

# Immigration Reform: What's Next for Agriculture?

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About 5% of U.S. workers, and over 50% of the workers employed on U.S. crop farms are unauthorized. This article explains how immigration reforms in the past increased the availability of unauthorized farm workers, allowing employers to become complacent about farm labor. However, federal government audits of employers, and more states requiring employers to use the federal E-Verify database to check the legal status of new hires, have increased worries about the cost and availability of farm workers.



Producing specialty crops, such as pears pictured above, involves large numbers of immigrant farm workers to fill seasonal jobs.

Farm labor was a major concern of agriculture in the early 1980s when enforcement of immigration laws involved the Border Patrol driving into fields and attempting to apprehend workers who ran away. Apprehended migrants were normally returned to Mexico, and many made their way back to the farms on which they were employed within days. There were no fines on employers who knowingly hired unauthorized workers, and the major enforcement risk was loss of production until unauthorized workers returned. As a result, perishable crops, such as citrus, that were picked largely by labor contractor crews included more unauthorized workers than lettuce crews that included workers hired directly by large growers.

The Immigration Reform and Control Act (IRCA) of 1986 imposed federal sanctions on employers who knowingly hired unauthorized workers. In order to avoid fines and criminal sanctions, all newly hired workers must present documents to their employers to establish their identity and right to work. The employer and worker complete and sign an I-9 form attesting that the worker presented and

the employer saw work-identification documents. Employers are not required to determine the authenticity of the documents presented by workers.

There were two legalization programs in 1987–88 that allowed 2.7 million unauthorized foreigners, 85% of whom were Mexicans, to become legal immigrants. The nonfarm program legalized 1.6 million unauthorized foreigners who had been in the United States since January 1, 1982, while the Special Agricultural Worker (SAW) program legalized 1.1 million unauthorized foreigners.

Unauthorized workers continued to arrive in the early 1990s and presented false documents to get hired, that is, forged documents or documents that belonged to work-authorized persons. As a result, employers faced less risk of disrupted production because the paper chase involved in checking whether documents were genuine did not immediately remove unauthorized workers from the workplace as had Border Patrol worker chases.

Figure 1 shows that newly legalized SAW farm workers were one-third of the crop work force in the early 1990s, but found nonfarm jobs

Figure 1. SAWs Down, Unauthorized Up

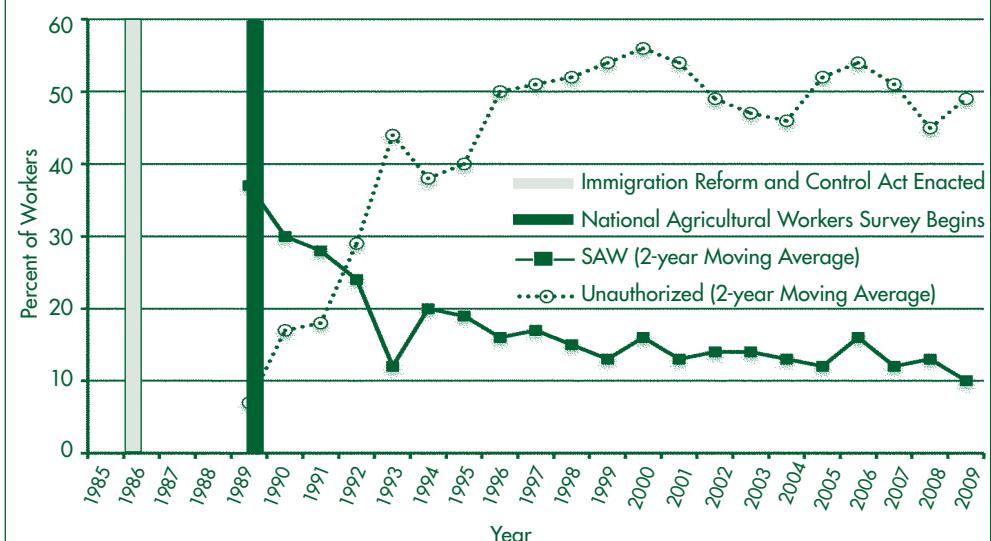
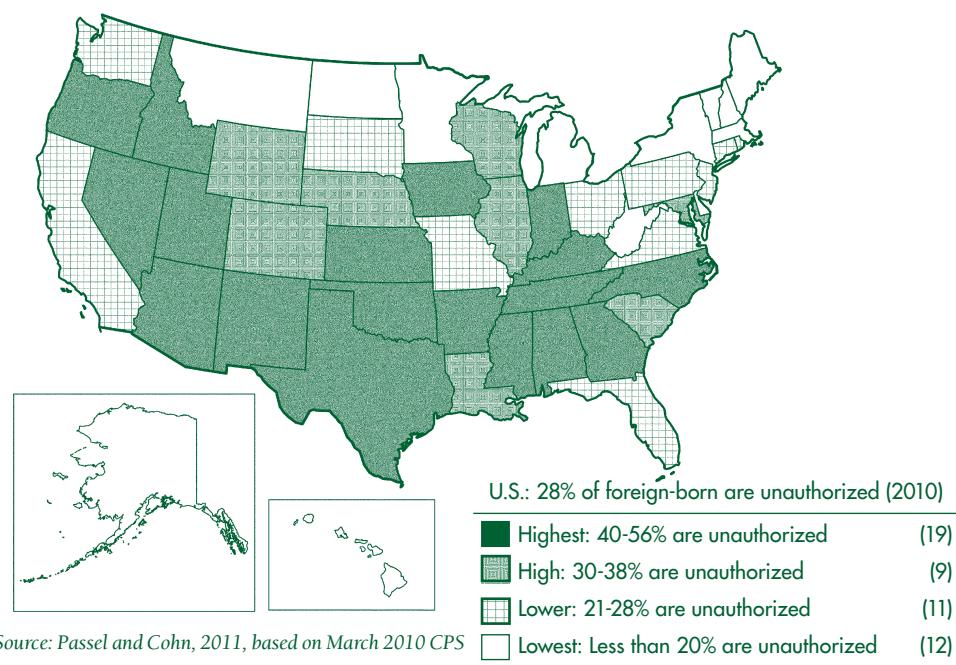


Figure 2. Unauthorized Share of Foreign-Born Residents by State



as the economy improved in the mid-1990s. The U.S. Department of Labor's National Agricultural Worker Survey first found that over half of the workers employed on U.S. crop farms were unauthorized in 1995, and the share of unauthorized crop workers has remained at about half since then.

### Federal E-Verify and I-9 Audits

In 1996 Congress required the then Immigration and Naturalization Service to develop programs to check the validity of worker documents. These programs evolved into E-Verify, the current Internet-based system that employers used to check on the legal status of almost 16 million new hires in fiscal year (FY) 2010, about 30% of the 50 million to 60 million new hires made each year in the United States.

Employers submit Social Security numbers and immigration data to E-Verify, and over 98% of their inquiries result in workers being confirmed as work-authorized in less than five seconds. Employees with "tentative nonconfirmations" are given a written notice advising them to correct their records so that E-Verify shows them to be authorized to work. Over

80% of tentative nonconfirmations result in the employee quitting, likely because the worker was unauthorized.

At the end of 2011, all federal contractors and 18 states required some or all of their employers to use E-Verify to check new hires. The U.S. Supreme Court upheld Arizona's Legal Arizona Workers Act in May 2011, which requires all of Arizona's employers to participate in E-Verify. Most major meatpackers have been using E-Verify for at least a decade. The House Judiciary Committee approved the Legal Workforce Act (LWA)(HR 2164) in September 2011 to require all U.S. employers to use E-Verify to check new hires and/or job applicants within four years.

Today the federal government enforces laws against hiring unauthorized workers by auditing the I-9 forms completed by newly hired workers and their employers. Most workers identified as having problematic documentation quit or are terminated, prompting denunciations of so-called "silent raids" aimed at unauthorized workers. Some employers, such as L. E. Cooke in Visalia, complain that I-9 audits require them to terminate

experienced employees who are difficult to replace. Gebbers Farms in Washington fired hundreds of workers after an I-9 audit and replaced them with legal H-2A guest workers.

### State Laws

With Congress deadlocked on immigration, states such as Arizona enacted laws to reduce the number of unauthorized foreigners in an "attrition through enforcement" strategy. Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070) in April 2010—a law that requires everyone to carry proof of their legal status and show this proof to police officers who stop them for other reasons. Unauthorized foreigners detected by police can be fined \$2,500 or jailed up to six months.

The Obama administration asked a federal court to block implementation of SB 1070, arguing that federal immigration law prevents Arizona from enacting a state law that interferes with federal immigration enforcement priorities and could lead to the arrest of U.S. citizens and foreigners lawfully in the United States who are not carrying proof of their legal status.

A federal judge agreed and issued an injunction blocking implementation of the key provisions of SB 1070. However, a Pew poll in May 2010 found 59% support for SB 1070, including two-thirds who support requiring people to present proof of legal status to police if asked.

Arizona and other states that enacted attrition-through-enforcement immigration laws have mostly unauthorized foreign-born residents. Figure 2 shows that a band of states that trace a U-shape, from Idaho through the southern states to North Carolina, has the highest share of unauthorized foreigners among foreign-born residents in the state. About 28% of foreign-born persons in the United States in 2010 were unauthorized, but 40% or more

Table 1. Average Annual Employment on Crop Farms, 2001–2010

Year	U.S. Crop Farms	CA Crop Farms	U.S. Support	CA Support	Total U.S.	Total CA
2001	563,580	189,192	274,652	156,136	838,232	345,328
2002	555,075	186,335	266,888	151,334	821,963	337,669
2003	555,926	184,247	270,101	156,615	826,027	340,862
2004	555,437	178,844	268,106	153,778	823,543	332,622
2005	548,715	177,003	280,336	166,012	829,051	343,015
2006	540,682	172,267	283,589	169,717	824,271	341,984
2007	538,528	172,222	287,457	175,985	825,985	348,207
2008	536,507	174,697	290,855	178,862	827,362	353,559
2009	531,096	170,041	279,642	166,885	810,738	336,926
2010	528,867	170,068	287,480	177,168	816,347	347,236
2009-10 -2001-02	-46,703	-27,271	19,205	28,808	-27,498	1,537
% Change	-6%	-11%	5%	11%	-2%	0%

Source: Quarterly Census of Employment and Wages

of the foreign-born residents in states such as Arizona, Alabama, and Georgia that enacted laws against illegal migration in 2011 are unauthorized.

Alabama's HB 56 is considered the "toughest" state law against unauthorized foreigners, with Arizona-style police and E-Verify requirements. This law also voids contracts entered into by unauthorized foreigners, makes it unlawful to hire or rent to unauthorized foreigners, and requires schools to obtain and report data on the legal status of school children and their parents (but not turn away unauthorized children). Suits have blocked the implementation of parts of HB 56, but some unauthorized foreigners left the state, prompting complaints of labor shortages.

The U.S. Department of Homeland Security (DHS) deports about 400,000 unauthorized foreigners a year. The main target of internal enforcement efforts are foreigners who committed U.S. crimes, but DHS agents take into custody other unauthorized foreigners they encounter when searching for criminals. Under

the Secure Communities program, state and local police share the fingerprints of persons they arrest with DHS, which can ask police to hold suspected unauthorized foreigners.

### Legal Guest Workers

If federal enforcement and state laws reduce the availability of unauthorized farm workers, can farmers hire legal guest workers? The H-2A program allows farmers to request certification from the U.S. Department of Labor (DOL) to employ legal guest workers. DOL certified over 95% of employer requests for H-2A workers within 45 days, allowing over 7,000 farm employers to fill almost 95,000 jobs with H-2A workers in 2010. In some cases, one H-2A worker fills more than one U.S. farm job in the United States; the number of visas issued to H-2A workers averages 55,000 a year.

In order to be certified to employ H-2A workers, farm employers must try to recruit U.S. workers by posting the job with a State Workforce Agency and advertising it in local media. Employers record the reasons why the U.S.

workers who responded to the job offer were not hired. In many cases, U.S. workers seeking farm jobs want to go to work right away, not 30 days in the future, so many U.S. workers who are hired do not show up when the employer calls them to go to work.

Employers must offer the higher of the federal or state minimum wage, the prevailing wage in the area, or the adverse effect wage rate (AEWR)—the average hourly earnings of crop and livestock workers reported by farm employers to USDA's NASS during the previous year. The AEWR, which ranges from \$9 to \$12 an hour, is usually the highest of the three wages.

In addition to offering the higher-than-minimum wage AEWR, farmers seeking DOL certification to employ H-2A workers must offer free and approved housing to out-of-area U.S. workers and H-2A workers. This housing requirement is difficult to satisfy in California and other states where labor-intensive farming occurs largely in metro counties. Most farmers in such areas do not offer housing to their employees, and zoning laws make it hard to construct new farm worker housing.

Requirements for supervised recruitment, the AEWR, and providing housing for workers convinced many farmers, especially in California, that the H-2A program is "unworkable." Farmers supported bills in Congress during the 1990s that would have created alternative guest worker programs that eliminated the search for U.S. workers, reduced the AEWR, and eliminated the housing requirement.

These guest worker bills were not enacted. However, in December 2000, after the elections of Presidents Fox and Bush, both of whom embraced legalization for unauthorized workers and new guest worker programs, farm worker advocates and farm employers negotiated the Agricultural Job Opportunity Benefits and Security Act (AgJOBS).

AgJOBS would legalize unauthorized foreigners who have done farm work, and make it easier for farm employers to hire guest workers under the H-2A program, repeating the legalization and guest worker changes of IRCA in 1986.

## The Road Ahead

AgJOBS was not enacted despite bipartisan support. Instead, Republicans in Congress and states introduced bills and enacted laws that use an enforcement-first strategy to deal with unauthorized migration. As Table 1 shows, more crop farmers in California and throughout the U.S. have turned to labor contractors to obtain workers; employment has been stable, but an increasing share of workers are brought to farms by labor contractors and other intermediaries who are willing to act as risk absorbers in the event of labor and immigration law enforcement. However, stepped-up enforcement of current laws without a new or revised guest worker program could leave agriculture with too few workers.

Republicans in Congress who want to increase enforcement are trying to deal with labor shortage concerns by making it easier for farmers to hire legal guest workers under new programs. The American Specialty Agriculture Act (HR 2847) would retain the current H-2A program and provide up to 500,000 new H-2C visas a year to foreign farm workers who could stay in the United States up to 10 months a year. To hire H-2C workers, farmers could simply attest that they are abiding by program regulations rather than engage in supervised recruitment, and they could give H-2C workers housing vouchers rather than provide them with housing. H-2C workers could be paid the higher of the federal or state minimum wage or the prevailing wage rather than the AEWR.

The second approach to make it easier for farmers to hire legal guest workers is the Legal Agricultural

Workforce Act (HR 2895), which would grant an unlimited number of 10-month W-visas to foreigners who could move from one farm employer to another. Farm employers certified by USDA to hire W-visa workers would pay Social Security and the Federal Unemployment Insurance taxes on the wages of W-visa workers to cover the cost of administering the program. W-visa workers would pay for their own transportation and housing in the United States, but would receive a refund of their Social Security contributions as an incentive to return home.

None of the bills mandating E-Verify or creating new guest worker programs is likely to be enacted in 2012. This means that a major farm labor challenge arises from the effects of long-time federal and new state enforcement efforts. For example, fences and vehicle barriers have been erected on one-third of the 2,000 mile Mexico-U.S. border, slowing the influx of unauthorized Mexicans and other foreigners; only 375,000 were apprehended in FY2011—down from 1.2 million in FY2006. Deportations of foreigners, almost 400,000 in FY2011, exceeded the number of foreigners apprehended just inside U.S. borders for the first time.

Fewer new entrants means fewer new farm workers, since many rural Mexicans find their first U.S. job in agriculture. If states require employers to check new hires with E-Verify, and if state and local police detain the persons they encounter who do not have proof of their legal status, farm employers may find fewer new workers appearing to replace those who move on to nonfarm jobs.

## What Is Next?

Agriculture is at another farm labor crossroads. The question is whether the next few years will turn out to be like the mid-1960s, when the end of the Bracero program ushered in a 15-year era of rapidly rising wages,

mechanization, and union activities. Or will the coming years be more like the late 1980s, when legalization, continued unauthorized migration, and the spread of labor contractors, custom harvesters, and other intermediaries negated the effects of federal employer sanctions laws, allowing the employment of unauthorized workers to increase.

Farmers are reacting to the Congressional stalemate on immigration and new enforcement efforts in different ways. Some are constructing housing for farm workers and beginning to hire workers under the current H-2A program, reasoning that investments in foreign worker recruitment and housing will provide legal and stable workers. Others hope to persuade Congress and state legislatures to exempt agriculture from new immigration enforcement efforts and create new guest worker programs.

### Suggested Citation:

Martin, Philip L. 2011. "Immigration Reform and Agriculture." *ARE Update* 15(2):5-8. University of California Giannini Foundation of Agricultural Economics.

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### For additional information, the author recommends:

Mines, Richard and Philip L. Martin. 1983. Foreign Workers in Selected California Crops. *California Agriculture* 37, 3-4 (March): 6-8.

Martin, Philip and Linda Calvin. 2010. Immigration Reform: What Does It Mean for Agriculture and Rural America? *Applied Economic Perspectives and Policy* 32(2): 232-253.

Rural Migration News. Quarterly. <http://migration.ucdavis.edu/rmn/>