fisherphillips.com

**Atlanta**
1075 Peachtree Street, NE
Suite 3500
Atlanta, GA 30309

(404) 231-1400 Tel
(404) 240-4249 Fax
**Writer's Direct Dial:**
(404) 240-4223
(404)-240-4269
**Writers' E-mail:**
apointer@fisherphillips.com
jviau@fisherphillips.com

December 24, 2018

Mr. William W. Thompson II
Administrator
Office of Foreign Labor Certification
Box PPII 12–200
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Comments on Proposed H-2A Forms, particularly ETA 790/790A and ETA 9142A, Appendix A to the extent they are part of or are treated as an employment "contract" or are supposed to contain all "material terms" of employment or incorporate "material terms" of employment. OMB Control Number 1205– 0466)

Dear Mr. Thompson:

Although the supporting statement for the proposed changes to the H-2A application forms for temporary employment certification purports to recognize at page 3 that ETA 790 and ETA 790A forms and any variation that are used as part of the Wagner-Peyser Act interstate recruitment processes for agricultural workers must describe "all the material terms and conditions of employment," it appears that the authors of the proposed changed forms are not aware that reasons for termination and discipline are "material" terms of employment and must be either expressly stated or at least presaged and generally described in an employment contract that the employee enters into in connection with accepting the job--- not as later "add ons" in order for the employer, subject to contractual rights of an employee as stated in the contract, to

discipine or discharge the employee. The employer may not simply wait until an employee who has *already* entered into a written contract for a job for a definite term to show up on the job to tell the employee that there are other material terms of the job that are not part of the written agreement or at least presaged in the written agreement that will govern his employment relationship with the employer.

For most U.S. employees in the private sector, when they are hired, they are informed by their offer letter or other hiring document that they are to be employed "at will," a legal term of art meaning what is sometimes expressly stated: that either the employee or the employer may terminate the employment relationship at any time and for any reason with no "strings attached," meaning no severance or other remaining consequences. In such cases, the employer may "add on" work rules and other restrictions once the employee has begun the job. Other than a potential claim by the employee that he has been fraudulently induced to leave another job to take the new job and similar claims, an employer of such an "at will employee" may first inform an employee of additional job terms and conditions – work rules, reasons for discharge, etc. -- only after the employee has begun work—often in connection with an overall employee orientation. Only employees whose employment is subject to a collective bargaining agreement ("CBA") and certain employees, typically high level executives, who are able to negotiate or obtain written contracts of employment have rights beyond such employment at will. In the context of employees under union contracts who are subject to discharge or discipline only for "just cause" or some other statement of cause, the employer typically incorporates work rules into the collective bargaining agreement or provides under the "management rights clause" in the collective bargaining agreement that management will implement work rules, the violation of which or the failure to comply with which can subject the employee to discipline including discharge. When the employer seeks to impose discharge or discipline because of a failure to comply with such work rules, the employer bears the burden of proof that the employee violated the rule or failed to meet the rule requirements.

In the context of the H-2A program, the ETA form 790 job order has long been asserted by the Department of Labor and recognized by many courts as a work contract giving the employee rights to the job at the wage rates set in the job and for the full period stated in the job order. Typically, agricultural employers who must use the Wagner-Peyser job service system recruitment performed by State Workforce Agencies ("SWA's") as part of the H-2A program requirements who are represented by experienced attorneys or who work with human resource professionals and consulting agents make sure that in the ETA 790 itself and in attachments to the ETA 790 that are incorporated into the "contract," the employer sets forth workplace conduct and housing rules, sometimes as separate rules and sometimes combined, and specifies that other conduct or misconduct of similar significance can be the basis of discipline and even discharge so that the employer may end the employment relationship earlier than the otherwise applicable ending date. As in the case of employees whose employment is governed by a CBA, the terms under which an individual may be disciplined or discharged are specifically stated insofar as possible and at least referenced or presaged in commonly understood terms that give the employee notice and the employer rights to terminate or otherwise discipline the individual.

Under formal rules issued under the Wagner-Peyser Act, the job order, as an ETA 790 (with its attachments) or any new form that is adopted to meet Wagner-Peyser requirements, must contain "all the material terms and conditions of the job." The job order must provide an assurance on the form, signed by a representative of the employer, that "[T]his clearance order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job." 20 C.F.R. §653.501(c)(3)(viii). The Wagner-Peyser regulations also provide that:

> If a SWA discovers that an employer's clearance order contains a material misrepresentation, the SWA may initiate the Discontinuation of Services as set forth in part 658,

subpart F of this chapter.

20 C.F.R. §653.501(c)(4).

Generally speaking, an agreement or contract for employment specifying a period of employment operates to guarantee the individual who has entered into the contract with an employer employment at the wages described in the contract for the period covered by the contract absent some extraordinarily serious provable misconduct or breach of duties and other requirements as specified under the contract by the employee. For example, if an employee who had contractual rights to a job for a defined time made an unprovoked physical attack on a supervisor or other employee in front of witnesses qualified and available to testify in a court challenge of the discharge, the employer could hope to win the challenge, assuming that the witnesses were available to testify at trial and that the jury believed the attack occurred and that the misconduct was so severe as to warrant the discharge. That principle is presently in the public eye in the context of the alleged misconduct of former CBS executive Les Moonves. Without commenting on or knowing about what ultimate proof might be in evidence in a trial on this matter, it is pertinent to this consideration that the employer in that situation had provisions in its written contract with Mr. Moonves and other key executives that gave CBS termination rights so that it would not be obliged to continue the employment of Mr. Moonves or other key executives if they engaged in certain types of misconduct. Even with contract terms giving the employer certain termination and disciplinary rights, if the employee challenged the action of the employer, the employer would bear the burden of proof that facts meeting the contract terms had been met if its actions were challenged by the employee. The popular press is full of discussion in recent days regarding the consequences to the employer of Mr. Moonves if it had not spelled out in writing in its contract with Mr. Moonves the circumstances under which it could terminate Mr. Moonves and would not be obliged to pay Mr. Moonves some $120 million in severance pay. (A portion of the written contract and summary of the contract between CBS and Mr. Moonves was attached to a corporate SEC filing and excerpts are provided here in

this article: https://www.marketwatch.com/story/cbs-is-incredibly-lucky-to-not-pay-les-moonves-his-120-million-severance-2018-12-19.

These contract terms serve as illustrations of the specificity with which employment contracts can and often do allow employers rights to terminate their employment obligations with respect to employees. As in the case of agricultural employees, an employer would not necessarily be obliged to set forth in the contract each and every specific act of misconduct or failure of conduct that would legally justify a termination of employment relationship, but the contract with Mr. Moonves makes it clear that at least the types of misconduct or failures to act must be fairly presaged within the written contract in order to justify the severance of an employment relationship that is governed by a contract for a specific term and is not one that the employer may terminate "at will," meaning at any time of the employer's choice and for any reason or even no reason at all. Employment of H-2A visa-holding workers and U.S. workers in corresponding employment is not "employment at will."

Under OFLC's own regulations, an employer must provide a prospective H-2A visa-holding worker a work contract or, in lieu of a separate document called a "contract," the filed and approved ETA 790 form with attachments that necessarily includes or incorporates all of the material terms of employment. The Wagner-Peyser requirements at 20 C.F.R. § 503.501(c)(3) and (4) contain this requirement, and the document must be provided to the prospective worker "no later than the time at which the worker applies for the visa." 20 C.F.R. §655.122(q). Under the OFLC regulations the employer must provide these materials to a U.S. worker in corresponding employment no later than on the day work commences. 20 C.F.R. § 655.122 (q).

It appears that OFLC has not considered that under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), agricultural employers who will employ migrant agricultural workers -- that is those engaged in field or packing house work who cannot return to or commute to their permanent residences each day -- must be provided a document that contains the material terms and conditions of employment at the time the workers are recruited, meaning *before* the workers relocate in order to accept the employment. This requirement is contained in 29 U.S.C. §1821 (a)(4). (Under MSPA, as distinguished from under the H-2A rules at 20 C.F.R. § 655.122 (q), local workers, i.e., "seasonal agricultural workers" who may be employed as corresponding U.S. workers need not be provided a copy of the written terms of the job unless and until they ask for such written terms, but if they ask for a written description of the material terms of the job, that written document must be provided under 29 USC section 1831 (a)(1)(D). As noted, however, under the H-2A program, even these local, commuter workers must affirmatively be provided a copy of the job order or other contract no later than the day work begins because of 20 C.F.R. § 655.122(q) even if they have not asked for the documents.) The Wage-Hour Division and the Courts have enforced the terms of the ETA 790 as MSPA disclosures that were contractually binding on agricultural employers.

Moreover, under the Wagner-Peyser regulations, the job order applicant holding SWA office "must provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications in the clearance order." 20 CFR 653.501 (c)). While the job service or SWA may or may not be liable to the employer or to the worker for failing to provide a full checklist with all "material specifications" of the job, the prudent agricultural employer takes steps to make sure each prospective migrant worker

has a copy of the appropriate documents in his or her hands as part of the recruitment process before the worker relocates to accept such a job, the ETA 790/790A form proposed to be used in the future by OFLC would affirmatively prevent the SWA office as well as the employer from providing information on all material job specifications, either specifically or by general references to categories of forbidden misconduct and mandatory conduct, insofar as the employer lawfully and properly desires to specify in writing in the ETA 790/790A the terms under which an employee might be discharged or disciplined and provide those to the worker as part of the recruitment process and certainly as part of the process of entering into the employment contract so that if the need arises, the employer will be able to impose those written terms and discharge or discipline the employee.

The current OFLC proposal to change the permissible content of the clearance order or the revised Form ETA 790/790A is a step backwards from the efforts made by the Department of Labor in expanding the content of the old ETA form 790 in 2004. In the 2004 Notice explaining the reasons for including many topics not previously in the job order but that were by then part of the standard WH-516 disclosure form under the Migrant and Seasonal Agricultural Worker Protection Act, the Department of Labor explained that the then proposed and currently-used ETA 790 form will allow "agricultural employers to satisfy their disclosure requirements without also having to fill out the Worker Information - Terms and Conditions of an Employment, Wage & Hour Form 516." 69 Fed. Reg. 21578 (April 21, 2004). At that time, the Department of Labor said the inclusion of the terms required under MSPA in the ETA 790 form:

> will ensure that workers receive full disclosure of required terms and conditions of employment in an

> appropriate language prior to traveling out of their commuting area.

*Id.* at 215784 (middle and third columns).

Even if the ETA 790 form and incorporated attachments comprising the job order itself were not viewed as a contract, there is case authority that the clearance order with its attachments is a term of the working arrangement between the worker and the agricultural employer and is enforceable under the Migrant and Seasonal Agricultural Worker Protection Act, as discussed by the Court in *Garcia v. Frog Island Seafood, Inc,* 644 F. Supp. 2d 696 (E.D.N.C June 25, 2009), discussing *De Leon-Granados v. Eller & Sons Trees, Inc.* 581 F. Supp. 2d 1295, 1324-1325 (N.D. Ga. 2008). In the *De Leon-Granados* case the Court explained that the ETA 790 clearance order promise of 40 hours a week became a term of the working arrangement that could be enforceable by the workers under MSPA. Other courts have recognized that ETA 790 job orders can be treated as unilaterally imposed contracts, enforceable by workers against their employers as in *Salazar-Martinez v. Fowler Brothers, Inc.,* 781 F. Supp. 2d 183, 198 (W.D. N. Y. March 15, 2011); *Ulloa v. Fancy Farms, Inc.,* 274 F. Supp. 3d 1287, 1288 (M.D. Fla. Aug. 9, 2017); *Mencia v. Allred*, 808 F. 3d 463 (10th Cir. Dec. 14, 2015); *Garcia-Celestino v Ruiz Harvesting, Inc.*, 843 F 3d (11th Cir. Dec. 15, 2016).

If there be any doubt as to whether a written contract that contains a promise of employment for a definite term or period can be enforced, *see generally* Bloomberg, BNA, Discipline and Discharge in Arbitration, Ch. 2, *Just Cause* (3d Ed. 2014). As just one example, in *Story* v. *Culverhouse*, 727 So. 2d 1128 (Fla. 2d DCA 1999), the Court recognized that if an employment contract with an employee

provides for a definite term, employer may not treat the employment as an "at will" employment relationship, and the employer could not terminate the worker at any time and for any reason the employer wished.

We are concerned that the current proposal, with the stated intent to "streamline" and "clarify statutory and regulatory requirements," will have undesirable and unlawful effect of changing the current H-2A regulatory requirements without a full rule-making and indeed exceeds the Department's lawful authority even were the current process an announced "substantive" rule-making under the Administrative Procedure Act.

The Department of Labor's statutory role is simply to determine that the proposed foreign worker's employment in the job opportunity under terms and conditions, as contemplated by the employer, "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. §1188(a)(1)(B).

The role and prerogative of the United States Department of Labor are not to set the terms and conditions of such employments beyond those that are otherwise lawful and in which "similarly employed" U.S. workers are or have been employed, recognizing that as in the case of hotel and other "domestic service" workers in the Virgin Islands and sugar cane workers in Florida in the 1970's, there are jobs, like hotel housekeeping and related tourist industry jobs and cutting sugarcane, that are important to the U.S. economy and to U.S. workers in other jobs that would not be performed in the U.S. at all but for the availability of temporary foreign workers fill those jobs that U.S. workers neither wish to or need to perform. *See Rogers v. Larson*, 563 F.2d 617, 624 (1st Cir. 1977). The opportunity to provide these economic activities that are beneficial to the whole of the United States economy and the U.S. workforce as a whole should not be precluded or thwarted by unnecessary regulation or restrictions in the H-2A program requirements or restrictions.

The United States Department of Labor is not authorized to make agricultural jobs more "attractive" to U.S. workers by enhancing wages above those paid in similar employment under similar conditions in the same area of intended employment or by imposing restrictions on employers that are not applicable to U.S. workers who are similarly employed. *Williams v. Usery,* 531 F2d. 305, 307 (5th Cir. 1976). Moreover, under current regulations, the Department is not authorized to deny employers their rights to impose "normal and accepted job qualifications and requirements of employers that do not use H-2A workers for the same or comparable employment in the same or comparable occupations in the same area of intended employment." 20 C.F.R. § 655.122(b). Instead of providing only restricted ETA 790 form "space" and opportunity to provide material information about the job, the Department should allow employers, many of which have highly sophisticated Human Resources executives, agents and attorneys, to provide details regarding material job requirements and duties. We respectfully submit that "form," legally and practically, must follow substance, not the other way around. In the guise of being more efficient or streamlined, the Department may not deny employers their prerogatives to set employment terms and conditions, including housing and job performance rules consistent with their statutory rights, as interpreted by binding case law analyses and indeed, 8 U.S.C. §1188(a)(1)(B).

Moreover, Constitutional the principles and requirements of Federalism are undermined, in fact, violated when the United States Department of Labor undertakes to interpret and enforce state-created rights, such as those of employers that are consistent with H-2A statutory and regulatory rights that would be imperiled by adoption of the planned ETA 790 and ETA 790A forms with restrictions on the attachment of material terms of the job for which there is no room on the forms.

Conclusion

We respectfully ask that the Department consider these comments and revise the proposed forms and its planned disallowance of attachments that allow employers to describe the material terms of the job accordingly.

Very truly yours,

/s/Ann Margaret Pointer
Ann Margaret Pointer

/s/Joshua H. Viau
Joshua H. Viau

For FISHER & PHILLIPS LLP

AMP:sh