



November 14, 2023

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**RE: Doc. No. ETA-2023-0003 Improving Protections for Workers in Temporary Agricultural Employment in the United States (RIN 1205-AC12)**

Dear Administrator Pasternak and Director DeBischopp,

We, the undersigned organizations representing migrant and seasonal farmworkers, submit this comment in response to the invitation from the Department of Labor (the Department) for public comment on its Notice of Proposed Rulemaking (NPRM) entitled “Improving Protections for Workers in Temporary Agricultural Employment in the United States” amending regulations of the H-2A temporary agricultural worker visa program. The NPRM would make substantial changes to the program and certification process, and many of these changes would better enable workers to secure decent working conditions and assert their legal rights.

Farmworker Justice is a national organization that aims to empower migrant and seasonal farmworkers to improve their living and working conditions, immigration status, health, occupational safety, and access to justice. The additional signers of these comments include farmworker unions and organizations, as well as other organizations whose staff have assisted

both U.S. and foreign farmworkers navigate the H-2A program for decades. We have witnessed firsthand the experiences of farmworkers participating in the H-2A program, and we provide their stories throughout our comments. We seek to center farmworkers' experiences in our evaluation of the NPRM, and we hope the Department will do the same.

We appreciate the steps that the Department is taking in this NPRM to strengthen worker protections by ensuring enhanced transparency in disclosure of recruitment and job terms, broader access rights for key service providers and labor unions, stronger retaliation and wage protections, and stricter debarment processes to prevent utilization of the program by bad actors. Overall, our comments support the Department's proposed changes to the H-2A program. We also recommend further clarifications to the proposed regulations to ensure that the Department fulfills its statutory mandate to protect workers and enforce the goals of the H-2A program.

## **Comments on Proposed Changes in the NPRM**

### **I. Camp and Housing Access**

We support the Department's proposal to increase H-2A workers' access to information about their rights, recognize workers' rights to have visitors, and recognize workers' rights to access essential services. Farmworker housing is often physically isolated from the surrounding community and "such isolation also creates conditions in which workers are vulnerable to abuse and may be denied their rights."<sup>1</sup> This isolation is compounded by the reality that many H-2A workers do not have access to a vehicle or public transportation in order to travel to nearby communities. Moreover, many workers have limited English proficiency and are unable to readily communicate with many individuals in their surrounding communities, even when they are not physically isolated from those surrounding communities. Therefore, the ability for H-2A workers to access basic services, such as healthcare and legal services, often depends on their ability to meet with service providers in person at their housing.

Workers' ability to host visitors, though, is complicated by the nature of H-2A worker housing itself. H-2A housing is often communal, located adjacent or near the workplace, and owned or controlled by the employer or a farm labor contractor, which can create situations where visitors can be unduly denied access and workers can be unfairly prevented from asserting their basic right to privacy.<sup>2</sup> These issues are not solely related to the rural nature of farmworker

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<sup>1</sup> Sara A Quandt et al., *Farmworker Housing in the United States and Its Impact on Health*, 25 *New Solutions* 263 (2015).

<sup>2</sup> *Id.* ("Farmworkers never had a place to call their own, as all available rooms were shared. With housing close to fields, lack of physical separation from the place of work created an inescapable association with work, even when in a place that is supposed to offer rest and respite from the work day. The ability of growers to enter the camp at any time created a sense of regulation and economic interest in maximizing productivity.").

housing. As the Department duly noted in its Notice, “even workers whose housing is more centrally located may be isolated by virtue of employer policies that limit their ability to leave housing or to interact with the public even during time that is outside of workers' workday.”<sup>3</sup> Therefore, the following comments seek to help ensure the essential access of visitors for all H-2A workers.

### **A. The Department Must Provide a Right of Access to Key Service Providers Free from Arbitrary Restrictions**

The Department has invited comment on “whether the right of access in [§ 655.135(n)(2)] should be expanded to provide similar access to some or all key service providers as defined in proposed § 655.103(b)[.]” The Department seeks to improve access to worker housing “to protect the right of association and access to information for H-2A workers and workers in corresponding employment and address the isolation that contributes to the vulnerability of some H-2A workers.”<sup>4</sup> To achieve the Department’s goal, the Department must expand the right of access to worker housing to all key service providers as defined in proposed § 655.103(b) without the restrictions listed in § 655.135(n)(2).

Worker advocates alerted the Department to grave problems with the isolation of H-2A workers in employer-provided housing and with lack of access rights on the part of outreach, social services, and legal services personnel in our comments to the proposed changes in 2015 to Workforce Innovation and Opportunity Act regulations.<sup>5</sup> The Department determined that our comments were outside the scope of that proposed rulemaking.<sup>6</sup> Those comments, however, go to the heart of the current NPRM, and they are particularly timely because in our experience the incidence of H-2A worker isolation and denial of access by “outsiders” has deteriorated since 2015.

### **1. The ability of H-2A workers to access key service providers is critical**

H-2A workers are uniquely vulnerable to workplace abuses given the nature of the H-2A program. H-2A workers are tied to the employer who sponsors their visa, and they do not have the freedom to leave an employer and seek a better job if they are not happy with their work conditions. Fear of retaliation is common among H-2A workers.<sup>7</sup> Because H-2A workers are

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<sup>3</sup> Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63750, 63800 (proposed Sep. 15, 2023).

<sup>4</sup> *Id.* at 63799.

<sup>5</sup> Workforce Innovation and Opportunity Act Notice of Proposed Rulemaking, 80 Fed. Reg. 20690 (proposed Apr. 16, 2015); Farmworker Justice et al., Comment Letter on Proposed Rule regarding Workforce Innovation and Opportunity Act, Comment ID ETA-2015-0001-0767, (Jun. 15, 2015), <https://www.regulations.gov/comment/ETA-2015-0001-0767>.

<sup>6</sup> Workforce Innovation and Opportunity Act Final Rule, 81 Fed. Reg. 560722 (Aug. 19, 2016).

<sup>7</sup> See S. Poverty Law Ctr., *Close to Slavery: Guestworker Programs in the United States*, at 16, (2013) [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-)

provided a temporary contract with an end date, employers retaliate against any worker who asserts their rights and demands better conditions by simply opting not to bring them back the next season. Many workers fear that if they step out of line, the employer and their agents will not only blacklist the worker, but their entire family or town as well.

The inherent nature of H-2A work isolates workers in many ways, which can make them unable or unwilling to assert their legal rights or access outside authorities and service providers. Because H-2A workers leave their homes to travel to the United States for work, they often lack familial and community ties in the regions where they work. Many H-2A workers do not speak English.<sup>8</sup> Many are not familiar with the laws and regulations that protect them and the services available to them. Some employers attempt to surveil workers and restrict their movements, which can intensify workers' isolation and fear of retaliation.<sup>9</sup> H-2A workers often live in rural areas without cell phone reception, far from public transportation and commercial areas.<sup>10</sup> They generally lack access to their own vehicles and rely on their employer for transportation. Since employers are generally not required to provide workers with transportation, workers often find themselves without the means to leave their housing.<sup>11</sup> Isolation can be extreme in rural areas, but exists regardless of where H-2A workers live.

During their period of work in the U.S., H-2A workers need access to a variety of essential services. They need access to medical care for routine appointments, care for chronic conditions, and emergency medical attention. Legal service providers give workers important information about their rights and legal representation when their rights are violated. Labor unions and worker centers play an important role in educating workers on workplace rights and supporting self-organization. Consulates also provide workers with information and support in a wide range of matters. H-2A workers benefit from access to local charity organizations as well. For example, when production slows down during the season, food banks provide workers with a lifeline to get them through periods of little or no work.<sup>12</sup>

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2013.pdf; Centro de los Derechos del Migrante, *Recruitment Revealed*, at 22, (Feb. 2018), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf).

<sup>8</sup> In 2019–2020, two-thirds of farmworkers said that Spanish was the language in which they were most comfortable conversing (62%), 25 percent said English was, 6 percent said both Spanish and English, 6 percent said more than one language (excludes Spanish/English bilingual), and 1 percent reported an indigenous language” Findings from the National Agricultural Workers Survey (NAWS) 2019–2020: A Demographic and Employment Profile of United States Farmworkers.

<sup>9</sup> See Centro de los Derechos del Migrante, *Ripe for Reform: Abuses of Agricultural Workers in the H–2A Visa Program*, at 23, (Mar. 2020), <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf> (reporting that 34% of workers interviewed reported restrictions on their movement).

<sup>10</sup> See Katrina Dix, *Eastern Shore Farmworkers Stock Our Grocery Stores. They Struggle to Take Care of Themselves*, THE VIRGINIA PILOT, (Sept. 24, 2023), <https://www.pilotonline.com/2023/09/24/eastern-shore-farmworkers-stock-our-grocery-stores-they-struggle-to-take-care-of-themselves/>.

<sup>11</sup> *Id.*

<sup>12</sup> See Katrina Dix, *Foreign Farmworkers Go Hungry When Work Stops on The Eastern Shore. This Nonprofit Keeps Them Fed*, THE VIRGINIA PILOT, (Aug. 24, 2023), <https://www.pilotonline.com/2023/08/24/foreign-farmworkers-go-hungry-when-work-stops-on-the-eastern-shore-this-nonprofit-keeps-them-fed/>.

Accordingly, it is important for the Department's definition of key service providers at § 655.103(b) to encompass a wide range of entities that provide workers with crucial support during their time in the United States. The definition proposed by the Department is not overly broad and should not be further restricted. The definition should also note that a service provider's title is not fully demonstrative of their inclusion within this definition under the proposed rules. Key service providers have many titles, including "Outreach Worker" and "Community Worker" and have many job roles that overlap with regards to the provision of information and services to H-2A workers. Workers in rural areas generally have very few people they can turn to, so a broad definition of key service providers can help ensure workers have access to the wide array of services that a worker may require.

Due to workers' isolation, it is critical that service providers can come to the workers. Indeed, the right of key service providers to access H-2A workers at their housing is supported by First Amendment jurisprudence. The Supreme Court has long recognized the First Amendment right "to impart information and opinions to citizens at their homes."<sup>13</sup> The Supreme Court has also recognized that a necessary corollary to the First Amendment right of a speaker is the right of a listener to receive information.<sup>14</sup> In 2017, a Maryland District Court adopted this rationale in finding that legal aid workers stated viable claims after being arrested for trespass after conducting outreach to migrant workers who worked and lived on the grower's property.<sup>15</sup> Invoking *Martin*, the Court noted that migrant workers were "entitled to unfettered exchange of information just as much as any other individual in the community" and that workers do not "forfeit their constitutional rights by living on their employer's premises."<sup>16</sup>

Nevertheless, confusion and uncertainty over key service providers' right to visit migrant workers at their housing persists throughout the country. As a result, some providers opt not to visit workers at their housing, thereby depriving isolated H-2A workers of critical support. Many employers simultaneously feel empowered to block service providers' access to workers through locked gates, no trespassing signs, and threatening behavior that can significantly chill outreach efforts. Accordingly, the Department's rule must allow for a broad definition of key service providers and explicitly provide key service providers with a right of access.<sup>17</sup>

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<sup>13</sup> *Schneider v. New Jersey*, 308 U.S. 147, 1525 (1939).

<sup>14</sup> See *Martin v. City of Struthers*, Ohio, 319 U.S. 141, 144 (1943) ("The freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").

<sup>15</sup> *Rivero v. Montgomery County*, 259 F. Supp. 3d 334, 346 (D. Md. 2017).

<sup>16</sup> *Id.* at 352.

<sup>17</sup> The regulatory recognition of the rights of unrestricted access to farm labor camps to all key service providers should be included in the final regulations issued by the Department. It should also be noted that the restriction on labor organization's access to H-2A employer housing including workers not classified as FLSA agricultural workers is only relevant to avoidance of NLRA preemption of protection of worker rights under the NLRA. There is no preemption issue in relation to key service providers' access to farm labor camps.

## 2. Access by invitation is ineffective in the H-2A context

Key service providers' access should not depend on invitation by workers. In the first place, the H-2A residents of employer-furnished housing will have little familiarity with the agencies and services that may be available to them in the geographical area of employment, and would therefore not be likely to even be aware of their ability to invite representatives of those agencies. Beyond that, certain key services providers may not be welcomed by the owner of the housing which would discourage workers from ever extending or acknowledging an invitation. Given the high degree of dependency of H-2A workers on their employers and the prevalent fears of retaliation as described in both the NPRM and throughout this comment, workers may often be fearful of making an invitation or being identified as the source of such an invitation. Indeed, the inviters of unwelcome visitors to H-2A housing could well be subjected to retaliation after the visit.

In 1981, the state of Oregon, adopted a statute that recognized the rights of persons invited by camp residents to have access to farm labor camps in response to access issues in remote farm labor camps.<sup>18</sup> Oregon found that in practice, requiring that persons serving camp residents to first be invited proved to be an impractical and unworkable solution.

In 1989 the Oregon Legislative Assembly heard testimony about some of the problems that had arisen:

Farm workers who were experiencing problems of sub-minimum wages and bad living conditions invited their attorney to speak with them at the camp. When their attorney sought to see them, some of the workers were fired in retaliation, and dumped in Hillsboro in the middle of the night. The attorney was not allowed to visit.

When sued under the then existing statute for injunctive relief, the grower offered to provide access, but only if the persons remaining at the camp who had issued the invitation were identified. Given the retaliation which had already occurred, and knowing of the beating of another farm worker who had tried to leave the camp, the attorney could not, in good conscience, disclose the names. After a three-day trial in Circuit Court the judge found that retaliation had occurred and ordered access. On appeal the Court of Appeals interpreted the statute to permit the owner to deny access under these circumstances. . .

Trying to gain access to clients at the camp in other ways, legal services workers arranged to meet workers at a Grange hall near the camp. An armed guard of the camp owner raced a pickup at legal services workers interviewing a client on the public road, and waved a firearm at them. Another meeting with clients at the Grange was disrupted

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<sup>18</sup> Or. Rev. Stat. § 659A.253-659A.259 (2021).

by the owner himself by intimidating the workers. Workers observed at the meeting were subsequently taken to the Portland airport to be placed on an airplane out of the country against their will. They were only able to escape through the intervention of an airport police officer.<sup>19</sup>

In another incident reported to the Senate Labor Committee:

Last summer, workers were housed in a chicken coop in a camp so isolated that there was virtually no contact from the outside. The fighting cocks kept by the labor contractor were kept in better conditions. Workers trying to escape from the contractor running this camp were kidnapped, beaten and returned to forced labor. Fortunately, one escaped in the night, walked miles into town and was able to get to the police. The other worker, suffering from a concussion, was found later the next day, disoriented in a strawberry field, by a sheriff's deputy.<sup>20</sup>

Even family members, who were supposedly authorized visitors under the 1981 law, reported encountering access problems: "In another incident a worker staying at an area labor camp wrote to his brother asking for help to escape the camp in which he was staying. When family tried to see him, they were told that he could not leave until his debt was paid."<sup>21</sup>

A Catholic priest testified:

Besides the problems of food and clothing, I saw repeatedly the situation of the contractor seeking to control the lives of the workers as if they were his property. In many instances the workers are threatened if they leave the camp, are instructed as to who they may and may not talk with, and are denied access to medical attention. Many contractors do not allow friends of the worker to visit in the camp.<sup>22</sup>

The Archbishop for Western Oregon noted the physical isolation and invisibility of workers, and the need for greater ability to communicate.<sup>23</sup>

A nun working with migrant workers spoke about the difficulty she encountered in visiting workers in the camps and helping them to access medical care.

During the migrant season, the need centered around the farm worker needing to move from one camp (where it was impossible to receive medical attention because the camp

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<sup>19</sup> Northwest Workers' Justice Project, Comment Letter on Improving Protections for Workers in Temporary Agricultural Employment in the United States ETA-2023-0003-0047, Attachment EXCERPTS FROM LEGISLATIVE HISTORY OF 1989 OREGON SENATE BILL 733, at 17-18 (Oct. 31, 2023), <https://www.regulations.gov/comment/ETA-2023-0003-0047>.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Id.* at 28.

manager prevented the farm worker from leaving the camp) to another camp. In one instance, I drove past ten "no trespassing" signs as I drove onto the camp property and assisted the farm worker in moving his possessions to my car to transport him to a more friendly campsite. While doing so, I had my car license number recorded and was generally made to feel that I was breaking a law. I could relate countless other instances relative to the need we have to have open access to migrant camps.<sup>24</sup>

The legislature heard testimony that migrant workers living in remote labor housing were experiencing hunger, overcrowding, lack of basic facilities and peonage that were enabled by a pervasive lack of access to community service providers.<sup>25</sup> In order to remedy these problems, the legislature modified the access statute to expand the types of persons who were authorized to visit labor housing *without an invitation* to include government officials, physicians, certified education providers, local health officials, representatives of religious organizations and any other providers of services for farmworkers funded in whole or part by state, federal or local government.<sup>26</sup> In addition, the amendment permitted invited persons access to non-work areas without having to disclose the identities of those workers who made the invitation, except perhaps in an ex parte hearing to secure access rights.<sup>27</sup> This statute opened this isolated housing to public scrutiny, and it has helped enable camp access by community service providers in Oregon ever since.

Not all states have such clear recorded history or enjoy the same established access protections as Oregon, but these issues are common throughout the United States and still exist today. Where workers lack access to community services and communication with key service providers, an atmosphere is created that allows abusive practices to flourish. Unfortunately, in many areas of the country access protections are not well established, and many H-2A workers are being admitted to work in such areas. The results are predictable.<sup>28</sup>

Where state law or interpretations of federal law have already established rights of access to farm labor housing, it is important that the final rule adopted by the Department protect those current established rights of access. The Department's final regulation should provide that any

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<sup>24</sup> *Id.* at 29.

<sup>25</sup> *Id.* at 10, 14, 16-17, 20, 25-29, 36.

<sup>26</sup> Or. Rev. Stat. § 659A.250 to 659A.262 (2021); Comment Letter ETA-2023-0003-0047, Attachment EXCERPTS FROM LEGISLATIVE HISTORY OF 1989 OREGON SENATE BILL 733, at 2-3, <https://www.regulations.gov/comment/ETA-2023-0003-0047>.

<sup>27</sup> Or. Rev. Stat. § 659A.253 (2)(a).

<sup>28</sup> *E.g.*, Maria Perez et al., *Farm labor traffickers bribed Georgia government employees, federal agent testifies*, USA TODAY, (Jul. 21, 2022, 5:50 PM) (where a federal agent testified that Georgia labor officials were bribed by an alleged criminal organization accused of subjecting farmworkers to forced labor and degrading living conditions, including housing dozens in a single-room trailer without safe drinking or cooking water), <https://www.usatoday.com/story/news/investigations/2022/07/21/farm-labor-traffickers-bribe-georgia-government-employees/10098195002/>.



regulatory provisions regarding access to employer housing are minimum standards and are not intended to preempt any other more expansive or permissive state access requirements.<sup>29</sup>

### **3. Key service providers' right to access should not be encumbered by arbitrary restrictions**

The Department has proposed limitations on labor organizations' access to H-2A worker housing, including a cap of "10 hours per month."<sup>30</sup> The Department invited comment on whether such limited access should also apply to key service providers. Key service providers' right of access should not be subject to the proposed limitations set forth in § 655.132(n)(2). Limiting key service providers' right of access to 10 hours per month would undermine the Department's goal of protecting workers' right of association and access to information. There are many scenarios where key service providers would need to visit H-2A workers more than ten hours in a month. Examples may include: attorneys meeting with clients to develop a legal case, healthcare workers providing medical services to a large group of workers, and food pantry workers distributing food during periods of no work. Imposing an arbitrary cap would also give employers a pretext for monitoring key service providers' visits with H-2A workers under the guise of ensuring that such visits do not exceed 10 hours per month.

Similarly, key service providers' right of access should not be limited to housing that is not readily accessible to the public. As the Department concedes and as is further detailed in this comment, even workers who are not geographically isolated may be culturally and socially isolated. The Department itself acknowledges that it is not clear how to determine what housing "is not readily accessible to the public."<sup>31</sup> Such ambiguity would sow confusion among workers and key service providers thereby chilling the exercise of access rights.

The H-2A program provides an enormous benefit to growers. H-2A workers leave their families and communities to travel to the U.S. to perform difficult jobs. In contrast to domestic workers, H-2A workers cannot easily seek out jobs with better wages and conditions. When production slows during the season, they have little recourse but to wait around hoping for the

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<sup>29</sup> The Migrant and Seasonal Agricultural Worker Protection Act at 29 U.S.C. § 1871 specifically provides that the Act is "...is intended to supplement State law, and compliance with [the Act] ... shall not excuse any person from compliance with appropriate State law and regulation. Similarly, that Act at 29 U.S.C. § 1823(a) provides that "...each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing." Similar language should be included in the final regulation.

<sup>30</sup> Improving Protections, 88 Fed. Reg. at 63800-63801, 63825.

<sup>31</sup> The Department at page 63800 of the NPRM notes: "The Department is aware of instances in which employers used abusive restrictions to keep workers isolated and to restrict their access to services, for example, by forbidding workers to leave housing areas that may otherwise have been accessible except when being transported to work or for other limited purposes such as to buy groceries, or by retaining keys to worker housing or employing armed guards such that workers did not feel that they could leave or have guests. Regardless of whether housing is located in a remote or densely populated area, workers would benefit from a protected right to invite and accept visitors."

work to pick back up. Given the imbalance of power inherent in the H-2A system, it is imperative that the Department take steps to empower workers and reduce their isolation. Granting key service providers a right of access, rather than placing the burden on workers to invite key service providers to their housing, is critical. If growers do not want to accept the protections that the Department promulgates to protect workers, they are free to opt not to use the H-2A program.

Finally, we support requiring that a fixed site agricultural grower owning housing that is utilized by an H-2 labor contractor for H-2A and corresponding domestic workers should be required to comply with the farm labor camp access provisions of § 655.135(n). This proposal is necessary and appropriate, and could readily be accomplished by an accompanying acknowledgment of this responsibility by the agricultural grower.

#### **4. Prior restraint and meeting surveillance are not reasonable restrictions**

The Department invited comment on its proposal, “to broaden the range of service providers and advocates with whom consultation regarding the terms and conditions of employment under the H–2A program is explicitly protected.”<sup>32</sup> The Department also proposed that “[w]orkers residing in employer-furnished housing must be permitted to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of the workers' workday subject only to reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas.”<sup>33</sup> The Department invited comment on “what would constitute reasonable or unreasonable restrictions and other means of balancing different workers' interests in shared housing, as well as comments on visitor policies that may unduly hinder workers' rights to invite or accept guests.”<sup>34</sup>

The Department noted that such visitation rights already exist for workers, but including such rights in the regulations as they relate to key service providers would “increase the likelihood that workers will receive necessary services and help prevent the frequent isolation that renders workers more vulnerable to H–2A violations and other forms of labor exploitation, including worsening working conditions.”<sup>35</sup> The Department proposed to protect workers to ensure that no employer shall “intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has...[c]onsulted with a key service provider...”<sup>36</sup>

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<sup>32</sup> Improving Protections, 88 Fed. Reg. at 63791.

<sup>33</sup> *Id.* at 63825.

<sup>34</sup> *Id.* at 63800.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 63824.

The rules, and any determination of what is a reasonable restriction, should recognize the fundamental fact that H-2A workers' visas and legal presence in the U.S. in effect tie them to a single employer, and this dynamic makes them extremely vulnerable to violations of the law and willing to suffer employers' use of isolation and restrictions on their freedom of association. Upsetting an employer may lead an H-2A worker to lose their job, be forced to leave the country, and lose most or all of their income for the year. Therefore, putting the worker into the position of having to individually opt-in to access to information from legal and other key service providers can require the worker to make a leap of faith that a bad employer will not retaliate against the worker. The rules should ensure that any restrictions do not interfere with the privacy rights of the H-2A worker or the visitor, or make them vulnerable to undue influence or retaliation by their employer. Key service providers should not have to check in, provide prior notice, pre-register, or be surveilled by employers or growers in order to be provided access to H-2A worker housing. Any requirements that visitors provide prior notice, pre-register, or disclose which workers they are meeting with would not be a reasonable restriction, and would be extremely unworkable in practice based on the current prevalence of employer surveillance, retaliation, and threats against workers.<sup>37</sup>

For the same reasons, the protection in § 655.135(n)(1) should not be limited to workers in certain types of employer-furnished housing or in certain locations, but should apply without qualification to all H-2A workers. The NPRM correctly notes that even workers in housing that is less physically isolated may be isolated by virtue of other employer policies that are intended to isolate, or have the effect of isolating, workers from the public and/or information and services.<sup>38</sup> Additionally, even absent these policies, workers' limited access to transportation, limited English proficiency, limited free time, limited integration into a local community as a foreign worker, and simple exhaustion after long hours of manual work mean that workers can have limited access to the public, information, and services even in housing that is not geographically remote.

Given the "serious concerns" outlined in the NPRM about workers' vulnerability to trafficking, restrictions on any worker's right to accept a guest in that worker's living quarters, common areas, or outdoor spaces should face an extremely high burden to be considered reasonable. The fact that other workers allegedly do not want to meet with a key service provider or would prefer that worker meet with a key service provider at a different time should not outweigh any single worker's need to meet with the guest. The final rule should permit interested workers to meet with key service providers without the need to obtain consent from a larger group.

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<sup>37</sup> Northwest Workers' Justice Project, Comment Letter on Improving Protections for Workers in Temporary Agricultural Employment in the United States ETA-2023-0003-0047, Attachment New Jersey AG Opinion 1981-3 - Re Access to Farm Labor Camps (Oct. 31, 2023), <https://www.regulations.gov/comment/ETA-2023-0003-0047>.

<sup>38</sup> Improving Protections, 88 Fed. Reg. at 63800.

The NPRM also correctly states that some employers also use monitoring to control workers.<sup>39</sup> The rules should prohibit employers and their agents from monitoring communications between workers and their guests through surveillance by individuals or technology. This monitoring deprives workers of their right to privacy, frustrates their rights to information and critical services, and thereby perpetuates their isolation and the likelihood they will accept substandard and illegal working conditions.

As proposed § 655.135(n)(2) would allow *labor organizations* “...access to the common areas or outdoor spaces near such housing for the purpose of meeting with workers.”<sup>40</sup> (emphasis added). In many instances, applying such a restrictive limitation on areas within farm labor housing where key service providers could go to meet with individual workers would functionally prevent opportunities for private communication with workers. Limiting labor organization access to common areas or outdoor spaces near housing would give employers ample pretextual reasons to prohibit these visits based on a supposed lack of a suitable location for the meeting. There also must be physical space where a worker can meet with a key service provider, including privately as needed. Housing that is designated functionally only as a sleeping area or as an area where visitors are not allowed would cause access to key service providers to be denied by employers. While a restriction limiting visitors’ access to shared sleeping quarters during “sleeping hours” may be reasonable if it allows for a visit in some other area free from surveillance by employers or their agents, a restriction limiting all visitor access during “sleeping hours” would generally not be reasonable if it unfairly and unreasonably limits a worker’s ability to meet with their guest at the time outside work hours of that worker’s choosing.

## **B. Key Service Providers Need Access to Worker Information to Effectively Offer Support**

The Department has proposed language that would allow labor organizations to request and obtain within one week “a complete list of H-2A workers and workers in corresponding employment employed at the place(s) of employment,” with contact information and basic employment information for each worker.<sup>41</sup> The Department requested comment on whether key service providers should also be able to request this information, “particularly in light of the unique circumstances of the H-2A program.”<sup>42</sup>

We strongly recommend that the Department extend the provision of this list to legal service providers, community organizations, and healthcare providers. As already described, key service providers often play a crucial role in addressing the elements of the H-2A program that

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 63825.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 63796.

put workers at risk for abuse. Allowing key service providers the opportunity to request worker contact information would improve their ability to successfully carry out this role, and thus decrease the burden placed on the Department's enforcement capabilities. The Department recognizes several ways in which H-2A employers interfere with key service providers' attempts to support H-2A workers, including preventing H-2A workers from consulting with legal services organizations and refusing to transport workers to medical providers for care in the United States.<sup>43</sup> Worker advocates and other key service providers encounter these and similar barriers on a regular basis, and find that H-2A employers too often use the control they have over workers to hamper key service providers' outreach efforts. For example, while conducting outreach to H-2A workers for a recent legal clinic that had been advertised on social media, staff from Centro de los Derechos del Migrante, Inc. (CDM) found that no workers were present when they went to visit employee housing outside of typical work hours. H-2A workers later told CDM that their employer had required them to report to their worksite at the time of the visit, even though there was no work to be done. Providing direct worker contact information to key service providers would help address this type of interference.

Under the proposed regulations, the information employers would be required to provide to labor organizations would include each worker's "full name, date of hire, job title, work location address and ZIP code, and if available, personal email address, personal cellular telephone number and/or profile name for a messaging application used by the worker to communicate, home country address with postal code, and home country telephone number."<sup>44</sup> Key service providers need similar information, and like labor organizations should be able to request updated information.<sup>45</sup> In addition to the elements already proposed, to maximize its utility without any meaningful increase in the burden on employers, the information available to key service providers should also include the following:

- Precise location of assigned housing location, including geocoordinates and/or apartment complex and hotel numbers, where applicable;
- Country code for all phone numbers provided; and
- Whether a worker prefers WhatsApp or SMS text messaging.

For this proposed provision to be meaningful, it must be accompanied with mechanisms to ensure that the worker information provided to key service providers is accurate. A possible approach to this, which would also serve the goal of "ensur[ing] workers are adequately notified of these employer obligations," would be to require employers to obtain workers' verification that their employee information is correct each season using a form disclosure in the worker's preferred language.<sup>46</sup> Employers should be required to maintain documentation of each worker's

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<sup>43</sup> *Id.* at 63788.

<sup>44</sup> *Id.* at 63795.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 63796.

verification for three years, in line with other existing document retention requirements at 20 CFR § 655.167. An employer's failure to obtain or maintain a worker's verification of their contact information should be considered evidence that an employer has not met its obligation to provide accurate contact information to key service providers.

Ensuring key service providers have access to up-to-date, accurate worker contact information is a straightforward way for the Department to "increase awareness of existing protections for workers advocating for better working conditions," and in doing so "help prevent adverse effects on workers in the United States."<sup>47</sup> The final rules should include this provision.

### **C. Labor Organization Access Should be Clearly Severable from Key Service Provider Access**

The Department proposed a severability clause and invited comment on the scope of the regulations' severability.<sup>48</sup> The Department proposed that "[i]f any provision of this subpart is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or sub-provision shall be severable from this subpart and shall not affect the remainder thereof."<sup>49</sup> It should be noted that the access of labor organizations to visit workers has been treated differently in the law than has the access of other entities.<sup>50</sup> The rules should clearly separate the access provisions for labor organizations from key service providers to both clarify their separate legal basis and to prevent any undue conflation.

### **D. Emergency Services Should Not be Subject to Any Restrictions and Employers Should be Required to Register with Emergency Service Providers**

As mentioned, the Department invited comment on "what would constitute reasonable or unreasonable restrictions and other means of balancing different workers' interests in shared housing, as well as comments on visitor policies that may unduly hinder workers' rights to invite or accept guests."<sup>51</sup> The rules should clarify that emergency medical services should not be subject to any restrictions and the rules should require employers to notify and maintain up-to-date housing location information with local emergency medical providers regarding specific

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<sup>47</sup> *Id.* at 63789.

<sup>48</sup> *Id.* at 63808.

<sup>49</sup> *Id.* at 63828.

<sup>50</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) ("government health and safety inspection regimes will generally not constitute takings"). It should also be noted that *Cedar Point* involved "over 400 seasonal workers and around 100 full-time workers, *none of whom live on the property.*" *Id.* at 2069 (emphasis added). Therefore, farmworker housing access and its unique concerns, were not specifically addressed. *Id.*

<sup>51</sup> Improving Protections, 88 Fed. Reg. at 63750, 63800.

geographic coordinates of farmworker housing and how to access the housing from public and private roads. There are no reasonable restrictions to life-saving medical care, and emergency medical providers should have unencumbered access to individuals who require it. Emergency medical providers also should be able to find workers without delay.

While many domestic workers know to call “911” and have cell phone access, this is not the reality for all H-2A workers. Nor is it a given that workers who call 911 will be able to speak with someone in their native language. Local medical providers should also have access to the language capabilities of the H-2A workers at a particular housing location. It has been well-documented that language barriers can negatively impact the quality of care for farmworkers.<sup>52</sup> Emergency medical care is too important and time-sensitive to risk delays or inadequate treatment by failing to easily notify medical providers ahead of time on how to communicate with their patients.

The proposed changes could also clarify that workers who seek emergency or necessary medical treatment are not only protected from retaliation, as with other key service providers, but that they have a direct right to request assistance from their employer and that their employer must help assist workers in making contact with emergency medical providers. We have tragically seen farmworkers become ill and even die when medical access policies are not in place.<sup>53</sup> Farmworkers should know when they read their employment contract and job order that if an emergency medical situation occurs, they can ask their employer for support. This will not only clarify the protocol but also reduce any fear that a worker may have of retaliation that could lead workers not to seek life-saving medical care.

Emergency medical providers should have an explicit right of access and housing should be easily accessible for emergency vehicles. This cannot be guaranteed without employer participation. H-2A housing can be located many feet from main roads in locations that are not necessarily visible nor intuitively accessible. We have seen employers claim property right interests in order to deny access to visitors, including medical providers. The rules should clearly state that workers’ access to emergency medical providers should be permitted without limitation.

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<sup>52</sup> Sheila Soto et al., *Determining Regional Differences in Barriers to Accessing Health Care Among Farmworkers Using the National Agricultural Workers Survey*, 25 J. IMMIGR. MINOR HEALTH, 324-330, (2023) (“In the U.S., speaking the English language increases the ability to identify and access health care services. Unsurprisingly, when health care services are obtained, language barriers can result in negative perceptions of health care experiences and quality of care.”).

<sup>53</sup> U.S. Dep. of Labor, *US Department of Labor cites Okeechobee labor contractor after heat illness claims the life of 28-year-old farmworker in Parkland*, (Jun. 28, 2023), <https://www.osha.gov/news/newsreleases/region4/06282023>.

## E. Mobile Housing Access and Shepherders

The Department also requested, “comments on whether and how proposed § 655.135(n)(1) and (2) should apply with respect to workers housed pursuant to §§ 655.230 (housing for work performed on the range in herding and range production of livestock occupations) and 655.304 (mobile housing for workers engaged in animal shearing or custom combining).”<sup>54</sup> In order to correct the imbalance in bargaining power, the most vulnerable H-2A workers, including those housed in mobile and range housing pursuant to §§ 655.230 and 655.304, must be afforded the right to have visitors and access to essential services like other H-2A workers as set forth in the proposed § 655.135(n)(1) and (2).

Shepherders, sheep shearers, range workers, and others whose H-2A job occupation requires the workers to reside in mobile or range housing and travel to various worksites are even more isolated and disconnected from the communities in which they work than some other H-2A workers. Some of the most egregious reports of abuse, exploitation and labor trafficking involve H-2A herders and range workers. For years, worker advocates have been urging the Department to provide additional safeguards for H-2A shepherders and range workers due to the level of extreme abuse and exploitation being reported by these workers.<sup>55</sup> All sworn statements, court pleadings, investigative findings referenced and cited herein that were provided to the Department in support of our comments for the 2015 and 2019 NPRMs are incorporated by reference.<sup>56</sup> There have been numerous civil lawsuits and complaints filed with state and federal labor departments by H-2A herders and range workers involving claims of assault and battery, false imprisonment, denial of medical care, withholding of food and water, confiscating documents, visa fraud, wage theft and labor trafficking.<sup>57</sup> Recent in-depth investigations by the

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<sup>54</sup> Improving Protections, 88 Fed. Reg. at 63801.

<sup>55</sup> See Farmworker Justice et al., Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the U.S., Comment ID ETA-2015-0004-0514, (June 1, 2015), <https://www.regulations.gov/document/ETA-2015-0004-0514> (thirty-five pages of comments with Appendix A consisting of over 1000 pages of photos, sworn statements, USDOL reports and findings of investigations, surveys of workers, and Appendix B Media Supplement). See also, Farmworker Justice et al., Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Nonimmigrants in the U.S., RIN 1205-AB89, Document ID ETA-2019-0007-0375 (Sept. 24, 2019), <https://www.regulations.gov/comment/ETA-2019-0007-0375>.

<sup>56</sup> *Id.*

<sup>57</sup> Many of the pleadings, findings and other records of these lawsuits and complaints are included in Appendix A of the 2015 Worker Advocate Comments (ETA-2015-0004-0514). See also, e.g., *Velasquez Catalan et al v. Vermillion Ranch Limited Partnership et al*, Case No. 06-cv-01043-WYD-MJW (D. Colo. Filed June 1, 2006) App’x A at 757-832 of 2015 Comments, ETA-2015-0004-0514 (H-2A range workers sued employer for violations of the Trafficking Victims Protection Act, RICO, FLSA, breach of contract, false imprisonment and other tort claims); *Conovilca Matamoros v. Calvin L. Inda and Western Range Association*, 10-cv-00023 (District Court Delta County, Colorado, June 26, 2010)(H-2A shepherd sued employer for extreme and outrageous conduct, false imprisonment, breach of contract and state wage violations); *Saenz Mencia v. Allred et al.*, No. 11-cv-00200 (D. Utah (Feb. 24, 2011) (H-2A worker hired as shepherd sued employer for violations of FLSA, retaliation (FLSA) and breach of contract); *Espejo Camayo v. John Peroulis & Sons Sheep, Inc. et al*, No. 10-cv-00772-MSK-MJW, 2012 U.S. Dist. LEXIS



media into continued abuses and exploitation of H-2A shepherders help to illustrate how the abuse and exploitation of these workers is ongoing and the Department's current attempts at safeguarding these workers is not sufficient.<sup>58</sup>

Shepherders and range workers make up a small percentage of the thousands of H-2A jobs that are certified each year, yet due to the nature of their work, they are likely the most geographically isolated out of all H-2A job positions. Because of their intense isolation, they are also almost entirely dependent on their employer for access to food and water, medical care, and other basic essential needs.<sup>59</sup>

H-2A shepherders and range workers, by definition, are required to spend the majority of their workdays out on the range and are generally required to be on call 24 hours a day, 7 days a week.<sup>60</sup> They spend most of their days working and living in isolated mountainous and desert areas with unreliable or non-existent cell phone service and at times withstand long durations of extreme weather conditions, including forest fires.<sup>61</sup> They reside in small mobile housing units or tents without electricity, running water, and toilets and have no means of transportation. While

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136100, at \*18 (D. Colo. Sept. 24, 2012), consolidated with *Fernandez v. John Peroulis & Sons Sheep, Inc., et al.*, Case No. 11-cv-01132-REB-CBS (D. Colo. Filed April 28, 2011) (H-2A shepherders sued the employer and recruiter for violating the TVPRA, FLSA, state wage laws and various related tort claims); *Serrano Zeferino v. James Craig Bair Ranch et al.*, 12-cv-01881-BNB (D. Colo. July 19, 2012)(shepherd sued employer raising claims of battery, assault, negligent and intentional infliction of emotional distress, invasion of privacy, false imprisonment and FLSA); *Ruiz et al v. Fernandez, et al.*, 949 F. Supp. 2d 1055 (E. D. Wash. 2013) (H-2A worker hired as shepherd sued employer for wage violations); *Zosimo Rojas v. R. Lason Sheep Company, L.C., et al.*, Case No. 12-cv-00712-BCW (D. Utah filed July 20, 2012) (H-2A worker hired as shepherd sued employer for wage violations); *Vilcapoma v. Western Range Association, et al.*, Case No. ECU0726 (Imperial County Super. Ct. of Cal. Filed August 31, 2012) (H-2A workers hired as shepherders sued employer for wage violations); *Solorzano Aquino v. John Peroulis & Sons Sheep, Inc. et al*, No. 13-cv-00418, (D. Colo. Feb. 16, 2013)(H-2A shepherd brought claims against employer including TVPRA, false imprisonment, extreme and outrageous conduct, assault, breach of contract, and CO wage violations); *Vivas Moreno et al v. James Craig Bair Ranch et al*, No. 16-cv-0752 (D. Colo. March 31, 2016)(4 H-2A workers hired as shepherders sued employer for violations of FLSA (collective action), RICO, CO wage violations, false imprisonment, breach of contract, assault and battery, negligent and intentional infliction of emotional distress, fraud); *Zevallos v. Stamatakis*, No. 17-cv-00253 (D. Utah April 4, 2017)(H-2A shepherd sued employer for violation of FLSA and breach of contract); *Castillo Arroyo v. Chacon Sheep Co et al*, No. 22-cv-00854 (D. Colo. April 8, 2022)(H-2A worker hired as a shepherd sued employer for violations of FLSA (collective action), CO wage violations and breach of contract).

<sup>58</sup> See Teresa Cotsirilos, *The dark side of America's sheep industry*, High Country News, (Oct. 2, 2023), <https://www.hcn.org/issues/55.10/labor-the-dark-side-of-americas-sheep-industry>; Ian Max Stevenson, *These foreign workers have some of the hardest jobs in Idaho. Are they mistreated too?*, Idaho Statesman, (Aug. 21, 2023), <https://www.idahostatesman.com/news/northwest/idaho/article277209028.html>. See also, High Country News, A conversation about the West's abusive shepherding industry, YOUTUBE, (Oct. 4, 2023), <https://www.youtube.com/watch?v=-sbEiWd9-WM>.

<sup>59</sup> See Central California Legal Services, *Suffering in the Pastures of Plenty: Experiences of H-2A Shepherders in California's Central Valley* (2000) in Appendix of Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the U.S., Comment ID ETA-2015-0004-0514, at 595 (June 1, 2015); see also Colorado Legal Services, *Overworked and Underpaid*, (2010), <http://hdl.handle.net/20.500.12613/6761>.

<sup>60</sup> 20 CFR § 655.200(b).

<sup>61</sup> When they are not on land owned or leased by their employer, they are moving with the livestock over public lands, where their employers have grazing permits.

out on the range, they live alone and tend to have no contact with other humans for days or even weeks. They must rely on their employer to bring them food and water (approximately every seven to ten days) and because they are not allowed to leave the livestock they are caring for, their ability to have contact with the outside world is extremely limited and almost entirely dependent on their employer.<sup>62</sup> Sending and receiving mail, accessing their money, sending money home, visiting doctors or dentists for medical care, making a phone call to a loved one or the worker's consulate or anyone - only happens if and when the employer allows it. Oftentimes, no one, not even the worker themselves, knows their location. Only the employer or the person designated by the employer to bring the worker food, water and supplies knows the worker's exact whereabouts.

Shepherders and other H-2A workers housed in mobile and range housing need to have more autonomy in their ability to access visitors and key service providers under the proposed § 655.135(n)(1) and (2).

As mentioned in the NPRM, the Department is aware of H-2A employers who have prohibited or effectively prevented H-2A workers from receiving assistance from certain service providers, refused to transport workers to a medical provider, prohibited workers from consulting with legal aid organizations, and retaliated against workers for asserting their rights.<sup>63</sup> Thus, it would be counterintuitive for the Department to continue to allow this subsection of H-2A workers to remain completely reliant on their employer for all of their basic needs – especially given the documented accounts of abuse and exploitation. The Department must enable all H-2A workers to independently access services and resources, including by permitting them to invite or accept guests to their living quarters and surrounding spaces and to provide these workers with access to key service providers as described in the proposed revisions to § 655.135(n)(2)

As discussed above, shepherders and other range workers live and work in the same location while out on the range. Oftentimes, they are in areas that lack cell service and the only person who knows how and where to find them is their employer. Shepherders and other H-2A workers residing in mobile housing need to be able to independently access and locate key service providers, including Emergency Service providers.

There is nothing in the proposed or current H-2A regulations that require H-2A employers to provide the location of mobile housing units in the job orders for these H-2A occupations, which can have fatal consequences for workers seeking emergency services as

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<sup>62</sup> See Central California Legal Services, *Suffering in the Pastures of Plenty: Experiences of H-2A Shepherders in California's Central Valley* (2000) in Appendix of Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the U.S., Comment ID ETA-2015-0004-0514, at 595 (June 1, 2015); see also Colorado Legal Services, *Overworked and Underpaid*, (2010), <http://hdl.handle.net/20.500.12613/6761>.

<sup>63</sup> Improving Protections, 88 Fed. Reg. at 63788.

previously discussed.<sup>64</sup> Neither the workers, their family members, Consulate officials, key service providers nor the Department are provided with the knowledge of where these workers can be found during their H-2A contract period. In most instances, the employer must be contacted directly in order to obtain the worker's specific location at any given time. This dynamic can prevent workers from accessing urgent or emergency medical care. Given the nature of the work, accidents resulting in the need for medical assistance can happen on any given day, at any given time. H-2A workers, and especially shepherders, are performing physically intensive and dangerous work activities while caring for the livestock out on the range at all hours of the day, seven days a week. This can include anything from repairing fences, administering vaccines, assisting with the birthing, protecting the livestock from predators, and otherwise tending to the needs of the livestock.<sup>65</sup>

The current H-2A regulations require employers to provide H-2A herders and range workers effective means of communicating “with persons capable of responding to the workers’ needs” except for when the workers are out on the range without cell service.<sup>66</sup> In those instances, it is sufficient for the employer, or their designee, to contact the worker on a regular basis to check on their well-being.<sup>67</sup> Because the Department provides the option for the employer to take the place of “the person capable of responding to the workers’ needs” when these workers are out on the range without cell service, this provision actually increases these workers’ reliance on their employers and impedes their ability to seek outside assistance when necessary.

To address these concerns, those subject to the range and mobile housing provisions of the H-2A program should be included in the Access to Worker Information as previously discussed above. In addition, the language of 20 CFR § 655.210(d)(2) should be revised to ensure shepherders and range workers have direct access to emergency responders and other key service providers when out on the range by deleting (ii) of 20 CFR § 655.210(d)(2) and revising § 655.210(d)(2) to require the employer to provide these workers with the means to communicate directly with emergency responders at all times, as well as a GPS tracking device (or locator) to allow them to provide their coordinates to emergency or other services. Including an explicit provision that requires employers to provide workers with a communication device,

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<sup>64</sup> When the use of mobile housing is permitted, the ETA-790 only requires that the “nearest geographic location of the mobile housing unit where it resides at the time of filing of Form ETA-790A” and a general explanation “as to where the mobile housing will be used (e.g., “mobile unit will travel with the workers to various range locations through Jefferson, Fremont, and Bonneville Counties (Idaho) and Teton and Lincoln Counties (Wyoming).” See Dep’t of Lab., Form ETA-790-General Instructions, <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA-790-790A%20General%20Instructions.pdf> (last visited Nov. 14, 2023).

<sup>65</sup> See Central California Legal Services, *Suffering in the Pastures of Plenty: Experiences of H-2A Shepherders in California’s Central Valley*, (2000) in Appendix of Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the U.S., Comment ID ETA-2015-0004-0514, at 595 (June 1, 2015); see also Colorado Legal Services, *Overworked and Underpaid*, (2010), <http://hdl.handle.net/20.500.12613/6761>.

<sup>66</sup> 20 CFR § 655.210(d)(2).

<sup>67</sup> *Id.* at § 655.210(d)(2)(ii).

such as a satellite phone or other similar device and a GPS tracking device or locator, will substantially increase their ability to communicate with others and share their location when on the range without cell phone service, in cases of emergency and otherwise.

## **II. Union Rights**

We collectively celebrate the Department's proposed additions and amendments to 20 CFR § 655.135. The proposed changes as a whole, extend many essential labor protections, which are guaranteed to other domestic workers, but currently do not extend to agricultural workers. Extending labor rights protections to H-2A workers will help workers combat substandard working conditions and prevent the depression of wages for these workers. These protections will also help fulfill the statutory mandate of the H-2A program by preventing any adverse effects to domestic workers' wages or working conditions.

### **A. The NPRM Should Clarify Its Language Concerning Preemption**

The mention of the preemptive impact of the proposed rules in the NPRM creates an unnecessary ambiguity that should be addressed in the final rule. On the one hand, the preamble states: "The Department emphasizes that nothing in this proposed rule is intended to preempt more protective local, State, or Federal laws, including labor and employment laws and regulations at the State level that expressly protect agricultural workers, as well as those that protect workers generally against discrimination, unsafe working conditions, or other adverse impacts, such as those referenced above."<sup>68</sup> But on the other hand, the preamble also states: "In addition, as noted above, the Department does not intend to preempt any applicable State laws or regulations that may regulate labor-management relations, organizing, or collective bargaining by agricultural workers."<sup>69</sup>

The second statement, however, misstates what is "noted above." Laws that are "more protective" are only a subset of "any applicable . . . laws." This ambiguity should be addressed in both the preamble to the final rule and in the text of the rule in order to make clear that any state and local laws that prohibit, punish or in any way frustrate an employers' compliance with federal H-2A Program obligations are preempted.

Of course, the federal government has plenary power over immigration and border control. The federal government has authority to authorize the entry into the country of workers holding H-2A visas, to authorize their employment, and to establish the conditions for their employment. The courts have held that efforts by states to prohibit the employment of H-2A workers are preempted. For example, in *Maine Forest Products Council v. Cormier*, the United States Court of Appeals for the First Circuit struck down a Maine statute that prohibited certain

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<sup>68</sup> Improving Protections, 88 Fed. Reg. at 63791-92.

<sup>69</sup> *Id.* at 63795.

motor carriers and landowners from employing drivers to transport forest products within the state who were not residents of the United States.<sup>70</sup> The First Circuit explained,

“The text and structure of the H-2A statutory provisions reflect Congress's considered judgment that agricultural employers who cannot find qualified U.S. workers should be able to hire foreign laborers when specified criteria [including that the hiring of foreign workers not undermine the conditions of U.S. workers] are satisfied.<sup>71</sup> Congress evidently decided that when an employer has run this gauntlet and made the required showing to federal authorities, the employer should have access to foreign labor rather than see its business prospects wither on the vine.”<sup>72</sup>

Because the Maine law “constitutes a direct and significant obstacle to achieving the H-2A program’s clear and manifest objectives,” the Court deemed the state law to have been preempted.<sup>73</sup>

Clearly, a state cannot achieve indirectly what it cannot achieve directly. A state that prevents employers from complying with the “specified criteria” for hiring H-2A workers also prevents employers from hiring them just the same as a state that bars such hiring directly. For example, 8 C.F.R. § 655.135(k) currently states, “The employer must contractually prohibit in writing any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees.” Therefore, a state law that provided, “Any provision of an agreement that directly or indirectly bars any provider of employees to work in agriculture in the state from accepting payments or other compensation from the prospective employees is invalid and unenforceable as against public policy” would be preempted because it effectively bars employers in the state from employing foreign workers under the conditions established by the federal government.

State or local actions that prevent or deter employers from satisfying the conditions for hiring H-2A workers carry precisely the same effect as the laws the courts have already held to be preempted. Such state or local actions effectively prevent the employment of H-2A workers. In order to avoid any confusion on the part of employers or state and local officials and to make clear that the preemptive sweep of the rules does not reach “more protective local, State, or Federal laws.”<sup>74</sup> We recommend that a new subsection be added to the final rule between subsection 655.182 and 655.190 providing:

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<sup>70</sup> 51 F.4th 1, 3 (1st Circuit 2022).

<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 10.

<sup>74</sup> Improving Protections, 88 Fed. Reg. at 63791-92

The Immigration Reform and Control Act, specifically, 8 U.S.C. 11889(a)(1), and this Part [Part 655] shall preempt any state or local law that prevents an employer from complying with the requirements of this Part and of 29 CFR Part 501 or with the assurances described in subsection 655.135 or in any manner punishing or penalizing employers for such compliance.

We further suggest that the preamble to the final rules provide as examples of state laws that would be preempted, two provisions of N.C. Gen Stat. § 95-79(b).

The second part of that North Carolina law provides:

notwithstanding G.S. 95-25.8, an agreement requiring an agricultural producer to transfer funds to a labor union or labor organization for the purpose of paying an employee's membership fee or dues is invalid and unenforceable against public policy in restraint of trade or commerce in the State of North Carolina.<sup>75</sup>

This provision forces employers of agricultural workers who wish to support labor organizing to do exactly what proposed § 655.135(h)(2) prohibits because it forces such employers to discriminate against such workers by preventing them or their union from entering into an agreement under which their employer deducts their union dues from their wages and pays them to their union when other employees are not similarly barred under the referenced section 5-25.8. The Department should thus use this provision of state law as an example of a provision that would be preempted by the final rule.

The first part of the North Carolina law separately provides:

Any provision that directly or indirectly conditions the purchase of agricultural products, the terms of an agreement for the purchase of agricultural products, or the terms of an agreement not to sue or settle litigation upon an agricultural producer's status as a union or nonunion employer or entry into or refusal to enter into an agreement with a labor union or labor organization is invalid and unenforceable as against public policy in restraint of trade or commerce in the State of North Carolina.<sup>76</sup>

Similarly, this provision forces employers of agricultural workers who wish to support a labor organizing effort to do exactly what proposed § 655.135(h)(2) bars because it forces such employers to discriminate against such workers by preventing them from agreeing to settle

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<sup>75</sup> N.C. Gen. Stat. § 95-79(b) (2023).

<sup>76</sup> *Id.*

litigation on terms that require the workers' employer to recognize the workers' union while permitting the inclusion of all other similar terms in settlement agreements. Accordingly, the Department should thus also use this provision of state law as an example of a provision that would be preempted by the final rule.

On the other hand, the Department should include Or. Rev. Stat. §§ 658.405 to 658.511 in the preamble as an example of more protective state laws that are not preempted. Those statutes require licensing and bonding of certain entities that recruit agricultural workers to work for others, and specify duties and prohibitions with respect to the treatment of agricultural workers by such entities. Since this regulatory scheme provides greater protections for affected workers, and its preemption would have the effect of degrading the working conditions of domestic workers, it would not be preempted.

## **B. Protections Against Retaliation for Protected Activities**

We applaud many of the protections provided through amendment of subsection (h) of 655.135, which provides that an employer “has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against . . . any person” who has engaged in any protected activity as defined therein.<sup>77</sup>

In addition, we applaud the NPRM's revision of Subsection (h)(2) to § 655.135 to extend the National Labor Relations Act's (NLRA) prohibition against discrimination or retaliation against any person engaged in concerted protected activity to all FLSA agricultural employees who are otherwise exempt from such protections under the NLRA. However, the NPRM does not define what is intended by the term “secondary activity” and that term is neither identified nor defined within the NLRA. Accordingly, we suggest that the NPRM define “secondary activity” as “peaceful expressive activity, including picketing, seeking to convince members of the public to cease doing business with any entity that does business with the employer of H-2A workers or sells or otherwise distributes products derived from the labor of H-2A workers or seeking to convince such entities to cease doing business with the employer of H-2A workers or selling or otherwise distributing products derived from the labor of H-2A workers.”

We note that these additional regulatory safeguards against retaliation against employees for engaging in concerted protected activity are essential to protecting and enforcing safe, fair, and legal working conditions. As many commentators have recognized, affording employees the right to freely discuss workplace concerns without fear of reprisal assures self-enforcement and employer compliance with their labor law obligations.<sup>78</sup> In light of this, we further recommend that, in addition to protecting the right of workers to speak with legal service providers without

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<sup>77</sup> Improving Protections, 88 Fed. Reg. at 63787.

<sup>78</sup> Morris, Charles J. *Article: NLRB Protection in the Non-Union Workplace: Glimpse at a Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1693 (May 1989).

the threat of retaliation, the regulations should likewise specifically protect workers' rights to discuss their workplace concerns among themselves. Employers may take actions to suppress these conversations and could stifle any discussion that could ultimately lead to contact with a legal service provider or further actions. In addition, the right of agricultural workers to provide each other mutual aid and support ensures non-discriminatory enforcement of good cause termination requirements.<sup>79</sup>

Furthermore, because the legal and work permit status of H-2A workers is tied to a single employer, the ability to confer and to engage in concerted protected activity with their coworkers to assert their labor and employment rights is essential to ensuring they are accorded their legal rights and safe working conditions. It is vital for H-2A workers to have the ability to consult with legal service providers about issues arising in the workplace as these workers are living and working in a foreign land and are often unfamiliar with their geographical surroundings and legal rights. In reality, in most areas of the United States, there are no established labor organizations with the capacity to perform outreach to most farm labor camps in order to provide information to workers "on their rights under the H-2A program and to engage in self-organization." Because H-2A workers are often almost entirely dependent upon their employers and recruiters for transportation and connection to community resources which often are located far away from the labor camps in which they reside, it is less likely that they will be able to access such resources on their own.

### **C. Labor Organization Access to Worker Contact Information**

The NPRM's proposed § 655.135(m)(1) supplies to labor organizations the necessary contact information for H-2A workers and those in corresponding employment to enable such organizations to meet and confer with workers about their labor rights and working conditions.<sup>80</sup> Workers in the H-2A temporary agricultural program are particularly dependent upon their employer for not only outside resources, but also for information about their employment rights and restrictions. This isolation is compounded by the current structure of the H-2A visa program where workers are prohibited from working for any other agricultural employer even if they are being mistreated in the workplace or even if another opportunity for employment is available that provides higher wages and/or better working conditions.<sup>81</sup>

We support the Department's proposed regulation to provide worker contact information to labor organizations. Workers with access to labor organizations would be better informed

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<sup>79</sup> *Id.* at 1748.

<sup>80</sup> Improving Protections, 88 Fed. Reg. at 63795

<sup>81</sup> *Arriaga v. Fla.-Pac. Farms, LLC*, 305 F.3d 1228, 1232 n.2 (11th Cir. 2002) ("The H-2A worker is only admitted into the United States to work for the designated employer and the designated period of employment... If the employment relationship ends—whether the employee quits or the employer terminates the employment—the H-2A visa expires, and the worker must leave the United States").



about critical resources and information, including their ability to engage in protected concerted activity to improve their working conditions. Given the vulnerable nature of H-2A workers, labor unions can provide workers with the necessary information to assert and enforce their labor and employment rights without fear of retaliation. Worker-led accountability can help improve worker conditions and help resolve violations that would otherwise likely go undetected. The ability of these entities to contact and engage in discussions with H-2A workers regarding their wages and working conditions would also further the legislative mandate that the introduction of H-2A workers are subject to the same wages and working conditions as domestic workers and that the introduction of these workers does not adversely affect the wages and working conditions of domestic workers.

We also recognize that the Department has been underfunded while experiencing an increase in the number of workers covered under its regulations, thereby heightening the importance of mechanisms to allow and support third-party enforcement of compliance with applicable labor regulations.

Finally, while there is no evidence that labor organizations have in any way misused or would misuse the contact information for workers as described in the NPRM, the Department might avoid unnecessary objections if the final rule expressly limited the permissible use of employee contact information in a manner similar to what the National Labor Relations Board provides with respect to contact information on an *Excelsior* list.<sup>82</sup> It would be appropriate to state that a requesting labor organization shall only use the list for purposes of contacting the H-2A workers in an effort to represent them or otherwise assist them in relation to their terms and conditions of employment.<sup>83</sup>

#### **D. Designated Representatives**

In subsection 135(m)(2) to § 655, the NPRM proposes to add a provision to permit workers “to designate a representative to attend any meeting between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline.”<sup>84</sup> The NPRM also permits the employee to receive advice and active assistance from the designated representative during such meetings, and grant a right of access to the designated representative when any meeting is held at the employer’s workplace or private establishment.<sup>85</sup>

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<sup>82</sup> *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966) (held that employers must file an eligibility list that includes the names and home addresses of eligible voters within seven calendar days after a decision and direction of election issues or approval of an election agreement).

<sup>83</sup> See 29 C.F.R. § 102.62(d).

<sup>84</sup> Improving Protections, 88 Fed. Reg. at 63796.

<sup>85</sup> *Id.*

These rights, known in the National Labor Relations Act (NLRA) context as *Weingarten* rights, further ensure that H-2A workers are subject to equal wages and working conditions as their non-H-2A counterparts, so as to protect against the depression of the wages and working conditions within the agricultural industry.<sup>86</sup> Studies demonstrate that employees confronted alone within the H-2A context may be too fearful or inarticulate to state their defense to any disciplinary charges.<sup>87</sup>

H-2A workers often have limited knowledge of or cultural familiarity with U.S. labor and employment practices, and this can place them at a significant disadvantage when attempting to present their defense to pretextual or unjust causes of discipline. Guaranteeing H-2A workers the right to the presence and assistance of an employee representative during investigatory and disciplinary hearings will fulfill several important objectives. First, the designated employee representative will have the ability to inform the worker of rights and defenses under U.S. law available to them.<sup>88</sup> Second, the ability of an H-2A worker to confer with an employee representative during disciplinary hearings will allow workers to more effectively develop and present a factual defense, thereby shielding H-2A workers from unjust or unwarranted discharges, which may be taken by an unscrupulous employer to avoid the costs associated with the three-fourths guarantee.<sup>89</sup> Finally, the ability of H-2A employees to band together in this context will empower their ability to collectively enforce their labor rights and afford them legal protection in such actions.<sup>90</sup>

Permitting H-2A workers to request the presence of an employee representative during investigatory hearings will help ensure that H-2A workers are not subjected to unequal working conditions, which would in turn place domestic workers at a competitive disadvantage with temporary foreign workers.

## **E. Coercive Speech**

The Department's proposed prohibition at § 655.135(m)(3) of coercive speech by employers designed to dissuade H-2A workers from exercising their rights or participating in concerted protected activity will help ensure that the introduction of H-2A workers does not adversely affect the working conditions of domestic workers. It provides in relevant part, that H-2A employers "[r]efrain from engaging in coercive employer speech intended to oppose workers' protected activity" unless they comply with certain cautionary measures. These

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<sup>86</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959 (1975) (held that employees have a right to union representation at investigatory interviews, these rights have become known as the Weingarten Rights).

<sup>87</sup> Sarah Helene Duggin, *The Ongoing Battle over Weingarten Rights for Non-Union Employees in Investigative Interviews: What Do Terrorism, Corporate Fraud, and Workplace Violence Have to Do with It*, 20 ND J. L. ETHICS & PUB POL'Y 655, 667.

<sup>88</sup> *See id.* at 712.

<sup>89</sup> *See* 20 C.F.R. 655.122(i) & (n).

<sup>90</sup> *See id.* at 681, citing *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676, 678 (2000).

measures may include that the employer supply an explanation of the meeting or communication, assures the workers that attendance or participation is voluntary, informs the workers that nonattendance or nonparticipation will not result in reprisals, and assures workers that attendance or participation will not result in rewards or benefits.<sup>91</sup> In addition, the NPRM requires that the employer obtain affirmative consent from a worker to talk to that worker in work areas during working hours and assure the worker that such discussions are entirely voluntary and that they may end the meeting or discussion at any time without adverse consequence.<sup>92</sup>

We praise the inclusion of these protections against coercive speech in the NPRM, but suggest that employer compliance with the aforementioned restrictions would be best supported by an additional requirement that the employer supplement any oral assurances in writing to the worker before the employer engages in a discussion of union activity or participation.

Studies demonstrate that employers have utilized coercive speech, otherwise known as captive-audience speeches, to discourage workers from organizing to advance their rights in the workplace. Indeed, the unique ability of the employer in the agricultural setting to control and condition the work standards on the attendance of H-2A workers in such an environment will unduly interfere with any union organizing drive or representative election.

Finally, the prohibition of captive audience speeches in the H-2A context complies with this nation's jurisprudence on union access to employer property. In the landmark Supreme Court decision of *NLRB v. Babcock & Wilcox*, the court held that a union is entitled access to an employer's property to speak with workers when the union has no other reasonable right of access to the workers.<sup>93</sup> The Supreme Court in *Babcock & Wilcox* famously stated, "depends in some measure on [their] ability . . . to learn the advantages of self-organization from others."<sup>94</sup> To allow employers to subject H-2A workers to captive audience speeches would have an overwhelming chilling effect on the exercise of any protected right of any H-2A or domestic worker in corresponding employment. Indeed, in light of the overwhelming and undue influence exerted by employers in this context, many states have enacted legislation to ban captive audience speeches in other contexts.<sup>95</sup> Providing H-2A workers similar protections would ensure that the statutory mandate of the Immigration and Nationality Act prevents any adverse effects on the wages and working conditions of domestic workers.

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<sup>91</sup> Improving Protections, 88 Fed. Reg. at 63797.

<sup>92</sup> *Id.*

<sup>93</sup> 351 U.S. 105, 112 (1956).

<sup>94</sup> *Id.* at 113.

<sup>95</sup> Elizabeth J. Masson, "*Captive Audience*" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?, 56 HASTINGS LAW J. 1, at 190.

## **F. Labor Neutrality**

We approve of the Departments' proposed addition of § 655.135(m)(4), requiring that H-2A employers attest to whether they agree to negotiate in good faith over the terms of a neutrality agreement, or to provide an explanation in the job order if they choose not to, will help ensure that H-2A workers and domestic workers in corresponding employment enjoy the free market right to select work that offers their preferred working conditions.<sup>96</sup> By providing H-2A and similarly employed workers with information of the employers' position on labor neutrality agreements, workers themselves will be more empowered in their decision making about H-2A and other agricultural job opportunities.

We also support the proposed regulation that the Department should promote the entry of H-2A employers into labor neutrality agreements with organizations that are subject to the Labor Management Reporting and Disclosure Act. Inclusion of this information on the H-2A job order, will provide a mechanism for protecting against employer interference with workers' assertion of their labor rights or efforts to organize.

## **III. Disclosure Requirements and Job Terms**

We appreciate the Department's efforts to strengthen recruitment and disclosure requirements in the H-2A program. The enhanced transparency in information will empower workers to assert their rights and promote program integrity.

### **A. Enhancing Transparency in Foreign Recruitment**

We applaud the Department's stated goals of enhancing foreign recruitment chain transparency. While we believe that the proposed changes take some modest steps in the right direction to protect H-2A workers from bad actors, the NPRM provides limited transparency to workers and will not meaningfully discourage the currently widespread recruitment abuse prevalent in the H-2A program without further action.

#### **1. The proposed changes to international recruitment are a modest improvement from the current regulatory scheme**

- a. Recruitment fraud by U.S. employers and their agents is widespread and leaves heavily indebted workers vulnerable to labor abuses and even human trafficking.

Employers that hire temporary foreign workers primarily utilize labor recruiters to locate and contract with workers abroad. Despite the current regulation prohibiting

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<sup>96</sup> Improving Protections, 88 Fed. Reg. at 63798-99.

employers and their agents from requesting or receiving payments from employees or potential employees in exchange for any activity related to H-2A employment<sup>97</sup> and the requirement for H-2A employers to sign assurances that they have contractually forbid any foreign recruitment agents from soliciting or receiving recruitment fees from H-2A worker applicants,<sup>98</sup> fraud in foreign labor contracting remains rampant throughout the program and leaves workers vulnerable to labor exploitation and human trafficking in the U.S. The anti-trafficking organization, Polaris, recently reported that between 2018 and 2020, it identified 2,841 H-2A workers who had called the National Human Trafficking Hotline as victims of human trafficking.<sup>99</sup> The H-2A program is the temporary work visa program with the highest reported incidence of trafficking by an overwhelming margin. One perverse example of the outcome of the current regulatory scheme prohibiting fees is the wide usage of a bilingual form that was distributed by a North Carolina-based visa processing agent to his H-2A worker clients for their arriving H-2A workforce to sign that threatens to terminate the arriving workers immediately if it is revealed that they paid a recruitment fee.<sup>100</sup> Workers are in a vulnerable position that makes them unwilling and unable to report recruitment fees to the relevant enforcement officials, and employers and recruiters know that reporting and any subsequent enforcement action is unlikely.

Despite recruitment fee prohibitions, many foreign workers succumb to recruiters' false promises of opportunity<sup>101</sup> and invest anywhere from hundreds to thousands of U.S. dollars in unlawfully charged recruitment fees to H-2A employers and their agents. For example, in 2013-2014, a recruiter in Florida for H-2A strawberry pickers told the worker that they would have to pay recruitment fees as a condition of employment. Hundreds of workers paid between \$3,000 and \$4,000 per worker and were told that the fees would be refunded at the end of the contract.<sup>102</sup> Further, between 2012 and 2018, several recruiters in California were indicted for illegally charging Mexican nationals up to \$3,000 to obtain H-2A visas to harvest lemons, avocados, and oranges.<sup>103</sup> Polaris reported that temporary foreign workers, including H-2A visa holders, who called the National Human Trafficking Hotline paid recruitment fees ranging from \$1,000 to \$9,000.<sup>104</sup> A 2018 survey of H-2A workers

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<sup>97</sup> 20 C.F.R. § 655.135(j).

<sup>98</sup> *Id.* at § 655.135(k).

<sup>99</sup> Polaris, *Human Trafficking on Specific Temporary Work Visas, A Data Analysis 2018–2020*, at 25 (July 2022), <https://polarisproject.org/labor-trafficking-on-specific-temporary-work-visas-report/>.

<sup>100</sup> See Exhibit A, Form #1 Worker Arrival (Must be signed before beginning work).

<sup>101</sup> *Palma Ulloa v. Fancy Farms, Inc.*, 762 F. App'x 859, 862–63 (11th Cir. 2019) (H-2A workers paid \$3000 to \$4000 each in recruitment fees).

<sup>102</sup> *Ulloa v. Fancy Farms, Inc.*, 762 Fed. Appx. 859 (2019 U.S. App.); See also *Palma Ulloa v. Fancy Farms, Inc.*, 274 F. Supp. 3d 1287 (2017 U.S. Dist.).

<sup>103</sup> U.S. Citizenship and Immigr. Serv., *3 Indicted In Immigration Fraud Scheme That Exploited Immigrant Farm Workers By Charging Prohibited Fees For Visas, Living Expenses*, (May 17, 2018), <https://www.ice.gov/news/releases/3-indicted-immigration-fraud-scheme-exploited-immigrant-farm-workers-charging>.

<sup>104</sup> Polaris, *supra* note 99, at 15.

from Mexico reported that 58% of workers surveyed reported paying a recruitment fee that on average amounted to \$590 per worker.<sup>105</sup> This was in addition to any travel, visa and other fees for which the worker should receive reimbursement from the employer.<sup>106</sup> That same survey reported that 47% of H-2A workers needed to take out a loan to cover illegal recruitment fees and other pre-employment expenses.<sup>107</sup> The interest on these loans ranged from 5% to 79%.<sup>108</sup> In addition, workers are sometimes required to pledge collateral, such as a property deed, with recruiters to ensure that workers will complete their contracts and/or pay down their recruitment fee debt, regardless of whether or not their U.S. employer complies with the law. False promises of potential earnings, misleading or undisclosed contract terms, excessive recruitment fees, and increasingly, the involvement of organized crime<sup>109</sup> often lead to cases of human trafficking involving H-2A workers<sup>110</sup> in the United States.

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<sup>105</sup> Centro de los Derechos del Migrante, *Recruitment Revealed; Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, at 16 (Feb. 2018), [http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 18.

<sup>109</sup> See Press Release, U.S. Dep't of Justice, Owner of Farm Labor Company Sentenced to 118 Months in Prison for Leading a Multi-State Conspiracy Involving Forced Labor of Mexican Farm Workers (Dec. 29, 2022), <https://www.justice.gov/opa/pr/owner-farm-labor-company-sentenced-118-months-prison-leading-multi-state-conspiracy-involving>.

<sup>110</sup> See generally Steven Greenhouse, *Low Pay and Broken Promises Greet Workers*, N.Y. TIMES, (Feb. 28, 2007) <https://www.nytimes.com/2007/02/28/us/28labor.html> (North Carolina and Louisiana); Megan Twoheny, Mica Rosenberg & Ryan McNeill, *Wanted: Foreign Workers—and the Labor Brokers Accused of Illegally Profiting from Them*, REUTERS INVESTIGATES, (Feb. 19, 2016), <https://www.reuters.com/investigates/special-report/workers-broker> (Florida); Amanda Magnus & Frank Stasio, *A Different Side of Human Trafficking in North Carolina*, N.C. PUB. RADIO (Apr. 4, 2019), <https://www.wunc.org/post/different-side-human-trafficking-north-carolina> (North Carolina); Alexandra Hall & Sarah Whites-Koditschek, *Fainting and Freezing in the Fields: Alleged Labor Trafficking Victim Tells of Mistreatment in Wisconsin and Georgia*, WIS. WATCH, (Sept. 8, 2019), <https://www.wisconsinwatch.org/2019/09/fainting-and-freezing-in-the-fields-alleged-labor-trafficking-victim-tells-of-mistreatment-in-wisconsin-georgia> (Wisconsin and Georgia); Ga. Legal Services Program, *Federal Court in Georgia Orders Human Trafficker to Pay Over \$275,000 to Pine Straw Workers*, (Aug. 1, 2019), <https://farmworkerrights.org/2019/08/01/federal-court-in-georgia-orders-human-trafficker-to-pay-over-275000-to-pine-straw-workers> (Georgia); and Tina Vásquez, *Human trafficking or a Guest Worker program? H-2A's Systemic Issues Result in Catastrophic Violations*, PRISM (April 14th, 2023) <https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/> (North Carolina). See also *West v. Butikofer*, No. 2020 WL 5245226 (N.D. Iowa August 18, 2020) (default judgment). *Gonzalez-Leiva v. Clute*, No. 4:19-cv-00087 (N.D.Ind. January 29, 2021 (default judgment). See also numerous civil complaints alleging human trafficking in the H-2A program: *Catalan v. Vermillion*, No. 1:06-cv-01043 (D.Colo. June 1, 2006); *Sianipar v. GTN Emp't Agency, Inc.*, No. 07-cv-53490 (N.C. Super. Ct. Feb. 22, 2007); *Asanok v. Million Express Manpower, Inc.*, No. 5:07-cv-00048 (E.D.N.C. Aug. 24, 2007); *Trevino-Villarreal v. Garcia*, No. 6:08-cv-00031 (N.D.Tex. June 16, 2008); *Antonio-Morales v. Bimbos Best Produce, Inc.*, 2:08-cv-05105 (E.D.La. December 10, 2008); *Cuarenta-Ramos v. Odom*, No. 4:09-cv-00368-SWW (E.D. Ark. May 13, 2009); *Hernandez Sanchez v. Williams*, No. 5:10-cv-00117-JMH (E.D. Ky. Apr. 2, 2010); *Murray v. Altendorf Transport*, No. 2:10-cv-00103 (D.N.D. October 28, 2010); *Valdez Huerta v. L.T. West, Inc.*, No. 6:11-cv-01589 (W.D.La. August 31, 2011); *Ruiz v. Fernandez*, No. 2:11-cv-03088, E.D.Wash. September 2, 2011); *Solorsano-Aquino v. John Peroulis & Sons Sheep, Inc.*, No. 1:13-cv-00418 (D.Colo. February 16, 2013); *Buezo-Caballero v. All Nation Staffing, LLC.*, No. 0:14-cv-6149 (S.D. Fla. June 30, 2014); *Ajias-Solval v. Cisco Produce*,

- b. Foreign worker applicants seeking H-2A jobs are routinely victimized by fake recruiters with no true job offer that exploit the current lack of transparency in recruiting in the H-2A program.

Additionally, individuals purporting to be recruiters who have no relationship with an actual H-2A employer often charge prospective foreign workers for the chance to get a job that does not even exist. Advocates working in countries of origin have reported that recruitment schemes requesting payment for jobs that do not exist are prevalent and occur every season. Over a span of 15 years, CDM documented 6,497 prospective H-2 workers who paid an average recruitment fee of \$9,300 Mexican pesos each, totaling \$60 million pesos to fraudulent recruiters.<sup>111</sup> This fraudulent recruitment is so common that the U.S. and regional governments issue warnings every year to prevent citizens looking for work from paying for nonexistent employment.<sup>112</sup>

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*Inc.*, No. 1:14-cv-00197 (M.D.Ga. December 23, 2014); *Barriga-Bermudez v. Gutierrez-Tapia*, No. 8:15-cv-01171 (M.D. Fla. May 14, 2015); *Gutierrez-Morales v. Planck*, No. 5:15-cv-00158 (E.D.Ky. May 28, 2015); *Cruz-Cruz v. McKenzie Farms*, No. 5:15-cv-00157 (E.D.Ky. May 28, 2015); *Luna-Duarte v. Mejia Produce*, No. 1:16-CV-108 (W.D.N.C. April 24, 2016); *Zevallos v. Stamatakis*, No. 2:17-cv-00253 (D.Utah April 4, 2017); *Alonso-Miranda v. Garcia-Pineda*, No. 5:17-cv-00369 (E.D.N.C. July 22, 2017); *Rosas v. Sarbanand Farms LLC*, No. 2:18-cv-00112 (W.D. Wash. Mar. 2, 2018); *Bernal v. Coleman*, No. 1:18-cv-00088 (W.D.Ky. Jul 12, 2018); *Arreguin v. Sanchez*, No. 2:18-cv-00133 (S.D. Ga. Nov. 1, 2018); *Van Rensburg et al v. Hood et al*, No. 3:19-cv-00008 (E.D.Ark. January 14, 2019); *Fernandez-Lopez v. Hernandez*, No. 1:19-cv-00782 (W.D. Tex. Aug. 2, 2019); *Alcaraz v. RC Orchards, LLC*, No. 1:19-CV-3192-TOR (E.D. Wa. August 16, 2019); *Perez-Ovando v. Barajas*, No. 5:19-cv-00464 (N.D.Fla. November 12, 2019); *Moshan-Martinez v. Francisco Valadez, Jr. LLC*, No. 5:20-CV-00205 (E.D.N.C. May 18, 2020); *Cortez-Romero v. Marin J Corp*, No. 2:20-cv-14058-RLR (S.D. Fla. Mar. 30, 2020); *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, No. 5:20-cv-11692 (E.D.Mich. June 25, 2020); *Gomez-Garcia v. Stemilt Ag Services, LLC*, No. 2:20-cv-00254 (July 20, 2020); *Rodriguez v. City Pinestraw & Harvesting, LLC*, 2:20-cv-93 (S.D. Ga. September 7, 2020); *Fouche v. United States*, No. 3:21-cv-00050-BSM (E.D. Ark. Mar. 3, 2021); *Gonzalez-Rodriguez v. Jose M. Gracia*, No. 5:21-cv-406 (E.D.N.C. October 5, 2021); *Marin-Santiago, et al. v. Canela, et al.*, 5:21-cv-61 (S.D. Ga. October 18, 2021); *Martinez-Morales v. Valentino Lopez, Jr.*, No. 5:22-cv-187 (E.D.N.C. May 8, 2022); *Aguilar-Roblero v. Carrillo-Najarro*, No. 5:23-cv-10 (S.D. Ga. February 10, 2023 (original complaint filed), October 12, 2023 (complaint amended to include TVPRA claims); *Perez-Hernandez v. Hernandez, et al.*, 6:23-cv-26 (S.D. Ga. April 4, 2023), *Zuniga Hernandez v. Patricio*, 5:23-cv-23 (S.D. Ga. Apr. 5, 2023), *Aguilar-Ocampo v. Bahena*, No. 5:23-cv-195 (E.D.N.C. April 13, 2023); and *Velasco Rojas et al. v. First Pick Farms LLC, et al*, 1:23-cv-604 (WDMI June 9, 2023).

<sup>111</sup> Centro de los Derechos del Migrante, *Fake Jobs for Sale: Analyzing Fraud and Advancing Transparency in U.S. Labor Recruitment*, (Apr. 2019), [https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale - Report.pdf](https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf).

<sup>112</sup> See D. Portillo, *Embajada de EUA advierte de intentos de estafa para obtener visas H2*, LA PRENSA GRAFICA, (Apr. 25, 2023), <https://www.laprensagrafica.com/elsalvador/Embajada-de-EUA-advierte-de-intentos-de-estafa-para-obtener-visas-H2-20230425-0045.html> (the U.S. Embassy in El Salvador warns of H2 recruitment fraud); L. Reyes, *No caigas: consulado de EU alerta por estafas en visa de trabajo H2*, UNO TV, (Mar. 26, 2023), <https://www.unotv.com/nacional/consulado-de-eu-alerta-por-estafas-en-visa-de-trabajo-h2/> (U.S. Consulate in Guadalajara alerts potential workers of H2 visa scams); A. Ortiz, *Aumentan estafas en Guatemala por visas para trabajar en el extranjero y así operan las bandas, según la Policía y el MP*, (Jul. 19, 2023), Prensa Libre, <https://www.prensalibre.com/guatemala/comunitario/aumentan-estafas-en-guatemala-por-visas-para-trabajar-en-el-extranjero-y-asi-operan-las-bandas-segun-la-policia-y-el-mp-breaking/> (Guatemalan Ministry of Labor identifies multiple instances of illegal recruitment scams).

- c. The Department needs to consider serious tools to *prevent* recruitment fraud, in addition to better enforcement *after* the fraud has occurred.

Recruitment fraud in the H-2A program is an extremely profitable enterprise. Collecting just one or two seasons of illegal recruitment fees can be such a life-changing windfall of money for an H-2A employer or their foreign recruiter that heightened enforcement efforts alone will have little to no deterrent effect against this fraud. For example, in a federal lawsuit in North Carolina, H-2A worker plaintiffs alleged that, in 2018, their H-2A labor contractor (H-2ALC), a company that incorporated months prior to the agricultural season, collected illegal recruitment fee payments ranging from about \$800 U.S. dollars to about \$2,500 U.S. dollars each.<sup>113</sup> Their complaint alleged that these abuses, among others, were widespread amongst their H-2A co-workers in North Carolina.<sup>114</sup> Because the first-year labor contracting company was approved to employ a total of 1,442 H-2A workers that year, with 1,294 in North Carolina alone, the alleged windfall was in the millions. The labor contractor has since been debarred,<sup>115</sup> but unfortunately the practice persists.

## **2. Foreign recruiter contracts and information sharing**

We are in support of the Department's proposal at § 655.137 to require employers that engage foreign recruiters or agents to provide copies of their contracts to the Department and to allow the Department to share that information with other Federal agencies and relevant state actors such as State Workforce Agencies (SWAs). We are also in support of the Department's proposal to make recruiter information available to the public, similar to the requirement under the H-2B program.

- a. Increased transparency and information sharing will only prevent recruitment fraud to the extent that the information is truly transparent and accessible to the population being defrauded.

To more effectively address foreign worker recruitment fraud, H-2A worker applicants need an accessible way to verify that an individual claiming to be a recruiter is, in fact, a representative of the employer they purport to represent. Most H-2A worker applicants do not speak English and typically conduct this research using a smartphone. Unfortunately, an H-2A Foreign Labor Recruiter List, if modeled after the current H-2B Foreign Labor Recruiter List, would not be an accessible tool for worker applicants to use to vet H-2A recruiter representations and prevent fraud. The current H-2B Foreign Labor Recruiter List is an English language spreadsheet housed on an English language website that lists foreign recruiter names and their

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<sup>113</sup> See *Moshan-Martinez, et al. v. Francisco Valadez, Jr. LLC, et al.*, 5:20-cv-00205-FL (E.D.N.C., May 18, 2018).

<sup>114</sup> *Id.* at Compl.

<sup>115</sup> See U.S. Dep't of Lab., Press Release, US Department of Labor Investigation Results in Judge Debarring North Carolina Farm Labor Contractor for Numerous Guest Worker Visa Program Violations, (Mar. 16, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210316>.



companies, recruitment regions, and a 14-digit case number for the clearance orders that they are associated with.<sup>116</sup> Despite multiple attempts to match case numbers from this H-2B Foreign Labor Recruiter List to clearance orders using the Case Number search field on [www.seasonaljobs.gov](http://www.seasonaljobs.gov), multiple staff of the undersigned organizations were not able to match a single listed recruiter with the corresponding job offer. While we believe that the proposed registry may help the Department enforce the removal of program access after fraud has been identified, it is not an accessible tool for workers seeking to avoid fraudulent recruitment agents.

We are supportive of a proposal that would allow the sharing of recruitment information with foreign governments for investigative or enforcement purposes. However, we do not believe that it will meaningfully address fraud in foreign labor recruitment for H-2A jobs on a systemic level because the major sending countries, including Mexico, South Africa, Jamaica, and Guatemala, lack the resources and systems to address corruption.

- b. The Department can modify [Seasonaljobs.gov](http://Seasonaljobs.gov) to make it a more effective information-sharing platform for foreign workers to gain and verify job offer information, as well.

The current NPRM's efforts to increase transparency in the H-2A program should be combined with current and language-accessible resources so that prospective H-2A workers can have the needed tools and information to effectively evaluate potential employment opportunities. [Seasonaljobs.dol.gov](http://Seasonaljobs.dol.gov) is used as a clearinghouse for all available temporary employment that any domestic worker may be interested in before those employers begin international recruitment for H-2A and H-2B workers. Currently, anyone can log on and view information about specific jobs and the employers offering them, including job duties, pay, work location, expected hours, and employer information. However, there is no information available regarding recruiters connected to those jobs and employers. Again, this proposal to publish the list of H-2A recruiters is an excellent advancement, but if the Department took the step of combining the information already available on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov) with the recruiter registry, workers would be empowered to have real-time information that could help them avoid abusive recruiters and recruitment scams.

## **B. Language Access**

Language access requirements in 29 CFR 38.9 require that, “a recipient must take reasonable steps to ensure meaningful access to each limited English proficient (LEP) individual served or encountered so that LEP individuals are effectively informed about and/or able to participate in the program or activity.” Further, Executive Order 13166 requires Federal agencies to identify the needs of LEP individuals and adequately support them.

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<sup>116</sup> U.S. Dep’t of Lab., Foreign Labor Recruiter List, <https://www.dol.gov/agencies/eta/foreign-labor/recruiter-list> (last visited Nov. 14, 2023).

Despite the requirement to provide workers a contract in a language that they can understand, H-2A employers, if they provide anything in writing at all, may just provide the clearance order. The clearance order is not typically translated from English into Spanish or any other language commonly spoken by H-2A workers. Additionally, clearance orders are dense documents, loaded with information that is not easily distinguished even in English.

In compliance with language access requirements, the Department should ensure that clearance orders are translated to Spanish and other major languages spoken by relevant worker populations. To ensure that all workers are aware of their rights—and to effectuate the positive recruitment of U.S. workers that is required under the H-2A program—the Department must ensure that Spanish-speaking workers are able to access and review the clearance orders in their native language at the time of recruitment. We know that English-only clearance orders have presented particular barriers for domestic workers in Puerto Rico, where some local SWA officials have limited English ability and, without translations, are unable to refer workers to available positions elsewhere in the United States. This would align with the practices of certain SWAs that already translate or require submission of translated clearance orders and help to fulfill the Department’s language access obligations under E.O. 13166. It would also bolster compliance with the existing regulatory requirement that all H-2A workers and workers in corresponding employment receive a copy of the work contract “in a language understood by the worker.”<sup>117</sup>

### **C. Offered Wage Rate**

We support the proposed clarification that employers must offer and pay the prevailing piece rate when it would result in higher wages for a worker than the Adverse Effect Wage Rate (AEWR) or other hourly wage offered. A reading of the regulation to require employers to offer and pay the prevailing piece rate when it could result in higher wages for workers than the AEWR is the only reading that is consistent with the statutory mandate in 8 U.S.C. § 1188 that the Department not permit the importation of foreign labor if it will adversely affect the wages and working conditions of domestic workers. This clarification has been needed for a number of years, as the Department has been approving clearance orders that fail to offer to pay prevailing piece rates despite the clear language in the current regulation. When the Department allows employers to pay the hourly AEWR instead of the prevailing piece rate, experienced local and H-2A workers are prevented from earning the significantly higher wages they have historically earned in certain states and certain activities. For example, farmworkers in Washington State have historically earned significantly higher wages in cherry, pear, and apple harvest than they earn with the hourly AEWR. There is extensive evidence of this compiled in the pleadings of *Ramon Torres Hernandez et al v. Su*.<sup>118</sup> The Court in that case found that it was undisputed that

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<sup>117</sup> 20 C.F.R. § 655.122(q).

<sup>118</sup> *Hernandez v. United States DOL*, No. 1:20-CV-3241-TOR, 2022 U.S. Dist. LEXIS 200629 (E.D. Wash. Nov. 3, 2022).

workers would be irreparably harmed by historically piece-rate activities now being paid at the AEWR.<sup>119</sup> An analysis of NAWS data cited in those pleadings showed that at least 70% of harvest workers earn more than the AEWR when harvesting by the piece in the Northwest Region, and those workers earn an average of 41% more an hour than harvest workers paid at an hourly rate.<sup>120</sup> Industry testimony from 2015 (when the AEWR was \$12.42 in Washington) confirmed harvester earnings of \$20 per hour as typical in the state.<sup>121</sup> A local worker testified in that litigation that he earns between \$22.72 and \$27.96 per hour picking apples by the piece rate, well over the AEWR.<sup>122</sup>

As the H-2A program has grown to be a significant portion of the labor market in states such as Washington State, the approval of clearance orders offering only the hourly AEWR for harvest work has been having an adverse effect on the Washington agricultural labor market. Experienced local workers will choose work opportunities that offer a market piece rate wage rather than accept hourly wages, particularly during fruit harvest. Furthermore, the approval of clearance orders in which employers leave themselves the option of paying either the AEWR or a piece rate deprive local workers of valuable wage information when they are applying for agricultural jobs. The need for this clarification is made apparent by the compilation of 2023 Washington State clearance orders.<sup>123</sup> Of 192 applicable clearance orders, 162 failed to offer the prevailing piece rates applicable to harvest work.<sup>124</sup> Clearance orders were approved for cherry, apple, and berry harvest that listed only the AEWR, despite the existence of a piece rate prevailing wage for that work.<sup>125</sup> Other clearance orders were approved which left the pay to the later discretion of the employer. For example, “[U]nder ‘8e. Piece Rate Units/Special Pay Information’ [a 2023 clearance order] says ‘workers may be eligible for additional incentive pay based on their production in accordance with company policy[.]’”<sup>126</sup>

Recent clearance orders offering wages lower than the prevailing piece rate by calling the wage a “weekly bonus” rather than a piece rate illustrate the need for the Department to make it clear that employers are required to offer and pay the highest of the wage rates, regardless of the unit of pay.<sup>127</sup> The end result of the terms of this clearance order is pay by the bin, but at a lower rate than the prevailing piece rate.<sup>128</sup>

Furthermore, the proposed clarification is needed so that employers have explicit direction to offer in the clearance order the wages that they are legally required to pay. This is

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<sup>119</sup> *Id.* at ECF No. 57 at 26, 28.

<sup>120</sup> *See Hernandez*, Plaintiffs’ Motion for Preliminary Injunction, ECF 172 at 8, citing to Rutledge Decl., Ex A at 5.

<sup>121</sup> *Id.* at page 9.

<sup>122</sup> *Hernandez*, Declaration of Andres Dominguez Carrasco, ECF No. 174 ¶14-15.

<sup>123</sup> *Hernandez*, Declaration of Heidi Hernandez-Jimenez, ECF No. 202.

<sup>124</sup> *Id.* at 4.

<sup>125</sup> *Id.* at 5-21.

<sup>126</sup> *Id.* at 11.

<sup>127</sup> *See*, U.S. Dep’t of Lab., H-2A Agricultural Clearance Order Form ETA-790A, at 23 <https://api.seasonaljobs.dol.gov/job-order/H-300-22343-632052>.

<sup>128</sup> *Id.* at 21, ¶ 53, citing Washington Fruit Clearance Order.

necessary so that the Department has the ability to enforce workers' right to be paid the prevailing piece rate when it would result in higher wages. As is stated in the Preamble, the Department's Wage and Hour Division (WHD) will not collect the legally required piece rate earnings where the clearance order lacks the promise to pay that prevailing piece rate wage. This undermines the effectiveness of establishing and protecting local prevailing wages. If employers can avoid the obligation to pay these wages simply by omitting them from their clearance orders, then those prevailing wages may as well not exist.

This requirement does not impose additional recordkeeping burdens on employers, as they already must track the number of hours worked and calculate workers' potential hourly earnings to ensure compliance with the AEWR and minimum wage. Also, employers already track production for business purposes. The practical effect is that employers must compare the hourly earnings with potential earnings under the prevailing piece rate and pay workers the higher rate.

Domestic workers have relied for years on the opportunity during harvest periods to earn higher piece rate wages to support their families during low employment months. Workers will work extremely hard during these periods to maximize their earnings. Employers competing in the local job market have had to offer piece rates to attract these local workers. Allowing these employers to bring temporary foreign workers to do this work without requiring them to pay these piece rates has exactly the adverse effect on local working conditions that Congress directed the Department to prevent in the H-2A statute.<sup>129</sup> Such protection for local worker wages is particularly important given the high poverty rates still experienced by farmworker families.

### **1. The NPRM should explicitly name piece rates**

Although the Preamble explicitly requires that where there is an applicable prevailing piece rate, or where an employer intends to pay a piece rate or other non-hourly wage rate, the employer must include the non-hourly wage rate on the job order along with the highest hourly rate, the language of the proposed rule itself fails to explicitly reference piece rates and all non-hourly wage rates. Given the history of misinterpretation of the wage obligations of § 655.120, we recommend that the regulation incorporate the language of the Preamble. Therefore (a)(ii) should read, "A prevailing wage rate, *whether expressed as a piece rate or other unit of pay*", and § 655.120 (2) should read, "Where the wage rates set forth in paragraph (1) are expressed in different units of pay (*including piece rates or other pay structures*)"

### **2. The NPRM should address the wages owed to misclassified H-2A workers**

The current language fails to address the situation of H-2A workers who are assigned non-agricultural work (most commonly landscaping or retail nurseries) and therefore should be

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<sup>129</sup> Brief of Amicus Curiae, United Farmworkers of America in support of Plaintiffs in *Hernandez v. Walsh*, Nos. 22-35913, 23-35525, 23-35582, 2023 U.S. App. LEXIS 25947 (9th Cir. Sep. 29, 2023).

paid the National Prevailing Wage Center (NPWC) prevailing wage set for those actual job duties rather than the AEWR, as those prevailing wages are generally higher than the AEWR. Those prevailing wages are not determined by a wage survey, so the Department has not enforced them under this regulation. Instead, the workers receive only the H-2A AEWR, even though the work that they were doing would be paid at a higher rate if they had been brought in under the H-2B program as they should have been. The regulation could add that “federal minimum wage” includes the appropriate NPWC prevailing wage in the case of misclassified workers. To do otherwise is inviting fraud, which we are increasingly seeing, with no real penalty. Even if caught, the Department has only ever required the employer to reimburse back wages at a lower AEWR rate rather than the often-higher NPWC prevailing wage adversely affects local workers and working conditions.

### **3. Applicability to herders**

We support extending the language clarifying that employers must include in their job offers all wage rates potentially applicable to the job opportunity to § 655.210(g) and § 655.211, the regulations applicable to herders. Job applicants for herding positions should know of state prevailing wages or higher state minimum wages that might apply to the work set out in the clearance orders for herding jobs for the same reasons that job applicants for farm labor jobs should have access to that information and be entitled to receive the higher of those wages when applicable.

## **D. Productivity Standards**

### **1. Undisclosed and variable productivity standards for hourly workers lead to an increased risk of accidents, a fear of retaliation, and a chilling effect**

The Department should issue the changes in the proposed 20 C.F.R. § 655.122(l)(3) regarding the disclosure of productivity standards to hourly workers—and limits to what they can be. Undisclosed, and often variable, productivity standards for workers engaged in hourly work have increasingly been a tool for decreasing pay and a weapon against workers speaking out about working conditions. The Department rightly notes that historically, with increases in the hourly wage, employers have required employees to work faster rather than increase a piece rate as an incentive—a sort of “productivity standard creep.”

Federal courts first observed three decades ago the danger of productivity standard creep, in reference to the predecessor to the now existing 20 C.F.R. § 655.122(1)(2)(iii), which reflects similar protections with regard to piece rates. Courts have noted that this provision was clearly aimed at preventing employers from raising productivity standards rather than piece rates whenever the AEWR increased.<sup>130</sup> Much like the regulation found at 20 C.F.R. § 655.122(1)(2)(iii) protects piece rate workers, this new regulation will protect hourly workers.

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<sup>130</sup> See *NAACP v. Donovan*, 558 F. Supp. 218, 222 (D.D.C. 1982).

With the ballooning of the H-2A program, employers do not have to incentivize workers to pick faster via increased pay—it is enough incentive to tell H-2A workers that if they do not move faster, they will lose their jobs or will not be called back the following year. When workers are not called back, this creates a mass chilling effect not only about productivity standards, but about any right under federal, state, or local law. In essence, the carrot has been replaced by a stick.

We have encountered workers whose employers force them to work so fast, upon threat of termination or not being called back, that they reasonably fear increased incidence of accidents. Agricultural work is already one of the most dangerous occupations in the U.S., and when workers are forced to move too quickly on ladders, or while using machines, and are working too fast to safely complete their tasks, accidents are more common.<sup>131</sup> H-2A workers in particular are reluctant to speak up about these conditions for fear of being let go or not called back the following year. Perhaps of most concern, employers often put inexperienced workers, who are slower, in the more non-productive parts of the orchard, which leads them to rush. These are the workers without experience, so it is easier for them to get hurt.

We have also heard stories from workers about being punished by being sent to more non-productive parts of a farm to pick, where they cannot reach productivity standards, in retaliation for speaking up about their rights in other contexts. We also fear that workers can be fired, or not called back, for “not meeting productivity standards,” when in reality the termination was retaliatory, and the productivity standards were a pretext. Many employers, even those who disclose productivity standards in their clearance orders, also institute a more informal, undisclosed productivity standard on-the-ground. For instance, workers have phoned advocates to report that though they met the productivity standards on the clearance order, despite being in a more non-productive part of the farm, they were disciplined for not picking as much as they had the day or the week prior, when they had well-exceeded productivity standards in a more prosperous part of the farm.

## **2. Undisclosed, and high, productivity standards harm the recruitment of domestic workers**

Since a primary goal of the H-2A program is to not adversely affect the wages and working conditions of domestic workers,<sup>132</sup> undisclosed productivity standards, or variable productivity standards, need to be reined in because they harm the local recruitment of domestic labor. With more and more farms switching from a piece rate to an hourly rate, workers have called advocates complaining that for the amount of work they do, they are actually taking home less money than ever before, given that they must work just as hard to retain their jobs, but are only earning an hourly rate rather than a higher piece rate. However, because H-2A workers fear the loss of their jobs, they are willing to accept less money in exchange for a steady job year after

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<sup>131</sup> Margaret Gray et al., *The New York Farmworker: Hours, Wages & Injuries* at 30, 32 (2023), <https://www.umass.edu/lrrc/sites/default/files/FULL%20REPORT%20The%20NY%20Farmworker%20Hours%20Wages%20%26%20Injuries.pdf> (where two workers each discuss how having to rush at work led to accidents).

<sup>132</sup> 8 U.S.C. § 1188(a)(1).

year. Real wage value has lessened, ironically, as the AEWR has risen each year, as employers urge, or even threaten, workers to work harder so they feel they are getting more work out of workers as the hourly rate rises.

With H-2A workers feeling the threat of their jobs, this industry change has exacerbated H-2A workers' status as an underclass of workers, which undercuts wages and working conditions and thus adversely affects domestic workers. As the Department notes, many domestic workers are reluctant to take such jobs without higher pay, or to perform duties that wear out their bodies with no limit, impact their safety, and lead to less money than what they would have been making ten years ago. By the time the foreign workers' human endurance has been reached, the growers have eliminated domestic workers from the applicant pool, as H-2A workers desperate for a job are less likely to complain and have fewer alternatives.

Not putting a limit on productivity standards would eventually end local recruitment. We believe that a large part of the reason the recruitment of domestic workers has dried up in recent years are these unrealistic standards, which can be used to discriminate against domestic workers, particularly those who are older, or who are women, or who are otherwise not employers' preferred demographic. domestic workers who cannot keep up with unrealistic standards are forced to quit, or employers are justified in not calling them back the following year.

### **3. The disclosure of productivity standards follows longstanding policy that only prevailing practices be included in clearance orders**

Given that many H-2A employers nationwide first applied for Temporary Employment Certification after 1977, it will be crucial that the Employment and Training Administration (ETA) and SWAs enforce productivity standards that truly are no more than those that were normally required in the area of intended employment in the year certification was first sought.

The H-2A regulations are designed to guard against adverse effects by requiring SWAs to assure that the "...working conditions offered are not less than the prevailing working conditions among similarly employed farmworkers in the area of intended employment."<sup>133</sup> A SWA may certify a job with, *e.g.*, productivity standards, only if such requirements are "...bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops."<sup>134</sup> The practices of non-H-2A employers are crucial in the effort to combat worsening wages and working conditions for domestic workers.

The gold standard for detecting what is normal and accepted among non-H-2A employers is yearly prevailing practice surveys that collate information on different regions and crops. "Under the prevailing practice standard, it is incumbent on the DOL . . . to establish the

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<sup>133</sup> 20 C.F.R. § 653.501(c)(2)(i).

<sup>134</sup> 20 C.F.R. § 655.122(b).

prevailing practice in a particular area by conducting surveys using the State workforce agencies.”<sup>135</sup> Surveys should be based on the practices of non-H-2A employers.<sup>136</sup> Where a prevailing practice survey does not already include information on productivity requirements, existing ETA guidance suggests that SWAs start including such information.<sup>137</sup>

However, since many state SWAs have failed to conduct such surveys over the years, it will be crucial for the Department and SWAs to have alternative methods of detecting what was normally required in the area of intended employment in the year of an employer’s first temporary labor certification. Otherwise, employers can indicate productivity standards from prior years with no realistic limit. Generally, where an employer wishes to include requirements—such as productivity standards—and no valid survey has been conducted, those requirements then must be reviewed for their appropriateness.<sup>138</sup> The H-2A regulations explicitly give the SWA the authority to “require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.”<sup>139</sup> Such documentation must be sufficient to support a finding that the requested productivity requirement is, or was, consistent with what was “normally required by other employers of *domestic workers in the area*,” or else SWAs have the authority to deny the H-2A application.<sup>140</sup> Perhaps most importantly, the burden of proof rests with the employer.<sup>141</sup>

Despite this, and as noted above, in recent years, SWAs have been approving clearance orders across the country that contain productivity standards without requiring any sort of evidence that they are bona fide, normal, and accepted in the area of intended employment at non-H-2A farms. Thus, a productivity standard that is disclosed, enforced, bona fide, and normal and accepted—rather than arbitrary and variable—will do much to protect workers. However, the Department must ensure the state SWAs do not approve productivity standards that are arbitrary or inappropriate for the year of first temporary labor certification.

## **E. Workers’ Compensation**

### **1. Employers have refused to transport employees to receive medical care and have forced workers to go home to receive medical care for on-the-job injuries**

We wanted to take this chance to note that advocates across the country commonly encounter workers who are seriously affected by injuries related to their H-2A visas and an inability to obtain adequate medical care or compensation. Agricultural labor is dangerous, and

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<sup>135</sup> *In re Wash. Farm Labor Ass’n*, OALJ Case No. 2014-TLC-00088 (May 20, 2014).

<sup>136</sup> *In re Manzana, LLC*, OALJ Case No. 2021-TLC-00167 (July 23, 2021).

<sup>137</sup> See Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; H-2A Program Handbook No. 398, 53 Fed. Reg. 22076, 22096-22097 (June 13, 1988).

<sup>138</sup> *Id.*

<sup>139</sup> 20 C.F.R. § 655.122(b).

<sup>140</sup> Handbook No. 398, 53 Fed. Reg. at 22096-22097 (emphasis added).

<sup>141</sup> *Id.* at 22084, 22096-22097; 20 C.F.R. §§ 655.103(a) and 655.122(b); *In re Hart Hudson Farms*, OALJ Case No. 2015-TLC-13 at 9 (Feb. 2, 2015).



injuries are common. For instance, a recent survey of 511 farmworkers in New York found that 19% of respondents had had an on-the-job injury that led to lost work time.<sup>142</sup> Nationally, the fatality rate from on-the-job injuries across all industries is 3.4 per 100,000 full-time equivalent (FTE) workers, while the fatality rate for Crop Production is a whopping 20.8 per 100,000 FTE workers.<sup>143</sup>

All H-2A employers are required to purchase workers' compensation policies, as well as to comply with state laws, but many H-2A employers do not actually comply with those policies. It is common to receive calls from workers who have said they cannot file for workers' compensation or get ongoing medical care out of fear of retaliation, or because their employer is threatening to send them home because they are injured and cannot work, or because their employer went with them to the doctor to prevent the report of a workplace injury.

Further, many injured workers remain isolated in their labor camps and unable to reach medical appointments. H-2A workers generally do not have their own transportation. State laws are far from uniform in terms of whether or not employers are required to transport injured workers to medical care. Workers have been forced to call 911 just to attend follow-up visits for serious injuries because employers will not provide transportation in rural areas. Others have been immediately sent home to recover in their home countries: Although some state workers' compensation laws do allow for medical care outside the country, many others do not, meaning many H-2A workers who are sent home are forced to pay out-of-pocket for medical care because their employers have terminated them and forced them to leave the country. Even in those states that do allow workers' compensation claims outside the country, they are reimbursed *after* medical care is obtained, meaning workers must pay upfront and risk not being reimbursed. For workers who need serious medical care, such as surgery, this cost can be prohibitive. For instance, one advocate reported that a worker who needed surgery was forced to leave the country when his visa ended then could not find care at home because no surgeon would accept payment after the fact, and the worker could not afford to front the costs.

H-2A workers often find it impossible to stay to seek ongoing care because that necessitates changing visa status to a tourist visa, and workers are unable to work on such visas and unable to front housing and living costs. Further, current USCIS processing times are up to two (2) years for such changes, putting workers in a situation where they may accrue unlawful presence if the visa is denied, permanently affecting their ability to work in the United States on

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<sup>142</sup> Margaret Gray et al., *The New York Farmworker: Hours, Wages & Injuries* at 23 (2023), <https://www.umass.edu/lrrc/sites/default/files/FULL%20REPORT%20The%20NY%20Farmworker%20Hours%20Wages%20%26%20Injuries.pdf>.

<sup>143</sup> U.S. Bureau of Lab. Stat., *Hours-Based Fatal Injury Rates by Industry, Occupation, and Selected Demographic Characteristics* (2020), <https://web.archive.org/web/20220723215349/https://www.bls.gov/iif/oshcfoi1.htm#rates>. The direct link is [https://web.archive.org/web/20220620222134/https://www.bls.gov/iif/oshwc/cfoi/cfoi\\_rates\\_2020hb.xls](https://web.archive.org/web/20220620222134/https://www.bls.gov/iif/oshwc/cfoi/cfoi_rates_2020hb.xls).

H-2A visas once they are recovered. Even without unlawful presence, overstaying an H-2A visa risks the five-year H-2A bar for violating the terms of the visa.

Employers should thus be obligated to purchase workers' compensation policies that will cover medical care outside the country, even in states where the state law does not require such payments. Employers should also be obligated to provide transportation—as they do for groceries, for instance—to injured workers who need to attend medical appointments or follow-up care, as well as initial care for injuries. These requirements should be stated upfront in all clearance orders.

Finally, employers should be prohibited from terminating injured workers, evicting them from employer-provided housing, sending them home, or otherwise separating them from their employment for the duration of their H-2A visas, particularly for workers injured in connection with work performed for their H-2A visas.

#### **F. Severability**

A severability clause should also be added to every clearance order, so that if any part of a clearance order—which forms the work contract in many instances—is found to be unenforceable, the rest remains in effect.

#### **G. Job Orders Should Contain the Most Prevalent State Labor and Employment Laws**

Lip service, at best, is paid by some employers in clearance orders when committing to complying with state law. For instance, large numbers of employers across the country willfully misstate state laws in their H-2A applications, without correction by ETA or even the state SWAs. Recognizing this problem, California recently enacted AB 636, which will require H-2A employers not under a union contract to give each H-2A worker a Spanish-language notice that provides information about applicable state laws.<sup>144</sup> SWA staff must be trained in applicable state laws and make a concerted effort to identify applicable state laws so that they can adequately screen job orders for language that would violate state law. Employers should then be put on actual, specific notice by the SWA—when they sign an application under penalty of perjury—of at least some of the most critical state protective laws that apply to H-2A workers in that particular state. Employers should also be required to specifically acknowledge in their H-2A application that at least the most important state law protections apply to H-2A workers.

Applications with boilerplate language that misstate state law requirements should be rejected. For instance, advocates have noted language in clearance orders that misstates state law on housing, tenancy, deductions (including FICA taxes, which H-2A workers are not obligated to pay), wages, and reasonable accommodations. Few clearance orders acknowledge existing state

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<sup>144</sup> Assemb. B. 636, 2023 Leg., Reg. Sess. (Cal. 2023) (available online at [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202320240AB636](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB636)).

law on issues such as organizing or the right to visitors. State-specific assurances about Workers' Compensation laws are also woefully absent from clearance orders across the country, despite how often injured farmworkers must make use of such claims. Requiring the inclusion of basic state standards will make it easier for the Wage and Hour Division to enforce the regulations governing the H-2A program, since they would be included on the clearance order.

## **H. Transportation and Side Agreements**

### **1. The proposed changes are necessary to improve transportation safety for H-2A workers**

#### **a. Requirement of seat belts**

In the NPRM, the Department proposes revisions to §655.122(h)(4) to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation. The Department notes the benefits of seat belt usage, and correctly observes that seat belt use in rural areas lags behind other parts of the United States, and rural vehicle crashes are disproportionately deadly. Despite this, the Department's proposal is limited in how it can better ensure transportation safety in rural and agricultural communities. Specifically, the regulation currently only requires employers to comply with all applicable local, State, and federal laws and regulations and at a minimum, the AWPAs vehicle safety regulations. This catch-all provision has led to inconsistent enforcement throughout the United States. For example, some states (like New Hampshire) have no seat belt requirements whatsoever for adult passengers. Other states (like North Carolina) generally require seat belts but exempt farm labor vehicles. Yet others (like California and Florida) require seat belts in some, but not all, vehicles used to transport farmworkers.<sup>145</sup>

To ensure further uniformity and safety, the final rule should make clear that the seatbelt standard applies for all transportation of H-2A workers, not just to and from worksites, but also for inbound and outbound transportation, interstate and intrastate transportation between job sites, and all other employer-transportation of farmworkers. The regulation should also expressly state that agents of employers who are responsible for transporting farmworkers, such as farm labor contractors' or third-party transportation agents, must also comply with the new seatbelt requirements.

The Department seeks comment on the types of vehicles that should be required to comply with these new vehicle safety standards. In addition to covering passenger cars and buses with a gross vehicle weight rating (GVWR) under 10,000 pounds, the new regulation should include buses with a GVWR of over 10,000 pounds. This would include medium duty (class 3-6) buses with a GVWR of 10,001-26,000. It is important to cover larger vehicles like school buses

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<sup>145</sup> See Cal. Veh. Code § 2731(d)(1) 5 (Motor Vehicle Safety Act); Fla Stat. § 316.622(2); 49 C.F.R. § 571.208.

because employers frequently use old school buses to transport H-2A workers. However, only California, Florida, Louisiana, New Jersey, and New York currently have laws that require seatbelts on school buses – and not all of these laws capture transportation of farmworkers.<sup>146</sup> Thus, excluding this larger vehicle category creates a meaningful gap in vehicle safety and permits most H-2A employers to circumvent the proposed seat belt rules by simply transporting H-2A workers using old school buses, as many already do. As H-2A workers typically work in isolated rural locations, they have no other means of transportation other than employer provided transportation.<sup>147</sup> It is thus critical that the seatbelt safety regulation is as expansive as possible to ensure all H-2A workers receive adequate transportation safety.

With respect to the Department’s request for comments as to whether employers ever retrofit vehicles with additional seats (or any seats if the vehicle was manufactured without passenger seats), and how these vehicles should comply with the proposed seat belt standards, the proposed rule should expressly prohibit any retrofitting of any vehicles with additional seats. Permitting “jerry-rigged” seating will only serve to encourage employers to evade the regulation’s seatbelt requirement. If the Department does permit “jerry-rigging” of seats, which it should not, the Department should ensure these jerry-rigged seats are inspected and approved prior to approving an employer’s job order.

In addition, employers should be required to verify that all passengers are wearing seat belts, not just that seat belts are made available. Oftentimes, H-2A workers come from rural communities in Mexico, where wearing seatbelts may not be customary. Farmworkers may also not be fully informed of the safety benefits of wearing a seatbelt. For example, according to the Center for Disease Control and Prevention, deaths and serious injuries from vehicle crashes can be reduced by half by wearing seat belts.<sup>148</sup> Further, we recommend that employers certify that they will require drivers to ensure seatbelt use and that seatbelts are available in any vehicle used to transport workers.

With respect to the Department’s discussion of the exemption found in AWPAs regulations at § 500.104(l) regarding vehicles primarily operated on private farm roads when the total distance traveled does not exceed 10 miles, so long as the trip begins and ends on a farm owned and operated by the same employer, the exemption should be inapplicable to H-2A employers. Otherwise, an employer could simply avoid this requirement by housing the H-2A workers on the same farms owned and operated by employers. Moreover, 10 miles is enough to get into major accidents.

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<sup>146</sup> Cal. Veh. Code § 27316; Fla Stat. Ann. § 316.6145 and § 1006.25(1)(b); La. Rev. Stat. § 17:164.2; N.J. Stat. Ann. § 39:3B-10 and § 39:3B-11; N.Y. Veh. & Traf. 383(5) and N.Y. Educ. 3635-a(1).

<sup>147</sup> *Rodriguez v. SGLC, Inc.*, No. 2:08-cv-01971-MCE-KJN, 2012 U.S. Dist. LEXIS 164383, at \*56 (E.D. Cal. Nov. 15, 2012) (plaintiffs presented evidence suggesting that they were de facto required to use the employer-provided buses, as they did not know where they would be going ahead of time and had no other means of transportation).

<sup>148</sup> Ctr. for Disease Control & Prevention, *Seat Belts: Get the Facts, Effectiveness* (June 5, 2018), <https://www.cdc.gov/motorvehiclesafety/seatbelts/facts.html>.

Overall, the seatbelt requirements will greatly improve vehicle safety for H-2A workers, but the Department should take some additional steps to ensure unscrupulous employers do not attempt to bypass this new seatbelt requirement.

b. Elimination of gaps in vehicle insurance

The NPRM does not adequately address the gaps in coverage for vehicle insurance. H-2A employers are required to provide, at a minimum, the vehicle insurance required by the regulations promulgated under the AWP. <sup>149</sup> However, as presently administered by the Department, there are substantial gaps in this vehicle insurance. As a result, each day, many H-2A workers are transported in employer vehicles without having in effect any insurance protecting the passengers against injury or death. The Department should revise the regulations to close these gaps so that the requisite insurance is in place during any transportation provided H-2A workers by their employers.

Under AWP, agricultural employers or farm labor contractors who transport migrant or seasonal agricultural workers are required to provide at least \$100,000 of liability insurance for each seat in the vehicle, subject to a \$5,000,000 per vehicle cap. <sup>150</sup> However, AWP provides a waiver of this requirement if the employer provides workers' compensation insurance that covers all "circumstances" under which the workers are transported. <sup>151</sup> The employer is required to maintain liability insurance or liability for any transportation that is not covered under workers' compensation law. <sup>152</sup>

Because they are required to provide workers' compensation insurance, many H-2A employers also seek to rely on this same workers' compensation insurance to satisfy the regulations' vehicle insurance requirements. <sup>153</sup> Many such employers do not provide additional liability insurance, expecting (or hoping) that the workers' compensation insurance will be in effect for any and all transportation provided to H-2A workers. <sup>154</sup>

In fact, a good deal of farm labor transportation falls outside of most states' workers' compensation coverage. For example, farm labor contractors and agricultural employers often transport H-2A workers, who usually do not have their own vehicles, to stores, laundries, money transfer establishments, and other businesses. As one federal court explained, such

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<sup>149</sup> 29 C.F.R. § 500.122(h)(4).

<sup>150</sup> *Id.* § 500.121(b).

<sup>151</sup> 20 C.F.R. § 655.122(a)(1).

<sup>152</sup> *Id.* § 655.122(b).

<sup>153</sup> 20 C.F.R. § 655.122(e); *see also* 29 C.F.R. § 500.122.

<sup>154</sup> *Cornejo-Ramirez v. James G. Garcia, Jr. Inc.*, No. 99-cv-201, 2000 WL 33350974, at \*10 (D. Ariz. Nov. 21, 2000) (noting that "the [Act] places an additional burden on farm labor contractors to insure transportation not otherwise covered by the state's workers' compensation laws").

trips are an integral part of a farm labor contractor's job as a middleman between the grower and the harvest workers:

[the farm labor contractor] on numerous occasions provided transportation to the workers to nearby towns where they could purchase groceries and personal needs and do their laundry. These latter trips into town were conducted on Friday evenings and Saturdays after the work day had been completed ... part of [the farm labor contractor's] business as a middleman includes seeing to it that the workers are provided with a means of getting into town to secure the necessities of life which are not provided for at the camp....<sup>155</sup>

However, workers' compensation coverage does not extend to this transportation. Similarly, workers' compensation coverage does not usually extend to transporting H-2A workers from one grower's jobsite to another grower's farm. Because of these and similar gaps, the Department opposed creation of the workers' compensation alternative to vehicle liability insurance when it was first proposed in 1978 as an amendment to the Farm Labor Contractor Registration Act. In a November 10, 1977 letter to California Congressman Bernie Sisk, Assistant Secretary of Labor Donald Elisburg wrote:

There are many reasons why States' workers compensation coverage is not acceptable in lieu of the required Farm Labor Contractor Automobile Liability Certificate of Insurance. Workers compensation policies vary with each State in accordance with the mandate of the particular State legislation. Liability under such policies is limited to work related activities or the work related area and is effective only where the passengers are clearly 'employees' of the insured employer.... In addition, liability under State workers compensation plans would not extend to the times migrant workers are being transported from one employer to a prospective employer. Also, such State workers compensation plans do not extend to protect members of migrant workers being transported.<sup>156</sup>

At the same time Assistant Secretary Elisburg warned of these gaps, agribusiness representatives acknowledged the problem of gaps that would be created if only workers' compensation insurance was in place:

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<sup>155</sup> *Donovan v. Buntings' Nursery of Selbyville, Inc.*, 459 F. Supp. 92, 96-97 (D. Md. 1978).

<sup>156</sup> Farm Labor Contractor Registration Act, Hearings on H.R. 8232, H.R. 8233, H.R. 8234, H.R. 8249, H.R. 10053, H.R. 10631, H.R. 10810, H.R. 10922 Before the Subcomm. on Econ. Opportunity of the Comm. on Educ. & Labor, 95th Cong. at 8 (Feb. 22, 1978).

Conversely, if the worker is recruited at a great distance and he comes from, say, Texas to Illinois, perhaps he is not technically an employee until he gets to Illinois, then in that circumstance it may well be that the recruiter down in Texas, even though an employee of the Illinois farmer or processor, should have to register, if for no other reason than to make sure the insurance provisions (sic) requirements of the act would apply to the long haul, which may not be covered by workmen's compensation from Texas to Illinois....<sup>157</sup>

Despite the warnings by the Department, Congress included the workers' compensation waiver when it enacted the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) in 1982.

In administering 20 C.F.R. § 655.122(h)(4), the Office of Foreign Labor Certification (OFLC) normally reviews only the petitioning employer's certificate of workers' compensation insurance. The OFLC lacks the staff and time to evaluate whether this policy will cover all transportation provided to H-2A workers. Not surprisingly, numerous H-2A applications are approved each year in which there are gaps in insurance coverage—the employer relies exclusively on worker's compensation insurance, which provides at best partial coverage.

It has been increasingly difficult to identify the insurance gaps because an increasing number of farm labor contractors and agricultural employers are obtaining workers' compensation insurance through professional employer organizations (PEOs) or other employee-leasing companies. Typically in these arrangements, the PEO is the insured entity for workers' compensation purposes, rather than the farm labor contractor or agricultural employer. The insurance provided through the PEOs often strictly limits workers' compensation coverage to the period the H-2A worker appears on the PEO's payroll. Therefore, no workers' compensation coverage is in force when a crew of H-2A workers is traveling to a new job in a new state after completing a previous assignment, because the worker is not "employed" by the PEO during that period. When the worker completes the job assignment, the workers' compensation coverage ceases, including during any return transportation provided by the employer at the end of the contract.

A tragic example of such gaps occurred on November 6, 2015, when six H-2A workers were killed while being transported back to Mexico in their H-2A employer's bus after completing employment contracts in Florida and Michigan. The H-2ALC had procured workers' compensation insurance through a PEO. Because the employment ended prior to the

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<sup>157</sup> *Id.* at 105 (testimony of Roderick K. Shaw, Jr., General Counsel, Citrus Industry Council).

workers embarking on the trip back to Mexico, the insurance was not in force because the H-2A workers were no longer “employed” by the PEO. The Wage and Hour Division’s investigative narrative detailed the insurance gap:

Unfortunately, the insurance coverage held by the employer was not in compliance. The workers’ compensation insurance did not cover the workers and all claims were denied. because there was no employer/employee relationship between employee and employer at the time of accident and the employee was not engaged in work performed for the employer. The worker’s compensation was purchased through the leasing company, Impact Staff Leasing of Jupiter, Florida....<sup>158</sup>

In a sworn deposition in a civil case filed on behalf of the estates of several of the workers, the PEO (Impact Staff Leasing) detailed the gaps in the workers’ compensation insurance provided to the H-2A workers in the farm labor contractor’s crew. The PEO’s corporate representative stated that “we do provide workers’ compensation coverage in certain circumstances limited by the contract [with the client H-2A employer].”<sup>159</sup> The PEO’s representative explained the “limited circumstances” as follows:

- **No coverage provided until the hiring paperwork is received and processed by the PEO.** “The staffing agreements we have with our client companies do require that their hire documents are turned in prior to the workers’ compensation being provided.”<sup>160</sup> Because the H-2A employer was slow in submitting the “hiring paperwork”(employment application, I-9 form, W-4 form) for various crewmembers, they worked for nearly two weeks without workers’ compensation coverage.<sup>161</sup>
- **No coverage provided during periods when the H-2A worker is not performing work compensated through a paycheck issued by the PEO.** The PEO’s corporate representative explained that “if they’re not working and earning wages that are going to be paid via a payroll check issued by Impact Staff Leasing, they are no longer covered under our worker’s compensation coverage for that time.”<sup>162</sup> Quite simply, “if there is no check written in a week to a worker, there is no workers’ compensation coverage.”<sup>163</sup> This applied when the crew was traveling from a job in one state (Florida)

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<sup>158</sup> Exhibit B, DOL Wage and Hour Division H-2A Addendum Narrative Report, pages 94-120, Vasquez Citrus & Hauling, FLC Case ID 1776085.

<sup>159</sup> Exhibit B, Deposition of Stephanie M. Rosen, at 6, April 12, 2018; *Lopez v. Vasquez Citrus & Hauling, Inc.*, No. 2:17-cv-14383, (S.D. Fla.).

<sup>160</sup> *Id.* at 11-12.

<sup>161</sup> *Id.* at 12.

<sup>162</sup> *Id.* at 14.

<sup>163</sup> *Id.*



to one in another (Michigan).<sup>164</sup> Coverage is also not provided during periods when the crew is not working because of bad weather or lack of assignments from the grower.<sup>165</sup>

Likewise, the coverage was not in effect when the contractor paid the workers directly, rather than through a PEO check. “So if they’re not working, then they are not covered. And if they are not being paid by Impact Staff Leasing, if they are being paid by [the farm labor contractor] themselves, or they are being paid through another means, they would not be covered by our workers’ compensation coverage via our contractual agreement.”<sup>166</sup>

- **Non-work hours.** Even during weeks when the H-2A worker was paid wages through the PEO, trips on the workers’ personal time, such as trips to stores and laundromats, are not covered.

**Q.** They worked Monday through Friday and earned wages in my example. But it’s now Saturday and we’re going to go to the laundromat

**A.** I would have to say that if it is personal time and they’re not working, then they would not be covered.<sup>167</sup>

- **No coverage when the H-2A employer fails to submit the payroll on a timely basis to the PEO.**

**Q.** So we have identified a fourth area where the workers’ compensation insurance might not be in force, is if the employer submits either inaccurate or untimely records, the workers’ compensation is voided according to paragraph 5(a) of the leasing agreement?

**A.** Based on the contract, that is correct.<sup>168</sup>

- **No coverage for inbound and outbound transportation between the H-2A workers’ home country and the U.S. jobsite.** “We are not responsible period for anything to do with the inbound or outbound transportation.”<sup>169</sup>

We believe that the workers’ compensation coverage limits described by Impact Staff Leasing are fairly typical of PEOs providing payroll and related services to agricultural employers. The current regimen for review of H-2A applications under 20

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<sup>164</sup> *Id.* at 17.

<sup>165</sup> *Id.* at 30-31.

<sup>166</sup> *Id.* at 20.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 52.

C.F.R. § 655.122(h)(4) fails to sufficiently identify gaps that may exist in workers' compensation policies relied on as alternatives to liability insurance. At a minimum, the employer needs to identify the types of transportation that will be provided to the H-2A workers (inbound transportation from abroad to the U.S. jobsite, daily transportation between lodging and worksite, transportation to allow the workers to perform personal errands, transportation between different job sites in different states, outbound transportation at the conclusion of the contract period). If the H-2A employer proposes to satisfy 20 C.F.R. § 655.122(h)(4) through a workers' compensation policy, it must provide evidence that the policy covers all of the kinds of transportation identified. If not, the employer must purchase liability insurance or provide a liability bond in the amount specified by the AWP regulations.

### **I. The Department's Proposal to Add Standard Language to Job Orders Affirming A Worker's Right to Communicate with the Department Safeguards Workers Against the Chilling Effects of Unlawful Side Agreements**

In the NPRM, the Department acknowledges the alarming increase in the trend of "side agreements" seeking to alter the terms and conditions of an H-2A worker's employment, including the right to communicate with the Department. As noted in the NPRM, H-2A regulations have always included robust disclosure requirements, requiring employers to disclose all material terms and conditions of employment in the job order. However, some employers require workers to sign arbitration agreements after their arrival at their place of employment. Such arbitration agreements, while not unlawful in and of themselves, are unlawful side agreements if not disclosed in the job order.

In addition to violating the regulation's disclosure requirements, side agreements may also force workers to waive specific rights afforded to them under the H-2A program. For example, H-2A workers are asked to sign agreements stating they have resigned. These agreements are often presented in writing, even though a worker may not be able to read. Even if a worker can read, these side agreements are often presented in English, rather than the worker's primary language. Workers are then denied the opportunity to have someone review the side agreements with them prior to signing them. Workers are sometimes forced to sign these agreements through intimidation, yelling, threats and other unlawful measures.

As a result of these unlawful side agreements, workers may be misled about their rights under the H-2A program, including their right to communicate with the Department. For example, a worker that signs an arbitration agreement may be misled to believe they cannot file a complaint with the Department before first submitting the issue to arbitration. We applaud the Department's proposal to include standard language in the job order affirmatively stating that a worker may not be prevented from communicating with the

Department or any other Federal, State, or local governmental agencies regarding the worker's rights.

#### **IV. Unfair Treatment, Retaliation, Progressive Discipline, and Just Cause**

Farmworkers under the H-2A program have historically been a vulnerable workforce exposed to numerous challenges. One of these challenges is the difficulty to speak out against unsafe workplace conditions and abuses without the fear and very real threat of retaliation. At best, this means that employers are able to keep H-2A workers in depressed and exploitative conditions, which in turn affect the conditions for all domestic workers. At worst, it can mean serious cases of labor trafficking and other crimes against workers – and in fact, it often does. For example, between the period of January 2018 and December 2020, the Polaris Project, operator of the National Human Trafficking Hotline, identified 15,886 cases of labor trafficking, with 72 percent of these victims holding a temporary visa status.<sup>170</sup>

Unjust and arbitrary terminations and retaliation are rampant and undermine the protections for domestic workers in the H-2A program. We have seen both domestic and H-2A workers terminated for reasons that either are spurious accusations or have nothing to do with the workplace, even for things as small as having a guest at employer-provided housing. This can create a situation where workers work “scared,” always worried about losing their jobs. This dynamic can disproportionately affect older, female, disabled, and domestic workers.

Employers often want to maintain a high level of control over their workforce as a means of extracting as much work as possible from their employees. They often use arbitrary terminations to help them achieve this level of control. We often see workers who are fired for alleged failures to work hard enough or fast enough or comply with vague productivity standards. These arbitrary terminations not only affect the worker who is fired but also cause the rest of the workforce to work harder and faster in order to keep their jobs.

We also regularly see H-2A employers retaliate against workers for speaking up about their rights under the H-2A program and other laws. Employers prefer not to have these workers, many of whom are domestic workers, causing “problems” in the workplace by attempting to enforce their rights.

Contrary to statutory obligations, we also see that many employers repeatedly discriminate against qualified domestic workers in favor of H-2A workers. Under the current system, employers are able to employ tactics to discourage domestic workers from continuing employment or unjustly fire domestic workers. These tactics include:

- Firing workers within a day or two and before the end of any training period;
- Firing workers for failing to meet an unknown or undisclosed productivity quota;

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<sup>170</sup> Polaris, *supra* note 99, at 4.

- Firing workers for missing one day of work;<sup>171</sup>
- Firing workers for minor infractions of work rules.<sup>172</sup>

These misuses of the H-2A program not only harm workers who should be entitled to work and to the three-fourths guarantee, but also worsen employment conditions and impede employers' and the Department's ability to properly assess the available U.S. workforce as they are required to do. Domestic workers often and understandably do not want to remain working for employers who arbitrarily fire employees.

We commend the Department for recognizing that, in order to safeguard the rights of these workers effectively, regulations informed by the lived experiences of the workers and those that advocate for them must exist. The proposed changes successfully acknowledge previously expressed concerns, and present a need for clearer definitions for others. However, there remains a need for strong whistleblower and immigration protections. Equal effort needs to be spent on preventing retaliation rather than only seeking to remediate it. We are well aware of the realities of labor recruitment in workers' home countries and blacklisting. The prevalence of labor trafficking in the H-2A program is discussed in the NPRM, but we believe it needs to be further centered in the proposed regulations. We support the addition of the prohibition on passport and document withholding as an important step in preventing labor trafficking in the H-2A program, but concerns remain about other abuses like social security number withholding, mail access, and surveillance that we discuss within this comment.

#### **A. Protections for Workers who Advocate for Better Working Conditions**

Throughout the H-2A program's existence, we have heard many workers describe employer intimidation, threats, restraint, coercion and blacklisting. There should be no circumstances under which "intimidation, threats, restraint, coercion and blacklisting" by employers against workers are permitted in the H-2A program. These are the key actions that cause workers not to speak up and not to exercise their rights. Rather than conditioning the prohibition on the "reason" for these particular actions, we ask that the Department prohibit employers from engaging in these activities at all and state "[t]he employer has not and will not intimidate, threaten, restrain, coerce, or blacklist, and has not and will not cause any person to intimidate, threaten, restrain, coerce, or blacklist against any person."

The Department must educate workers and employers about these new protections. In addition to the robust enforcement suggestions below, we ask the Department to focus resources on how to educate workers on their strengthened legal rights under the H-2A system. We want to ensure workers are able to assert their legal rights with confidence. The Department must ensure that written materials educating workers are not only provided in Spanish or other languages

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<sup>171</sup> *In re Tri-Turf Farms*, No. 2011-TLC-0017 (Dep't of Labor, ALJ Feb. 3, 2011).

<sup>172</sup> *Caugills v. Hepburn Orchards, Inc.*, No. 84-cv-989, 1987 WL 47376 at \*5 (D. Md. June 5, 1987).

spoken by the workers, but also in plain language. Where possible, the Department should provide information in an audio format. Equally important is thinking about how to educate employers on what is lawful under the system and what enforcement and subsequent consequences may look like. We believe the Department takes many steps toward this goal with the proposed regulations, and encourage it to publicize its enforcement efforts broadly in a way that causes employers to engage in self-enforcement.

## **1. Assurances and obligations of H-2A employers**

We support the Department's expansion of assurances and obligations of H-2A employers 20 CFR § 655.135 to include strengthened protections against unfair treatment. However, we suggest some additional measures to ensure that the regulations are effective in reducing workplace exploitation. We believe that expanding the required assurances in an H-2A worker's employment contract, as the Department proposes to do, will help empower workers to enforce their rights and maintain the integrity of the H-2A program. Additionally, we believe that extending the definition of discrimination to include similar provisions will provide workers an opportunity to assert these rights.

Unfortunately, we have seen too many workers fired or disciplined after asking their supervisor questions about their rights and protections or talking to a coworker about a potential violation of the law. In order for these regulations to protect workers' ability to access their rights and engage in self-advocacy, the regulation protections must encompass broader clarifying language or at the very least, a broad interpretation such that "[f]iled a complaint" includes actions like asking a supervisor about whether the worker was paid correctly or telling a coworker that they think the port-a-potties need to be cleaned more frequently. We ask the Department to include broader language to include protection for "any person who has: exercised on behalf of employee or others any right afforded by federal, state or local laws, opposed any practice forbidden by federal, state or local laws, made any complaint, instituted or caused to be instituted any proceeding, or testified or is about to testify in any proceeding under or related to any applicable federal, state, or local laws or regulations, including safety and health laws." This expanded language would make clear the workers' self-advocacy, questions about their workplace conditions and reporting of concerns are included in these much-needed protections. We ask that these comments also be applied to the regulations in Parts 501, 501.4.

Lastly, we know that assurances in a job order only mean so much to a worker who feels intimidated by their boss, works long hours far away from home, and speaks English as their second language. Ultimately, without stronger enforcement mechanisms, workers will not be able to make these positive changes. Without access to remedies for infringement of their rights, these newly expanded assurances will not make a difference to the workers we see each day.

## 2. Consultation with key service providers

The Department's proposed change in 20 CFR § 655.13(h)(1)(v) to include an assurance to workers that they are protected from discrimination for communications with key service providers is critical. Similarly, the Department's proposed change to explicitly forbid discrimination against workers who speak with key service providers will help workers assert these rights. As previously described, we often see workers retaliated against for speaking with healthcare providers, safety agencies, and community organizations. Providing protection for these workers is an important step in the right direction. However, workers should not bear the burden of proving that they were speaking with key service providers about matters related to 8 U.S.C. 1188 or its corresponding regulations. Workers who speak to key service providers should be protected from retaliation regardless of the subject matter of their conversations. At the very least, the Department can provide interpretation that protections that reference 8 U.S.C. 1188 should be read broadly to include all state and federal employment laws because H-2A employers are required to comply with all laws in their state.

In order to effectuate the statutory goals of the H-2A program, the protections against unfair treatment must be broadened. For example, a worker may consult with a legal services program employee or attorney at a labor camp about where to find a dentist. That worker might later be fired by a supervisor because who saw the worker consulting with the legal services program. It is not clear from the current proposed regulation language in this section that such a firing would be impermissible under the wording of this part of the protections (although most probably would not meet the "termination for cause" requirements). We encourage the Department to adjust the language of proposed regulations to simply read:

655.135(h)(1)(iv): "The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against .... Any person who has: Consulted with an employee of a legal assistance program or an attorney."

Thus, workers would clearly understand that they have the right to speak with any legal assistance program staff without limit to the content of their conversation.

For workers to feel comfortable speaking with service providers, this additional protection is needed in the next section. We encourage the Department to adjust the language of proposed regulations to simply read:

655.135(h)(1)(v): "The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against .... Any person who has: Consulted with a key service provider."

Thus, workers would clearly understand that they have the right to speak with any key service provider staff about any topic without limiting the protection to certain conversations.

### **3. Complaints**

Additionally, we support § 655.135(h)(1)(i) of the NPRM to include an assurance in the job order that workers who file complaints under any employment-related law are protected from discrimination. We encourage the Department to interpret “filing a complaint” broadly in the sense that speaking up to a boss, or otherwise preparing to file a complaint, should be considered filing a complaint. We simply cannot have regulations where workers are expected to immediately file a formal complaint in court as opposed to speaking up about issues directly to their employers.

While we applaud the addition of the language in 20 CFR § 655.135(h)(1)(vii) and § 655.135(h)(1)(vi), we similarly urge the Department to broaden protected activity in this section to include situations where the employer knows that a worker intends to take this action. Possible language could include “attempts in furtherance of a filing,” “when an Employer believes,” or other language to encompass acts beyond filing the action, instituting it, or providing testimony.

We understand that the Department would include a worker’s reporting of a concern about whether he or she is being paid correctly to be included as having “[e]xercised or asserted on behalf of themselves or others any right or protection.” We encourage the Department to make this explicit by including language such as “including but not limited to reporting concern that a right is being violated to a supervisor or office worker or other employee of the employer” or share such examples in further guidance as interpretation of the rules.

Finally, § 655.135(h)(1)(vii) proposes to clarify existing regulations by explicitly protecting any person who has “[f]iled a complaint, instituted or caused to be instituted any proceeding, or testified or is about to testify in any proceeding under or related to any applicable Federal, State or local laws or regulations, including safety and health laws.” We applaud the inclusion of a broader range of federal and state protections, including health and safety laws outside of H-2A regulations. This is necessary such that the protections include protections in many states against discrimination and retaliation against injured workers or workers who speak up against health and safety violations and other whistleblower protections.

### **4. Passport and document withholding**

The Department requested comments on its proposal to expressly prohibit the taking or withholding of a worker’s passport, visa, or other immigration or identification documents against the worker’s wishes in a new paragraph at § 655.135(o), and its proposal to include failure to comply with this assurance and obligation within the definition of violations subject to debarment under § 655.182(d)(1)(viii) and 29 CFR 501.20(d)(1)(viii). The Department requested comments particularly regarding whether the Department should include any other requirements for application of the proposed exception to this prohibition, and whether the Department should include any additional exceptions to this prohibition.

We support the Department’s proposals to prohibit the nonconsensual withholding of workers’ passport or other documents. As we have described throughout our comment, and as the Department itself recognizes, H-2A workers are extremely vulnerable to labor exploitation, and withholding a worker’s passport or other documents can be a powerful form of intimidation or retaliation. The prohibition against passport and document withholding is an important protection for workers, and it is not so complex or overbroad as to hamper any legitimate, consensual document handling or safekeeping for employers.

Under the Department’s proposal, the only exceptions to this prohibition would be where the worker has stated in writing: that the worker voluntarily requested that the employer keep these documents safe, that the employer did not direct the worker to submit such a request, and that the worker understands that the passport, visa, or other immigration or government identification document will be returned to the worker immediately upon the worker’s request. This exception will still allow workers to provide their passports or documents to their employers if they so wish, and will allow for employers to help facilitate any submission of these documents to the U.S. Government for the purposes of visa application, entry to the United States, or any other proper purpose. We believe that these proposals will better protect workers from potential labor trafficking and other labor abuses, and we do not believe they are burdensome or overbroad.

## **B. Progressive Discipline**

We would like to note the overlap between this section and the new proposed rule prohibiting side agreements. During the proposed progressive disciplinary process, employers may require employees to sign inculpatory statements that employees feel they have no choice but to sign to protect their jobs—often without even being able to read the papers, or when the papers are given in a different language. Included here should be that employers cannot require workers to sign such statements.

### **1. The NPRM should have additional procedures for employers to follow before terminating workers’ employment to better effectuate statutory goals**

We support the Department’s recognition that unjust terminations have significant negative impact on workers’ rights and that a clearer definition of what constitutes termination for cause is required. As noted by the Department, many H-2A and domestic workers have been fired from H-2A employment unfairly despite the existence of the termination for cause regulation. When this happens, they lose critical protections including right to the three-fourths guarantee, reimbursement for outbound travel costs and for domestic workers, the right to be contacted for future years’ employment. In contrast, when employers flaunt “termination for cause” regulations, they are rewarded by financial gain.

Many H-2A workers fired unfairly face additional negative consequences. Many H-2A workers invest substantial resources when they accept an H-2A job. They often travel thousands



of miles to arrive. They incur travel expenses, some of which are not reimbursed despite current regulations. Sometimes they pay illegal recruitment fees – which they feel pressured not to disclose even if being informed they are illegal because they do not know another way to obtain employment. They often leave behind families who need funds to meet their basic needs. They often travel with family members meaning a loss of employment for one member could cause risks to their family members' employment. Because migratory agricultural opportunities are generally offered year after year each season, an unfair loss of employment for one year can disrupt a families' income for many years.

There are additional consequences for domestic workers. An unjust firing may hurt the ability to obtain unemployment benefits or the ability to find a subsequent job. But another harm is the harm to the H-2A program itself. If an employer is able to terminate workers without cause, word gets around and domestic workers will choose not to work for that employer, defeating the system's ability to accurately determine whether there are sufficient domestic workers available for those positions.

a. Termination for cause or abandonment of employment (655.122 (n)(1))

Current regulations state that when an employer terminates an employee for cause or finds that an employee has abandoned their position AND, in the case of H-2A workers, the employer notifies NPC and DHS within two working days, then the employer is not responsible to pay for the employee's return transport, or the three-fourths guarantee. In the case of domestic workers, the employer will not need to contact them the following season for rehire. This can result in significant financial gain for the employer if they can avoid these obligations.

Further, current regulations require that H-2A employers report a worker to DHS if he or she "absconds from the worksite" or is terminated prior to the work contract. The notification requirement often functions as yet another avenue of exploitation for abusive employers, who can make sound ominous threats of reporting a worker as having absconded to retaliate against workers seeking to leave. The coercive effect of the threat is intensified by current policy that bars some absconded workers from the H-2A program for five years. USCIS does not have the resources to review these reports or to verify their accuracy - employers are not required to provide any information about what they allege occurred. Thus, we ask the Department to amend this notification system.

At the very least, if this system of required reporting is continued, the report process at a minimum should be revised to include opportunity for workers to respond. We ask the Department to make changes to ensure that employers cannot continue to abuse this system. Current or proposed regulations do not require employers to inform affected employees when such notice has been provided to NPC and/or DHS. Sometimes employees are not aware that the employer considers them to have been terminated for cause or having abandoned employment. For example, sometimes employers tell injured H-2A workers to return to their home country for

treatment before the end of the contract and then file a notice claiming abandonment. Other times, a worker may leave employment due to employer abuse, and while the worker considers the termination of employment to be a constructive discharge, the employer notifies NPC of an abandonment. For these reasons, we ask the Department to require employers to send a copy of any notice filed with NPC and/or DHS to the worker involved contemporaneously. We further suggest that the Department create a process by which workers could appeal the notice or at least indicate objection to the issuance of the notice in circumstances of disagreement. Including workers in the process will minimize the chances that H-2A employment-related reports will be used to retaliate against workers who have exercised their rights or to coerce them into remaining in an abusive or exploitative working environment.

b. Productivity standards (655.122(n)(2))

One concern is that the proposed regulations only govern “for cause” termination for productivity standards. They do not govern the call-back of H-2A workers, which is in reality what H-2A workers are afraid of. Particularly for short-contract workers, who come for 6-8 weeks per year, it is simple for an employer to hang on to a worker who meets the productivity standards in a clearance order—but does not meet a higher productivity standard on-the-ground—for the remainder of the contract and simply not call that worker back the following year. Productivity standards are predominantly used as an excuse *not to call workers back*, not as an excuse to terminate them in a given year. Without recall right protections—with the caveat, of course, that local recruitment of domestic workers be attempted first—this addition will be easy for employers to circumvent, particularly for short-contract workers.

Further, particularly in at-will employment states, workers will still be terminated and sent home. What these regulations do is define “for cause” for purposes of the three-fourths guarantee and transportation home. However, employers rarely miss the three-fourths guarantee since so many employers across the country falsely advertise the expected hours on their clearance orders, writing “40” for the week when the reality is more like 60, or higher. Reaching the three-fourths guarantee, when the clearance order reads 40 hours per week, is easy, even if workers are terminated early. We therefore applaud the inclusion of these limitations on the use of productivity standards to terminate workers, but suggest adding language about terminating workers for other reasons as a pretext.

*Termination for cause when the worker fails to meet productivity standards or comply with employer policies or rules (655.122 (n)(2))*

We support the Department’s clarification that there are only two circumstances in which a termination can be considered for “cause:” when a worker fails to meet productivity standards; or when a worker violates the employer’s policies or rules. This clarity is critical to inform employers and employees that arbitrary terminations are not for “cause,” and that terminations with no reasons given are not for “cause.” Terminations that result from a worker engaging in

self-advocacy or for engaging with other workers in collective advocacy are not for “cause.” This clarity will help to prevent unjust terminations. It will help support workplace environments where workers can self-advocate without fear. It will also help the Department monitor and ensure compliance as well as reduce unfair competition against employers who comply with the law.

*Conditions to satisfy termination for cause (655.122 (n)(2)(i))*

We support the Department’s language making it clear that employers must comply with all six of the following steps for a discharge to be considered a “termination for cause.” These steps emphasize the need for employers to not just have a justifiable reason for a discharge but to have a fair process to inform workers of the policy, rule or productivity standard, evaluate whether the worker has ability to comply, evaluate whether the rule or policy or standard is reasonable, have a fair investigation process, and implement a progressive discipline policy proportional to any alleged deficiencies. As the Department states, these are “common sense personnel practices” that many responsible employers already have implemented. Requiring satisfaction of all of these steps are the minimum required to provide workers with a minimum amount of due process before critical rights are denied.

- 1) The employee has been informed (in a language understood by the worker) of the policy, rule or productivity standard, or reasonably should have known of the policy, rule, or productivity standard. (655.122 (n)(2)(i)(A))*

This initial requirement of “informing the worker” within the termination for cause process is critical. For employers to have the expectation for workers to comply with a rule, policy, or productivity standard, workers must understand that rule, policy or standard. We appreciate the Department’s recognition that the information must be in a language understood by the worker. As previously mentioned, many farmworkers speak languages other than English, including many Mesoamerican languages such as Mixtec, Zapotec, and Mam.<sup>173</sup> We ask that the Department interpret “understood” to state that informing workers of policy, rules and standards must involve a variety of formats to ensure accessibility. For example, workers with low literacy skills may need written materials to be written and designed in a way using images to accommodate different reading levels. Workers with visual impairments may need communications in large font size and easy-to-read fonts. Workers may also need the opportunity to ask questions.

We understand that the Department contemplates that employers can comply with this notice requirement by providing handbooks, posters, training, verbal notice or meetings. We

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<sup>173</sup> Richard Mines, Sandra Nichols and David Runsten, *Final Report of the Indigenous Farmworker Study (IFS) To the California Endowment*, at 39, (Jan. 2010)  
<http://www.indigenousfarmworkers.org/IFS%20Full%20Report%20Jan2010.pdf>.

encourage the Department to consider strengthening this regulation to require that communication of these policies, rules and standards be in writing and provided individually to each worker in paper or electronic copies (as many workers have access to texts or emails). This would improve the Department's ability to monitor and enforce these regulations. Many workers tell us that sometimes policies are conveyed in large group meetings often when not all workers are present, when there is noise making it difficult to hear, and workers are too exhausted, distracted or intimidated to ask for clarification or understanding. In addition to concerns regarding verbal notice, posters or central postings can be challenging for workers to access if they fear retaliation for spending time in a public area reading about the policies or their rights. Written language access is needed throughout the process from the job offer/clearance order to all stages of any progressive discipline process. To ensure greater compliance, we ask the Department to amend the regulations to state that the employer has the burden to show that it had a policy and that the worker and any union received a copy of that policy.

We also ask the Department to interpret "reasonably should have known" narrowly. While it may be reasonable for workers to know that certain illegal activities (stealing, assaulting) would violate employers' policies and rules, other kinds of "misconduct" may not be so commonly known. For example, what constitutes "insubordination" and "harassment" may not be "reasonably" known by workers. We ask that the employer have the burden to show why a worker "reasonably should have known" a policy or rule such as to encourage employers to have clearly described policies and to put their policies and rules into writing.

*2) If the termination is for failure to meet a productivity standard, such standard disclosed in the job offer. 655.122 (n)(2)(i)(B)*

Both H-2A workers and domestic workers need to know any required productivity standard before accepting the job. They need to make an informed decision on whether they have the ability to perform the work satisfactorily before expending the time and costs to travel to the job and before giving up other work opportunities. Employers must write the disclosure such that the worker can understand what the productivity standard requires. In order to effectuate the goals of the statute and provide domestic workers with sufficient information to determine if they would want to apply for that job opportunity, we also ask the Department to require employers to disclose the kind and amount of training workers that will be given to help them reach the required productivity standards.

The Department has stated that an employer is not required to disclose all policies and rules in the job offer. While we understand the practical considerations that make this difficult, we encourage the Department to consider requiring employers to include any policy that could lead to termination in writing, in the job offer, and in the language which the worker uses to communicate with the employer.

3) *Compliance with the policy, rule, or productivity standard is within the worker's control. 655.122 (n)(2)(i)*

We support the Department's recognition that an important part of a discipline process is to evaluate whether the worker had the ability to prevent any alleged "misconduct" or "failure" or to effectuate what was required under the policy, rule or standard. We ask the Department to provide additional detail and/or examples regarding what should be evaluated to determine if compliance was within the worker's control. For example, workers may be prevented from complying with a productivity standard due to lack of training, faulty or unavailable equipment needed to perform the work, unripe fruit or bad crop in certain fields or rows, the need to wait for product to be weighed or measured, an excess of workers performing the work, unequal distribution of crops to pick across rows, and other mitigating factors. In addition, any productivity standard based on the productivity of a group of workers should be found to be invalid as the performance of the other workers in the group is outside the worker's control. Finally, any productivity standard language should include a notice to workers that workers with disabilities may request reasonable accommodation.

4) *The policy, rule, or productivity standard is reasonable and applied consistently. 655.122 (n)(2)(i)(D)*

This requirement that policies, rules and productivity standards be "reasonable" is a necessary due process protection. We have seen many workers fired for rules that are not reasonable. For example, we have seen workers fired for arriving at work a couple of minutes late, for missing one day of work because they are sick, for not working "hard enough," for violating vague housing policies, and for not complying with vague productivity standards.<sup>174</sup>

We encourage the Department to define how employers and employees can measure if a policy, rule, or standard is reasonable. This additional clarity would help the Department monitor and enforce this regulation and effectuate the underlying statutory goals.

For example, existing regulations state that the burden is on the employer to provide evidence and justification to demonstrate job qualifications that meet the required standards of H-2A employers.<sup>175</sup> Thus, the Department should amend the regulations to clarify that employers must provide evidence showing that any job policy or rule meets the required standard in the region and crop activity for both H-2A and non-H-2A employers. This evidentiary requirement

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<sup>174</sup> See, e.g. ETA-790A, H-2A Case Number H-300-23076-859150, Certification Determination April 18, 2023 (including requirement "[w]orkers must work at a sustained, vigorous pace and make bona fide efforts to work efficiently and consistently that are reasonable under the climatic and all other working conditions").

<sup>175</sup> While many SWAs interpret this standard to be "bona fide and consistent" with normal and accepted qualifications, we believe that the higher prevailing practice standard should be applied to all working conditions as set forth in the discussion about criteria vs. non-criteria clearance orders as discussed in section Vi.A.1.b of these comments.

could be determined if there is a valid prevailing practice survey that supports the inclusion of the policy or rule.

The Department should provide additional guidance regarding housing policies and when they can be a basis for discipline. Job orders often have included vague, overreaching requirements.<sup>176</sup> Workers are often disciplined and often fired unfairly for violations of unreasonable housing rules. For example, workers have been fired for having too many cars at the labor camp. When workers are in employer provided housing outside of work hours, they are off the clock. They are entitled to freedom and privacy in their off-work hours. While there may need to be rules to provide for the health and safety of labor camp residents, the Department should give clear guidance to providers of labor camp housing that copies of any housing rules must be provided to workers and are valid only if their purpose is to preserve safety and health of the workers.

We support the Department's guidance that productivity standards must be static, quantified and objective. We encourage the Department to codify such guidance in the regulations. Other provisions of the regulations describe what constitutes acceptable productivity standards. Unfortunately, due to lack of resources and perhaps lack of will, many SWAs and COs for decades failed to evaluate Clearance Order productivity standards sufficiently. In addition, many SWAs have failed to conduct adequate prevailing wage or practice surveys or have failed to develop other mechanisms to properly evaluate whether a Clearance Order's productivity standard is normal and accepted for other H-2A and non-H-2A employers with workers performing similar activities in the area of intended employment. These failures for the process to work have negatively affected productivity standards, which has hurt the ability of the system to ensure its statutory requirements that work conditions do not suffer and that the program sufficiently tests the market for availability of domestic workers.

The Department should amend the regulations to place the burden on employers to show that their productivity standards are normal and accepted and comply with regulatory requirements. This requirement could be waived upon showing supporting results of valid prevailing practice surveys.

Finally, employers must bear the burden of proving that the policies, rules and productivity standards are applied "consistently." Employers must preserve the information needed to show the consistent application and provide such information to workers upon discipline. For example, if a worker is fired for arriving late multiple times within a two-week period, then that worker should be given information showing that they were treated consistently

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<sup>176</sup> See, e.g. ETA-790A, H-2A Case Number: H-300-22031-866773, Certification Determination Date: March 1, 2022 (including requirements such as "Workers assigned to bunk beds in employer-provided housing may not separate bunk beds" and "Workers may not leave paper, cans, bottles and other trash in fields, work areas, or on housing premises.")

with other workers. Employers have access to this information and workers do not. Thus, to correct the imbalance of power, employers must share this information. In addition to showing consistent applicability across H-2A and domestic workers in the same job categories, H-2A employers should also bear the burden to show consistent application across its corporate structure.

*5) The employer undertakes a fair and objective investigation into the job performance or misconduct. 655.122 (n)(2)(i)(E)*

Before imposing the harsh consequences accompanying “termination for cause,” it is critical for employers to adequately investigate allegations made against employees. We have heard many workers state that employers fired them without providing any opportunity for them to hear the allegations made against them, and/or present evidence in their defense. While the Department recognizes the importance of ensuring employers do not make assumptions or rely on third parties' hearsay testimony, we ask for further clarification through language in the regulations or additional guidance on what is required to constitute a fair and objective investigation. We suggest that a fair and objective investigation require the following: 1) inform the worker on what the process will be; 2) give the worker written notice as to what allegations have been made and the evidence that has been presented to support those allegations including comparative data; and 3) allow the worker ample opportunity to provide information in response.

Such ample opportunity must include a worker interview that includes an objective and competent interpreter, if necessary. We often hear that workers have investigatory meetings with a supervisor serving as interpreter. This often leads to miscommunication, as the supervisor is rarely a neutral party. In addition to an interpreter, we suggest that the Department require that the worker be able to have a representative of their choice participate in any meeting regarding a disciplinary matter.

*6a) The employer engages in progressive discipline to correct the worker's performance or behavior. 655.122 (n)(2)(i)(E)*

We support the requirement for employers to engage in progressive discipline before terminating a worker for cause. Too many workers have been unjustly fired for missing one day of work or coming late to work. This guidance will help prevent unjust and pretext firings. This requirement will help the Department monitor and enforce the “termination for cause” rules.

However, we ask for further amendments to prevent worker exploitation. For this requirement to help, workers must know what their employer's progressive discipline system is. There should be a requirement that workers are provided with a copy of the progressive discipline policy upon their arrival to work in the language they understand. If the workers have a union, the union should also receive a copy of the policy.

To provide protection, the policies must have articulated steps with specific examples of proportionality regarding common rule violations, such as tardiness. We welcome the Department's example that coming to work 15 minutes late is a minor infraction and that the goal of this regulation is to clarify that employers should not punish workers for minor infractions.

The regulations should also require consideration of mitigating and extenuating factors. The policies should be required to list out the types of egregious behavior that could lead to immediate termination and the mitigating factors that must be considered.

*6b) Steps to be taken during the disciplinary process. 655.122 (n)(2)(ii)*

This guidance is helpful to clarify the steps the employer must take after a warning. We appreciate the requirement for the employer to document these steps. However, for workers to be protected, we ask that the Department further strengthen the regulations to require that the employer:

- Document each of these steps in writing;
- Prepare these documents contemporaneously;
- Provide copies of all of this documentation to the worker involved within a short period of time, such as within 3 business days;
- Provide copies of documentation to worker union, if applicable;
- Communicate to the worker of the consequences of any future rule or policy violation or failure to meet productivity standard; and
- Provide a contemporaneously created written notice to a worker who is terminated detailing the reason(s) the employer is alleging for the termination, and provide copies of this notice to the worker promptly (i.e., within three days) and to the union.

Many workers are fired without knowing the reason the employer alleges for the firing. For workers to effectively contest an unjust firing, prompt, clear, written notification of the employer's alleged reason(s) is necessary.

## **2. The NPRM does not go far enough to correct the structural barriers that prevent workers from accessing these protections and prevent the H-2A program from meeting statutory requirements**

One of the main reasons why the NPRM needs additional strengthening to meet statutory requirements and to protect workers is because H-2A and domestic workers do not have access to sufficient remedies if these regulations are violated. If a worker is fired in violation of these regulations and their employer is not willing to correct the mistake, generally workers have two options: 1) file a complaint with the Department (or possibly another agency if discrimination,



retaliation, or other violations exist); or 2) file a contract claim in court. The H-2A laws and regulations do not provide workers a private right of action for violations of H-2A regulations within the H-2A statutes or regulations.

The WHD is responsible for enforcement of the H-2A regulations. However, the Department generally does not have sufficient resources to ensure compliance on their own. There is a very low probability, just 1.1%, that any farm employer will be investigated by WHD in any given year. The number of agricultural investigations has decreased significantly over the last decade.<sup>177</sup> The system relies on workers speaking up about violations. But the Department also lacks sufficient resources to respond promptly to workers' complaints. Certainly, it is nearly impossible for WHD to respond before the time within which an H-2A worker has to make decisions about whether and when to return home to preserve potential ability to return to the U.S. for a future H-2A job.

While the remedy of Deferred Action is a critically helpful remedy to help support workers speaking up about workplace violations, it is difficult to obtain this relief in a timely manner for workers to see that possibility as a reasonable option. To fully protect workers against unjust terminations, workers need a system in which they can fully contest the violation, obtain full contract value relief and the right to return to work the following year if they choose to do so, and immigration status throughout the period needed to contest the unjust termination and to allow them to return for the following year's work.

It is not easy for workers to find legal resources to bring a private right of action. They may only be able to bring a contract claim for the three-quarter guarantee, which even after prevailing does not make them whole and which many private attorneys will not take due to such low potential recovery and nonexistent or low potential award of attorney fees. Even damages providing the full remainder of contract are not adequate, as they do not provide for injunctive relief, including return to work the following year. H-2A workers are further excluded from AWPAs protections.

Remedies available to domestic workers are also limited. They face the same limitations regarding contract claims. While they do receive potential protection through AWPAs, that statute does not allow attorney's fees, which makes it difficult to find legal representation. Further, the damages provided are actual damages or up to \$500 per violation which often means that the potential financial recovery is often quite low which means it often fails to serve as an adequate deterrent especially as legal action may take years.

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<sup>177</sup> Daniel Costa et al., *Federal Labor Standards enforcement in agriculture*, ECONOMIC POLICY INSTITUTE, (2020), <https://epi.org/publication/federal-labor-standards-enforcement-in-agriculture-date-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers>.

The proposed regulations fail to address one of the primary ways in which employers take adverse action against H-2A workers who speak up, who are injured, or who “can’t keep up:” refusing to bring those H-2A or domestic workers back the following year. We encourage the Department to include protections for workers who are unjustly not brought back to work the following year. If this protection is not there, employers will be able to continue to exploit workers, worsening employment conditions and making impossible the determination of whether there are sufficient domestic workers for those jobs. While workers may have the right to file a private lawsuit for some kind of discrimination for not being brought back to work, the barriers for workers to take these actions are high. Setting aside the inherent difficulty of transnational litigation, they may not be able to find counsel, evidence is difficult to obtain, and legal procedures can often take years. To fully protect against retaliation, the Department must amend the regulations to place the burden on employers to show non-discriminatory, legitimate, job-related “for cause” reasons for not bringing H-2A and domestic workers back the following year and other protective procedures similar to those newly proposed procedures for termination for cause.

### **C. Clarification of Termination for Cause**

We support and applaud the Department’s provision defining termination for cause, and specifically, the clarification of when termination is NOT for “cause” found in proposed §655.122(n)(2)(iii). As the Department notes, the consequences to a worker terminated for cause are grave; that worker loses entitlement to outbound transportation costs, the three-fourths guarantee and, for domestic workers, the right to be contacted for work in the subsequent season. The Department also correctly notes that many employers abuse this provision in order to shift the burden of return costs to workers and evade their other obligations under the H-2A program.

The clear definitions of what is not termination for cause as proposed by the Department will benefit domestic workers, H-2A workers, and aid the Department in its enforcement activities. In addition, it will provide clarity to employers around the structure they must follow prior to terminating a worker for cause. The Department properly places the burden on the employer to show that any termination for cause meets the regulatory requirements. Our hope and expectation is that having clear, comprehensive instructions on what is NOT just cause will reduce the number of employers who abuse the H-2A program. To that end, we fully support the policy found in §655.122(n)(2)(iii), but offer several suggestions based on our experience that may strengthen its effectiveness.

#### **1. The Department should strengthen the proposed language outlining the specific reasons for termination for cause**

- a. “[C]ontrary to a Federal, State, or Local Law”

The regulatory language in 20 CFR 655.122(n)(2)(iii) stating that termination for cause does not apply where the termination is contrary to a Federal, State or local law is welcome but would be further strengthened by additional clarification and examples from the Department. We understand this language to cover a wide range of situations including things such as firing a worker who refuses to perform an illegal act on the job, termination after a worker files for workers' compensation, or firing a worker for taking leave to which they were entitled under state or local law.

For example, consider a worker who suffered from heat stress and almost died did not seek workers' compensation benefits because he feared that if he accessed the benefits, the employer would fire his uncle. We have also seen, among workers, a fear that if they file their taxes, their employer will retaliate against them, terminating them or not re-hiring them in subsequent years.<sup>178</sup>

It must be clear to employers that these situations cannot lead to termination for cause, and the Department should educate the employers by providing examples and guidance.

- b. "[E]mployee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk"

We support termination for cause *not* including an employee's refusal to work under conditions that pose an unreasonable health and safety risk. Refusal to work in unsafe conditions is too often a question of life or death. Take the workers at Saraband Farms in Sumas, WA in the 2017 growing season.<sup>179</sup> Forced to work in wildfire smoke by their employer's threats of blacklisting and termination, workers experienced headaches and dizziness. When workers refused to work without better safety and health conditions, the employer fired 60 workers for "insubordination." One of the blueberry workers then died, showing that the group was correct in its assessment that the respiratory conditions in their work environment were a serious health hazard.

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<sup>178</sup> First-time H-2A workers are entitled to obtain social security numbers. While many employers ensure workers reach a Social Security Office to obtain a social security card, many also do not. When workers do not have access to their own identifying information and cannot obtain a social security number, it contributes to trafficking risks and puts the worker in a delicate situation with state and federal tax authorities. Employers should be obligated to transport first-time workers to a Social Security Office within ten (10) days of arrival. In addition, many workers do not have access to mail, or cannot realistically receive mail because it is reviewed by employers prior to it being delivered to them. Not having access to mail makes it almost impossible for workers to, e.g., receive notices from the IRS or state tax authorities, or about workers' compensation, or from any other social service provider, including doctors' offices. Those that do have access to mail often fear that employers are reading and reviewing it prior to passing it on to workers, which, although a federal crime, is still common. Employers should be required to provide workers with a mailing address where they can receive mail, and although they are already prohibited by federal law from reviewing it, this should be stated upfront in the clearance order.

<sup>179</sup> Liz Jones, *They were ordered to work unless on their 'deathbed,' blueberry workers claim*, KUOW, (Jan. 25, 2018), <https://www.kuow.org/stories/they-were-ordered-to-work-unless-on-their-deathbed-blueberry-pickers-claim>.

Farmworkers face daily the devastating effects of climate change. Temperatures have already increased significantly – by about 3.19°F across the United States.<sup>180</sup> The resulting heat waves and severe weather conditions increase the number of days when working outside is not safe.<sup>181</sup> Harm to workers from wildfire smoke – increasing in prevalence due to climate change – and pesticide use is made worse by climbing temperatures.<sup>182</sup> Farmworkers are not disposable, and it is unacceptable for them to labor unprotected while they bear the worst consequences of climate change. When a worker identifies that it is unsafe to work, based on external standards or their own assessment of their respiratory or other health conditions, an employer cannot respond by retaliating against them. A worker should never be forced to choose between their life and their job.

The Department should also consider clarifying termination is not for cause when it is done in retaliation against workers seeking improvements for safer housing. One example we are aware of is a worker in Virginia who labored all day in 90-degree heat, only to return to a trailer that was 100-degrees Fahrenheit. When this worker asked his employer for air conditioning, he was put on a bus to Mexico.

We also ask the Department to provide examples either within the regulations or in accompanying guidance demonstrating that refusing to engage in lifting excessive weight cannot be the basis for termination for cause. Many clearance orders include lifting requirements of 75 pounds and up to 100 pounds. Some orders require continuous lifting of these heavy weights. These requirements are despite OSHA guidance that workers should not lift more than 50 pounds without some type of assistance. Back injuries are one of the most frequent types of injuries for farmworkers. Back injuries can substantially negatively affect workers' ability to live and work for the remainder of their lives. Workers may be physically capable of doing the work required but may not be able to lift 100 pounds nor is it healthy for them to do so. We ask the Department to clarify that workers may refuse to lift weights of over 50 pounds if they believe such lifting poses an “unreasonable health and safety risk.”

- c. “[B]ecause of discrimination on the basis of race, color, national origin, age, sex (including sexual orientation or gender identity), religion, disability or citizenship”

Discrimination is rampant within the H-2A program. Worker advocates most often see discrimination against domestic workers. See, for example, the settlement reached by the EEOC with Hamilton Growers after the Georgia company fired African American workers and assigned domestic workers to fields already picked by foreign workers, resulting in less pay for the

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<sup>180</sup> Dr. Kaitlyn Henderson & James Morrissey, *Exposed and Unprotected: The Threat Posed by Climate Change to U.S. Agricultural Workers*, at 3, OXFAM, (Oct. 2023), <https://www.oxfamamerica.org/explore/research-publications/exposed-and-unprotected-climate-and-labor/>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 18.

domestic workers.<sup>183</sup> There is also significant discrimination in other areas. In interviews by CDM, 86% of workers said that women were either not hired or received worse pay than men – worse, 67% said their employers had a total ban on female workers.<sup>184</sup> In addition, although underreported, many H-2A workers face sexual harassment and violence at their workplace.<sup>185</sup>

Given the severity of these issues, we request that the Department spend additional time considering whether there are areas where anti-discrimination protections can be strengthened, including in its definition regarding what is not termination for cause. Two concrete additions would be adding “family status” and replacing “citizenship” with “citizenship status” in the list of forms of discrimination that cannot be considered “termination for cause.”

Domestic workers that should be protected by the H-2A regulations include not only U.S. citizens, but lawful permanent residents, asylees and refugees, and others with work authorization. Although protections from discrimination are key pillars of employment protections for domestic workers, they are difficult protections to access for many workers who are not U.S. citizens. For example, a lawful permanent resident, who is originally from Mexico, with 30 years of agricultural employment experience denied a job by an employer intent on hiring a Mexican H-2A worker for the position has limited remedies available to him. Because he is not a citizen and did not apply to become a citizen within 6 months of attaining his residency, the lawful permanent resident is not eligible to claim discrimination on the basis of citizenship under the Immigration Reform and Control Act (IRCA). It is difficult for him to assert a claim under Title VII or comparable state law because his race and national origin are the same as the H-2A workers. In order to effectuate the Department’s statutory mandate to protect domestic workers, it should include protection from discrimination for lawful permanent residents and others who live in the United States and have permission to work. We believe this would be best accomplished by a broad reading of citizenship status.

As discussed below, the Department should also clarify and provide examples of what constitutes disability discrimination. In a program where productivity rules all, many employers do not comply with – and may not even know about – the protections of the ADA.

Finally, we urge the Department to strengthen protections against age discrimination by providing information about what would constitute termination not for cause when an individual is covered by the ADEA. In a system where job postings might include language like “We will be looking for 18 to 39-year-old men with experience in the harvesting of oranges for temporary work with an H-2A visa in the U.S.,” it is critical that the Department make clear to employers

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<sup>183</sup> U.S. Equal Emp. Opportunity Comm’n, *Hamilton Growers to Pay \$500,000 to Settle EEOC Race / National Origin Discrimination Lawsuit*, (Dec. 13, 2023), <https://www.eeoc.gov/newsroom/hamilton-growers-pay-500000-settle-eeoc-race-national-origin-discrimination-lawsuit>.

<sup>184</sup> See Centro de los Derechos del Migrante, *Ripe for Reform*, at 5, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>.

<sup>185</sup> Human Rights Watch, *Cultivating Fear The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, (May 15, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and>.

that pushing older workers out – often domestic workers – does not comport with the requirements for participation in the H-2A program nor the laws of the United States.

d. Employer's failure to comply in collective bargaining

We support this addition to the list of situations when a worker is not terminated for cause.

**2. The Department should clarify additional situations where termination is not for cause**

a. Failure to comply with progressive discipline process

The Department should explicitly state that termination following an employer's failure to comply with the progressive discipline process in accordance with 20 CFR § 655.122(n)(2)(ii) and (iii) is *not* for cause and therefore the employee continues to be entitled to protections.

b. When the employer has failed to provide reasonable accommodations required by the ADA and other state and federal laws

We are observing a disturbing trend that indicates H-2A employers believe workers have no legal protections against termination once a worker's injury is considered non-occupational and this worker cannot return to full duty or to their previous tasks immediately. We have also seen some language in job orders that tends to reflect this belief. For example:

“Three unexcused absences by the worker will be considered a job-related reason for worker termination. Workers who become ill or injured for **non-work-related reasons and are unable to perform essential functions of the job will be released for cause.**” (emphasis added).

When employers take these actions, their employees, regardless of whether the injury is occupational, are protected by the American with Disability Act (ADA) and, in California, the Fair Employment and Housing Act (FEHA). These workers are often not provided any reasonable accommodation, are evicted from housing, and sent back to their home nation without medical treatment. We would like to see something in the regulations that at least references an employer's duty to provide reasonable accommodation under the ADA.

We propose the Department include the following language:

Under Federal Law, an employee has a disability when they have a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or they are being regarded as having a disability. An employer must provide a reasonable accommodation (any change or adjustment to a job or work environment) that permits an employee with a disability to perform the essential functions of a job; unless the accommodation would be an undue hardship, (it requires

significant difficulty or expense). Taking sick leave or unpaid leave to obtain medical treatment or to recuperate can be a reasonable accommodation. Other types of reasonable accommodations include but are not limited to part-time or modified work schedules, job restructuring or reassignment to a vacant position.

c. When the termination is due to a workplace injury or health and safety violation

Missing from the NPRM is language that makes it clear when termination is not for cause to ensure sufficient protections for injured workers. We hear repeatedly that a workplace injury, frequently caused by unsafe working conditions, can be devastating to an H-2A worker and their families. Not only are many workers illegally barred from access to workers' compensation and adequate medical attention, but many are also terminated and sent home at their own cost, in debt and without the income they were promised when entering into an H-2A contract. When employers classify these terminations as "for cause," even more difficulties pile up. In the Washington blueberry case mentioned above, the employer fired workers who became sick or suffered injuries and refused to pay for their transportation home.<sup>186</sup> Injured workers had to rely on the generosity of other workers to pay their way home.

The Department should think critically and creatively about how to better protect injured H-2A workers. One possible proposal is to require more process before a worker can be deemed unable to work and sent home. For example, workers who have documentation from their doctor that shows they are likely to be able to return to work before the end of their contract should be able to remain. Other protections could include requiring the employer to offer a job to any injured worker in the next season.

d. Workers with school age children and workers who are school age

Many migrant workers may need to leave employment earlier than the end of the contract to bring themselves or their children back to school. This is especially true when employers have unjustly expanded the dates during which they say workers are needed in order to discourage domestic workers. A U.S. worker who leaves an H-2A job one or two weeks early, especially for a 4-month job, because they need to go back to school or need to bring their children back to school in a home state, should not be denied a job the following year for this reason. The Department must protect U.S. migrant workers and their families by providing some protections from negative consequences of leaving a minimal period of time before the end of the contract.

## **D. Protect Workers from False Reports of Abandonment or of Having Voluntary Quit**

Given the robust protections around termination for cause, the Department should take affirmative steps to ensure employers do not circumvent these protections by falsely claiming

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<sup>186</sup> Liz Jones, *They were ordered to work unless on their 'deathbed,' blueberry workers claim*, (Jan. 25, 2018), <https://www.kuow.org/stories/they-were-ordered-to-work-unless-on-their-deathbed-blueberry-pickers-claim>.

that workers abandoned their employment. We suggest an addition to 20 CFR §655.122(n)(3) that requires a demonstration that the employer attempted to contact a worker using their most recent contact information on file in its report to NPC and DHS of worker abandonment.

Similarly, in our experience, employers frequently coerce workers into signing voluntary quit paperwork as a way to evade responsibilities for return costs under the H-2A regulations. The Department should also require employers to keep simultaneous records indicating the reason(s) proffered by the worker when voluntary quitting.

Finally, if this abusive abandonment reporting system is maintained, workers must be given copies of such reports within five days and given the opportunity to appeal or contest such reports. This is especially needed for workers who may leave work due to abusive workplace conditions. Without such protections, these workers will be unjustly labeled as “absconders.”

#### **E. Extend the Required Time Period That Employers Must Maintain Records**

Proposed § 655.122 (n)(4) reads “[t]he employer is required to maintain records described in this section for not less than 3 years from the date of the certification.” The imbalance of power between worker and employer especially lies in access to information, evidence and witnesses. Reducing worker exploitation requires that employers keep contemporaneous records and provide copies to workers within specific, short timeframes. In addition, employers need to be required to keep these records for longer periods of time. Many workers may not receive documents from employers but may later choose to enforce their rights. Many worker protection statutes, such as anti-trafficking protections, have long statutes of limitations due to recognition that workers may need time, among other reasons, to recover from trauma to allow them to pursue their legal rights and to find legal resources. Federal anti-trafficking claims may be filed within ten years. Many states allow workers to pursue contract claims within six years. Thus, we encourage you to require employers to keep records required by this section for ten years. Due to the fact that most records are maintained electronically, this will not cause an undue burden on employers but is necessary to allow workers to exercise their rights and reduce worker exploitation.

Further, we ask that this section clarify that, not only is the employer required to keep such records listed in this section, but also that they provide and maintain proof of having provided such records to each affected worker and, if applicable, the workers’ union.

Again, we also recommend in 20 CFR § 655.122 (n)(4)(ii) that the Department require employers to contemporaneously create and provide to workers any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded to the worker.

Finally, we ask that the regulations clarify that the employer must not only maintain [r]ecords indicating the reason(s) for termination of any worker but also must



contemporaneously create a document that clearly and specifically describes in detail the reason(s) for the termination, and provide a copy of that document with the alleged reason(s) for termination to the impacted worker within 5 days of the termination, and provide a copy to the union, if applicable.

## **V. Debarment and Discontinuation**

We endorse the Department's proposed changes to strengthen the use of discontinuation of services by the SWAs in appropriate cases, as well as to clarify the definition of a successor-in-interest for the purposes of discontinuation and debarment. Both changes will protect vulnerable workers as well as provide clear notice to employers about their obligations under the law. To that end, we suggest some additional steps and clarifications. First, it is imperative for the Department to have an effective procedure in notifying the appropriate SWA of violations that would trigger a discontinuation of services. Without such a procedure, any efforts to reform the regulations that apply to discontinuation of services are meaningless, since it will remain a logistical impossibility. Second, the Department should encourage workers to come forward as whistleblowers by clarifying, and amplifying, what constitutes restitution and corrective action sufficient to restore services after an employer has had them discontinued under 20 C.F.R. § 658.503. Finally, we support the Department's efforts to increase scrutiny on successors-in-interest, but implore the Department to provide adequate training and support to those responsible for applying the successorship analysis.

In many instances, discontinuation of employment services is a more effective and efficient enforcement mechanism than debarment. By requiring restitution for workers and a corrective action plan for employers, discontinuation provides an incentive for workers to come forward without fear that their employers will be debarred—and they will therefore lose their employment. However, the discontinuation procedure requires that the Department notify the SWAs of triggering violations. No such communication currently exists, and this NPRM does not create such an avenue for information sharing. Imposing a requirement on the Department to put the SWAs on notice would require only minor revisions to the current regulations, yet is needed for discontinuation of services to be an effectively utilized protection.

### **A. Recent Violations are Evidence of the Need for an Intermediate Penalty that Incentivizes Employers to Correct Course Without Costing Workers Their Jobs**

Discontinuation provides vital protections for workers who want to receive what they are owed and work under improved conditions without losing their jobs altogether. Unlike debarment, which is a discretionary sanction, discontinuation of services is mandatory whenever an H-2A employer is determined to have violated an employment-related law. And through detailed provisions for reinstatement of services, the discontinuation remedy can ensure that farmworkers impacted by the employer's violations receive restitution, which does not routinely occur in debarment cases. Finally, the wayward employer in discontinuation proceedings is

required to adopt a corrective action plan to eliminate future violations, which is also not required in debarment actions.

Though the Wagner-Peyser Act regulations impose a mandatory obligation on the SWAs to discontinue the provision of services to employers found to have violated employment-related laws, this is rarely done. The almost complete failure by the SWAs to discontinue employment services to employers who were determined to have violated the law has undoubtedly contributed to the widespread abuse of H-2A workers nationwide. Properly applied, discontinuation of services would be a major deterrent to employers who might otherwise violate the law.

## **B. The NPRM Provides Needed Clarification and Strengthening of Provisions Related to Debarment and Discontinuation**

The current lack of enforcement is not due to a lack of serious legal violations by H-2A employers. A third of the 1000 farms investigated by WHD in Fiscal Year 2021 were found to have violations of H-2A regulations that resulted in orders to pay almost \$6 million in back wages, as well as civil money penalties of \$5.6 million.<sup>187</sup> Yet, as acknowledged by the Department,<sup>188</sup> despite these widespread violations, often announced publicly through WHD press releases, fewer than two dozen employers nationally had employment services discontinued by SWAs as required by 20 C.F.R. Part 658.<sup>189</sup>

### **1. Meaningful implementation of discontinuation requires a simple, procedural revision to 20 C.F.R. § 658.501**

While the paucity of instances in which delinquent H-2A employers have had employment services discontinued undoubtedly results to at least some degree from lack of “clarity among the SWAs about the circumstances under which they must discontinue services to employers,” it is also a direct result of the Department’s own policies and procedures, and especially those of WHD.<sup>190</sup> While SWAs occasionally uncover violations of law on their own during outreach efforts or in responding to worker complaints, a much larger number of violations are found through investigations by WHD or OSHA.<sup>191</sup> In the numerous instances in which WHD or OSHA determines that H-2A employers have violated the law, the procedures for discontinuing services at 20 C.F.R. § 658.502 should routinely be initiated. However, in

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<sup>187</sup> Univ. of California, Davis, *The H-2A Program in 2022*, RURAL MIGRATION NEWS, (May 16, 2022), <https://migration.ucdavis.edu/rmn/blog/post/?id=2720>.

<sup>188</sup> Improving Protections, 88 Fed. Reg. at 63755 (remarking that “SWAs have underutilized in recent years” the discontinuation of services regulations).

<sup>189</sup> Improving Protections, 88 Fed. Reg. at 63761; *see also* Teresa Cotsirilos, *The dark side of America’s sheep industry*, at 34 (even though the Wage and Hour Division has found at least 80 sheep industry employers have violated H-2A regulations in the past decade, virtually none have had employment services discontinued)..

<sup>190</sup> Improving Protections, 88 Fed. Reg. at 63761.

<sup>191</sup> *Id.*

order to commence discontinuation proceedings based on determinations by WHD or OSHA, the SWA must receive notification of the violation from the enforcement agency itself.<sup>192</sup> Mandatory discontinuation is *not* triggered when a SWA learns of a final determination through other sources, as it is when the SWA learns of non-compliance with a job order under 20 C.F.R. § 658.501(1)(3).<sup>193</sup> Unfortunately, the proposed regulations leave untouched the current language of 20 C.F.R. § 658.501(a)(4) vis-a-vis notification procedure.

SWA officials in a number of states have informed us that their respective agencies are unable to discontinue services to errant employers because WHD refuses to share its final investigative determinations. One such complaint from a SWA director came during an October 20, 2022, ETA roundtable in Indianola, Mississippi which was attended by both Acting Assistant Secretary Parton and OFLC Director Pasternak. When the ETA-funded SWAs complain regarding this non-cooperation, some local WHD officials respond that the SWAs can obtain the investigation results only by filing Freedom of Information Act (“FOIA”) requests. In addition to the time delay, this is an impractical suggestion because in order to file a FOIA request, the SWA must first know which employers have been the subjects of investigation, information WHD will not share. The end result is that employers which should have had SWA services discontinued are permitted to file job orders and H-2A applications year after year.

The Department can easily correct this glaring deficiency in the enforcement of farmworkers’ rights with only minor edits to the regulations. The Department should adjust 20 C.F.R. § 658.501(a)(4) to pull more expansive language from subsection (a)(3) to trigger mandatory discontinuation of services whenever the SWA learns of a final determination by the enforcement agency *or otherwise*. The Department should also, by regulation, require its various agencies, including WHD and OSHA, to formally notify the SWAs in those jurisdictions in which the employer operates of final determinations that an employer has violated employment-related laws or regulations. This requirement could mirror the proposal to require SWAs to notify the Workforce Investment Office of reinstatement determinations.<sup>194</sup> These simple changes would ensure that the SWAs will be able to effectuate the provisions of 20 C.F.R. § 658.501(a)(4) and initiate the discontinuation of services to offending employers.

## **2. Concrete examples of restitution and corrective action will help abate retaliation fears**

We applaud the Department’s commitment to ensuring that employers who have had services discontinued make their workers safe and whole before restoring the employer’s access to the H-2A program. By providing a clear explanation of what conditions shall be improved

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<sup>192</sup> See 20 C.F.R. § 658.501(a)(4) (requiring an enforcement agency provide notification of final determination that an employer has violated employment-related laws to trigger mandatory discontinuation of services).

<sup>193</sup> 20 C.F.R. § 658.501(1)(3) (triggering mandatory discontinuation of services when employers “[a]re found through field checks or otherwise to have misrepresented the terms or conditions of employment specified on jobs orders”).

<sup>194</sup> Improving Protections, 88 Fed. Reg. at 63767.

after discontinuation, the Department can help to lessen the fear of retaliation for workers who make the difficult decision to come forward. To assist in that process, we have compiled suggestions for what could constitute “adequate evidence” of corrective action and restitution under the terms of the proposed edits to 20 C.F.R. § 658.504(a)(2) (to be moved to subpart (b)(2)).

- a. Corrective action requires meaningful reporting and enforcement mechanisms to keep workers safe

As it stands now, 20 C.F.R. § 658.504(a)(2)(i) requires employers to submit a plan for future compliance with the law to the SWA in order to be reinstated. The Department’s current proposals for clarifying the procedure and effects of appeal, as well as removal of the word “any”, are a helpful start for putting employers on notice of their obligations.

However, clarification is needed to put *employees* on notice of their rights under the law, and it can be provided without over-punishing or overburdening employers. Examples of “adequate evidence that any policies, procedures, or conditions responsible for the previous discontinuation of services have been corrected and that the same or similar circumstances are not likely to occur in the future” under the proposed 20 C.F.R. § 658.504(b)(2) include the following:

- SWAs should require corrective action plans be disclosed in future job orders. The existence of a corrective action plan, or contents therein, can help interested applicants make informed decisions about accepting future employment. Transparency regarding past violations also empowers employees to enforce components of the corrective action plan that are not being achieved.
- To make sure workers see the corrective action plan as well as other critical parts of the job order, employers should submit a short summary in the job order. This will help workers understand what their employer is required to do and identify a situation where their employer is not meeting their obligations. Because a short version of the job order is already required under the Wagner-Peyser regulations, this does not put an additional burden on employers. 20 C.F.R. § 653.501(d)(10). Rather, it simply makes the summary accessible to H-2A workers in addition to domestic workers in corresponding employment.
- The SWA should require employers subject to a corrective plan to post the terms of the corrective plan, in both English and, if applicable, the native languages of every worker, at a work or housing site accessible to workers.
- The SWA and/or Department should create an anonymous tip line for employees at workplaces that are subject to a corrective plan to be used for reporting the employer’s failure to adhere to their corrective plan that is posted with the terms as described above. While this could later be expanded to be a resource for more workers, starting as a monitoring system for recently reinstated employers could help ensure that increased

implementation of discontinuation does not result in an unreasonable increase in workload for the SWAs or the Department. It would also help balance the power dynamic for workers who are in the precarious position of returning to work for an employer who has a history of violating the law. We suggest that this tip line be created with an option to submit both text messages and voice messages and allow for communication using the application WhatsApp, which is currently the primary method H-2A workers use to communicate with family and friends in their home countries. Allowing workers to submit voice messages would ensure that literacy is not an obstacle.

- b. Identifying restitution damages for difficult-to-quantify violations encourages workers to speak up and puts employers on notice

We appreciate the Department's commitment to making workers whole after their employers violate the regulations designed to protect them. We also recognize the importance of proportionality. To that end, we suggest adding clarification in the final rule about what types of restitution would be appropriate in some of the most common violations we see where damages may not be easy to calculate. While such a list need not be exhaustive, workers often hesitate to come forward because they do not believe they have much to gain by doing so. By clarifying the type of restitution that may be available, the Department would make additional strides toward its goals of fostering worker safety. In our experience, examples of "adequate evidence . . . including restitution to the complainant" under the proposed 20 C.F.R. § 658.504(b)(2) should include the following:

- *Liquidated damages paid to the workers for housing violations set on a scale based on the severity of the violation.* In determining the appropriate amount of liquidated damages, the Department should be mindful of the enormous impact that substandard housing conditions have on farmworkers and their families. Where appropriate, these damages should include non-working family members subjected to substandard housing conditions, as is provided for by AWPAs.<sup>195</sup> As a federal judge admonished when adjudicating a case of farmworkers whose electrical service was discontinued by their employer, "[t]he plight of migrant laborers in this country is a tragedy which should weigh upon the conscience of all and which outweighs any monetary burden amelioration thereof may impose."<sup>196</sup> Under a sliding scale based on the severity of the harm inflicted on the occupants, for example, a broken stove burner might not carry the same penalty as a broken window. Setting transparent and quantifiable damages for violations graded for severity gives employers clear notice of the consequences for failure to comply with their obligations, and at the same time, gives workers an incentive to come forward.

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<sup>195</sup> *Hernandez v. Ruiz*, 812 F. Supp. 734, 737 (S.D. Tex. 1993).

<sup>196</sup> *Flores v. Fulwood Farms of Florida, Inc.*, 450 F. Supp. 1046, 1048 (M.D. Fla. 1978).

- *Damages paid to domestic workers who were offered fewer hours than their H-2A counterparts.* In most instances, damages for the domestic workers being denied these job opportunities will be the difference between the hours offered to H-2A workers during the workweek and those offered to the domestic workers in corresponding employment multiplied by the applicable wage rate (in most instances the AEW).<sup>197</sup>
- *Damages to workers assigned non-agricultural duties.* In these instances, the workers should be paid the difference between the hourly wage that the workers were paid and the prevailing wage for the job they actually performed, as well as any overtime they are owed, if applicable. The prevailing wage should be that specified for non-agricultural occupations at 20 C.F.R. §655.10, utilizing the mean wage derived from the Bureau of Labor Statistics' OEWS survey. Employers who lie in their H-2A applications by misrepresenting the nature of their employees' duties should not be unjustly enriched by paying restitution at the lower agricultural wage. Instead, they should pay restitution based on the value of the labor received, which can be calculated using the SOC codes.<sup>197</sup> Critically, this should include all SOC codes, not just the six most common agricultural SOC codes envisioned in the current regulations. Such an approach is consistent with that set out with respect to H-2B workers employed in non-certified activities as discussed in Wage and Hour Division Field Assistance Bulletin No. 2022-3 (April 14, 2022).<sup>198</sup>

### **C. Stronger Enforcement of Debarment Against Successors-in-Interest Will Protect Workers from Repeat Offenders.**

The Department's efforts to clarify liability of successors-in-interest for debarment purposes and to streamline procedures to deny labor certifications filed by successors-in-interest attempting to evade sanction by rebranding as new, separate entities are generally well-conceived.

The Department correctly recognizes that there are situations in which bad apple employers, in an attempt to evade sanction from the Department and SWAs, have reconstituted as different entities. In some cases, the transition to a successor, which is intended to unlawfully evade the law and regulatory requirements, is complicated and requires a deep investigation into facilities and machinery used, management structures, workforce continuity, and conditions of employment. In other cases that are noted in this comment, employers have engaged in a far

<sup>197</sup> See, e.g., *Saenz Mencia v. Allred*, 808 F.3d 463, 473 (10th Cir. 2015) (calculating damages based on the rate for duties employee actually performed rather than the rate on employer's clearance order).

<sup>198</sup> U.S. Dep't of Lab., FIELD ASSISTANCE BULLETIN NO. 2022-3, (Apr. 13, 2022), <https://www.dol.gov/sites/dolgov/files/WHD/fab/2022-3.pdf>, <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2022-3>.

more rudimentary rebranding, yet have successfully flown under the Department’s enforcement radar. The Department should be concerned that its strongest enforcement mechanisms in regulating compliance with the H-2A rules, which it admits are already underutilized, have been rendered powerless by a simple name change in a labor certification.<sup>199</sup> The revisions proposed by the Department in this rulemaking are welcome and long overdue.

The Department correctly notes that its 2008 attempt to clarify successor liability was insufficient and that there have been employers who have taken advantage of the Department’s lax nature regarding scrutiny applied to putative successors. The revisions proposed by the Department should give Certifying Officers (“COs”) the tools that they need to make informed (and better) decisions regarding successorship status. They also simplify the regulatory requirements for denying certifications to successor firms, which should only create for more efficiency. Along with these proposed regulatory changes, COs should be given adequate training on how to recognize the non-exhaustive factors highlighted in this rulemaking. Only with proper training and support will COs be able to implement the successorship analysis that is intended with this rulemaking—without such measures, we are confident that bad apple employers will continue to find ways to successfully petition for workers during periods of debarment.

## **1. Definition of successor in interest**

a. The NPRM’s changes to the definition of “Successor in Interest” in § 655.104 are necessary clarifications.

The Department proposes to move the current definition of “successor in interest,” which is now located at § 655.103 to § 655.104. In doing so, the Department makes some key, and necessary, changes to the definition. In addition to the revisions, the act of setting the definition apart in a separate section of the regulations signals the unique importance of this definition within the regulations.

b. The Department’s attempts to broaden the application of the successorship analysis beyond situations when the predecessor firm has “ceased doing business or cannot be located” is in line with successorship doctrine

The Department proposes removing language in the current regulations that unnecessarily restricted successorship analysis to situations when the predecessor firm had ceased business or could not be located. In attempt to broaden application of a successorship analysis, the Department proposes to add new language in paragraph § 655.104(b), stating:

[a] successor in interest includes an entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor, regardless of whether such

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<sup>199</sup> Improving Protections, 88 Fed. Reg. at 63771.

successor in interest has succeeded to all the rights and liabilities of the predecessor entity.

As noted by the Department, such revision is in accordance with successorship doctrine and does not limit liability in such a manner.<sup>200</sup> Corporate succession, even when it is not based in fraud and deceit, is often far more complicated than, for example, Corporation A becomes Corporation B.<sup>201</sup> Firms often continue in existence while transferring some operations to a successor—liability attaches to that successor despite the original firm’s continued existence.<sup>202</sup> It is also possible for firms to transfer operations to multiple successor firms, which the rule should state explicitly.

The NPRM rightly recognizes that the current regulations are far too narrow to account for any level of complexity in a corporate succession. As an example, within the H-2A context, the current regulatory framework would allow for a debarred employer to pass H-2A workers on to a successor employer to carry on the same operations, while the debarred employer continues operation with a non-H-2A workforce. In more complex operations that might involve both the cultivation/picking of fruit and the processing, a successor firm could arise to conduct the cultivation and harvest of the fruit, while the original firm handles the processing using a non-H-2A workforce. It simply is not acceptable to allow debarred employers to ignore or circumvent Department sanction. We therefore fully support the Department’s proposed edits to the regulations to broaden the definition of “successor in interest” and close this loophole.

- c. The Department’s non-exhaustive factors are helpful in detecting successors-in-interest, but Certifying Officers must be given training in how to apply a successorship analysis and must receive consistent support from the Department

The Department’s comments regarding how the non-exhaustive factors have been applied in the past (treatment of overlapping supervisors and management as the “primary factor”) are noteworthy. In true cases of corporate succession, where, for example, Corporation A passes part or all of its operations to Corporation B, overlap of supervisors and management may be indicia of a successor-in-interest. The Department is dealing with something wholly different here—and a proper successorship analysis must be able to detect employer fraud and efforts to deceive the Department.

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<sup>200</sup> Improving Protections, 88 Fed. Reg. at 63772.

<sup>201</sup> See *Chicago Truck Drivers, Helpers & Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995) quoting *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256 (1974) (“Successor liability is an equitable doctrine, not an inflexible command, and ‘in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate’”).

<sup>202</sup> Improving Protections, 88 Fed. Reg. at 63772.



In the most rudimentary attempt to evade debarment by rebranding, an employer will first attempt to obfuscate management structure. Overlapping management with the debarred employer is a giveaway. So, when debarred employers want to sidestep the Department's enforcement mechanisms, they may change or alter corporate names and include different owner names on petitions. The new shell corporation continues the same or substantially similar operations of the debarred employer with nominally different management. We agree with the Department that reliance on any of the factors as dispositive or even primary could result in errors, but we stress that a majority of the factors considered overlap in the work that is actually done and how that work is performed, and not in who is nominally directing the work.

As further illustration of this point, consider the case of Big River Honey, in Wewahitchka, FL. Joseph Cantu, owner of Big River Honey, was debarred from the program in 2022 following WHD investigations that resulted in the payment of significant civil penalties and back wages. Shortly following his debarment, Mr. Cantu's mother, Leslie Cantu, successfully petitioned for H-2A workers using the same address, but under a different corporate name, Cantu Apiaries.<sup>203</sup>

Consider also the debarment of Steve Boyum of Wanamingo, MN, who was debarred for three years beginning on March 2, 2021. Shortly before Mr. Boyum's debarment, his daughter, Kari Boyum, created Kat Farming, LLC to run a farm on the same property. Kari Boyum successfully petitioned to bring H-2A workers to continue the operation in 2021 and 2022.<sup>204</sup>

In another similar rebranding effort by a family member, Lawrence Secor, who owned and operated Secor Nursery, was debarred in 2022 for significant threats to workers and violations of wage and hour law. He had long been on the Department's radar and was the subject of several investigations. Despite his debarment, his nephew, Aaron Secor d/b/a A.F. Secor, was first approved for H-2A workers in 2022. Secor Nursery and A.F. Secor both share the same administrative address.<sup>205</sup> If the Department's successorship analysis cannot even detect foul play in these relatively obvious and rudimentary schemes to evade enforcement, we can be assured that the more complicated efforts have gone undetected as well.

In a successorship analysis, we urge the Department to focus on overlap of the work actually being done, the workforce, and the product that comes from the work. In cases where new entities are petitioning for labor certification, the Department must scrutinize whether the principals or managers of those entities are family members of recently debarred entities. The Department must also scrutinize addresses contained in applications for labor certification—if administrative addresses are the same as those of a debarred employer, the presumption must be

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<sup>203</sup> Ryan Murphy, *Employers Banned from Hiring H-2A Workers can "Reinvent" Themselves to Hire Again*, INVESTIGATE MIDWEST, (Sep. 14, 2023), <https://investigatemidwest.org/2023/09/14/employers-banned-from-hiring-h-2a-workers-can-reinvent-themselves-to-hire-again/>.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

that the new firm is a successor in interest to a debarred firm and thus, debarred itself. All of this nuance must be communicated to COs in a comprehensive training, and they must be provided ongoing support to ensure that they are effectively navigating these analyses.

- d. The Department's effort to remove unnecessary regulatory barriers that impede its ability to treat successors as debarred when their predecessors have already been debarred is a necessary reform

We share the Department's dissatisfaction with some of the regulatory barriers that have prevented debarment of successor firms, specifically those that require successors-in-interest to be debarred again under the full set of regulatory procedures required for debarment of the original entity. This repetition is nonsensical and unnecessary—in a true successorship circumstance, the firm has already received the sanction—successorship doctrine is principled on the point that liabilities of the predecessor firm attach to the successor firm.<sup>206</sup>

The Department's proposed 20 C.F.R. § 655.104(c) and corresponding revisions to 20 C.F.R. § 655.182, which detail that successors to debarred predecessor firms will also be treated as debarred themselves, are both logically sound and in line with successorship doctrine.<sup>207</sup> Should successor firms apply for workers after the original firm has been debarred, those applications should be denied. It follows that any appeal of such denial should be limited to a consideration of the petitioning entity's status as a successor.

We further agree with the Department's clarification in 20 C.F.R. § 655.104(c) that emphasizes that the OFLC Administrator possesses the power to revoke certifications that were issued to debarred employers in error. Situations where successors to debarred predecessor employers attempt to apply for workers during a debarment should be treated as cases of fraud and/or misrepresentation and warrant revocation under 20 C.F.R. § 655.181(a).

- e. The Department's inclusion of a definition for "Successor in Interest" in 20 C.F.R. § 651.10 is a helpful addition

The Department proposes to add a definition for "successor in interest" to the Employment Service portion of the regulations. Those regulations previously did not define "successor in interest" and the factors used for determining whether an entity is a successor in interest have been carried over from 20 C.F.R. § 655.103, now proposed to be set aside in 20 C.F.R. § 655.104.

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<sup>206</sup> Improving Protections, 88 Fed. Reg. at 63771; see *Criswell v. Delta Air Lines*, 868 F.2d 1093, 1095 (9th Cir. 1989).

<sup>207</sup> Improving Protections, 88 Fed. Reg. at 63771; see *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 180 (1973).

We agree with the Department’s inclusion of this definition in the ES regulations, which will allow SWAs to extend discontinuation to successors-in-interest, but we emphasize the same points that were made in regard to debarment herein. Inclusion of a definition (which includes many factors) is only effective if those responsible for using the factors understand how the analysis works. Department resources must be devoted to training the SWAs on how to apply a successorship analysis to ensure that employers who have had services discontinued are not evading that sanction with a simple rebrand.

## **2. The corresponding revisions to 29 CFR § 501.20, which apply to WHD debarments, are well-conceived and do not impose due process concerns**

The Department proposes corresponding revisions to the procedures governing WHD debarments under 29 CFR 501.20. We agree with those revisions. As previously noted, we find it unnecessarily redundant to issue notices of debarment to successors-in-interest, since doing so would be against the very principles of successorship doctrine—if the entity is truly a successor firm, it has already received notice of debarment that was issued to the predecessor firm. A successor firm cannot cite due process concerns since that firm can request a hearing under § 655.171 on the limited issue of successorship status.

## **VI. Employment Services**

The NPRM proposes revisions to the Wagner-Peyser Act implementing regulations to clarify an employer’s obligations in the event of a delayed start date and to make conforming revisions to the H-2A regulations to clarify pre-certification H-2A Application amendments and employer obligations in the event of post-certification changes to the start date. We believe NPRM adds some needed clarity to employment service regulations and strengthens protections for workers. The proposed language will help ensure that costs stemming from a delay in available work will not be placed on workers. We provide clarifications to definitions and proposed language to help ensure the success of these revisions to the employment services portion of the H-2A program.

### **A. Revisions and Additions to the Definitions Provided at 20 C.F.R. § 651.10 are Necessary to Clarify Protections and to Bring Definitions in Alignment with Terms as Defined Elsewhere in the Regulations**

#### **1. Definition of agent**

We support the Department’s proposed addition of a definition of “agent” to 20 C.F.R. §651.10. We agree that, to the greatest extent feasible, the §651.10 definition should be consistent with that used in the H-2A regulations, 20 C.F.R. §655.103(b). The Department should use this opportunity to make clear that, to the extent that agents assist in the preparation and submission of H-2A clearance orders on behalf of their principals, said agents must obtain certificates of registration as farm labor contractors under the AWP. H-2A clearance orders,

currently submitted on ETA Form 790, are used to recruit domestic workers for the positions for which H-2A workers are requested.<sup>208</sup> In such situations, the agent is being paid by the employer for recruiting migrant or seasonal agricultural workers, thereby falling squarely within the definition of farm labor contractor set out in Section 3(7) of the AWP, 29 U.S.C. § 1802(7).

## 2. Definition of criteria and non-criteria clearance order

We support the Department's proposal to revise 20 C.F.R. §651.10 to include definitions of criteria and non-criteria clearance orders. We agree that clarification is needed as to which provisions of part 653, subpart F and part 655, subpart B apply to the various agricultural clearance orders filed with the Department and with a SWA. The Department should use this rulemaking to further clarify these issues, which have resulted in considerable confusion among the SWAs and inconsistent decisions regarding proposed terms in clearance orders.

Often, when evaluating agricultural clearance orders, SWAs have evaluated *all* of an employer's job terms applying the standards of 20 C.F.R. §655.122(b). That regulation, which addresses only job *qualifications*, requires that they be "consistent with the normal and accepted qualifications" required by non-H-2A employers. The Department has interpreted this standard as merely requiring that the qualification not be unusual or rare.<sup>209</sup>

The Department should take this opportunity, with the new separate definitions, to emphasize that the "normal and accepted" standard of 20 C.F.R. § 655.122(b) applies only to *criteria* clearance orders, and, within such orders, only to job *qualifications*. Job qualifications include those requirements that must be met for a prospective worker to be *hired* for the advertised position.<sup>210</sup> These may include matters such as prior experience, lifting requirements or possession of a designated type of driver's license.

However, the category of job qualifications does not encompass the wide range of "working conditions" imposed once the worker is hired for the position. As the Department knows, and as we discuss in the present comment, many prospective H-2A employers weigh down their clearance orders with a myriad of "working conditions" such as extensive work rules and rules governing the conduct of workers residing in employer-provided housing. Employers have then used trivial violations of these marginally relevant work rules as a pretext for terminating workers who stand up for themselves for "cause." Before being approved as part of H-2A clearance orders, these "working conditions" must not merely be normal and accepted;

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<sup>208</sup> 20 C.F.R. § 655.121(c); *Bernett v. Hepburn Orchards, Inc.*, No. JH-84-991, 1987 WL 16939, at \*7 (D. Md. Apr. 14, 1987) (recognizing that a grower's clearance orders are used to recruit U.S., as well as H-2A, workers).

<sup>209</sup> See *Snake River Farmers' Ass'n, Inc. v. U.S. Dep't of Labor*, No. 91-0075-S-HLR, 1991 WL 539566, at \*9 (D. Idaho, Oct. 1, 1991); *In re Westward Orchards*, No. 2011-TLC-00411, at 21 and 15-16 (Office of Adm. Law Judges, July 8, 2011). This is a lower standard than that used to determine whether a practice is prevailing.

<sup>210</sup> See ETA H-2A Handbook, 53 Fed. Reg. 22076, 22097 (June 13, 1988) (stating that job qualifications are those "necessary to perform the job duties specified in the job order for which H-2A certification is being sought.").

they must satisfy the considerably more stringent “prevailing” standard. In this regard, we strongly disagree with the Department’s incorrect assertion in the preamble to the NPRM that productivity standards, which are self-evidently “working conditions” rather than job qualifications (because they deal with post-hiring conduct), are subject only to the “normal and accepted” standard of 20 C.F.R. § 655.122(b).<sup>211</sup> A production standard that may serve as a basis for termination of a worker only matters if the worker has already been hired after satisfying the employer’s “job qualifications.”

The provisions of part 653, subpart F, and notably 20 C.F.R. § 653.501(c)(2)(i), apply to all agricultural intrastate and interstate clearance orders, be they criteria or non-criteria in nature. These regulations predate the creation of the current H-2A program through the Immigration Reform and Control Act of 1986 and implement longstanding Department policy to prevent the interstate clearance system created by the Wagner-Peyser Act from being used by employers to recruit individuals from outside the immediate area to work at wages and under working conditions less than those routinely extended to local workers.<sup>212</sup>

The current iteration of these longstanding policies was promulgated in 1977 as part of the Department’s response to the federal district court’s order in *NAACP v. Brennan*, 360 F. Supp. 1006 (D.D.C. 1973).<sup>213</sup> These regulations were a response to the federal court’s determination that the Department and the SWAs had almost totally failed to follow “regulations and directives that have been enacted to protect job opportunities, wages and working conditions of domestic workers.”<sup>214</sup> A rule substantively identical to the current 20 C.F.R. § 653.501(c)(2)(i) was included in the set of regulations promulgated to settle the case, then captioned *NAACP, Western Region v. Marshall*.<sup>215</sup> As before, the purpose of the regulatory provision now codified at 20 C.F.R. § 653.501(c)(2)(i) was to ensure that the employment of out-of-state workers would not depress local wages and working conditions.<sup>216</sup> Rigorous enforcement of these provisions is essential within the context of the H-2A program because, as

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<sup>211</sup> Improving Protections, 88 Fed. Reg. at 63754.

<sup>212</sup> See *Comité de Apoyo para los Trabajadores Agrícolas (CATA) v. Dole*, 731 F. Supp. 541, 544–45 (D.D.C. 1990) (explaining that since at least 1946, the Department has sought to prevent the interstate clearance system being used to undercut the wages and working conditions of local farmworkers); 11 Fed. Reg. 11278 (Oct. 3, 1946) (“It is the policy of the United States Employment Service . . . [t]o recruit no workers for employment if wages, hours, or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality”); 16 Fed. Reg. 9142 (Sep. 8, 1951) (permitting state agencies to place into interstate clearance orders seeking agricultural workers only if “[c]onditions of employment are not less favorable than those offered by employers who have been successful in recruiting and retaining domestic workers for similar work in the area”).

<sup>213</sup> See 42 Fed. Reg. 4722 (Jan. 25, 1977) (“The proposed regulations paralleled the court order in the case of *NAACP, Western Region, et al.* . . . The proposed 20 CFR Part 653, subpart B, Services for Migrant and Seasonal Farmworkers, (MSFWs) related to Sec. I of the court order.”).

<sup>214</sup> 360 F. Supp. at 1014.

<sup>215</sup> 45 Fed. Reg. 2498 (Jan. 11, 1980).

<sup>216</sup> *Snake River*, 1991 WL 539566, at \*1.

the Department has acknowledged, “domestic workers cannot be expected to accept employment under conditions below the established minimum levels.”<sup>217</sup>

Domestic workers have seen their working conditions consistently eroded in recent years because the SWAs have evaluated the working conditions set out in criteria clearance orders under the “normal and accepted” standard of 20 C.F.R. § 655.122(b), rather than the more rigorous prevailing practice standard required under 20 C.F.R. § 653.501(c)(2)(i). Indeed, as the Department knows from multiple job service complaints filed over the past several years regarding SWA misconduct, all too many SWAs not only fail to scrutinize clearance orders for legality but instead believe, wrongly, that they lack the authority to do so. This problem has been further exacerbated in Florida and many other states by the paucity, if not total nonexistence, of prevailing practice surveys being conducted by the SWAs, despite the commitment of the state agencies in their annual to conduct such surveys in the annual foreign labor certification grant applications.

For example, in many rural areas, local workers rely on farm labor contractors to provide them with daily transportation to remote job sites. The farm labor contractors’ compensation from the growers includes payment for providing these services. The Department’s own H-2A Handbook recognizes the importance of these transportation services:

Another factor which has to be considered in determining positive recruitments is the extent to which non-H-2A employers utilize farm labor contractors (crew leaders) to secure domestic workers. If a majority of non-H-2A employers in an area (who employ a majority of the domestic workers in the area) use crew leaders, and provide an override (payment usually based on a per worker or per unit of production basis) for the crew leader's services, H-2A employers must be willing to do the same and must provide an override which is no less than provided by other employers. . . .<sup>218</sup>

Although use of farm labor contractors to provide these transportation services has long been the predominant practice in Florida’s fruit and vegetable industries (and currently, over 80% of the H-2A employers in Florida are themselves farm labor contractors who provide daily transportation to the jobsite for their H-2A workers), as well as in other sending states such as Texas, the Florida SWA has consistently refused to require H-2A employers to hire farm labor contractors or to otherwise require provision of daily transportation to domestic workers. This has resulted in the displacement of literally thousands of U.S. farmworkers from jobs in the Florida citrus and sweet corn harvests.

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<sup>217</sup> 20 C.F.R. § 655.0(a)(2).

<sup>218</sup> Handbook No. 398, 53 Fed. Reg. at 22097.

In sum, in addition to defining criteria and non-criteria clearance orders, the Department needs to unequivocally state that the “normal and accepted” standard of 20 C.F.R. § 655.122(b) is to be applied exclusively in evaluating “job qualifications,” as defined by the ETA Handbook, in criteria job orders. All other working conditions are to be assessed under the Department’s venerable prevailing practices presently codified at 20 C.F.R. § 653.501(c)(2)(i).

### **3. Definition of discontinuation of services**

Instrumental to ensuring effective enforcement against bad-actor employers is preventing such employers from continuing to use the JS system. The previously undefined term “discontinuation of services” is defined in the NPRM at § 651.10 as follows: “an employer, agent, farm labor contractor, joint employer, or successor in interest, as defined in this part, cannot participate in or receive any Wagner-Peyser Act employment service provided by the ES to employers pursuant to parts 652 and 653 of this chapter.”

The NPRM here provides clarity to both SWAs and employers as to which services are discontinued and who may be subject to the discontinuation of services described in 658, subpart F. The scope of discontinuation is broadly defined to include agents, successors-in-interest, farm labor contractors, and joint employers. This broad scope is crucial in that it requires SWAs to include, for meaningful enforcement, action against entities that act or had acted on behalf of the problem employers, or who are simply a reincarnation of the prior bad actor under a new name. The NPRM further provides the needed clarification that all job services in parts 652 and 653 are impacted by discontinuation, including job services located in another state, thereby preventing bad actors from continuing to receive services, absent reinstatement, elsewhere or for non-criteria orders. The Department should consider adding to the definition of discontinuation of employment services clarity that the SWA cannot process the employer’s H-2A application.<sup>219</sup>

### **4. Definition of employment-related laws**

The NPRM clarifies the definition of “employment-related laws” by noting that implementing regulations are also included in the law that relates to the employment relationship. The NPRM defines “employment-related laws” as “those laws and implementing regulations that relate to the employment relationship, such as those enforced by the Department’s WHD, OSHA, or by other Federal, State, or local agencies.”

JS staff will be assisted by the revised language, which should be seen as a mere common-sense clarification, not an actual change, to the scope of violations that require JS staff to proceed with discontinuation. The H-2A program provisions of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(15)(H)(ii)(a), have associated regulations promulgated by the

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<sup>219</sup> See *In re Wabash Valley Growers, LLC*, No. 2022-TLC-00122 (Board of Alien Labor Certification Appeals Aug. 22, 2022).

Department and other federal agencies, and these implementing regulations are needed to further clarify the rights of workers. Multiple examples of core worker protections, such as the Occupational Safety and Health Act (“OSHA”) standards governing field sanitation, 29 C.F.R. § 1928.110, and temporary labor camps, 29 C.F.R. § 1910.142, are set forth principally in regulations. Such an approach is consistent with the broad interpretation by a number of federal courts of the term “working arrangement,” an undefined term in AWP. <sup>220</sup> OSHA state plans provide further regulatory authority at the state level. For example, in North Carolina, the state Department of Labor enforces the OSHA through a state plan approved by the Department and also enforces state laws such as the North Carolina Migrant Housing Act. <sup>221</sup> Local county-level agencies are further required, for example, to determine if wastewater systems in the employer-provided housing meet sewage treatment and disposal standards.

For meaningful enforcement, a broad reading of both the laws covered and agencies involved is necessary, and the protections given farmworkers would be gutted if the associated implementing regulations were not also enforced.

## **5. Definition of farm labor contractor**

Farm labor contractor was not previously defined in this subchapter. The wording of the new definition is pulled from the AWP., and is meant to align with the definition of H-2A contractor at 20 C.F.R. § 655.103. <sup>222</sup> The NPRM defines “farm labor contractor” as “any person or entity, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal farmworker (MSFW).”

MSFWs are defined in the same subpart, 20 C.F.R. § 651.10 as migrant or seasonal farmworkers, and notably, that definition does not specifically exclude H-2A workers. This is consistent with longstanding Department interpretations that have included within the Wagner-Peyser Act definition of migrant farmworkers those aliens legally authorized to work in the United States. <sup>223</sup> However, as the NPRM states, it draws its definition of farm labor contractor from the AWP, 29 U.S.C. § 1802(7), 29 C.F.R. § 500.20(j), whose provisions specifically exclude H-2A workers from MSFW. Our concern is that JS staff may mistakenly assume that H-2A workers would be excluded from the NPRM’s definition of farm labor contractor due to the reference to “migrant and seasonal farmworkers (MSFW).” This is problematic in that farm labor

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<sup>220</sup> See *Elizondo v. Podgorniak*, 100 F. Supp. 2d 459, 463 (E.D. Mich. 2000) (holding that compliance with OSHA field sanitation is part of the working arrangement); *De La Cruz v. Gill Corn Farms, Inc.*, No. 03-CV-1133, 2005 WL 5419057, at \*7 (N.D.N.Y. Apr. 13, 2005).

<sup>221</sup> N.C. Gen. Stat. §95-19.

<sup>222</sup> 29 U.S.C. § 1802(7); 29 C.F.R. § 500.20(j); Improving Protections, 88 Fed. Reg. at 63757.

<sup>223</sup> See 45 Fed. Reg. 39454, 39457–58 (Jun. 10, 1980).



contractors who employ or furnish exclusively H-2A workers should also be subject to discontinuation sanctions under part 658 in appropriate circumstances.

We recommend a simple clarification that 20 C.F.R. § 651.10 is the applicable definition of MSFW corresponding to the NPRM's new definition of the term "farm labor contractor." It is important to be clear that farm labor contracting activities related to H-2A workers are covered and do not, as in the AWP definition of the term, exclude H-2A workers.

## **6. Definition of joint employer**

We welcome this change to the definition of joint employer,<sup>224</sup> which makes clear that, when a fixed-site employer or H-2ALC illegally loans an H-2A worker to another, non-petitioning employer not listed on the clearance order, or otherwise permits an H-2A worker to provide services to such a non-petitioning employer, both the petitioning employer and the non-petitioning employer jointly employ the worker. The Department may apply the single employer test or the joint employment test depending on the facts and circumstances of each case. The language in both the definitions for joint employer and single employer should explicitly state that the single employer definition does not replace or supersede the definition of "joint employment" for purposes of enforcement.

## **7. Definition of single employer**

The apparent purpose of the definition of single employer,<sup>225</sup> is to codify and clarify an approach to determining whether a single or joint employment relationship exists when multiple nominally separate employers are operating as one employer for the purposes of the H-2A program. This definition will also explicitly permit the use of the single employer test when reviewing applications for temporary labor certification and for purposes of enforcement.

Judicial and administrative precedent has established a four-factor test for single employment that includes the following: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) degree of common ownership/financial control. The Department has applied the single employer analysis from an NLRB single employer test to address more complex business structures filing H-2A applications through nominally different employers. This test has been unofficially used by the Department since 2015, yet it has been inconsistently applied. The proposed definition for single employer would incorporate the four factors and would consider the totality of the circumstances surrounding the relationship among the entities. No one factor would be determinative in the analysis, as is sustained by precedent.<sup>226</sup> The Department primarily focuses on the relationship

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<sup>224</sup> Improving Protections, 88 Fed. Reg. at 63820.

<sup>225</sup> Improving Protections, 88 Fed. Reg. at 63822.

<sup>226</sup> *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1134 (D.C. Cir. 2015).

between the entities themselves and each entity's use of the H-2A program when examining whether two or more entities are a single employer. The proposed single employer formulation is similar to the alter ego analysis used by some courts to examine employment relationships in the H-2A context.<sup>227</sup>

The single employer test focuses on the relationship between corporate entities to determine whether they are so involved or "intertwined" that they constitute a single employer. The proposed definition would explicitly provide that the single employment test would be used to enforce an H-2A employer's contractual obligations. The Department aims to provide clarity for internal and external stakeholders and could deter employers from intentionally seeking to circumvent the H-2A program's requirements by corporate-law and -entity gamesmanship. Depending upon the facts and circumstances of a given case, the Department may apply the single employer test, the joint employment test, or both to determine an H-2A employer's compliance with program requirements.

The Department's proposal indicates that the single employer test is not meant to eliminate or undermine appropriate use of the joint employment test. The Department should so explicitly state so in its definition of joint employment. Given that the Department may apply the single employer test or the joint employment test, depending on the facts and circumstances of each case, the language in the definition should reflect this intention. In addition, the definition for single employment should be construed broadly to address potential inconsistent application of the single employer test. Finally, the Department should explicitly state in the definition that the single employer test is applied between employers, not as between the employer and the employees, which is the case for the joint employer tests. Finally, the term "nominally distinct" employers should be stated in the definition. These recommendations will add clarity and avoid confusion for JS staff.

## **B. Proposed Revisions in the NPRM Are Needed to Promote Accuracy in the Job Orders and For Enabling the Department to Take Effective Enforcement Action**

### **1. Proposed changes help protect workers in the event of a change of the date of need**

Employers would prefer that workers arrive early so that they are ready and available when work begins, but this creates a burden to workers who rely on an accurate start date so that they do not end up waiting for days or weeks with no wages. H-2A workers incur significant incoming travel expenses and fees, sometimes while paying high interest rates, including transportation to the U.S. consulate, hotel costs while waiting for their consular appointment, transportation costs to the work site, visa fees, border crossing fees, and daily subsistence while en route with travel sometimes taking ten or more days. Domestic workers also incur significant

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<sup>227</sup> See *Ortiz Bazan v. Coleman Indus., Inc.*, No. 6:19-cv-1823, 2021 WL 4498645, at \*7 (D. Ore. Sept. 21, 2021).

inbound travel expenses when traveling from their homes to remote worksites, only to find that the start of work has been delayed.<sup>228</sup>

For domestic workers, positive recruitment efforts are impeded where local workers accustomed to certain work timelines may not yet be looking for a particular job at the time advertised in the H-2A system. All workers consider the dates of employment in choosing between job options and may further suffer an opportunity cost for having foregone alternative work at home in reliance on a particular start date for the new employment. Delayed wages at the outset cause financial harm to workers making interest payments and can be stressful for those unable to cover their family's basic needs. Workers leave their homes to travel and are, therefore, also dependent on the provision of housing upon arrival.

The harm to workers for needing to wait multiple weeks prior to the actual start date is illustrated by allegations in a pending civil case in North Carolina, where H-2A workers allege that they became heavily indebted due to the usual incoming travel expenses and fees plus unlawful recruitment fees amounting to thousands of dollars.<sup>229</sup> Incoming expenses included cost of travel from their hometown to Monterrey, Mexico, bus travel from Monterrey to Houston, Texas, a border-crossing fee, meals for subsistence during travel, and, for some, lodging while waiting for a Consular appointment.<sup>230</sup> According to the complaint, after workers depleted most of their available funds to make the trip, no actual work was provided for ten to fourteen days after arrival, leading the workers to suffer actual hunger.<sup>231</sup> The complaint further alleges that the indebtedness was exploited to coerce labor. Farmworker advocates and service providers have encountered many similar situations.

To promote an accurate assessment of the start date, current regulations require employers to include an assurance, at 20 C.F.R. § 653.501(c)(3), that the employer provide workers referred through the clearance system the number of hours of work, as indicated on the clearance order, for the week beginning with the anticipated date of need unless the employer notifies the order-holding office of a change to the anticipated start date at least 10 business days prior to the original start date and amends the start date. Post-certification changes to the anticipated date of need are currently allowed due to weather and other unforeseeable factors that can reasonably occur.

Under the current regulations, the SWA is charged with making a record of such a notification and attempting to inform referred workers of the change.<sup>232</sup> The employer must

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<sup>228</sup> See, e.g., *Villalobos v. N.C. Growers Ass'n.*, 252 F. Supp. 2d 1, 23, n.55 (D.P.R. 2002); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1220–21 (7th Cir. 1981).

<sup>229</sup> *Martinez-Morales v. Lopez*, No. 5:22-cv-00187 BO (E.D.N.C., May 5, 2022).

<sup>230</sup> *Martinez-Morales*, Compl. ¶ 102.

<sup>231</sup> *Martinez-Morales*, Compl. ¶¶ 104–110.

<sup>232</sup> 20 C.F.R. § 653.501(c)(3).

provide notice to the SWA when crops are not on schedule or there is other reason to change the terms of employment. If an employer fails to provide such notice, the employer must then provide workers “referred through the job order system” the first week’s pay or alternative work, should available work have been included in the clearance order.<sup>233</sup>

Recognizing that workers should not bear the weight of that uncertainty and that the current regulations are inadequate, the Department now seeks to provide some more meaningful safeguards.<sup>234</sup> The proposed revisions regarding date of need go to improving notice and increasing compensation to better prevent workers from being negatively impacted by a delayed start date given the increasing costs of housing, transportation, and food.<sup>235</sup> Current regulations, at 20 C.F.R. § 653.501(c)(3)(i), merely provide for compensation as to the number of hours for the first week for domestic workers referred through the clearance order system where there is a delayed start date and the employer has notified the ES office. The NPRM would require compensation for each hour promised for up to the first 14 days unless alternative work is provided, and would extend the compensation requirement to H-2A workers—which is particularly important in light of the number of complaints farmworker legal services providers have received from H-2A workers who have no food and no money for days to weeks at the start of the job when no work is available, notwithstanding the promised start date on the clearance order. The Department correctly notes that the current standard of one week is insufficient, and it increases the payment for hours offered for up to two weeks. The increase to two weeks of pay is warranted given incoming travel costs and potential economic harm. As illustrated in the allegations in *Martinez-Morales*, workers can arrive with thousands of dollars of debt and may wait weeks to begin actual work.

Consider then that a North Carolina job order in 2023 might offer 35 hours per week at the AEWR of \$14.91 per hour. Compensation for a single week due to delayed work would then only gross \$521.85. With the visa fee alone costing \$205.00, a single week’s wages will not likely cover incoming travel expenses.<sup>236</sup> While two weeks of compensation would still be far less than incoming expenses that the *Martinez-Morales* plaintiffs allege to have paid, it would have been helpful, to put it mildly, to at least avoid actual hunger and to cover some debt.

Current 20 C.F.R. § 655.145(b) requires housing and subsistence be provided to workers employed under the Application for Temporary Employment Certification who have already left home prior to notice. This requirement helped encourage a correct assessment of the start date

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<sup>233</sup> 20 C.F.R. § 653.501(c)(5).

<sup>234</sup> The ability to bring in workers from far away helps the employer. Indeed, in *Arriaga v. Fla. Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002), the court determined that these costs for incoming travel were primarily for the benefit or convenience of the employer such that they acted as a FLSA deduction.

<sup>235</sup> Improving Protections, 88 Fed. Reg. at 63759.

<sup>236</sup> U.S. Embassy & Consulates in Mexico, *Information for H-2 Applicants and U.S. Petitioners*, (May 23, 2023), <https://mx.usembassy.gov/h-2-visa-information/>.

but was insufficient to protect H-2A workers impacted from financial hardship. The NPRM states that it intends “to ensure consistent protections” to H-2A workers and workers in corresponding employment, and so provides conforming regulations at new 20 C.F.R. § 655.175 so that all workers employed under the Application for Temporary Employment Certification will now receive compensation for up to 14 days plus housing and daily subsistence if the employer does not provide written notice of the delayed start date prior to their departure.<sup>237</sup>

There was no legitimate reason to exclude H-2A workers, who often travel further, absorb greater costs, and have fewer alternative options such as finding interim employment elsewhere. Because many H-2A employers employ few or no domestic workers referred under the job order, providing H-2A workers in date of need compensation protections is a necessary step to make the protection meaningful and an actual deterrent to inaccurate reporting of the date of need.

Under the NPRM, employers, instead of JS staff, are then tasked with informing workers of the change in date of need. This is a common-sense change where the employer, who has been in prior contact with the workers, either directly or through agents, is much more likely than the SWA to have the most current and effective contact information. The employer, rather than the SWA, can more quickly reach workers, when time is critical, by going directly to the workers rather than roundabout through the SWA. An additional benefit is that the burden of contacting workers is taken from JS staff, whose resources are, reportedly, already stretched thin. The NPRM reduces the burden on employers by clarifying that only workers who are placed on the order, rather than all workers referred, are covered by the notice requirements.

Relying on the employer to give notice, however, raises concern as to whether meaningful and effective notice will actually be received. The proposed regulations attempt to address that concern in two ways. First, the employer must document the attempts at notice. Second, failure to provide notice results in a higher cost burden to the employer who must pay these expenses for up to 14 days of compensation.

Safeguards are required to ensure effective notice is actually received. There is minimal additional cost to opening housing that should already have been ready, and if “notice” eliminates additional financial obligation, then the ideal for employers may be for workers to be waiting at the housing without need to provide for hours promised. Unfortunately, the NPRM does not require that the notice be provided in the language spoken by the worker. The regulations are also unclear on whether the worker must actually receive the notice, or merely that notice be sent out. There is no requirement that the employer use the most reliable or speediest form of communication. For example, the employer may be in possession of a mailing address, but that is a much slower form of communication than a text message. It is less likely

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<sup>237</sup> Improving Protections, 88 Fed. Reg. at 63759.

that workers would have received the mailed communication prior to departing work, particularly since workers routinely receive text and WhatsApps messages from recruiters, agents, and consular processing services prior to commencing travel. There is also no requirement that the employer reach out to farm labor contractors or local recruiters, if unable to reach workers themselves, to ensure workers get the message. We request that the Department clarify the notice requirement to ensure that workers actually receive effective notice.

The proposed regulations further eliminate an additional obstacle to domestic workers in that previously they had to contact the JS office to verify the date of need prior to the original date of need to be eligible for the first week's pay. This cumbersome verification requirement at current 20 CFR § 653.501(d)(4) is fortunately eliminated in the NPRM. Finally, the NPRM makes clear that alternative work must be in the approved job order. This is an important clarification to deter unsafe or undercompensated work.

The proposed changes in the NPRM are a significant improvement that will help ensure that costs stemming from a delay in available work will not be placed on workers.

We applaud the proposed changes regarding date of need, but ask that the Department improve notice requirements by requiring that notice be received, that notice be provided in a language common to the workers, and that the employer use electronic or telephonic correspondence if previously used with a particular worker by anyone in the recruitment, visa-processing, and employment chain.

## **2. Proposed changes to the application for temporary employment certification will assist enforcement by requiring information collection on employers**

The NPRM requires H-2A employers to submit additional information as part of their applications.<sup>238</sup> These new requirements will enable better enforcement of the program's worker protection standards. However, additional clarifications are necessary to ensure that applicants will provide the correct information. Further, the Department should require additional information that would help to ensure additional compliance.

First, this section should be clarified to ensure that applicants understand that information needs to be collected regarding all employers, not just the applicant employer. Additionally, the Department should collect information for fixed-site growers who may not be joint employers of the H-2A workers.

Proposed §655.130(a)(2) adds the requirement that the application must include "the employer's legal name, trade name(s), and a valid FEIN as well as a valid place of business"

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<sup>238</sup> 20 CFR §655.130(a)(1)-(4); Improving Protections, 88 Fed. Reg. at 63785-63786.

(emphasis added). In contrast, the following sentence requires information regarding the owners of “*each employer* of any worker employed under this application”<sup>239</sup> (emphasis added). The regulations as written do not explain the distinction between these two phrases, and the singular “the employer” misleadingly implies that there is only ever one employer for H-2A workers. Where a requirement is vaguely written, agents and employers will err on the side of under-disclosing. To resolve this ambiguity, §655.130(a)(2) should provide that the applicant must include information for all employers.

The Department should also require the applicant to provide information for all owners and operators of fixed-site locations at which the workers will perform work. This is likely to result in increased compliance. As currently written, the NPRM does not require the applicant to list the actual business name of the operator of the fixed-site location, their trade names, or the names of owners. Such information is obviously useful in detecting fraud in the H-2A program, as it would allow the Department to more easily detect instances in which a single owner/operator uses multiple business entities in an attempt to skirt H-2A regulations or to continue seeking H-2A workers despite having been debarred.

For example, employers often use overlapping job orders from two separate but jointly-owned and operated entities, so that the employer can keep H-2A workers at their place of employment year-round on alternating job orders.<sup>240</sup> If the Department were to require employers to submit information about the owners and operators of fixed-site operations, it could more easily ascertain when an employer is improperly using the program to obtain workers year-round for multiple interrelated businesses.

This data would also be useful in preventing the displacement of US workers by H-2A workers, particularly when a grower that employs domestic workers begins outsourcing its labor to an H-2ALC. We are aware of multiple instances in which a fixed-site grower hired domestic workers for many years, then began to use an H-2ALC to hire H-2A workers.<sup>241</sup> When this

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<sup>239</sup> 20 CFR §655.130(a)(3); Improving Protections, 88 Fed. Reg. at 63786.

<sup>240</sup> *Haas Farms*, 2016-TLC-00032 (BALCA Apr. 7, 2016) (year-round work for two interlocking businesses is not seasonal or temporary); *Legume Matrix, LLC*, 2016-TLC-000008 (BALCA Dec. 8, 2015) (intertwined companies cannot use multiple H-2A applications to create year-round need); *Rosalba Gonzales*, 2017-TLC-00028 (BALCA Oct. 11, 2017) (same); *JBO Harvesting*, 2020-TLC-00129 (BALCA Nov. 6, 2020) (overlapping contracts not seasonal under H-2A regulations); *Advanced Agriculture, Inc.*, 2014-TLC-00077 (BALCA Mar. 31, 2014) (employers cannot evade the H-2A seasonality requirements by using two employer entities with overlapping dates of need); *Ag-Mart Produce, Inc.*, 2020-TLC-00097 (BALCA Aug. 13 2020) (need is not seasonal if H-2A workers perform normal, ongoing operations); *Farm-Op, Inc.*, 2017-TLC-00021 (BALCA July 7, 2017) (stringing together overlapping jobs at different jobsites is not seasonal or temporary work); *Great Southern Farms, LLC*, 2009-TLC-00065 (BALCA Sep. 03, 2009) (two separate groups of workers performing different seasonal tasks with year-round date of need is not seasonal); *Bracy's Nursery*, 2000-TLC-11 (BALCA Apr. 14, 2000) (overlapping H-2A orders may not be used to fill year-round jobs).

<sup>241</sup> Examples include: Village Farms in hydroponic vegetables in West Texas switching to Fresh Harvest, an H-2ALC, to begin hiring H-2A workers and to displace domestic workers; and Chapa Global, another H2ALC, hiring

happens, it is impossible for the workers (or worker advocates) to determine whether the fixed-site grower is using H-2A workers because the grower's name never appears at all on the job order or supporting documentation.

### **3. Additional disclosure requirements are recommended to meet the Department's stated goal of improved enforcement**

Documentation requirements should be expanded to include additional information that will ensure better compliance.

#### **a. Transportation providers**

The Department should require that applicants list the name and contact information of all individuals who will be providing transportation to the workers from the housing site to the place of employment. The Department should also require that the employer certify whether the individuals providing transportation to H-2A workers will also be providing transportation to domestic workers in agricultural employment. This will allow the Department and worker advocates to ensure that individuals who transport workers are appropriately licensed under federal and, if applicable, state law. In particular, if an individual transports domestic workers in agricultural employment, the licensing requirements for farm labor contractors under the AWPB would apply.<sup>242</sup> The Department can and should ensure that any individual offering to transport workers as part of an H-2A application should be licensed to do so, since the employer will be obligated to hire domestic workers who apply for the job.

#### **b. Workers' compensation policyholder**

The applying employer should be required to identify the worker's compensation policyholder for the policy which covers workers hired under the job order. As previously discussed in this comment, workers' compensation policies for H-2A workers are held by PEOs. The insurance provided through the PEOs often strictly limits workers' compensation to the period in which the worker is technically on the payroll. Unfortunately, this means that no worker's compensation insurance is in place when workers are being transported to the worksite from their home country, or back to their home country after their work has been completed, or for travel between worksite (for example, in different states) during the contract period. Coverage gaps also arise when the PEO requires the employer to submit hiring paperwork for the H-2A workers prior to coverage. If the employer does not require H-2A workers to complete hiring paperwork immediately, then they may work for weeks without worker's compensation coverage.

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H-2A workers in the Texas watermelon harvest in lieu of domestic farmworkers who had formerly been employed by domestic farm labor contractors.

<sup>242</sup> See 29 U.S.C. § 1811.



This issue is discussed in more detail in the letter from Southern Migrant Legal Services to WHD and ETA.<sup>243</sup> The letter details the fallout of a fatal vehicle accident in 2015 that killed several H-2A workers, also discussed previously in the comment. Because the Department did not adequately ensure that the H-2A employer in that case carried worker's compensation insurance that covered the workers in transit to their homes, there was no insurance coverage for the workers' families after the workers' deaths.

If the employer informs the Department that the worker's compensation policyholder is a PEO, Department staff should be instructed to follow up with the employer to ensure that coverage extends to workers in transit during the entire period of the clearance order, including between their home country and the worksite.

c. Owner and operator information for housing

The Department should require employers to submit information regarding the owner and operator of H-2A housing. This information will allow the Department and worker advocates to ensure that the housing complies with state and federal housing requirements.

The Department has previously noted the myriad problems arising in rental and public accommodation housing.<sup>244</sup> Compliance is strikingly low because the Department's current guidance does not require SWAs to inspect rental and public accommodation housing offered to H-2A workers.<sup>245</sup>

Housing providers are often not aware of the housing regulations, as the current regulations require the employer – not the housing provider – to attest that the housing complies with applicable regulations.<sup>246</sup> Requiring the employer to provide the name and contact information for the owner and operator of the housing will allow workers and worker advocates to better understand whether the housing is in compliance.

A worker can often determine that a hotel is not in compliance with the regulations simply by calling the hotel and asking basic questions about the facilities. If the employer is not furnishing meals to the worker, the worker can simply call the hotel and ask what cooking facilities are available to the worker. Often, the answer will be “none.” Or the worker can call and ask whether there are adequate storage facilities in the room for their clothes, or whether

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<sup>243</sup> Exhibit C, Southern Migrant Services Letter, Gaps in vehicle coverage of vehicles used to transport migrant and seasonal agricultural workers.

<sup>244</sup> See Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36192-3 (Jul. 26, 2019), codified at 20 C.F.R. § 655.122(d)(1)(ii).

<sup>245</sup> Advocates have long contended that the Department's position is erroneous, as the clear language of the Wagner-Peyser regulations requires a physical inspection of all housing prior to occupancy. 20 C.F.R. 653.502(e).

<sup>246</sup> 20 C.F.R. § 655.122(d)(6)(iii).

laundry facilities are provided – all of which are common violations in hotel housing used for H-2A workers.<sup>247</sup>

Finally, we reiterate our longstanding concern that not all SWAs and other applicable state agencies are performing pre-occupancy housing inspections at all or are performing woefully inadequate inspections. This failure has been the subject of several recent job service complaints against SWAs. Further, all too often when visiting housing, our outreach workers discover that there is no housing at the listed site—the address is for an unrelated business such as a fast-food restaurant or an office, or it the side of a field in the middle of nowhere with no buildings, let alone housing, anywhere in sight. This would suggest that no state official bothered to visit the housing address.

d. Previous recruitment information for first-time growers

As explained above, the Department could close a loophole in the existing recruitment requirements and prevent the displacement of domestic workers by asking for additional information from first-time employers and fixed-site growers. Similar questions could also be asked of fixed-site growers using H-2A workers, even if they are not employers.

When a new employer begins to use the H-2A program, or when an H-2ALC adds a new fixed-site grower to their client list, the Department does absolutely nothing to ascertain how that grower previously recruited workers. If the grower is the employer submitting the H-2A application, the Department merely relies on the grower’s attestation that they are unable to find a sufficient number of qualified workers. If the grower is not the employer, then the Department does nothing to ensure that the grower has not exhausted previous recruitment streams. The recruitment requirements in the current regulations are designed to prevent this from happening, but they fall short. Employers must only contact “domestic workers employed by the employer in the occupation at the place of employment during the previous year.”<sup>248</sup> This obligation does not apply to workers who work at the fixed site in the previous year, but who were not employed by the employer.

In other words, the recruitment requirements currently in effect do not actually require anyone to recruit domestic workers who were harvesting the same crops on the same farms in the previous year, so long as the application is made by someone other than the person who employed the domestic workers. This means that a grower can transition from a full crew of domestic workers to a full crew of H-2A workers from one year to the next, *without being*

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<sup>247</sup> Of course, it should not be incumbent on the worker to call ahead and ask about the facilities being provided. If the Department were to require inspections of public accommodation housing, these problems would be far less common.

<sup>248</sup> 20 C.F.R. § 655.153.

required at all to contact and recruit the domestic workers. Consider, for example, the following scenarios:

- A grower traditionally uses a farm labor contractor to find domestic workers and contends that it does not directly employ those workers. The grower then files an H-2A application on its own. Because the employer believes that the workers were not “employed by the employer,” the grower is not obligated to contact them.
- The grower traditionally directly employs domestic workers. One season, the grower decides to use H-2A workers, and contracts an H-2ALC to provide its labor force. If the grower and H-2ALC believe that the grower will not be an employer of the H-2A workers, then the grower is not required to contact any of its domestic workers from the previous season.

This is a massive loophole. Closing it would protect the rights of domestic workers and fulfill the Department’s mandate of ensuring that the H-2A program is not used to displace domestic workers. The Department could close this loophole by requiring the applicant to submit information detailing exactly what workers performed the work at the fixed site in the previous year, how they were recruited for those jobs, and what efforts have been undertaken to pursue those recruitment avenues in the current year.<sup>249</sup>

## **Conclusion**

We appreciate the opportunity to provide comments on the NPRM and welcome the Department’s efforts to improve the function of the H-2A program to benefit the farmworkers we serve. This NPRM is an important step forward to strengthen protections for H-2A workers and domestic workers as well as enhance the Department’s capabilities to monitor program compliance and take necessary enforcement actions. We hope that you will take our recommendations into consideration before issuing a final rule.

Sincerely,

Farmworker Justice

Advocates for Basic Legal Equality  
Alianza Nacional de Campesinas, Inc.  
Brazilian Women's Group  
California Primary Care Association Advocates  
Casa Azul de Wilson

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<sup>249</sup> The Department could further enshrine these protections by closing this loophole in 20 C.F.R. § 655.153. For example, the Department could require employers to contact all workers who performed work at the worksite in the previous year, irrespective of whether they were employed by the employer.

Centro de los Derechos del Migrante, Inc.  
CRLA FOUNDATION  
Economic Policy Institute  
El Futuro Es Nuestro  
FarmSTAND  
Farmworker Legal Services  
Farmworker Program - Legal Aid Services of Oregon  
FLAP- Farmworker and Landscaper Advocacy Project  
Freedom Network USA  
Indiana Legal Services  
Justice at Work (Pennsylvania)  
Justice in Motion  
Legal Aid Justice Center  
Legal Aid of North Carolina  
Legal Aid Society of Mid-New York, Farmworker Law Project  
MANA, A National Latina Organization  
MHP Salud  
Michigan Immigrant Rights Center  
Migrant Clinicians Network  
Migration That Works  
National Legal Aid & Defender Association  
NC FIELD, Inc.  
Northwest Forest Worker Center  
Northwest Justice Project  
Northwest Regional Primary Care Association  
Northwest Workers' Justice Project  
Pennsylvania Farmworker Project at Philadelphia Legal Assistance  
Pineros Y Campesinos Unidos del Noroeste (PCUN)  
Polaris  
Southern Minnesota Regional Legal Services-The Agricultural Worker Project  
Texas RioGrande Legal Aid, Inc.  
UFW Foundation  
United Farm Workers (UFW)  
Voto Latino  
Washtenaw Solidarity with Farmworkers

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