Tax Statements (Forms W-2) for tax year 2001 don't agree with Social Security Administration records," it reads. "We need corrected information from you so that we can properly credit your employees' earnings. We realize there could be a number of reasons why the reported information doesn't agree with ours, such as: transcription or typographical errors, incomplete or blank name or SSN, or name changes." The letter proceeds to inform the recipients that they have 60 days to respond with the information they are able to correct; materials are attached to instruct the recipient on how to correct SSNs.

Despite the fact that directions are clearly spelled out and there is even a phone number to call for questions, employers start worrying about what they should do, at which point they call law firms like Atterbury's. "It's the first time they get 'official' notification from any governmental agency that they may have a potential immigration problem," says Atterbury. "As soon as they get that letter, they start worrying about the potential ramifications." All of the information you need, however, is contained within this letter; an attorney can only direct the letter recipient back to the instructions delineated in the letter. The reason greenhouse managers and owners are calling, according to Atterbury, is that they want to protect themselves. "Many of them have heard these horror stories about the immigration service backing up buses and loading all of their workers on it and hauling them away, and they ♦

don't want that to happen to them." Employers are also concerned because they may have received the Social Security letter for a long-time employee. "It is not unheard of that an employee noted in the letter may have been an employee for five or

six years. They've got a reputation and some work experience with that individual, they might even be a key person — an assistant foreman or something, and that would be difficult to replace in today's workforce."

Following the instructions in the letter is the easy part; what's muddier is what you should do in the long-term. There are a number of possibilities that will vary based on you, the employer, and what you view as the best way to pro-



ceed. Depending on what you find out about the mismatch, you'll have to ask yourself if firing the employee is the best option, asking the employee to visit the Social Security office themselves, or perhaps not even apprising the employee of a potential problem and taking action on your own. You don't have to assume the worst has occurred right away, however; remember that the error could be a clerical mistake on your part or the government's involving transposed numbers or misspelled names.

Before making any drastic decisions, comb through the letter's instructions. If your records do not match the W-2 Form, you should correct the Form and report that correction to the SSA. In this case, the employee doesn't even have to be involved. If your records and the W-2 Form do match, however, you should "ask your employee to check his/her Social Security card and to inform you of any name or SSN difference between your records and his/her card. If your employment records are incorrect, correct your records." If your records and the employee's records match, however, the employee needs to resolve the issue with SSA and inform you of any changes, and you should then correct your own records. ANLA's Government Relations Team advises that employers give employees a reasonable amount of time to resolve the mismatch issue with SSA and report back to the employer if there are changes that need to be made. The mismatch letter, the SSA writes, "is not a basis 'in and of itself' for you to take any adverse action against the employee, such as laying off, suspending, firing or discriminating against an individual who appears on the list." Employers who use the information in the letter to justify taking adverse action against an employee may violate state or federal law and be subject to legal consequences.

SEEKING LEGAL STATUS

Not all employers would seek to terminate an employee they believed to have questionable immigration status, anyway; for some, discovering or knowing that an employee is illegal, especially if that employee is a great asset to the company, is reason to find out how they can make the employee right with the law. Says Atterbury, “An employer calls and says, ‘I have reason to believe that some of my workers are not legal. What can I do to get them legal?’” This issue may have arisen because employees in question have come forward and admitted that they are not legal, or because another worker has come forward and indicated that the employer should take a look at X employee’s documents because he/she may be illegal. If the employer finds out an employee is illegal, they will either terminate them or call an attorney to find out how they can make the employee legal.

Unfortunately, there is no one way to answer this question — it must be dealt with on a case-by-case basis. Atterbury usually advises employers to go to a local attorney who handles immigration issues, and more specifically, one who deals with immigration issues in the green industry. You can find one through a referral from a corporate attorney, or contact the American Bar Association ([www.abanet.org](http://www.abanet.org)) for references. “Either the employer themselves and/or the employer and employee have to go and discuss it with the immigration attorney and determine what their individual legal status is, and what they can do to amend their status, if it is illegal, to make it legal,” Atterbury says.

An alternative, not-so-safe approach is for both employer and employee to go to the Immigration and Naturalization Service (INS) in person and ask what procedures would need to be followed to legalize the employee. You could be voluntarily placing your employee in the arms of danger, however, judging from the recent uproar over what happened to a number of Middle Eastern immigrants when they were forced to register with the INS. For those unfamiliar with the story, all male visitors aged 16 and older from five countries, including Iran, Iraq, Libya, Sudan and Syria, were

ordered to register with the INS by December 16, and in the process, some were arrested for not having their papers in order. In some cases, this lack of proper documentation was caused by government backlog. Lawsuits have been filed contending the INS is violating

Congress’ intent by detaining so many immigrants when the order was simply to register them.

With an attorney, you can be assured confidentiality and a possible path, however long, to legality; with the INS, no one knows what may happen.

I-9 FORMS

One tool every employer has in place to both avoid penalties and hiring potentially illegal employees is the I-9 Form. I-9 Forms are required by every employer in the United States for every employee hired since November 1986. The ♦



Form performs two functions: First, it identifies the workers and verifies their ability to work in this country, and second, if a government agent visits your facility, it provides documentation for them to verify the correctness of their own files and see if there are any potential violations of the law. There are fines and penalties associated with filling these forms out incorrectly or not filling them out at all, accepting illegal documents, or filling them out but providing incorrect documentation. Social Security cards are often one of the documents presented by a worker when filling out an I-9 Form, which brings us full-circle to the issue of Social Security mismatches once again.

So what happens if you accept documents that, unbeknownst to you,

turn out to be fraudulent? “As long as the employer examined the documents and they appeared to be valid using a reasonable-person test — as long as they look valid on the face of them — that’s as far as the employer needs to go. There is no penalty to the employer in those circumstances, assuming they followed a good-faith effort in examining them,” Atterbury says.

And what if you know an employee is illegal and try to skirt the law by not filling out an I-9 and paying “under the table?” First of all,

Atterbury does not believe that hiring illegal workers is as bad a problem as it used to be. “Business has become more sophisticated and the government has become more sophisticated, in terms of the tracking of workers and payment of wages.” If you should get caught, however, you could face large fines and penalties from the INS, the Internal Revenue Service, the SSA and any other agency that has anything to do with employment issues.



## WAGE AND HOUR ISSUES

The fourth issue concerning greenhouse employers has not to do directly with immigration, but with wage and hour laws. Making deductions that would reduce the employee’s wage below minimum is a frequent problem about which employers seek guidance. For example, the federal minimum wage is currently \$5.15 per hour. If an employer hires someone at \$6.00 per hour but requires the employee to purchase a uniform for the job, the employer would be violating the Wage and Hour Law if buying that uniform reduced the employee’s pay below \$5.15 in any given workweek.

Overtime issues are another area of concern, according to Atterbury, since it is widely assumed that employees working in the green industry are exempt from overtime because they are working in agriculture. That is not necessarily so. “The government’s definition of agriculture isn’t quite that broad, it’s a bit more restrictive, and there are a number of employers that don’t qualify for the agriculture exemption under the Fair Labor Standards Act. Overtime would be required if the employer does not qualify for the agriculture exemption; the standard is that overtime is required. You start with the basic premise that overtime is required to determine if employees are exempt or not.”

Employers will frequently call wanting to know if they might be violating the Wage and Hour Law by not paying overtime. Labor laws can be complicated, and it is difficult to determine a simple yes or no answer for particular questions without scrutinizing the case at hand. Atterbury advises that an employer with questions that fall under the Wage and Hour Law contact an attorney specializing in two things: first, the Fair Labor Standards Act, and second, its application in the green industry. “Even an attorney that’s familiar with the Fair Labor Standards Act may not do much work in the green industry, and it’s a bit different than, say, working in a factory or car dealership or something.”

ANLA offers a publication to its members that summarizes the Fair Labor Standards Act and its application in the green industry, written by Atterbury. For more information, call (202) 789-2900. If you have been contacted by the SSA, read the documents, follow their instructions and relax. If you want to make sure you aren’t violating any laws under the Fair Labor Standards Act, call an attorney with experience in the green industry. Wisdom for how to proceed can only come when all facts lie before you — not in the quagmire of the unknown.

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