



Agricultural Law Update

January 2012

I-9 COMPLIANCE & E-VERIFY – A POTENTIALLY USEFUL TOOL, BUT NOT A SUBSTITUTE FOR A COMPREHENSIVE COMPLIANCE POLICY

- Ryan E. Lamb

The last few years have witnessed significant increases in workforce audits and raids by U.S. Immigration and Customs Enforcement ("ICE") at all levels. Therefore, while proper I-9 compliance has always been important, it has never been more essential. It is not enough for employers to simply fill out the I-9 form to the best of their ability according to the basic form instructions and throw them in a file. Proper I-9 compliance requires due care and proactive planning.

Two Documents Every Employer Needs to Have:

Every employer should have a formal internal I-9 Compliance Policy detailing the employer's exact policies and procedures for properly completing, verifying and retaining I-9 and employment authorization documentation, for assigning supervisory responsibility within the company for these duties, and for self-audits or other periodic internal monitoring efforts to ensure compliance. The other document every employer needs to have is an Employee Handbook which contains a section explaining to the employee the employer's and the employee's respective obligations with respect to Form I-9.

If I sign up to participate in E-Verify, am I relieved of my other I-9 compliance obligations?

No! E-Verify permits employers to verify the employment eligibility of newly hired employees by comparing the employee's eligibility information with online government databases. The government's "E-Verify" Program has received large shares of attention and

publicity, with the U.S. government and many state governments actively encouraging, and in some cases mandating, participation in the program. While E-Verify can be a useful tool supplementing basic I-9 compliance, the employer's strict procedural compliance with I-9 regulations is paramount. An employer could positively verify an employee's employment eligibility using E-Verify and nevertheless remain exposed to fines and penalties for failure to properly complete, retain, or manage its I-9 documentation.

With all of the enforcement activity, publicity and risks, it is time to get proactive on this issue. As there are a number of positive and negative factors to be considered on an individualized basis, unless mandated, choosing whether to participate in E-Verify is a decision that an employer should review with their legal counsel when implementing or updating its comprehensive I-9 Compliance Policy.

The experienced immigration or employment attorneys at Foster Swift welcome an opportunity to discuss a comprehensive approach to your agricultural business. ■ ■



Ryan E. Lamb
Attorney

P: 571.371.2503

E: rlamb@fosterswift.com

DATES TO REMEMBER:

January 9-11, 2012 | Michigan Agri-Business Association Winter Conference & Trade Show (Lansing, MI) VISIT OUR BOOTH (#635)

January 17-19, 2012 | Fort Wayne Farm Show (Fort Wayne, IN)

January 26, 2012 | Michigan Ag Commodities Educational Expo (Lansing, MI)

February 15-18, 2012 | National Farm Machinery Show (Louisville, KY)

March 1-3, 2012 | Commodity Classic (Nashville, TN)

MOST FAVORED NATIONS CLAUSES IN WIND FARM CONTACTS

- Scott A. Storey

The current national focus on developing alternative sources of energy has resulted in a dramatic increase in efforts to obtain leases and/or easements for the development of wind farms. These efforts have expanded far beyond the Great Lakes shorelines and windiest areas of Michigan, and wind farm developers are now obtaining leases and easements in nearly every part of the State.

In general, the provisions in the wind farm contracts, like in other contracts, are negotiable. However, an increasing number of developers are using "Most Favored Nations Clauses" to avoid negotiation over the financial terms in these contracts.

A Most Favored Nations Clause usually promises that the developer will not offer anyone else a better deal. The Most Favored Nations Clauses are typically applicable only to the financial terms of the wind farm contract. Developers will promote the clause as assuring you that no one in the area will get a better deal than you. However, developers will include a Most Favored Nations Clause in all of their contracts.

Thus, the practical effect of the clause is that the developer also cannot offer you better financial terms than it offers to everyone else. The clause allows the developer to claim that its hands are tied and that it is impossible to negotiate any of the financial terms of the contract.

Fortunately, Most Favored Nations Clauses are usually limited to the financial terms of a wind farm contract. Thus, with the assistance of legal counsel, it may still be possible to negotiate issues such as turbine and road placement, drain field repair, burying lines below plow depth, guaranteed payments for the length of the contract, and site restoration when the contract terminates. ■■



Scott A. Storey
Attorney

P: 571.371.8159

E: ssorey@fosterswift.com

HIDDEN RISKS IN LAND CONTRACTS

- Scott A. Storey

Selling property by land contract is often a viable option where conventional financing is not available. However, there can be risks associated with a land contract that are completely unrelated to the financial considerations.

An example of these potential risks arose when a Foster Swift farm client was presented with an opportunity to sell several hundred acres of timbered land. The property had been well-managed for decades by a well-qualified forester. The buyer offered a generous price and represented that his intention was to establish an upscale development on large wooded lots with a park-like buffer. The purchase was to be financed through a land contract.

Shortly before the closing, however, the client observed a timber harvester on the wood lot, apparently marking trees for clear cutting. Alarmed, the client requested Foster Swift to assist it in rescinding the purchase agreement. Further

investigation disclosed that this purchaser had obtained other large wooded parcels on land contracts, harvested all of the timber, and then defaulted on the land contracts, allowing the sellers to recover back the deforested property.

The client was able to avoid this fate, but not until after defending a year of litigation brought by the purchaser in an unsuccessful effort to enforce the purchase agreement. And, although the client later obtained a significant judgment against the purchaser for fraud, it would have preferred to avoid the aggravation.

Next time this client sells property under a land contract, you can bet that its investigation of the purchaser will be thorough and that it will not be limited to only a determination of the purchaser's ability to honor the financial terms of the land contract. ■■

Oil and Gas Update

HYDRAULIC FRACTURING IN OIL AND GAS DEVELOPMENT

- Scott A. Storey

The use of hydraulic fracturing in oil and gas exploration has recently generated significant public debate. Hydraulic fracturing, which may be employed during the drilling or reworking of oil and gas wells, involves the injection of water, sands and chemicals at high pressure down and across into horizontally drilled wells. This pressurized mixture is released into the rock layer thousands of feet below the surface causing the rock layer to crack. The resulting fissures are held open by the sand particles in the mixture, which allows natural gas to flow up the well.

Hydraulic fracturing has been used in Michigan since the 1950s in more than 12,000 wells. The practice has come under recent criticism, most notably in Pennsylvania, where there have been reports of gas migrating in to aquifers, most

likely due to improper well construction. The EPA also recently announced the preliminary results of a study in Wyoming which suggested the possibility of aquifer contamination resulting from hydraulic fracturing. Michigan, however, which has always been considered a leader in regulation and safety of oil and gas wells, recently enacted additional regulations for larger-volume hydraulic fracturing. These new requirements include additional documentation of fresh water use to ensure no adverse impact to surface water or neighboring water wells, and submission of fracturing records and charts showing fracturing volumes, rates and pressures. Notwithstanding these new protections, we expect that hydraulic fracturing will continue to be the subject of much research and discussion in connection with Michigan oil and gas exploration and production. ■■

THE SIGNIFICANCE OF THE PRIMARY TERM ON OIL AND GAS LEASES

Most oil and gas leases proposed by oil companies provide for long primary terms and options that can double the primary term of a lease. The primary term is the initial period during which a well may be drilled. If a successful well is drilled within the primary term, the lease will extend for as long as the well remains productive. If a well is not drilled within the primary term, the lease will usually expire. Scott Storey often counsels his landowner clients to negotiate for short primary terms and for little or no option to extend the lease. This advice recently worked out well for two of Scott's clients.

In one case, an oil company offered to lease a client's 160 acres for a five year primary term. The proposed lease also contained an option to extend the lease an additional five years upon payment of an additional \$40 per acre.

Scott was able to assist the client in negotiating a primary term of three years with an option to extend the lease for two years. An additional payment of \$100 per acre would be required to exercise the option. Recently, the client reported the receipt of \$16,000 from the oil company which had elected to exercise its option so that it can drill a well on the property early next year.

In the other case, a client was presented with a proposed lease with a primary term of seven years. Scott was able to assist the client in getting the primary term reduced to two years. Since the two year anniversary is fast approaching and the oil company will not be ready to drill its planned well until early 2012, he is now assisting the client in negotiations for a new one year lease which will result in another \$100 per acre signing bonus for the client. ■■



MANAGING RISK IN CONTRACTS

- Liza C. Moore

Entering into contracts is an important part of every agribusiness. No one enters into a contract expecting it to go sour, but sometimes they do. While it is not possible at the time of contracting to anticipate and avoid every potential risk, strategies exist to help minimize exposure and avoid costs down the road. The list below covers the fundamentals:

- **Investigate risks before contracting.** Be sure that you know why you are entering into the contract and what you expect to gain from the contract. In this volatile economic climate, it is more important than ever to carefully evaluate whether changed circumstances or increased input costs in the future could affect the abilities of the parties to satisfy the agreement. Be comfortable with the terms of the agreement.
- **Know who you are contracting with.** Are you doing business with a corporation, limited liability company, partnership, or individual? Are they a Michigan business, or could litigation end up out of state? What assets does that entity have, in case you need to collect on a debt later? Answering these questions will help ensure you understand whether the person has the money to pay, and whether you would be able to collect in the event of a breach.
- **Put it in writing.** People may forget or misconstrue the terms of an oral contract. Plus some contracts must be in writing to be legally enforceable and avoid the statute of frauds. Put the interest rate (not over the usury limit) or time price differential in writing.
- **Be specific.** Ensure that the contract contains all the essential terms. For example, identify the goods that are being

purchased, the quantity and quality of the goods, the price and time of payment, the time and method of delivery. Detail any obligations of a party to be insured. Be sure that all parties agree on the terms.

- **Take action if the contract is breached.** If the goods you receive do not conform to the contract, give notice. Follow-up if payments are not made when due. Do not sit on your rights, as statutes of limitations or other legal requirements could affect your abilities if you wait too long.
- **Get advice.** Not sure whether you have covered all of the essential terms? Confused by legalese? Remember that it is better (and probably much cheaper) to get help understanding the terms of the contract before you sign it than to wait until the contract has been breached, or you find yourself in a lawsuit. Attorneys can help you ensure you have a perfected security interest, draft contracts to fit your needs, and explain what contract language means.

Be proactive on your contracts. Remember, attorneys can help efficiently and effectively manage your risk. ■■



Liza C. Moore
Attorney

P: 571.371.8281
E: lmoore@fosterswift.com

AGRICULTURAL ATTORNEYS:

PRACTICE GROUP LEADER

Brian G. Goodenough

517.371.8147

bgoodenough@fosterswift.com

Charles E. Barbieri | 517.371.8155

James B. Doezema | 616.726.2205

Julie I. Fershtman | 248.785.4731

Todd W. Hoppe | 616.726.2246

Charles A. Janssen | 517.371.8262

Ryan E. Lamb | 616.796.2503

David M. Lick | 517.371.8294

Liza C. Moore | 517.371.8281

Jean G. Shtokal | 517.371.8276

Scott A. Storey | 517.371.8159

Lynwood P. VandenBosch | 616.726.2201

David VanderHaagen | 517.371.8102

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