



**NATIONAL
COUNCIL OF
AGRICULTURAL
EMPLOYERS**

**Statement of
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On behalf of the

National Council of Agricultural Employers

Before the

House Judiciary Subcommittee on Commercial and Administrative Law

February 28, 2002

The National Council of Agricultural Employers (NCAE) appreciates the opportunity to submit this statement on the activities of Legal Services Corporation (LSC) grantees in relation to agricultural employment issues. NCAE's membership includes agricultural employers in all 50 states who hire the vast majority of the national agricultural workforce. Our members include farm cooperatives, growers, packers, processors and agricultural associations. Many of our members utilize the H-2A temporary foreign worker program, which is a focal point for LSC-funded lawsuits.

Labor is an essential input in farming. Fundamentally, all commercial farms rely to a greater or lesser degree on hiring labor to perform certain essential tasks. The 1997 Census of Agriculture reported that more than 650 thousand farms hire labor directly, and reported 3.4 million hires. More than 225 thousand farms also hired contract labor. Total expenditure for hired and contract labor in 1997 was \$17.8 billion. This was nearly 12 percent of total farm production expenses, or \$1 of every \$8 spent by farmers. Farmers spend more for hired labor than they spend for seed, fertilizer, agricultural chemicals, petroleum products, interest or property taxes. In fact, after purchases of livestock and feed, hired labor accounts for greater farm production expenses than any other category of expenses reported by the Census of Agriculture.

The H-2A program in the Immigration and Nationality Act, the program Congress enacted to deal with legal labor shortages in agriculture, is unworkable and in a state of paralysis. The H-2A program is administratively cumbersome and imposes uncompetitive requirements on employers. Unlike other temporary worker programs, the

H-2A implementing regulations are over 40 pages long and the Department of Labor internal operating procedures manual interpreting the regulations is over 300 pages. But, the threat of LSC-funded lawsuits against any employer who seeks to utilize the program is one of the main reasons growers shy away from its use. NCAE is working with members of the House Judiciary Committee to reform the administrative side of this program and bring it into the 21st century. These reforms should eliminate some of the “gotcha’s” that LSC grantees utilize to harass agricultural employers out of the H-2A program.

Grantees, however, are always searching for new issues upon which to base lawsuits – pushing the envelope on requirements of federal labor laws and the restrictions Congress has placed on their activities. Other representatives of agriculture will present statements on grantees’ use of mirror corporations to avoid Congressional restrictions on class actions and alien representation. This statement will address the contortions of the Erlenborn Commission Report of 1999 relating to the alien representation restriction, and the continued filing of Fair Labor Standards Act (FLSA) lawsuits based on issues the courts have held are without merit.

Erlenborn Commission Report

In 1998, LSC attorneys from North Carolina were caught on videotape recruiting alien clients in Mexico in violation of restrictions in both appropriations law (PL 105-277) and LSC regulations (45 CFR Part 1626). The relevant section of the law states “None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity...(11) that provides legal assistance for or on behalf of any alien, unless the alien *is present in the United States*...(emphasis added).” After an investigation called for by Rep. Charles Taylor, the LSC fined the grantee \$17,000 for providing legal assistance to aliens who had never even been in the United States.

Afterwards, the LSC Board scrambled to find a way to circumvent the restriction. A “special commission” was appointed under the Chairmanship of the Honorable John N. Erlenborn and then filled with pro-LSC members. Against the provisions of the Government in the Sunshine Act, the commission met behind closed doors. In tortuous report language, the commission decided that the law denying legal assistance to any alien really meant “*was present in the United States.*” This action flies in the face of congressional intent and seeks to rewrite federal law to suit the LSC’s own purposes. The LSC Board of Directors has no authority to change the plain meaning of the federal law. “Is” does not mean “was.”

No amount of self-serving interpretation by Legal Services activists can change the meaning of the law. Yet it has become apparent that Legal Services lawyers have routinely violated the law based on their own absurd notion that “is” means “was.”

The February 17, 1999 article in *The Wall Street Journal* (“Legal Air Lawyers’ Kicks Up New Battle With Farmers in North Carolina,” by Motoka Rich) illustrates the

intrinsic unaccountability of Legal Services lawyers when the law is inconvenient to their agenda:

“The dispute centers on a regulation of the Legal Services Corporation, which distributes federal funding to local legal-aid groups. The rule says lawyers can assist foreign temporary workers only while they are ‘present in the United States.’ Legal services attorneys took that to mean they could help workers with issues that occurred while they were in the country. And until Ms. Hall’s trip, no one questioned the attorneys’ interpretation that they could provide migrants who had returned to Mexico with follow-up counseling for such cases as assuring final payment of wages or medical care for injuries that occurred in the U.S.”

A simple procedure exists for Legal Services lawyers who have any doubt as to the meaning of a regulation issued by LSC. They can contact the General Counsel of LSC and request a written opinion as to the meaning of the language in question. Apparently, the last thing any Legal Services lawyers wanted was a written opinion telling them that the legal requirement that an “alien is present in the U.S.” to receive assistance means that the alien must be present in the United States to receive legal assistance. The very fact that Legal Services lawyers engaged in illegally representing non-citizens not present in the U.S. did not seek such guidance from the LSC General Counsel speaks for itself.

The LSC, rather than enforce the law as required by the LSC Act, saw fit to appoint the Erlenborn Commission to study the language of an appropriations law it had absolutely no authority to change. The fact that the commission was named in secret, had nothing remotely resembling balance, and met in closed-door sessions to develop its tortuous conclusions for the final report, is all further proof to those of us whose members must deal with this rogue program that we should not expect any fair treatment or good faith actions from the LSC Board.

“Glassboro” Theory-based Lawsuits

Legal Services grantees, and/or their mirror corporations, during the past couple of years have filed numerous lawsuits against agricultural and other employers alleging violations of the minimum wage provisions of FLSA based on the “Glassboro” theory. The *Glassboro* theory addresses two closely related issues in connection with expenses incurred by workers. The first issue is whether actual deductions for food, transportation, housing, and other expenses can be counted toward the minimum wage. These deductions are called “direct deductions” and are relatively uncontroversial. The second issue is whether costs incurred by the workers themselves in seeking work and coming to the job can or should be counted toward the minimum wage. These so-called deductions are called “*de facto* deductions” and are highly controversial. *Glassboro* proponents argue that these expenses are for the employer’s benefit and therefore cannot be credited against or allowed to reduce the workers’ earnings below the minimum wage. They argue that merely arriving at work is a “benefit” to the employer, whether or not the

employee performs any work. To the extent that these so-called deductions “reduce” the workers’ wages below the minimum wage during the first pay period, proponents of the *Glassboro* theory argue that a violation of the minimum wage law occurs.

Stripped to its core, the *Glassboro* theory is nothing more than a policy judgment of its proponents that all employers ought to pay transportation, subsistence, and immigration-related costs for their workers. The applicable statutory materials and regulations do not compel it; in fact, they contradict *Glassboro*. When, in the early 1990s, the Department of Labor sought actively to enforce *Glassboro* with agricultural employers, its efforts engendered strong political opposition and ultimate defeat. Because of this defeat, *Glassboro* proponents have switched to the courts to achieve their political goal through judicial decree, rather than publicly accountable rulemaking.

Glassboro-based lawsuits have been filed by Florida Rural Legal Services, Michigan Migrant Legal Assistance Project, Farmworker Law Project of the Legal Aid Society of Mid-New York in conjunction with its mirror corporation, Farmworker Legal Services of New York, and by the Florida mirror corporation, the Migrant Farmworker Justice Project. These cases were filed even though the United States Court of Appeals for the Ninth Circuit in *Reich v. Japan Enterprises Corp.* found DOL’s asserted authority in support of *Glassboro* completely lacking. Although technically not binding on other courts outside the Ninth Circuit, the *Japan Enterprises* decision is well reasoned and should be followed.

In fact, the Florida Federal District Court rejected the Migrant Farmworker Justice Project attorney’s arguments in *Alvarado et al., v. R&W Farms and Florida Pacific Farms* that employers of H-2A workers violated FLSA by failing to pay for workers’ immigration and transportation costs to the United States based in large part on the *Japan Enterprises* decision. In a case of first impression, the court found that travel costs and recruiter fees paid by H-2A workers to enable themselves to work in the United States are not reimbursable expenses that must be paid by the employer prior to the end of the first pay period. The court rejected the *Glassboro* theory and granted summary judgment for the defendant strawberry growers.

Not to be deterred, the Migrant Farmworker Justice Project has appealed this decision to the U.S. Court of Appeals for the Eleventh Circuit and has filed three additional lawsuits based on the same arguments against other strawberry and citrus growers. NCAE has submitted an *amici curia* in support of the defendants in the *Jorge E. Arriaga, et al., v. Florida Pacific Farms, et al.* case.

NCAE firmly opposes the *Glassboro* theory and the attempts by Legal Services attorneys and their mirror corporations to expand it. We believe that the *Glassboro* theory unfairly shifts costs and expenses to employers and does so in a way that is contrary to any reasonable interpretation of the law. Continued filings of lawsuits based on *Glassboro* in the face of adverse court rulings only serves to harass agricultural employers and subject them to needless litigation expenses.

Conclusion

Based on the LSC's continued reluctance to enforce the restrictions placed on grantees by Congress, and the continued disproportionate litigation filed against H-2A employers to the exclusion of providing legitimate legal counsel to the poor, NCAE asks this Subcommittee to continue its close oversight of LSC and its grantees. The Council also asks the members of this Subcommittee to encourage President Bush to quickly appoint a LSC Board that will enforce Congress' restrictions and implement mandated reforms of the grant process to ensure a system of competition among would be legal services providers.

Thank you, again for the opportunity to submit this statement to the record.