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H2AUSA.COM Newsletter

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FROM: THE H-2AUSA FRONT DESK:

Borders Tighten, Immigrants Leave

A recent speech by government officials and ironically, a foreign newspaper, provide perspective for this week's insights into immigration in America.

From HSToday's (Homeland Security Today's) website:

"US Homeland Security Secretary Michael Chertoff welcomed US Secretary of Commerce Carlos Gutierrez to the headquarters of US Customs and Border Protection in Washington, DC, Monday to deliver the Bush administration's third state of immigration address, highlighting progress the federal government has made on enforcing border security and immigration enforcement while boosting temporary worker programs.

"For border security, Chertoff highlighted progress on border fencing, staffing for US Border Patrol, and the Secure Border Initiative-Network (SBI-net) surveillance system."¹

Chertoff's 3-pronged plan briefly included these points:

1-Fencing:

"Currently, the Department of Homeland Security (DHS) has built about 330 miles of fencing out of a target of 670 miles scheduled to be completed by the end of December 2008. The department continues to work with landowners

along the US southern border to resolve disputes over the placement of that fencing, Chertoff stated."²

2-Border Patrol:

"The number of US Border Patrol agents, meanwhile, is increasing dramatically. In fiscal 2002, the agency had 9,800 agents, but it now has 16,471, Chertoff reported. The agency will have more than 18,000 agents by the end of calendar year 2008."³

3-SBInet Security System:

"As for SBInet, Project 28 has produced a functional prototype and key members of Congress have been impressed with its progress, Chertoff remarked. DHS will soon award SBInet prime contractor Boeing with additional task orders under the program to proceed with deploying the next legs of the operational version of the system, the secretary added."⁴

US Secretary of Commerce, Carlos Gutierrez, taking note of recent attempts by the individual states to set up their own version of the H-2A program, weighed in with this:

"He cautioned states against enacting piecemeal integration laws, calling for comprehensive immigration reform efforts at the federal level.

"This patchwork of laws is untenable in the long-term. But until Congress acts, we will take steps for our nation's security and our economic stability," Gutierrez commented."⁵

From another publication—this one, *The Guardian*, from the United Kingdom, there comes a report of Florida immigrants being fed up and moving out of the state.

"There was no one thing that caused Hector Salinas to pack his bags and give up for good on the trials of life as an illegal immigrant in southern Florida. But the reasons he enumerates are echoed by increasing numbers of Latin American immigrants, both legal and not, who appear to be souring on their job prospects and going home.

... "No hard figures exist, but various surveys and anecdotes from immigrants, their advocates and consular officers in Miami suggest that more Latin Americans are voluntarily heading back home, the apparent result of the US economic downturn and anxiety generated by a federal crackdown on illegal immigration.

"The hardest hit appear to be those in agricultural, construction, food processing and service jobs in which many immigrants work.

"In southern Miami-Dade county, even before the winter growing season came to an end, many farmworkers from Mexico and Central America were leaving for home.

"They can't find work," said Elvira Carvajal, a volunteer at the Florida Farmworkers Association in Florida City. "Then there is fear in the community because of immigration raids ... What are they going to do? A lot of people are opting to leave."

... "A recent survey of Latin American immigrants by the Inter-American Development Bank highlights their malaise: 81% said it was more difficult now than a year ago to get a well-paying US job. More than a quarter said they were considering going home in the next few years. And 68% said anti-immigration sentiment was a major problem - almost double the percentage who said so in 2001.

... "One difference, he said: Those coming to stay increasingly have work visas, in part in response to US immigration enforcement."⁶

¹ Mickey McCarter, "Immigration Address Highlights Borders, Workers," June 10, 2008. Website at: <http://hstoday.us/content/view/3721/128/>. (accessed 6-13-08)

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ "More immigrants choosing to leave US," This article was first published on [guardian.co.uk](http://www.guardian.co.uk) on Wednesday June 11 2008. Website at: <http://www.guardian.co.uk/world/2008/jun/11/usa>. (accessed 6-13-08)

Wage and Hour Disputes Analyzed by former DOL Administrator

Paul DeCamp, a former administrator for the DOL recently spoke at a conference session entitled "Inside the DOL Wage and Hour Division" at the 25th annual Upper Midwest Employment Law Institute in St. Paul, MN, on May 30, 2008.

Some of his presentation involved agricultural labor. Here are some germane snippets from his speech:

"Every law that the agency (Department of Labor) enforces is, at its core, about protecting workers' rights in one way or another," DeCamp noted. "Agency personnel believe in the laws that they enforce, and they see themselves as protecting the workers whose rights may have been violated."

"Some investigators have seen so many willful violations during their careers that they have become jaded and generally suspicious of employers," he concedes, "but that is not the typical field employee."¹

If that is not the "typical field employee," then why am I getting this creeping sensation along the base of my spine right now?

"The Wage and Hour Division handles 30,000 compliance actions each year. Of these, 80 percent are complaint-based—generated by employees who have contacted the agency. The remaining 20 percent are investigations instituted by the agency without a complaint, in accordance with its particular goal of protecting workers who are lower-income and less likely to help themselves or to retain private counsel to take on their employer.

"These 'directed' cases focus on types of workplaces or employers where compliance is likely to be low and violations are likely to go unreported or underreported," DeCamp noted. "For example, the agency seeks to maintain an active directed investigation program in the areas of agricultural labor, child labor, low-wage industries, and businesses that tend to employ undocumented workers." The DOL's 2008 enforcement initiatives include:

"Gulf Coast. The agency has expended considerable resources to address the anomalous labor conditions that arose after Hurricanes Katrina and Rita in the Gulf Coast in 2005, with the convergence of large-scale government contracting and the day labor/farm labor contractor model of staffing. "The result was a very large number of fly-by-night enterprises with little or no working capital and little or no experience with contracts, particularly federal government contracts, or with complying with the full spectrum of applicable labor laws," DeCamp explained. As a result, many workers in the Gulf Coast did not receive all of the pay to which they are entitled.

"The severity of the problem was magnified by the fact that a large portion of the emerging workforce in the region consists of undocumented workers who are reluctant to approach the federal government to present a wage claim," DeCamp added. "The agency is actively enforcing the laws in the region, as well as working with community groups, such as churches, immigrant rights groups, and local media to get the word out to the worker community that the agency is there to protect their rights and not to enforce provisions of the INA that are outside the Department's bailiwick."²

Two areas that would be particularly interesting for farmers to ponder are these:

... *"Disclosures, wages, housing, and transportation.* The agricultural initiative focuses this year on disclosures that employers must make to workers, the wages they must provide, terms and conditions relating to employee housing, and the transportation, if any, that the employer provides to its workers. "Transportation, in particular, is an especially important aspect of enforcement because virtually every year the news carries one or more stories about a serious or fatal automobile accident involving a farm labor contractor transporting migrant workers in an uninsured or otherwise unsafe vehicle," DeCamp explained.

"Recidivism. The Wage and Hour Division seeks to track the impact of its interactions with employers by reinvestigating employers that have previously been found in violation. The agency hopes to see that reinvestigated employers have a higher compliance rate than the average for their industry. "If so, this suggests that the agency's efforts are increasing compliance. Where prior interactions with the agency have not improved compliance, this indicates that the agency needs to be more aggressive and punitive with respect to recidivist employers."³

Finally, legal advice is offered by Mr. DeCamp, in the form of recommending settling with the Department of Labor over litigation, instead of opting for going for litigation with the ever-so-pricy avenue of private attorneys—which, I understand, is paved with gold! (For the attorneys, that is.)

"Except in the most unusual circumstances, an employer is virtually always better off resolving a matter with the Department of Labor than through litigation with a private attorney," he stressed. "In most instances, so long as the employer agrees to future compliance and to provide back pay, and where there is no evidence of deceit or intent to violate the law, the Department will be willing to resolve an investigation on the basis of a two-year limitations period, without liquidated damages, without attorneys' fees, and with the use of the fluctuating workweek method for calculating back overtime.

"Most private counsel, by contrast, seek a three-year limitations period, plus liquidated damages, attorneys' fees and costs, and using an overtime calculation that seeks full additional time-and-a-half for all hours above forty in a week.

"Moreover, private counsel tend—and perhaps have an ethical obligation—to take the most aggressive legal positions regarding liability," DeCamp pointed out, "whereas the Department has a more neutral approach to the law." While a private attorney strives to obtain the optimal outcome for his individual client, "the department needs to look at its cases more from a macro perspective. Each case has to fit in with the agency's overall enforcement approach."⁴

¹ Topic Spotlight, "Former Wage and Hour Administrator offers a glimpse inside the DOL," Website at: <http://hr.cch.com/topic-spotlight/emplaw/061508a.asp>. (accessed 6-20-08)

² Ibid.

³ Ibid.

⁴ Ibid.

Construction Bust a Boon and Machine Mania

During my weekly read, two curious stories caught my eye. The first was a tale of a sub-cultural phenomenon at the moment: the return of foreign workers to the farm fields because of the construction woes of late—the second, farmers opting for the road less traveled—chopping down their orchards that require harvesting by hand and going the way of the machines.

In the article, "*Immigrants Turn to Farm Work Amid Building Bust*," we find the writer, Miriam Jordan—writing for *The Wall Street Journal*—explaining that:

"The building bust is turning out to be an unexpected boon for another industry, agriculture, as many Hispanic immigrants who lost construction jobs return to the fields in search of work.

"In recent years, the ranks of farm workers had been thinned by a crackdown on illegal immigration coupled with the lure of better-paying construction jobs. That left farmers scrambling to find workers to harvest labor-intensive crops. Now, growers and labor contractors from Florida to California are reporting that former carpenters, dry wallers and painters are returning."¹

Certainly, if this is true, it could be a boon to the crisis generated by the shortages of workers because of the security issues with migrants, the stalemate in Congress over immigration, and the crackdown at the borders and raids on businesses. But, is it a long-term panacea for the labor crisis?

Jordan continues:

"In recent years, real-estate growth fueled an exodus from the countryside. Construction offered full-time, year-round work that was better paying and less arduous than field labor. It also offered opportunities to acquire skills that raise earnings.

"During the construction boom, people were leaving the fields to get paid on an hourly basis rather than on a piece-rate basis," said Phil Martin, an agricultural economist at University of California at Davis. "Now, construction is not adding workers, and the gap between construction and farm wages has narrowed."

"Field workers make an average of \$9.65 an hour in the U.S., according to the Agriculture Department. Many construction jobs now pay about the same. ...An analysis released last week by the Pew Hispanic Center found that foreign-born Hispanics have been disproportionately affected by the construction slump. The report also concluded they have flocked to other occupations rather than return to their countries of origin."²

So, it is an either-or question for the illegals: Flee or fight. The question remains, however—how you going to keep them down on the farm after they have seen Paree? (or any other big city, in this case.) Are the numbers valid? The article continues:

"Because the reverse migration to agriculture is a new trend, it is yet to be quantified. UC Davis' Mr. Martin hopes to track the flow in a few months, when unemployment and other data become available.

"Agriculture is one of the main industries in states like California and Texas, but its growth has been hemmed in by labor shortages. California, the leading state, produces more than 350 crops that generate annual revenue of more than \$30 billion, or about twice that of Texas, the second-largest farm state.

... "Farmers still complain of a dearth of workers, particularly in regions of Arizona and Texas near the Mexico border. Most field workers have crossed into the U.S. from Latin America without documentation. Beefed-up security at the border has made it more difficult, risky and expensive for undocumented workers to re-enter the U.S. That has interrupted the circular migration of seasonal workers -- and prompted some farmers to move."³

And so, the watchwords, as with most farm workers issues of late, is the same: Wait and See!

The following dispatch comes from our friends at *The New York Times*, via reporter Joshua Brustein. It deals with increasingly frustrated farmers who have opted for less labor and more machinery in order to decrease their frustration level with the shortage of available field hands.

"APPLETON, N.Y. — Scores of Jim Bittner's cherry trees are now just heaps of roots and sticks, piled in his fields here along Route 18. Some of the branches lying on the ground are dotted with small blossoms, the season's earliest evidence that sweet cherries were on their way. But for Mr. Bittner, having sweet cherries would have meant hiring someone to prune the trees and harvest

the fruit, and he was not sure that he could do it this year. So he cut his trees down.

"Mr. Bittner said he was planning to grow blueberries, or tart cherries for use in pies, because those crops could be harvested by machine and did not require migrant workers.

"Others managing the fields and dairies of western New York State are starting to make the same calculation. For the last several years, crackdowns on illegal immigrants and the lack of comprehensive immigration reform have increased anxiety among the region's farmers, many of whom rely on a migrant labor force from Latin America to work their fields. Some have begun making changes in their operations to reduce their reliance on that labor force."⁴

So, did Mr. Bittner do the right thing or was he too hasty? Here is some background and perspective on the situation:

"There are no data on the number of farmers changing crops because of the labor problem. Farmers' organizations and state officials said that only small numbers of farmers were making major changes and that there was no immediate threat of major disruptions in local agricultural markets.

"But experts monitoring New York's agricultural industry said that the shift away from labor-intensive crops would accelerate if the uncertainty over migrant labor and immigration policies remained unresolved. (On May 20, an attempt by Senator Dianne Feinstein of California to attach a guest worker program to an Iraq spending bill failed.)

"I don't believe that we are seeing those numbers right yet, but I do think that this is a serious conversation that farmers are having," said Jessica Chittenden, a spokeswoman for the state's Department of Agriculture. "One of the things that will change is the fresh market crops that need to be handpicked. They're fresh, they're fragile and they need that special personal harvest."

"Last fall, the Farm Credit Associations of New York, which finance farmers in the area, issued a projection, using federal Department of Agriculture data, showing that 800 farms in the state with total sales estimated in excess of \$700 million were "highly vulnerable to going out of business or forced to severely cut back their farm operations."⁵

Then, there is the question that came to my brain at once: Will some enterprising entrepreneur fill the niche left by the abandonment of hand-picked harvesters and come to use an available labor pool in an innovative way to do so. But then, that would depend on the numbers available, wouldn't it? Which, as I last calculate it would fall into the lap of our US Congress. That, and the level of individual expertise and resources risked and brought to bear on the matter.

¹ Miriam Jordan, *"Immigrants Turn to Farm Work Amid Building Bust,"* June 13, 2008. The Wall Street Journal website at:
http://online.wsj.com/article/SB121331595868170069.html?mod=googlenews_wsj. (accessed 6-21-08)

² Ibid.

³ Ibid.

⁴ Joshua Brustein, *"With Migrant Workers in Short Supply, a Farmer Looks to Machines,"* 5-29-2008. The New York Times website at:
http://www.nytimes.com/2008/05/27/nyregion/27crops.html?_r=1&em&ex=1212206400&en=c8d68c32b1972005&ei=5087%0A&oref=slogin. (accessed 6-21-08)

⁵ Ibid.