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April 15, 2024

Robert Waterman
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**RE: Comment Request; Information Collections: Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration 89 Federal Register 11319 (Feb. 14, 2024)**

Dear Mr. Waterman:

These comments are submitted on behalf of Texas RioGrande Legal Aid ("TRLA") in response to the Department of Labor's (the "Department") information collection request entitled "Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration," 89 Fed. Reg. 11319 (Feb. 14, 2024).

TRLA provides free legal assistance in civil matters to farmworkers in Texas and, through its Southern Migrant Legal Services project, six southeastern states (Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and Tennessee). A substantial number of these workers are recruited, furnished, transported or employed by farm labor contractors (FLCs). The information currently collected by the Department from FLCs through the registration process contributes to the implementation and enforcement of the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").

In April 2020, we submitted lengthy comments to the Office of Management and Budget regarding the Department of Labor's last information collection request regarding the Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration. While the revised Forms WH-530, WH-535 and WH-540 addressed a handful of the problems we highlighted, most of the deficiencies remained. Our current comments embodied in this letter reiterate many of these same issues, especially as they relate to the transportation of migrant and seasonal agricultural workers.

**Form WH 530, Item 3**

We support the continued inclusion on Form WH 530 of questions requesting the FLC's Internal Revenue Service employer identification number, as well as his state unemployment insurance reporting number. Collection of this information is wholly consistent with the underlying purposes of the MSPA. Since the Farm Labor Contractor Registration Act ("FLCRA") was enacted in 1963, a central objective of federal laws protecting farmworkers has been ensuring that FLCs deposit Social Security and other employment-related tax payments due on the workers' labor.[1] There have been numerous examples of FLCs being found delinquent in their obligations to make these payments. *See, e.g.*, *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 2d 1243, 1262 (N.D. Fla. 2014); *Saintida v. Tyre*, 783 F. Supp. 1368, 1372 (S.D. Fla. 1992); *Charite v. Jones*, No. 89-2548, 1990 WL 165247, at *1 (S.D. Fla., Aug. 13, 1990); *Fields v. Luther*, No. JH-84-1875, 1988 WL 59963, at *7 (D. Md., May 4, 1988); *Frenel v. Freezeland Orchard Co., Inc.*, No. 87-278, 1987 WL 46894, at *4 (E.D. Va., Dec. 24, 1987).

Section 3 should be expanded to also request applicants to provide their employer identification numbers for state unemployment compensation, as well information regarding the state(s) unemployment compensation programs to which the applicant pays such taxes. Many farmworkers rely on unemployment compensation benefits as a stopgap between harvests, but unfortunately, many FLCs fail to pay such taxes. If an applicant for a certificate of registration lacks a state unemployment compensation identification number, this should trigger an inquiry as to the reason for this situation, especially if the applicant indicates in response to Section 5 that s/he intends to "employ" agricultural workers. The FLC is unlikely to be exempt from FUTA coverage unless s/he employs a very small number of workers for a very short of time. To ascertain if the applicant is indeed one who may be exempt from FUTA coverage, the Department should consider adding a question as to the maximum number of workers the FLC anticipates employing, an inquiry that previously was included on Form WH-530.

**Form WH 530, Section 6**

Section 6 of Form WH 530 seeks information that may form the basis for denying an individual's application for a certificate of registration as a farm labor contractor. Unfortunately, the section fails to inquire of applicants regarding perhaps the most common basis for refusing to issue a certificate of registration.

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[1] "In addition to checking general crew leader abuses, this legislation [the FLCRA] would also aid in the implementation of old-age and survivors insurance provisions of social security. Under OASI the crew leader is responsible for making the necessary deductions and keeping payroll records. Because of the lack of information concerning crew leader activities and the difficulty in keeping track of them, evasions and abuses of OASI have been virtually impossible to detect and correct. The information which will become available under a national registration system will provide greater assurance that farm labor contractors will act responsibly in deducting and transmitting old-age and survivors insurance withholdings." Farm Labor Contractor Registration Act of 1963, S. Rep. No. 202, 88th Cong., 2d Sess., *reprinted in* 1964 U.S.C.C.A.N. 3689, 3692–93.

Under MSPA Section103(d), 29 U.S.C. § 1813, and 29 C.F.R. § 500.51, the Department may refuse to issue or renew a certificate of registration to FLCs who have violated the MSPA, committed serious crimes, or submitted applications found to be fraudulent or containing misrepresentations. Currently, Section 6 elicits data allowing the Department in its certificate decisions to consider the applicant's prior criminal convictions, consistent with 29 C.F.R. §§ 500.51(f) and (g).

Section 6 should be expanded to inquire of applicants regarding an even more common basis, set forth below, warranting the Department to refuse to issue a certificate. Importantly, broadening Section 6 as we suggest would provide the Department with important information it currently often lacks in evaluating FLC applications.

An applicant may be denied a certificate if s/he has failed to pay a court judgment under the MSPA. The judgment may be one obtained either by the Department or by a private party (usually a farmworker) in a civil action. 29 C.F.R. § 500.51(d). While the Department secures relatively few monetary judgments under the MSPA, scores of unsatisfied MSPA judgments have been entered against FLCs in lawsuits brought by farmworkers. In many of these private actions, the farmworker plaintiffs are represented by legal services or other nonprofit organizations. Currently, the Department only learns of an unsatisfied civil MSPA judgment when a farmworker plaintiff petitions the Department to revoke the FLC's certificate of registration. *See* Opinion Letter 1573 (WH-520) (Jan. 5, 1984). Many farmworker plaintiffs do not avail themselves of this cumbersome and lengthy process. To allow the Department to secure this information, Section 6 should be is expanded to require FLCs to disclose all MSPA civil judgments entered against them, as well as whether the judgment has been satisfied, and, if so, the date on which the judgment was paid in full.

Section 6 should be revised to include an additional question to address the problem of "fronting," *i.e.***,** filing an application on behalf of someone who "has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked," or otherwise does not qualify. 29 U.S.C. § 1813(a)(2); 29 C.F.R. § 500.51(b). We are aware of many situations in which family members have filed FLC applications on behalf of individuals whose FLC certification had been suspended or revoked in order that the contracting business could continue operating despite documented violations of the MSPA or other labor laws. Section 6 should therefore also be expanded to ask whether any member of the applicant's immediate family, as defined by the MSPA regulations, 29 C.F.R. § 500.20(o), has been refused issuance or renewal of a certificate or has had a certificate suspended or revoked. If so, the applicant should provide the name of the family member, state the reason(s) the family member is ineligible, and sign an attestation that the ineligible family member is not the real party in interest for the present application.

The burden of expanding Section 6 along the lines suggested would be minimal on both FLCs and the Department. FLCs who have not violated the MSPA and are not fronting for ineligible family members could simply check "No." For the Department, collecting this ineligibility information in one place via Form WH 530 would be more efficient in evaluating registration applications than the current system.

**Form WH 530, Section 9**

We support the inclusion in Section 9 of an admonition regarding the limitations of workers' compensation coverage. However, the warning only partially describes the common "gaps" in workers' compensation coverage. Furthermore, the current Form WH 530 does not require the FLC to provide the data needed to determine whether the coverage is sufficiently comprehensive to warrant issuance of a transportation authorization supplement.

Section 9 understates the gaps that exist in many workers' compensation policies, especially when the insured entity is someone other than the FLC itself. This issue is particularly important with FLCs who pay their crews through a professional employer organization ("PEO").

A growing number of FLCs utilize the services of PEOs or other employee-leasing companies. These PEOs provide the FLCs with various administrative, payroll, and other human resources services. *See, e.g.*, *Jean-Louis v. Clear Springs Farming, LLC*, No. 8:13-cv-3084, 2015 WL 2342688, at *2 (M.D. Fla. May 14, 2015). Oftentimes, the PEO obtains workers' compensation insurance coverage for the FLC's workforce and so is the insured entity for workers' compensation purposes, rather than the FLC.[2] The workers' compensation insurance provided through the PEOs often strictly limits workers' compensation coverage to periods when the worker appears on the PEO's payroll. As a result, no workers' compensation coverage is in force when a crew is traveling to a new job in a different 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 FLC-provided transportation at the end of the contract period.

A tragic example of this gap occurred on November 6, 2015, when six H-2A workers were killed while being transported back to Mexico in their FLC's bus after completing employment contracts in Florida and Michigan. The FLC's transportation authorization supplement was issued based on workers' compensation insurance he had procured through a PEO. Because the employment ended prior to the workers embarking on the trip back to Mexico and the workers were no longer "employed" by the PEO, the insurance was not in force. 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 time of accident and the employee was not

[2] It is unclear whether such arrangements are permissible under MSPA. Under the statute, the workers' compensation waiver is available only to farm labor contractors and agricultural employers who are employers for workers' compensation purposes. 29 U.S.C. §1841(c) and 29 C.F.R. § 500.122. Under some state laws, the PEO's "client" (the entity that actually supervises and directs the worker) is considered to be a co-employer for workers' compensation purposes, but this is not universally the case.

> engaged in work performed for the employer. The workers' compensation was purchased through the leasing company, Impact Staff Leasing of Jupiter, Florida. . . .

H2A Addendum Narrative Report, Wage and Hour Division, FLC Case ID 1776085, Vasquez Citrus & Hauling, May 9, 2016, at 6.[3]

A deposition in the civil case filed on behalf of the estates of several of the workers killed in the November 6, 2015 accident revealed that there are gaps in PEO workers' compensation policies well beyond those currently mentioned in Section 9. The PEO's general counsel testified that "we do provide workers' compensation coverage in certain circumstances limited by the contract [with the client FLC]." Dep. of Stephanie M. Rosen, Apr. 12, 2018, *Lopez v. Vasquez Citrus & Hauling, Inc.*, No. 2:17-cv-14383 (S.D. Fla.), at 15–16. She went on to detail just how limited the workers' compensation coverage was:

- **No coverage is 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." *Id.*, at 35–37. Because the FLC was slow in submitting the "hiring paperwork" (employment application, Form I-9, Form W-4) for various crewmembers, the farmworkers were employed for nearly two weeks without workers' compensation coverage. *Id.* at 37.[4]

- **No coverage is provided during periods when the 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 workers' compensation coverage for that time." *Id.* at 48. Quite simply, "if there is no check written in a week to a worker, there is no workers' compensation coverage." *Id.*

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[3] This was not an isolated incident. On July 2, 2016, three passengers were killed and 30 farmworkers injured when a labor bus owned by FLC Billy Ray Evans collided with a commercial dump truck near St. Marks, Florida. As the Wage and Hour Division's investigation revealed, although Evans had been issued a transportation authorization supplement based on a worker's compensation policy issued to the PEO that was handling Evans' payroll, the PEO's insurance was not in effect at the time of the accident because "the Workers' Compensation policy did not cover any of the workers on the bus since the employer used another payroll service the last week of work in Georgia," immediately prior to the fatal accident.

[4] This was also a problem with the Billy Ray Evans' crew involved in fatal July, 2016 accident described above. As the Wage and Hour Division's investigative narrative of the incident noted, "even if the Workers' Compensation policy were still in effect to cover this accident, not all workers were covered on the policy since they were not paid on the payroll."

This situation existed when the crew was traveling from a job in one state (Florida) to one in another (Michigan)

**Q.** For example, if during that period in which no check was issued the crew was traveling from Florida to another state, would there be any workers' compensation insurance on them from Impact Staff Leasing?
**A.** There would not be coverage during that period.

*Id.* at 59–60.

Coverage also is not provided during periods when the crew is not working because of bad weather or lack of assignments from the grower. *Id.* at 112–13.

Likewise, the coverage was not in effect when the FLC 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"). *Id.* at 69.

- **Non-work hours.** Even during weeks when the worker was paid wages through the PEO, no coverage was in force for transportation provided during the employees' non-work time, such as during trips to stores and laundromats:

**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.

*Id.* at 71.

- **No coverage when the FLC employer fails to submit the payroll to the PEO on a timely basis.** Workers could also lose coverage even for basic working hours through no fault of their own, if their FLC fails to submit payroll information to the PEO promptly after the work was performed:

**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.

*Id.* at 124.

We believe that the workers' compensation coverage limits described by Impact Staff Leasing's counsel are fairly typical of PEOs providing payroll and related services to FLCs.

Given the high percentage of FLCs seeking to obtain transportation authorization by using workers' compensation policies to satisfy the liability insurance requirements, Section 9 should be revised to obtain additional information from applicants. If the applicant indicates that s/he is relying on workers' compensation insurance to satisfy the Act's insurance requirements, Section 9 should inquire as to the name of the insured entity (the FLC, the grower, a PEO, or other entity). In instances in which a PEO or staffing service is the insured entity, the Department should require the FLC to submit a copy of the contractual agreement so it can be determined if insurance gaps of the sort described above exist. Unless there is comprehensive coverage, with no gaps, the FLC should be required to purchase liability insurance or secure a liability bond to meet the MSPA's vehicle insurance requirements.

Adopting this simple measure would greatly reduce the incidence of this obviously illegal and appalling misconduct.

Thank you for your attention to and consideration of these comments.

Sincerely yours,

*/s/Gregory S. Schell*
Gregory S. Schell
Attorney at Law
Southern Migrant Legal Services
Admitted only in Florida and Maryland

**Attachments:**

Dep. of Stephanie M. Rosen, Apr. 12, 2018, *Lopez v. Vasquez Citrus & Hauling, Inc.*, No. 2:17-cv-14383 (S.D. Fla.)

H-2A Addendum Narrative Report, Wage and Hour Division, FLC Case ID 1776085, Vasquez Citrus & Hauling, May 9, 2016

MSPA Narrative Report, Wage and Hour Division, FLC Case ID 1795959, Billy R. Evans, dba OKEE-B, Inc., Oct. 11, 2016