

September 24, 2019

Adele Gagliardi
Administrator, Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5641
Washington, DC 20210

Re: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States
RIN 1205-AB89

Dear Ms. Gagliardi,

The undersigned organizations submit these comments in response to the Department of Labor's (DOL) proposed changes to the regulations under the H-2A temporary foreign agricultural worker visa program (hereinafter "the H-2A program").¹ The signers of these comments include farmworker unions and organizations *as* well as organizations whose staff have assisted both U.S. and foreign farmworkers regarding the H-2A program for decades. These comments oppose many of the Department of Labor's proposed regulatory changes to the H-2A temporary foreign agricultural worker program and further recommend substantial changes to the proposed regulations that should be made to fulfill the law's requirements.

I. Introduction

DOL's proposed regulations are extensive, complex, and substantially alter or eliminate many components of the H-2A program. We object to the short time frame for submitting comments to the proposed regulations, which were developed during a lengthy process with the requested input of agricultural employers. The comment time period has been wholly inadequate and unduly burdensome for individuals and organizations, especially the many nonprofit groups that serve farmworkers, to analyze, discuss and prepare comments.

Under the H-2A program, Congress authorized agricultural employers to hire foreign citizens to perform temporary or seasonal agricultural jobs and authorized the Government to issue H-2A temporary employment visas to workers selected for these jobs by the employers. Congress imposed significant requirements on the Government, including the Attorney General, the Secretary of Labor and the Department of Homeland Security (DHS), for approving employers' requests to hire H-2A visa workers. Such approval must be preceded by a "certification" by the Secretary of Labor of two related conditions - that there are no U.S. workers available and that the employers' job offers will not adversely affect the wages and working conditions of U.S. workers similarly employed. The DOL's regulations must

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188.

implement these and other requirements in the statute, and must also meet the standards of the Administrative Procedure Act, including that they not be arbitrary or capricious.

The history of temporary foreign agricultural worker programs in the United States, including under the *Bracero* Program, the H-2A program and its predecessors, is replete with examples of the failure of the Government to meet its obligations and of violations by agricultural employers of their responsibilities. The regulations under the H-2A program have not been as strong as needed to ensure that DOL and employers comply with the program's statutory mandates. In addition, the Government has not fully implemented and adequately enforced the H-2A program's procedures, obligations on employers, and protections for workers. As these comments detail, instead of strengthening enforcement of key program requirements, the proposed rules seek to eliminate or weaken these requirements. Unfortunately, in many ways the proposed rule will allow and perpetuate labor abuses and noncompliance with the law.

Congress recognized the inherent and historical problems in the H-2A program and the DOL has acknowledged them for decades. H-2A visas restrict foreign workers to a particular employer for a set period of time and the foreign workers are dependent on the employers for their jobs. The H-2A workers are not free to change jobs or bargain for better wages and working conditions. Frequently, H-2A workers have borrowed money to travel to the U.S., arriving indebted, and, therefore, are reluctant to say or do anything that would jeopardize their job and force them to return home without having earned the money they need. In addition, most H-2A workers come from poorer nations with lower wages and lower costs of living.

U.S. workers, by contrast, need to earn enough to support themselves and their families at the cost of living in the United States. U.S. workers have the freedom to seek out other agricultural jobs where the pay may be higher. However, under the H-2A program, once an employer offers the required minimum wage, the employer may reject a U.S. worker as "unavailable" if he or she demands a higher wage. Moreover, there is a long history of H-2A employers selecting young men in foreign countries to receive visas, and this age and sex discrimination has not been addressed. For these reasons, many agricultural employers prefer to recruit, hire and employ H-2A workers rather than U.S. workers, knowing they are essentially a captive labor force with little bargaining power. Too often, H-2A employers act on this preference by avoiding the hiring of U.S. workers. Congress imposed requirements that are meant to limit the harms caused by these inherent problems in agricultural guestworker programs.

Many of DOL's proposed changes would result in a decreased ability of U.S farmworkers to access needed agricultural jobs, increased vulnerability of farmworkers, increased costs for workers, and reductions in wages for many domestic and H-2A workers. These proposed

changes will violate the H-2A statute in numerous ways and are arbitrary and capricious, in violation of the Administrative Procedure Act.

DOL must do a better job of preventing and remedying the exploitation of vulnerable temporary foreign workers and the discrimination and other abuses experienced by U.S. workers. As these comments demonstrate, DOL's regulations and implementation need substantial improvements. The Department's decisions regarding the H-2A program are increasingly significant as every year more employers apply for H-2A certification and the program continues to spread geographically.

Unfortunately, DOL's decision to revise the H-2A program would exacerbate the harms that are inflicted on both H-2A and U.S. workers. Several major protections for U.S. and foreign workers would be eliminated, weakened or reduced if this rule were finalized as written. A few changes offer modest improvements to the H-2A program but do not adequately address the serious problems identified by DOL. Accordingly, these comments identify multiple proposed changes in the regulations that should be withdrawn as they would violate the Department's statutory obligations and/or be arbitrary or capricious and further recommend substantial changes to the proposed rule that should be made to fulfill the law's requirements.

II. Recruitment: The Proposed Changes to the Recruitment Requirements Violate Statutorily Required U.S. Worker Recruitment and Employment and Are Arbitrary and Capricious

A. The H-2A Statute Clearly Establishes A Preference for U.S. Workers and Recruitment Obligations for Employers Seeking to Access the H-2A Program

The DOL proposes changes that would violate the H-2A statute and long-standing interpretations regarding U.S. worker recruitment and would establish a recruitment system that is irrational and ineffective, depriving U.S. workers of the job preferences and employment to which they are entitled. In addition to the H-2A portion of the Immigration and Nationality Act (INA), the proposed changes would violate portions of the Wagner-Peyser Act and the Migrant and Seasonal Agricultural Worker Act (AWPA). The proposed changes would also be arbitrary and capricious in that they are not based upon any data or information that supports the need for the regulations, or provide a basis for finding that they would rationally promote the purpose of the H-2A statute.

The H-2A program allows agricultural employers in the U.S. to hire foreign workers to perform agricultural work on a temporary basis *only* when there are insufficient U.S. workers available. Furthermore, the employment of such H-2A workers must not negatively affect the wages and working conditions of US workers.² Under the H-2A statute, employers must demonstrate or prove that both of these conditions exist: (1) there are not sufficient workers who

² 8 U.S.C. § 1188(a)(1).

are able, willing and qualified, and who will be available at the time and place needed to perform the specific work, and (2) employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.³ The introductory regulation setting forth the purpose and scope of the H-2 regulations notes “This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible.”⁴

U.S. workers must be hired wherever possible rather than H-2A workers.⁵ U.S. workers do not need to possess extraordinary skills or extensive experience. Indeed, U.S. workers need to be only minimally qualified to be given preference to these jobs over H-2A workers.⁶ A business justification for choosing H-2A workers based upon more skilled or experienced workers is insufficient.⁷

In addition, the statute prohibits DOL from issuing an H-2A labor certification if the employer has failed to engage in recruitment of U.S. agricultural workers.⁸ In order to show that there are not sufficient U.S. workers who are able, willing and qualified to do the job, the employer must actively recruit U.S. workers using two mechanisms. First, employers must use the Employment Service operated by state workforce agencies (SWAs). Second, employers must conduct “positive recruitment.”

Recognizing that many U.S. agricultural workers follow a multi-state migrant stream (for example, from California to the Pacific Northwest, from Texas to locations throughout the Midwest, from Florida to the Carolinas and mid-Atlantic states, and from Puerto Rico to various East Coast jobsites), the statute expressly requires that employers must make “positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.”⁹ In establishing the current H-2A program, Congress emphasized certification must be denied whenever “the Department of Labor has determined that the employer has not made adequate efforts to secure domestic workers in areas where a significant number of such workers can be expected to be found.”¹⁰ The positive recruitment requirement was one of the major changes made by the 1986 Immigration Reform and Control Act, and “an employer’s failure to conduct positive recruitment specified by the [Department] must, by statute, result in denial of certification.”¹¹

³ *Id.*

⁴ 20 C.F.R. § 655.0(a)(3).

⁵ *Alfred L. Snapp & Son, Inc.*, 458 U.S. 592 (1982); *Hernandez-Flecha v. Quiros*, 567 F.2d 1154, 1155 (1st Cir. 1977).

⁶ *Bernett v. Hepburn Orchards, Inc.*, No. JH-84-991, 1987 WL 16939, at *5 (D. Md. Apr. 14, 1987).

⁷ *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493 (1st Cir. 1974).

⁸ 8 U.S.C. § 1188(b)(4).

⁹ *Id.*

¹⁰ H.R. Rep. No. 99-682, at 80–81 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5684–85.

¹¹ ET Handbook 398, 53 Fed. Reg. 22085 (June 13, 1988).

The “positive recruitment” language in the statute imposes an affirmative obligation on employers to undertake positive or “active” recruitment and requires the DOL to make a determination as to whether qualified U.S. workers in a multi-state area are willing to make themselves available for a job that offers a number of specific job terms and which equals to or exceeds the established wages and working conditions in the area of the employer’s operations.¹² This positive recruitment is in addition to the circulation of the employer’s clearance order and must be at least equal to positive recruitment efforts made by non-H-2A employers of comparable size in the area of the petitioning employer’s operations.¹³ The employer may also be required to make efforts to secure U.S. workers through farm labor contractors if doing so is the prevailing practice among non-H-2A growers in the area.¹⁴

The preamble to the Notice of Proposed Rulemaking (NPRM) emphasizes the desire for these rules to comply with President Trump’s “Buy American and Hire American” executive order and “to create higher wages and employment rates for workers in the United States, and to protect their economic interests.”¹⁵ However, the proposed regulations fail to satisfy the statutory requirements, as well as the President’s executive order. In addition to the arguments presented below, we incorporate by reference the arguments presented in the comments submitted by Farmworker Justice and others addressing a 2008 proposal on the H-2A program regarding recruitment.¹⁶

B. The Proposed Regulations Fail to Address Protections Needed for the U.S. Agricultural Workforce

1. Proposed changes to recruitment requirements fail to recognize the thousands of U.S. agricultural workers actively working in or seeking work in agriculture across the nation.

Approximately 2.4 million farmworkers labor on our nation’s farms and ranches, cultivating and harvesting crops, and raising and tending to livestock.¹⁷ The DOL’s own recent National Agricultural Workers Survey (NAWS) report found that approximately half of agricultural workers are authorized to work in the U.S. (50% of whom, according to the report, were either U.S. citizens or permanent residents).¹⁸ Based on the DOL’s own data, there are potentially over a million authorized U.S. workers currently working in agriculture.

¹² *Id.*

¹³ 20 C.F.R. § 655.154(b).

¹⁴ ET Handbook 398, 53 Fed. Reg. 22085.

¹⁵ Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36168, 36169 (July 26, 2019) (2019 NPRM).

¹⁶ See Farmworker Justice et al., Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Aliens in the United States (Apr. 14, 2008), <https://www.regulations.gov/document?D=ETA-2008-0001-1011>.

¹⁷ Philip Martin, California Ag Employment: 2014 (Apr. 2014), <http://migrationfiles.ucdavis.edu/uploads/cf/files/2014/04/22/martin-california-ag-employment-2014.pdf>.

¹⁸ Trish Hernandez & Susan Gabbard, U.S. Dep’t of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 2015–2016: A Demographic and Employment Profile of United States Farmworkers* 5 (Jan. 2018), https://www.doleta.gov/naaws/research/docs/NAWS_Research_Report_13.pdf.

Many of these U.S. workers wish to continue to work in agriculture. State workforce agencies have thousands of migrant and seasonal farmworkers registered in their systems seeking agricultural work.¹⁹ Some of them work in agricultural jobs for part of the year, work in other industries such as construction and retail for a certain period of the year, and then return to agricultural jobs. Some local areas of employment and migrant streams involve contiguous states. Workers alter their migration patterns depending on the terms and conditions of employment.

Qualified, eligible U.S. agricultural workers are a diverse group. They are of all races and national origins and include both men and women. Many of these workers are U.S. citizens. Others are long-time permanent residents who have been doing agricultural work for decades. Many are the children or grandchildren of agricultural workers who may perform agricultural work for just a few seasons before entering another field. U.S. farmworkers range in age from teenagers working during their summer vacations to the career farmworkers who may continue working into their 70s. Some agricultural workers work in their local area, while others travel, often with their families, from home bases in California, Arizona, Texas, Florida, or Puerto Rico to many points north.

These agricultural workers form an important part of our nation's cultural and social fabric. These workers serve key roles in our communities in addition to that of "worker." They are parent leaders in our elementary and secondary schools and head start programs; church, neighborhood, and civil leaders; and consumers. Our communities, particularly rural communities, benefit socially, culturally, and economically from their presence, leadership, and economic investment.

Employers, SWAs, and DOL must take statutorily required actions to protect the livelihoods of U.S. farmworkers before determining that there are no U.S. workers available for a certain task in a specific area of intended employment. Unfortunately, at this time, the majority of the H-2A certifications are based on a flawed system: employers including inaccurate terms in job orders, SWAs performing only perfunctory scrutiny of job orders and doing little to recruit U.S. workers, and DOL insufficiently reviewing H-2A applications and failing to hold employers accountable for inadequate positive recruitment efforts. Unless employers, SWAs, and DOL take statutorily required actions and are held accountable to take such actions, these agencies cannot make accurate determinations regarding whether there are true labor shortages. The regulatory revisions should strengthen, rather than weaken, the system to ensure that U.S. workers are connected to agricultural employers.

2. Proposed changes to recruitment requirements fail to address employer preference for H-2A workers due to a higher level of control over these often vulnerable workers, the ability to discriminate against certain types of workers, and financial incentives.

¹⁹ For Program Year 2015, the last year for which data has been published, the SWAs referred 35,531 U.S. farmworkers in jobs. Nat'l Monitor Advocate, *National Monitor Advocate Report, Program Year 2015*, at 6 (Aug. 2018), <https://farmworker.workforcegps.org/resources/2018/08/08/19/57/National-Monitor-Advocate-Report-PY-2015>.

While the H-2A statute requires employers to give job preference to U.S. workers,²⁰ many employers prefer H-2A workers because they are able to control who comes to work for them and what they do once they arrive.²¹ The proposed regulatory system fails to recognize and actively counter employers' preferences for H-2A workers.

H-2A workers are dependent on the employer that obtained their visa for their employment. If the worker leaves the job, or is fired, the worker must return to his/her home country. H-2A workers are prohibited from working for any other employer even if they are dissatisfied with or mistreated by their employer or another employer is paying more or providing better housing.²² The workers cannot work another job during the weekend that pays them higher wages or gives them experience in a new field. In addition, it is the employer who decides whether the worker will be offered the opportunity to obtain a visa in the next year. Under these constraints, most guestworkers are extremely reluctant to complain about their treatment on the job. Under these circumstances, many employers prefer H-2A workers because are deemed more "reliable" or "steady."

Further compounding their vulnerability, many guestworkers arrive deeply in debt, having paid significant recruiters' fees for the opportunity to work in the United States, often under very misleading descriptions.²³ Depending on their country of origin, workers pay anywhere from hundreds of dollars to thousands of dollars in recruitment fees. In addition, workers are sometimes required to leave collateral, such as a property deed, with recruiters to ensure that workers will complete their contract. False promises of potential earnings, misleading or undisclosed contract terms, excessive recruitment fees and increasingly, the involvement of organized crime found in countries of origin often lead to cases of debt bondage and human trafficking in the United States. The anti-trafficking organization Polaris recently released a report covering human trafficking in temporary work visa programs during the period from 2015

²⁰ As the U.S. Supreme Court noted, "[t]he obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers, including the citizens of Puerto Rico. First, these workers are given a preference over foreign workers for jobs that become available within this country..." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

²¹ See, e.g., Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 Stan. L. & Pol'y Rev. 1, 14 (2017); Ken Bensinger, Jessica Garrison & Jeremy Singer-Vine, *All You Americans Are Fired*, BuzzFeed News (Dec. 1, 2015), <https://www.buzzfeednews.com/article/jessicagarrison/all-you-americans-are-fired#.vqADxyo1XD>; Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>. Dan Charles, *Guest Workers, Legal Yet Not Quite Free, Pick Florida's Oranges*, <https://www.npr.org/sections/thesalt/2016/01/28/464453958/guest-workers-legal-yet-not-quite-free-pick-floridas-oranges>

²² *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.").

²³ See discussion in Section XII on international labor recruitment; see also *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).

to 2017, which showed that the category with the most reported trafficking cases—over 300—was the H-2A program.²⁴

Many employers seeking H-2A certification hire recruiters to go to another country and find workers to apply for the visas. Recruiters generally target their recruitment based upon the kind of worker the employer wants: generally young, unaccompanied males.²⁵ As a result, employers may use the H-2A program as a means to avoid hiring those who they presume to work at a slower rate, including older workers, women, and people with disabilities who would be able to do the work with accommodations.

Once H-2A workers arrive, their dependence on their employers is exacerbated. Many live in employer-provided housing, often close to the worksite, and often situated in rural, isolated locations. The employer is able to set housing rules and regulations and oversee workers in the housing. Camp managers, supervisors, and even the owners themselves often live right next to workers, providing a high level of control.²⁶ The employer is able to see when workers leave and who visits them.²⁷ Without access to public transportation, workers are dependent on the employer for transportation. While many employers provide transportation once a week to give employees the chance to purchase groceries or cash their paycheck, few offer transportation to workers wishing to attend church, enroll in English classes, visit the library, go shopping, or other such activities.

In addition to the control employers have over their H-2A workforce, employers also have several financial incentives for hiring H-2A workers rather than U.S. workers. Employers do not have to pay their share of Federal Insurance Contributions Act, Medicare, or unemployment insurance taxes with respect to the wages of H-2A workers, but must do so for U.S. workers.²⁸ The proposed regulations threaten to further increase employers' incentives to hire H-2A workers by lowering the required wage rates for many H-2A workers and reducing the employer's obligation for H-2A workers' transportation costs (discussed more fully in Sections IV and V below).

Moreover, as discussed above, employers often prefer H-2A workers because they have no freedom of movement between jobs and are considered more reliable workers.²⁹ In contrast,

²⁴ Polaris, *Human Trafficking on Temporary Work Visas, A Data Analysis 2015–2017*, at 7 (Apr. 2018), <https://polarisproject.org/sites/default/files/Human%20Trafficking%20on%20Temporary%20Work%20Visas%20A%20Data%20Analysis%202015-2017.pdf>.

²⁵ Data for fiscal year 2017 shows that only six percent of H-2A entries in 2017 were women. The age group with the largest number of workers was 25–29, followed closely by the age groups 20–25 and 30–34. *See* Dep't of Homeland Security, *Nonimmigrant Admissions by Selected Classes of Admission and Sex and Age: Fiscal Year 2017* <https://www.dhs.gov/immigration-statistics/readingroom/NI/NonimmigrantCOAsexage> (last visited Sept. 23, 2019).

²⁶ *Rosas v. Sarbanand Farms, LLC*, No. 18-cv-112, 2018 WL 6696681 at *2 (W.D. Wash. Dec. 20, 2018) (H-2A workers “were housed in dormitories enclosed by a fence, and a security guard restricted access”).

²⁷ *Rivero v. Montgomery County*, No. 16-cv-1186, 2017 WL 1684618 at *1–2 (D. Md. May 3, 2017) (employer blocked legal aid workers from visiting H-2A workers in employer's camp).

²⁸ Lee, *supra* note 21, at 19 n.95.

²⁹ *Arriaga v. Fla.-Pac. Farms, LLC*, 305 F.3d 1228, 1232 n.2 (11th Cir. 2002); *see also Garcia-Celestino v. Consol. Citrus, L.P.*, No. 2:10-cv-542, 2015 WL 3440351, at *2 (M.D. Fla. May 28, 2015), *rev'd in part on other*

U.S. law does not force U.S. employees to continue in a job if they do not want to do so. Thus, under the free market system, U.S. workers are free to move to competing farms paying more or offering better working conditions. Many agricultural employers accordingly prefer not to hire U.S. workers or may seek to control U.S. farmworkers by requiring that in order to be hired for most jobs for which H-2A workers are requested, they must make a “full crop commitment,” *i.e.*, pledge to work for the entire contract period. For example, a representative of an agricultural trade association e-mailed a USDA official in the aftermath of Hurricane Maria noting that “H-2A employers are rightfully concerned that they may be swamped” with referrals for workers from Puerto Rico seeking agricultural jobs in the mainland and proposing that they be directed to non-H-2A employers, because in the past Puerto Rican workers have exercised the ability to switch jobs, or in his words, have “absconded” - usually a term applied to a guestworker who quits an H-2A job prior to the completion of the employment contract.³⁰

Absent the availability of H-2A labor, employers would be forced to raise wages or improve working conditions in order to attract and retain domestic labor. Further, the employers can extract very high levels of productivity from these vulnerable guestworkers without paying them higher wages or offering special incentives.

The H-2A program has also resulted in the creation of many businesses that depend on the success and growth of the H-2A program for their profits. Many H-2A employers rely on labor intermediaries to supply them with labor (often with the goal of shifting liability for immigration and labor law violations). Various H-2A businesses (associations, persons who make their living filing applications as agents, and farm labor contractor operations started for the purpose of employing H-2A workers) are present throughout the United States with the main business purpose of providing H-2A labor. These businesses specializing in providing H-2A labor are needed only if domestic workers are unavailable, and therefore they have a financial interest in limiting or discouraging available U.S. workers from seeking these jobs. Agents use many tactics to actively discourage the recruitment of U.S. workers, including inserting illegal job order terms and conditions; posting incorrect, early start dates; posting incorrect 50% dates; and helping employers avoid the application of the 50% rule.³¹

Unfortunately, instead of strengthening recruitment protections to overcome the preference of many employers to hire H-2A workers and the financial incentives that agents and other businesses have to avoid hiring domestic workers, the H-2A proposal has weakened recruitment protections in many ways. As one example of what the proposed regulations could do to strengthen recruitment protections, DOL could effectively enforce current regulatory requirements at 20 C.F.R. § 655.154(b) requiring employers to spend equal resources on

grounds sub nom. Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276 (11th Cir. 2016) (large citrus grower directed its farm labor contractors to hire H-2A workers because no “steady” domestic labor could be found).

³⁰ See Email from Craig Regelbrugge, Senior Vice President, AmericanHort, to Kristi Boswell, Senior Advisor to the Secretary, U.S. Dep’t of Agric. (Sept 29, 2017) (“And I was just in Florida last week...H2A employers are rightfully concerned that they may be swamped with PR worker referrals, whom they are obligated to hire. And in recent years, many such workers have absconded after travel reimbursed...leaving growers in the lurch. It would be a win-win-win if there were a trusted, credible third party entity that could function to match PR workers with non-H-2A US agricultural job opportunities....”), Exhibit A-18.

³¹ See, *e.g.*, Screenshot of AJ Website Discussing U.S. Workers (Mar. 23, 2018), Exhibit A-1.

domestic and H-2A worker recruitment. In order to better evaluate these efforts, the regulations should require employers to disclose not only the use of agents to recruit H-2A workers but also the amount of resources spent on that recruitment and on domestic worker recruitment.

3. Proposed changes to recruitment requirements fail to address employer discrimination against U.S. workers

Contrary to statutory obligations, many employers repeatedly discriminate against qualified U.S. workers in favor of H-2A workers.³² Under the current system, employers are able to employ tactics to discourage U.S. workers from applying, often with impunity.³³ Some common examples include:

- Not answering the phone or not returning calls from U.S. workers looking for work;³⁴
- Assuming that U.S. workers are not interested;³⁵
- Filing job orders with additional conditions or requirements (for example, drug testing, background checks, 100 lb. lifting requirements, restrictive experience and/or reference requirements that are not applied to H-2A workers);³⁶
- Filing job orders which contain multiple job sites that are far apart;
- Illegally requiring that U.S. workers apply only through a SWA office and refusing to hire U.S. workers who apply directly to the employer.³⁷

After they apply, U.S. workers often face various tactics from employers. Examples include:

- Finding workers unqualified although they meet job qualifications;³⁸
- Telling workers that the job is too hard for them;
- Rejecting workers for not having a resume;³⁹
- Rejecting workers on the basis of a job qualification not listed in the job order;⁴⁰
- Steering workers to lower paying tasks;
- Giving confusing information about when the job will start;
- Asking them to perform a job test that is not bona fide.⁴¹

³² *Supra* FN 16; *See Fulford v. Alligator River Farms, LLC*, 858 F. Supp. 2d 550, 558–59 (E.D.N.C. 2012); *Tomasao v. Stanley*, No. 6:13-cv-42, 2013 WL 5652040, at *2 (S.D. Ga. Oct. 16, 2013); *see also* Hearing Before the H. Comm. on Educ. & Labor, 110th Cong. (May 6, 2008) (testimony of Bruce Goldstein, Executive Director, Farmworker Justice), <https://edlabor.house.gov/imo/media/doc/2008-05-06-BruceGoldstein.pdf>.

³³ *In re Guadalupe San Miguel Farms*, No. 2006-TLC-00008 (Dep't of Labor ALJ May 25, 2006). This and all following cases from DOL's Office of Administrative Law Judges can be found online at <https://search.oalj.dol.gov/>.

³⁴ *In re Hearn Farms, Inc.*, No. 2012-TLC-00006 (Dep't of Labor ALJ Dec. 9, 2011).

³⁵ *In re Turbin Landscaping, Inc.*, No. 2009-TLC-0031 (Dep't of Labor ALJ Mar. 23, 2009).

³⁶ *In re Sw. Agric.*, No. 2011- TLC-00337 (Dep't of Labor ALJ Apr. 5, 2011).

³⁷ *Ackerman v. Mount Levels Orchards*, No. 82-TAE-00003 (Dep't of Labor ALJ May 5, 1983).

³⁸ *In re Goulding Farms*, No. 2009-TLC-00042 (Dep't of Labor ALJ May 19, 2009); *In re Cal Farms*, No. 2009-TLC-00049 (Dep't of Labor ALJ May 29, 2009).

³⁹ *In re Sylva Nature Nursery*, No. 2010-TLC-00021 (Dep't of Labor ALJ Feb. 25, 2010).

⁴⁰ *In re Broken Circle Ranch*, No. 2016-TLC-00038 (Dep't of Labor ALJ Apr. 25, 2016).

⁴¹ *Bennett v. Hepburn Orchards, Inc.*, No. 84-cv-991, 1987 WL 16939 (D. Md. Apr. 14, 1987).

Finally, for those workers able to overcome obstacles and receive employment, they often experience employers:

- 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;
- Firing workers for missing one day of work;⁴²
- Firing workers for minor infractions of work rules.⁴³

The DOL has acknowledged its concern about this discrimination by entering into a memorandum of understanding with the Department of Justice in the “Protecting U.S. Workers Initiative.” However, this initiative is not enough. As discussed below, existing federal protections are also insufficient to end this discrimination.

4. Fulfilling the statutory mandate to protect U.S. workers requires strong H-2A regulatory protections because individual U.S. workers have inadequate protections against discrimination.

Some of the key pillars of employment protections for U.S. workers are protections against unlawful discrimination. There are federal laws against discrimination on the basis of race, national origin, age, disability (including perceived disability), and citizenship.⁴⁴ However, for many workers these protections are difficult to access. For example, a lawful permanent resident, 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 permanent resident is not eligible to claim discrimination on the basis of citizenship under the Immigration Reform and Control Act (IRCA).⁴⁵ 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 addition, under IRCA, prevailing workers can obtain only back pay and reinstatement, providing an insufficient deterrent. Thus, U.S. workers often cannot rely on these anti-discrimination protections to enforce the H-2A statute’s preference for U.S. workers. Other possible claims that workers may have, such as under AWPAs or breach of contract claims, have limited damages, again lessening any potential deterrent effect. Thus, H-2A regulations protecting U.S. worker recruitment, hiring, and retention must be strengthened.

All parts of the H-2A system must work to support recruiting and hiring U.S. workers. DOL cites to low numbers of domestic workers applying for H-2A jobs. But these numbers must be evaluated against decades of employer discrimination against U.S. workers seeking positions for which guestworkers have been requested. In order to fulfill the statutory mandate protecting U.S. workers, DOL must promulgate regulations that actively address and remove these

⁴² *In re Tri-Turf Farms*, No. 2011-TLC-0017 (Dep’t of Labor ALJ Feb. 3, 2011).

⁴³ *Caugills v. Hepburn Orchards, Inc.*, No. 84-cv-989, 1987 WL 47376, at *5 (D. Md. June 5, 1987).

⁴⁴ See 8 U.S.C. § 1324b; 42 U.S.C. §§ 1981, 2000e-2(a), 12112(a).

⁴⁵ 8 U.S.C. § 1324b.

obstacles. Employers must not be permitted to frustrate the statutory preference for U.S. workers or the positive recruitment requirements by taking actions to discourage U.S. workers.⁴⁶

DOL's regulations must ensure strong recruitment protections for U.S. workers and hold H-2A employers accountable when they fail to recruit or hire or retain qualified U.S. workers. Unfortunately, the proposed regulations fail to do this.

C. DOL's Proposal to Replace the "50% Rule" with a "30-Day Rule" Would Deprive U.S. Workers of the Job Preference and Jobs to Which They are Entitled.

The 50% rule is vital to protecting the employment opportunities of U.S. farmworkers. The 50% rule requires H-2A employers to hire qualified domestic workers who apply for the job after access to H-2A workers has been granted, but before half of the work period for which H-2A workers have been admitted has expired.

The agency has failed to provide sufficient evidence or an adequate explanation to support overturning the "50% rule" and replacing it with a "30-day rule." The determination to eliminate the 50% is arbitrary and capricious, and the agency's rationale is faulty for several reasons. First, if the numbers of workers applying during the 50% period are low, then there is no undue burden on employers. Second, the agency's rationale does not account for and fails to address the decades of employers violating the law and discouraging U.S. workers from applying for jobs, as well as the DOL's failure to enforce recruitment protections, furthering the discouragement of U.S. workers from applying.

The evidence relied on by DOL is biased towards the employers' point of view and does not take into account employers' long term and active discouragement of U.S. workers. Some earlier studies regarding an alleged lack of U.S. workers, for example, were flawed due to their failure to recognize that in many instances SWAs were not referring US workers after the start date and SWAs were referring domestic workers to non-H-2A jobs but not to H-2A jobs.⁴⁷ Earlier evidence demonstrates the long history of discrimination against U.S. workers by H-2A employers and note that in instances where growers engage in discriminatory conduct, it renders domestic worker recruitment efforts far less effective.⁴⁸ The agency is irrationally responding to decades of violations of these provisions by further weakening U.S. worker protections, in contradiction to the statutory mandate.

1. The history of the 50% rule.

⁴⁶ *Clayton v. Tri-Cty. Growers, Inc.*, No. 87-JSA-00005 (Dep't of Labor ALJ July 22, 1987).

⁴⁷ See Exhibit A-2 Lori Johnson, "Flawed study seeks to justify discrimination against U.S. workers," SPLC (6/7/201); See Exhibit A-3 U.S. Worker H-2A Referrals 2012; Clarification of Certain Procedures for Processing H-2A Labor Certification Applications, 11/14/07 TEGL, available at <https://wdr.doleta.gov/directives/attach/TEGL/TEGL11-07c1.pdf>.

⁴⁸ See Exhibit A-4 Employment service memo, December 27, 1965; Exhibit A-5 Letter from Wally Orr, Florida Secretary of Labor to U.S. Secretary of Labor Donovan, October 27, 1982.

Prior to the passage of the Immigration Reform and Control Act in 1986, the Virginia Agricultural Growers Association brought suit challenging the 50% rule. The district court concluded that DOL had authority to issue the 50% rule, stating:

I believe that the 50% rule, as part of this scheme, is an effort to strike a balance between these two goals and well within DOL's statutory authority to promulgate regulations. The role of DOL is to certify that United States workers are not available thus allowing the employer to proceed through the regulatory scheme and contract for alien labor in order to assure an adequate labor force. The goal of protecting the job of citizens is furthered by the 50% rule which insures that those small groups of available domestic employees who might not be known to DOL at the time of the initial certification are protected. *It is virtually impossible to certify that no United States workers are available except as to large contingents of workers at the time the DOL issues its certification.* The 50% rule is, in a sense, a safety net to protect the jobs of citizens.⁴⁹

The decision was affirmed on appeal, with the Fourth Circuit noting that “to recognize a legal right to use alien workers upon a showing of a business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible.”⁵⁰ Furthermore, the Court explained that DOL had applied the 50% rule or its predecessor to agricultural producers for decades. “This is not a case where a new regulation not yet in effect threatens to bankrupt an industry, but a rule that agricultural businesses have coped with over the past twenty years.”⁵¹ The Court determined that the “rule rationally balances the need for an adequate seasonal labor force with the goal of protecting the wages and conditions of domestic workers similarly employed.”⁵²

DOL argues in the NPRM that:

The obligation to hire additional workers mid-way through a season is disruptive to agricultural operations and makes it difficult for agricultural employers to be certain they will have a steady, stable, properly trained, and fully coordinated workforce. Since the implementation of the current regulation, the Department has collected a significant amount of data that shows that a very low number of U.S. workers apply for the job opportunity within 30 days after the start date of work, and even fewer after that.”⁵³

However, DOL fails to present any evidence of disruption caused by the 50% rule. While there is no requirement that the DOL provide a “steady, stable, properly trained, and fully

⁴⁹ *Va. Agr. Growers Ass'n, Inc. v. Donovan*, 579 F. Supp. 768, 775 (W.D. Va. 1984) (emphasis added).

⁵⁰ *Va. Agr. Growers Ass'n, Inc. v. Donovan*, 756 F.2d 1025, 1029–30 (4th Cir. 1985).

⁵¹ *Id.* at 1031.

⁵² *Id.*

⁵³ 2019 NPRM, 84 Fed. Reg. at 36172.

coordinated workforce,” there is a statutory obligation to protect U.S. workers. The DOL’s alleged balancing act is arbitrary and capricious and biased irrationally towards employers.

DOL goes on to state in the NPRM that “[s]ince the implementation of the current regulation, the Department has collected a significant amount of data that shows that a very low number of U.S. workers apply for the job opportunity within 30 days after the start date of work, and even fewer after that.”⁵⁴

The data collected by the Department assumes that the SWAs are properly implementing the 50% rule. In fact, there are multiple instances in which the SWAs miscalculate the 50% period and improperly shorten the recruitment period. For example, in August of this year, the Department certified an H-2A application from Champlain Orchards of Vermont for 28 apple pickers to work from September 1 through October 31, 2019. However, the clearance order and accompanying ETA-9142A form listed the 50% and expiration date as September 7, a full three weeks too early. Thus, a U.S. worker applying for the job on September 8 would have been informed that the job order was closed and that the 50% period had elapsed even though the work had commenced just a week earlier. There are dozens of other job orders from multiple states certified in 2019 with similar errors. Because of such mishandling of the clearance orders by the SWAs, the figures cited by the Department undoubtedly underreport the number of U.S. workers who would have sought jobs within the 50% period.⁵⁵

2. DOL’s analysis of the 50% rule in the NPRM ignores the realities of the traditional methods that U.S. workers use to learn about and apply for work, as well as certain tactics that H-2A employers utilize to ensure that workers will not apply for the job.

DOL continues the justification of the proposed rule by stating that:

“Based on available data, it appears that the costs of the rule to employers outweigh any benefits the rule may provide to U.S. workers. Replacing the 50 percent rule with a rule requiring employers to hire qualified, eligible U.S. worker applicants for a period of 30 days after the employer’s first date of need will balance the needs of workers and employers. Requiring employers to hire workers 30 days into the contract period, while still disruptive to agricultural operations, shortens the period during which such disruptions may occur and restores some stability to employers that depend on the H-2A program.”⁵⁶

However, this analysis provides no data as to the actual costs to employers and ignores the financial losses, including lost wages, that would occur without the 50% rule for U.S. workers. U.S. workers bear many costs when searching for a job. For example, a U.S. worker who migrates from Florida to New Jersey may incur considerable expenses such as gas or a bus ticket as well as lodging. Therefore, the trip in itself will be time-consuming and costly. With

⁵⁴ *Id.*

⁵⁵ See Exhibit A-6 containing *Champlain Orchards, Inc.*, ETA Case No. H-300-19190-035977, clearance order and ETA Form 9142A.

⁵⁶ 2019 NPRM, 84 Fed. Reg. at 36172.

the current 50% rule, an H-2A employer is obligated to hire a U.S. worker if he shows up for employment prior to the 50% mark of the contract period; however, with this new rule in place, if the worker does not make it within the 30-day period, the worker's expenditures of time and money to travel to the job will have been wasted. In addition, the worker will then have to incur additional expenses of either returning to Florida or traveling to another job location in the hopes of being hired. Since many farmworkers do not find the jobs through the employment service system as mentioned earlier, it can be reasonably expected that workers will continue to incur these kinds of costs even if the 50% rule were to be removed and replaced.

In addition, the removal of the 50% rule will eliminate key job opportunities that U.S. workers currently have. For example, if U.S. workers learn about an H-2A job that pays a much higher wage and provides free transportation and housing if applicable, they can apply for that job instead of settling for a non-H-2A job that may have lower pay and no legal requirement to provide transportation, housing, or other protections such as workers compensation.⁵⁷

This sentiment was set forth by the former National Monitor Advocate:

...I wanted to advise (the ETA) of what is happening out there with unreliable and potentially unscrupulous farm labor contractors. ... we do no service to domestic workers by not referring them on these orders or at least advising them of the full array of job opportunities available to them. *Likewise, we never really find out if the [farm labor contractor] is cognizant of its job responsibilities and law abiding if we make no referrals.*⁵⁸

DOL also ignores the importance and inherent benefits of U.S. workers being hired under H-2A job orders. The presence of U.S. workers, who have the capacity to influence labor practices by voting with their feet and leaving an abusive employer, forces the H-2A employer to compete with other employers. This is a core tenet of the free market system. The presence of U.S. workers normalizes an otherwise artificial H-2A employment site in that U.S. workers are more likely to expose problematic employers.

3. The 50% rule is one of the few means of reducing the risk to workers being displaced due to crop loss.

Growers frequently refer to the uncertainty of agriculture caused by unexpected severe weather conditions. Therefore, growers obtain insurance, seek government financial assistance, or hedge their investments in the market. However, crop failure affects not just growers, but also the workers who have lost their jobs due to the crop loss. By eliminating the 50% rule, the displaced workers will have fewer alternative options and will bear the risk of crop loss without much recourse. For example, Hurricane Irma in 2017 greatly impacted the large farm working state of Florida as well as others in the Southeast. Hurricane Irma knocked millions of dollars' worth of citrus fruit to the ground in Florida. In addition the hurricane force winds plowed down

⁵⁷ Non-H-2A jobs typically do not have a contractual agreement between the employer and the farmworker. In addition, many states are at-will states.

⁵⁸ See Exhibit A-7, Email from Erik Lang, Former National Monitor Advocate, to Dorie Faye, H-2A Coordinator (25 May, 2005).

thousands of acres of sugarcane, decimated the avocado crop, and toppled nursery plants. This damage was estimated to be in the billions.⁵⁹

Hurricane Irma did not only affect farmworkers by causing crop loss and delays in harvesting, many farmworkers in Florida lost their employment and were unable to provide for themselves and their families. The elimination of the 50% rule would greatly impact farmworkers during a natural disaster such as this because it would make it more difficult to find substitute work.

4. U.S. Worker Recruitment will be Negatively Impacted by the Proposed Elimination of the 50% Rule.

In addition, DOL fails to factor in how many farmworkers still obtain work by directly applying at the work site during the beginning days or weeks of the work period. In general, recruitment in agricultural industries in the United States occurs at or near the beginning of the work period and is generally by word of mouth; direct contact from crew leaders, radio, churches, or other employer representatives, including farm labor contractors; and through referrals from the state workforce agencies (SWAs).

Although it may be commonplace for workers in other industries to prepare themselves in advance of a job opportunity, it is not the case with agricultural labor. Job positions for farm working opportunities typically require a farmworker to be able to work immediately as well as have a willingness to travel for a job that often lasts only for a harvesting season. As a result, U.S. workers are more likely to be in need of additional farm work right after a particular job ends in order to continue to have income, as well as housing and transportation to and from work for each harvesting season.

If DOL replaces the 50% rule with the 30-day rule, this will further incentivize growers to place the date of need prematurely, especially in states that have a lot of U.S. migrant farmworkers such as Florida. Over the years, farmworker advocacy organizations have seen that the dates of need for job orders are presented earlier and earlier in order to speed up the 50% mark. This new proposal would be further incentive to keep moving the process forward in order to shut out domestic farmworkers.

In addition, DOL also fails to factor in the very fluid nature of what constitutes the beginning of the work period in agriculture. In areas where migration is typical, crews are called to work in stages. An operation might begin with 2 to 4 crews and then increase at season peak to 15 or 20 crews which are then gradually reduced until the harvest period is over. Workers who have reported for and worked in these jobs for years will be displaced under a program that allows a grower to hire his entire labor supply from outside of the country, and then reject U.S. workers who report to work on the exact date they had begun work the year before, which could be after the 30-day deadline.

⁵⁹ Georgina Gustin, *Hurricane Irma's Overlooked Victims: Migrant Farm Workers Living at the Edge*, *Inside Climate News* (Oct. 17, 2017), <https://insideclimatenews.org/news/16102017/hurricanes-florida-agriculture-migrant-farm-workers-jobs-crop-loss>

Generally, affirmative recruitment obligations are scheduled to take place before the date on which the H-2A workers leave their homes in order to travel to the U.S. for work or at least one week before the stated starting date for work. By the H-2A employer setting a date that is earlier than the actual working start date, the affirmative recruitment can occur months before the actual work will begin. This is an issue because farmworkers traditionally do not plan their employment that far in advance. In addition, employers are supposed to notify U.S. workers who worked for them during the previous year of the new clearance order job. These notices are generally sent out a few weeks prior to the scheduled start date. Therefore, a former U.S. worker who has been employed with the crew in the past will receive a notice regarding employment up to several months before the job is actually supposed to start. In this case, a farmworker, especially if a migrant farmworker, is unlikely to go to the local career services office to apply for a job that far in advance, due to them being out of the recruiting area at the time or currently working, which would require the worker to miss work to apply at the job center.

For example, the south Florida sweet corn harvest normally runs from late March through the end of May. One of the largest H-2A sweet corn employers, McNeill Labor Management, Inc., filed a job order seeking sweet corn workers from March 21 through May 28, 2019. However, another sweet corn employer, A & M Labor Management, Inc. filed a clearance order requesting workers beginning January 10, 2019, with work finishing June 1. As a consequence, the 50% period for A & M Labor Management, Inc. ends on March 22, 2019, before the sweet corn harvest begins in earnest. This tactic is likely to detrimentally impact A & M Labor Management's recruitment of domestic workers.

Farmworker advocates encounter persistent and pervasive violation of the 50% rule. As discussed previously, many employers actively discourage workers from applying. Workers may face obstacles in finding out how to apply for a job, whether they have a right to a job, or whether they meet the qualifications for a job. Preserving the 50% rule gives domestic workers an opportunity to overcome these obstacles and connect with a job. Changing this protection to 30 days could make that task virtually impossible.

These cases demonstrate how the 50% rule protects U.S. workers from the inefficiencies of the job service recruiting system as well as employers' desire to avoid their responsibility to hire U.S. workers. DOL has provided no evidence to suggest that the rule change will decrease the likelihood that U.S. workers are displaced by H-2A workers. To the contrary, there is every reason to believe that this regulatory change will insulate growers who engage in recruitment practices that favor H-2A workers.

Farmworker advocacy organizations and legal services organizations are not the only groups that have noticed the continued issue of U.S. farmworker experiencing discrimination and displacement. The Department of Justice ("DOJ") issued a release on June 11, 2019 noting that the DOJ settled a claim against a Florida strawberry farm for discriminating against U.S. Workers. They went on to note that this was the 7th settlement made by the Civil Rights Division of the DOJ. In the release the DOJ noted that:

Under the Protecting U.S. Workers Initiative, the Civil Rights Division has opened dozens of investigations, filed one lawsuit, and reached settlement agreements with seven employers. Since the Initiative's inception, employers have agreed to pay or have distributed a combined total of more than \$1.1 million in back pay to affected U.S. workers and civil penalties to the United States. The Division has also increased its collaboration with other federal agencies to combat discrimination and abuse by employers using temporary visa workers.⁶⁰

Therefore, the elimination of the 50% rule results in the elimination of any meaningful job opportunities for U.S. workers seeking employment with H-2A employers. Without the 50% rule, H-2A employers would not be required to hire qualified U.S. workers resulting in thousands of U.S. workers being unemployed or underemployed.

The DOL's reasoning for the change demonstrates a determination to remove the 50% rule from the H-2A regulations that is based on a biased analysis. The proposed 30 day rule contravenes the statute, has no rational basis and is an arbitrary and capricious change after over thirty years with the 50% rule as the law of the land.

D. The Proposal to Allow Staggered Entry within a 120-day Period will Violate the Statutory Mandate to Ensure Adequate Recruitment of U.S workers.

1. The proposed staggered entry rule would violate the H-2A statute because it would make it impossible for the DOL or SWAs to do the labor test necessary to see whether there are available U.S. workers.

The H-2A statute requires an assessment of the labor market. Key information as to dates, locations and numbers of workers are critical for that determination. For example, if the employer states that its original start date is June 1, 2019, the agencies take steps to do the analysis as to whether and how many U.S. workers are qualified and available. Under the proposed regulations, the employer could invoke the ability to do a staggered start with a post-certification amendment stating that it actually needs this different number of workers at a different date at a different location. The original determination of the labor market was completely useless and invalid. An adequate labor market determination requires a fixed start date, fixed location and fixed number of workers.

In the proposed rule DOL states that:

any employer that receives a temporary agricultural labor certification and an approved H-2A Petition may bring nonimmigrant workers into the United States at any time up to 120 days after the first date of need identified on the certified Application for Temporary Employment Certification without filing another H-2A Petition. If an employer chooses

⁶⁰ Office of Pub. Affairs, Dep't of Justice, *Justice Department Settles Claim Against Florida Strawberry Farm for Discriminating Against U.S. Workers* (June 11, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-claim-against-florida-strawberry-farm-discriminating-against-us>.

to stagger the entry of its workers, it must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified Application for Temporary Employment Certification, whichever is longer.⁶¹

First, allowing a staggered start will further encourage employers to establish an early start date to thwart recruitment of U.S. workers, as discussed above. Second, although the proposed regulations state that employers must accept and hire qualified U.S. workers who apply for the job through the latest date of the staggering period or the first 30 days, whichever is longer, this does not account for the fact that the U.S. worker may not know or understand this complicated process. As referenced above, farmworkers generally learn about a job by word of mouth; direct contact from crew leaders, radio, churches, or other employer representatives, including farm labor contractors; and through referrals from SWAs. As the clearance orders are currently set up, it is clear when the 50% rule should be set to expire, although, as noted above, even this straightforward requirement has been stated in error on multiple orders. However, there will be no such clarity if the 30-day rule and staggered entry are implemented. How will a domestic worker know whether they are still eligible to apply?

For instance, Florida is a primary source of migrant workers throughout the eastern United States. Therefore, as Floridian migrant farmworkers travel, they often learn about jobs through word of mouth as well as their relationships with other farmworkers, friends, labor contractors and crew leaders. With this proposed complex system, it is very unlikely that U.S. farmworkers will learn of H-2A job opportunities in advance of the date of need. In addition, it is also unlikely that they will understand the staggered entry system or be informed of a 30-day restart by H-2A employers.

2. The proposed system incentivizes H-2A employers to not continue to positively recruit U.S. workers.

Generally, under the current system, employers are more likely to hire U.S. workers for the gradual start of the season. Allowing them to bring in workers through a staggered start will remove this advantage. The removal of the 50% rule and the implementation of the staggered entry system will foreclose many job opportunities, which is contrary to the congressional policy of giving preference to U.S. workers.

Under the current program requirements, H-2A employers would have to send a separate application if they decided to bring in more H-2A workers during a particular harvesting season. This is an important safeguard for U.S. workers.

Requiring H-2A employers to submit a separate application if they need to bring in additional guest workers allows U.S. workers who may be coming back from being on the migrant stream or finishing up another job to be aware and able to apply for that specific job. In addition, this provision protects U.S. workers who may have missed the boat in regards to

⁶¹ 2019 NPRM, 84 Fed. Reg. at 36172.

applying under the first job order if the employer set an incorrect starting date as discussed above.

Moreover, for employers who decide to stagger the entry of their workers, there will essentially be no recruitment obligations past the last date of staggered entry, not even a 30-day rule, as the obligation to hire U.S. workers would end on the last date of the staggered entry. Under the current regulations, the 50% protection would apply to the new date under any separate application. Thus, not only does staggered entry create confusion about possible job opportunities and limit employer incentives to recruit U.S. workers, it would also eliminate any recruitment preference for U.S. workers after the date of need.

The agricultural industry can be quite volatile (i.e. natural disasters, industry changes) and therefore can leave U.S. farmworkers scrambling to find needed employment in order to continue to provide for themselves and their families. By allowing a system where H-2A employers can stagger the entry of H-2A workers without having to submit a new application altogether, the DOL is creating yet another obstacle for U.S. workers to obtain employment.

3. The staggered entry system will allow employers to hold workers to increasingly difficult productivity standards.

The proposed regulation would make it easy for the employer to fire workers (both domestic and H-2A workers) who are not working at the desired productivity levels and keep bringing in new H-2A workers through the 120 day period. The staggered entry system would illegally allow employers to fire those workers who may not be working as fast as other workers but who are qualified. Employers should have a training period to allow workers to learn the job. The regulations should be revised to require a minimum training period in which workers may not be fired for failing to comply with productivity standards.

4. The staggered entry system, by itself and in conjunction with other proposed changes to recruitment requirements, will make the job application process more complex and uncertain for U.S. workers.

DOL has also unlawfully failed to account for the potential cumulative effect of the proposed regulations on statutorily mandated U.S. worker recruitment and hiring. Each of the following proposed changes will negatively impact the recruitment of U.S. workers: eliminating the 50% rule, allowing staggered starts, redefining the date of need to allow a 14-day window, reducing the role of the SWA, revising the wage requirements, and permitting pre-filing recruitment reports and post-certification amendments. The NPRM frames these changes as efforts to simplify the program, but for prospective U.S. workers they will create significant obstacles to the ability of U.S. workers to learn about and apply for H-2A jobs. The cumulative impact of these changes will result in making the system more confusing, the terms and conditions of work less compliant with standards and less transparent, and the start dates less connected with how U.S. workers find jobs. Together, these changes will make H-2A employers' ability to discriminate against U.S. workers essentially unlimited.

E. The Proposed Regulation Allowing Pre-Filing Recruitment Would Have Negative Effects on U.S. Worker Recruitment

We oppose permitting pre-filing recruitment. Allowing pre-filing recruitment would not only be inconsistent with the traditional recruitment and hiring practices for agricultural work, it would be detrimental to it.

Agricultural labor recruitment is distinct in that many of the modernized methods of soliciting workers are not efficient practices for recruiting farmworkers. Many agricultural workers are migrant or seasonal workers that are moving frequently and cyclically in accordance with the particular seasons of the crops that they work. They often do not own homes or have consistent access to the internet in the places they live temporarily for work. For this reason, systems have been created over time to facilitate recruitment of this roving workforce. U.S. farmworkers have developed long-term relationships with growers and possess a wealth of knowledge about how to track and time when work will be available in which locations. Farmworkers do not simply rely on job posts to decide to move to a new location to obtain work, they will move to a location where they predict work will be available and find the work.

Under the proposed change, an employer could file a pre-filing recruitment report within 50 calendar days before the date of need. Any sort of efficient recruitment of U.S. workers simply could not be done this early. Not only does early recruitment create confusion in the labor force, it ultimately discourages the interest of the U.S. workers that the recruitment is designed to attract. For example, take a migrant farmworker who has worked the strawberry season for one employer and the blueberry season for a different employer for years and years. He usually just shows up at both sites and begins working, he doesn't fill out an application or make any other contact before the start of the season. What if this worker sees an advertisement for the blueberry work position a month and a half before the season usually begins? The strawberry season isn't over yet, so the worker doesn't think he can apply for this new position. When the strawberry season is over, the worker assumes that it is probably too late to apply for the blueberry position because it was posted so far in advance. This risk of confusion could lead to many U.S. workers not seeking the jobs they would have otherwise.

A significant amount of labor recruitment for agricultural work is still done through direct contact with the employer or employer's representatives rather than remote recruitment. Given the migration patterns of agricultural workers, it is very unlikely that the majority of a normal workforce for a crop will be located closely enough for this type of recruitment before the start of a season. It is a waste of employer resources, not to mention ineffective, to start disseminating information about available work if the intended audience is not around to hear it. To effectively recruit U.S. workers, these traditional systems of recruitment already in place should be taken advantage of, not destroyed.

Pre-filing recruitment will not result in greater U.S. worker recruitment, rather, it is an attempt to arbitrarily change the traditional methods of recruitment. Allowing pre-filing recruitment creates a myriad of efficiency and accountability issues in an already flawed system of recruitment while providing few or no advantages to actual U.S. worker recruitment. The current regulations state that the employer's recruitment report must be submitted on a date

specified by the CO in the Notice of Acceptance.⁶² The proposed changes to 20 C.F.R. § 655.123 will allow for an employer who engages in pre-filing positive recruitment to submit a pre-filing recruitment report at the time that it submits the Application for Temporary Employment Certification. Employers will be able to file this report within 50 calendar days before the date of need. This change to earlier recruitment and reporting will empower agricultural employers to shirk their ongoing responsibility to actively recruit U.S. workers.

As the present regulations mandate, the written recruitment report must contain specific detailed information. This report must identify all recruitment sources; identify all U.S. workers referred and the results of the referral; confirm that all former U.S. worker employees have been contacted and identify by which means; and state the lawful, job-related reason for which any U.S. workers were not hired.⁶³ Given the traditional recruitment practices for agricultural labor, it is an incredibly unrealistic notion that an employer would have sufficient information or even close to sufficient information to provide any sort of helpful reporting at such an early stage in the recruitment process. Any streamlining that pre-filing recruitment may appear to create is greatly overshadowed by the additional enforcement and processing issues that this it will generate.

Many U.S. workers have consistently obtained work from directly visiting the labor site at, or soon after, the beginning of a particular season. None of the start of season data would make it into the initial pre-filing recruitment report. Further, due to the migration patterns of many farmworkers, it is unlikely that any early recruitment efforts would reach the intended audience. Thus, if the pre-filing recruitment report will not contain any complete useful data what purpose does it serve? Perhaps it is intended as a method for employers to comply with their bureaucratic obligations sooner in the season. This is not rationally related to the statutory mandate to recruit and hire U.S. workers.

Pre-filing recruitment creates a greater likelihood that employers will not submit timely and accurate reporting information to the DOL. In the current scheme, an employer must at least submit the recruitment report by the date specified in the Notice of Acceptance. In the proposed scheme, this initial reporting obligation can be met at a much earlier stage. There would no longer be any mechanism in place to hold employers accountable at the most critical stage of recruitment, the window of time just before and after a season begins. Employers could simply report their pre-filing recruitment and then, until the employer submits the complete final report for the season, DOL would not have any particular knowledge of what was happening in the recruitment processes. This does not leave any opportunity to correct any issues or ensure that recruitment processes are being correctly administered before a job order ends. Alternatively, this would at minimum create a need for additional systems of enforcement or monitoring to ensure that these issues are addressed. Implementing these types of systems would certainly not streamline any processes, but would take additional time and resources.

Finally, another troubling aspect of this proposal is that it is unclear as to what, if any, advantages there are to allowing pre-filing recruitment. This change is proposed without any documentation or evidentiary support for the necessity of change. Nor does the proposal indicate

⁶² 20 C.F.R. § 655.143(b)(3).

⁶³ *Id.* § 655.156(a).

how pre-filing will support more productive recruitment of domestic workers. It is nonsensical to risk the potential burdens that pre-filing recruitment creates when there is no clear objective need to change the current regulation scheme.

F. Ensuring that Job Order Content Is Accurate and Contains Legally Compliant Terms and Conditions of Employment Is Critical to U.S. Worker Recruitment. The Proposed Regulations Do Not Adequately Address This Issue.

Workers choose jobs based upon job terms. They want to know not just how much they are going to get paid but what the job involves, what qualifications they need for the job, where the job is located, and other key terms. The job order is what sets out the terms and conditions of each employment opportunity for workers. Some employers have used the job order to discourage U.S. workers by including job terms that are not desirable. Sometimes, these include terms that do not accurately reflect what the job involves. Sometimes employers include terms that are not “bona fide,” are not “normally and accepted” and are not “prevailing practices” in the industry in the intended area of employment. While these kinds of terms are illegal, they often occur because the system does not function correctly – for example, the SWA does not review the job order adequately, or the employer files an emergency application to get around a SWA’s NOD. Getting the language of the job order right is also essential in protecting U.S. workers, who may be rejected for not being qualified, and who are not considered “available” merely by insisting on job terms in excess of those required by the regulations.⁶⁴

The “job offer” is defined in the regulations as “[t]he offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.”⁶⁵ The job offer “must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.”⁶⁶ Further, it may “not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer’s H-2A workers.”⁶⁷ The job order is in essence the job offer describing the terms and conditions of the job.⁶⁸

The H-2A regulations provide that each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements of non-H-2A employers in the same or comparable occupations and crops.⁶⁹ The statute allows employers to include in their job offers only those normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations or crops in the same area.⁷⁰ The employer bears the burden of demonstrating that they are not offering job terms which create an adverse effect to the wages and working conditions of U.S. workers such

⁶⁴ *Hernandez-Flecha v. Quiroz*, 567 F.2d 1154 (1st Cir 1977).

⁶⁵ 20 C.F.R. § 655.103(b).

⁶⁶ *Id.* § 655.122(a).

⁶⁷ *Id.*

⁶⁸ *Bernett v. Hepburn Orchards, Inc.*, No. JH-84-991, 1987 WL 16939, at *2 (D. Md. Apr. 14, 1987).

⁶⁹ 20 C.F.R. § 655.122(b).

⁷⁰ 8 U.S.C. § 1188(c)(3).

that they deter U.S. workers from applying for, accepting, or remaining at employment with H-2A workers.⁷¹ The DOL's oversight of this process is essential to ensuring that the bona fide occupational qualifications make sense within industry standards.⁷²

The proposed regulations should seek to support the statutory and regulatory mandates to protect US workers and prevent an adverse effect. Instead, the proposed regulations fail to address some of the areas in which job orders often include terms and conditions that are less than prevailing practice. These include, among others, the level of experience required, lifting requirements, productivity quotas, required drug testing and whether crew leaders are used to bring workers.

1. H-2A Employers Have Introduced Ever Increasing Job Qualifications That Are Used by Employers to Deny Employment to U.S. Worker Applicants and to Allow Preference for Foreign Workers by Rendering U.S. Worker Applicants "Unqualified."

This increase in job qualification requirements is most strikingly seen in the evolution of the experience requirement--for example--from no experience, to a three month experience requirements, to three month experience requirements that must be verified and affirmative.⁷³ These requirements discourage US workers from even applying and have been used to deny jobs to US workers. The current proposed regulations do nothing to address this increase in job qualifications over time and fail to require any showing by employers seeking new job qualifications as to how these standards will be used to similarly screen foreign labor.

A review of H-2A job orders from years ago illustrates the concern that current job orders often impose more job qualifications than were previously required for the same job duties. For example, the North Carolina employer Buds and Blooms Nursery went from filing orders with zero previous experience required to orders in 2018 that required three months experience and mentioned dropping off resumes. The current interpretation of normal and accepted, combined with the ability of employers to meet their burden by relying on flimsy support, has resulted in harmful administrative law judgments, such as the following:

Southwest Agricultural, No. 2011-TLC-00337 (Dep't of Labor ALJ Apr. 5, 2011): Employer required one reference for H-2A workers, while two references were required in newspaper ads for U.S. workers. The ALJ didn't question whether references were normal and accepted in finding that the language was unacceptable because the terms offered to U.S. workers were less favorable than those offered to the H-2A workers. Tacitly, the ALJ accepted the right to demand references, so long as they are not discriminatorily applied. Where there was no showing that farmworkers generally provide references in non-H-2A positions, the ability to

⁷¹ 8 U.S.C. § 1188(a).

⁷² See, e.g., *Bernett*, 1987 WL 16939, at *4.

⁷³ See *In re Guadalupe San Miguel Farms*, No. 2006-TLC-8 (Dep't of Labor ALJ May 25, 2006) (employer improperly rejected U.S. worker applicants for lack of experience when no experience requirement was included in job order); *In re Strathmeyer Forests, Inc.*, No. 1999-TLC-6 (Dep't of Labor ALJ Aug. 30, 1999) (in the absence of a reliable prevailing practices survey, the Dictionary of Occupational Titles provides a basis for imposing a requirement of up to three months prior experience for an entry level position).

find an uncommon exception should not open the door for employers to demand this pretext for excluding U.S. workers.

Similarly, some ALJ cases raise the concern of harmful job terms not being struck where US workers are sufficiently dissuaded from even applying. In *Mt. Clifton Fruit Company*, 2012-TLC-00081 (Dep't of Labor ALJ Aug. 14, 2012), an employer got an ALJ to vacate Notice of Deficiency where H-2A employer required job applicants to furnish verifiable "affirmative" (i.e. positive) references. The DOL argued that the reference requirement would allow the employer to unlawfully reject an otherwise qualified U.S. worker who received a neutral reference. No final determination was made on the question of where references could be required to be affirmative due to lack of actual case or controversy where no actual U.S. worker had been denied. This case demonstrates the inability to bring to review the terms which are most successful in dissuading US workers.

There is a significant practical difference between an experience requirement and a requirement that the experience be verified. It is the difference between an applicant being asked whether he has prior experience in a crop and requiring that the applicant provide the name and contact information of prior employers. The use of the term "affirmative" invites untested production requirements, as employers may rely on it not just to verify that the applicant had completed three months of work in a crop, but further that the prior employer was satisfied. The test used by that former employer to make that subjective opinion is unknown and untested, and may constitute a production requirement that would be rejected if actually tested by the SWA.

An historic case illustrates the decreased tolerance for US workers seeking work under job orders.⁷⁴ In this case, a prior employer informed the prospective employer that the US workers had a history of absenteeism due to alcohol abuse in past years. The ALJ found that the employer failed to substantiate the allegation with evidence that the production of the US worker applicants was impacted by the allegation of their poor character, and, further, that even if they did suffer from alcohol abuse, that that would be insufficient to overcome the obligation to hire U.S. workers.

The Preamble should clarify the purpose in adding the words "at a minimum" to subsection 655.122(q), which creates uncertainty and could be interpreted as allowing job terms not reviewed and approved by the SWA or NPC. "In the absence of a separate, written work contract entered into between the employer and the worker, the work contract will be, *at a minimum*, the terms of the job order and any obligations required under the H-2A statute and regulations."⁷⁵

Further, US workers have not been permitted to intervene in a proceeding with the ability to present evidence that could be determinative in whether to accept the employer's application

⁷⁴ *In re Matter of the Alleged Refusal of Hearty-Virginia, Inc. to Hire Carlton Carter Et Al.* (1987); See Exhibit A-19.

⁷⁵ 2019 NPRM, 84 Fed. Reg. at 36271 (proposed subsection 655.122(q), with proposed edit).

for certification.⁷⁶ The individuals who would be most impacted by the decision, the U.S. workers, should be able to effectively participate.

Acceptance of uncommon job terms has allowed the job qualification creep seen in job orders over the past two decades. We ask that “normal and accepted” be defined the same as “prevailing practice.”

2. Illegal Productivity Standards Should Not Be Approved in Job Orders.

Moreover, SWAs and DOL often approve job orders with illegal productivity standards. The regulations limit the ability of employers to offset increases in the requisite wage rate by insisting that workers increase productivity. Thus, an employer may impose production standards no greater than those imposed by non-H2A employers during the first year in which the H-2A employer sought certification. *See* 20 C.F.R. §655.122(1)(2)(iii).

As a result, current (and proposed) regulations do not allow an employer to increase its production standards, unless approved by the Office of Foreign Labor Certification (OFLC) Administrator. This is particularly important when employers tie the production standards to changing rates, such as the state minimum wage or the adverse effect wage rate. As use of the H-2A program proliferates around the country; so, too, does the number of employers who compensate workers on a piece-rate basis. But, of course, even though many employers compensate based on a piece-rate basis, workers are guaranteed wages at least equal to the adverse effect wage rate in accordance with 20 C.F.R. §655.122(1)(2).

As federal courts first observed three decades ago with respect to the current regulation’s predecessor: “This provision clearly aims at preventing growers from raising productivity rates rather than piece rates whenever the [AEWR] increases.”⁷⁷ Until around a decade ago, many employers did not impose productivity standards on pickers.⁷⁸ But that is no longer true, as the inclusion of productivity standards by long-time H-2A employers is now commonplace. Even though commonplace, however, one theme resonates: The sudden inclusion of productivity standards in clearance orders by long-time H-2A employers runs afoul of the applicable regulations.

Specifically, the regulations at 20 C.F.R. § 655.122(1)(2)(iii) bar employers from adding or increasing productivity requirements following their entry into the H-2 program:

If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must . . . be no more than those normally required (at the time of the first Application for Temporary Employment Certification) by other employers for the activity in the intended area of employment.

⁷⁶ *See In re Global Horizons*, No. 2005-TLC-00003 (Dep’t of Labor ALJ Feb. 25, 2005).

⁷⁷ *See NAACP v. Donovan*, 558 F. Supp. 218, 222 (D.D.C. 1982).

⁷⁸ *See* Exhibit A-8 containing a Letter from Florida Legal Services, Inc. to William Carlson, OFLC-ETA (Sept. 24, 2014) (discussing the insert of productivity standards in Florida clearance orders post-2008).

Put simply: Employers who entered the H-2A program without a production standard in the first certification order they were granted cannot later be permitted to unilaterally impose a production standard. However, advocates continue to see production standards erroneously approved in H-2A orders. Federal and state agencies, as a result, are not comporting with long-standing federal law when they approve such orders.

To further compound the issue, these problems are not limited to longtime H-2A employers. In general, when included, productivity requirements have steadily crept upwards. Across the country, the trend is universal (whether it be large or small employers, new or long-time employers, and otherwise): ever-increasing production standards that are (often) approved by agencies, contrary to law.

As a result, SWAs and DOL should require employers to assure and certify that any productivity standards comply with applicable local prevailing practices and regulations. Too many clearance orders include spurious productivity requirements. DOL must further take into consideration a distinct reality: H-2A workers rarely complain. Even if workers are familiar with complicated rules regarding legality of productivity standards under federal law, workers are reticent to complain about such illegalities. Why? To keep their employment and return in the following season, H-2A workers must hope that their employer requests a new visa for them. Consequently, H-2A workers rarely complain about their treatment, including unilaterally and illegally imposed production standards. This in turn impacts U.S. workers, who often are unwelcome at H-2A employers because they have the freedom to switch jobs and are more likely to challenge unfair or illegal conduct, including illegal or inhumane production standards.

In the main, when law-abiding, competitive employers are increasing piece rates to improve productivity and worker earnings, those employers should not be undercut by H-2A employers who would be permitted to utilize illegal production standards and further stagnate wage rates.

3. The SWA's role in assessing prevailing practices must be strengthened.

Proposed revisions to 20 C.F.R. § 653.501(c) eliminate the designated role that the SWAs have in working with employers to make sure that the job orders actually reflect local practices.

The current regulations allow for an active role by the SWA providing that:

(2) SWAs must ensure:

(i) The wages and working conditions offered *are not less than the prevailing wages and working conditions* among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher....⁷⁹

This provision, although not always adhered to, allows the SWA to independently review and enforce the prevailing wages and working conditions in the area of intended employment and make sure that those prevailing conditions are not undercut by what is being offered to H-2A

⁷⁹ 20 C.F.R. § 653.501(c)(2)(i) (emphasis added).

workers and corresponding employees. This is critically important in states like California, where the crop, the agricultural activity and the geographic location each factor into the local wages and practices, which differ significantly from federal law and vary from region to region depending on market practices. Proposed Regulation 653.501(c)(2)(i) provides only that the SWA must ensure that:

(i) The wages and working conditions offered are not less than the prevailing wages, *as defined in § 655.103(b)*, and prevailing working conditions among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. Proposed 653.501(c)(2)(i), 84 F.R. 36250, italics added.

As further discussed in section III on Wages, *infra*, elimination of the SWAs' independent ability to determine a prevailing wage will have the likely effect of driving down wages, particularly in areas like California, the Cornbelt and parts of the mountain region where use of H-2A workers is on the rise, but there is still a significant representation of domestic workers in the agricultural workforce.⁸⁰ This would create an incentive to post the job order as an H-2A order, irrespective of local market conditions, and adversely affect U.S. workers in the short and long term.

In addition to prevailing wages, as described above, the SWAs are obligated to ensure whether a submitted job order contains terms or conditions of work that are not less than prevailing practices. As detailed above, this analysis is critical not only to encourage U.S. worker recruitment but also to ensure that the employment of H-2A employees does not cause a worsening of terms and conditions for U.S. workers in the industry.

ETA Handbook 398 outlines the different ways that prevailing practices may be determined. One way is for the SWA to conduct a survey. Unfortunately, it is difficult for SWAs to obtain adequate results because often employers refuse to participate in the surveys or do not provide correct or complete information in response to the surveys. Most SWAs do not have the resources necessary to directly pursue responses from employers through telephone calls or in-person visits to farms. If the DOL determines that the survey results are inadequate, they will make their own determinations, however, there is no methodology that DOL is required to follow under these circumstances. Given that the CO is almost never local, it is highly likely that whatever information DOL has is based on contact with employers, not workers. These actions do not comply with current regulations which vest the SWA with the responsibility for determining prevailing wages and practices or with the ETA Handbook 398 which directs the SWAs to determine prevailing practices using information from other sources if the survey results are not sufficient. The SWAs are in the best position to determine most accurately prevailing practices based upon the agricultural industry, area of intended employment and job position. This role should be preserved, not diminished.

⁸⁰Wages in various states in the Cornbelt and the Mountain states, as well as in California and Oregon, would actually decrease under the proposed methodology for determining the AEWR for "Farmworkers and Laborers, Crop, Nursery and Greenhouse" (45-2092) and "Packers and Packers" (53-7064). See 2019 NPRM, Appendix A, Tables I and II, 84 Fed. Reg. at 36249–51.

4. DOL Must Strengthen the Protections Regarding Productivity Standards

As productivity demands get more and more challenging without a real pay increase, U.S. workers are less likely to accept the jobs that desperate guest workers will reluctantly accept. As discussed earlier, H-2A employers in unguarded moments have admitted that H-2A workers will work without challenging their conditions and are, therefore, favored over U.S. citizens and permanent resident immigrants. Moreover, H-2A employers often favor young workers, and set productivity standards to support hiring their preferred demographic at the expense of other workers. By the time the foreign workers' human endurance has been reached, the growers have eliminated U.S. workers from the applicant pool.

Consider a Virginia employer in 2018 where workers are paid a piece rate of \$4.80 for picking a tub of grape tomatoes, the work day is 8 hours, and the AEWR is \$11.46 per hour (amounting to \$91.68 per day). The harvester must pick at least 19.1 tubs per day to earn the minimum (\$91.68). When wages in agriculture increase, for instance, and the AEWR for the same employer increases to \$12.32 per hour (or \$98.56 per day), but the employer's piece rate remains the same (\$4.80 per tub), then workers must pick at least 20.53 tubs per day to earn the minimum. In this example, the worker did not receive a real pay raise; he was forced to increase his productivity by about one tub a day (7%), and now runs the risk of being fired for not picking fast enough to earn the minimum hourly wage. Meanwhile, because the employer is still paying the same per tub it always paid, it has avoided any increase in its wage rates or its payroll. In fact, the faster-than-average workers got no pay increase and would need to worry about picking even faster to avoid being fired for not earning at least the new, higher minimum wage.

DOL now has years of experience with such irrational, backward, and inappropriate piece-rate systems. The agency should adopt the requirement it had until mid-1987 mandating that as the adverse effect wage rate (which is an hourly rate) increases, employers must increase their piece rates proportionally.

The former provisions stated at 20 C.F.R. §§ 655.202(b)(9)(ii) and 655.207(c) (1987), respectively:

If the worker will be paid on a piece rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the piece rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the workers' pay will be supplemented . . .

In any year in which the applicable adverse effect rate increases to the point where the employer's previous year's piece rate in a crop activity will not enable the average U.S. worker's hourly earnings to equal or exceed the new applicable adverse effect rate without requiring the average U.S. worker to increase productivity over the previous year, the employer shall increase the piece rate to a level at which the average U.S. worker would earn at least the adverse effect wage rate.

These provisions, adopted in 1978,⁸¹ revised earlier provisions under the Bracero and H-2 programs that required employers to adjust piece rates as AEWs changed so that they were “designed to yield” earnings that would avoid stagnation and adverse effect. These provisions, DOL recognized, responded to the concern that employers would increase productivity demands in a piece-rate-paid occupation rather than provide wage increases required by law. With its long history on this topic, DOL now has the evidence to know that guestworker programs in agriculture require such protections.

In short, DOL should (a) adopt the 1978 provisions cited above, and (b) more generally, investigate virtually every piece rate system, including but not limited to its relationship with productivity standards, and massively increase its enforcement to remedy and deter such abuses.

5. Use of crew leaders as a prevailing practice

Many agricultural employers and employees rely heavily upon crew leaders as intermediaries. Crew leaders can often speak the language of both the employer and the employees, and they fill a variety of informal roles: such as advocating for workers, informing workers of the job availability, and organizing carpools with workers. Crew leaders are not farm labor contractors who recruit, supervise, and pay workers; instead, they are leaders from among the group of workers themselves. Though their role is informal, it is also vital. Crew leaders—who are not acting as farm labor contractors, but are the connection between job opportunities and workers—are how many farmworkers learn of jobs. Farmworkers with minimal education and ability to read and write are not going through the formal systems, and often may speak indigenous languages and have minimal language ability even in Spanish. The rural settings and lack of public transportation add to the difficulty for domestic workers to identify jobs without the connection to their crew leaders. The use of these networkers has increased not decreased. The vast majority of fresh fruit and vegetable producers send word about coming back the following season through their crew leaders. This is a widespread practice in Oregon and other states that produce fresh fruit and vegetables.

Many employers whose farms are in remote areas—or who supply labor to farms in remote areas—could not get a domestic labor force without crew leaders. Yet many employers state in their applications for H-2A workers that the use of crew leaders is not the prevailing practice in their industry and area. Allowing an employer whose industry and area requires the use of crew leaders in order to supply a domestic labor force to declare that the use of crew leaders is not standard practice, and then cease to recruit domestic workers through crew leaders, hamstring the SWA's efforts to protect and recruit domestic workers. Workers who are used to hearing about job opportunities from their crew leaders will not know to reach out to the SWA to learn about and apply for agricultural employment. Furthermore, even if workers do successfully apply for jobs through the SWA, without a crew leader to assist with carpooling, they often have no way to get to work. The farms are not so far from these workers that they must be away from their homes overnight and therefore qualify to stay in the farm labor housing where they would be transported every day to the farms -- but neither are they close enough for most domestic

⁸¹ 43 Fed Reg. 10306, 10308–09 (Mar. 10, 1978).

workers to be able to walk to, and farms are generally in remote areas without public transportation. Therefore employers' change in practices from utilizing crew leaders to no longer utilizing crew leaders once they begin recruiting H-2A workers makes jobs for which domestic workers would otherwise be qualified for unattainable.

Thus, the regulations must support the SWA's ability to rigorously review job orders in regards to use of crew leaders and labor contractors and require employers to comply with prevailing practices. SWAs must play the key role in facilitating the determination of these prevailing practices.

6. Other types of job order terms that do not reflect the prevailing practice should not be approved.

In addition to the terms already discussed, criminal background checks, drug testing and education requirements can all be used to discourage domestic workers from applying for and/or being hired for jobs. Some employers will list requirements such as 3 months experience, a clean criminal record, or a high school diploma or equivalent, as requirements for agricultural jobs and turn away domestic workers who do not meet the standards. At the same time, these same companies recruit H-2A workers without even asking about this criteria.

We recommend that the SWA not accept any job order and the OFLC not certify any H-2A applications that do not list use of crew leaders as a prevailing practice, that do list quotas or productivity standards, or that do list experience requirements, background checks, or educational requirements unless there is sufficient data, either through a survey or other adequate means of determining prevailing practice, to determine whether or not these requirements are, in fact, the prevailing practices of non-H-2A employers in the industry and area. The SWA must maintain its role in these determinations because they have access to the information about local industry dynamics and conditions and the practices of non-H-2A employers.

7. The Role of the SWA in Identifying Unlawful Job Terms and Protecting U.S. Workers Must Be Strengthened

The proposed regulations at 20 C.F.R. § 655.121(a)(1) elevate the role of the NPC by having the employer first submit the order to it rather than the SWA, to then be placed by the SWA in intrastate clearance. The SWA has greater knowledge than the NPC of actual labor need, crop needs, and local practice and is more likely to see obviously flawed or fraudulent orders. The introduction to the proposed regulations states that the reason for increasing the NPC's role is to assure "greater accuracy and consistency,"⁸² where consistency should not necessarily be the goal. Job terms are reviewed based on the standards of the area of employment,⁸³ and standards may vary between regions. The Preamble further states that the SWAs can focus their resources on recruiting U.S. workers and on timely inspections.⁸⁴ While these duties are also vital, the SWA has also been an instrumental guard against unlawful job terms.

⁸² 2019 NPRM, 84 Fed. Reg. at 36191.

⁸³ 8 U.S.C. § 1188(c)(3).

⁸⁴ 2019 NPRM, 84 Fed. Reg. at 36191.

Below are some examples of unlawful language that has been struck by a SWA:

Examples of types of illegal job terms used by employers	SWAs' role in determining non-compliance
Work that is not temporary or seasonal	<p>Numerous ALJ decisions support SWA findings that the job order involved work that was not temporary or seasonal. Examples: Stockman Farm, 2010TLC00002, (DOL, 10/23/2009); Carter Ahlers, 2015TLC00048, (DOL, 05/12/15); Rodriguez Produce, 2016TLC00013, (DOL, 02/04/16); Rainbrook Farms, 2017TLC00013, (DOL, 03/21/17)</p>
Work that is not agricultural	<p>Numerous ALJ decisions support SWA findings that the job order involved work that was not agricultural. Examples: In re Domaine Drouhin Oregon, 2004 TLC 00008, (DOL, 06/07/04; Halter Winery, 2017TLC00022, (DOL, 08/04/17)</p>
Waiver of tenancy rights/restrictions on visitors	<p>Job Order improperly contained language stating:</p> <p><i>... No tenancy in such housing is created.</i></p> <p>The H-2A program should not be used as a vehicle for undermining or negating state law protections, such as tenancy. This creates an adverse effect.</p> <p>North Carolina Growers' Association orders contain language that purported to waive rights under North Carolina law until the NC SWA ordered it removed. When another employer attempted this in 2015, the NC SWA ordered the language removed.⁸⁵</p>
Production Standards	<p>Job Order improperly contained language stating:</p> <p><i>Employees working under the piece rate system will be required to average not less than the State and Federal minimum wage at the end of the first work week."</i></p> <p>Employers have attempted to add language such as above to undermine the right to the highest of AEW, the prevailing hourly wage, or the Federal or State minimum wage.</p> <p>Andrew Jackson 2013 orders included this provision until the NC SWA had the language removed.⁸⁶</p>
	<p>Job Order improperly contained language stating: <i>operations must meet standards contained in the employer's contract with the buyer</i></p> <p>This language relies on an unknown and untested production standard. The NC SWA had it removed.</p>
Grievance and Arbitration Provisions	<p>Job Order improperly contained language stating:</p> <p><i>[e]mployees must agree to use the employer's grievance and arbitration procedure as an alternative to filing suit in local, state or federal court as a condition of employment.</i></p>

⁸⁵ See Exhibit A-9.

⁸⁶ See Exhibit A-10; See Exhibit A-11.

	<p>ALJ Decisions finding that Arbitration Clauses are invalid “job requirements” because they are not “normal and accepted” among non-H-2A employers:</p> <ol style="list-style-type: none"> 1. Head Brothers 2011TLC00394 (DOL, 05/18/2011) 2. Moss Farms 2011TLC00395 (DOL, 05/18/2011) 3. John L. Bourne 2011TLC00399 (DOL 06/06/2011) 4. Elliott Farm 2011TLC00400 (DOL 06/06/2011) 5. Scott Richards 2011TLC00401 (DOL 06/06/2011) 6. Deeugenio & Sons #2 2011TLC00410 (DOL 06/13/2011)
Experience Requirements	<p><i>Workers must pass a plant recognition test.</i></p> <p>The SWA immediately noted that this was suspicious and reached out to the employer, who admitted that he did not intend to apply this test to H-2A workers, but only US workers.⁸⁷</p>
Licensing Requirements (for diversified field crop workers)	<p><i>Applicants must possess proper license (minimum of Class C or its foreign equivalent) to legally operate farm trucks on public highways in the jurisdiction involved in NC. Applicants must have a minimum of 3 months verifiable experience operating 125+ horsepower farm machinery."</i></p> <p><i>"Must produce and furnish to employer a current 'driver's abstract' showing an acceptable driving record.</i></p> <p>SWA found that this is not a bona fide job requirement for diversified field crop workers.</p>
Transportation Reimbursement	<p><i>"Workers who voluntarily quit or are terminated for cause prior to completing 50% of the contract period will be required to reimburse the employer for the full amounts of transportation and subsistence which were advanced and/or reimbursed to the worker."</i></p> <p>SWA recognized that returning wages that were paid free and clear would constitute a FLSA violation.⁸⁸</p>
Math and/or Literacy Skills	<p><i>Basic literacy and basic arithmetic also required</i></p> <p>SWA found that this is not a bona fide job requirement for diversified field crop workers.</p>
Drug Testing	<p>SWA found that <i>pre-hire</i> testing requirement should be flagged as not likely to be applied to H-2A workers and US workers equally.</p>
Criminal Background	<p>SWA has struck overly broad language which indicates applicants with any criminal convictions will not be accepted as not a bona fide job qualification.</p> <p>ALJ affirmed a denial of certification to an employer who improperly used a marijuana conviction, among other things, to reject U.S. workers. In re Cal Farms and Washington Farm Labor Source 2009TLC00049 (DOL 05/29/2009).</p>
Altering Statute of Limitations	<p>Job Order improperly contained language stating:</p> <p><i>two-year statute of limitations applies to all claims arising from this order.</i></p> <p>SWA struck this language that would certainly result in an adverse effect. The H-2A program should not be used as a tool to undermine or negate</p>

⁸⁷ See Exhibit A-12.

⁸⁸ See Exhibit A-13.

	statutory authority or common law.
Education Requirements	<p><i>High school degree required.</i></p> <p>SWA struck this language as not a bona fide job qualification for general field work.</p>
Choice of Forum Clause	<p>Job Order improperly contained language stating:</p> <p><i>The state and federal courts have jurisdiction over Sampson County, North Carolina, shall have exclusive jurisdiction and venue of any civil action arising out of, in the course of, or pertaining to employment under this work contract. Any civil action brought hereunder must be brought in the State and federal courts of such jurisdiction and the employer and employee consent to such exclusive jurisdiction and venue. Workers are assured access to the Job Service Complaint System and are encouraged to avail themselves of the System before instituting any civil action</i></p> <p>SWA struck this language that would certainly result in an adverse effect. The H-2A program should not be used as a tool to undermine or negate statutory authority or common law.⁸⁹</p>
Restricted Referral Process	The SWA has reviewed job orders to require that the employer be available for referrals at least four hours per week. ⁹⁰
Anti-Whistleblower language	SWA struck language that workers might interpret as stating that they would be fired for disclosing that a recruiter had demanded a recruitment fee. ⁹¹

G. Proposed rule 20 C.F.R. § 655.121(e) should be revised to allow the SWA more time to comply with the added requirements regarding a notice of deficiency.

Instead of strengthening the SWA's ability to reject inappropriate job terms, the proposed regulations add to the burden of the SWA by requiring that it not only provide the reason the job order fails to meet the applicable requirements, but further that the SWA state the modifications needed for the SWA to accept the job order. The proposed regulations then fail to provide additional time beyond the original seven days for the SWA to meet the added burden.

The proposed regulations impose new requirements on the SWA regarding the detail that must be included when an employer is given a notice of deficiency. We do not object to requiring this detailed information, however we are concerned that the time frame for reviewing the job order and notifying the employer is too limited especially given this additional burden. SWAs have reported that the current timeframe of seven calendar days imposes significant burdens on their staff, particularly during peak recruitment periods. This is exacerbated by the review days being based on calendar versus business days. In most circumstances this means only five business days for review of a job order. If a holiday falls within that time period, it is reduced to four and sometimes three days. This is simply not enough time to review whether the job order imposes experience requirements, improper job conditions, including production standards, fails to meet prevailing wage or practices standards or includes worksites that are

⁸⁹ See Exhibit A-15.

⁹⁰ See Exhibit A-16.

⁹¹ See Exhibit A-17.

beyond reasonable commuting distance. This review is critical to the determination that the application will not adversely affect U.S. workers under the statutory mandate and the SWAs must be given more time to fulfill this responsibility. We support extending the time to either twelve calendar days or seven business days and believe that this will not significantly impact the timely processing of applications, but will afford a more meaningful opportunity for review.

In addition, while we do not object to requiring the SWA to explain the reasons for the deficiency and what would be needed to bring the job order into compliance, we think it is important to include additional language that reiterates that the employers have the burden to provide information to support any required qualifications listed in the job order.

With an ever-increasing number of job orders to be reviewed and resources that are largely unchanged, the SWA has less time available per order than before. Adding to the SWA's burden without increasing resources or at least pushing back the deadline gives the SWA less opportunity to address deficiencies or respond in a timely manner, resulting in more orders getting pushed into the emergency filing process under § 655.134.

The regulations fail to be clear that the burden is on the employer to defend job terms. Language such as “the SWA will work with the employer to address any noted deficiencies,”⁹² which appears in the current and proposed regulations, seems to undermine the directive at § 655.103(a) that it is the employer who must demonstrate that there are not sufficient U.S. workers able, willing, and qualified to perform the work and that the employment will not adversely affect the wages and working conditions of U.S. workers similarly employed. Employment & Training Administration (ETA) 398 II-14 states that the burden of proof for justifying acceptability of an occupational qualification which is questioned rests with the employer. The SWA should be receptive of any demonstration made by the employer that a finding of deficiency was wrongly made, but rejections of orders should stand unless and until the employer satisfies the SWA. The regulations should clarify that it is not the SWA's role to defend, but the employer's role to demonstrate sufficiency.

The regulations' failure to make clear that the burden is on the employer has resulted in ALJ decisions, such as the ones described above, which allowed the employer to make a rather weak effort and then switched the burden back to DOL.

While the SWA used to place the order into interstate clearance, the proposed language would have the NPC do it “promptly.” An objectively measurable deadline is needed, particularly given the added delay of sending the order back and forth with the NPC instead of having the SWA deal with it directly.⁹³

The ability of the SWA to perform its role is further undermined by the regulations allowing emergency applications and post-certification amendments. These regulations must be rescinded as they irrationally permit employers to escape the SWA's required evaluation of job terms and availability of workers. Supporting the SWA's ability to effectively review orders and

⁹² 20 C.F.R. § 655.121(e)(2).

⁹³ *Id.* § 655.121(f).

stand by deficiencies is essential to meeting the requirement that all US workers be given the opportunity and that there be no adverse effect.

H. Compliance With Recruitment Requirements of 20 C.F.R. § 655.135(c)- *Meaningful Contact of Former U.S. Workers.*

To adequately comply with the requirements of 20 C.F.R. § 655.135(c), the recruitment of domestic workers should not merely be a perfunctory set of motions that employers go through to demonstrate that they have checked all the boxes necessary to participate in the H-2A program. The contact with former U.S. workers must be meaningful to truly serve the intended purpose of the statute. The current regulation only designates mail as one specific example of an acceptable method of contact; however, the regulation also indicates that contact to former U.S. employees may be made by “other effective means.” The issue of what means of contact are truly effective must be expanded to reflect the changing industry and technologies that are available to employers and workers.

Meaningful communication includes contacting workers in a variety of ways. A single attempt in one medium is not going to maximize effectiveness. Employers now have the ability to move beyond some of the costs associated with printed notifications given the newer technologies available. Unlike in the past, many farmworkers now have cellular telephones so they can maintain the same phone number throughout their travel. This gives employers the ability to call, leave voicemails and send text messages to these workers about available work. This method is more immediate and ensures a more direct communication than a print letter. This method is low cost and it is reasonable to expect that employers will follow up with subsequent calls or messages if workers are not reached at first attempt. Some farmworkers now have an increased access to internet and social media sites. Domestic contractors have already begun taking advantage of these platforms to post jobs and recruit workers. This would also be a low-cost method for H-2A employers to increase meaningful contact with U.S. workers.

Even the print method noted in the regulation should be evaluated for improvement. For instance, mailing a printed letter to a former employee may have been deemed an effective communication, but even this method could be made more meaningful to hiring domestic workers. For example, in agriculture, where many workers speak languages other than English, these letters should be printed in the native language of the worker. Though employers may argue that this is too burdensome to do for every worker, in situations where the workforce is dominated by a specific non-English language speakers, this is not an unreasonable requirement.⁹⁴ Communicating with domestic workers in their native language is critical to achieving meaningful contact for recruitment purposes.⁹⁵

Another manner in which more effective contact with former U.S. workers could be attained would be to increase the length of time required in which employers must contact

⁹⁴ 77% of U.S. farmworkers speak Spanish as their primary language. Trish Hernandez & Susan Gabbard, U.S. Dep’t of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 2015–2016: A Demographic and Employment Profile of United States Farmworkers* 5 (Jan. 2018), https://www.doleta.gov/naaws/research/docs/NAWS_Research_Report_13.pdf.

⁹⁵ See *In re Broken Hoof Ranch*, No. 2005-TLC-00002 (Dep’t of Labor ALJ July 22, 1987).

former workers. The current regulation notes that employers must only contact workers who worked for the employer for the previous year. This time frame is too short to facilitate effective recruitment and does not account for reasonable employment absences. For instance, there is the very common situation where a U.S. employee of several years takes time off of work for pregnancy or childbirth related reasons and is not able to return for a subsequent season after working for an H-2A employer or the situation of a worker who is injured and may not return until two or three seasons later. The employer is under no obligation to notify such workers of available jobs the following season. If the true mission of the recruitment requirements is to find U.S. workers to fill positions, it is nonsensical to have an arbitrary cap of one year for contacting the workers that employers have access to. It would not be an undue burden to ask the employer to contact former U.S. workers from the last three years.

Achieving meaningful contact with former U.S. workers is not only a matter of employing the correct mechanisms of communication, but also ensuring that the actual content of the communication is effective. There have been many instances where U.S. workers are discouraged from applying for the particular job that the H-2A workers will be doing and are steered into other positions with the same employer. This results in the employer “complying” with the responsibility to hire U.S. workers but the employer avoids having to pay the domestic workers the higher AEWR amount. The employer still gets to bring in their desired H-2A workforce and the available domestic workers won’t interfere since they are employed in the lower-paying position. H-2A employers must address this issue by offering all opportunities for work available to all workers and refrain from rejecting or discouraging the U.S. workers who attempt to apply for positions.

To ensure that employers are complying with this duty to recruit, employers should be required to document all communications with U.S. workers. Particularly, to ensure transparency in the full recruitment process, employers must document their informal communications with applicants. For example, it would be useful to document things such as what the office assistant told an applicant when they dropped off an application or if an employer is calling to notify a former U.S. workers details about the call, document details such as whether the employer left a message and the number from which the employer called. All of these little details in communication influence how U.S. workers respond to positive recruitment acts. Requiring employers to document all communications provides a record that can be utilized to hold employers accountable and improve recruitment practices in the future.

Proposed § 655.153 requires that an employer provide the notice described in § 655.122(n) to the NPC with respect to a U.S. worker who abandoned employment or was terminated for cause in the previous year. If the employer does not provide the notice, then that worker must be contacted for employment the following year. This proposed regulation needs some additional strengthening. First, DOL must require that an employer provide a copy of any such notice to the worker and give the worker the opportunity to contest the categorization of the separation from employment. The agency recognizes that an abandonment due to intolerable conditions may constitute constructive discharge. DOL needs to establish criteria as to what would constitute “intolerable conditions.” Also, DOL must create a process by which a worker receives notice and the opportunity to contest such notice. Additionally, DOL should define

abandonment and indicate that a worker leaving work to bring his minor child to school does not constitute abandonment.

I. Advertising in area of intended employment (20 C.F.R. § 655.151)

The Department correctly notes that “the recruitment of U.S. workers is most effective when the work performed under the job order is advertised to workers residing in the local or regional area and enables them to return to their permanent places of residence on a daily basis rather than traveling long distances to reach the places of employment. Longer than normal commuting times, transportation issues, geographic barriers, or the need to live away from home are all factors that can discourage U.S. workers from accepting a temporary agricultural job opportunity.”⁹⁶ Accordingly, to the extent a regulatory definition of distance is needed, it should be a figure considerably shorter than the 60+ mile figure urged by some H-2A employers. The 45-mile figure determined to be reasonable in the Department’s *Azor* decision is a possible benchmark.

J. Additional Positive Recruitment (20 C.F.R. § 655.154)

“Positive Recruitment” refers to the active participation of an employer or its authorized hiring agent in recruiting and interviewing individuals in the job area and any other state designated as an area of traditional or expected labor supply with respect to the area where the employer’s job opportunity is located, in an effort to fill specific job openings with U.S. workers. The proposed changes to § 655.154 are inconsistent with the intended purpose and function of positive recruitment. It is clear from the language and the general structure of the H-2A program regulations that the driving force behind this requirement is to fill available farm labor positions with U.S. workers. However, in order to achieve this goal with any efficiency, traditional farm labor recruitment practices must be understood, utilized and continually monitored. Should these proposed changes be made, the manner in which this critical institutional knowledge is obtained is at risk.

In the proposed changes to § 655.154 (Additional Positive Recruitment), DOL states that it seeks to “provide greater clarity with respect to the procedures OFLC will use to determine the states of traditional or expected labor supply.” However, there is not a direct indication of how these modifications will ultimately clarify the procedure. Under the current rule, the SWA provides information to the CO at least every six months regarding the availability of workers and interstate referrals to job openings. The CO then uses this information to designate the states of traditional labor supply. Under the proposed change, instead, the OFLC Administrator will designate the states of traditional labor supply on an annual basis, only considering the 120-day period preceding the decision.

One clear issue with the proposed changes is that this restructuring of organization undermines authority and expertise of the SWA by delegating the responsibility of determining the states of traditional labor supply to the OFLC Administrator. This change is illogical, and it is imperative that the responsibility to determine traditional or expected labor supply should remain

⁹⁶ 2019 NPRM, 84 Fed. Reg. at 36174.

with the SWA. The SWA, unlike the OFLC Administrator, is more aware of what a local labor market looks like because the SWA has direct contact with both employers and potential employees on a regular basis. This contact gives the SWA more current and timely information about hiring practices than the OFLC Administrator is able to access. Additionally, the SWA has information on past local area trends so the offices are able to be able to monitor patterns on a more precise basis. Centralizing this role away from the local SWAs will create a resource drain on the OFLC Administrator who is not in the position to best handle all this information efficiently.

Additionally, there is a question raised as to how the OFLC Administrator will obtain the information needed to make this determination at all. Under DOL's proposal, the OFLC Administrator could rely on unclear sources of information in making the designation about labor supply states. The DOL includes in its proposal that the OFLC Administrator will be able to consider "other sources" of information beyond the SWA's information in making the determination of the states of traditional labor supply. That is a vague standard. It does not provide any information as to what sources may be considered, the weight they will be given, or if any entity will be responsible for monitoring the use of these sources. We are concerned that this could result in a lack of transparency regarding the process for determining states of traditional or expected labor supply. The SWAs have the access and knowledge to lead the charge on these types of decisions and the DOL should maintain the current regulation giving the SWA that authority.

Another problematic change is that the language indicating that an employer must offer "proof of recruitment" has been removed from this section. Currently, the rule states that the CO could specify which documents are needed as proof that the positive recruitment requirements were met. Under the proposed structure, this language is not included. This authority provided COs with a tool to create an extra level of accountability for employers. In a system that is already riddled with accountability and enforcement issues, opportunities for increased compliance should be taken advantage of, not stripped away.

The proposed change to the timing structure of this section is also problematic in several ways. Under the current scheme, the SWA provides new information at minimum every 6 months that influences the determinations of which are the states of traditional labor supply. Under the change, the OFLC Administrator would make the determination an annual basis. The proposal also indicates that the OFLC Administrator will only be reviewing the preceding 120 days to make the determination for a year. Reviewing this amount of time is not a sufficient mechanism for setting yearlong standards. A period of 120 days shows only a snapshot of the market and does not provide enough data to rely on for the entire year. Under the current system, with information being collected at least every six months, there is a much greater chance that this information will be more accurate and timely. If the true objective of the positive recruitment activities is to recruit U.S. workers then it does not make sense to modify the current system to create a greater chance that the relied-on information for recruitment is inaccurate.

In reference to all of the proposed changes in this section generally, DOL has again failed to offer clear evidence as to why a clarification or change to the section is even necessary. The

proposal states that DOL determined the increased transparency resulting from the changes to this section would provide clear expectations for employers to meet their recruitment obligations. However, there are no details as to what expectations these changes clarify nor why these clarifications are necessary. DOL goes so far as to state that the implementation of the current regulation has not resulted in any significant changes in state designations year to year. That is not a description of a problematic finding, rather, a show of consistency in the information gathering process. So then, what issues are these proposed changes purported to address? If there is no clear answer to this question, then the changes are nothing more than arbitrary and not worth risking the confusion they may cause.

K. Pre-filing Recruitment Report with Application for Certification Hinders U.S. Worker Recruitment.

As discussed above, the new section proposed by DOL in regards to Positive Recruitment of U.S. workers, 20 C.F.R. § 655.123, contains a radical change from the current system and would harm recruitment of U.S. workers. It proposes to allow employers to file a recruitment report with their submission of the Application for Temporary Employment Certification no more than 50 calendar days before the date of need.

While the employer is technically required to continue to positively recruit and hire U.S. workers and to keep track of these actions, they would not be required to submit this information to DOL and will most likely not be asked for the report. This series of minimal actions could conceivably comply with the proposed regulations. Without knowing the full recruitment actions in which the employer is engaging, the DOL will not be able to ensure that there are not sufficient workers who are able, willing and qualified to do the job and that the employer has made positive recruitment efforts. DOL will also be unable to verify whether the employers' efforts are "no less than the normal recruitment efforts on non-H-2A agricultural employers of comparable or smaller size . . . and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain foreign workers."⁹⁷ Thus, the proposed changes regarding the recruitment report violate the INA and are not rational.

Under the current regulations, upon receipt of the Application, the CO can direct the employer to undertake specific or additional positive recruitment efforts and the date by which to submit the recruitment report. Submitting the report after the filing of the Application allows the possibility that the recruitment efforts would occur in the timeframe most likely to fit the timeframe of those U.S. agricultural workers looking for work.

Unfortunately, the current regulations do not go far enough to ensure that employers' positive recruitment of U.S. workers is meaningful and meets the statutory goals. The following changes are needed to achieve the statutory mandate that the employer conduct positive recruitment and the DOL makes a bona fide determination whether the employer has done so.

The CO should direct that positive recruitment include the following at a minimum:

⁹⁷ 20 C.F.R. § 655.154(b).

- Copies of the letters, texts, and social media posts to all former employee and any other method that has been used to communicate with former U.S. workers in the last three years;
- The communication must be in the language(s) used to communicate with former U.S. workers in the last three years;
- All U.S. workers who worked for employer for the last three years should be contacted by all means of contact;
- U.S. workers who worked on the farm through a labor contractor;
- Payroll for the last three years to allow the DOL to determine if this is the list of previously hired U.S. workers;
- The notice shall include the statutory preference for U.S. workers and a summary of the terms and conditions of the work;
- Outreach to workers should be clear as to how workers can apply for the job;
- The number for the SWA should be included if the worker cannot reach the number indicated by the employer;
- A description of types of positive recruitment utilized to recruit H-2A workers and the resources expended in such efforts (as current regulations require comparable resources to be expended);⁹⁸
- A description of how other non-H-2A employers in the area of intended employment for the occupation in the order recruit their employees;
- Such recruitment report shall be submitted before the certification is granted and again on the date of need;
- If references are requested, a log of how such references are checked for both US workers and H-2A workers;
- If experience is required, a log of how such experience is checked for both US workers and H-2A workers;
- If other job qualifications are required, a log of how such requirements are checked or evaluated for both U.S. workers and H-2A workers.

DOL should review the recruitment report and determine if any follow-up is needed. Follow-up should include:

- Sending a copy of the recruitment report to the SWA for the SWA to determine if the recruitment efforts of US workers are consistent with those of other non-H-2A employers in the area and to give the opportunity to provide additional suggestions for positive recruitment efforts, including the location of historical and/or current labor supply patterns pursuant to 20 C.F.R. § 655.154(b);
- Contacting all U.S. workers rejected allegedly for lawful, job-related reasons to give them the opportunity to contest the rejection. Also creating a process whereby workers are given notice of the employer's determination of termination for cause/abandonment and given the opportunity to contest that determination.

⁹⁸ 20 CFR 655.154(b).

- Direct that such efforts take place at a time most likely that U.S. workers would be looking for such work.
- Ask the SWA for a list of all U.S. worker referrals to each job to compare with the lists employers provide.⁹⁹

L. DOL should revise regulations to reinstate requirement for employers to contact non-H-2A farm labor contractors as part of their U.S. worker recruitment, in areas where this has been the prevailing practice.

The preamble to the NPRM emphasized that it furthers the goals of President Trump's "Buy American and Hire American" executive order and is designed to administer the laws governing guestworker programs so as "to create higher wages and employment rates for workers in the United States, and to protect their economic interests."¹⁰⁰ To this end, DOL should reinstate the requirement for employers to contact non-H2A farm labor contractors as part of their U.S. worker recruitment, in areas where this has been the prevailing practice.

In many parts of the country, the vast majority of U.S. farmworkers are furnished to growers through farm labor contractors. In many instances, the farmworkers are transported on a daily basis to and from the small towns in which they live to fields, grove, orchards and nurseries located a considerable distance away.¹⁰¹ Because they do not own their own vehicles, for many of the farmworkers, contractor-provided transportation is not merely a convenience; it is essential in order to be able to travel to the jobsite on a daily basis.¹⁰²

An agricultural employer intent on replacing its domestic workforce with H-2A workers can do so relatively easily by refusing to utilize farm labor contractors (FLCs). Without the labor contractors, many local U.S. workers have no means of getting to the jobsite, because the H-2A regulations do not require employers to provide daily transportation to local workers. In some areas, such as south Florida, literally hundreds of U.S. farmworkers have been displaced from their long-time harvesting jobs when their employers ceased utilizing farm labor contractors and began employing H-2A workers. Even when the employer provides the written notification required by 20 C.F.R. § 655.153, former employees residing in the area of the employer's operations are helpless to accept the job offer absent provisions for daily transportation to the jobsite, a service that had traditionally been provided by farm labor contractors. In the Florida situation, the SWA claims it is powerless to address the problem, because, among other things, it is unable to determine whether it is a prevailing practice for

⁹⁹ See *In re Hiatt Honey CA LP*, No. 2011-TLC-00147 (Dep't of Labor ALJ Jan. 11, 2011).

¹⁰⁰ 2019 NPRM, 84 Fed. Reg. at 36169.

¹⁰¹ See, e.g., *Jean v. Torrese*, 278 F.R.D. 656, 659 (S.D. Fla. 2011); *Guerra Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1083 (D. Ariz. 2010); *Lie v. Dara*, No. 01-cv-3167, 2002 WL 992812, at *1 (E.D. Pa. May 15, 2002); *Metzler v. Lykes Pasco, Inc.*, 972 F. Supp. 1438, 1440 (S.D. Fla. 1997); *State Farm Mutual Automobile Insurance Co. v. Martinez-Lozano*, 916 F.Supp. 996, 998 (E.D. Cal. 1996); *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367, 1372 (M.D. Fla. 1994); *Campbell v. Miller*, 836 F. Supp. 827, 829 (M.D. Fla. 1992); *Saintida v. Tyre*, 783 F. Supp. 1368, 1371 (S.D. Fla. 1992); *Melendez v. Sweetser*, No. 92-cv-1338, 1992 WL 453979, at *1 (D.N.M. Dec. 22, 1992); *Alba v. Gonzales*, No. 91-cv-1143, 1992 WL 454048, at *1 (D.N.M. March 5, 1992); *Soliz v. Plunkett*, 615 F.2d 272, 274 (5th Cir. 1980).

¹⁰² *Metzler*, 972 F. Supp. at 1439-40 ("[T]he contractors hire hundreds of workers...to harvest Lykes Pasco's fruit. Because the company's groves are located in isolated areas of Florida that are far removed from public transportation, many of the workers are heavily dependent on the contractors for daily transportation to and from work.").

employers of non-H-2A workers to utilize the services of farm labor contractors. The end result has been that numerous employers have been able to replace longtime U.S. farmworkers with H-2As, simply by refusing to continue to hire the farm labor contractors who traditionally provided daily transportation. This outcome, a direct consequence of DOL's removal of regulatory language in the course of the 2008 revisions to the H-2A regulations, totally contravenes DOL's stated policy of promoting the employment of U.S. workers.

DOL's 2008 decision to cease requiring employers to utilize farm labor contractors to locate U.S. workers is puzzling. DOL has acknowledged that about 30% of farmworkers are employed through farm labor contractors.¹⁰³ Congress has repeatedly acknowledged the FLCs' central place in the farm labor economy.¹⁰⁴

When it first issued regulations implementing the current H-2A program, DOL took care to require employers as an integral part of their positive recruitment efforts aimed at U.S. workers to utilize the services of farm labor contractors in geographic areas and crops in which FLCs were generally relied on to secure labor. Potential H-2A employers were required to engage in positive recruitment of U.S. workers to an extent comparable or greater than the efforts made by non-H-2A employers in the area, and this "include[d] efforts to recruit through farm labor contractors."¹⁰⁵

The interim final regulations promulgated to implement the H-2A provisions of the Immigration Reform and Control Act of 1986 provided that, as a part of the potential H-2A employer's positive recruitment plan:

When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers.¹⁰⁶

These policies were incorporated as part of ETA Handbook 398, the H-2A Program Handbook, published in March, 1988. The Handbook advises the state employment agencies that as part of its positive recruitment plan, "[t]he employer should also describe efforts to locate and utilize farm labor contractors when it is the prevailing practice of non-H-2A employers in the area of employment and for the occupation."¹⁰⁷

The Handbook further explains:

Another factor which has to be considered in determining positive recruitments is the extent to which non-H-2A employers utilize farm labor contractors (crewleader) to secure

¹⁰³ 73 Fed. Reg. 77174 (Dec. 18, 2008).

¹⁰⁴ See, e.g., S. Rep. No. 88-202, at 2 (1963) (FLCs "play a unique and important role in the farm labor market"); H.R. Rep. No. 88-358, at 2 (1963) (FLCs "develop job opportunities for their crewmembers and serve as intermediaries in making and meeting work commitments, a most vital role in the migrant agricultural labor situation"); see also *Jenkins v. S & A Chaisssan & Sons, Inc.*, 449 F. Supp. 216, 226 (S.D.N.Y. 1978) (FLC "helps to provide continuity of employment" for farmworkers).

¹⁰⁵ 52 Fed. Reg. 16773 (May 5, 1987); 52 Fed. Reg. 20499-20500 (June 1, 1987).

¹⁰⁶ 20 C.F.R. § 655.102(d) (1987) (emphasis added); see also 52 Fed. Reg. 20516 (June 1, 1987).

¹⁰⁷ ETA Handbook 398, at I-65, 53 Fed. Reg. 22088 (June 13, 1988).

U.S. workers. *If a majority of non-H-2A employers in an area (who employ a majority of the U.S. workers in the area) use crewleaders, and provide an override (payment usually based on a per worker or per unit of production basis for the crewleader'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...*¹⁰⁸

These provisions apply even in those instances in which the state workforce agency is unable to conduct sufficient prevailing practice surveys to determine whether the usage of farm labor contractors is, in fact, the prevailing practice among non H-2A employers. In such situations, the Handbook provides that Regional Administrator (now the Office of Foreign Labor Certification) “must make the determination based on its own assessment.”¹⁰⁹

DOL chose to remove the express requirements regarding utilization of farm labor contractors in the 2008 regulations, over objections from farmworker advocacy organizations.¹¹⁰ At the time, DOL opined that because it perceived that the costs of hiring H-2A workers would exceed those for U.S. workers, employers would be compelled by financial considerations to seek out domestic workers wherever possible, including, supposedly, through FLCs.

DOL’s optimism regarding the economic incentives that would prompt agricultural employers to prefer U.S. workers proved ill-founded. As discussed previously, there is a long history of agricultural employers discriminating against U.S. farmworkers in order to hire guestworkers from abroad.¹¹¹ The Department of Justice’s Immigrant and Employee Rights Section has prosecuted a number of cases in which agricultural employers have rejected U.S. workers in favor of H-2A workers.

DOL’s own study shows that only about six percent of H-2A jobs are being filled (oftentimes for only a brief period) by U.S. workers.¹¹² Unquestionably at least part of this dismal record is due to DOL’s unfortunate decision in 2008 to remove the well-established requirements that in areas where it is the prevailing practice, H-2A employers utilize FLCs to help recruit domestic workers, coupled with a requirement that the override offered the FLCs be comparable to those offered by non-H-2A employers. If tDOL is genuinely concerned about taking action “to create higher wages and employment rates for workers in the United States, and to protect their economic interests,” it will reinstate the requirement that potential H-2A employers engage the services of the most effective recruiters of agricultural laborers: farm labor contractors.

M. The regulation should be revised to require employers to provide family housing when it is required under state law.

¹⁰⁸ *Id.* at II-12, 53 Fed. Reg. at 22097 (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ 73 Fed. Reg. 77130 (Dec. 18, 2008).

¹¹¹ See, e.g., *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1131 (9th Cir. 2016); *Fulford v. Alligator River Farms, LLC*, 858 F. Supp. 2d 550, 553–54 (E.D.N.C. 2012); *Guerra Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1084 (D. Ariz. 2010); *Villalobos v. N.C. Growers Ass’n*, 252 F.2d 1 (D.P.R. 2002); *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d 334 (D. Mass. 1999); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982).

¹¹² 2019 NPRM, 84 Fed. Reg. at 36207.

One key way for employers to recruit U.S. workers is to provide family housing. The proposed regulations retain the current requirement that family housing be offered “[w]hen it is the prevailing practice in the area of intended employment.”¹¹³ This provision is virtually identical to the requirement in the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986.¹¹⁴

Given the importance of family housing to U.S. worker recruitment, DOL should use this opportunity to resolve a conflict between several of its administrative law judges in favor of increasing job opportunities for domestic workers.

1. Family housing increases job opportunities for U.S. workers:

Over 30 years ago, a DOL administrative law judge concluded:

The unavailability of housing for non-working family members has a serious detrimental effect upon the successful recruitment of domestic fruit pickers. Domestic fruit pickers who would go to Washington County, Maryland to work do not go since there is no housing available for their families.¹¹⁵

2. The conflicting legal opinions on family housing.

Given the importance of family housing to U.S. worker recruitment, the Department should use this opportunity to resolve a conflict between several of its administrative law judges on this issue.

Applying rules of statutory construction, the Fourth Circuit upheld the validity of the H-2A family housing provision, despite the fact that it directly conflicts with provisions of the federal Fair Housing Act prohibiting discrimination on the basis of familial status. (*Farmer v. Employment Security Commission of North Carolina*.)¹¹⁶

While the statutory construction rules allowed the *Farmer* court to determine which of two conflicting federal statutes governed, they do not resolve the question of whether the INA (and corresponding DOL regulations) must defer to state fair housing laws. The issue has been addressed on at least three occasions by DOL administrative law judges. In each case, the employer’s job order had been rejected for failure to offer family housing when state fair housing laws (in Oregon and Washington state) barred housing discrimination on the basis of familial status. In two of the three cases, the ALJ directed the Office of Foreign Labor Certification to accept the employers’ job orders, even though they did not offer family housing.

In the remaining case, in a lengthy opinion, the ALJ upheld the OFLC’s decision to require the employer to offer housing to families. The ALJ rejected the employer’s argument of excessive cost, given the requirement that the H-2A regulations be construed to ensure that U.S. workers be hired rather than aliens whenever possible. 20 C.F.R. §655.0(3):

¹¹³ 20 C.F.R. § 655.122(d)(5).

¹¹⁴ 8 U.S.C. § 1188(c)(4) (“[W]hen it is the prevailing practice in the area of intended employment to provide family housing, family housing shall be provided to workers with families.”).

¹¹⁵ *Azor v. Hepburn Orchards, Inc.*, No. 87-JSA-1, slip op. at 6 (Dep’t of Labor ALJ, Dec. 14, 1987).

¹¹⁶ *Farmer v. Emp’t Sec. Comm’n of N.C.*, 4 F.3d 1274 (4th Cir. 1993).

[The employer] took the position that being required to provide family housing would be so costly it would scuttle the utility of the H-2A program in Oregon. But nothing in the record suggests that it has sunk non-H-2A employers, who must provide familial housing. If the margin is so slim that it is economically feasible to hire H-2A workers if the agricultural employer is relieved of the duty to provide family housing, the Congressional non-displacement principle is violated. The employer then gains an economic advantage from preferring H-2A workers to domestic agricultural workers (*In the matter of Cal Farms, Inc.*).¹¹⁷

Two other ALJ s decided family housing cases within a few months of the *Cal Farms, Inc.* decision. In both cases, the ALJ relied on the reasoning of *Farmer* and declined to find that state law controlled over the H-2A regulations.¹¹⁸

We ask the agency to revise regulations to mandate the provision of family housing when state fair housing laws require it.

III. Application Process

The process through which employers apply to use the H-2A program is critical in ensuring that employers and federal and state agencies take the steps necessary to fulfill the statutory H-2A program goals. The key criteria to evaluate the sufficiency of the process is not whether it is cost-effective or “speedy” but whether it allows for an adequate determination as to whether the terms of 8 USC 1188 are met.

To be effective, this process must require that employers provide sufficient information to the SWAs and to DOL through job orders, applications, and recruitment reports to enable these reviewing agencies to adequately evaluate whether the job terms and recruitment efforts promote the employment of U.S. workers and do not reduce their wages.

A. Reducing the Role of the SWA and Permitting Employers to Avoid Proper Agency Review contravenes Statutory Goals.

The proposed regulations diminish the role of the State Workforce Agency (SWA) in a variety of ways that are not justified by the analysis contained in the Supplementary Information. SWAs are in a far better position than the Chicago based CO to evaluate whether a particular job order or application for H-2A workers will displace or adversely affect U.S. workers or dissuade them from applying for jobs because of wages, working conditions or job requirements that are inconsistent with local practices. Domestic workers and the states have an interest in ensuring that the protections for U.S. workers expressly provided for under the statute are rigorously enforced. The proposed regulations diminish the SWA’s ability to promptly recruit and otherwise advise U.S. workers of job opportunities presented in H-2A applications; and compromise the SWA’s ability to issue a notice of deficiency when the job order violates state law provisions or fails to conform to local prevailing wage and practices.

¹¹⁷ *In re Cal Farms, Inc.*, No. 2014-TLC-85, slip op. at 13 (Dep’t of Labor ALJ, Apr. 28, 2014).

¹¹⁸ *In re Wash. Farm Labor Ass’n*, No. 2014-TLC-88 (Dep’t of Labor ALJ May 20, 2014); *In re Adelsheim Vineyard, LLC*, No. 2014-TLC-49 (Dep’t of Labor ALJ Mar. 7, 2014).

1. Changes to 20 C.F.R. § 655.103 to include filing of the job order with the SWA

Section 655.103: The proposed regulations change the definition of the Job Order eliminating the reference to orders submitted to the SWA replacing it with a reference to that submitted to the CO (§ 655.103). This is no doubt done to conform to the change to proposed § 655.121 which now requires the initial electronic filing with the CO and subsequent transmittal of the Order by the CO to the SWA.¹¹⁹ We agree that electronic filing may streamline the process and response times and is consistent with the intent to reduce paperwork. However, it is important that the SWAs receive immediate notice of the filing of the job order and retain their important role in reviewing the job order to ensure consistency with state laws and prevailing wages and practice.

Recommended Revision:

The “Job order” definition in § 655.103 should be modified to add “and SWA” at the end of the current definition.

2. 20 C.F.R. § 655.121(a) and (c) – Initial filing of the Job Order

As proposed, subsection 655.121(a)(1) would provide that the job order be submitted in the first instance to the CO designated by the OFLC. This is a departure from the current regulation which requires submission, in the first instance, to the SWA. Intentional or not, this de-emphasizes the importance of the SWA’s role in ensuring that there is no adverse effect as a result of approving an H-2A application and issuing visas. Procedurally, we propose a revision that would require that the electronic submission be submitted to both the SWA and the CO simultaneously. This will eliminate any delay in processing the application that could be caused by a delay in transmission by the CO to the SWA. If for some reason this is not feasible, then the CO should be required to transmit it as soon as possible, but by no means later than the next business day.

Recommended Revision:

Subsections 655.121(a)(1) and 555.121(c) should be modified as follows:

655.121 Job order filing requirements.

(a) What to file. (1) Prior to filing an Application for Temporary Employment Certification, the employer must submit a completed job order, Form ETA-790/790A, including all required addenda, to the CO designated by the OFLC Administrator, and to the SWA, as provided in section 655.121(c).

* * * * *

(c) Location and method of filing. The employer must submit a completed job order to the CO, using the electronic method(s) designated by the OFLC Administrator, and, where available, to the SWA using the electronic method designated by the SWA. In the

¹¹⁹ 20 C.F.R. § 655.121(c), (e).

event that the SWA does not have a designated electronic method for submission, the CO will transmit the job order to the SWA immediately and no later than one calendar day after receipt by the CO. The CO will return without review any job order submitted using a method other than the designated electronic method(s), unless the employer submits the job order by mail as set forth in § 655.130(c)(2) or requests a reasonable accommodation as set forth in § 655.130(c)(3).

3. 20 C.F.R. § 655.121(e) - Placement with the Appropriate SWA

Under current regulations the applying employer selects which SWA the job order will be submitted to and may submit it to the SWA in any state within the area of intended employment. Farmworker advocates have seen this process abused, particularly by H2ALCs who submit job orders that encompass multiple states and different crops. In some instances, employers have filed in one state and been required to address notices of deficiency by that state's SWA, and then decided to submit it to a different state in the following year. The proposed regulation would have the CO designate which SWA, but provides no criteria for doing so. As indicated above, we believe that submission to the SWA and CO should be simultaneous. In order to accomplish this, the employer—and CO—should be given specific criteria to use to determine which SWA should have responsibility for reviewing the job order. Based on a review of orders that include multiple states, we recommend that the SWA assignment be made based on the first work location under the contract. This location is important because positive recruitment prior to submission of the job order, as well as recruitment during the 50% period (or 30-day period under the proposed regulations) is likely to be most effective in the state where work begins. This is also likely to be the state in which the housing is located.

Recommended Revision

(e) SWA review. (1) ~~Upon receipt of the job order, The SWA serving the area of intended employment for intrastate clearance. If the job opportunity is located in more than one state within the same area of intended employment, the job order will be simultaneously submitted to the CO will transmit the job order to any one of and to the SWAs having jurisdiction over the place(s) of employment the first job site location listed in the job order.~~

4. Proposed rules 20 C.F.R. § 655.120(b)(5) and(d) irrationally eliminate the role of the SWA in determining the applicable Standard Occupational Classification.

Under current procedures the SWA, using acquired knowledge about the nature of work performed in various crops and by specific employers, assigns a Standard Occupational Classification (SOC) to the job order upon submission. DOL points out that, currently, this has no real impact on processing since the SOC is not a factor used in determining the applicable wage rate.¹²⁰ However, under the proposed regulations, the SOC is a critical component to determining the applicable AEWR,¹²¹ yet the authority to determine the accurate SOC will now

¹²⁰ 2019 NPRM, 84 Fed. Reg. at 36189.

¹²¹ 20 C.F.R. § 655.120(b)(ii), (iv).

be given to the employer. It should not be left to the employer, subject only to CO review, to determine the applicable SOC. This determination should continue to rest with the SWA.¹²² The SWA is the entity with the most knowledge about the different work in a certain agricultural industry in that geographical region. It necessarily follows that the SWA, and not the CO, in the first instance should be able to issue a notice of deficiency in the event that the job order is submitted with an AEWR based on an incorrect SOC. Proposed regulation 20 C.F.R. § 655.120(d)(1) vests the exclusive authority to issue a notice of deficiency in the CO.¹²³ The proposed regulation should be revised as follows:

655.120(b)(5)

(5) If the job duties on the Application for Temporary Employment Certification do not fall within a single occupational classification, the ~~CO~~ SWA will determine the applicable AEWR based on the highest AEWR for all applicable occupational classifications.

655.120(d)

(d) Appeals. (1) If the employer does not include the appropriate offered wage rate on the Application for Temporary Employment Certification, the SWA or CO will issue a Notice of Deficiency (NOD) requiring the employer to correct the wage rate. (2) If the employer disagrees with the wage rate required by the SWA the employer may follow the procedures in § 655.121(e)(3). If the employer disagrees with the wage rate required by the CO, the employer may appeal only after the Application for Temporary Employment Certification is denied, and the employer must follow the procedures in § 655.171.

B. We oppose proposed changes to 20 C.F.R. § 655.134 - Emergency situations

Current regulations allow employers to file applications on an emergency basis for employers who did not use temporary foreign workers during the prior year's agricultural season or if they have "other good and substantial cause."¹²⁴ DOL proposes to change current procedures by allowing an employer to request a waiver of the required time period by submitting all of the documentation *only* to the CO and not to the SWA serving the area of intended employment. This proposed regulation contravenes the INA statute for several reasons.

¹²² Leaving it to the employer provides great leeway for manipulation of job rates. For example, in a recent California application, the employer sought 100 workers described only as 100% tomatoes and brussels sprouts on the face of the job order. It was assigned an SOC code by the SWA of 45-2092, which had no impact under current regulations, but under the proposed formula for the AEWR would result in a wage rate of \$12.92 per hour. However, a review of the work description contained at pages 6 and 7 of the ETA 790 reveals that the request included first line supervisors, graders and sorters, and equipment operators, all of whom fall into a different SOC with wage rates that are \$22.11 and \$13.53. See West Coast Tomato Job Order 16455874, available on the icert website at: https://lcr-pjr.doleta.gov/index.cfm?event=ehLCJRExternal.dspJobOrderView&frm=lcjr&task=view_job_order&view=external&lcjr_id=146856.

¹²³ 2019 NPRM, 84 Fed. Reg. at 36266.

¹²⁴ 22 C.F.R. § 655.124.

First, we oppose providing an opportunity to waive the required time period. The main purposes and rationales for the time period of the application process are (1) for the employer to take necessary actions and allow necessary time to recruit U.S. workers, and (2) for the SWA to recruit and refer U.S. workers and for the CO to determine that recruitment efforts are adequate so as to test the labor market.

Second, if such an emergency option is to be allowed, it must be narrowly tailored to meet specific, justifiable emergency needs that would only be used in the most limited number of situations. We understand that many employers are using this emergency option as a way to get around statutory and regulatory obligations.

The proposed regulation reads:

Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (e.g. a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health conditions, or similar conditions that are wholly outside of the employer's control.¹²⁵

“Similar conditions that are wholly outside of the employer's control” and “unforeseeable changes in market conditions” and “similar conditions that are wholly outside of the employer's control” are terms that are too broad and too vague and might encompass situations which would not warrant the provision of a waiver. In particular, this language could allow waiver based on the occurrence of normal but unpredictable market fluctuations, which would not necessarily affect the start date of work but could reduce the positive recruitment period during which these jobs had to be affirmatively made available to U.S. workers. The only named causes that are truly outside an employer's control, and not a potential means of dodging U.S. worker recruitment include: “Acts of God or similar man-made catastrophic events (e.g. a hazardous materials emergency or government-controlled flooding) and “pandemic health conditions” which could potentially impact worker availability, not based on pricing or other market based factors under the control of the employer.¹²⁶

Third, if a narrowly tailored, limited emergency option is permitted, the SWA must remain involved in the process. SWAs are the agencies charged with connecting U.S. workers with employment. That is their area of expertise. Thus, the SWA must be involved to determine whether the job order terms and conditions of employment are lawful, but they also must be involved to assist with the recruitment and referral of U.S. workers. To further remove the SWA from the application process through this emergency back door does not permit DOL to execute its responsibilities to test the labor market as statutorily required. Not only would it constitute a violation of the Immigration and Nationality Act, but removing the SWA or reducing its involvement would also be a violation of the Wagner-Peyser Act.

¹²⁵ 2019 NPRM, 84 Fed. Reg. at 36274 (proposed 20 C.F.R. § 655.134(b)).

¹²⁶ *Id.*

Fourth, there is insufficient guidance as to what the CO needs to do to “test the availability of U.S. workers.”¹²⁷ The agency must further develop standards and guidance as to steps the CO must take, in conjunction with the SWA, to “test the availability of U.S. workers.” In order for the CO to determine whether it has time to take this step, it must be clear what this step entails. Standards must include communicating effectively with prior workers, communicating with registered MSFWs in Employment Service systems of the SWA of intended area of employment and those in traditional or expected labor supply.

Fifth, allowing employers submitting deficient emergency applications to have endless backdoor attempts deters and inhibits U.S. recruitment of workers.

In order to fulfill the statutory obligations of the H-2A program, the agency must significantly narrow this emergency exception.

C. We support the requirement for electronic filing of applications, but note that information should be made promptly and publicly available in order to ensure program transparency.

We generally support DOL’s efforts to require electronic filing. As stated in the notice, many employers already use this option. Furthermore, electronic filing is a cost and time efficient method of exchanging information. DOL’s decision to require that forms be filled out electronically (with limited exceptions), could potentially serve two purposes: promoting efficiency and improving accuracy. As stated in the notice, the proposal to shift to electronic filing might help minimize time spent by DOL’s limited personnel collecting the required information, which would in turn allow DOL to devote more of its resources to robust monitoring and enforcement of the program. However, as pointed out above, electronic filing should be simultaneous with the SWA, when the SWA has the ability to accept such filings.

Unfortunately, even as the H-2A program has grown significantly over the last decade, and is expected to continue to grow exponentially over the next decade—per DOL’s own projections—DOL’s economic resources have not been increased accordingly. We welcome electronic filing as a way of maximizing available resources; however, it in no way solves the broader problem of insufficient economic resources for DOL to effectively carry out its work. Though we understand that this is an issue for Congressional action that is beyond this rulemaking, we think it important to note that electronic filing by itself will not solve the personnel and other resource challenges faced by DOL and SWAs in their monitoring of the program.

We similarly support DOL’s proposal to require that employers completely fill out required information on the forms before the application is allowed to be submitted. This will likely help to ameliorate delays related to incomplete or inaccurate applications by employers. More important than efficiency, however, is the accuracy of the information submitted. We hope that the electronic filing process will also be helpful in this regard by ensuring that all information is provided in a clear and comprehensive way.

¹²⁷ *Id.* (proposed 20 C.F.R. § 655.134(c)(2)).

With regard to the specific information required, we hereby incorporate by reference our comments regarding specific changes to the H-2A program forms, submitted on December 24, 2018 in response to 83 Fed. Reg. 53911¹²⁸ and May 14, 2019 in response to 84 Fed. Reg. 956,¹²⁹ as if fully set forth herein. As stated in those comments, we reiterate that it is important that all of the job and employer information in all forms be accessible to potential workers, in order for them to be able to make an informed decision regarding the job opportunity and be aware of the employer's obligations under the program. Also as stated in those comments, we believe it is important to ensure that all forms are made available via a public registry in order to ensure that all of the job and employer information in all forms is accessible to potential workers, including farmworkers and their advocates.

The public availability of such information once the application has been approved is an important issue that is not addressed in the notice. The current regulation requires that a copy of the job order be promptly placed for public examination on an electronic job registry maintained by DOL and that DOL maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications.¹³⁰ However this is inadequate. It is also essential for specific job order information to be publicly available so that workers and advocates can be made aware of job opportunities, can provide an additional layer of review regarding job terms, and can engage in outreach both to potential U.S. workers and to H-2A workers.

In the past, DOL has uploaded copies of the job orders to the iCERT system, though there have at times been significant delays in providing this information. However, a few months before this notice was published, DOL announced its intention to decommission the iCERT system and transition to a new electronic system, the FLAG system, for employer applications. DOL has conducted outreach and training to employers on the FLAG system, including two webinars,¹³¹ and will soon require that all H-2A applications be submitted through this new

¹²⁸ See Exhibit B-2.

¹²⁹ See Exhibit B-3.

¹³⁰ 20 C.F.R. § 655.144 ("Electronic job registry. (a) Location of and placement in the electronic job registry. Upon acceptance of the Application for Temporary Employment Certification under § 655.143, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.142. (b) Length of posting on electronic job registry. Unless otherwise provided, the Department will keep the job order posted on the Electronic Job Registry until the end of 50% of the contract period as set forth in § 655.135(d)."); *id.* §655.174 ("Public disclosure. The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.").

¹³¹ One webinar, titled *Event Information: FLAG system Demo with Tips and Tricks*, was hosted on June 21, 2019, and was available at https://dolevents.webex.com/mw3300/mywebex/default.do?nomenu=true&siteurl=dolevents&service=6&rnd=0.8139845856748037&main_url=https%3A%2F%2Fdolevents.webex.com%2Fec3300%2Feventcenter%2Fevent%2FeventAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b000000047be4a502c416396bc909efc88e237f02a0e7a944d00da4a6bc55df24da38b7d0%26siteurl%3Ddolevents%26confViewID%3D131531611223147993%26encryptTicket%3DSDJTSwAAAAR5MCftgRMwPnQmHTfKUQKD1SUGY8WyFnqcFD2WmyeySA2%26. The second, titled *Event Information: FLAG System Implementation for the H-2A Temporary Agricultural Visa Program*, was hosted on September 10, 2019 at https://dolevents.webex.com/mw3300/mywebex/default.do?nomenu=true&siteurl=dolevents&service=6&rnd=0.8138124593136381&main_url=https%3A%2F%2Fdolevents.webex.com%2Fec3300%2Feventcenter%2Fevent%2FeventAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b000000047be4a502c416396bc909efc88e237f02a0e7a944d00da4a6bc55df24da38b7d0%26siteurl%3Ddolevents%26confViewID%3D131531611223147993%26encryptTicket%3DSDJTSwAAAAR5MCftgRMwPnQmHTfKUQKD1SUGY8WyFnqcFD2WmyeySA2%26

digital platform. In spite of this, the NPRM repeatedly makes reference to the iCERT system that is set to be decommissioned.

Additionally, on September 20, 2019, just a few days before the deadline for submitting comments on this NPRM, DOL issued its final rule regarding recruitment in the H-2A program.¹³² The final recruitment rule issued by DOL eliminates the requirement for newspaper advertisements and instead states that DOL will advertise all available jobs on a new digital platform, SeasonalJobs.dol.gov, which will go live in fall 2019. We hereby incorporate by reference our comments to the proposed recruitment rule submitted in December 2018.¹³³ In our recruitment comments we noted, among other important considerations that DOL should address, that farmworkers and their advocates should be consulted in the creation of any online recruitment tools.

Given these developments during the last few months, we are concerned that DOL does not seem to have a clear plan or timeline for ensuring that (1) as DOL transitions to the new electronic systems, key information regarding current job orders is not lost or unavailable, (2) job order information from new applications submitted under the new electronic filing system is made public in a timely and accessible way, including relevant supporting documents, and (3) prospective employees and their advocates are made aware of how to best use these new digital platforms to actually find jobs.

Particularly in light of DOL's limited resources, public access to this information is crucial for workers to be able to know and assert their rights. Moreover, as stated above, access to this information is crucial for program transparency as well as for the effective monitoring and enforcement of program requirements. The prompt public disclosure of this basic information is one of the most useful tools available to ensure transparency in the program and promote DOL's goals of effective enforcement.

In line with the transition to electronic filing, we do not have any objections to the use of electronic signatures, as long as the signatures comply with the stated conditions and procedures for use and acceptance of electronic signatures issued under the Government Paperwork Elimination Act, as detailed in the notice.

D. We oppose the issuance of a Notice of Acceptance before all required documentation has been submitted.

Proposed regulations that permit the agency to issue a Notice of Acceptance¹³⁴ even in circumstances where the employer has not submitted all of the required documentation or “promises” to be submitted and in compliance by the first date of need are not rational and

[ntAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b00000004baad4bd792fa02500a12bdeee02ae876823e216a5b3f1a880097992287de65a7%26siteurl%3Ddolevents%26confViewID%3D138870814630003879%26encryptTicket%3DSDJTSwAAAAR8UM08iF2P_ziracE5HHGfC3wTCe7JDPIJoRKfR3W1_Q2%26](https://www.regulations.gov/document?D=ETA-2018-0002-0046)

¹³² Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States, 84 Fed. Reg. 49439 (Sept. 20, 2019).

¹³³ See Farmworker Justice et al., Comment Letter on Proposed Rule regarding Recruitment in the H-2A program (December 21, 2018), available at <https://www.regulations.gov/document?D=ETA-2018-0002-0046>.

¹³⁴ 20 C.F.R. § 655.143.

contravene statutory requirements. Employers who wish to use the H-2A program must follow procedures and comply with requirements. There is no rational basis to permit the agency to issue a Notice of Acceptance if the employer is “expected” to be in compliance by the first date of need. The H-2A statute requires an employer seeking permission to hire temporary foreign agricultural workers to first obtain a “labor certification” from DOL predicated on a determination that there is a shortage of qualified workers at the place and time needed and that the wages and working conditions offered will not “adversely affect” those of U.S. farmworkers.¹³⁵ This determination cannot be made without all of the required documentation. To allow certification based upon an employer’s promises to meet requirements is essentially an effort to substitute an attestation model for the requirement of certification. To allow this is contrary to the statute.

Moreover, the proposed change is arbitrary and capricious because it makes the procedures and requirements meaningless. The most unscrupulous employers are the most likely to ignore core obligations and the most likely to lie if it will benefit them. The people most likely to be affected directly, H-2A workers, are the least likely to complain, given their dependence upon the employer. While many decent employers may be harmed by unfair competition from H-2A program users that take advantage of the proposed reduced labor protections and oversight, many such victimized employers would be reluctant to complain about their fellow farm operators for fear of retaliation or bringing bad publicity to the sector.

H-2A employers have already been required to certify under penalty of perjury as to the accuracy of their job order and their intent to follow the law. Numerous employers have amply demonstrated their ability to lie under oath, or at least to mislead, about the true nature of the H-2A job terms.

E. The Criteria for Certification Must Include Sources In Addition to Employer Lists.

The agency cannot rely on employer provided lists of U.S. workers who had applied for the jobs and were rejected for non-job-related reasons. The CO must also obtain this information from other sources to ensure its accuracy. The SWA should send its lists of registered MSFWs who are qualified for those jobs. All workers on lists provided by both employer and SWA should be contacted and asked whether the information provided is correct. There should be a website portal that allows workers to report applications to H-2A employers that were not accepted or rejected.

F. The Certification Fee Should be Increased (20 C.F.R. § 655.163)

The Certification fee has not been adjusted since 1987. DOL and SWAs need additional resources to administer this program, ensure employers are complying with the law, and ensure preference is given to U.S. workers. Additionally or alternatively, SWAs should be allowed to assess a processing fee themselves to help fund the staff necessary to review and approve job orders and to conduct prevailing wage and practice surveys. SWAs have already reported that the

¹³⁵ See 8 U.S.C. § 1188(a)(1).

limited funding provided by DOL for these services is inadequate. As the number of H-2A applications increase that inadequacy will further compromise the reliability of the process as a mechanism for determining whether approving H-2A petitions will adversely affect U.S. workers. In light of the fundamental importance of the review, failing to provide for additional resources via fee increases is an irrational and arbitrary and capricious decision that contravenes the statute.

G. We oppose the proposal for post-certification amendments (20 C.F.R. § 655.175).

We oppose the addition of the proposed regulation that would permit an employer to request post-certification amendments to the places of employment listed in the approved certification under certain conditions.¹³⁶ The proposed post-certification amendment violates the statutory mandate regarding the application timeframe and DOL's certification process. Post-certification amendments should not be permitted under any circumstances as they allow manipulation of the terms and conditions of employment in a manner that may dissuade U.S. workers from applying and that undermines the ability of the DOL to accurately assess the availability of U.S. workers per its statutory mandate. Law-abiding employers will be placed at a disadvantage by employers who use post-certification amendments as a tool to further their illegal preference for H-2A workers. Moreover, the agency has not provided sufficient data or rationale as to why this new regulation is needed or how it fulfills statutory goals or requirements.

The proposed regulation requires only that "the employer has good and substantial cause for the amendment requested, the circumstance(s) underlying the request for amendment could not have been reasonably foreseen before certification and is wholly outside the employer's control, the material terms and conditions of the job order are not affected, and the amendment requested is within the certified area(s) of intended employment."¹³⁷ Under the proposal, employers' request for amendment could be granted upon a demonstration of these factors and assurances as to the terms and conditions of the work contract, that it has provided a copy of the modified job order to workers, and that it would retain and make available upon request all documentation substantiating the request.¹³⁸ The CO would have only three business days to review the request and assurances. There is no requirement for any additional testing of the labor market, even though the preamble itself notes that the requested additional worksite could be in another state, the only limitation being that it must be in the same area of intended employment.

DOL's proposal would violate the statutory intent of ensuring that no US workers are available. While the preamble itself notes the importance of ensuring that the "post-certification amendments must not compromise ... the determination 'that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended

¹³⁶ 20 C.F.R. § 655.175.

¹³⁷ *Id.*

¹³⁸ 2019 NPRM, 84 Fed. Reg. at 36219.

employment,”¹³⁹ the rules as proposed fail to include any protections for U.S. workers. There is no review of the terms and conditions of the work contract, no involvement of the SWA to post the revised job order, and no requirement for any additional positive recruitment. DOL also has inadequate time to properly make a determination on the request:

DOL needs more than three business days to evaluate the evidence to determine if the situation meets the criteria, and particularly how the amendment will affect the underlying labor market test for this job opportunity. As a result of DOL’s inability to test the labor market, US workers will suffer lost job opportunities. Even U.S. workers who had worked at the same farm for years could lose their jobs because of this provision. For example, if an H2ALC added additional farms where workers were previously directly hired, the U.S. workers arriving for harvest work could be turned away with no recruitment protections as even the very limited 30 day period or staggered entry period may have already ended.

Moreover, the proposed regulations fail to consider how the addition of new worksites may impact U.S. and H-2A workers. For recruitment of workers to be effective, the workers must know where the work is going to be. The different factors involved in a location such as access to housing, transportation, terrain, facilities, quality of crop and other factors affect a workers’ interest in possible employment. In order to test the labor market, U.S. workers must know where the job is and the employer must contact the workers that worked in that location, for that employer or for that FLC to determine whether they are available for the job.

The proposed regulation regarding post certification amendments combined with the shortened recruitment time period and the flexibility for start dates would compound the difficulty U.S. workers already face obtaining information about and access to jobs with H-2A employers. By taking advantage of both the staggered entry and post-certification amendment proposals, employers who do not want to hire US workers could easily circumvent recruitment requirements as U.S. workers would have no way of knowing about the new work sites or start dates.

This proposed regulation also exacerbates the vulnerability H-2A workers are experiencing by giving employers unilateral power to change the worksite locations. H-2A workers may find themselves being told to work in completely new worksites, possibly even in different states. H-2A workers already are vulnerable due to their dependence on their employers. We hear anecdotally about the concern many H-2A workers have when being sent to new worksites as they do not know if the work is covered by their visa. While the regulations do require employers to share the modified job order with workers, many employers already violate similar requirements, and H-2A workers have very limited ability to ascertain whether the work is permissible under their visa terms. Giving such unilateral power to employers increases the

¹³⁹ 2019 NPRM, 84 Fed. Reg. at 36219 (citing Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(ii); 20 C.F.R. § 655.103(a)).

likelihood of trafficking and labor abuses. According to a Polaris report, H-2A workers are already among the work visa categories with the highest reported instances of trafficking.¹⁴⁰

The proposed regulations contravene the statutory requirement of a DOL certification process. Here, DOL would allow employers to add additional worksites without testing the labor market, through a mere attestation process. DOL would be relying on employer assurances that they have secured required workers compensation, have properly identified the wage rate and more. DOL already brings multiple enforcement actions against H2ALCs who violate program requirements. Proposing regulatory changes enabling the expansion of H2ALC access to the H-2A program without needed government oversight is deeply troubling.

The proposal fails to place any time limitations on the ability of an employer to seek a post-certification amendment. DOL asks in its preamble whether such a time frame should be imposed; however, DOL's questions do not provide any assurances that a time limitation will indeed be imposed. If the final rules include a post-certification amendment, there must be a time limit and it must be short. DOL suggests a choice between 45 days, 30 days, or 60 days after certification. None of these timelines are permissible as they fail to protect U.S. workers. U.S. workers must be given adequate notice about the job opportunities, and DOL must fulfill its statutory role of ensuring that there are no available U.S. workers.

The agency asks for comments on ways to balance employers' needs to adapt quickly to a change in circumstances with the need for DOL to protect the integrity of the labor certification program. This is not the correct question to ask. The current timeline for the labor certification process is already short, allowing for adaptation. Indeed that is what the program is designed for: meeting temporary need for workers.

H. We Oppose the Proposal to Allow Master Applications with Different Dates of Need.

DOL proposes to permit a master application if the employer-members have different first dates of need, provided no first date of need listed in the application differs by more than 14 calendar days from any other listed first date of need.¹⁴¹ We oppose this proposed change, which is problematic for several reasons, including the lack of adequate notice to U.S. workers and lack of transparency about job opportunities. Separately, the notice proposes to modify the definition of date of need to include the word "anticipated" and to allow for a start date within a 14-day period from the date listed.¹⁴²

Taken together, these proposed changes would make it increasingly difficult for U.S. workers to know and be able to act upon start dates for specific jobs at specific locations, as the actual start dates could differ from the anticipated date of need by up to 28 days. For example, if Employer #1's anticipated date of need under the master application is February 15 and

¹⁴⁰ Polaris, *Human Trafficking on Temporary Work Visas, A Data Analysis 2015–2017*, at 20–24 (Apr. 2018), <https://polarisproject.org/sites/default/files/Human%20Trafficking%20on%20Temporary%20Work%20Visas%20A%20Data%20Analysis%202015-2017.pdf>.

¹⁴¹ 2019 NPRM, 84 Fed. Reg. at 36201, 36272.

¹⁴² 2019 NPRM, 84 Fed. Reg. at 36175.

Employer #2's is February 29 (14 days after), but employer #2's work does not actually start until March 13 (14 calendar days after anticipated date of need), there could be almost a month between Employer #1 and #2's start dates (February 15 and March 13).

These changes to the potential start dates are particularly concerning given the challenges that already exist with joint applications and master orders. U.S. workers already face difficulty obtaining information about and access to these jobs as well as logistical hurdles to access the jobs. Some job orders filed have requested hundreds of workers, with multiple letters of commitments from a variety of growers and includes multiple housing cites and dozens of different job sites.¹⁴³ For U.S. workers to be treated fairly regarding master orders, they must have specific information about the actual jobs to which they wish to apply, including the location and timing of specific job opportunities. Because U.S. workers do have other options, they especially need accurate, specific information about job opportunities in order to make a wise selection.

Moreover, some grower members or associations may try to use their joint employer status as a way to make the aggregate jobs untenable for U.S. workers. For example, we have seen situations where U.S. workers applying for these jobs are told they have to be willing to do any of the work on the job order, even if it includes different crops and tasks and work sites at great distance from one another.¹⁴⁴ If a U.S. worker must be available for all the jobs or the entire itinerary, the employer may try to assign the U.S. workers to the least desirable jobs or conditions. Obviously, this does not incentivize U.S. workers to apply for the job. Many domestic workers also come to the assumption that H-2A employers are not interested in hiring U.S. workers and no longer pursue positions at those employers. U.S. workers should not be forced to accept any job within these voluminous orders in order to be considered to be "available." Allowing the wide range of dates of need and the lack of transparency regarding actual start dates that necessarily follows, exacerbates the obstacles U.S. workers already face accessing these jobs and would make it easier for employers to place U.S. workers at jobs that have no work to offer yet as a way of discouraging these workers from applying.

It is also important to note the potential cumulative effect of various proposed timing changes throughout the notice which would both weaken U.S. worker recruitment requirements and create increased uncertainty regarding start dates. Among these proposed changes, employers would be allowed staggered entry for up to 120 days, the anticipated date of need could vary by up to 14 days, master applications may contain jobs with anticipated dates of need that similarly vary by up to 14 days, and the 50% rule would be eliminated in favor of a 30-day rule. All of these proposals, individually and together, make it less likely that U.S. workers will be realistically able to know which jobs are available, when and where, and to plan accordingly.

These proposed changes are framed as adding "flexibility" for employers, when in fact they are adding uncertainty for U.S. workers, all within an existing context of discrimination

¹⁴³ See Exhibit B-1 containing Michigan job orders Manzana LLC, Job order # 9593178 and accompanying chart prepared by outreach workers listing distance between housing and different worksites locations.

¹⁴⁴ *Id.* In the Manzana job order, for example, there are multiple worksite locations that are over 100 miles from the provided housing, with some locations over 150 miles away.

against U.S. workers under the H-2A program.¹⁴⁵ Furthermore, the value to growers in having joint orders (shared visa rights) does not help or apply to U.S. workers. In addition to grower convenience, it seems that one of the main objectives of these changes is to reduce DOL's workload by decreasing the number of applications that the Department must review. Yet the burden is merely being shifted from employers and the DOL onto the backs of those least able to shoulder it: the workers whom the program is supposed to protect. The end result of these proposed changes is a set of additional obstacles for U.S. workers to obtain employment, which is the opposite of DOL's stated goal of protecting U.S. workers.

I. We support proposed regulations clarifying joint employer liability for associations but are concerned about proposed language to limit when an employer-member may be jointly liable.

With regard to filing and liability requirements involving associations, our position is that any attempt to weaken job employment liability is inconsistent with DOL's stated objective of improving program enforcement. Conversely, strengthening joint employment liability is important for ensuring adequate enforcement that actually results in benefits to the workers themselves.

We agree with DOL's proposal to add a new paragraph codifying its longstanding practice that an agricultural association that files a master application as a joint employer with its employer-members may sign the application on behalf of the employer-members, but an agricultural association that files as an agent may not and must obtain each member's signature on the application.¹⁴⁶ We think it is helpful to make this requirement explicit as a way of ensuring that each employer-member is responsible for the requirements included in the application.

¹⁴⁵ The U.S. Department of Justice's own press releases show that discrimination against U.S. workers is a pervasive problem in guestworker programs, including the H-2A program. *See, e.g.,* Off. of Pub. Affairs, Dep't of Justice, *DOJ Settles Claim Against Florida Strawberry Grower for Discriminating Against U.S. Workers* (June 11, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-claim-against-florida-strawberry-farm-discriminating-against-us>; Off. of Pub. Affairs, Dep't of Justice, *Departments of Justice and Labor Formalize New Partnership to Protect U.S. Workers From Discrimination and Combat Visa Abuse* (July 31, 2018), <https://www.justice.gov/opa/pr/departments-justice-and-labor-formalize-new-partnership-protect-us-workers-discrimination-a-0>; Off. of Pub. Affairs, Dep't of Justice, *Justice Department Settles U.S. Worker Discrimination Claims Against Colorado Agricultural Company* (Dec. 18, 2017), <https://www.justice.gov/opa/pr/justice-department-settles-us-worker-discrimination-claims-against-colorado-agricultural>; Off. of Pub. Affairs, Dep't of Justice, *Departments of Justice and State Partner to Protect U.S. Workers from Discrimination and Combat Fraud* (Oct. 11, 2017), <https://www.justice.gov/opa/pr/departments-justice-and-state-partner-protect-us-workers-discrimination-and-combat-fraud>; Off. of Pub. Affairs, Dep't of Justice, *Justice Department Resolves Citizenship Status Discrimination Charge Against Pennsylvania Employer Huber Nurseries* (Sept. 26, 2013), <https://www.justice.gov/opa/pr/justice-department-resolves-citizenship-status-discrimination-charge-against-pennsylvania-0>; Off. of Pub. Affairs, Dep't of Justice, *Justice Department Files Lawsuit Alleging Employment Discrimination by Texas Farm* (Sept. 11, 2012), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-alleging-employment-discrimination-texas-farm>; Off. of Pub. Affairs, Dep't of Justice, *Justice Department Resolves Citizenship Status Discrimination Charge Against Pennsylvania Employer Sernak Farms* (Dec. 13, 2011), <https://www.justice.gov/opa/pr/justice-department-resolves-citizenship-status-discrimination-charge-against-pennsylvania>.

¹⁴⁶ 2019 NPRM, 84 Fed. Reg. at 36174.

We similarly agree with DOL’s proposal to add language to the definition of joint employment in the H-2A program that clarifies that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H-2A workers sponsored under the application and, if applicable, of corresponding workers.¹⁴⁷ This explicit clarification will serve as an incentive for associations to adequately monitor their members and ensure compliance with program requirements.

DOL also proposes to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer, but only during the period in which the member employs H-2A workers sponsored under the association’s joint employer application.¹⁴⁸ With regard to this proposal, we are concerned about the language that employer members are only responsible during “the period in which the member employs H-2A workers.” This timing limitation may prove challenging in establishing liability, especially given the uncertainty that may accompany the proposed changes to the date of need, staggered applications, etc., described above.

DOL also proposes language allowing the already existing practice of job orders with joint employers. If employers are to be given this advantage, then the orders filed in this manner should have language specifying that all named employers are filing as “joint employers” for the period of employment listed on the order, not just dates in which H-2A workers completed work owned or operated by a particular employer, so as to prevent disputing joint employment should something go wrong. In this situation, that employer should still be held liable for any violations under the order. With regard to the definition of joint employment, please refer to the discussion in Section X below.

IV. The Proposed Rule’s Adverse Effect Wage Rate and the Prevailing Wage

DOL is obligated by statute to ensure that the wage levels it approves under the H-2A program will not “adversely affect” the wages of similarly employed U.S. workers.¹⁴⁹ To accomplish the program’s statutory goals, DOL must determine current market wage levels and establish a methodology to set appropriate wage levels to protect U.S. workers’ wages against adverse effects caused by the hiring of foreign workers. Its methodology must be based on reliable data, rational analysis, and reasonable conclusions.

At the outset of the NPRM, DOL states the revised rule is designed to further the objectives of President Trump’s Buy American and Hire American executive order. The rules are intended to implement the executive branch’s policy to rigorously administer the laws governing importation of foreign workers “in order to create higher wages” for workers in the United States.¹⁵⁰ In this regard, the executive order’s objectives mirror those set out in 20 C.F.R.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 8 U.S.C. § 1188.

¹⁵⁰ 2019 NPRM, 84 Fed. Reg. at 36169.

§ 655.0 (admission of foreign workers permitted only when doing so “will not adversely affect the wages...of similarly employed U.S. workers”).¹⁵¹

The proposed rule regarding wages in proposed sections 655.120 and 655.122(l) should be revised to meet DOL’s statutory obligations. We generally support the proposed continued obligation on H-2A program employers to pay the highest of an AEW, prevailing wage, collective bargaining wage, state minimum wage, and federal minimum wage. However, adoption and implementation of the proposed rule’s provision regarding the prevailing wage and the AEW, as written, will have a direct and continuing depressive impact on the wages of domestic farmworkers in violation of the statute.

A. The Statutory Protections Exist to Address the Established Evidence that Employment of Temporary Foreign Agricultural Workers as Guestworkers Causes Wage Depression

The statutory obligation to prevent adverse effect has existed under agricultural guestworker programs for decades (see, for example, the Foran Act of 1885, regarding padrone who recruited temporary laborers from Italy and other labor contractors), and has been renewed repeatedly since World War I in standalone legislation and in conjunction with other efforts to regulate foreign labor contracting, as well as immigration laws that regulate migration and employment.

The *Bracero* Program, which began during World War II to alleviate alleged labor shortages primarily in agriculture, contained important protections driven by demonstrated realities about guest worker programs. The law and the related U.S.-Mexico agreement prohibited employment of temporary foreign workers under conditions that would cause adverse effects to domestic workers similarly employed. The mechanism to prevent adverse effect evolved over time as the earlier protections failed to achieve the statutory goal.¹⁵²

The long history of the *Bracero* and H-2A programs has demonstrated that their very nature results in wage depression that must be overcome through regulation. DOL’s proposal implicitly and explicitly ignores the inherent restrictions on guest workers’ legal status and economic bargaining power that lead to depression in wage rates and other job terms. DOL needs to confront this 60-year history with policy choices that comply with the law and are rational. It has not done so in this proposal.

First, H-2A program employers recruit workers almost exclusively from poor nations and from populations within those nations whose earnings are substantially less than those of farmworkers in the United States. Almost any wage in the U.S. can be attractive to the foreign citizens recruited for these jobs due to the imbalance between the economies of the United States and the foreign nations, including Mexico, Jamaica, and Thailand, from which H-2A workers are

¹⁵¹ See also *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 596 (1982) (“The obvious point” of the H-2A regulatory scheme is to ensure that “to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected.”).

¹⁵² Howard N. Dellon, *Foreign Agricultural Workers and the Prevention of Adverse Effect*, 17 Labor L.J. 739 (1966). (Dellon was a DOL economist.)

recruited. U.S. farmworkers' wages, which are about one-half those of the average worker in this nation, are often ten or more times a Mexican worker's wage, but U.S. workers must pay the cost of living in the United States. A wage rate that is mediocre, or below the rate paid to the local labor market in the United States may not only be attractive but can induce high productivity among impoverished citizens of poor countries because their earnings opportunities and cost of living in the foreign countries are so low. The H-2A program allows U.S. employers to exploit international wage discrepancies.

Second, the legal restrictions on the status of an H-2A visa worker contribute to workers' inability to cause improvements in wages and working conditions at H-2A employers. Under the Immigration Service regulations, generally an H-2A worker may only work for the employer that obtained the visa and must leave the country when the job ends.¹⁵³ The worker is dependent on the employer for the visa; if the worker wishes to return the following season, the worker must hope that the employer applies for a visa and offers it to him/her. In these circumstances, few workers find it in their interest to make demands for better wages or working conditions. Fear of lost jobs is a powerful force not only for the individual workers but for the foreign workers' governments, which believe they are competing with other developing nations for the valuable economic opportunity to send their citizens to the United States. In these circumstances, the foreign workers and their governments do not exert pressure on the market for improved wages and working conditions. Their presence in the marketplace often dilutes the economic power of the already low-paid U.S. farmworkers, who strive to meet the increasing cost of living in the United States. U.S. workers at an H-2A employer have difficulty making demands for higher wages when their foreign co-workers are fearful of losing job opportunities.

Third, the legal framework regulating the H-2A job terms causes harm to U.S. workers. An H-2A employer must offer at least the required wage rates under the H-2A program,¹⁵⁴ but need not offer more than the minimum required wage or other job terms required by the H-2A program even when there are U.S. workers available to accept the job if the wage rates were higher. A worker who asks for a higher wage rate can be deemed "unavailable for work" and the available job can be filled with a guest worker at the minimum required wage.¹⁵⁵ The depressing effect of guestworker programs extends beyond wages to other job terms. H-2A employers need not offer paid sick leave, paid vacation, health care insurance, or other fringe benefits because they are not common in agriculture and because H-2A workers rarely have bargaining power to win them.

Fourth, H-2A employers also favor H-2A workers over U.S. workers because they need not pay Social Security contributions or unemployment tax on the guestworkers' wages.¹⁵⁶ Hiring a U.S. worker is often seen by H-2A employers as increasing payroll costs and motivates employers to place more downward pressure on U.S. workers' wages or to avoid hiring them at all.

¹⁵³ 8 C.F.R. § 214.2(h)(5)(viii).

¹⁵⁴ 20 C.F.R. § 655.102(b)(9).

¹⁵⁵ *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977).

¹⁵⁶ 26 U.S.C. §§ 3121(b)(1), 3306(c)(1)(B).

For these and other reasons, the “minimum” standards under the H-2A program often become the maximum that the workers at an H-2A employer can hope to be paid. Because there is an endless supply of citizens of foreign countries willing to work in the United States and because these jobs are generally classified as unskilled (or at times semi-skilled), the employers’ access to that foreign labor supply means that employers have little or no economic incentive to meet the economic demands of a U.S. worker (or a courageous guestworker) who demands a better wage. Workers have little bargaining power when they can so easily be replaced as a matter of law. Union organizing and collective bargaining are made extremely difficult in these circumstances. One would think that the existence of a perpetual claimed “labor shortage” in agriculture would suggest that agricultural employers should begin offering basic fringe benefits to attract and retain workers. But that hasn’t happened on a broad scale. Frequently, the best workers can hope for under guest worker programs is employers’ compliance with the H-2A obligations.

Since the inception of the modern guestworker program with the initial *Bracero* agreement in 1942, the federal government has used a two-pronged approach to guard against wage depression that would otherwise result from the importation of substantial numbers of foreign agricultural workers. These two mechanisms—the prevailing wage and the AEW—serve different and distinct, although complementary, purposes.

Prevailing wage provisions are designed to protect local wage rates against the depressive effects from the employment of guestworkers willing to work for lower rates. They are particularly important in those instances where local wages are well above minimum levels required by state and federal laws. Merely enforcing the regulatory minimums, without more, will do little to curb erosion of local wage rates when employers are able to hire guestworkers at rates below those established in the local labor market.

Thus, from the inception of the *Bracero* Program in 1942, prevailing wage requirements have focused on wages paid *local* workers employed in the area of intended employment.¹⁵⁷ The prevailing wage requirements exist “to prevent the use of the interstate clearance system as a vehicle for undermining prevailing wage rates in the area of intended employment.”¹⁵⁸

Prevailing wages protections have always been directed at wages paid in the locales in which the guestworkers are employed; they have never been designed to establish regional or

¹⁵⁷ *Dona Ana Cty. Farm & Livestock Bureau v. Goldberg*, 200 F. Supp. 210, 212 n.4 (D.D.C. 1961); Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* at 135 (1972) (from their inception, prevailing wage rates were decidedly local in nature and were keyed to protect the wages of the domestic farmworkers in the geographic area); Samuel Liss, *The Concept and Determination of Prevailing Wages in Agriculture During World War II*, 24 *Agricultural History* 4, 8 (Jan. 1950) (agricultural prevailing wages “insured the standards of work approximating those prevailing in the area of employment” prior to the arrival of guestworkers).

¹⁵⁸ Letter from Justice Department to Secretary of Labor, regarding proposed regulations under the Wagner-Peyser Act (July 2, 1959), reprinted in *Extension of Mexican Farm Labor Program*, Hearings Before the H. Subcomm. on Equipment, Supplies and Manpower of the H. Comm. on Agriculture, 86th Congress at 341 (Mar. 1960). As the Fifth Circuit put it, the prevailing wage “is the wage rate being paid to American Workers for the same activity in the same area” so that “[t]he Employer finds himself in the same position as to wages whether he hires Mexicans or Americans.” *United States v. Morris*, 252 F.2d 643, 647 (5th Cir. 1958).

statewide wage levels.¹⁵⁹ The prevailing wage is not intended to establish wage norms for the local area. Often, prevailing wage levels in agriculture have been quite low. As one historian observed, the agricultural prevailing wage system instituted by the *Bracero* Program “was not designed to be a vehicle for eliminating substandard wages in agriculture, for narrowing industry-farm wage disparities, nor for equalizing wages for the same or comparable work between geographic regions.”¹⁶⁰ The architects of reforms in the *Bracero* Program recognized that additional protections would be needed to prevent widespread use of guestworkers from leading to chronically “low wage ghettos.”

To counteract this wage stagnation, the federal government has consistently conditioned importation of agricultural guestworkers on employer adoption of certain additional minimum standards. In the first *Bracero* agreement, besides being required to pay the local prevailing wage, employers were obligated to offer a wage no less than 30 cents per hour.¹⁶¹ This figure was equal to the federal minimum wage applicable to nonagricultural employment at the time.¹⁶² Over time, these normative wage requirements became the adverse effect wage rate.¹⁶³ Unlike the prevailing wage requirements, which are directed exclusively at local wages, the adverse effect wage rate is designed to prevent the creation and perpetuation of areas with chronically substandard wages. The employer’s labor certification is conditioned on his agreement to pay a wage based usually on multi-state standards.¹⁶⁴

Normally, wage differentials between geographic areas tend to equalize over time, as low wage locales are forced to up their pay rates in order to compete for available labor with higher-paying areas. But the ready availability of guestworkers serves to insulate employers from the normal labor market forces that lead to wage increases in those areas paying substandard wages. As DOL has said, the introduction of foreign guestworkers prevents higher local wages that would ordinarily result from labor shortages.¹⁶⁵ With the labor market no longer exerting upward pressure, wage stagnation is likely to occur.¹⁶⁶

DOL has explained the importance of an AEWL based on a methodology that is different from (and in addition to) the local prevailing wage:

¹⁵⁹ Liss, *supra* note 160, at 10 (the government’s 1943 instructional guide on computing prevailing wages, published at the outset of the *Bracero* Program, emphasized that separate wage findings were required for each agricultural area and were not to be averaged in order to arrive at a single rate for two or more areas of employment).

¹⁶⁰ *Id.* at 8.

¹⁶¹ Otey M. Scruggs, *Evolution of the Mexican Farm Labor Agreement of 1942*, 34 Agric. Hist. 140, 145 (1960) (“While Mexicans contracted to do sugar beet work would be receive wages equal to those established under the Sugar Act, those imported to work in other crops would be paid wages prevailing in the areas of employment. But in no case would any workers be paid less than 30 cents an hour.”).

¹⁶² 54 Fed. Reg. 28039 (July 5, 1989).

¹⁶³ *Id.*

¹⁶⁴ 74 Fed. Reg. 45911 (Sept. 4, 2009) (the AEWL combats wage stagnation resulting from use of guestworkers by superimposing a wage floor based on data from a wide geographic area).

¹⁶⁵ 75 Fed. Reg. 6892 (Feb. 12, 2010).

¹⁶⁶ 74 Fed. Reg. 45911 (Sept. 4, 2009) (employment of large numbers of H-2A workers in a labor market at the prevailing wage “would inevitably keep the prevailing wage improperly low”).

By computing an AEW to approximate the equilibrium wage that would result absent an influx of temporary foreign workers, the AEW serves to put incumbent farm workers in the position they would have been in but for the H-2A program. In this sense, the AEW avoids adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing wage rate when they would have otherwise risen to a higher equilibrium level over time.¹⁶⁷

An AEW distinct from a prevailing wage concept is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area (within which movement of domestic labor is feasible) or over a broader occupation/crop/ activity definition (within which reasonably ready transfer of skills is feasible). In such cases, the introduction of foreign workers paid at the local prevailing wage fails to account for the fact that the labor shortage would have otherwise resulted in higher local wages. The use of the observed local prevailing wage would adversely affect domestic workers by filling job vacancies with foreign workers before wages were allowed to adjust upward to alleviate the labor shortage in the imperfectly functioning labor market information system.¹⁶⁸

Thus, to more fully protect domestic workers from the adverse effects of temporary foreign workers, it is appropriate to compute wages based on a broader geographic area or broader occupation definition than the more specific prevailing wage computation when the local prevailing wage is below the average found in the broader market area.¹⁶⁹

Despite the importance of the AEW, it alone does not protect U.S. workers against depression in local wage rates. In many jobs, the availability of guestworkers employed at AEW levels will result in the gradual erosion of wage rates paid U.S. workers unless local prevailing wage rates are protected.

B. The Proposed Prevailing Wage Methodology Must Be Revised

The proposal would essentially eliminate the longstanding requirement that employers must offer a local prevailing wage (if it is the highest wage) by stating that prevailing wage surveys are not required and by ensuring that they will rarely, if ever, be carried out or, if they are carried out, that any wage finding will rarely be considered valid.¹⁷⁰ In the absence of prevailing wage determinations, H-2A employers could lawfully offer below-market wage rates, as discussed further below. For low-wage farmworkers, these could be very harmful pay cuts.

¹⁶⁷ 75 Fed. Reg. 6891–92 (Feb. 12, 2010).

¹⁶⁸ *Id.* at 6892–93.

¹⁶⁹ *Id.* at 6893.

¹⁷⁰ See Exhibit C-3, Philip Martin, *Prevailing Wage Surveys*, Rural Migration News (Sept. 2019) (“DOL’s July 26, 2019 regulations are likely to reduce the number of prevailing wage surveys and prevailing wage determinations.”).

DOL acknowledges that the state agencies in many instances are not carrying out prevailing wage surveys and are not being allowed to make prevailing wage findings due to shortcomings in data. Since the days of the *Bracero* Program, the states have been delegated the responsibility to determine local agricultural prevailing wages. Initially this was accomplished through state agricultural wage boards,¹⁷¹ and later by surveys conducted by state employment service agencies, now referred to as SWAs. Most SWAs lack the resources to conduct the number of prevailing wage surveys suggested by ET Handbook No. 385.¹⁷² Indeed, a number of states have failed to conduct a single prevailing wage survey for a decade or longer. This includes some states that regularly import sizable numbers of H-2A workers, such as Louisiana and Arkansas.

While DOL ascribes some of the problem to the current “resource-intensive standards,” this proposal would impose additional requirements that would make surveys even less likely. It is simply not true that DOL’s proposal will “allow the SWAs and other state agencies to conduct surveys using more practical standards and establish reliable and accurate prevailing wage rates for workers and employers.”¹⁷³

DOL states that it has decided to no longer require prevailing wage surveys.¹⁷⁴ As discussed above and below, the lack of prevailing wage findings in many locations already results in adverse effects on U.S. workers by employers who are permitted to hire H-2A visa workers at the lower AEWRs in their states. DOL, without objective support, denies that its decision causes adverse effects in violation of the statute.

DOL’s acknowledgment of its failure to ensure that prevailing wage findings are made and enforced should lead it to conclude that it must both assign adequate resources to the prevailing wage determinations, and allow for alternative methods for determining prevailing wage based on objective data that will ease the burden, and may increase reliability. DOL is obligated to implement numerous requirements as part of its responsibilities under the H-2A program. The essential nature of the obligation to implement the prevailing wage requirement is evident from the history of guestworker programs, DOL’s knowledge and regulation of the H-2A program, court decisions, and the statutory obligation to reject H-2A employers’ obligations unless the job offer “will not adversely affect the wages and working conditions of workers in the United States similarly employed.”¹⁷⁵ In fact, DOL refers to the reality that “State agencies [and therefore the Department] know based on past experience that prevailing wage surveys commonly result in hourly wages higher than the AEWR.”¹⁷⁶

There is no statutory or factual basis that would support the position that DOL has the discretion not to implement the prevailing wage requirement, nor to claim that its resources are so limited that the requirement is virtually impossible to carry out and therefore excused. Likewise, DOL may not delegate prevailing wage surveys to state agencies while acknowledging

¹⁷¹ Liss, *supra* note 160, at 8–9.

¹⁷² 53 Fed. Reg. 22095 (June 13, 1988) (recommending surveys once per season in any crop activity in which H-2A workers are employed); *see also* 2019 NPRM, 84 Fed. Reg. at 36185.

¹⁷³ 2019 NPRM, 84 Fed. Reg. at 36171, 36179.

¹⁷⁴ *Id.* at 36179–80.

¹⁷⁵ 8 U.S.C. § 1188.

¹⁷⁶ 2019 NPRM, 84 Fed. Reg. at 36180.

that the surveys will not be carried out due to the limited sources at those agencies. Nor are these positions rendered reasonable or lawful by DOL’s statement that sometime in the future “it will work with the States through their annual grant plans to focus prevailing wage surveys.”¹⁷⁷ The time is now.

DOL has evidence of the adverse effect caused by the lack of prevailing wage surveys, which it proposes to exacerbate. Local agricultural wage rates seem increasingly at risk of being depressed by widespread use of H-2A workers. In fiscal year 2009, DOL estimated that the local prevailing wage, as measured by the Occupational Employment Statistics (OES) survey, exceeded the AEW in only ten percent of cases.¹⁷⁸ The data below suggests that this percentage has grown considerably over the past decade, making meaningful protection of local prevailing wage rates more important than ever.

There continue to be significant wage differentials for similar crop activities in different sections of the same state, as reflected in data derived from the limited number of prevailing wage surveys completed by the SWAs over the past decade.

FLORIDA

Activity	Year	East Coast	South Florida	Central Florida
Early/mid-season processing oranges	2014		90¢ per box	\$1.00 per box
Early/mid-season processing oranges	2011		85¢ per box	90¢ per box
Early/mid-season processing oranges	2007	98¢ per box	95¢ per box	85¢ per box
Valencia oranges for processing	2014		\$1.00 per box	\$1.05 per box
Valencia oranges for processing	2011		90¢ per box	90¢ per box

MARYLAND

Activity	Year	Eastern Shore	Central area

¹⁷⁷ *Id.*

¹⁷⁸ 75 Fed. Reg. 6893 n.7 (Feb. 12, 2010).

Nursery labor	2018	\$10.00 per hour	\$9.65 per hour
Nursery labor	2016	\$9.50 per hour	\$10.00 per hour
Nursery labor	2015	\$9.50 per hour	\$9.00 per hour
Nursery labor	2011	\$8.00 per hour	\$9.50 per hour

NEW JERSEY

Activity	Year	North area	South area
Nursery labor	2015	\$8.50 per hour	\$10.00 per hour
Nursery labor	2014	\$8.25 per hour	\$10.00 per hour
Tomato harvest	2013	\$9.50 per hour	\$7.50 per hour
Tomato harvest	2012	\$9.00 per hour	\$7.30 per hour
Peach harvest	2013	\$10.00 per hour	\$8.70 per hour
Peach harvest	2007	\$8.50 per hour	\$7.15 per hour
Mixed vegetables harvest	2013	\$10.00 per hour	\$8.00 per hour
Mixed vegetables harvest	2012	\$9.00 per hour	\$7.30 per hour
Mixed vegetables harvest	2009	\$10.00 per hour	\$7.25 per hour

NEW YORK

Activity	Year	Western New York	Hudson Valley	North Country

General apple orchard work	2012	\$9.00 per hour	\$8.50 per hour	\$10.75 per hour
General apple orchard work	2011	\$9.63 per hour	\$9.70 per hour	\$10.00 per hour
General apple orchard work	2010	\$9.00 per hour	\$9.51 per hour	\$9.70 per hour
General apple orchard work	2009	\$9.70 per hour	\$8.50 per hour	No finding
General apple orchard work	2008	\$9.00 per hour	\$7.50 per hour	\$9.50 per hour

NORTH CAROLINA

Activity	Year	Northeast area	Southeast area	Piedmont area
Tobacco transplanting	2014	\$7.25 per hour	\$7.50 per hour	\$8.00 per hour
Tobacco transplanting	2013	\$7.25 per hour		
Tobacco transplanting	2009	\$6.50 per hour	\$7.00 per hour	\$8.00 per hour
Tobacco transplanting	2008	\$7.00 per hour	\$7.00 per hour	\$7.00 per hour
Tobacco harvesting	2014		\$7.50 per hour	\$8.00 per hour
Tobacco harvesting	2013	\$7.25 per hour		\$8.00 per hour
Tobacco harvesting	2009	\$8.00 per hour	\$7.00 per hour	\$8.00 per hour
Tobacco harvesting	2008	\$7.50 per hour	\$7.00 per hour	\$7.00 per hour
Horticulture cultivating	2014	\$8.00 per hour	\$9.25 per hour	\$8.00 per hour

Horticulture cultivating	2013	\$7.25 per hour		\$9.00 per hour
Horticulture harvesting	2009	\$8.00 per hour	\$8.00 per hour	\$9.00 per hour
Horticulture harvesting	2008	\$6.90 per hour	\$8.00 per hour	\$7.00 per hour

VIRGINIA

Activity	Year	Charlottesville	Roanoke	Petersburg	South Hill	Bristol
Apple harvesting	2009	\$5.85 per hour	\$7.00 per hour			
Apple pruning	2013	\$7.25 per hour	\$10.00 per hour			
Peach harvesting	2013	\$7.25 per hour	\$8.85 per hour			
Peach harvesting	2009	\$5.15 per hour	\$8.00 per hour			
Peach pruning	2013	\$7.25 per hour	\$10.00 per hour			
Tobacco planting, cultivating, harvesting	2013			\$8.00 per hour	\$9.30 per hour	\$8.50 per hour
Nursery work	2013			\$8.75 per hour	\$10.00 per hour	
Nursery work	2009	\$7.50 per hour	\$7.40 per hour	\$8.00 per hour	\$10.00 per hour	
Vegetable picking	2009			\$8.00 per hour	\$9.02 per hour	

Data from the Bureau of Labor Statistics' OES survey offers further insight into these labor markets. The compilations below show the OES prevailing wages for selected counties, parishes, and townships in which the Department has certified in 2019 at least one crop worker (SOC 45-2092) position that will be paid on an hourly basis at the AEW. ¹⁷⁹

First, the OES data reveals that throughout the country, there are substantial differences in the wages paid crop workers in various locations within the same state. Secondly, and perhaps more importantly, there are many areas in which the prevailing wage paid crop workers is higher than the AEW, often significantly so. In some states, in *every* instance in which the Department has approved an H-2A application, the OES prevailing wage is above the AEW rate at which certification was granted.

In these situations, formal protection is needed to prevent local wage rates from eroding. The AEW alone will do nothing to safeguard these local prevailing wages from being undercut so long as DOL certifies employers to import foreign workers at an AEW that is below the local prevailing wage. Local U.S. farmworkers who insist on payment of long-standing prevailing wage rates are likely to be quickly displaced by H-2A workers. Under current law, an H-2A employer is not obligated to offer a job to any U.S. worker who requests a wage higher than that approved by the Department; any worker seeking pay even nominally above the approved rate is considered “unavailable” for the position.¹⁷⁹

ALABAMA

Limestone County	\$13.30 per hour (exceeds 2019 Alabama AEW of \$11.13 per hour)
Chilton County	\$12.22 per hour (exceeds 2019 Alabama AEW of \$11.13 per hour)
Calhoun County	\$12.08 per hour (exceeds 2019 Alabama AEW of \$11.13 per hour)
Tuscaloosa County	\$11.38 per hour (exceeds 2019 Alabama AEW of \$11.13 per hour)
Baldwin County	\$11.00 per hour
Mobile County	\$10.86 per hour
Geneva County	\$10.61 per hour
Bullock County	\$10.36 per hour

ARIZONA

La Paz County	\$15.56 per hour (exceeds 2019 Arizona AEW of \$12.00 per hour)
Maricopa County	\$12.79 per hour (exceeds 2019 Arizona AEW of \$12.00 per hour)
Cochise County	\$11.58 per hour
Yuma County	\$11.50 per hour

ARKANSAS

Crittenden County	\$11.99 per hour (exceeds 2019 Arkansas AEW of \$11.33 per hour)
White County	\$11.70 per hour (exceeds 2019 Arkansas AEW of \$11.33 per hour)
Bradley County	\$10.82 per hour
Lincoln County	\$10.60 per hour
Poinsett County	\$10.38 per hour
Cross County	\$9.82 per hour

CALIFORNIA

Sonoma County	\$14.57 per hour (exceeds 2019 California AEW of \$13.92 per hour)
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¹⁷⁹ *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977).

San Diego County	\$14.18 per hour (exceeds 2019 California AEW of \$13.92 per hour)
Santa Cruz County	\$13.27 per hour
San Luis Obispo County	\$12.94 per hour
Ventura County	\$12.80 per hour
Santa Barbara County	\$12.43 per hour
Tehama County	\$12.30 per hour
San Bernardino County	\$12.01 per hour
Fresno County	\$11.55 per hour

COLORADO

Eagle County	\$20.76 per hour (exceeds 2019 Colorado AEW of \$13.13 per hour)
Montrose County	\$15.80 per hour (exceeds 2019 Colorado AEW of \$13.13 per hour)
El Paso County	\$15.12 per hour (exceeds 2019 Colorado AEW of \$13.13 per hour)
Weld County	\$15.00 per hour (exceeds 2019 Colorado AEW of \$13.13 per hour)
Mesa County	\$14.18 per hour (exceeds 2019 Colorado AEW of \$13.13 per hour)
Otero County	\$11.75 per hour

CONNECTICUT

Hartford County	\$15.66 per hour (exceeds 2019 Connecticut AEW of \$13.25 per hour)
New Haven County	\$14.84 per hour (exceeds 2019 Connecticut AEW of \$13.25 per hour)

DELAWARE

Kent County	\$15.12 per hour (exceeds 2019 Delaware AEW of \$13.15 per hour)
Sussex County	\$14.97 per hour (exceeds 2019 Delaware AEW of \$13.15 per hour)

FLORIDA

Alachua County	\$13.72 per hour (exceeds 2019 Florida AEW of \$11.24 per hour)
Hamilton County	\$11.88 per hour (exceeds 2019 Florida AEW of \$11.24 per hour)
Hendry County	\$11.52 per hour (exceeds 2019 Florida AEW of \$11.24 per hour)
Volusia County	\$11.28 per hour (exceeds 2019 Florida AEW of \$11.24 per hour)
Palm Beach County	\$10.52 per hour
Miami-Dade County	\$10.45 per hour
Collier County	\$9.88 per hour
Orange County	\$9.54 per hour

GEORGIA

Brooks County	\$13.68 per hour (exceeds 2019 Georgia AEW of \$11.13 per hour)
Rabun County	\$13.14 per hour (exceeds 2019 Georgia AEW of \$11.13 per hour)
Lee County	\$12.41 per hour (exceeds 2019 Georgia AEW of \$11.13 per hour)
Tift County	\$10.49 per hour
Crawford County	\$10.00 per hour
Tattnall County	\$9.48 per hour

HAWAII

Honolulu County	\$16.51 per hour (exceeds 2019 Hawaii AEW of \$14.73 per hour)
Hawaii County	\$15.29 per hour (exceeds 2019 Hawaii AEW of \$14.73 per hour)

IDAHO

Canyon County	\$11.71 per hour
Franklin County	\$11.55 per hour
Jefferson County	\$11.05 per hour

ILLINOIS

McLean County	\$17.73 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)
Hancock County	\$17.21 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)
Carroll County	\$16.58 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)
Ford County	\$15.27 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)
Sangamon County	\$15.06 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)
McHenry County	\$13.40 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)
Union County	\$13.35 per hour (exceeds 2019 Illinois AEW of \$13.28 per hour)

INDIANA

Knox County	\$13.89 per hour (exceeds 2019 Indiana AEW of \$13.26 per hour)
Washington County	\$13.58 per hour (exceeds 2019 Indiana AEW of \$13.26 per hour)
Jasper County	\$13.40 per hour (exceeds 2019 Indiana AEW of \$13.26 per hour)
Sullivan County	\$12.19 per hour
Lagrange County	\$11.94 per hour
Tipton County	\$11.16 per hour

IOWA

Palo Alto County	\$19.07 per hour (exceeds 2019 Iowa AEW of \$13.34 per hour)
Jones County	\$15.46 per hour (exceeds 2019 Iowa AEW of \$13.34 per hour)
Butler County	\$14.36 per hour (exceeds 2019 Iowa AEW of \$13.34 per hour)
Jefferson County	\$12.73 per hour
Dallas County	\$12.34 per hour

KANSAS

Douglas County	\$14.22 per hour
Riley County	\$13.19 per hour
Sheridan County	\$13.08 per hour

KENTUCKY

Grant County	\$15.50 per hour (exceeds 2019 Kentucky AEW of \$11.63 per hour)
Calloway County	\$14.91 per hour (exceeds 2019 Kentucky AEW of \$11.63 per hour)
Shelby County	\$13.58 per hour (exceeds 2019 Kentucky AEW of \$11.63 per hour)
Meade County	\$12.93 per hour (exceeds 2019 Kentucky AEW of \$11.63 per hour)
Logan County	\$12.19 per hour (exceeds 2019 Kentucky AEW of \$11.63 per hour)
Henderson County	\$12.12 per hour (exceeds 2019 Kentucky AEW of \$11.63 per hour)
Woodford County	\$11.44 per hour
Franklin County	\$11.17 per hour

LOUISIANA

DeSoto Parish	\$13.68 per hour (exceeds 2019 Louisiana AEW of \$11.33 per hour)
Rapides Parish	\$12.63 per hour (exceeds 2019 Louisiana AEW of \$11.33 per hour)
Pointe Coupee Parish	\$12.45 per hour (exceeds 2019 Louisiana AEW of \$11.33 per hour)
Natchitoches Parish	\$12.17 per hour (exceeds 2019 Louisiana AEW of \$11.33 per hour)
Iberia Parish	\$11.98 per hour (exceeds 2019 Louisiana AEW of \$11.33 per hour)
Madison Parish	\$11.67 per hour (exceeds 2019 Louisiana AEW of \$11.33 per hour)

MAINE

Mapleton town	\$16.81 per hour (exceeds 2019 Maine AEW of \$13.25 per hour)
Newport town	\$15.23 per hour (exceeds 2019 Maine AEW of \$13.25 per hour)
Manchester town	\$13.46 per hour (exceeds 2019 Maine AEW of \$13.25 per hour)
Hartford town	\$10.96 per hour

MARYLAND

Montgomery County	\$16.66 per hour (exceeds 2019 Maryland AEW of \$13.15 per hour)
Cecil County	\$15.12 per hour (exceeds 2019 Maryland AEW of \$13.15 per hour)
Kent County	\$13.40 per hour (exceeds 2019 Maryland AEW of \$13.15 per hour)
Baltimore County	\$13.36 per hour (exceeds 2019 Maryland AEW of \$13.15 per hour)
Washington County	\$12.14 per hour

MASSACHUSETTS

Ashfield town	\$16.76 per hour (exceeds 2019 Massachusetts AEW of \$13.25 per hour)
Stow town	\$16.41 per hour (exceeds 2019 Massachusetts AEW of \$13.25 per hour)

MICHIGAN

Oceana County	\$13.54 per hour
Leelanau County	\$12.15 per hour
Genesee County	\$12.12 per hour
Ottawa County	\$11.73 per hour

MINNESOTA

Renville County	\$17.48 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)
Clearwater County	\$16.74 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)
Benton County	\$15.23 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)
Blue Earth County	\$15.12 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)
Rice County	\$14.87 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)
Wabasha County	\$14.68 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)
Chisago County	\$14.37 per hour (exceeds 2019 Minnesota AEW of \$13.54 per hour)

MISSISSIPPI

Sunflower County	\$12.32 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
Rankin County	\$12.22 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
Claiborne County	\$12.08 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
Tate County	\$11.99 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
George County	\$11.92 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
Perry County	\$11.91 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
Jackson County	\$11.80 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)
Calhoun County	\$11.66 per hour (exceeds 2019 Mississippi AEW of \$11.33 per hour)

MONTANA

Ravalli County	\$12.97 per hour
Fallon County	\$12.62 per hour
Beaverhead County	\$10.39 per hour

NEW HAMPSHIRE

Hampton Falls town	\$16.41 per hour (exceeds 2019 New Hampshire AEW of \$13.25 per hour)
Lebanon City	\$14.19 per hour (exceeds 2019 New Hampshire AEW of \$13.25 per hour)
Loudon town	\$13.89 per hour (exceeds 2019 New Hampshire AEW of \$13.25 per hour)

NEW JERSEY

Monmouth County	\$15.83 per hour (exceeds 2019 New Jersey AEW of \$13.15 per hour)
Gloucester County	\$15.12 per hour (exceeds 2019 New Jersey AEW of \$13.15 per hour)
Atlantic County	\$13.40 per hour (exceeds 2019 New Jersey AEW of \$13.15 per hour)
Cumberland County	\$11.83 per hour

NEW MEXICO

Doña Ana County	\$10.56 per hour
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Torrance County	\$10.27 per hour
Luna County	\$9.76 per hour

NEW YORK

Orange County	\$15.83 per hour (exceeds 2019 New York AEW of \$13.25 per hour)
Columbia County	\$15.22 per hour (exceeds 2019 New York AEW of \$13.25 per hour)
Wayne County	\$14.88 per hour (exceeds 2019 New York AEW of \$13.25 per hour)
Onondaga County	\$13.89 per hour (exceeds 2019 New York AEW of \$13.25 per hour)
Wyoming County	\$13.83 per hour (exceeds 2019 New York AEW of \$13.25 per hour)
Saratoga County	\$13.38 per hour (exceeds 2019 New York AEW of \$13.25 per hour)
Ulster County	\$12.98 per hour
Washington County	\$12.87 per hour
Clinton County	\$12.54 per hour
Erie County	\$12.39 per hour

NORTH CAROLINA

Moore County	\$12.96 per hour (in excess of 2019 North Carolina AEW of \$12.25 per hour)
Henderson County	\$11.98 per hour
Alleghany County	\$11.96 per hour
Pender County	\$11.29 per hour
Johnston County	\$11.18 per hour
Wayne County	\$11.09 per hour
Greene County	\$10.82 per hour
Nash County	\$9.02 per hour

NORTH DAKOTA

Morton County	\$16.63 per hour (exceeds 2019 North Dakota AEW of \$14.38 per hour)
Bottineau County	\$16.00 per hour (exceeds 2019 North Dakota AEW of \$14.38 per hour)
Richland County	\$12.44 per hour

OHIO

Fulton County	\$13.94 per hour (exceeds 2019 Ohio AEW of \$13.26 per hour)
Erie County	\$13.65 per hour (exceeds 2019 Ohio AEW of \$13.26 per hour)
Lorain County	\$12.29 per hour
Fairfield County	\$11.18 per hour
Highland County	\$10.27 per hour

OKLAHOMA

Johnston County	\$16.03 per hour (exceeds 2019 Oklahoma AEW of \$12.23 per hour)
Beckham County	\$15.89 per hour (exceeds 2019 Oklahoma AEW of \$12.23 per hour)
Rogers County	\$14.79 per hour (exceeds 2019 Oklahoma AEW of \$12.23 per hour)
Logan County	\$13.03 per hour (exceeds 2019 Oklahoma AEW of \$12.23 per hour)

OREGON

Jackson County	\$16.65 per hour (exceeds 2019 Oregon AEW of \$15.03 per hour)
Multnomah County	\$13.52 per hour
Hood River	\$13.36 per hour
Umatilla County	\$12.07 per hour
Polk County	\$12.05 per hour

PENNSYLVANIA

Lehigh County	\$14.91 per hour (exceeds 2019 Pennsylvania AEW of \$13.15 per hour)
Columbia County	\$13.67 per hour (exceeds 2019 Pennsylvania AEW of \$13.15 per hour)

Luzerne County	\$12.42 per hour
Franklin County	\$11.15 per hour
Adams County	\$9.70 per hour

SOUTH CAROLINA

Spartansburg County	\$18.35 per hour (exceeds 2019 South Carolina AEW of \$11.13 per hour)
Beaufort County	\$13.26 per hour (exceeds 2019 South Carolina AEW of \$11.13 per hour)
Horry County	\$13.26 per hour (exceeds 2019 South Carolina AEW of \$11.13 per hour)
Bamberg County	\$12.84 per hour (exceeds 2019 South Carolina AEW of \$11.13 per hour)
Calhoun County	\$10.57 per hour
Aiken County	\$9.02 per hour

SOUTH DAKOTA

Faulk County	\$14.20 per hour
Lincoln County	\$13.66 per hour
Potter County	\$13.59 per hour

TENNESSEE

Montgomery County	\$13.19 per hour (exceeds 2019 Tennessee AEW of \$11.63 per hour)
Robertson County	\$12.25 per hour (exceeds 2019 Tennessee AEW of \$11.63 per hour)
Rhea County	\$10.13 per hour
Lauderdale County	\$9.98 per hour

TEXAS

Burleson County	\$14.25 per hour (exceeds 2019 Texas AEW of \$12.23 per hour)
Frio County	\$12.38 per hour (exceeds 2019 Texas AEW of \$12.23 per hour)
Travis County	\$12.12 per hour
Atascosa County	\$12.01 per hour
Bell County	\$11.95 per hour
Collin County	\$10.89 per hour
Fannin County	\$10.28 per hour
Brazoria County	\$10.14 per hour
Dallam County	\$9.85 per hour

UTAH

Box Elder County	\$14.70 per hour (exceeds 2019 Utah AEW of \$13.13 per hour)
Salt Lake County	\$12.78 per hour
Washington County	\$12.26 per hour
Utah County	\$11.96 per hour
Wasatch County	\$11.28 per hour

VERMONT

Shoreham town	\$16.32 per hour (exceeds 2019 Vermont AEW of \$13.25 per hour)
Jericho town	\$14.77 per hour (exceeds 2019 Vermont AEW of \$13.25 per hour)
Craftsbury town	\$14.12 per hour (exceeds 2019 Vermont AEW of \$13.25 per hour)

VIRGINIA

Loudon County	\$16.66 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Albemarle County	\$14.00 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Charles City County	\$13.96 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Northampton County	\$13.83 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Frederick County	\$13.42 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Montgomery County	\$13.36 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)

Rockingham County	\$13.26 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Pittsylvania County	\$13.25 per hour (exceeds 2019 Virginia AEW of \$12.25 per hour)
Augusta County	\$11.74 per hour

WASHINGTON

Okanagan County	\$14.85 per hour
Snohomish County	\$14.73 per hour
Yakima County	\$14.38 per hour
Chelan County	\$13.53 per hour
Whatcom County	\$13.33 per hour
Benton County	\$12.94 per hour

WEST VIRGINIA

Jefferson County	\$16.66 per hour (exceeds 2019 West Virginia AEW of \$11.63 per hour)
Mineral County	\$12.91 per hour (exceeds 2019 West Virginia AEW of \$11.63 per hour)
Berkeley County	\$12.14 per hour (exceeds 2019 West Virginia AEW of \$11.63 per hour)
Upshur County	\$11.63 per hour

WISCONSIN

Shawano County	\$16.04 per hour (exceeds 2019 Wisconsin AEW of \$13.54 per hour)
Marathon County	\$15.65 per hour (exceeds 2019 Wisconsin AEW of \$13.54 per hour)
Trempealeau County	\$15.51 per hour (exceeds 2019 Wisconsin AEW of \$13.54 per hour)
Waushara County	\$15.51 per hour (exceeds 2019 Wisconsin AEW of \$13.54 per hour)
Eau Claire County	\$15.30 per hour (exceeds 2019 Wisconsin AEW of \$13.54 per hour)

C. The Methodology for the Prevailing Wage Surveys Must Include Methods and Data Sources that Capture Local Prevailing Wages.

While agriculture has changed somewhat, local labor market factors still drive significant variance in rates of pay. For many crops and jobs, prevailing wages cannot be accurately determined through a statewide survey. As demonstrated above, in certain crops in certain states, the current, local prevailing wages for particular crop activities result in higher hourly wages than the applicable AEW.

1. The Methodology Must Allow for the Consideration of Piece Rate Wages.

This becomes even more apparent in areas where the piece rate is used in some crops. In the state of Washington, for example, prevailing wages based on piece rates for cherry, pear, and apple harvesting result in higher wages than the hourly AEW. This reality has been admitted in court documents by agricultural employers and their associations.

For example, in January 2015, WAFLA, an agricultural employer association that has filed the vast majority of H-2A applications on behalf of Washington growers over the last ten years, filed an amicus brief with the Washington Supreme Court in the case of *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, regarding farmworkers' claims under state law for paid rest breaks, in which WAFLA stated the following:

(a) "Piece rates are a common method of payment for farm workers who use hand labor to tend or harvest crops."

- (b) “Washington is number one in the harvest of: apples, sweet cherries and pears, all of which are traditionally handpicked at piece rate wages.”
- (c) “Skilled piece rate workers make significantly more than the AEW, often more than \$20 an hour.”¹⁸⁰

On February 14, 2017, West Mathison, president of Stemilt Growers, the largest agricultural employer in Washington State and a major user of H-2A workers, stated during a legislative hearing that he was testifying on behalf of his company and 80 growers who deliver fruit to Stemilt’s fruit packing warehouses. Mr. Mathison testified that the average hourly wage earned by Stemilt orchard workers was nearly \$18 an hour (\$17.96) when they were being paid on a piece-rate wages. Absent a prevailing wage determination, growers who utilize the H-2A foreign worker program would only have to pay the AEW of \$14.12 an hour to harvest apples that year, a reduction of nearly \$4 per hour in wages for Stemilt’s average workers.

This is not an isolated example. In the Sonoma and Napa counties of California, piece rate wine grape harvesters report earning as much as \$22 per hour. Crew-wide production bonuses in the strawberry industry can bring worker wages well above the AEW. Ironically, foreign recruiters use these piece rate earnings to entice H-2A workers to come to the United States, promising them the opportunity to earn \$100 or \$200 a day even when the AEW included in the job order used to recruit U.S. workers guarantees a significantly lower rate. Over time, if employers are not required to pay prevailing wages, and as the number of foreign workers rises in a particular crop activity, these lower wages will have a broader downward effect on wages for both U.S. and H-2A workers. DOL has the statutory responsibility to protect agricultural workers’ wages from being adversely affected by the use of the H-2A program, and prevailing wages, including piece rate earnings, are an essential component of the program’s wage protections.

DOL should make explicit in 20 C.F.R. § 655.120 that the employer must pay the prevailing piece rate if that is the reported unit of pay resulting from the wage survey and yields a higher average hourly rate than the AEW. DOL needs to make this requirement explicit because in *In re Golden Harvest Farm*, the ALJ held that if DOL had intended to require growers to pay the prevailing piece rate, DOL would have explicitly stated this in the regulation.¹⁸¹

The proposed language replacing the ETA 385 manual as the guide for conducting prevailing wage surveys is a move in the right direction. The ETA 385 is outdated and fails to provide the states with a methodology that is both simple to use and affordable. It is no longer reasonable to expect SWAs to send staff out in person to survey growers about their wages paid. For one thing, many agricultural employers are now corporate businesses not located on the farm itself. In addition, given the advance of technology and communication, it is much more efficient to perform the survey electronically than to send out staff to physically travel to each farm throughout the state.

¹⁸⁰ WAFLA Amicus Brief, *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 355 P.3d 258 (Wash. 2015) (No. 90932-6), 2015 WL 893143, at *2, *3, *5.

¹⁸¹ *In re Golden Harvest Farm*, No. 2011-TLC-00442, slip. op. at 3 (Dep’t of Labor ALJ Aug. 17, 2011).

The Department should replace the ETA 385 with methodology that the SWAs can carry out within their limited resources. Several of the requirements set out in proposed § 655.120(c) are unnecessarily complicated and leave too much room for third parties to challenge. Proposed subsection (c)(1) provides that the Administrator will issue a prevailing wage for an activity if all of the requirements in the subsection are met. Because several of those requirements are vague and open to interpretation, survey results that are the result of a neutral, professionally administered survey may still be rejected or challenged, thereby leaving the states without prevailing wage findings. Without prevailing wage findings, under the proposed regulations, employers would be required to pay only the AEWR for work that has historically been paid at higher wages, such as harvesting wine grapes, strawberries, cherries and apples.

Proposed subsection § 655.120(c)(iv)'s requirement that "(t)he surveyor either made a reasonable, good faith attempt to contact all employers employing workers performing the work task(s) in the crop activity or agricultural activity and geographic area surveyed or conducted a randomized sampling of such employers" is overly restrictive. It is unreasonable to set a goal for states operating with limited resources of contacting 100% of the growers of a particular crop. DOL should allow the states more flexibility in the number of employers surveyed. DOL is setting up the SWAs for failure with this requirement. Reaching 100% of employers of a particular crop is an unattainable goal, as there is no requirement that employers report to the state the specific crops that they grow. There is no database that the SWA can refer to. Even the agricultural employer associations have only partial lists of the growers of a particular crop.

The question of what constitutes a "reasonable" effort to reach this goal is open to interpretation. How will states know whether or not they have made a sufficient effort? The validity of the survey should not hinge on the total number of workers in the crop activity. In statistical methodology, the confidence that can be placed in estimates drawn from a sample does not depend on the size of the population, but instead on the size of the sample taken from that population, and whether that sample was drawn randomly from the population or can otherwise be assumed to be representative of the population.

If DOL wants the states to take specific steps, such as contacting crop associations or their state departments of agriculture, DOL should specify those steps. Otherwise, DOL is once again setting up the states for failure. It would be clearer to ask that the state perform a randomized sample of the employers that they have knowledge of rather than a randomized sampling of "such growers." Since the goal is to obtain prevailing wage findings, the regulations should allow the states the third option of proposing to the Department an alternative sampling method that meets the conditions and resources in that state.

Additionally, proposed subsection § 655.120(c)(v) should be revised to read that:

the survey reports the average wage of U.S. workers in the crop activity or agricultural activity and geographic area using the unit of pay used to compensate at least 50 percent of the workers whose wages are reported in response to the survey.

The current language leaves ambiguity as to whether the survey must report 50% of the workers represented in the surveys sent out (which would be an onerous requirement) or 50% of the workers represented by the survey responses received.

Proposed subsection § 655.120(c)(vi) imposes another unworkable requirement on the SWAs. The requirement that the survey “covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the state” will result in the Department or third parties challenging survey results after the fact based on individual judgments as to what is or is not “appropriate.” Even if DOL itself accepts the survey results, an agricultural employer could challenge the prevailing wage finding based on their own perspective of the most appropriate geographic area. The question of what is an appropriate geographic area is open to interpretation based on many potential factors. For example, one employer may argue that it would be appropriate to divide a state into multiple local survey areas. However, the SWA may determine that such a division would not be appropriate because the SWA will not be able to gather sufficient survey responses within that area so as to meet the requirement in subsection (c)(vii). SWAs are left to guess at what will be accepted as an “appropriate” geographic area for their survey. This is particularly difficult because it is unclear what it means to require that a survey cover an appropriate geographic area based on the size of the agricultural population covered by the survey. Given the absence of sufficient explanation in the proposed regulation as to what would make the geographic area appropriate or not, prevailing wage findings will be unnecessarily open to question. There is no obvious connection between the size of the agricultural population and the appropriate geographic area to be surveyed, except as to the need to have sufficient responses to have valid survey results. If that is the purpose, it should be explicitly stated.

Finally, the SWAs are left with the responsibility to determine whether there are different wage structures in the crop activity within the state, which is a determination that will be based on unreliable anecdotal data until after the survey is complete. Past experience shows that it is already difficult to convince the SWAs to conduct wage surveys. Furthermore, since employer responses have been low in a number of states, division of surveys into geographic areas smaller than an entire state is likely to result in survey results that fail to meet the minimum population thresholds set by DOL. For example, Washington State, the largest apple producer in the United States, was unable to obtain sufficient responses from apple employers to establish prevailing wage findings for apple harvesting in 2017.

DOL’s requirements for acceptance of survey results should be limited to a clearly defined, limited set of procedures for the SWA to take in carrying out the survey. So long as the SWA follows those defined steps, the findings should enjoy a presumption of validity.

2. Local Wage Rates Can Best Be Determined By Preserving, Not Diminishing, the Role of the SWA.

The current regulations allow for an active role by the SWA providing that SWAs must ensure that:

The wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. If

the wages offered are expressed as piece rates or as base rates and bonuses, the employer must make the method of calculating the wage and supporting materials available to ES staff who must check if the employer's calculation of the estimated hourly wage rate is reasonably accurate and is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher[.]¹⁸²

This provision, although not always adhered to, allows the SWA to independently determine that in certain areas of intended employment the prevailing wages are higher than the AEWR, minimum wages, or even the prevailing wage in other areas. This is critically important in states like California where the crop, the agricultural activity, and the geographic location each factor into what the local prevailing wage is, making it much higher in areas like Sonoma County and Monterey County when compared to similar crop activity in Stanislaus or Imperial Counties. As currently written, prevailing wage surveys are but one method that the SWA and OFLC may use to determine whether the job order provides an adequate wage. This protects U.S. workers—particularly piece rate workers—who as a result of collective bargaining or market conditions enjoy a higher wage rate than their peers in other parts of the state.

In contrast, proposed subsection 653.50(c)(2)(i) provides only that the SWA must ensure that:

(i) The wages and working conditions offered are not less than the prevailing wages, as defined in § 655.103(b), and prevailing working conditions among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher.¹⁸³

Proposed subsection 655.103(b) refers only to prevailing wage surveys, thereby establishing surveys as the sole mechanism for determining whether a prevailing wage rate is the highest rate of pay. While the wage surveys could be and should be an important tool for determining what rate of pay is necessary to ensure that offered wages do not deter U.S. workers, it should not be the exclusive method for several reasons. First, as DOL has acknowledged, relatively few prevailing wage surveys are conducted by the SWAs and certified by the OFLC under the current process. SWAs report that surveys are not completed not just because of the complexity of the current process, but also because of the lack of funding to do the surveys. DOL does not address this problem, but instead proposes eliminating the requirement for engaging in this important assessment.

3. A Prevailing Wage Determination Is Relevant to Every Job Order and Ensures the AEWR Does Not Artificially Deflate Wages U.S. Workers Expect to Receive.

The prevailing wage analysis, unlike the AEWR, provides the flexibility needed to address circumstances when market conditions, or the specific nature of the work or location, drive wages above a national or statewide average. This is clearly true in California, where the reliance on H-2A workers is relatively new, but increasing at a dramatic pace. News articles and workers represented by legal services organizations report an increase in minimum wage rates

¹⁸² 20 C.F.R. § 653.501(c)(iv)(I)(2)(i).

¹⁸³ 2019 NPRM, 84 Fed. Reg. at 36260.

that is exceeding both the pace and amount of the statutory increase in California's minimum wage. Nonetheless, while these reports indicate 2019 wage rates of \$15 per hour for citrus workers in the San Joaquin Valley and garlic workers in Gilroy, the current AEWR for California is \$13.92. While this may not be indicative of the industry as a whole, the SWA should be allowed to use these reported wage rates, as well as staff knowledge of local wage rates garnered from other job orders and employer prepared payroll reports, to double-check the AEWR and minimum wage rates against what is really being paid in that industry. Current regulatory language allows for such an inquiry and should be preserved.

The SWA has been an integral part of the review and approval process of job orders because SWA staff have local and statewide information available to them that is current and directly probative on the question of whether there is a legitimate need for foreign workers. The proposed revisions sidestep that knowledge base and instead dictate a flawed survey method that all parties concede is unlikely to produce meaningful data upon which to base the review of most job orders since such surveys are voluntary. Under this revision, a grower or farm labor contractor could propose using the AEWR even though it is lower than what was paid to their workers in the prior season or lower than what other employers are paying in the area of intended employment. The SWA would not have the power to issue a notice of deficiency even if the SWA could demonstrate that the grower had placed a job order for the same positions at a higher rate in the job service system. This change increases the likelihood that the wages of H-2A and domestic workers will be deflated as more H-2A workers come in. It also ties the hands of states that want to keep the domestic workforce gainfully employed and maintain the market-driven level of wages earned by their farmworker residents—both domestic and H-2A.

DOL offers no explanation for revising and limiting the SWAs' role in determining the prevailing wage exclusively to conducting wage surveys. Instead, DOL addresses only the fact that the change is to clarify its position that DOL is not required to issue prevailing wage rates for all job classifications.¹⁸⁴

4. Prevailing Wages Can Be Reliably Determined By Using Other Data Sources in Addition to Prevailing Wage Surveys.

We agree that the current methodology for the prevailing wage surveys should be revised and included in the regulations. However, the SWAs and OFLC should not be so limited when determining whether or not a job order offers a wage rate that is consistent with what workers are being paid for that job in that region. A wage survey is merely one of the ways to ensure that employing the H-2A workers will not adversely affect the wages of U.S. workers similarly employed. SWAs have a variety of real time data available to them that is provided by employers. This includes both data submitted in connection with the state's unemployment insurance program and historical job service listings for comparable positions in the same area of intended employment or by the applicant employer themselves. Job service staff funded by Migrant and Seasonal Farmworker funds are uniquely qualified to assess whether an hourly or piece rate is consistent with the prevailing practice in their region.

¹⁸⁴ *Id.* at 36179–80.

Workers have reported a reduction in wages when their direct hire grower or farm labor contractor began hiring H-2A workers. At times this was due to an abandonment of a piece rate compensation that yielded a far higher rate than the AEWR. In other instances it was because the AEWR was applied across the board to all job tasks, even though wage rates were historically different. While the use of the SOC will help address this problem, it is not precise enough to cover all historical differences in compensation practices. It goes without saying that a U.S. worker should never have to take a pay cut to keep her job simply because the employer has decided to rely on the published AEWR to establish the required wage rate.

We propose that in addition to the objective data used to determine prevailing wage rates and the AEWR, the applying employer be required to attest to the fact that neither U.S. nor H-2A workers will be paid at a piece or hourly wage rate that is less than the rate that was paid for comparable work performed at that location in the prior season or that is being offered by other employers in the area of intended employment. In the event that market conditions or other factors have driven wages down for reasons other than the availability of H-2A workers, the applying employer could be given the opportunity to demonstrate that the proposed offered wage equals or exceeds the prevailing wage for that season. Additionally, the regulations should make clear that DOL will review and require a change to the rate of pay even after certification if presented with worker complaints or clear, persuasive evidence that the H-2A employer is paying less than the prevailing wage based on any of the information sources listed above.

If DOL refuses to revise its proposed rule effectively ending the current prevailing wage survey system without making improvements and assigning adequate resources, then it is obligated to consider additional or alternative means of protecting the wages paid U.S. farmworkers in those areas in which H-2A workers are employed.

In the case of crop activities paid on an hourly basis, which comprise a majority of the jobs for which H-2A certifications are issued, the Occupational Employment Survey (OES) data set offers a viable source of information.

DOL currently uses the OES survey to compute prevailing wages for the H-2B and other guestworker programs. Like other prevailing wage measures, the OES survey gathers and reports wage data on a local, as opposed to statewide or multi-state, basis.¹⁸⁵ In the past, DOL has stated that OES survey data represents the best information available to protect the wages of U.S. workers from adverse effects.¹⁸⁶ The OES wages are computed using “statistically sound methodology” and are far better designed to capture variations between different sections of the state than the broad, region-based AEWRs.¹⁸⁷ Moreover, DOL’s proposed regulation utilizes the OES survey data to determine wage rates in those instances in which USDA Farm Labor Survey information is unavailable.¹⁸⁸

¹⁸⁵ *Comité de Apoyo a los Trabajadores Agrícolas v. Perez*, 45 F. Supp. 3d 477, 488 n.12 (E.D. Pa. 2014); *Moodie v. Kiawah Island Inn Co.*, 124 F. Supp. 3d 711, 721 (D.S.C. 2015).

¹⁸⁶ 73 Fed. Reg. 77173 (Dec. 18, 2008).

¹⁸⁷ *Id.* at 77175.

¹⁸⁸ 2019 NPRM, 84 Fed. Reg. at 36171, 36178–80.

In addition, there is relatively little chance that use of the OES data will overstate the actual wages paid to domestic farmworkers. The OES agricultural wage data does not include wages paid workers directly by farm operators and instead relies on wages paid by farm labor contractors and other employers in the agricultural support services sector. DOL's own studies indicate that farm labor contractors and other employers in the support services field on average paid wages that were 14% lower than those paid by farm operators.¹⁸⁹ As a result, the wages reported in the OES survey are likely to be slightly less than the average wages actually paid crop workers.

Finally, there is no chance that using OES survey data to establish prevailing wages, in the absence of the current data sources used for the prevailing wage determinations, will reduce wage rates paid U.S. farmworkers. The proposed regulations retain the requirement that employers pay the AEW in those instances in which it is higher than the OES-based wage.¹⁹⁰ As DOL has previously observed, under such conditions, "domestic workers receive the greatest potential protection from adverse effects on their wages and working conditions, including the adverse effect of being denied access to the opportunity to earn a higher equilibrium wage that would have resulted as the market (perhaps slowly) adjusted in the absence of the guest workers."¹⁹¹

It is imperative under the statutory scheme that DOL protect U.S. workers by ensuring that employers offer at least the local prevailing wage.

D. The Proposed Adverse Effect Wage Methodology Must Be Revised

The Department proposes several changes to the current methodology to establish AEWs. These include breaking down, or disaggregating, the category used in the USDA Farm Labor Survey for the current AEWs into additional job categories defined by the Standard Occupational Classification (SOC). In addition, when adequate data is not available regarding the average wages based on the USDA Farm Labor Survey (FLS), DOL will utilize data from the Bureau of Labor Statistics' OES survey to determine the AEW. The proposed rule should be revised to carry out DOL's statutory obligation to protect U.S. workers' wages against adverse effects.

Relying on USDA FLS data, or when not available, OES state or regional surveys, is an important improvement to the method for determining the AEW, and we support this change in methodology with revisions. DOL properly recognizes that using the SOC classification will provide a more accurate AEW for discrete classifications and this change to the § 655.120 offered wage rate calculation should be adopted with modification. Increasingly, job orders are being submitted that include several job types, from harvesters, to graders and sorters, to machine operators and drivers. There can be a difference of \$1.00 to \$2.00 per hour in the normal and average pay rates for these different classifications, yet they all come in at the same AEW. Using the SOC will ensure a fair rate is paid and encourage more accuracy in job orders. In particular, the fact that the proposed regulation subsection 655.120(b)(4) requires that

¹⁸⁹ 75 Fed. Reg. 6898 (Feb. 12, 2010).

¹⁹⁰ 20 C.F.R. § 655.120(a).

¹⁹¹ 75 Fed. Reg. 6893 (Feb. 12, 2010).

the highest rate be paid for orders that include positions with different SOC's is critically important.

For many states and regions this proposed methodology results in a slight increase in the AEWR, which is justified by the fact that the purpose of the AEWR is to establish a wage rate that, in the absence of a prevailing wage survey or other reliable determination, can approximate the wage rate need to ensure that U.S. workers are not dissuaded from accepting H-2A jobs because they are not competitive with local wage rates. However, as demonstrated in Appendix A, Table 1 and Table 2, as proposed, this could result in a reduction in wages in some employment areas to below the current AEWR.¹⁹² This could be the result of a number of factors, including the fact that FLS data is regional or state based and does not capture local rates. We therefore recommend a modification of the methodology to include all available data sources for state, region, and local areas of intended employment.

The following table reflects those areas where the hourly rate would actually go down, driven primarily by the fact that FLS data is the default wage rate. (See proposed regulation subsection 655.120(b)(1).) The table contains data for SOC 45-2041, "Graders and Sorters, Agricultural Products" and 45-2092, Farmworkers, and Laborers, Crop, Nursery, and Greenhouse." Similar discrepancies can be found in other SOC classifications.¹⁹³

Region	State	SOC	CURRENT HRLY AEWR	PROP AVG HRLY WAGE	WAGE DROP	SOURCE
Cornbelt I	IL	45-2041	\$12.93	\$10.43	\$2.50	FLS R
Cornbelt I	IN	45-2041	\$12.93	\$10.43	\$2.50	FLS R
Cornbelt I	OH	45-2041	\$12.93	\$10.43	\$2.50	FLS R
Cornbelt II	MO	45-2041	\$13.42	\$13.35	\$0.07	OES S
Florida	FL	45-2041	\$11.29	\$9.29	\$2.00	OES S
Hawaii	HI	45-2041	\$14.37	\$12.43	\$1.94	FLS R
Lake	MI	45-2041	\$13.06	\$11.34	\$1.72	OES S
Mountain I	ID	45-2041	\$11.63	\$11.21	\$0.42	FLS R
Mountain I	MT	45-2041	\$11.63	\$11.21	\$0.42	FLS R
Mountain I	WY	45-2041	\$11.63	\$11.21	\$0.42	FLS R
Northern Plains	SD	45-2041	\$13.64	\$13.23	\$0.41	OES S
Pacific	OR	45-2041	\$14.12	\$11.90	\$2.22	OES S
Southeast	GA	45-2041	\$10.95	\$10.44	\$0.51	OES S
Southeast	SC	45-2041	\$10.95	\$10.92	\$0.03	OES S
Southeastern Plains	OK	45-2041	\$11.87	\$11.70	\$0.17	FLS R
Southeastern Plains	TX	45-2041	\$11.87	\$11.70	\$0.17	FLS R

¹⁹² See *The H-2A Program and AEWRs: FLS and OES, Rural Migration News* (Sept. 9, 2019), <https://migration.ucdavis.edu/rmn/blog/post/?id=2337> (noting that wages for some occupations, including crop workers and graders and sorters, are likely to fall under the new calculation methodology).

¹⁹³ See Exhibit C-1.

Appalachian II	KY	45-2092	\$11.19	\$10.77	\$0.42	FLS R
Appalachian II	TN	45-2092	\$11.19	\$10.77	\$0.42	FLS R
Appalachian II	WV	45-2092	\$11.19	\$10.77	\$0.42	FLS R
California	CA	45-2092	\$13.18	\$12.92	\$0.26	FLS R
Cornbelt I	IL	45-2092	\$12.93	\$11.53	\$1.40	FLS R
Cornbelt I	IN	45-2092	\$12.93	\$11.53	\$1.40	FLS R
Cornbelt I	OH	45-2092	\$12.93	\$11.53	\$1.40	FLS R
Cornbelt II	IA	45-2092	\$13.42	\$11.82	\$1.60	FLS R
Cornbelt II	MO	45-2092	\$13.42	\$11.82	\$1.60	FLS R
Delta	AR	45-2092	\$10.73	\$10.40	\$0.33	FLS R
Delta	LA	45-2092	\$10.73	\$10.40	\$0.33	FLS R
Delta	MS	45-2092	\$10.73	\$10.40	\$0.33	FLS R
Florida	FL	45-2092	\$11.29	\$11.21	\$0.08	FLS R
Lake	MI	45-2092	\$13.06	\$12.47	\$0.59	FLS R
Lake	MN	45-2092	\$13.06	\$12.47	\$0.59	FLS R
Lake	WI	45-2092	\$13.06	\$12.47	\$0.59	FLS R
Mountain I	ID	45-2092	\$11.63	\$10.82	\$0.81	FLS R
Mountain I	MT	45-2092	\$11.63	\$10.82	\$0.81	FLS R
Mountain I	WY	45-2092	\$11.63	\$10.82	\$0.81	FLS R
Mountain II	CO	45-2092	\$10.69	\$10.02	\$0.67	FLS R
Mountain II	NV	45-2092	\$10.69	\$10.02	\$0.67	FLS R
Mountain II	UT	45-2092	\$10.69	\$10.02	\$0.67	FLS R
Mountain III	AZ	45-2092	\$10.46	\$10.23	\$0.23	FLS R
Mountain III	NM	45-2092	\$10.46	\$10.23	\$0.23	FLS R
Northern Plains	KS	45-2092	\$13.64	\$12.83	\$0.81	OES S
Northern Plains	SD	45-2092	\$13.64	\$12.59	\$1.05	OES S
Southeast	GA	45-2092	\$10.95	\$10.44	\$0.51	FLS R
Southeast	SC	45-2092	\$10.95	\$10.92	\$0.03	FLS R
Southeastern Plains	OK	45-2092	\$11.87	\$11.70	\$0.17	FLS R
Southeastern Plains	TX	45-2092	\$11.87	\$11.70	\$0.17	FLS R

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Clearly, the AEWR must be set using a methodology that best ensures that there is no regional or local incentive to using the H-2A program because it has a lower rate of pay than the local market rate. Recruitment of U.S. workers often takes place locally. The local wage rates are what U.S. workers expect to be offered and will be willing to take in a healthy job market. Relying solely on FLS data that is generated from multiple states, or statewide, does not take into consideration differences in local wage rates driven by market or crop specialty factors.

¹⁹⁴ 2019 NPRM, 84 Fed. Reg. at 36249–59 (App’x A, tbls. 1 and 2).

The OFLC has available to it three sets of wage survey data: the FLS, the OES State data, and the OES Metropolitan and Nonmetropolitan Area data, which surveys wages for selected counties, parishes, or townships (hereafter “Area data”). Subsection 655.120(b)(i) makes the FLS survey the default survey. This is true even if the OES State Survey yields a higher result. Going forward, this may have the impact of artificially depressing wages. This is particularly true in states with discrete agricultural areas where earnings can vary widely.

Under the methodology proposed by the Department for 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) the AEWR would be from \$0.04 to \$6.20 lower than it would be if the OES Area data were used. This means that an H-2A employer could undercut the wages paid by non-H-2A employers by as much as \$4,960 per worker in a 20-week, 40-hour-per-week season. The inevitable result would be that non-H-2A employers would reduce wages in order to compete. Workers suffering this deflation in wages, both short and long term, would be adversely affected in contravention of 20 U.S.C. § 1188.

[Continued below.]

OES Local Survey Area	State/Region	OES Code	Proposed AEW¹⁹⁵	OES Local Area Mean Hourly Wage¹⁹⁶	OES State Mean Hourly Wage¹⁹⁷
Salinas, CA	California	45-2092	\$12.92	\$13.92	\$12.61
San Diego-Carlsbad, CA	California	45-2092	\$12.92	\$14.18	\$12.61
San Luis Obispo-Paso Robles-Arroyo Grande, CA	California	45-2092	\$12.92	\$12.94	\$12.61
Santa Cruz-Watsonville, CA	California	45-2092	\$12.92	\$13.27	\$12.61
Santa Rosa, CA	California	45-2092	\$12.92	\$14.57	\$12.61
Stockton-Lodi, CA	California	45-2092	\$12.92	\$12.97	\$12.61
Visalia-Porterville, CA	California	45-2092	\$12.92	\$13.30	\$12.61
Bend-Redmond, OR	Oregon	45-2092	\$14.32	NA	\$12.71
Medford, OR	Oregon	45-2092	\$14.32	\$16.65	\$12.71
Central Oregon nonmetropolitan area	Oregon	45-2092	\$14.32	\$13.36	\$12.71
Eastern Oregon nonmetropolitan area	Oregon	45-2092	\$14.32	\$16.03	\$12.71
Bellingham, WA	Washington	45-2092	\$14.32	\$13.33	\$14.15
Mount Vernon-Anacortes, WA	Washington	45-2092	\$14.32	\$14.95	\$14.15
Spokane-Spokane Valley, WA	Washington	45-2092	\$14.32	\$17.21	\$14.15
Yakima, WA	Washington	45-2092	\$14.32	\$14.38	\$14.15
Western Washington nonmetropolitan area	Washington	45-2092	\$14.32	\$16.18	\$14.15
Eastern Washington nonmetropolitan area	Washington	45-2092	\$14.32	\$14.85	\$14.15
Bloomington, IL	Cornbelt I	45-2092	\$11.53	\$17.73	\$14.43
Champaign-Urbana, IL	Cornbelt I	45-2092	\$11.53	NA	\$14.43

¹⁹⁵ Proposed Regulations, 84 FR 36249-36260, which includes generally includes FLS data.

¹⁹⁶ OES May 2018 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates.

¹⁹⁷ OES May 2018 State Data.

Danville, IL	Cornbelt I	45-2092	\$11.53	NA	\$14.43
Davenport-Moline-Rock Island, IA-IL	Cornbelt I	45-2092	\$11.53	\$14.99	\$14.43
Evansville, IN-KY	Cornbelt I	45-2092	\$11.53	\$12.12	\$11.94
Fort Wayne, IN	Cornbelt I	45-2092	\$11.53	\$11.90	\$11.94
Indianapolis-Carmel-Anderson, IN	Cornbelt I	45-2092	\$11.53	NA	\$11.94
Kokomo, IN	Cornbelt I	45-2092	\$11.53	NA	\$11.94
South Bend-Mishawaka, IN-MI	Cornbelt I	45-2092	\$11.53	\$11.67	\$11.94
Terre Haute, IN	Cornbelt I	45-2092	\$11.53	NA	\$11.94
Northern Indiana nonmetropolitan area	Cornbelt I	45-2092	\$11.53	\$11.94	\$11.94
Central Indiana nonmetropolitan area	Cornbelt I	45-2092	\$11.53	\$11.16	\$11.94
Southern Indiana nonmetropolitan area	Cornbelt I	45-2092	\$11.53	\$13.89	\$11.94
Huntington-Ashland, WV-KY-OH	Cornbelt I	45-2092	\$11.53	NA	\$12.37
Lima, OH	Cornbelt I	45-2092	\$11.53	NA	\$12.37
Mansfield, OH	Cornbelt I	45-2092	\$11.53	\$11.35	\$12.37
Springfield, OH	Cornbelt I	45-2092	\$11.53	\$11.15	\$12.37
Toledo, OH	Cornbelt I	45-2092	\$11.53	\$13.94	\$12.37
Weirton-Steubenville, WV-OH	Cornbelt I	45-2092	\$11.53	NA	\$12.37
Wheeling, WV-OH	Cornbelt I	45-2092	\$11.53	NA	\$12.37
Youngstown-Warren-Boardman, OH-PA	Cornbelt I	45-2092	\$11.53	\$12.83	\$12.37
West Northwestern Ohio nonmetropolitan area	Cornbelt I	45-2092	\$11.53	\$9.99	\$12.37
North Northeastern Ohio nonmetropolitan area (non-contiguous)	Cornbelt I	45-2092	\$11.53	\$13.65	\$12.37
Cedar Rapids, IA	Cornbelt II	45-2092	\$11.82	\$15.46	\$14.73
Davenport-Moline-Rock	Cornbelt II	45-	\$11.82	\$14.99	\$14.73

Island, IA-IL		2092			
Northeast Iowa nonmetropolitan area	Cornbelt II	45-2092	\$11.82	\$14.36	\$14.73
Northwest Iowa nonmetropolitan area	Cornbelt II	45-2092	\$11.82	\$19.07	\$14.73
Southwest Iowa nonmetropolitan area	Cornbelt II	45-2092	\$11.82	\$12.69	\$14.73
Southeast Iowa nonmetropolitan area	Cornbelt II	45-2092	\$11.82	\$12.73	\$14.73
Cape Girardeau, MO-IL	Cornbelt II	45-2092	\$11.82	NA	\$14.73
Columbia, MO	Cornbelt II	45-2092	\$11.82	NA	\$13.95
Fayetteville-Springdale-Rogers, AR-MO	Cornbelt II	45-2092	\$11.82	\$12.38	\$13.95
Jefferson City, MO	Cornbelt II	45-2092	\$11.82	NA	\$13.95
Joplin, MO	Cornbelt II	45-2092	\$11.82	NA	\$13.95
Kansas City, MO-KS	Cornbelt II	45-2092	\$11.82	\$14.08	\$13.95
St. Joseph, MO-KS	Cornbelt II	45-2092	\$11.82	NA	\$13.95

¹ Proposed Regulations, 84 FR 36249-36260, which includes generally includes FLS data.

¹ OES May 2018 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates.

¹ OES May 2018 State Data.

We appreciate the fact that each of these surveys has been criticized with respect to the accuracy of the reported wages in one or more regions or job classifications. However, the overarching purpose of establishing the AEW is to ensure that the wages paid to H-2A workers or domestic workers in corresponding employment are not lower than those that a domestic worker would normally expect to earn in the area.

Therefore, we propose that any survey that yields a higher wage rate for that SOC and region should be applied. Subsection 655.120(b)(1) should be revised as follows:

- (i) If an annual average hourly gross wage for the occupational classification in the State or region is reported by the USDA's FLS, that wage shall be the AEW for the occupational classification and geographic area unless the statewide annual average hourly wage, or applicable regional annual mean hourly wage for the standard occupational classification (SOC) reported in the OES survey is a higher average hourly rate, in which case the OES State or OES Metropolitan and Nonmetropolitan Area data rate, whichever is higher, will be the AEW.

The AEWWR must not be set in a way that encourages employers to seek H-2A workers based on the fact that they can recruit using a wage rate lower than the prior year's AEWWR. Therefore, it is important that there be a phase-in which ensures that the AEWWR determined under the proposed regulations does not result in a wage loss for U.S. or H-2A workers. To address this problem, we propose that the regulations make clear that the AEWWR will not go down in the future based on the new survey methodology.

The following subsection should be added replacing proposed subsection 655.120(b)(1)(ii):

(ii) If an annual average hourly gross wage for the occupational classification in the state or region is not reported by the FLS, the AEWWR for the occupational classification and state shall be the statewide annual average hourly wage for the standard occupational classification (SOC) if one is reported by the OES survey with respect to any H-2A applications filed within following the effective date of this regulation, the AEWWR shall be no lower than the applicable AEWWR established for that region or state in 2019.

For the foregoing reasons, the proposed rule on prevailing wages and the AEWWR should be revised.

V. Transportation: The DOL must continue to require full transportation benefits and must strengthen other vehicle safety measures.

The NPRM includes two major changes regarding the transportation of H-2A workers. The first proposed revision promises to create greater confusion among employers, H-2A workers, and courts by creating a new method for calculating workers' inbound and outbound transportation costs. Moreover, it contravenes decades of recognition by the government that the failure to provide transportation cost payments to temporary foreign workers and seasonal U.S. workers would have serious negative consequences. Furthermore, its enforcement is directly contrary to Wage and Hour Division enforcement procedures. As DOL acknowledges, the new formulation conflicts with related employer obligations for transportation reimbursements under the Fair Labor Standards Act (FLSA). The H-2A program should continue to require employers to (1) reimburse workers for the transportation and subsistence costs of coming from their homes, whether in the United States or in the foreign country, to work at the H-2A employers' place of business, (2) pay workers for their costs of transportation to their home upon completing the season, and (3) pay for transportation from the workers' local residences to the job site each workday. It would be harsh and counterproductive to eliminate these important, longstanding provisions.

Additionally, DOL proposes modest changes to the safety requirements for vehicles used to transport H-2A workers. While we endorse these safety improvements, we urge DOL to use this opportunity to address the problem of insurance coverage gaps applicable to these vehicles, including the bus involved in the fatal accident described in the NPRM.

A. We Oppose DOL's Proposed Changes to the H-2A Transportation Reimbursement Requirements.

DOL's proposed revision to the transportation reimbursement requirements must be withdrawn as it violates DOL's statutory obligations and is arbitrary and capricious. Specifically, the proposed change is contrary to FLSA and would create confusion for both employers and workers, rather than the clarity that the rule purports to provide. Further, this proposed regulation would adversely impact U.S. workers by passing millions of dollars in costs from employers on to workers, contrary to DOL's statutory mandate to protect workers.

The proposed regulatory change will increase, rather than eliminate, confusion among stakeholders over obligations for transportation reimbursements. Two separate regulatory schemes govern reimbursement of inbound transportation expenses to H-2A workers. Revising the proposed regulation may relieve the employer of the obligation to reimburse the H-2A worker for the cost of travel between his home and the consular city for purposes of 20 C.F.R. § 655.122(h), but it does not excuse him of liability to the extent that pre-employment transportation expenses (including those for travel between the worker's home and the consular city) bring the worker's first week net wages below either the AEWR or the FLSA minimum wage. And because the low wage rates paid them mean that the first week earnings of almost all H-2A workers fall below the AEWR (and often below the FLSA minimum wage) due to pre-employment transportation expenses, DOL's proposed revision all but ensures widespread confusion.

DOL's regulations have long required reimbursement of inbound transportation and subsistence expenses. Inbound expenses must be reimbursed at the midway point of the worker's employment contract.¹⁹⁸

Distinct from the H-2A regulations, reimbursement of inbound transportation, visa and related charges is required during the initial workweek to the extent that these charges reduce the employee's net wages below the federal or state minimum wage. This is because these expenses have been held to primarily benefit the employer, rather than the employee.¹⁹⁹ This is true of the entirety of the inbound transportation costs incurred by the employee, and not merely travel between the consular city and the jobsite.^{200 201}

The same principles that prohibit the employee from bearing expenses that reduce his or her initial workweek earnings below the federal or state minimum wage also bars reducing the employee's net workweek earnings below the AEWR:

A worker must be reimbursed for any costs incurred for the employer's benefit which serve to reduce the employee's net earnings during the first week of work below the mandated wage rate. In this action, the applicable wage rate is the adverse effect wage rate; to the extent that workers' net

¹⁹⁸ 20 C.F.R. § 655.122(h)(1).

¹⁹⁹ *Arriaga v. Fla.-Pac. Farms, LLC*, 305 F.3d 1228, 1241–42 (11th Cir. 2002).

²⁰⁰ *Avila-Gonzalez v. Barajas*, No. 2:04-cv-567, 2006 WL 643297, at *3 (M.D. Fla. March 2, 2006) (“travel from home villages to Monterrey” primarily benefits the employer); *see also Rivera-Santiago v. Wm. G. Roe & Sons, Inc.*, No. 8:07-cv-1786, 2009 WL 10671210, at *4, *7 (M.D. Fla. July 2, 2009).

²⁰¹ The NPRM acknowledges that “[t]he proposed rule does not affect an FLSA-covered employer's obligations under the FLSA.” 2019 NPRM, 84 Fed. Reg. at 36194 n. 60.

earnings in the first week fell below this rate because of the pre-employment expenditures discussed below, [the employers] were required to reimburse these amounts to the workers.²⁰²

The court's holding in *Avila-Gonzalez* was based in part on Wage and Hour (WH) Memorandum 99-03 (February 11, 1999), which states that:

Deductions that cut into the highest applicable minimum wage (MW) enforced by WH are illegal unless the law establishing that MW allows the particular deductions. In other words, if an employer is legally required to pay a MW higher than the FLSA MW, then deductions are permitted only to the extent that they do not reduce the employee's pay to an effective hourly rate lower than the highest applicable required wage rate enforced by WH...Under H-2A, deductions (other than those required by law) are allowed only if the employer discloses them to the worker in the job offer/work contract and they are "reasonable." We interpret "reasonable" to require that the deduction be voluntary on the worker's part, and the deduction may not benefit the employer....²⁰³

Under the present regulation, an employer's responsibilities under 20 C.F.R. § 655.122(h) are consistent with his AEWB obligations under 20 C.F.R. § 655.122(1) and his minimum wage obligations under the FLSA and state law. In each instance, the employer is responsible for reimbursing the worker for the cost of travel between his home and the consular city.

DOL is mistaken in its assertion that the proposed change "is necessary to the efficient administration of the H-2A program."²⁰⁴ As explained above, instead of being required to reimburse H-2A workers at a single rate for pre-employment expenses, as is the case under current law, under the proposed revision employers will face different reimbursement responsibilities—one for purposes of 20 C.F.R. § 655.122(h) and a higher figure for purposes of payment of the AEWB and the federal and state minimum wage.²⁰⁵ This hardly "simplifies the process for employers," as claimed in the NPRM.²⁰⁶ It is bound to lead to confusion among the regulated community and enforcement personnel. Relying only on the language of the proposed 20 C.F.R. § 655.122(h), employers are likely to mistakenly conclude that the reimbursements due workers in their first week of work under 20 C.F.R. § 655.122(1) and the FLSA do not require inclusion of the expenses the worker incurred traveling from his home to the consular city. DOL's proposed "simplification" is likely to result in employers incurring liability for not only the amount of these costs, but also for liquidated damages under the FLSA and many state minimum wage laws.

²⁰² *Avila-Gonzalez*, 2006 WL 643297, at *2.

²⁰³ Wage and Hour Mem. 99-03, at 3 (Feb. 11, 1999); *see also* Wage & Hour Division, Field Operations Handbook, at 30c16 (Nov. 17, 2016), https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

²⁰⁴ 2019 NPRM, 84 Fed. Reg. at 36195.

²⁰⁵ *See* 20 C.F.R. § 655.122(1).

²⁰⁶ 2019 NPRM, 84 Fed. Reg. at 36195.

Stakeholders would be far better served by revising 20 C.F.R. § 655.122(h) to provide a clear and concise restatement of the law on H-2A transportation reimbursements, including those arising under the FLSA (which covers virtually all H-2A employers), in a format something like this:

Transportation to place of employment. Unless the employer has previously advanced such costs to the worker or otherwise paid for these costs on the worker's behalf, at the end of the first workweek during which the worker is employed, the employer must reimburse to the worker for certain pre-employment expenses to the extent that these costs reduce the worker's first workweek wages below the applicable adverse effect wage rate. The costs that must be reimbursed pursuant to this paragraph include (i) the cost of the worker's travel from the worker's home to the jobsite in the United States (which may include intermediate stops at a United States consulate to obtain an H-2A visa) and lodging fees incurred during the journey; (ii) the worker's visa application fee pursuant to 22 C.F.R. §22.1; and (iii) fee for issuance of U.S. Customs and Border Protection Form I-94. If the worker completes 50 percent of the contract period, the employer at that point must pay the worker for any inbound transportation costs not previously reimbursed and daily subsistence from the worker's home to the employer's jobsite.

Not only will the proposed regulation create confusion regarding legal requirements, but the failure to provide adequate transportation reimbursement will also shift H-2A program costs from employers onto the backs of H-2A workers, who are far less likely to have the resources needed for transportation. This change will only drive foreign workers further into debt and make them more vulnerable to exploitation than they already are and more desperate to maintain their employment. A 2008 rule made a similar change, and the costs shifted to workers during 2009 was about \$4.7 million; that cost would be much higher today. The notice itself calculates that during the next ten years workers would lose, and employers would gain, \$789.6 million, for an average of almost \$80 million per year because of the changes to the transportation and subsistence requirements. The proposed regulations fail to provide adequate justification for this change, which is arbitrary and capricious.

In addition to the arguments presented above, we incorporate by reference the arguments presented in the comments submitted by Farmworker Justice and others addressing a 2008 proposal with the same proposed limit on transportation reimbursement.²⁰⁷

Finally, we note that the H-2A employer, rather than the workers, selects the consular site where the prospective employees will apply for their visas. Currently, employers are required to reimburse the full cost of travel between the worker's home and the U.S. jobsite, so employers have no incentive to select any particular consulate site for processing the workers. In most instances, the employer selects a consulate based on the availability of appointments at that post and its proximity to the workers' domiciles. Adoption of the proposed revision will introduce

²⁰⁷ See Farmworker Justice et al., Comment Letter on Proposed Rule regarding Temporary Agricultural Employment of H-2A Aliens in the United States 119–22 (Apr. 14, 2008), <https://www.regulations.gov/document?D=ETA-2008-0001-1011>.

another consideration. The proposed revision makes the employer responsible only for the cost of transportation between the consulate post and the U.S. jobsite. This will likely impact the employer selection of consular location, further increasing the transportation costs that the worker will be forced to bear under the proposed regulation, especially for the growing number of workers recruited from the southern states of Mexico.

One provision of the proposed change that we do support is DOL's clarification as to employers' liability to reimburse as part of subsistence costs any lodging fees incurred by workers in the consular city while awaiting processing of their H-2A visa applications. This is consistent with treatment of these expenses under the FLSA.²⁰⁸

B. DOL Should Require Greater Transportation Protections

1. Transportation to medical appointments

Most H-2A workers arrive at the jobsite without vehicles of their own. They rely on their H-2A employers not only for transportation to and from work but also for visits to grocery stores or laundromats. H-2A workers also require transportation to and from medical appointments, especially after suffering work-related injuries. The failure to receive initial follow-up care can have long-lasting and, under some circumstances, deadly consequences. While some workers' compensation carriers arrange to transport injured H-2A workers to both initial and follow-up medical appointments, this is far from universal. For example, in the state of Washington, covered employers are required to provide employees with transportation to medical treatment at the time of injury, but the statute fails to require employers to provide transportation to follow-up appointments.²⁰⁹ The law requires reimbursement to employees for the cost of follow-up transportation for pre-authorized provider visits of over 15 miles.²¹⁰ However, this scheme fails to recognize the unique circumstances of H-2A workers and creates an unrealistic logistical and financial barrier for most, if not all, Washington H-2A workers to obtaining necessary care for work-related injuries. A few states require employers to provide such transportation; DOL should require H-2A employers to provide workers with transportation at no cost to both initial and follow-up medical appointments related to work-related injuries suffered under the worker's current H-2A contract.

2. DOL Should Place Limits On the Length of Daily Commutes for H-2A Workers.

Next, DOL should place limits on the duration of daily commutes for H-2A workers. Long commutes are common among farmworkers.²¹¹ Generally, farmworkers are not compensated for this travel time (California being a notable exception). Because H-2A workers are frequently asked to work six or seven days per week, extremely long commutes leave the

²⁰⁸ See, e.g., *Rivera-Santiago v. Wm. G. Roe & Sons, Inc.*, No. 8:07-cv-1786, 2009 WL 10671210, at *6 (M.D. Fla. July 2, 2009) (lodging expenses are primarily for the benefit of the employer); see also *Ojeda Sanchez v. Bland Farms, LLC*, No. 6:08-cv-96, 2010 WL 3282984, at *9 n.15 (S.D. Ga. Aug 18, 2010); *Morales-Arcadio v. Shannon Prod. Farms, Inc.*, No. 6:05-cv-62, 2007 WL 2106188, at *17 (S.D. Ga. July 18, 2007).

²⁰⁹ See Rev. Code Wash. § 51.36.010(1).

²¹⁰ See Wash. Adm. Code § 296-20-1103.

²¹¹ See, e.g., *Vega v. Gasper*, 36 F.3d 417, 423 (5th Cir. 1994) (workers driven 2.5 hours each way between El Paso and Deming, New Mexico).

workers little time for sleep and virtually no free time for personal errands such as washing their clothes. DOL should limit the average commuting distance for H-2A workers to no more than 45 miles in each direction (see the discussion on the definition of “area of intended employment” for further detail).

3. Changes Are Needed to Improve Transportation Safety

In the NPRM, DOL solicits comments concerning how its H-2A regulations can be modified to improve transportation safety. We offer two suggestions in this regard:

(1) *Requirement of seat belts.* DOL should use this opportunity to require that the vehicles used by employers to transport H-2A workers require seat belts for the passengers. It is long past time for the Department to impose this basic and fundamental safety requirement.

The vehicle safety standards under the Migrant and Seasonal Agricultural Worker Protection Act have never required vehicles transporting migrant and seasonal farmworkers to be equipped with seat belts, regardless of the classification of the vehicle (passenger vehicle, van, bus, etc.). While DOL’s regulations impose a number of highly specific standards on such vehicles, they do not require seat belts for the passengers.²¹² The Wage and Hour Division’s Fact Sheet #50, “Transportation under the Migrant and Seasonal Agricultural Worker Protection Act,” implicitly acknowledges this situation, noting only that persons subject to the Act are required to comply with *state* safety laws:

It is imperative that a person subject to MSPA who is not otherwise exempt from the Act and who is transporting migrant or seasonal agricultural workers in a manner subject to MSPA comply with all safety obligations *imposed by the state in which it operates*, including, but not limited to, any seat belt requirements under State law. Therefore a violation of the State’s operating requirement, particularly regarding seat belt law requirements, is a violation under MSPA for failure to comply with other safety regulations.²¹³

There is an ongoing need for a uniform federal seat belt standard for vehicles transporting farmworkers. State laws are a patchwork of requirements relating to seat belts. Some states (New Hampshire) have no seat belt requirements whatsoever for adult passengers. Other states (North Carolina) generally require seat belts but exempt farm labor vehicles. Yet others (California, Florida) require seat belts in some, but not all, vehicles used to transport farmworkers.²¹⁴ It is unrealistic to expect farm labor contractors operating in multiple states to determine and comply with the array of varied and sometimes conflicting state seat belt standards.

²¹² See 29 C.F.R. §§ 500.104, 500.105; Karen Buck, *Confusion Created by the Migrant and Seasonal Agricultural Worker Protection Act: Should Congress Revisit the Legislation?*, 6 San Joaquin Agric. L. Rev. 117, 132 (1996).

²¹³ Wage & Hour Division, U.S. Dep’t of Labor, *Fact Sheet #50: Transportation under the Migrant and Seasonal Agricultural Worker Protection Act* (June 2016), <https://www.dol.gov/whd/regs/compliance/whdfs50.htm> (emphasis added).

²¹⁴ California vehicle code 2731(d)(1) 5 (Motor Vehicle Safety Act). Fla Stat. 316.622(2), No. 208, 49 C.F.R. s. 571.208.

DOL has long recognized the hazards farmworkers face from vehicle accidents. When it last updated the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) vehicle insurance requirements in 1996, DOL observed that agricultural workers constituted the second most likely employee cohort to suffer occupational fatalities.²¹⁵ Significantly, vehicular accidents accounted for 50% of all occupational deaths among farmworkers.²¹⁶ Undoubtedly, seat belts would have reduced the number of these fatalities. 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.²¹⁷

Federal seat belt standards for farm labor vehicles are long overdue. DOL considered including seat belt requirements when it initially promulgated vehicle safety standards under the MSPA in 1983. Although some commentators urged adoption of a seat belt requirement, DOL rejected these requests, concluding that such a standard “could place an unreasonable burden on employers.”²¹⁸ Implementation of a seat belt requirement will eventually require revisions to the MSPA regulations, but DOL can use the current rulemaking to start the move toward a federal standard by adding a seat belt requirement to 20 C.F.R. § 655.122(h)(4).

(2) *Elimination of gaps in vehicle insurance.* H-2A employers are required to provide, at a minimum, the vehicle insurance required by the regulations promulgated under the MSPA.²¹⁹ However, as presently administered by DOL, 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. DOL 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 MSPA, 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.²²⁰ However, MSPA provides a waiver of this requirement if the employer provides workers’ compensation insurance that covers all “circumstances” under which the workers are transported.²²¹ The employer is required to maintain liability insurance or a liability for any transportation that is not covered under workers’ compensation law.²²²

Because they are required to provide workers’ compensation insurance,²²³ many H-2A employers also seek to rely on this same workers’ compensation insurance to satisfy the regulations’ vehicle insurance requirements. Most such employers do not provide additional

²¹⁵ 61 Fed. Reg. 10914 (Mar. 18, 1996).

²¹⁶ *Id.*

²¹⁷ Center for Disease Control & Prevention, *Seat Belts: Get the Facts, Effectiveness* (June 5, 2018), <https://www.cdc.gov/motorvehiclesafety/seatbelts/facts.html>.

²¹⁸ 48 Fed. Reg. 36738 (Aug. 12, 1983).

²¹⁹ 29 C.F.R. § 500.122(h)(4).

²²⁰ *Id.* § 500.121(b).

²²¹ 20 C.F.R. § 655.122(a)(1).

²²² *Id.* § 655.122(b).

²²³ 20 C.F.R. § 655.122(e); *see also* 29 C.F.R. § 500.122.

liability insurance, expecting (or hoping) that the workers' compensation insurance will be in effect for any and all transportation provided to H-2A workers.²²⁴

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 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....²²⁵

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, DOL 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, DOL Assistant Secretary 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.²²⁶

²²⁴ *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").

²²⁵ *Donovan v. Buntings' Nursery of Selbyville, Inc.*, 459 F. Supp. 92, 96-97 (D. Md. 1978).

²²⁶ 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).

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:

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....²²⁷

Despite the warnings by DOL, Congress included the workers' compensation waiver when it enacted the Migrant and Seasonal Agricultural Worker Protection Act 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-2A labor contractor had procured workers' compensation insurance through a PEO. Because the employment ended prior to the 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:

²²⁷ *Id.* at 105 (testimony of Roderick K. Shaw, Jr., General Counsel, Citrus Industry Council).

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....²²⁸

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 the H-2A workers in the farm labor contractors 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]."²²⁹ 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."²³⁰ 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.²³¹
- **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."²³² Quite simply, "if there is no check written in a week to a worker, there is no workers' compensation coverage."²³³ This applied when the crew was traveling from a job in one state (Florida) to one in another (Michigan).²³⁴

Coverage is also not provided during periods when the crew is not working because of bad weather or lack of assignments from the grower.²³⁵

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

²²⁸ Exhibit D2, Vasquez Citrus & Hauling, FLC Case ID 1776085, DOL Wage and House Division H2A Addendum Narrative Report

²²⁹ Dep. of Stephanie M. Rosen, April 12, 2018, *Lopez v. Vasquez Citrus & Hauling, Inc.*, No. 2:17-cv-14383, at 15–16 (S.D. Fla.), Exhibit D-1.

²³⁰ *Id.* at 35–37.

²³¹ *Id.* at 37.

²³² *Id.* at 48.

²³³ *Id.*

²³⁴ *Id.* at 59–60.

²³⁵ *Id.* at 112–13.

[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.”²³⁶

- **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.²³⁷

- **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.²³⁸

- **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.”²³⁹

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 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 jobsites 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

²³⁶ *Id.* at 69.

²³⁷ *Id.* at 71.

²³⁸ *Id.*

²³⁹ *Id.* at 198.

must purchase liability insurance or provide a liability bond in the amount specified by the MSPA regulations.

VI. Housing Comments

A. Proposed changes to 20 C.F.R. § 655.122(d)(1)(ii) - Rental and/or public accommodations

The proposed changes to 20 C.F.R. § 655.122(d)(1)(ii) provide improved health and safety protections for farmworkers living in rental accommodation through the H-2A program and come closer to implementing the intent of the governing statute.

Groups of unrelated adults typically do not share motel rooms for extended periods of time. The H-2A program is an exception. Guestworkers in the United States under this visa experience a range of accommodations. Housing for guestworkers runs the gamut from safe, clean, shared homes to one-room apartments with bedbug infestations, insufficient bathroom and shower facilities, no laundry facilities, and no storage for personal belongings, food, and cooking supplies. H-2A workers living in rental and/or public accommodations deserve the same protections as workers whose employers furnish their own housing. State regulations for rental and/or public accommodations routinely fail to include standards for cooking facilities, maximum occupancy per room, or how many people can share a bed because these facilities—for example, motels—were not built to host groups of unrelated adults in the same room for an extended period.

1. DOL Appropriately Clarifies the “Applicable Local or State Standards”

INA allows H-2A employers to furnish employee housing that fails to meet the federal temporary housing regulations only in limited circumstances.²⁴⁰ In particular, the statute allows employers to utilize rental and/or public accommodations that meet the local standards for such accommodations. In the absence of such “applicable local standards,” the housing can satisfy state standards.²⁴¹ Where there are no “applicable local or State standards,” worker housing must meet the federal temporary housing regulations.²⁴²

From the context, it is clear that “applicable standards” referred to here are health and safety standards. The statute provides for the use of local substitutes for federal health and safety standards governing “temporary labor camps.”²⁴³ Therefore, the statute permits the use of rentals or public accommodations that meet applicable local or state health and safety standards instead of meeting the federal health and safety standards for labor camps. But without clarification, some employers have interpreted the term “standards” as any local ordinances that apply to motels or rental housing at all. Such ordinances are often limited to fire and building codes. They say nothing about health and safety standards regarding toilets and showers, cooking facilities, overcrowding, or laundry facilities.

²⁴⁰ 8 U.S.C. § 1188(c)(4).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *See id.*; *see also* 29 C.F.R. § 1910.142.

For this reason, the proposed changes clarifying that rental and/or public accommodations must meet basic health and safety standards both improve existing regulations and offer important health protections for workers. Some employers have exploited the imprecise wording of existing health and safety regulations; they have taken the position that any local standard for rental and/or public accommodations—even a fire or building code—exempts them from abiding by federal health and sanitation standards. Since towns and rural counties rarely have health and safety standards for private rental housing and motels beyond basic fire and building codes, workers in the H-2A program have been unprotected. Additionally, because the Department has failed to consistently require H2ALCs to obtain housing authorization for public accommodations and rental housing they control, there have been numerous instances of H-2A workers being housed in facilities so substandard that federal courts entered injunctions to immediately shutter the facilities.²⁴⁴

Basic health and safety considerations support the proposed requirements that rental or public accommodations meet either the DOL OSHA standards or the local or state standards addressing the health or safety standards set out in 29 C.F.R. § 1910.142(b)(2), (b)(3), (b)(9), (b)(11), (c), (f), and (j).

However, the proposed regulations arguably leave unclear which state regulations should apply if a state has both public accommodation standards and temporary worker housing standards. The regulations should simply require that regardless of local and state standards applicable to public accommodations, the housing must meet the basic minimum standards set at 29 C.F.R. § 1910.142. State regulations of motels address health and safety in a different context than that of housing H-2A workers. Motels are expected to house people for short periods of time, generally not more than 30 days, whereas many H-2A contracts last 10 or even 11 months. There is no expectation that people be able to cook and eat meals in motel rooms or regularly do laundry, whereas many H-2A workers cook their own food, three meals per day. Also, motels are not intended to house large numbers of unrelated adults.

2. DOL Properly Incorporates Standards that Protect the Health and Safety of Workers

Each of the cross-referenced standards is important for the health and safety of workers. Minimum square feet per occupant requirements, such as those provided in 29 C.F.R. § 1910.142(b)(2) and (9), protect the residents against the spread of disease and are important for the residents' mental health.²⁴⁵ The spacing requirements for beds contained in (b)(3) offer similar protection against the spread of communicable diseases and help preserve basic sanitation as well as mental health. Standards for motels, which usually provide housing for traveling motorists, do not necessarily address minimum space issues. The requirement of 100 square feet

²⁴⁴ Mark Davis, "Company housed Missouri farmworkers in 'inhumane and unhealthy' former county jail," *Kansas City Star*, August 9, 2018; *Acosta v. Marin J Corporation*, No. 1:18-cv-184 (E.D. Mo., preliminary injunction order of Aug. 7, 2018); Natalie Kitroeff and Geoffrey Mohan, "Arizona farm accused of abusing Mexican migrant workers," *Los Angeles Times*, May 15, 2017; *Acosta v. G Farms, LLC*, No. 2:17-cv-1446 (D. Ariz., preliminary injunction order of May 19, 2017)

²⁴⁵ Walter R. Gove, Michael Hughes & Omer R. Galle, *Overcrowding in the Home: An Empirical Investigation of Its Possible Pathological Consequences*, 44 *Am. Soc. Rev.* 59, 59 (1979).

per person is by no means extravagant. The Department of Housing and Human Development defines a space as “overcrowded” at less than 165 square feet per person.²⁴⁶

DOL should clarify, however, that workers cannot be required to share a bed with another worker. This requirement is particularly important for public accommodation housing because motels often furnish rooms with double beds, which often do not have enough space to sleep two adults.

The requirement in 29 C.F.R. § 1910.142(b)(9) that sanitary facilities shall be provided for storing and preparing food has obvious public health benefits, including protecting against foodborne illnesses and pest control.

29 C.F.R. § 1910.142(b)(11)’s requirement that all heating, cooking, and water heating equipment be installed in accordance with state and local ordinances, codes, and regulations governing such installations is an obvious fire prevention standard. Subsection 142(b)(11)’s requirement that adequate heating be provided if the housing is used during cold weather is also a fundamental health protection. In addition to the obvious benefits, adequate heating in the winter has been shown to lower systolic and diastolic blood pressures and improve self-reported health.²⁴⁷

The requirement for clean water in sufficient quantity and pressure for drinking, cooking, bathing, and laundry facilities (29 C.F.R. § 1910.142(c) and (f)) has clear public health benefits. Contaminated water is a source of multiple diseases, and sufficient water is needed to prevent dehydration and to allow workers to shower off pesticide residues and other potential contaminants. However, farmworkers do not always have access to sanitary water. For example, a 2012 assessment in North Carolina found that total coliform bacteria contaminated the drinking water in 34% of sampled farmworker camps, failing to satisfy basic standards set by the EPA.²⁴⁸

Laundry facilities are extremely important for worker health. As the Department notes, workers are exposed to pesticides and other chemicals during their workday and will continue to be exposed to the chemical residues day after day if they cannot wash their clothing. Acute pesticide exposure can send farmworkers to the hospital, but chronic exposure also has repercussions. Chronic exposure to pesticides is associated with neurodegeneration, with far-reaching consequences such as nerve damage and Parkinson’s disease.²⁴⁹ Washing pesticide-contaminated clothes immediately after exposure ensures the maximum removal of potentially

²⁴⁶ *Measuring Overcrowding in Housing*, U.S. DEPT. HOUSING AND URBAN DEVELOPMENT (2007), https://www.huduser.gov/publications/pdf/measuring_overcrowding_in_hsg.pdf.

²⁴⁷ Evan L. Lloyd et al., *The Effect of Improving the Thermal Quality of Cold Housing on Blood Pressure and General Health: A Research Note*, 62 J. Epidemiology & Community Health 793 (2008).

²⁴⁸ Werner E. Bischoff et al., *The Quality of Drinking Water in North Carolina Farmworker Camps*, 102 Am. J. Pub. Health 49 (2012); see also Revised Total Coliform Rule, 40 C.F.R. §§ 141.851 et seq.

²⁴⁹ See generally Farmworker Justice, *Exposed and Ignored: How Pesticides are Endangering the Nation’s Farmworkers* (2013), available at: <https://www.farmworkerjustice.org/sites/default/files/aExposed%20and%20Ignored%20by%20Farmworker%20Justice%20ingles%20compressed.pdf>.

hazardous chemicals. Farmworkers' clothing carries pesticides from the fields to their homes.²⁵⁰ If anything, the standards provided in the OSHA rules are inadequate to protect farmworker health. The standards should require access to washing machines, as washing clothing in a washing tub further exposes workers to pesticides. A substantial body of literature sets out the risks posed by pesticide residues that are exacerbated when workers lack adequate access to washing machines.²⁵¹

The same health hazards also make adequate shower facilities imperative to ensure that farmworkers can wash off pesticide residue. A survey of farmworker housing showed higher organophosphate pesticide levels in homes where workers did not change out of their clothes and bathe immediately after coming home.²⁵² The OSHA standards on bathing facilities ensure that every farmworker has the ability to bathe after work, washing off dangerous pesticides.

The final OSHA standard listed in the proposed regulations, 29 C.F.R. § 1910.142(j), requiring that effective measures be taken to prevent infestation by pests, also has clear public health value, as insects and rodents are known carriers of disease.

B .The Proposed Regulation Omits Critical Public Health Protections

The proposed regulations omit other important public health protections regulated by the OSHA farm worker housing standards. The OSHA standards are already bare bones health and safety standards. DOL should require compliance with all of the OSHA housing standards, as is necessary to cover all of the minimum basic public health requirements. Each of the standards applies to basic requirements for a healthy and humane living space.

In particular, the following omitted OSHA standards need to be included:²⁵³

The proposed changes exclude OSHA's standard for windows, 29 C.F.R. § 1910.142(b)(7). Rental or public accommodations without adequate windows may not provide sufficient air to avoid a damp indoor environment. In a 2004 Institute of

²⁵⁰ Cynthia L. Curl et. al., *Evaluation of Take-Home Organophosphorus Pesticide Exposure Among Agricultural Workers and Their Children*, 110 *Envtl. Health Persp.* 790 (2002).

²⁵¹ Thomas A. Arcury et al., *Reducing Farmworker Residential Pesticide Exposure: Evaluation of a Lay Health Advisor Intervention*, 10 *Health Promotion Prac.* 447 (2009); Cynthia L. Curl et al., *Evaluation of Take-home Organophosphorus Pesticide Exposure Among Agricultural Workers and Their Children*, 110 *Envtl. Health Persp.* A787 (2002); Chensheng Lu et al., *Pesticide Exposure of Children in an Agricultural Community: Evidence of Household Proximity to Farmland and Take Home Exposure Pathways*, 34 *Envtl. Res.* 290 (2000); Linda A. McCauley et al., *Work Characteristics and Pesticide Exposures Among Migrant Agricultural Families: A Community-Based Research Approach*, 109 *Envtl. Health Persp.* 533 (2001); Nancy J. Simcox et al., *Pesticides in Household Dust and Soil: Exposure Pathways for Children of Agricultural Families*, 103 *Envtl. Health Persp.* 1126 (1995); Larkin L. Strong, *Factors Associated with Pesticide Safety Practices in Farmworkers*, 51 *Am. J. Industrial Med.* 69 (2008); Michelle C. Turner et al., *Residential Pesticides and Childhood Leukemia: A Systematic Review and Meta-Analysis*, 118 *Envtl. Health Persp.* 33 (2010).

²⁵² Thomas A. Arcury, *Organophosphate Pesticide Exposure in Farmworker Family Members in Western North Carolina and Virginia*, 64 *Hum. Org.* 40 (2005).

²⁵³ These comments do not discuss individually subsections (b)(1), (4), (5), and (6), because although their subject matter is essential to healthy housing, they would most likely be covered by local building codes, unlike the remainder of the OSHA standards.

Medicine report, experts convened by the CDC concluded that “[d]amp indoor environments favor house dust mites and microbial growth, standing water supports cockroach and rodent infestations, and excessive moisture may initiate chemical emissions from building materials and furnishings.”²⁵⁴ Providing adequate ventilation, including windows, helps mitigate the health impacts of dampness.

The omission of 29 C.F.R. § 1910.142(b)(10), setting a minimum ratio of one stove to ten people, is incomprehensible. No one could successfully argue that the ratio is excessive. This minimum ratio must be maintained in order to make it possible for workers in shared facilities to have the bare minimum access to stoves. The ratio of one stove to ten people, as required in the OSHA standard, ensures that every worker can prepare food. As it is, even with this standard, workers report having to wait until late at night before getting their turn to cook their dinners. Without this protection, employers could cut costs by denying workers a basic stovetop. As DOL notes, workers without access to stoves often resort to using hot plates, which can create a fire hazard and fill worker housing with harmful smoke.

The local, state, or federal standards applied to rental and/or public accommodations also need to address workers’ access to adequate toilet facilities, as protected in 29 C.F.R. § 1910.142(d). Requirements for a minimum ratio of toilets per person, as well as provisions for lighting, a supply of toilet paper, and cleanliness, are essential for workers’ health.

Standards should also address inclusion of at least one light fixture and at least one electric outlet in sleeping rooms as well as light levels in other rooms, as provided in 29 C.F.R. § 1910.142(g).

Standards for refuse disposal set out in 29 C.F.R. § 1910.142(h), including provision of closed garbage cans and regular garbage pick-up, are essential to keep out rodents and insects and should be included in the standards. There is no point to requiring insect and rodent control (provided in subsection (j)) without also requiring control of garbage.

20 C.F.R. § 655.122(g) requires that employers “either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals.” To make that requirement a concrete reality, DOL needs to include minimum kitchen facilities at least as protective as those provided in 29 C.F.R. § 1910.142(i). Including these standards is necessary, as rental accommodations (like a motel) often do not have central dining facilities. Compliance with federal housing standards in this area is imperative for farmworker health. Research has shown that farmworker camps are often subject to improper refrigerator temperatures, cockroach infestations, contaminated water, and rodent infestations.²⁵⁵ Failure to comply has public health consequences, including spreading foodborne illness.

All of the OSHA labor camp standards listed above are minimum health and safety requirements that should be met by all housing furnished to workers in the H-2A program. The

²⁵⁴ Inst. of Med., *Damp Indoor Spaces and Health* 1 (2004).

²⁵⁵ E.g., Thomas A. Arcury et al., *Migrant Farmworker Housing Regulation Violations in North Carolina*, 55 Am. J. Industrial Med. 191, 201 (2012).

governing statute requires that housing meet the federal temporary labor camp standards *unless* there are applicable state or local standards for rental and/or public accommodations.²⁵⁶ The statute does not select a subset of the federal housing standards. In the absence of applicable state or local standards, the full set of OSHA standards should apply.

C. The Proposed Rule’s Reliance on Employer Attestations Fails to Ensure Effective Monitoring

For any rental/public accommodation housing provision to be effective, it needs to be subject to effective monitoring in proposed 20 C.F.R. § 655.122(d)(6)(ii). It has long been clear to worker advocates that, as DOL notes, public accommodation housing is rife with compliance issues. In all but 15 states, the SWAs lack authority to inspect public accommodation housing under state law. As a result, DOL proposes to codify the current practice, *i.e.*, relying on employers to attest that housing complies with relevant standards, without clarifying to employers which standards apply in their jurisdiction. This is only a slight improvement of the current 20 C.F.R. § 655.122(d)(1)(ii), which requires the employer to “document to the satisfaction of the certification officer” that the facility complies with applicable federal, state and local housing standards.

Under the current regulation, many H-2A employers continue to certify that housing meets relevant standards even though it is in flagrant violation of the law. One clear example of this issue is compliance with state-level housing regulations in Texas.²⁵⁷ Texas law requires anyone who provides housing to at least three migrant farmworkers to obtain a preoccupancy inspection and license from the Texas Department of Housing and Community Affairs. However, as recently as August 1, 2016, not a single H-2A employer in Texas was licensed under state law. As of the date of these comments, 61% of H-2A employers in Texas that are subject to state licensing requirements lack a state-level license and inspection despite their attestation, under penalty of perjury, that they would comply with all state and federal laws.²⁵⁸ It is clear that attestations, even under penalty of perjury, do nothing to generate compliance.²⁵⁹

In order to ensure meaningful compliance, DOL should overhaul the employer attestation process to ensure that employers are aware of the applicable standards and can demonstrate compliance with those standards. DOL should require that the employer inform DOL or the SWA as part of the Clearance Order process the specific local, state, or federal standards that apply to their housing. The SWA should review the applicability of the specified standards to the employer’s housing and confirm that the standards meet the requirements laid out in 20 C.F.R. § 655.122(d)(1)(ii) before issuance of the temporary agricultural labor certification.

²⁵⁶ 8 U.S.C. § 1188(c)(4).

²⁵⁷ See Exhibit E-2. Notably, Texas law contains no exemption from inspection for public accommodation housing.

²⁵⁸ A current list of facilities licensed under state law in Texas is available at <https://tdhca.state.tx.us/migrant-housing/index.htm>.

²⁵⁹ Attached as Exhibit E-3 is a spreadsheet prepared by farmworker advocates which analyzes the OFLC disclosure data for H-2A employers in Texas which are subject to the state licensing law (*i.e.*, have more than three workers). Column BL denotes whether the employer had a current license to house farmworkers at any facility in Texas as of September 23, 2019, as detailed in Exhibit E-4, the state licensure database.

DOL should also require the employer to submit documentation that verifies the employer's attestation that the housing meets the applicable standards. Employers that provide public accommodation housing should, at the bare minimum, be required to submit a self-inspection conducted on a form ETA 338. Ideally, DOL could develop self-inspection forms which expand on the form ETA 338 by including specific language that public accommodation housing must satisfy in order to comply with the relevant standards.

With respect to H-2A labor contractors, the proposed attestation procedures for public accommodations and rental housing are likely to cause considerable confusion. The housing provisions of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) generally apply to H-2A labor contractors, even though H-2A workers are exempt from the MSPA's protections. Because they are obligated to actively recruit and to employ available U.S. workers, who are covered by the MSPA, H-2A labor contractors must comply with that statute's housing provisions. The MSPA requires farm labor contractors to obtain authorization for any facility they use to house migrant agricultural workers.²⁶⁰ In order to obtain such authorization, the farm labor contractor must present either "a certification issued by a State or local health authority" that the facility complies with applicable federal and state standards, or a copy of a written request for the inspection of the facility made to the appropriate federal, state or local agency at least 45 days prior to the date of occupancy.²⁶¹ The attestation described in proposed 20 C.F.R. § 500.122(d)(6)(iii) does not satisfy these requirements. It is probable that many H-2A labor contractors who control the public accommodations or rental housing provided to their crews will fail to obtain the required housing authorization under MSPA with respect to this housing, assuming, incorrectly, that the issuance of temporary labor certification relieves the labor contractor of the need to comply with the MSPA's provisions.

Attestation is a poor substitute for direct oversight by an appropriate regulatory agency. Unfortunately, according to their Fiscal Year 2019 foreign labor certification grant fund applications filed in response to TEGL 21-18, most SWAs lack jurisdiction to inspect or regulate public accommodations or rental housing.²⁶² ETA should cooperate with the Wage and Hour Division to see that the Division allocates enhanced expansion resources to investigate public accommodations and rental housing used by H-2A employers. In all but a handful of states, Wage and Hour Division investigations represent the only oversight of such facilities because so many SWAs lack jurisdiction to perform pre-occupancy or post-occupancy inspections of public accommodation and rental housing.

D. Proposed changes to 20 C.F.R. § 655.122(d)(6)(ii)(a) – Inspection of H-2A Housing by State Agencies other than SWAs

DOL proposes to amend 20 C.F.R. § 655.122(d)(6)(ii)(a) to allow certification of job orders where a state agency other than the SWA has inspected the housing under the applicable

²⁶⁰ 29 U.S.C. §§ 1811(a), 1812(3); 29 C.F.R. §§ 500.45(c), 500.48(f).

²⁶¹ 29 C.F.R. § 500.48(f).

²⁶² Only 15 SWAs profess to having authority to inspect public accommodations or rental housing: California, Delaware, Hawaii, Idaho, Iowa, Massachusetts, Montana, Nevada, New York, Ohio, Oregon, Rhode Island, Utah, Washington, and Wisconsin.

ETA and OSHA standards. This amendment would do little to improve the overall quality of housing inspections of H-2A housing sites.

At the heart of this problem is the lack of resources available for performing pre-occupancy inspections of farmworker housing, both H-2A and non-H-2A. According to information drawn from the states' Fiscal Year 2019 foreign labor certification grant plans submitted in response to Training and Employment Guidance Letter 21-18 (May 29, 2019), only 13 states have state agencies other than the SWA to perform pre-occupancy inspections of farmworker housing.²⁶³ In the remaining states, the SWAs alone have responsibility for providing pre-occupancy inspections of H-2A housing. Combined with their other foreign labor certification responsibilities, including processing H-2A and H-2B applications and conducting prevailing wage and prevailing practice surveys, SWAs are hard-pressed to complete these housing inspections.

Authorizing the SWAs to outsource housing inspections to other agencies will do little to alleviate this problem. First, cooperating agencies are unlikely to undertake any substantial number of pre-occupancy inspections unless they receive funds to do so. The limited (and decreasing) funds allocated the states by ETA for foreign labor certification activities do not allow for much, if any, funding for outsourcing pre-occupancy housing inspections.

Secondly, unlike the SWAs, other state agencies do not have expertise in ensuring compliance with the ETA and OSHA standards. These agencies often inspect to state standards that are entirely different from ETA and OSHA standards and use forms that are keyed to state law rather than federal law.

Further, state agencies are often extremely underresourced. In Texas, for example, the Texas Department of Housing and Community Affairs (TDHCA), which oversees Texas's state law governing farmworker housing,²⁶⁴ has a minuscule housing inspection budget of approximately \$30,000 per biennium. This budget is not sufficient to deliver quality inspections. For years, TDHCA certified housing that was not up to code, even in units in which TDHCA was aware of violations and asked the housing providers to correct the deficiencies in the housing.²⁶⁵ TDHCA still does not verify that farmworker housing with well water has been tested up to the standards of its own regulations.

Other SWAs similarly lack resources to perform quality housing inspections, further confirming that DOL should not blindly depend on state agencies to inspect farmworker housing. Although in recent years it has led the nation in number of H-2A admissions, and despite the fact that these workers reside in literally hundreds of locations, the Georgia SWA's Fiscal Year 2019 foreign labor certification grant is only \$480,000 (down from \$564,490 in Fiscal Year 2017). The Kentucky SWA is charged with inspecting in excess of 600 housing locations, yet its Fiscal

²⁶³ These states are California, Colorado, Delaware, Florida, Indiana, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin.

²⁶⁴ Tex. Gov. Code §§ 2306.921 *et seq.*; *see also* 10 Tex. Adm. Code § 90.2 (state housing standards).

²⁶⁵ For an in-depth discussion of the serious, well-documented deficiencies in farmworker housing in Texas, see Jeremy Schwartz, *Unlivable: How Texas Fails Farmworkers* (Mar. 17, 2016), <http://specials.mystatesman.com/farmworker-housing>.

Year 2019 foreign labor certification grant is a mere \$300,000. The Louisiana SWA is expected to provide pre-occupancy inspections for over 500 locations with a total ETA foreign labor certification grant of \$255,000. In Oklahoma, for example, the state agency that is solely responsible for housing inspections conducted only 59 housing inspections in FY 2018.²⁶⁶ In the same year, Montana's SWA conducted 285 inspections while processing 951 clearance orders.²⁶⁷

In most of these states, as in Texas, the paucity and low quality of inspections are due in large part to lack of both resources and jurisdiction. Oklahoma's 2018 budget funded only 1.33 full-time staff positions.²⁶⁸ Montana's funded only four positions.²⁶⁹ And in Oklahoma (as in more than 30 other states), the SWA lacks jurisdiction to inspect rental or public accommodations.²⁷⁰ The proposed rule does not, however, alleviate these resource constraints or jurisdictional flaws.

To the extent that DOL allows inspections to be conducted by state agencies other than SWAs, DOL should take measures to assure that quality inspections are being delivered. DOL should promulgate a standard form for inspections and should accept only inspections on those forms. Because non-SWA state agencies do not have experience enforcing federal regulations, the form promulgated by DOL should be more robust than the ETA 338, ideally containing language detailing the regulatory requirement to be enforced. DOL should also require state agency inspectors to attend training developed by DOL or their state's SWA that educates inspectors on the standards in the ETA and OSHA regulations. DOL should also conduct compliance audits of state agency inspections to ensure that the inspections are sufficient to ensure regulatory compliance.

E. We Oppose the Proposed Changes in 20 C.F.R. § 655.122(d)(6)(ii) Which Would Allow 24-month Certification of Housing.

DOL proposes that SWAs develop guidelines under which a housing unit may be certified for a 24-month period rather than conducting one inspection per year. This would lower the overall quality of housing in the H-2A program.

A 24-month certification process would be inadequate to ensure that farmworker housing complied with the applicable standards. The current practice of annual preoccupancy inspections is already inadequate to guarantee that housing is safe and meets standards.

Many common issues in farmworker housing arise only after the season has started or worsen over time. For example, water and sewage lines often become overstressed only when workers arrive, so preoccupancy inspections may not catch those issues. Likewise, rodent and pest infestations materialize or worsen only after workers begin cooking and storing food. Similarly, the appliances provided to workers (including refrigerators, air conditioners, and stoves) are generally old and prone to breaking or malfunctioning after several months of use.

²⁶⁶ See Summary of State Foreign Labor Certification Grant Plans, Exhibit E-1.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

Structural problems common to the old or temporary buildings where farmworkers are often housed become more severe as time passes; for example, roofs may develop holes after a single severe thunderstorm. And other critical aspects of adequate housing, such as the number of beds and stovetops, might easily be changed from season to season without regard to the number of workers living in the unit. Requiring inspections only once every 24 months would exacerbate these problems and disincentivize employers from repairing defective housing.

Further, DOL's proposed employer self-inspection process will do nothing to fill the gap created by the new 24-month certification process. As discussed above, employer attestations have failed to generate any meaningful compliance for public accommodation housing. If DOL wishes to ensure meaningful compliance with its housing regulations, the data clearly demonstrates that inspections are the only way to achieve that goal.

Should DOL proceed as planned with the 24-month certification process, it should set national criteria for which properties should be allowed to self-certify, rather than allowing each state to develop its own procedures. At the very least, DOL should set minimum criteria below which states may not deviate in setting their own standards for self-certification.

We would propose that no employer with a history of housing or wage violations should be allowed to self-inspect. This should apply to employers that have been assessed civil monetary penalties by DOL as well as employers who have been sued by H-2A or U.S. workers for housing or wage violations at any time in the past 15 years. Additionally, employers that provide public accommodation housing and have a history of noncompliance with local or state laws governing housing should be prohibited from using the self-inspection process in the event that they switch to providing other accommodations that are subject to a preoccupancy inspection from the SWA. Employers that receive inspections from an agency other than the SWA should be certified for only 12 months at a time in all circumstances.

Finally, there are clerical errors in the drafting of § 655.122(d)(6)(ii) that DOL should correct. As drafted, this section states that “[w]here the employer-provided housing has been previously inspected and certified ... the employer may self-inspect and -certify the ... housing.”²⁷¹ First, this section should make it clear that the self-inspection and self-certification can be done *only* while the employer has an active 24-month certification resulting from an inspection by the SWA. Second, this section should provide that the employer *shall* “self-inspect and -certify the housing,” or should otherwise clarify that the self-inspection and self-certification process is required if the employer has not obtained an inspection from the SWA in advance of the current work season.

F. The proposed changes in 20 C.F.R. § 655.122(g) do not adequately address meal cost deductions.

The proposed rule fails to address an ongoing problem regarding the deduction of meal costs from workers' wages. As discussed above, an increasing number of H-2A workers are being housed in motels and other accommodations that do not provide cooking facilities. In these instances, in accordance with 20 C.F.R. § 655.122(g), the employer must provide each worker

²⁷¹ 2019 NPRM, 84 Fed. Reg. at 36267-68.

with three meals per day. The maximum meal charges are adjusted annually, with the current maximum meal charge being \$12.46 per day, or \$87.22 per week.²⁷² Many employers believe that they may automatically deduct the full amount of the allowable charge from workers' wages, but this is not necessarily true.

Deductions for meals are subject to legal principles limiting charges that serve to reduce the employee's weekly earnings below the guaranteed wage rate, be it the federal or state minimum wage or the AEWR. While in certain limited situations an employer may claim a credit against minimum wage obligations for the fair value of furnishing board, lodging, or other facilities, the employer must demonstrate that the charge for these facilities does not exceed the actual cost to the employer.²⁷³ This can be easily done if the employer complies with the recordkeeping requirements under the FLSA.²⁷⁴ However, if the employer does not maintain records sufficiently complete to establish the actual cost of furnishing the meals, the employer is entitled to *no* minimum wage credit whatsoever for the meals.²⁷⁵

Many H-2A employers lack the detailed records to support the meal charges. DOL should amend 20 C.F.R. § 655.122(g) to include a statement that meal charges remain subject to limitations imposed by the FLSA and other laws regulating wage deductions, and to require that employers retain records demonstrating the actual cost of furnishing meals.

G. Recordkeeping and Data Regarding Housing Should be Improved.

In the proposed modifications to the rules, DOL invites comment on recordkeeping and data issues related to farmworker housing in at least two regards: (a) DOL's proposal to authorize the SWAs (or other "appropriate authorities") to inspect and issue an employer-provided housing certification valid for up to 24 months; (b) potential costs to H-2A employers that elect to secure rental and/or public accommodations for workers to meet their H-2A housing obligations.

In enacting such rules, DOL's methodology must be based on reliable data, rational analysis, and reasonable conclusions. In this instance, however, it is clear that DOL is relying on insufficient and possibly unreliable data.

1. The Proposed Rule Inappropriately Estimates Zero Cost for Reviewing Self-Certifications

²⁷² See Annual Update to Allowable Charges, 84 Fed. Reg. 10838, 10838 (Mar. 22, 2019).

²⁷³ See 29 U.S.C. § 203(m); 29 C.F.R. § 531.3; *Donovan v. The New Floridian Hotel, Inc.*, 676 F.2d 468, 47475 (11th Cir. 1982).

²⁷⁴ See 29 C.F.R. § 516.27(a).

²⁷⁵ *Washington v. Miller*, 721 F.2d 797, 803 (11th Cir. 1983) (farm labor contractor entitled to no minimum wage credit for meals even though the meals had some value and the contractor had partial records relating to the meal costs); *Leach v. Johnston*, 812 F. Supp. 1198, 1213 (M.D. Fla. 1992) (in the absence of supporting records, no minimum wage credit is available for meals furnished by farm labor contractor to farmworkers, and "Defendants' claim that meal charges were closely estimated to reflect actual cost is simply inadequate under the law of this Circuit").

Under the proposal, an employer must self-certify that the employer-provided housing remains in compliance for a subsequent Application for Temporary Employment Certification filed during the validity period of the official housing certification. As a preliminary matter, there are overwhelming, gross substantive deficiencies of associated with self-certification. Those are discussed in detail above. But, even if self-certification is allowed, DOL falls short on its reliance on accurate and comprehensive data.

According to DOL:

To calculate the estimated recordkeeping costs associated with maintaining records of these certifications, the Department first multiplied the number of certified H-2A employers (7,023 employers) by the 4 percent annual growth rate of certified H-2A employers to determine the annual impacted population of H-2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that will self-certify each year (100 percent). This amount was then multiplied by the estimated time required to maintain this information (2 minutes) to calculate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists (\$63.68 per hour). This yields an annual cost ranging from \$15,557 in 2020 to \$22,839 in 2029. This assumes that the SWAs will exercise their right to certify housing for more than 1 year. Some SWAs do not issue housing certifications valid for more than 1 year as a rule; others do not on a case-by-case basis. It would be accurate to say that employers would be assumed to self-certify 100 percent whenever the SWA's certification permitted it. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.²⁷⁶

As described above, DOL would conduct absolutely *zero* review of the self-certifications. DOL accounts for only the “estimated time required to *maintain* the information,” *id.* (emphasis added), and allots a mere two minutes to the task. For some of the most vulnerable, easily exploited workers in the United States, living in some of the most remote areas of the several states, DOL is relying entirely on not only an employer's self-certification as to their compliance with housing, but also as to whether the submission of the information is even in a correct format. By way of example, what is to stop an employer from submitting a blank piece of paper for self-certification?

As described above, no human will review any of the information submitted by employers for their self-certification. If DOL's plan is truly as described above, farmworker housing exploitation will surely skyrocket, resulting in increased complaints, costs, and compliance efforts by DOL. If DOL does plan to review the self-certifications in some capacity, those costs are not captured in the proposed rules.

2. The Proposed Rule Focuses on Costs to Employers and Government Agencies While Ignoring Costs to Workers

²⁷⁶ 2019 NPRM, 84 Fed. Reg. at 36233.

DOL further notes: “The SWAs and other appropriate authorities would thus be required to conduct fewer inspections of H-2A employer-provided housing annually, permitting these authorities to more efficiently allocate and prioritize resources.”²⁷⁷ Moreover, DOL states that the proposed rule “includes potential costs to H-2A employers that elect to secure rental and/or public accommodations for workers to meet their H-2A housing obligations.”²⁷⁸

DOL invites comments on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible benefits in the final rule resulting from the housing inspection proposals.

One jarring omission from the proposed modifications to housing resonates clearly in the proposed rules: a complete void of recordkeeping and data (much less human and legal) concerns regarding benefits to migrant workers themselves. The proposed rules for housing are written as though there is only one party requiring assistance: the employer. This flies in the face of DOL’s statutory mandate to ensure that the H-2A program protects the wages and working conditions of U.S. workers. However, the workers themselves, toiling in the fields and living in rural (often, decrepit) housing, receive little to no attention in the proposed rules.

To that end, DOL has offered no information on data or recordkeeping to justify self-certification or any other housing modifications from the workers’ perspective. At the federal level, DOL has sole authority over migrant housing, yet the proposed rule and request for comments contain no data regarding complaints or compliance efforts, much less how self-certification improves the notoriously underwhelming migrant housing.

In short, the current state of inequity and balance of power speaks for itself. In DOL’s own example, “employers that currently require workers to share beds will be required to provide each worker with a separate bed.”²⁷⁹ One might read this and initially think that DOL is improving conditions for workers by making employers give them their own beds.

But the far more reasonable response is that it is beyond belief that employers can pass muster under the law by providing housing with shared beds for employees who perform some of the most back-breaking, difficult work in the United States. An appropriate rule would require a deep, data-driven analysis to determine how to root out these structural issues.

VII. Audit, Revocation and Debarment Provisions

A. The proposed changes to the enforcement rules are a minor improvement, although we also note some concerns below.

The NPRM makes some minor changes to the audit, revocation and debarment provisions of the H-2A rules. As discussed below, we support these changes as marginal improvements to the existing regulations.

²⁷⁷ 2019 NPRM, 84 Fed. Reg. at 36241.

²⁷⁸ *Id.* at 36235.

²⁷⁹ *Id.* at 36236

1) Changes to 20 C.F.R. § 655.180 - Audits by OFLC

This provision makes minor changes to OFLC's audit procedures and due dates and clarifies that partial compliance with an OFLC audit is a basis for debarment and revocation. It also clarifies the types of referrals OFLC can make to other federal agencies, e.g., to the Department of Justice. We believe these are helpful, clarifying changes and support them.

2) Changes to 20 C.F.R. § 655.181- Revocation by OFLC

This provision clarifies that when an employer does not appeal OFLC's final revocation determination, that determination becomes the final agency action. We believe this is a helpful, clarifying change and support it.

3) Changes to 20 C.F.R. § 655.182 - Debarment by OFLC

This section, as updated, includes two changes. First, the section prohibits debarred employers, agents and attorneys from applying for labor certifications and requires that any such applications filed be automatically denied. We believe this is a helpful, clarifying change and support it.

Second, the NPRM allows for debarment of agents and attorneys (or their successors) based on their own violations as well as their involvement in the violations of an employer. The Department notes that "there may be situations where an agent or attorney commits a violation that the Department finds it cannot or, in its discretion, should not, attribute to the employer."²⁸⁰ While we generally agree with the Department's rationale for this change, we have some concerns about the potential for abuse by employers to avoid liability. Accordingly, we emphasize that in any case in which the Department discovers misconduct by an employer's agent or attorney, the agency must closely scrutinize the employer's conduct as well. Otherwise, this rule change could open the door for the employer to, for example, instruct its agent or attorney to engage in violations precisely to avoid its own liability.

4) Changes to 29 C.F.R. § 501.20 - Debarment by WHD

This provision extends the changes to OFLC's debarment authority in 20 C.F.R. 655.182 to WHD. We believe this is a welcome extension of WHD's debarment authority and support it.

B. The Proposed Changes to the H-2A Rules Fail to Address the Failures of the Current Debarment Framework.

²⁸⁰ 2019 NPRM, 84 Fed. Reg. at 36220.

While the changes to the enforcement provisions discussed above represent welcome incremental improvements, the Department has missed a critical opportunity to address fundamental failings of the debarment process under the current H-2A rules. The agency's failure to make adequate use of the debarment provisions in the rules is well documented.²⁸¹ As the Government Accountability Office has explained, the Department's failure to "consider debarment as a remedy in cases where employers have committed substantial violations could result in employers who would have been debarred continuing to participate in the programs and hiring workers."²⁸² For the H-2A program protections to have meaning, the agency must commit itself to aggressively pursuing the worst employers and to ensuring that the agricultural industry knows that abusing H-2A and U.S. workers will result in their disqualification from the H-2A program.

Yet the problem is not just one of enforcement priorities. The rules themselves fail to adequately capture a common employer tactic to sidestep debarment, effectively undoing debarment's fundamental purposes. The farmworker advocate community has repeatedly observed the worst employer actors in the H-2A program be debarred only to reorganize under new corporate guises and continue to conduct the same businesses using the same illegal employment practices. It does not take a particularly sophisticated employer to understand that "debarred employers may 'reinvent' themselves by starting new companies and submitting applications with slightly different information in order to continue hiring workers."²⁸³ Under the current regulatory framework, employers have essentially no disincentive to engage in such transparent schemes to avoid the effects of debarment. Debarment cannot serve its intended purpose of protecting U.S. and foreign agricultural workers unless the regulations address this issue head on.

1. Debarments are Ineffective without an Effective Successorship Rule.

To illustrate the failure of the current debarment system, we highlight three cases in which DOL debarred employers that committed egregious violations of the H-2A rules. In each of these cases, the debarred employers continued operating their businesses under nominally different corporate forms, evading the effect of debarment. To date DOL has lacked an effective response to these employer schemes. It should update the successorship rule to address this ongoing problem with the debarment framework.

²⁸¹ See generally Ken Bensinger, Jessica Garrison & Jeremy Singer-Vine, *The Pushovers*, BuzzFeed News (May 12, 2016), <https://www.buzzfeednews.com/article/kenbensinger/the-pushovers>. See also Ken Bensinger, Jessica Garrison & Jeremy Singer-Vine, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BuzzFeed News (July 24, 2015), <https://www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f#.ywkzJj5aM7>.

²⁸² U.S. Government Accountability Office, *H-2A and H-2B Programs: Increased Protections Needed for Foreign Workers* at 60 (2015), <https://www.gao.gov/assets/690/684985.pdf>.

²⁸³ *Id.* at 41.

i. Fernandez Farms, Inc. and Gonzalo Fernandez (California)

In 2016, DOL successfully prosecuted an administrative case against Fernandez Farms, Inc., a defunct strawberry grower, and the company's president/owner, Gonzalo Fernandez. The case brought to light Fernandez and his family's years-long kickback scheme by which hundreds of workers were required to pay thousands of dollars for the "privilege" of working. These actors also engaged in threats against workers, interference with the agency's investigation and retaliation—in short, they demonstrated utter disregard for the program's protections. At the completion of the case, DOL won an ALJ order of \$2.4 million in back wages and civil money penalties. DOL also successfully debarred Fernandez Farms, Inc. and Mr. Fernandez for the maximum three years.²⁸⁴

During the case, DOL found that Fernandez's sister and nephew—individuals who had been deeply involved in the underlying violations—continued to run essentially the same operation under new corporate identities. Given these actors' direct involvement in the earlier violations, DOL sought their debarment in the *Fernandez* proceeding. The ALJ, however, denied the agency's request on the ground that the alleged successors had not been afforded sufficient notice of the agency's intent to debar.²⁸⁵

The *Fernandez* case shows not only the need for aggressive enforcement against successors for the debarment process to be effective, but it also makes clear the futility of debarment unless the regulations make clear that DOL can subject successors to debarment in the original debarment proceeding. The effect of the ALJ's order was to allow the successor entities to continue operating for at additional seasons—and potentially indefinitely—despite being shown to be egregious violators of the program rules.

ii. Vasquez Citrus & Hauling, Inc.

On November 6, 2015, six H-2A workers were killed when a bus owned and operated by farm labor contractor Vasquez Citrus and Hauling, Inc. crashed outside Little Rock, Arkansas while transporting the workers back to Mexico after they had completed H-2A jobs in Florida and Michigan.²⁸⁶ News reports revealed that the bus driver lacked a required commercial driver's license.²⁸⁷ A subsequent Wage and Hour Division (WHD) investigation also found that the bus

²⁸⁴ Decision & Order, *Administrator v. Fernandez Farms, Inc.*, No. 2014-TAE-0008 (Dep't of Labor ALJ Aug. 25, 2016), Exhibit F-1.

²⁸⁵ Order Denying Request for Relief Against Celia Fernandez, Lucia Fernandez, Juan Escobar, CFE Farms, Inc. and Royal Berry Farms, Inc., *Administrator v. Fernandez Farms, Inc.*, No. 2014-TAE-0008 (Dep't of Labor ALJ Sept. 25, 2015), Exhibit F-2.

²⁸⁶ Polly Mosendz, *Six Dead in Arkansas Charter Bus Crash*, Newsweek (Nov. 6, 2015), Exhibit F-3; Christine Hauser, *6 Migrant Workers Killed in Bus Crash in Arkansas*, N.Y. Times (Nov. 6, 2015), Exhibit F-4.

²⁸⁷ Ken Bensinger, Jeremy Singer-Vine & Jessica Garrison, *Bar None*, BuzzFeed News (May 12, 2016), Exhibit F-5.

was underinsured. (The FLC mistakenly assumed that his worker's compensation insurance—secured through and in the name of an employee leasing company—would provide coverage.) DOL originally assessed \$34,000 in civil money penalties, which it later lowered to \$2,000, and did not seek debarment.²⁸⁸

Based on these events, Farmworker Legal Services of Michigan in January, 2016 wrote to the Chicago OFLC office, suggesting that the company's 2015–16 temporary labor certification be denied.²⁸⁹ Nonetheless, the OFLC granted certifications allowing Vasquez Citrus & Hauling to contract H-2A workers in 2016 for work in Florida, North Carolina and Michigan. In November, 2017, Southern Migrant Legal Services wrote to the WHD Southeast Regional Administrator regarding his office's failure to formally notify the Florida SWA of the Division's findings regarding Vasquez Citrus & Hauling's violations of law in the events surrounding the November 6, 2015 accident.²⁹⁰ If WHD had provided formal notification, the Florida SWA would have been obligated to discontinue employment services to Vasquez Citrus & Hauling. The Administrator provided no response to this letter.

In May 2018, WHD issued a press release announcing that it was debarring Vasquez Citrus & Hauling from the H-2A program through March 6, 2021. However, the debarment was not based on the November 2015 accident and the company's associated violations of the law. Instead, the debarment was based on wage violations in a 2017 investigation of Vasquez Citrus & Hauling's work in the North Carolina sweet potato harvest.²⁹¹

But the debarment failed to derail the company's operations. The OFLC certified H-2A requests in 2018 for work in Florida, Michigan, and North Carolina for Agri-Labor, Inc., whose president is Cecilia Arenas, long-time office manager for Vasquez Citrus & Harvesting.²⁹² Two years later, in 2019, the OFLC certified requests for Harvestco LLC to work in Michigan, North Carolina, and Georgia. Harvestco used a Richfield Drive, Lake Placid address owned by Juan Vasquez, the president of the same debarred Vasquez Citrus & Hauling.²⁹³

iii. Worldwide Staffing LLC

²⁸⁸ WHD H2A Addendum Narrative Report (obtained via FOIA), Exhibit F-6.

²⁸⁹ See Letter from Farmworker Legal Services of Michigan to Chicago OFLC (Jan. 4, 2016), Exhibit F-7.

²⁹⁰ See Letter from Southern Migrant Legal Services to WHD Southeast Regional Administrator (Nov. 17 2017), Exhibit F-8.

²⁹¹ Wage & Hour Div., U.S. Dep't of Labor, *Corrected: U.S. Department of Labor Debars Florida Farm Labor Contractor for Violating H-2A Provisions, Assesses \$15,153 Penalty* (May 8, 2018), <https://www.dol.gov/newsroom/releases/whd/whd20180508>.

²⁹² The 2018 job order and attached I-9 form for one of the six deceased workers identifies Ms. Arenas as such. See Exhibit F-9.

²⁹³ State of Florida, County of Highlands, Property Appraiser's Office, *Record for Parcel Associated with 175 Richfield Drive*, <https://www.hcpao.org/Search/Parcel/30370606000300110C> (last visited Sept. 23, 2019).

Worldwide Staffing LLC was debarred from the H-2A program on March 7, 2018 for three years.²⁹⁴ According to the WHD press release, in 2017, the company failed to reimburse employees in North Carolina for their inbound travel expenses from their home countries, and owed \$58,458 in back wages to 200 employees. WHD assessed the staffing company a civil penalty of \$17,309.

Once again, the debarment failed to stop the same actors from continuing to operate using new company names. On those 2017 Worldwide Staffing job orders, Adolfo Cedillo, Jr. was identified on the order, along with Robert Rubert, as company shareholders. Shareholder Robert Rupert died while the investigation was open. The OFLC then certified H-2A requests in 2018 for work in North Carolina for Adolfo Cedillo, Jr.'s new company Carolina Agriculture LLC despite the Worldwide Staffing debarment and back wages owed. Mr. Cedillo appears to have used the same visa processing agent for both his 2017 Worldwide Staffing and 2018 Carolina Agriculture orders, Stephen McKay with H2 Express of Hudson, New York. However, to date, the back wages owed to Worldwide Staffing workers from the 2017 season has not been collected or distributed to the affected workers. To date, Worldwide Staffing does not appear in WHD's Workers Owed Wages, the website used to notify employees of recovered unpaid wages recovered by WHD.

2. DOL Should Allow Debarment of Successors in the Original Debarment Proceeding and Extend the Applicable Statute of Limitations.

The current debarment rule provides little guidance regarding the procedural steps required to debar a successor employer. The consequence in the *Fernandez* case was that the ALJ prohibited DOL from seeking debarment of the successor employers in the original debarment proceeding. Effectively, this meant that the successor employers—who, as noted above, had been deeply involved in the original violations—could avoid the effect of debarment for multiple growing seasons, or possibly indefinitely. This result subverts the fundamental purposes of debarment. The regulations should make clear that DOL has the authority to seek debarment against successor employers in the original debarment proceeding, without the procedural barrier of opening a second proceeding.

The statute of limitations in the debarment regulation also works contrary to effective debarments. The current regulation states that the Administrator must issue any Notice of Debarment “no later than 2 years after the occurrence of the violation.”²⁹⁵ But in any case in which the successor corporation did not come into existence until more than two years after the relevant violations—notwithstanding its officers', shareholders' or members' direct involvement

²⁹⁴ Wage & Hour Division, U.S. Dep't of Labor, *U.S. Department of Labor Debars North Carolina Farm Labor Contractor for H-2A Violations, and Assesses \$17,309 Penalty* (Apr. 30, 2018), <https://www.dol.gov/newsroom/releases/whd/whd20180430-0>.

²⁹⁵ 29 C.F.R. § 501.20(c).

in the violations—a literal reading of this provision would mean that the successor entity could never be debarred. This cannot be the intended meaning of the rule. DOL should amend the language to explicitly exempt successor entities to ensure ALJs do not misinterpret it.

Further, there is no good policy reason that DOL should continue to apply a two-year statute of limitations to debarment findings with respect to the original violating employers. No such limitations period applies to findings of underlying (e.g. wage, housing, transportation) violations. All actors in the H-2A program would benefit from application of the same statute of limitations to actions seeking back wages, civil money penalties and debarment. DOL should eliminate the statute of limitations provided under section 501.20(c).

3. The Debarment Rule Should Promote Employee Participation in WHD Investigations

An effective debarment mechanism would enhance compliance with the law. As currently written, however, the debarment rule works against itself by providing strong disincentives to employee cooperation with DOL’s investigations.

DOL should revise the debarment to reflect the unique nature of the H-2A workforce and their limited access to employment opportunities. H-2A workers are foreign nationals whose physical presence and status in the United States is tethered to one employer. In this context, debarment can be a problematic enforcement tool because it effectively punishes the employee-whistleblower. Most H-2A workers obtain their jobs through labor recruiters who connect them to U.S. employers. Those recruiters often work with a single employer. When that single employer loses the ability to participate in the program, the employees lose their jobs. Even when a recruiter works with multiple employers, recruiters may blacklist workers for having participated in a federal investigation.²⁹⁶ Many employees forgo reporting violations facing these very real threats to their livelihood.

Effective debarment would (a) meaningfully protect H-2A employee whistleblowers who come forward to report violations of their rights, even those that are foreign nationals, and (b) incentivize the rehiring of former employees of debarred employers by requiring the fixed site users of debarred H2ALCs to prioritize hiring—either directly or indirectly through their replacement H2ALCs—former employees of their now-debarred H2ALCs.

VIII. H2ALC Comments

²⁹⁶ See generally Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change* (2013), https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

A. History of abuse by farm labor contractors highlights need for strong protections in the H-2A program.

History has proven that efforts to curtail Farm Labor Contractor (FLC) abuses are futile unless the fixed site agricultural operators are held liable for their chosen contractors' bad acts. In the late 1950's, there was congressional interest in the condition of migrant and seasonal farmworkers, but no important legislation came about until about 1963. Proposed legislation began to make gains and, in 1964, the Farm Labor Contractor Registration Act (FLCRA) was passed. The purpose of the FLCRA was to end the historic abuse of farmworkers by requiring FLCs to register and by imposing disclosure requirements and keeping of pay records. The FLCRA later proved to be ineffective even after some legislation changes.

During the 1970's and early 1980's, crewleaders with domestic crews were notorious for abuses against farmworkers. One problem was that, with no grower accountability, even well-meaning crewleaders could be forced to underbid each other to the point that they could not break even without breaking the law. The problem with attempting to enforce any sort of legal protections against these landless crewleaders is that they were transitory, largely judgment-proof, had no assets, and could be easily replaced. In the mid-1980's Congress specifically changed the law and passed the AWPAs to attempt to address these ills, but exempted H-2A workers from these important AWPAs protections.²⁹⁷

Today, however, we have a new class of crewleader with all the challenges of the old system, but an additional international element that heightens the responsibilities of the contractor and exacerbates the potential for worker abuse. Fraud in foreign labor contracting is rampant, the costs fronted by workers are -- and their potential for significant loss is -- much greater, and farmworkers' visas are now tethered by their visa to an H-2A labor contractor and are not free to leave an exploitative situation to work lawfully elsewhere. Often, these foreign workers do not speak English, do not have any independent means of transportation, are unaware of legal protections and lack access to legal representation. They may not be aware of, or have access to, local services including clinics, churches, emergency services, resources for trafficked or abused persons, and other support services in the rural, isolated communities where they are housed. With the steep power imbalance inherent to the H-2A program and the tremendous opportunities for control over workers' daily lives, the requirements and oversight for farm labor contractors and the fixed site agricultural operations that use them should be significant.

B. Program Usage by H-2A Labor Contractors and, in Turn, Program Abuse Has Skyrocketed.

²⁹⁷ See generally Farmworker Justice, *Unfinished Harvest: The Agricultural Worker Protection Act at 30* (2013), <https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeUnfinishedHarvest.pdf>; see also Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 U.C.L.A. Law Rev. 983 (1999).

By DOL's own admission, the numbers of farm labor contractors using the program has ballooned. In 1988, DOL erroneously predicted that the extent of the employer's responsibility would deter farm labor contractors from becoming H-2A employers and those numbers, if any, would remain low.²⁹⁸ In fact, the opposite happened. Between 2014 and 2017, the number of applications filed by H-2A Labor Contractors (H2ALCs) nearly tripled.²⁹⁹ Orders filed by large-scale H2ALCs have skyrocketed in the past decade. According to OFLC Performance Data for 2018, 105,062 of the 262,736 positions certified were for H2ALC or Job Contractor positions.³⁰⁰ Twenty of the 2020 orders approved in 2018 were for 400 or more workers, accounting for 11,466 workers or four percent of the workers certified that year.

While violations of the H-2A program protections are widespread, we have seen a host of clearance order, compliance, and enforcement issues with regard to H2ALCs in particular. Fraud, insolvency, wage theft, other contract violations, and, most troubling, human trafficking by H2ALCs continue to plague the program.³⁰¹ These unlawful practices relate to travel expense

²⁹⁸“The H-2A program and the implementing regulations are primarily constructed for the use of employers who own and/or operate a fixed-site establishment and who are seeking workers from out of the area to come to that fixed site. However, there is nothing in the statute or the regulations to preclude an employer who does not fit into this category from utilizing the program. Therefore, bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification. *Given the extent of the employer's responsibility under these regulations, it is doubtful that many farm labor contractors would apply for certification.*” 53 Fed. Reg. 22076, 22099 (June 13, 1988) (emphasis added).

²⁹⁹ 2019 NPRM, 84 Fed. Reg. at 36202, n.76.

³⁰⁰ The 2018 Disclosure file, H-2A FY2018.xlsx, may be found under the “Disclosure Data” tab at <https://www.foreignlaborcert.doleta.gov/performance/cfm> (last accessed Sept. 24, 2019).

³⁰¹ 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).

See also 29 complaints involving H2ALC defendants: *Fuentes-Diaz v. Barajas*, No. 2:03-cv-00631 (M.D. Fla. Nov. 12, 2003); *Rodriguez v. H.B. Harvesting, Inc.*, No. 2:04-cv-00523 (M.D. Fla. Oct. 26, 2004); *Fernandez-Chavez v. Romero Harvesting, Inc.*, No. 2:05-cv-14386, (S.D. Fla. Dec. 27, 2005); *Sianipar v. GTN Emp't Agency, Inc.*, No. 07-cv-53490 (N.C. Super. Ct. Feb. 22, 2007); *Diaz-Juarez v. East Coast Produce & Harvesting Co.*, No. 9:07-cv-80540 (S.D. Fla. June 21, 2007); *De la Cruz-Hernandez v. Ochoa*, No. 2:07-cv-14228 (S.D. Fla. Aug. 2, 2007); *Cardona-Olamendi v. Garcia*, No. 8:07-cv-01803 (Oct. 3, 2007); *Toletino-Hernandez v. Becerra*, No. 2:07-cv-14382 (S.D. Fla. Dec. 10, 2007); *Ponce-Perez v. H.B. Harvesting, Inc.*, 2:08-cv-00851 (M.D. Fla. Nov. 10, 2008); *Rosario-Guerrero v. Orange Blossom Harvesting, Inc.*, 2:09-cv-00106 (M.D. Fla. Feb. 2, 2009); *Asanok v. Million Express Manpower, Inc.*, No. 5:07-cv-00048 (E.D.N.C. Aug. 24, 2007); *Gaspar-Guerrero v. Everglades Harvesting & Hauling, Inc.*, No. 2:09-cv-00384 (M.D. Fla. June 24, 2009); *Salizar Vasquez v. P & L Harvesting, Inc.*, No. 2:14-cv-00161 (M.D. Fla. Mar. 19, 2014); *Buezo-Caballero v. All Nation Staffing, LLC.*, No. 0:14-cv-6149 (S.D. Fla.

reimbursement, recruitment, pay, access to health care, transfer of workers from H-2A to non-H-2A job sites, inadequate field sanitation and housing, threats/fear of retaliation, and other serious violations. H2ALC confiscation of worker identity documents including worker passports, foreign identification cards, and Social Security cards remains rampant. Legal Aid of North Carolina documented many such instances, including five separate instances involving four North Carolina H2ALCs just between 2015 and 2018.³⁰² We have provided greater detail regarding some of those issues below.

C. DOL’s Proposed Changes to the H2ALC Regulations Include Some Helpful Clarifying Changes, but Do Not Adequately Address the Need for Greater Oversight of H2ALCs and Protections for H2ALCs’ Workers.

1. Technical and/or Minor Changes

a. 20 C.F.R. § 655.130(e) - Clarification That Application Is Limited to One Area of Intended Employment

This proposal makes minor changes to move language addressing the scope of H2ALC applications to clarify that the geographic scope of an Application for Temporary Employment Certification is limited to one area of intended employment and eliminate confusion in the regulatory text. We believe these are helpful, clarifying changes and support them.

b. 20 C.F.R. § 655.132(e)(2) - Replace “Worksite” with “All Place(s) of Employment”

June 30, 2014); *Bautista-Cruz v. D&K Harvesting*, No. 2:15-cv-00725 (M.D. Fla. Nov. 23, 2015); *Ruiz-Gomez v. Astin Farms, Inc.*, No. 8:15-cv-02438 (M.D. Fla. Oct. 15, 2015); *Barriga-Bermudez v. Gutierrez-Tapia*, No. 8:15-cv-01171 (M.D. Fla. May 14, 2015); *Rodriguez-Vasquez v. Dunson Harvesting, Inc.*, No. 8:16-cv-02451 (M.D. Fla. Aug. 25, 2016); *Aguilar-Perez v. Perez*, No. 7:17-cv-00069 (E.D.N.C. Apr. 5, 2017); *Lopez-Zarate v. Serna*, No. 7:17-cv-00090 (E.D.N.C. May 11, 2017); *Lopez v. Ham Farms, LLC*, No. 5:17-cv-00329 (E.D.N.C. June 30, 2017); *Alonso-Miranda v. Garcia-Pineda*, No. 5:17-cv-00369 (E.D.N.C. July 22, 2017); *Murillo-Quirino v. Saucedo*, No. 2:17-cv-00153 (S.D. Ga. Dec. 18, 2017); *Villa-Avalos v. Landa Investments, LLC*, No. 7:18-cv-00331 (D.S.C. Feb. 6, 2018); *Mondragon v. Scott Farms, Inc.*, No. 5:17-cv-00356 (E.D.N.C. May 15, 2018); *Socorec-Quel v. Munguia*, No. 2018-cv-040 (Ga. Super. Ct. Aug. 20, 2018); *Rosas v. Sarbanand Farms LLC*, No. 2:18-cv-00112 (W.D. Wash. Mar. 2, 2018); *Arreguin v. Sanchez*, No. 2:18-cv-00133 (S.D. Ga. Nov. 1, 2018); and *Cruz-Ortiz v. Williams*, No. 18-cv-03182 (Mich. 17th Cir. Ct. Aug. 22, 2019).

See also Exhibit G-2 with the indictment and arrest warrants for Saul Garcia, Saul Garcia, Jr., Daniel Garcia, Consuelo Garcia, and Maria Remedios Garcia-Olalde, *United States v. Garcia*, No. 2:19-mj-00041 (E.D. Wis. May 22, 2019).

³⁰² *See* Exhibit G-3 including: Emails from Caitlin Ryland, Att’y, Legal Aid of North Carolina, Farmworker Unit, to Andrew Jackson, Att’y, Andrew Jackson Law, *Safety Issue/Gutierrez-Tapia* (June 2015); Email correspondence between Ryland and Jose Gracia, H2ALC, *RE: Immediate Attention/Worker Passport* (July 2016) (redacted); Email correspondence between Ryland and Rodrigo-Gutierrez-Tapia, H2ALC, d/b/a/ 5G Harvesting LLC, *Passports/Gutierrez-Tapia* (Oct. 2016); Email correspondence between Ryland and Jackson, *Passports/Gutierrez-Tapia* (Oct. 2016); Email correspondence between Ryland and Jackson, *Passports/Fortino Ramirez-Bautista* (Oct. 2016); Email correspondence between Ryland and Jackson, *Unlawful Passport Confiscation* (July 2018) (redacted).

This proposal seeks to add a paragraph (e)(2) and clarify that transportation provided by the fixed-site agricultural business between all the worksites and the workers' living quarters must comply with the requirements of this section by replacing the term "the worksite" with "all place(s) of employment." We believe these are helpful, clarifying changes and support them.

2. Proposed Increased Surety Bond Amount and Calculation

a. 20 C.F.R. § 655.132(c), 20 C.F.R. § 501.9 - Proposed Changes to Bond Provision by H2ALCs

This section addresses the bonding requirement for H2ALCs, which became effective in 2009. Its purpose was to weed out transitory and undercapitalized farm labor contractors and, thus, curtail program abuse. Under the current regulatory scheme, the surety bond requirement has not lived up to its intended purpose. Despite notable enforcement actions against H2ALCs, particularly in the Southeast, the surety bond is rarely, if ever, accessed to compensate affected workers. Further, when accessed, the current surety bond amounts are insufficient to cover even minimal, unliquidated claims of unreimbursed inbound transportation expenses alone, not including wages owed, and other costs borne by workers or otherwise owed to them. While we support the proposal to retain the surety bond requirement for H2ALCs, we believe significant changes are needed to create a more effective deterrent against program abuse and actual remedy for affected workers.

b. 20 C.F.R. § 655.132(c); 20 C.F.R. § 501.9 - Moving the Surety Bond Amounts and Scope of Coverage

This section proposes to move the surety bond requirements and the scope of coverage from 20 C.F.R. § 501.9 to 20 C.F.R. § 655.132(c), which contains other requirements for the Application for Temporary Labor Certification to make this information more accessible to the regulated community. We believe this is a helpful, clarifying change and support it.

c. 20 C.F.R. § 655.132(c)(1) - Bond Payable only to WHD

This proposed regulation should be revised. Currently under the 2010 Rule and as proposed, the regulations allow for recovery against the bond only in enforcement actions brought by WHD. However, H-2A workers are increasingly obtaining judgments or administrative decisions as a result of their personal actions brought in state or federal court, or a state administrative agency. There is no less need for a surety bond in these circumstances yet, if the H2ALC defaults on the judgment, workers have no recourse against the bondholder. Clearly WHD does not have adequate resources to enforce all actions against H-2A employers. Workers who find an attorney or state agency to pursue their claim are no less deserving of having their judgment satisfied by the employer or by the bondholder. Section 655.132(c)(1) should be revised to provide that the bond is payable to the WHD or a worker with judgment for violations

of the H-2A certification and job order arising from a private civil action or through their State SWA complaint process in addition to a WHD action.

d. 20 C.F.R. § 655.132(c)(2) - Increasing Current Bond Amounts Generally

We support an increase in current bond amounts, but believe the increases proposed should be greater. The current surety bond requirements for H2ALCs are set in five graduated amounts based on the number of workers employed under that labor certification ranging from \$5,000 for an H2ALC seeking to employ less than 25 workers up to a maximum of \$75,000 for an H2ALC seeking to employ 100 or more workers. These amounts are not sufficient to cover even the minimal amounts of workers' potential damages. For example, H-2A workers travelling from Mexico typically have to front between \$400 and \$700 each in inbound travel expenses to a job site in North Carolina depending on where they are recruited,³⁰³ not including any paperwork processing or recruitment fees they may unlawfully be charged in the process.³⁰⁴ The current graduated bond amounts often amount to less than half of just the amount of workers' inbound travel expenses, unliquidated, and not including any damages owed for unpaid wages. For example, a surety bond for an H2ALC seeking to employ 24 workers breaks down to only approximately \$208 per worker available and a bond for an application for 49 workers breaks down to only approximately \$204 per worker. Return transportation is also costly and typically greater than what these bond amounts would reimburse affected workers.³⁰⁵ Also, as the United States looks to encourage the recruitment of H-2A workers from countries other than Mexico, including Central American countries,³⁰⁶ these baseline inbound travel costs will increase.

H-2A workers' claims against H2ALCs in actions for unpaid wages and other violations typically far exceed the current bond amounts.³⁰⁷ DOL's own findings against H2ALCs have resulted in findings of back wages owed that far exceed what the 2010 Rule bond amounts provided. For example, according to an August 2018 press release,³⁰⁸ WHD found that H2ALC

³⁰³ See Exhibit G-4 showing examples of the costs of bus travel from various states within Mexico to North Carolina.

³⁰⁴ The consular processing fee is currently \$190.00 per worker. 22 C.F.R. § 22.1. In addition to the consular processing fee, H-2A workers traveling from Mexico to North Carolina typically front the cost of bus and/or plane travel within Mexico and the United States, a multi-day hotel stay at the consulate during processing, the six-dollar border crossing fee, and subsistence fees for a travel period ranging from five to nine days.

³⁰⁵ See Exhibit G-5, an example showing the \$225 cost of return travel from Goldsboro, NC, to Poza Rica, Veracruz, Mexico, in 2017.

³⁰⁶ U.S. Dep't of Homeland Security, *Joint Statement Between the U.S. Government and the Government of Guatemala* (July 22, 2019), <https://www.dhs.gov/news/2019/07/22/joint-statement-between-us-government-and-government-guatemala>.

³⁰⁷ See, e.g., Judgment against H2ALC Manuel Sanchez in the amount of \$288,889.66 in *Medina-Arreguin v. Sanchez*, 2019 U.S. Dist. LEXIS 128797 (S.D. Ga. July 31, 2019); Judgment against all defendants jointly and severally in the amount of \$979,234.50 in *Asanok v. Million Express Manpower, Inc.*, No. 5:07-cv-00048 (E.D.N.C. Oct. 26, 2009). The amount of these judgments underscores the total inadequacy of DOL's proposed bond for farm labor contractors relative to damages suffered by those employed by such contractors.

³⁰⁸ Wage & Hour Div., U.S. Dep't of Labor, *U.S. Department of Labor Debars North Carolina Farm Labor Contractor for Wage and Worker Protection Violations; Assesses \$174,614 Penalty* (Aug. 28, 2018), <https://www.dol.gov/newsroom/releases/whd/whd20180828-1>.

Ruben V. Serna, owner of Serna Harvesting, owed \$194,109 in back wages to 181 employees certified to work at 15 North Carolina farms for which the contractor provides H-2A workers. Similarly, in a May 2018 press release, WHD announced that Garcia-Pineda owed \$195,735 in back wages to 287 employees working at Ham Farms in Snow Hill, North Carolina, and WHD assessed a civil money penalty of \$321,400.³⁰⁹ The bond amounts fall far short of ensuring that workers will be made whole for wages and other costs owed to them.

We support a proposed increase in surety bond amounts, but at a minimum, it should be increased to cover liabilities totalling at least the amount of workers' inbound and outbound travel-related expenses, and a significant portion of their wages, liquidated. Any bond should be tied to the actual AEWR applicable to the labor certification, the number of workers sought, the length of the contract, and the estimated expense of travel. To obtain the bond, the H2ALC encumbers only a mere percentage of this amount with the bond company.

e. 20 C.F.R. § 655.132(c)(2) - Increasing the Bond Amounts to Reflect Annual Increases in the AEWR and Increasing the Current Cap to Certifications of 150 or More Workers

This section proposes to increase the bond amounts required for certifications. As noted above, the bond amounts under the 2010 Rule are insufficient and must be increased. We applaud the proposal to increase the minimum bond amounts and to take into account increases in the AEWR, but we still do not find the proposed amounts sufficient to have any significant deterrent effect on those undercapitalized H2ALCs, nor will the newly proposed amounts cover H2ALCs' minimum potential liabilities to their workers.

Under the 2010 Rule, the bond amounts are capped at a maximum amount of \$75,000 for an H2ALC seeking to employ 100 or more workers, but H2ALCs are routinely filing applications to employ many times that amount. For example, a partial sampling of North Carolina H2ALC orders certified for the 2019 season shows the following numbers of workers requested: Badillo Brothers, Inc. filed an order for 200 workers; Francisco Valadez, Jr. LLC filed an order for 393 workers; FRB Harvesting filed one order for 298 workers and another for 290 workers; Jose M. Gracia Harvesting, Inc. filed an order for 490 workers; and O'Rea and Sons Harvesting and Hauling, Inc. filed an order for 506 workers.³¹⁰ A partial sampling of North Carolina H2ALCs certified for the 2018 season shows the following numbers of workers requested: Francisco Valadez, Jr. LLC filed an order for 344 workers and a separate order for 750 workers; FRB Harvesting filed one order for 247 workers; and O'Rea and Sons Harvesting

³⁰⁹ Wage & Hour Div., U.S. Dep't of Labor, *U.S. Department of Labor Debars North Carolina Farm Labor Contractor, Assesses \$321,400 Penalty, for Wage, Worker Protection Violations* (May 10, 2018), <https://www.dol.gov/newsroom/releases/whd/whd20180510-2>.

³¹⁰ See Exhibit G-6, containing 2019 job orders for Badillo Brothers, Inc. (Job Order No. 11022239); Francisco Valadez, Jr. LLC (Job Order No. 11025119); FRB Harvesting (Job Order Nos. 11040123 and 11040150); Jose M. Gracia Harvesting, Inc. (Job Order No. 11052446); and O'Rea and Sons Harvesting and Hauling, Inc. (Job Order No. 11041832).

and Hauling, Inc. filed an order for 413 workers.³¹¹ Looking more closely at the 2018 Francisco Valadez, Jr. LLC job order for 750 workers, inbound travel-related expenses alone, unliquidated, for a farm labor crew from Mexico of that size could range from \$300,000 to \$525,000, not including potential liabilities for other potential wage, recruitment, and contract-related violations.

For certifications seeking to employ 150 or more workers, this section proposes a base amount plus an additional amount calculated to take into account about two weeks' wages for workers in increments of 50 workers. We support the proposal not to cap the surety bond amount at \$75,000 for labor certifications seeking to employ 100 or more workers as it is capped in the 2010 Rule. We also applaud the proposal for the required amount to more accurately reflect the potential liabilities facing H2ALCs filing large-scale labor certifications. However, we do not believe that the proposed minimum amounts are increased enough to have any significant deterrent effect on undercapitalized H2ALCs nor will the newly proposed amounts ensure coverage of H2ALCs' minimum potential liabilities to their workers for the reasons stated above.

f. 20 C.F.R. § 655.132(c)(3) - Standardizing Bond Form for Electronic Filing and Ease of Review

This section proposes standardizing the bond form and language in a standard electronic surety bond for ease of review of bonds to make sure that the bond fits the 20 C.F.R. § 655.132(b)(3) requirements. We believe this is a helpful change that will promote efficiency during the review process and greater compliance with surety bond requirement and support it.

g. 20 C.F.R. § 655.132(c)(1) - Time Period for Claims Against the Bond

This section proposes revising language to clarify that the bond must remain in effect for all liabilities incurred during the period of the labor certification. This section also proposes extending and simplifying the time period in which a claim can be filed against the surety bond. Further, the section clarifies when the bond can be cancelled. The proposed changes are likely to support DOL in increasing the abysmal rate at which DOL accesses bonds for the affected U.S. and foreign national workers it was originally designed to protect. We support these proposed changes because they are helpful and will promote efficiency.

D. DOL Should Improve Oversight of H2ALCs by Improving Requirements for Fixed Site Agricultural Work Contracts

Additionally, DOL seeks comments as to whether any additional filing requirements for H2ALCs are needed to ensure that labor contractors are able to meet H-2A program

³¹¹ See Exhibit G-7, containing 2018 job orders for Francisco Valadez, Jr. LLC (Job Order Nos. 10836722 and 10836806); FRB Harvesting (Job Order No. 10832126); and O'Rea and Sons Harvesting and Hauling, Inc. (Job Order No. 10832163).

obligations.³¹² We propose the following additions to the fixed site agricultural work contracts required by 20 C.F.R. § 655.132(d).

1. 20 C.F.R. § 655.132(d) - Fixed Site Agricultural Work Contracts with H2ALCs Should Require an Acknowledgement by Both Parties of the H-2A Program Requirements and State the Number of Workers to be Provided

The Preamble states that revisions to subsection 655.132(d) were made “in order to protect the safety and security of workers and ensure basic program requirements are met.”³¹³ However, the current requirements of the work contract between the H2ALC and the fixed site agricultural employer fail to meet that goal.

First, the proposed changes fail to address insufficiencies in the work contracts required under § 655.132 for each fixed site agricultural operation to which the H2ALC expects to provide H-2A workers. The work contract requirements should include measures to ensure that fixed site agricultural operations had been given sufficient information to avoid work contracts from H2ALCs whose business models fail to demonstrate an ability to comply with the basic requirements of the H-2A program. Seasoned fixed site operators are aware of the costs of their business yet may be unaware of costs unique to the H-2A program, including the demand of higher business overhead, an increase in necessary personnel and training, and greater capitalization. Fixed site agricultural employers may be entering work agreements with H2ALCs without recognizing these increased costs and the resulting need to compensate H2ALCs to meet these higher obligations. The work contract should affirm that the fixed site agricultural operation has been provided sufficient information to determine whether, given the promised payments and recognized costs, the H2ALC has a viable business operation with opportunity to turn a profit. To achieve this end, the Department should require the work contract to include that both parties, the H2ALC and the fixed site agricultural operation, acknowledge having read and fully understood the requirements of the H-2A program including 20 C.F.R. § 655.122 and any other applicable federal and state laws or, alternatively, some future DOL disclosure or pamphlet itemizing the obligations and designed specifically for this purpose.

Further, while § 655.132(d) requires copies of fully executed work contracts with each fixed-site agricultural business identified under paragraph (a) of the section, the current language does not require the work contract to state the number of workers that will be provided to the fixed-site employer. This failure enables unscrupulous farm labor contractors, bent on maximizing recruitment fees, to overstate the grower’s actual need without the grower’s knowledge. Indeed, this has been a recurring issue.

³¹² 2019 NPRM, 84 Fed. Reg. at 36205.

³¹³ *Id.* at 36202–03.

2. 20 C.F.R. § 655.132(d) - Fixed Site Agricultural Work Contracts and U.S. Worker Recruitment

H2ALCs should not be used as a tool by fixed site agricultural operations to displace or discriminate against their U.S. worker employees, evading U.S. worker recruitment requirements and undermining a fundamental statutory requirement of the H-2A program.³¹⁴ H2ALCs should be required to provide evidence that they recruited all U.S. workers employed directly by the fixed site employer and by any FLCs or crew leaders employed by the fixed site grower in the prior year. In the work contract, the fixed site employer should be required to certify that they notified prior direct hire and FLC provided workers of the job opportunity.

IX. Eligible Work Comments

20 C.F.R. § 655.103(c) - Inclusion of Reforestation and Pine Straw as H-2A Eligible Agricultural Employment

We are deeply concerned about the reclassification of reforestation and pine straw workers from H-2B to H-2A workers. As explained below, pine straw and reforestation workers work in industries rife with abuse for whom the Migrant and Seasonal Agricultural Worker Protection Act offers critical protections, not all of which are found in the protections for H-2A workers. There is also a serious risk that H-2A employers will see reforestation and pine straw workers' status as a greenlight to stop paying overtime wages. The problem is not academic; DOL has already approved several H-2A orders for pine straw workers, none of whom received overtime pay under their H-2A contracts.

A. We are concerned about the potential loss of overtime protections.

Currently both reforestation and pine straw harvesting jobs are generally part of the H-2B visa system, and it is understood by employers that the overtime protections in the FLSA apply to these jobs. While the change from the H-2B to the H-2A system should not affect overtime protections for reforestation and pine straw work, there is a danger that this recategorization could open the door to legal challenges to overtime protections for reforestation and pine straw workers, and that even without direct challenges, employers will mistakenly believe that because reforestation and pine straw work is eligible for H-2A employment, overtime protections no longer apply.

1. Legal Challenges to Overtime Protection

In *United States Department of Labor v. North Carolina Growers Ass'n*, the Fourth Circuit decided that the planting, cultivating, and harvesting of Christmas trees should be considered agricultural work subject to the FLSA's agricultural exemption from overtime, rather

³¹⁴ An agricultural employer who wishes to employ H-2A workers must first show to DOL's satisfaction that there are not enough U.S. workers able, willing, and qualified to perform the jobs to be filled by H-2A workers, and that the hiring of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(a)(1).

than forestry work, which is not exempt from overtime requirements unless the employer employs eight or fewer employees.³¹⁵ This case centered on whether or not overtime protections still applied to Christmas tree workers after DOL recategorized Christmas tree work as eligible for H-2A visas. While the Fourth Circuit’s opinion was mostly based on whether Christmas trees should be considered forestry or an agricultural or horticultural product, the Court noted an “inherent unfairness” in requiring employers to provide housing and transportation costs in compliance with the H-2A regulations, while also requiring them to pay overtime to workers because Christmas trees were considered agricultural for H-2A purposes, but not under the FLSA.³¹⁶

It is not a stretch to imagine growers pointing to “inherent unfairness” in future legal challenges to requirements to pay overtime to reforestation and pine straw workers if these jobs are eligible for H-2A visas. The loss of overtime wages would greatly harm guest workers and U.S. workers in the reforestation and pine straw industries. Because of this danger, we oppose recategorizing reforestation and pine straw harvesting work as H-2A eligible.

2. Employer Confusion Regarding the Requirement to Continue Paying Overtime

It is foreseeable that even without legal challenges to the FLSA’s overtime requirement, employers will assume that reforestation and pine straw harvesting work, like all other types of work eligible for H-2A visas, are exempt from the FLSA’s overtime requirement. The fact that work can be considered agricultural work under one set of laws but not under another may not be readily apparent without being explicitly stated for employers at the time of certification. The lack of explanation will lead to employers failing to pay employees overtime wages to which they are legally entitled. Indeed, it already has led to the approval of H-2A applications for pine straw workers that did not include overtime wages (in violation of the Administrative Procedures Act, *see C section below*, discussing pine straw workers). In 2012, Nancy J. Leppink, Deputy Administrator of the Department of Labor’s Wage and Hour Division, issued Administrator’s Interpretation No. 2012-1 explaining that pine straw harvesting is included as agriculture under the Migrant and Seasonal Agricultural Worker Protection Act, which is meant to be construed broadly, but is not considered agriculture under the FLSA overtime exemptions, which are intended to be construed narrowly.³¹⁷

Adding to the confusion is the fact that many workers employed on federal land in forestry (including reforestation) fall under the protections of the McNamara-O’Hara Service Contract Act and the Contract Work Hours and Safety Standards Act, which do require overtime pay. Exempting reforestation workers from overtime on one type of land but not on another would only add to the confusion and unfairness for domestic workers. H-2A provisions are not supposed to worsen working conditions for domestic workers, and the H-2A categorization should not change overtime eligibility for all other forestry workers. But that is exactly the

³¹⁵ 377 F.3d 345 (4th Cir. 2004).

³¹⁶ *Id.* at 349 n.5; *see* Exhibit H-1.

³¹⁷ Nancy J. Leppink, Deputy Administrator, Wage & Hour Div., Dep’t of Labor, Administrator’s Interpretation No. 2012-1 (2012), Exhibit H-2.

danger if the regulations do not specifically and explicitly state that overtime is to remain regardless.

While we oppose the redefining of agricultural employment in 20 C.F.R. § 655.103(c) to include reforestation and pine straw, we strongly recommend that if this change is made, DOL should make clear that reforestation and pine straw work are still covered by the FLSA's overtime requirements.

B. Loss of Protection Under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

It would be harmful to H-2B pine straw and reforestation workers to lose MSPA protections. While at first glance, it may appear that the protections in place for H-2A workers are substantially equivalent to those contained in the MSPA, there are some key differences. First, the MSPA allows agricultural workers to have their claims heard in federal court. The importance of federal court jurisdiction for farmworker claims was discussed at the time federal migrant laws were first passed. For example, Congressman William D. Ford of Michigan, who later co-authored the MSPA, stressed the importance of federal court jurisdiction in the 1973 hearings on the FLCRA, stating, “We want to go just a step further and give [workers] that weapon that will also make it clear that individuals have standing before Federal courts” because “this is a matter that would be better handled in Federal courts than at local courts in several states.”³¹⁸

Overall, there was emphatic Congressional support for a private federal right of action under the MSPA. The farmworkers’ brief before the U.S. Supreme Court in *Adams Fruit Co. v. Barrett* outlines this important history of the private right of action under the MSPA, explaining that “Congress identified the lack of a private cause of action as a primary cause of FLCRA’s failure.”³¹⁹ One of the major purposes of the 1974 Amendments to the FLCRA was to create “an unfettered federal civil remedy” to be “crucial to the effective enforcement of existing law.”³²⁰ Congress modeled the FLCRA’s private cause of action after federal civil rights statutes, and federal district courts were given jurisdiction regardless of the amount in controversy, citizenship of the parties, or the exhaustion of administrative remedies.³²¹ Having this private right of action in federal court was one of the most important aspects of the MSPA, and losing MSPA coverage would mean that current H-2B pine straw and reforestation workers would revert to being relegated to raising claims only in local or state courts.

Losing MSPA protections would further harm H-2B pine straw and reforestation workers because the MSPA contains statutory damages provisions. An aggrieved worker can seek statutory damages under the MSPA even if actual damages cannot be proven. This is important because it can sometimes be difficult to quantify the harm that results from violations of the Act.

³¹⁸ Hearing on the Farm Labor Contractor Registration Act, 93rd Cong. (1973) (statement of Rep. William D. Ford), Exhibit H-3.

³¹⁹ Brief for Respondents at *2, *Adams Fruit*, 494 U.S. 638 (1990) (No. 88-2035), 1989 WL 430594 (citing S. Rep. No. 93-1206 (1974); H.R. Rep. No. 93-1493 (1974)), Exhibit H-4.

³²⁰ *Id.* (quoting H.R. Rep. No. 93-1493).

³²¹ *Id.*

Statutory damages under the MSPA are also intended to deter violations and promote compliance with the Act. In *Fanette v. Steven Davis Farms*, the Court stressed the importance of statutory damages, stating:

The purpose of statutory damages is two-fold. First, they serve to compensate injured farm-workers, especially in those instances where damages are inherently difficult to measure. Second, statutory damages are designed to promote enforcement of the Act and to deter violations, both by the defendant and other agricultural employers. To this end, damage awards should be large enough so it is not cheaper to violate the Act and be sued than to comply with the MSPA's requirements. Furthermore, the legislative history of the Act notes that farmworkers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations. Accordingly, awards should be adequate to encourage farmworkers to assert their statutory rights.³²²

Having this additional tool is important given the funding limitations on DOL's enforcement work.

We further note that in 2010, DOL specifically declined to reclassify reforestation and pine straw workers from H-2B to H-2A eligible in part because of the devastating effect that the loss of MSPA coverage would have on these workers' ability to enforce their rights.³²³ We request that DOL explain what has changed between 2010 and 2019 that renders these concerns less important.

In conclusion, losing MSPA coverage would be detrimental to H-2B visa holders because they would lose federal court jurisdiction for their claims, and they would not have the statutory damages under MSPA.

C. Pine Straw Applications

Although the Notice of Proposed Rulemaking states that "[t]he Department proposes to expand the regulatory definition of agricultural labor or services ... to include reforestation and pine straw activities," DOL has, in fact, been processing pine straw guestworker applications under the H-2A program for over a year.³²⁴ In 2019 alone, DOL certified at least three applications seeking pine straw workers under the H-2A program.³²⁵ In 2018, DOL also certified a number of applications seeking admission of pine straw workers under the H-2A program.³²⁶

³²² 28 F. Supp. 3d 1243, 1263 (N.D. Fla. 2014) (citations omitted), Exhibit H-5.

³²³ See Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6889 (Feb. 12, 2010), Exhibit H-6.

³²⁴ 2019 NPRM, 84 Fed. Reg. at 36176

³²⁵ Southern Pine Straw, Inc. (Alabama), ETA Case Number H-300-19084-524152, certified May 6, 2019; 2019; Saucedo Pinestraw (Georgia), ETA Case Number H-300-18344-081028, certified January 3, 2019; and Nunez Pine Straw, Inc. (Georgia), ETA Case Number H-300-19009-138656, certified April 22, 2019.

³²⁶ Resendiz Pine Straw, LLC (Georgia), ETA Case Number H-300-18140-146402, certified June 13, 2018; Nunez Pine Straw, Inc. (Georgia), ETA Case Number H-300-18059-541001, certified March 20, 2018; City Pinestraw and Harvesting (Georgia), ETA Case Number H-300-18034-123531, certified March 5, 2018 and ETA Case Number H-

Despite having decided in the course of the 2010 rulemaking to not include pine straw work in the H-2A definition of agriculture, DOL evidently later chose to reverse this decision entirely by fiat and without going through notice and comment rulemaking procedures. In addition to violating the Administrative Procedure Act, DOL's reversal of its earlier position regarding pine straw work had adverse consequences for the guestworkers themselves. Without exception, the workers were not paid overtime wages to which they were entitled, perhaps because their employers incorrectly believed that H-2A certification carried with it an automatic exemption from Section 7 of the FLSA.

There is little evidence that the H-2A pine straw workers realized the benefits that DOL touts in the proposed rule. A Georgia federal court recently entered a sizable judgment against a Georgia-based farm labor contractor who had been certified by DOL to import guestworkers for pine straw work as H-2As.³²⁷ The opinion describes in detail how the employer's mistreatment of the workers, including failure to pay wages and grossly substandard housing conditions, rose to the level of human trafficking. Plainly, the plaintiffs were not housed in housing that had been inspected or met federal regulations, one of the supposed benefits of H-2A regulation mentioned in the Notice of Proposed Rulemaking.³²⁸

The level of MSPA compliance in the pine straw industry has been abysmally low, as reflected in the investigative reports by the Wage and Hour Division. Removing MSPA coverage from what largely remains an "outlaw" industry seems a particularly poor policy choice. If DOL nonetheless decides to formally include pine straw work in the H-2A program, special care needs to be taken to ensure that pine straw employers comply with at least the most important worker protections. Farm labor contractors, who comprise virtually all of the petitioning pine straw employers, need to be properly registered under the MSPA with authorizations to house and transport workers. Vehicles used to transport the workers need to be fully insured as required by the MSPA and 20 C.F.R. § 655.122(h)(4). Housing needs to be in full compliance with the H-2A housing regulations, as revised. Housing issues pose a considerable challenge in states such as Georgia and Alabama, where the SWA is the lone agency charged with inspection of migrant worker housing and, as discussed above, often lacks the resources to conduct all of the required preoccupancy reviews.

Finally, special attention needs to be given to the common means by which pine straw employers underpay workers and attempt to conceal their unlawful conduct on their payroll records. Gathering and baling pine straw is often accomplished in two-day intervals. On the first day, the worker rakes and gathers the pine straw into piles, taking care to remove foreign matter from the piles. On the following day, the worker uses a baling machine to compress the contents of the piles into bound bales of pine straw. Because many pine straw workers are paid on a piece-rate basis, receiving a set sum for each completed bale of pine straw, payroll records often only show piece-work units earned on the second day of the process, when the finished bales are created. Unscrupulous pine straw employers sometimes attempt to skirt their wage

300-17362-112007, certified March 7, 2018; *The Pine Straw Man, LLC* (Georgia), H-300-17345-909621, certified January 31, 2018.

³²⁷ *Medina Arreguin v. Sanchez*, No. 2:18-cv-133, 2019 WL 3502536 (S.D. Ga. July 31, 2019), Exhibit H-7.

³²⁸ 2019 NPRM, 84 Fed. Reg. at 36177.

responsibilities by showing no work performed on the first day of the two-stage process, the day on which no piece-work units were recorded, despite the fact that the employee may have worked many hours gathering and cleaning the pine straw in anticipation of baling on the following day. This payroll practice effectively underreports by a factor of two the compensable hours worked by the employee.

D. Positive Recruitment of U.S. Workers In Reforestation and Pine Straw

While we have a number of reservations regarding reclassifying reforestation and pine straw workers from H-2B to H-2A eligible, we should note that the H-2A domestic recruitment requirements, including the 50% rule, are considerably better than any corresponding protections in the current H-2B program.³²⁹ While we appreciate this aspect of the rule change, we do not believe that it outweighs the harm that the potential loss of overtime wages would cause to U.S. workers. Regardless of how DOL ultimately classifies reforestation guestworkers, increased positive recruitment of domestic workers should be required to correct a decades-long practice of conducting little or no positive recruitment of U.S. workers before admitting alien workers to fill these jobs.

E. Recommendations

In light of this information, we recommend that DOL *not* reclassify reforestation and pine straw workers from H-2B to H-2A eligible. However, if DOL does reclassify reforestation and pine straw workers from H-2B to H-2A eligible, we urge the Department to take the following measures to protect these workers:

1. Clearly state that reforestation and pine straw workers in the H-2A program continue to be covered by the FLSA's overtime protections, and deny certification to any application for reforestation or pine straw workers that does not include overtime pay in its promised wages.
2. Ensure that reforestation and pine straw workers continue to enjoy the protections of the MSPA, including federal jurisdiction and statutory damages for violations of their employment rights.
3. Ensure that MSPA's housing and transportation protections continue to apply to reforestation and pine straw workers.
4. Ensure strict compliance with housing inspection requirements, and ensure federal funding for areas that currently lack resources and infrastructure to perform adequate housing inspections.
5. Strictly enforce positive recruitment requirements, including the 50% rule.
6. Increase funding to the state monitor advocates to ensure that workers in these industries who are particularly vulnerable to abuses have access to advocates who can help ensure that their rights are enforced.

³²⁹ See H. Michael Semler, *Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 Yale L. & Pol'y Rev. 187 (1983) (discussing how the classification of reforestation as non-agricultural work was seen as a boon to employers who could avoid the H-2A program's requirements for positive recruitment of U.S. workers), Exhibit H-8.

X. Definitions, 20 C.F.R. § 655.103

A. Definition of “first date of need”

The NPRM seeks to include the word “anticipated” in the proposed definition of “first date of need.” DOL states that its “proposed definition would provide a limited degree of flexibility for the actual start date of work for some or all of the temporary workers hired, which may vary due to such factors as travel delays or crop conditions at the time work is expected to begin.”³³⁰ DOL adds that “provided that the employer complies with all obligations to workers (e.g., providing housing and subsistence at no cost to workers as set forth in §655.145(b)), the employer’s actual start date of work may occur *within 14 calendar days after the anticipated first date of need listed on the temporary agricultural labor certification.*”³³¹

This change will provide employers a 14-day window following the stated start date of work in which the actual start date of work can be delayed. We oppose this change because it imposes a burden on both domestic and H-2A workers, who often must travel great distances, and sometimes turn down other work, to arrive and be available to work. Farmworkers often do not have savings upon which to draw during a two-week delay of anticipated work. While we agree that employers should provide housing and subsistence to workers during such a delay, most, if not all workers, have other expenses as well, including mobile phone plans, toiletries, laundry, medicines, and care for children or elderly or disabled family members.

While we understand that employers are at the mercy of weather and other factors beyond their control, employers often also have crop insurance and other resources that make them better able to cope with and absorb the costs of a change of plans than farmworkers, who often live below the poverty line.

If DOL does make this change, we suggest the following protections for workers:

(a) Strengthen the protections for domestic workers in 20 C.F.R. § 501(c)(5) accordingly. 20 C.F.R. § 501(c)(5) states:

If there is a change to the anticipated date of need and the employer fails to notify the order-holding office at least 10 business days prior to the original date of need the employer must pay eligible (pursuant to paragraph (d)(4) of this section) workers referred through the clearance system the specified hourly rate of pay, or if the pay is piece-rate, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need or provide alternative work if such alternative work is stated on the clearance order. If an employer fails to comply under this section the order holding office may notify the Department's Wage and Hour Division for possible enforcement.

³³⁰ 2019 NPRM, 84 Fed. Reg. at 36175.

³³¹ *Id.* (emphasis added).

DOL should amend this section so that the employer shall pay domestic workers referred through the clearance system their full wages, up to 14 days, for the days after the day that the worker arrives and is available to work unless the employer both:

(1) Notifies the SWA of the delay in the actual start date of work at least ten days before the start date listed in the job order, *and*

(2) Attempts to contact each worker referred through the clearance system by any and all contact information provided by each worker in their applications.

(b) Protect all workers, domestic and H-2A, by specifically stating that the $\frac{3}{4}$ guarantee period begins on the start date listed on the job order, even if the actual start date is a later date within the allowed 14-day window.

B. Definition of “area of intended employment”

The NPRM seeks a “minor amendment” to the definition of “area of intended employment.” It also seeks comments to help clarify the standard so as to aid employers to better understand how DOL will review the geographic scope of their job opportunities.³³²

DOL should use the rulemaking to revamp its use of geographic territories to regulate the temporary agricultural worker program. By doing so, administrative concerns that underlie the current regulation can be accommodated while at the same time further the stated purpose of the proposed rule: increasing employment rates for workers in the United States.³³³

Geographic areas are invoked in the agricultural guestworker regulations for two distinct purposes. First, prevailing practices and wages are judged against the practices of other employers in the “area of intended employment.”³³⁴ However, the “areas of intended employment” utilized for prevailing wage and prevailing practice surveys are not designated based on the regulatory definition. Among other reasons, this is because the SWAs lack the capacity or authority to conduct surveys across state boundaries, even when these areas are adjacent to or otherwise in close proximity to an in-state production area. Despite the definitional language in the regulations, prevailing wages and practices are calculated by the SWAs within the confines of a single state, even when locations are part of the same metropolitan statistical area. Thus, in preparing prevailing wage and practices surveys for the state’s apple producing area centered in Hagerstown, Washington County, the Maryland SWA does not include data from the adjacent orchards in West Virginia’s eastern panhandle, despite the fact that these areas

³³² 2019 NPRM, 84 Fed. Reg. at 36174.

³³³ *Id.* at 36169.

³³⁴ See, e.g., 20 C.F.R. § 655.122(d)(5) (family housing must be provided “[w]hen it is the prevailing practice in the area of intended employment”); *id.* § 655.122(h)(1) (employer required to advance inbound transportation if it is the prevailing practice among non-H-2A employers in the area); *id.* § 655.154(b) (employer must engage in positive recruitment efforts no less than those of non-H-2A employers in the area of intended employment); *id.* § 653.501(c)(2)(i) (employer must offer wages no less than those prevailing among workers in the area of intended employment).

are separated by approximately 25 miles and are in a common metropolitan statistical area.³³⁵ For purposes of identifying “areas of intended employment” for preparation of prevailing wage and practices under the regulations, the SWAs appear to still rely on agricultural reporting areas, delineated by the SWAs based on principles outlined in the venerable ET Handbook 385.³³⁶

The H-2A regulations also use geographic areas to help determine the relevant labor market for H-2A employers. Farm labor contractors are prohibited from including jobs from more than a single “area of intended employment” in a temporary labor certification.³³⁷ In the proposed rule, DOL seeks to clarify a similar limitation on other agricultural employers requesting H-2A certification.³³⁸ Some employers have complained of such a requirement, arguing that it prevents them from bundling into a single H-2A application job sites located more than 60 miles apart.

DOL correctly notes that “the recruitment of U.S. workers is most effective when the work performed under the job order is advertised to workers residing in the local or regional area and enables them to return to their permanent places of residence on a daily basis rather than traveling long distances to reach the places of employment. Longer than normal commuting times, transportation issues, geographic barriers, or the need to live away from home are all factors that can discourage U.S. workers from accepting a temporary agricultural job opportunity.”³³⁹ However, DOL’s analysis in the NPRM fails to discuss one of the primary reasons that “areas of intended employment” for recruitment purposes need to be smaller rather than larger.

The regulations are designed to ensure that “United States workers ... are given a preference over foreign workers for jobs that become available in this country.”³⁴⁰ DOL’s definition and application of “area of intended employment” directly impacts the number of U.S. farmworkers available to fill a given job opportunity for which an employer seeks to import H-2A workers.

Most farmworkers have limited options available to them to travel on a daily basis between their homes and remote agricultural worksites. Unlike workers employed in other economic sectors, most farmworkers do not own vehicles, and are therefore rely on other means to reach distant workplaces. In urban areas, public transportation is an option. But most of the fields, orchards, groves and nurseries in which farmworkers toil are not accessible by public transportation. In these instances, domestic farmworkers oftentimes rely on daily transportation provided by the

³³⁵ In failing to include the areas of both states in these computations, the SWAs are departing from DOL’s prior determination in a case evaluating prevailing practices among fruit harvesters in this same region. *See Azor v. Hepburn Orchards, Inc.*, No. 87-JSA-1 (Dep’t of Labor ALJ Dec. 14, 1987 (reversing a decision determining the relevant survey area based on state boundaries pursuant to ET Handbook No. 385 because the regulatory “definition of ‘area of intended employment’ ...relies on commuting distances and is not limited by state boundaries.”)), Exhibit I-1.

³³⁶ *See* ET Handbook, at I-102 to I-105 (instructing state agencies to delineate agricultural reporting areas within state boundaries, considering, *inter alia*, mobility limits on the labor supply, characteristics of the labor supply, characteristics of the area’s agriculture and geographic characteristics).

³³⁷ 20 C.F.R. § 655.132(a).

³³⁸ 2019 NPRM, 84 Fed. Reg. at 36199, 36271 (proposed 20 C.F.R. § 655.130(e)).

³³⁹ *Id.* at 36174.

³⁴⁰ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

farm operator, either directly or through a farm labor contractors utilized by the farmer for such purposes.³⁴¹

Under the current regulations, H-2A employers are not required to provide transportation to “local” workers.³⁴² U.S. farmworkers are entitled to free employer-provided housing, and the corresponding employer-provided daily transportation to the worksite if they “are not reasonably able to return to their residence within the same day.”³⁴³ This language (and the related provision limiting daily transportation to “workers eligible for housing”) first expressly appeared in DOL’s regulations in 1987, but merely codified the “longstanding policy of requiring H-2 growers to provide free housing only to workers recruited from outside the local commuting area.”³⁴⁴ When in 1987 DOL issued comprehensive regulations governing the admission of foreign agricultural workers, it did not identify as one of the “major differences from H-2 agricultural regulations” the predecessor of current 20 C.F.R. § 655.122(d)(1), limiting employer-provided housing to domestic workers who are not reasonably able to return to their residence on a daily basis.³⁴⁵ This is not surprising, because, as a federal court observed, DOL had concluded that under the prior regulatory scheme “H-2 growers need not provide free housing for local U.S. workers who live within commuting distance of the work site.”³⁴⁶

The current regulations do not define which U.S. farmworkers “are not reasonably able to return to their residence within the same day,” and thereby qualify for employer-provided housing and, more importantly, employer-provided daily transportation to the jobsite. Given the history of 20 C.F.R. §655.122(d)(1), it is likely to be interpreted consistently with the Department’s “longstanding policy” limiting this benefit to those U.S. farmworkers who do not reside within “commuting distance” of the jobsite. It is also probable that a reviewing tribunal will look to the definition of “area of intended employment” for guidance as to the meaning of “commuting distance.”

The larger that the “area of intended employment” and “normal commuting distance” are defined, the fewer U.S. farmworkers qualify for employer-provided transportation to the jobsite. This daily employer-provided transportation has become more vital to the recruitment and employment of U.S. farmworkers as more and more H-2A employers discontinue their longtime practice of hiring farm labor contractor to transport local workers to and from the jobsite on a daily basis.

³⁴¹ See, e.g., *Perez v. Valley Garlic, Inc.*, No. 1:16-cv-1156, 2016 WL 6094809 (E.D. Cal. Oct. 19, 2016); *Lie v. Dara*, No. 01-cv-3167, 2002 WL 992812, at *1 (E.D. Pa. May 15, 2002) (farm labor contractor transported farmworkers on a daily basis from Philadelphia to farms in southern New Jersey); *Metzler v. Lykes Paso, Inc.*, 972 F. Supp. 1438, 1439–40 (S.D. Fla. 1997) (“Because the company’s groves are located in isolated areas of Florida that are far removed from public transportation, many of the workers are heavily dependent on the contractors for daily transportation to and from work”).

³⁴² See 20 C.F.R. § 655.122(h)(3); 75 Fed. Reg. 6911 (Feb. 12, 2010) (noting that § 655.122(h)(3) continues DOL policy requiring transportation between a worker’s “employer-provided housing and the employer’s worksite”).

³⁴³ 20 C.F.R. § 655.122(d)(1).

³⁴⁴ *Phillips v. Brock*, 652 F. Supp. 1372, 1380 (D. Md. 1987), *appeal dismissed as moot sub nom Phillips v. McLaughlin*, 854 F.2d 673 (4th Cir. 1988).

³⁴⁵ 52 Fed. Reg. 20499 (June 1, 1987).

³⁴⁶ *Phillips*, 652 F. Supp. at 1381–82.

In the past, DOL imposed regulatory requirements designed to prevent the elimination of farm labor contractor services to U.S. farmworkers, including daily transportation. Under earlier iterations of the H-2A regulations, potential H-2A employers were required to engage in positive recruitment of U.S. workers to an extent comparable or greater than the efforts made by non-H-2A employers in the area, and this “include[d] efforts to recruit through farm labor contractors.”³⁴⁷ The interim final regulations promulgated to implement the H-2A provisions of the Immigration Reform and Control Act of 1986 provided that, as a part of the potential H-2A employer’s positive recruitment plan:

When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure *U.S.* workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers.³⁴⁸

In the 2008 regulations, the Department removed the specific regulatory requirements relating to use of farm labor contractors. As a result, there has been a sharp decline in employment of U.S. workers in areas in which farm labor contractors traditionally transported workers to and from work on a daily basis.³⁴⁹ Because they lack their own vehicle, many U.S. farmworkers are unable to accept a job unless daily transportation to the jobsite is provided. In south Florida, for example, literally hundreds of U.S. farmworkers were displaced from their long-time harvesting jobs when their employers ceased utilizing farm labor contractors and began employing H-2A workers. When some employer provided the written notification required by 20 C.F.R. § 655.153, former employees residing in the area of the employer’s operations were unable to accept the job offer because there no longer were provisions for daily transportation to the jobsite.

In sum, “area of intended employment” should be revamped to address both the reality of existing administrative practices and to enhance job opportunities for U.S. farmworkers. For determining prevailing wages and practices, DOL should acknowledge and consider codifying the SWAs’ practice of determining prevailing wages and practices based on geographic areas delineated pursuant to the agricultural reporting areas described in ET Handbook 385, rather than the regulatory definition of “area of intended employment.”

The Department also needs to revamp the regulatory definition of “area of intended employment” so it ceases to limit the employment of U.S. farmworkers. Because the commuting distance references incorporated in the definition may well end up determining the rights of local U.S. workers to daily employer-provided transportation, DOL should revamp the regulatory definition to better fit the circumstances of most domestic farmworkers. While nonagricultural workers within a metropolitan statistical area may be able to easily shift jobs within the entire region, this is far less true with farmworkers, who often face considerable transportation barriers to traveling to sites at distant points within the metropolitan statistical area, particularly those job

³⁴⁷ 52 Fed. Reg. 16773 (May 5, 1987); 52 Fed. Reg. 20499–20500 (June 1, 1987).

³⁴⁸ 20 C.F.R. § 655.102(d) (1987) (emphasis added); 52 Fed. Reg. 20516 (June 1, 1987).

³⁴⁹ See Exhibit I-2; Exhibit I-3.

sites located beyond the reach of public transportation.³⁵⁰ To the extent that the regulatory definition is needed, it should be a figure considerably shorter than the 60+ mile figure urged by some H-2A employers. The 45-mile figure determined to be reasonable in DOL's *Azor* decision is a possible benchmark.

C. Definition of “joint employer”

The joint employer concept is important because too often growers have sought to escape responsibility for their employment-related obligations by denying that they “employ” any farmworkers on their farm. The shared responsibility as joint employers can help ensure that the grower takes responsibility for the treatment of subcontracted farmworkers and seeks out law-abiding labor contractors.

We support the proposed changes in the subparagraph at 20 C.F.R. § 655.103(b)(iii) with respect to the definition of joint employer. Arrangements of this type have gained popularity among smaller growers in certain states, including Kentucky. In most instances, the employers filing joint temporary labor certification applications are doing so for the reasons cited by the Department, namely that while they all have labor needs, none of the individual employers have work opportunities to provide full-time job opportunities.

D. Definition of “agricultural labor or services”

As part of its revision to the definition of “agricultural labor or services,”³⁵¹ DOL should state that construction labor performed on a farm for an independent contractor rather than the farm operator is not agricultural employment for purposes of the FLSA and should not be certified as acceptable work under the H-2A program. Moreover, DOL should clarify that certification of employment under the H-2A program does not necessarily mean that the work for which admission of aliens is sought is “employment in agriculture” for purposes of exemption from the FLSA’s overtime provisions.

In recent years, DOL has granted H-2A labor certification for admission of thousands of foreign workers to construct livestock buildings. In almost every instance, the petitioning employers are not farm operators themselves, but construction companies that import a crew into a community and over a period of a few months construct livestock buildings on the farmer’s property. While the majority of this work is performed in the upper Midwest, an increasing number of these H-2A applications seek admission of construction for workers in the Southwest and Southeast.

In most instances, the H-2A construction workers are paid at or slightly above the applicable AEW. We understand DOL’s proposal to be that these workers should be paid at the prevailing wage for other construction workers (SOC 47-2061) and support that proposal.³⁵²

³⁵⁰The Office of Management and Budget has warned of the limited utility of metropolitan statistical areas in many contexts, noting that “Metropolitan Statistical areas are not designed as general-purpose framework for nonstatistical activities.” 75 Fed. Reg. 37246 (June 28, 2010).

³⁵¹ 2019 NPRM, 84 Fed. Reg. at 36264.

³⁵² *Id.* at 36182.

However, we further believe that most of these jobs do not constitute employment in agriculture under the FLSA. Accordingly, these workers are entitled to overtime wages. However, because the Department has certified these workers as H-2As, the employers have mistakenly concluded that they are also agricultural workers under the FLSA, and therefore exempt from the FLSA's overtime requirements.³⁵³

Prior to 2008, the Department did not consider these jobs to be "agricultural," and as a result, declined to certify H-A workers to fill them. However, beginning in February, 2008, *In the Matter of Alewelt, Inc.*, Case 2008-TLC-13, the Department reversed course and stipulated that "the work activity ... is agricultural employment and that [the employer] is subject to the requirements for certification as a farm labor contractor." The Department has never published the reasoning behind its conclusion, and because *In the Matter of Alewelt, Inc.* was voluntarily dismissed, no DOL administrative law judge has addressed the merits of the matter.

The construction of livestock buildings does not fall within the FLSA's definition of "primary agriculture" (cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of agricultural or horticultural commodities.") It also is not "secondary agriculture" under the FLSA, which encompasses "any practices performed by a farmer as an incident or in conjunction with such farming operations."³⁵⁴ Neither does the work performed by these independent construction companies fall within the provisions of 20 C.F.R. §655.103(c)(1)(i)(B), because as, independent contractors, the construction companies are not "[i]n the employ of the owner or tenant or other operator of a farm."

The work of the H-2A construction crews also are outside the IRC's definition of agricultural labor. The IRC does include as agricultural labor "[s]ervices performed in connection with the ...improvement" of farms, but, much like the FLSA, it only encompasses services in the employ of the owner or tenant or operator of the farm. As the IRC explains "the term 'agricultural labor' does not include services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties."³⁵⁵

Prior administrative and judicial decisions make clear that "agricultural labor" does not include efforts to improve or maintain a farm unless these activities are undertaken by the farm operator or his employees. For example, in *MRL Fencing and Construction*, the Board of Alien Labor Certification Appeals determined that the work performed by employees of a contractor installing, repairing and maintaining fences on farms did not constitute agricultural labor.³⁵⁶ The opinion noted that DOL regulations at 29 C.F.R. § 780.146 provide that "[g]enerally, a practice performed in connection with farming operations is within the statutory language [and agricultural labor] only if it ... does not amount to an independent business." As the ALJ

³⁵³ See 29 U.S.C. § 207 The same confusion has arisen with respect those H-2As admitted in 2018 and 2019 to perform pine straw in Georgia or Alabama. Because DOL admitted the workers as H-2As, the pine straw employers have mistakenly considered them as exempt from the FLSA's overtime provisions, a position directly in conflict with the Department's position set out in Wage and Hour Administrator's Opinion 2012-1, 2012 WL 6495042 (Dec. 12, 2012).

³⁵⁴ 29 U.S.C. § 203(f) (emphasis added).

³⁵⁵ 26 C.F.R. § 31.3121(g)-1(c)(3).

³⁵⁶ No. 2012-TLN-00042 (Bd. of Alien Labor Certification App. Aug. 8, 2012).

observed, “the mere fact that the Employer seeks workers to ‘build structures on farms and ranches’ is not determinative.”

Of even greater import is the decision in *NLRB v. Monterey County Building & Construction Trades Council*.³⁵⁷ That case involved a situation virtually identical to those present in the current H-2A labor certification applications seeking workers to construct livestock buildings. The issue was whether employees of an outside contractor hired to construct buildings for a poultry farmer’s operations were engaged in agricultural labor, and therefore exempt from the NLRA. Applying the FLSA’s definition of agricultural labor, the Ninth Circuit concluded that “[t]he construction activity ... although necessary to the functioning of the poultry ranch, [was] done by organizations ‘separately organized as an independent productive activity,’” rather than by the poultry farmer itself, and therefore was not agricultural labor.³⁵⁸

Accordingly, the Department should state that construction labor performed on a farm for an independent contractor rather than the farm operator is not agricultural employment for purposes of the FLSA and employees providing such services are entitled to overtime pay. If the Department continues to allow construction labor that will be performed on a farm for an independent contractor to be certified as agricultural labor, the regulations should state that construction labor performed on a farm for an independent contractor rather than the farm operator is not agricultural employment for purposes of the FLSA and employees providing such services are entitled to overtime pay.

Moreover, as discussed in the *eligible work* section, we oppose the Department’s proposal to move employment in the pine straw and reforestation industries from the H-2B program into the H-2A program. If the Department promulgates the final rule to include pine straw and reforestry, however, the definition section should make clear that because reforestation and pine straw work have been determined generally to be nonagricultural for purposes of the FLSA, workers involved in these activities will, in most cases, be entitled to overtime pay for any work time in excess of 40 hours in a workweek.

E. Definition of “Successor in interest”

We support the expansion of the definition of “successor in interest” to include agents and attorneys.

XI. Special Procedures– LABOR CERTIFICATION PROCESS FOR TEMPORARY AGRICULTURAL EMPLOYMENT IN ANIMAL SHEARING, COMMERCIAL BEEKEEPING, CUSTOM COMBINING, AND REFORESTATION OCCUPATIONS

A. 20 C.F.R. § 655.300 – Scope & Purpose

1. Reforestation Workers

³⁵⁷ 335 F.2d 927 (9th Cir. 1964).

³⁵⁸ *Id.* at 931.

It is not entirely clear why reforestation is included within this subsection. Other than an invitation for comments by the Department as to the housing needs and employer provided items for reforestation workers, there is no other reference to reforestation workers in this subsection. (See Section IX above for comments on the inclusion of reforestation workers within the H-2A program).

2. Revisions to 20 C.F.R. § 655.300(b) to Ensure Comprehensive Coverage of All Applicable Job Opportunities

Because it is common for there to be multiple worksites of intended employment in states that are not contiguous for these job occupations, there will likely be separate but related job orders filed pursuant to 20 C.F.R. § 655.132 that will be applicable to the same group of workers. It is additionally possible that worksites of intended employment may include provincial land owned or operated by Canadian employers.³⁵⁹ For these reasons, the following modifications must be made to ensure inclusion of all jobs intended to be covered by this subsection (added language is underlined).

(b) Jobs subject to §§ 655.300 through 655.304. The procedures in §§ 655.300 through 655.304 apply to job opportunities for animal shearing, commercial beekeeping, and custom combining, and reforestation as defined under §§ 655.103 and 655.301, where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment in one or more contiguous states, including provincial land owned or operated by Canadian employers.

B. 20 C.F.R. § 655.301 - Definition of Terms

The Department seeks comments regarding the definitions at 20 C.F.R. § 655.301 of the proposed regulations.³⁶⁰ Specifically, the Department requests comments on whether the definitions accurately and comprehensively reflect the activities workers in these occupations perform and whether a final rule should limit additional job duties that workers may perform under certifications approved under §§ 655.300 through 655.304 beyond those duties outlined in this proposed section.³⁶¹

We generally support the implementation of the proposed definitions for animal shearing, commercial beekeeping, and custom combining activities as proposed by the Department in this section. The following includes a few minor revisions suggested to ensure accurate coverage of all applicable job opportunities (inserted language underlined):

Commercial beekeeping. Activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers, including assembling, maintaining, and repairing hives, frames, or boxes;

³⁵⁹ See TEGL 16-06, at 1 (Feb. 12, 2007), <https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06.pdf>.

³⁶⁰ 2019 NPRM, 84 Fed. Reg. at 36222–23.

³⁶¹ *Id.*

inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies. For purposes of this definition, qualifying activities may be performed at work sites under direct supervision of either the fixed-site farmer/rancher or an itinerant beekeeping employer who employs one or more nonimmigrant workers on an itinerary to provide beekeeping services to fixed-site farmers/ranchers as defined in 20 C.F.R. § 655.132.³⁶²

Custom combining. Activities associated with combining crops for agricultural producers, including operating self-propelled combine and other farm equipment (i.e., equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to cutters, blowers and conveyers; performing safety checks on harvesting equipment; and maintaining and repairing equipment and other tools used for performing swathing or combining work. Transporting harvested crops to elevators, silos, or other storage areas, and transporting combine equipment and other tools used for custom combining work from one field or employer-owned work site to another, qualify as activities associated with custom combining for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the custom combining crew and who travel and work with the custom combining crew. Component parts of custom combining not performed by the harvesting entity (e.g., grain cleaning), are not eligible for the variance granted by this provision. The planting and cultivation of crops, and other related activities, are not considered custom combining or activities associated with custom combining for the purposes of this definition.

C. 20 C.F.R. § 655.302 Contents of Job Orders – Variations Needed

1. Additional Provisions Are Needed In 20 C.F.R. § 655.302 Given Unique Job Characteristics

³⁶² See TEGL 33-10 Attachment A, at 3 (June 4, 2011), <https://wdr.doleta.gov/directives/attach/TEGL/TEGL33-10ATT-A.pdf> (“An itinerant beekeeping employer who desires to employ one or more nonimmigrant workers on an itinerary to provide beekeeping services to fixed-site farmers/ranchers is, by definition, an H-2ALC. Therefore, the itinerant beekeeping labor contractor must identify itself as the employer of record on the ETA Form 9142 by completing Section C and marking item C.17 as ‘H-2A Labor Contractor,’ and submitting, in addition to the documentation required under 20 CFR 655.130, all other required documentation supporting an H2ALC application.”).

We generally support that unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122. However, there are a few key areas that should be included within this subsection given the unique characteristics of these occupations.

- a. Workers' Compensation.** We urge DOL to require in the contents of the job order information about workers' compensation coverage in each state where work will be performed as included in the 2011 TEGs 17-06 for animal shearers, 16-06 for custom combiners, and 33-10 for commercial beekeepers. This should also be made clear in the job orders applying to reforestation workers in the event they are included in this subsection. The suggested language for the additional provisions is as follows:

(e) Workers' Compensation. The employer must provide workers' compensation insurance coverage, as described in 20 C.F.R. § 655.122(e), in all states where animal shearing, custom combing, commercial beekeeping and reforestation work will be performed. Prior to the issuance of the Temporary Labor Certification, the employer must provide the Certifying Officer (CO) with proof of workers' compensation coverage, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or if appropriate, proof of state law coverage for each state where the animal shearing, custom combining, commercial beekeeping or reforestation work will be performed. In the event that the current coverage will expire before the end of the certified work contract period or the insurance statement does not include all of the information required under the regulations at 20 C.F.R. § 655.122(e), the employer will be required to supplement its proof of workers' compensation for that state before a final determination is due. Where the employer's coverage will expire before the end of the certified work contract period, the employer may submit as proof of renewed coverage a signed and dated statement or letter showing proof of intent to renew and maintain coverage for the dates of need. The employer must maintain evidence that its workers' compensation was renewed, in the event the Department requests it.

b. Rates of pay.

We urge DOL to require in the contents of the job order additional information about rates of pay for each state in which work will be performed for each of the covered occupations under this subsection. As previously mentioned, because the work in these occupations often occurs in various worksites across different sites, it is important to make it clear what the rate of pay is in each state where the work is located.

DOL should add a subsection and include in this provision language from the current Special Procedures in reference to rates of pay as follows: If paying by the piece rate, the animal shearing, custom combining, or commercial beekeeping employer must specify in the job order the established piece rates and on what increment of work they are calculated (i.e., rate of pay per head sheared, rate of pay per acre harvested, rate of pay per quantity of honey extracted, etc.) for each state where work will be performed and that is no less than the piece rate prevailing for the activity in the area of intended employment. If the worker is paid on a piece rate basis, the worker's pay must be supplemented if at the end of the pay period the piece rate does not result in average hourly rate earnings at least equal to the amount the worker would have earned had the worker been paid at the highest of the AEWR, the prevailing hourly wage rate, the agreed-upon collective bargaining wage, or the Federal or state minimum wage, in effect at the time and in the state where shearing work was performed.

c. Offered wage.

We urge DOL to additionally require in the contents of the job order information about the offered wage as applicable to these particular job opportunities.

DOL should include a subsection to add a provision with language from current Special Procedures guidance in reference to the Offered Wage Rate as defined in 20 C.F.R. § 655.120(a) for all itinerant animal shearing, custom combining and commercial beekeeping workers. In most circumstances, these workers are likely entitled to a higher hourly wage based on the prevailing wage rate but are often denied this level of pay due to lack of comparable survey data from adjoining or proximate SWAs. The Department should utilize its enforcement oversight to ensure that SWAs are accurately conducting and analyzing prevailing wage surveys in a timely manner in order for employers to pay its animal shearing and custom combining, including corresponding employees at the highest wage rate as specified in 20 C.F.R. § 655.120(a).

d. Productivity standards. Workers and advocates fully support the removal of a minimum productivity standard in order to retain employment offered under the H-2A Program. As such, we ask DOL to include language in all job orders that states something like: "Productivity standards may not be applied to activities as defined in § 655.301."

2. Job Qualifications and Requirements at 20 C.F.R. § 655.302(b)

In regard to the completion of itinerary for agricultural work performed in animal shearing, commercial beekeeping, and custom combine harvesting, we generally agree with the revised requirement that an applicant must be available to work for the remainder of the entire itinerary regardless of the percent of the work contract period that has elapsed.

The experience requirements proposed in this subsection are not reasonable and are likely to deter domestic workers from applying for these jobs. The proposed experience requirements would allow employers to require up to 6 months of experience in similar occupations and verifiable references for that experience. For other H-2A employers, jobs may only be conditioned on experience requirements if a survey conducted by the State Workforce Agency finds that experience requirements are a normal and accepted practice for employers of U.S.

workers in the same industry. DOL should not allow employers to circumvent the same requirements imposed on other H-2A employers.

Employers are obligated by law to hire any qualified U.S. workers who apply for an H-2A position at any time during the first half of the H-2A certification period. Experience requirements are often used as a barrier to exclude U.S. workers who may be qualified but do not have experience working with the particular crop or animal—for example, a tomato grower may require experience in tomatoes and exclude a worker who has experience working with similar crops but not tomatoes. Further, the “verifiable” experience requirement is an undue burden on U.S. workers, as employers often require an official reference on the company letterhead of the former employer. Migrant workers often do not maintain records of whom they worked for in the past and may not have the names or locations of their former employers, much less accurate and up-to-date contact information. Verifiable experience requirements are rarely imposed on H-2A workers recruited internationally, and DOL currently does not exercise any oversight over whether job qualifications are imposed equally on foreign workers. As a result, the experience requirement often serves more as an exclusionary mechanism, not a legitimate job qualification.

For the above stated reasons, the suggested revisions are as follows:

(b) Job qualifications and requirements. (1) For job opportunities involving animal shearing, the job offer may specify that applicants must possess up to ~~6~~3 months of experience in similar occupations ~~and require reference(s) for the employer to verify applicant experience.~~ The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available (but no less than 7 days from the date of need) and at the place the employer is located, and must be willing and available to complete the scheduled itinerary under the job order. U.S. applicants whose experience is based on a similar or related industry shearing method or pattern must be afforded a training break in period of no less than ~~5~~ 7 working days to adapt to the employer's preferred shearing method or pattern.

(2) For job opportunities involving commercial beekeeping, the job offer may specify that applicants must possess up to 3 months of experience in similar occupations ~~and require reference(s) for the employer to verify applicant experience.~~³⁶³ The job offer may also specify that applicants may not have known bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time the job opportunity is available (but no

³⁶³ As referenced in these comments, there is no justification for such stringent job qualifications and experience requirements for these job occupations. In order to ensure domestic workers are not unreasonably deterred from applying for these jobs, further investigation and documentation must occur in order to determine the appropriate level of job experience that may be required.

less than 7 days from the date of need) and place the employer is located, and must be willing and available to complete the scheduled itinerary under the job order.

(3) For job opportunities involving custom combining, the job offer may specify that applicants must possess up to 3 6 months of experience in similar occupations ~~and require reference(s) for the employer to verify applicant experience.~~³⁶⁴ The job offer may also specify that applicants must be willing to join the employer at the time the job opportunity is available (but no less than 7 days from the date of need) and place the employer is located and must be available to complete the scheduled itinerary under the job order.

3. Employer Provided Items Should Be Provided and Specified at 20 C.F.R. § 655.302(c)

DOL's proposed regulation in this subsection requires employers to provide workers with effective means of communicating with persons capable of responding to emergencies, free of charge, is fully supported by workers and their advocates. However, this provision should not exclude commercial beekeeping or reforestation work from its coverage as they are often similarly situated in remote regions, working in isolation without immediate means of communication.

DOL seeks comments as to whether it should specifically require additional tools, supplies, and equipment in the industries covered by this subsection, or whether it would be helpful to include in the regulation a list of items that typically are required by law, the employer, or the nature of the work and location, and which must be provided to the workers without charge or deposit. Based on DOL's request, this section addresses (1) the tools and equipment necessary to do these jobs as well as (2) the need to disclose to the worker the tools that should be provided by the employer at no cost to the worker.

Animal shearers, commercial beekeepers, custom combiners, and reforestation workers traveling to the U.S. to accept H-2A jobs often bring little with them, based on assurances that all tools and equipment necessary to complete assigned job duties will be provided at no cost. The Special Procedures historically have not described the precise items that need to be provided to the workers free of charge pursuant to H-2A regulation 20 C.F.R. § 655.122(f), leading to persistent misunderstanding among the workers and the industry of what this promise truly encompasses. Upon their arrival to the U.S., these foreign workers quickly discover that although their employer will purchase many of the items they need to be able to complete assigned job duties, the cost of such items is then deducted from their pay. Most often, foreign workers must purchase many or all items on their own.

³⁶⁴ *Id.*

The Department should recognize that the unique occupational characteristics of animal shearer, commercial beekeeper, custom combiner and reforestation occupations require distinct tools, supplies, and equipment that must be provided to the worker free of charge in order to perform their jobs safely and effectively. The Department should modify proposed § 655.302(c) to include an explicit, nonexclusive list of such items that are typically required by the nature of the work under this subpart, to avoid employers circumventing this requirement with their own interpretation of the “tools, supplies and equipment” necessary to do the job. The list should consist of the types of items the Department considers to be among those tools, supplies and equipment needed for these workers to perform their jobs safely and effectively.

a. Specific Tools and Equipment Required

First, we ask that DOL maintain the requirement that employers participating in the H-2A Program must provide to the animal shearing, commercial beekeeping, or custom combining employee, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, nor deduct from an employee’s pay the cost of any item that is an employer’s business expense where doing so would reduce the employee’s wages below the required wage rate, in order to remain consistent with 20 C.F.R. §§ 655.120(a) and 655.122(f) and (p).³⁶⁵

Next is a list of tools and equipment that are required by the nature of the work in these industries in order to perform activities defined under § 655.301 safely and effectively. This list includes some items that are traditionally provided free of charge to the worker and other items that most workers are charged for out of their wages. All are necessary to the safe and effective performance of the work, are generally not kept by the worker at the end of the contract and should be provided by the employer free of charge.

1. General:

- Lighting (e.g., lanterns and flashlights)
- Bedding (e.g., clean sheets, blankets or sleeping bags, and pillows)
- Outerwear to Protect Worker from Elements (e.g., raincoat/pants, rain boots, snow jacket, snow pants, snow boots, wool hat, sunglasses/goggles w/UV protection, thermal underwear, hats/visors, sunscreen (SPF 45), mosquito repellent, gloves)
- Protective and/or Disposable Gloves and Disinfectant (if reusable)

2. Animal Shearing:

- Shearing tools including combs, cutters and machine parts and/or repair.

3. Commercial Beekeeping³⁶⁶:

- Protective veil/screen goes over the hard hat
- White cuffs – sleeves

³⁶⁵ See TEGL 17-06 (Feb. 12, 2007), <https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06.pdf>.

³⁶⁶ This list of equipment necessary for beekeeper workers was provided to us by a current beekeeper working in Oregon.

- A hard hat light
 - Outerwear to Protect Worker from Elements (e.g., raincoat/pants, rain boots, snow jacket, snow pants, snow boots, wool hat, sunglasses/goggles w/UV protection, thermal underwear, a long sleeve shirt, hats/visors, sunscreen (SPF 45), mosquito repellent, waterproof gloves, and cotton gloves)
 - Safety goggles and dust masks
 - Overalls, or some type of protective clothing that covers chest, torso and legs
 - Steel-toe shoes
4. *Custom combining*³⁶⁷:
- Working gloves to be replaced on a monthly basis³⁶⁸
 - Safety goggles and dust masks³⁶⁹
 - Personal Protective Equipment while mixing, spraying, applying or otherwise working with pesticides and fertilizers
 - Steel toe shoes
 - Hard hat
 - Overalls, or some type of protective clothing that covers chest, torso and legs
 - Flashlight
 - Hand cleaner (soap) in the workshop
 - Regular maintenance of semi-trucks hauling grain³⁷⁰
 - Harnesses for climbing grain elevators
 - Clear safety warnings/signage on equipment
 - Hands-free communication devices
5. *Reforestation workers*³⁷¹:
- Kevlar chaps to prevent cuts to the legs when thinning with chainsaws
 - Caulked (pronounced “corked”) boots to prevent slips, trips, and falls.³⁷²

³⁶⁷ This list of tools, supplies, and equipment was provided by two current H-2A custom combining employees provided to worker advocates in Missouri. The Missouri worker advocates were informed that none of the items listed were provided to them. The workers had to purchase the items with their own money in order to meet the job requirements.

³⁶⁸ Due to the nature of work with hydraulic hoses on the combines and tractors. Hoses and surrounding parts are greasy and oily, and the header blades are dangerous, sharp, and produce sparks or small flames while custom combiners work to replace the blades, causing the gloves to wear quickly.

³⁶⁹ In the silos or bins, it is very dusty and not healthy to breathe in the dust. Flame-resistant masks should also be provided while working with flames or other potential fire hazards.

³⁷⁰ Workers complained of faulty brakes and reported their employers’ unwillingness to replace them.

³⁷¹ These items are necessary specifically for the safety of the worker.

³⁷² All reforestation workers need these, including tree planters and thinners. However, requiring these is contentious. Employers in the Pacific Northwest feel that they do not have to supply these, and Oregon law says that forestry employers must supply all safety equipment except boots.

- Respirators, hats, goggles, gloves for workers mixing, pouring and/or applying pesticides when the label calls for these personal protective equipment items (i.e., rodenticides, insecticides (applied to treat mountain pine beetle infestations and other insect-caused tree diseases), and some herbicides).
- Hearing protection for chainsaw operators
- Eye and face protection for chainsaw operators; this could be a clear plastic visor that extends below the hard hat to cover the face.
- Hard hats
- Gloves
- Respirators to protect from wildland fire smoke when it creates unhealthful air.³⁷³

In the alternative and at the very minimum, the language within this provision should include a specific reference to those categories of items DOL considers necessary to ensure the health and safety for these jobs like “outerwear to protect worker from elements, pesticide/chemical exposure, bee attacks/stings, fire hazards, falls, flying objects, or other dangerous conditions presented in the course of activities” performed in these job occupations currently covered by the Special Procedures.

Inclusion of Tools and Equipment in the Job Orders.

We urge DOL to require that the “employer must specify in the job order which items it will provide to the worker.” We believe such a list would not only be helpful but is necessary to help employers clarify with the Department the kind of tools that must be provided to the worker free of charge in order to perform their jobs safely and effectively. By requiring disclosure on the job order, the Department can then review whether an employer’s job order specifies many of the common items discussed above and require clarification or correction of any deficiencies. We recommend a comprehensive list be included on the job order form that lists all the items above (with additional blank lines in the event there are other items the employer plans on providing free of charge to the worker).

D. 20 C.F.R. § 655.303 - Filing Procedures for Applications for Temporary Employment Certification

We generally support that unless otherwise specified in §§ 655.300 through 655.304 the employer must satisfy the requirements for filing an Application for Temporary Employment Certification with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

In regard to 20 C.F.R. § 655.303(b), the language in this section needs to be modified to conform with reforestation practices in the event this section is going to include reforestation workers. For example, subsection (b)(1) should not simply request the names of the farms and

³⁷³ This is a new issue. People are just now starting to grapple with this issue in California and Oregon due to the extremely bad air quality that lasted for weeks in very large areas in both states during last year’s fire season.

ranches given that reforestation occurs at other locations. Suggested additional language to add to this subsection includes “those who operate timberland”.

Additional revisions to 20 C.F.R. § 655.303(b) are suggested as follows:

An employer must file a completed Application for Temporary Employment Certification complete with a detailed itinerary as defined in 20 C.F.R. § 655.122. The ~~employer~~ detailed itinerary must identify each place of employment with as much geographic specificity as possible, including the names of each farmer/rancher, the names, physical locations or latitude and longitude coordinates of each work site and associated housing location, and estimated period of employment where work will be performed at each site under the job order.

E. 20 C.F.R. § 655.304 – Standards for Mobile Housing

1. Housing Needs of Commercial Beekeepers and Reforestation Workers

DOL invited comments about the housing needs of commercial beekeepers and reforestation workers. The employer provided housing requirements for fixed housing sites set forth at 20 C.F.R. § 655.122(d) remain appropriate for the other occupations covered under this subpart, such as those engaged in commercial beekeeping and reforestation. After reviewing the housing needs of those engaged in beekeeping and reforestation and examining the current housing practices, the same obstacles to utilizing fixed housing sites for these workers simply do not exist.

However, when employers rent public accommodations such as hotels or motels for those employed in any job occupation covered in the H-2A regulations, a requirement should be included that individual beds be provided for each worker. Additional enforcement provisions are also needed to ensure that employers are complying with the requirements and are not overcrowding hotel rooms.

2. There Should Be No Variation from the Mobile Housing Standard When the Mobile Housing is Moved to the Range

The proposed mobile housing standards in this subpart sufficiently meet the mobile housing needs of those employed in animal shearing and custom combining even when they are relocated on the range. It would not be proper or humane to lower the housing standards for workers simply because they move to the range for a period of time. (*See* discussion below on the antiquated standards for range housing). As illustrated herein, there is only one modification that actually needs to be made to these standards so that they may sufficiently meet the mobile housing needs on and off the range. More importantly, by accepting Worker Advocate recommendations in this section and by not lowering the mobile housing standards when the workers relocated on the range for any amount of time, indicates that the Department is prioritizing worker health and safety over convenience for the employer.

DOL’s proposed regulations set forth at 20 C.F.R. § 655.304(a)(1) unnecessarily includes the requirement to apply an entirely different standard to the mobile housing employers provide

to their animal shearer and custom combine workers when they are working on the range from when they are not. The different standard not only comes with problematic certification and inspection procedures (discussed further below), there is the added requirement for employers to now determine whether each worksite constitutes the “range” and if so, the variations that may be applied.

After a side by side examination of the proposed mobile housing standards at 20 C.F.R. § 655.304 and the range housing standards at 20 C.F.R. § 655.235, the only differences worth noting are the following:

Electricity. Refrigeration to keep food fresh. A toilet. A stove or hotplate. Water. And a clean and comfortable place to sleep.

Electrical service or generators must be provided for those staying in non-range mobile housing but not for those in range housing.³⁷⁴

In non-range mobile housing, mechanical refrigeration must be provided and if that is not feasible, other means of keeping food fresh must be provided such as a butane or propane gas refrigerator. For range housing, salting and dehydration are offered as acceptable methods of safeguarding fresh food when mechanical refrigeration is not feasible.³⁷⁵

Toilet facilities such as portable toilets, RV or trailer toilets, privies, or flush toilets must be provided for occupants of non-range mobile housing. Those in range housing must simply be provided with a shovel.³⁷⁶

Non-range mobile housing occupants must be provided stoves or hotplates for cooking and eating facilities, but not range housing occupants.³⁷⁷ Unlike non-range mobile housing, a separate comfortable and clean bed, cot or bunk does not need to be provided for each occupant of range housing. There is also no requirement that clean and sanitary bedding be provided for each person in range housing nor is there a maximum occupancy requirement.³⁷⁸ The one provision for those residing in range housing that is “better” than what is provided in the proposed mobile housing is the requirement that 4.5 gallons of potable water per day, for drinking and cooking, be delivered on a regular basis, so that the worker on the range will have at least this amount available for their use until the supply is replenished.³⁷⁹ Additional water to meet laundry and bathing needs must also be supplied.³⁸⁰ On the other hand, the non-range mobile housing standards only require that a cold-water tap be available within a reasonable distance of each individual living until when water is not provided in the unit.³⁸¹

³⁷⁴ Compare 20 C.F.R. § 655.235(f) with *id.* § 655.304 (h)(1).

³⁷⁵ Compare 20 C.F.R. § 655.235(h) with *id.* § 655.304(j).

³⁷⁶ Compare 20 C.F.R. § 655.235(c) with *id.* § 655.304(e).

³⁷⁷ Compare 20 C.F.R. § 655.235(i)(1) with *id.* § 655.304(k)(1).

³⁷⁸ Compare 20 C.F.R. § 655.235(l) with *id.* § 655.304(n)(1), (n)(2), (p).

³⁷⁹ 20 C.F.R. § 655.235(b)(2).

³⁸⁰ *Id.*

³⁸¹ Both include the language that an adequate and convenient supply of potable water that meets the standards of the local or state health authority must be provided, however the 20 C.F.R. § 655.304(d).

Given the advances in technology and the affordability of rechargeable devices and charging mechanisms like solar panels and lithium batteries, there is no reason why workers must go without lights, electricity, cooking appliances and toilets just because their housing may be located on the range for a period of time.

We strongly urge DOL to implement the Mobile Housing Standards set forth at 20 C.F.R. § 655.304 without the lowering of the standards for when workers are relocated to the range. Instead, please consider the following revisions of § 655.304:

- (d)(3) A cold water tap shall be available within a reasonable distance of each individual living unit when water is not provided in the unit. (i) In the event a cold water tap is not available within a reasonable distance of each individual living unit, the employer must provide each worker at least 4.5 gallons of potable water, per day, for drinking and cooking, delivered on a regular basis, so that the workers will have at least this amount available for their use until this supply is next replenished. Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each worker. This additional water may be non-potable, and an employer may require a worker to rely on natural sources of water for laundry and bathing needs if these sources are available and contain water that is clean and safe for these purposes. (ii) If an employer relies on alternate water sources to meet any of the workers' needs, it must take precautionary measures to protect the worker's health where these sources are also used to water livestock, dogs, or horses, to prevent contamination of the sources if they collect runoff from areas where these animals excrete. (iii) The water provided for use by the workers may not be used to water dogs, horses, or the herd. (iv) In situations where workers are located in areas that are not accessible by motorized vehicle, an employer may request a variance from the requirement that it deliver potable water to workers, provided the following conditions are satisfied: (a) It seeks the variance at the time it submits its *Application for Temporary Employment Certification*; (b) It attests that it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located, and that these sources will remain available during the period the worker is at that location; (c) It attests that it shall provide each worker an effective means to test whether the water is potable and, if not potable, the means to easily render it potable; and (d) The CO approves the variance.

F. The Range Housing Standards at 20 C.F.R. § 655.235 Need to Be Eliminated or Amended

- 1. The Range Housing Standards Should Be Eliminated and Replaced with the Mobile Housing Standards Set Forth in the Proposed Regulation at 20 C.F.R. § 655.304.**

There is no justifiable reason why the mobile housing standard included within this new subpart could not replace the range housing standards provided at 20 C.F.R. § 655.235. As illustrated in the previous section, many of the concerns raised by worker advocates over the years about the range housing standards could easily be addressed by replacing the range mobile housing standards with this new proposed standard. For example, providing range workers with electricity, a toilet, and refrigeration to allow them to eat more than canned food would be a significant improvement and entirely feasible given technology today and affordable methods of providing these items.

There is simply no need for the Department to maintain separate mobile housing standards that are subject to different certification and inspection requirements, especially given all the concerns and complaints that the longstanding practice of allowing employers to provide self-inspection certifications between the SWA inspections that occur once every three years is entirely insufficient.

2. In the alternative, the Range Housing Standards set forth at 20 C.F.R. § 655.235 Should be Updated and Inspections of Range Housing Units Should Be More Vigorous.

(a) Range Housing Standards Should Be Improved

DOL's regulations governing range housing continue to allow too many archaic practices and fail to provide realistic minimum housing standards that take into account the technological advances in this country as well as the various housing scenarios for workers. For example, the standards do not provide for variations depending on the location or length of time the worker will be located on the range, and do not require use of modern equipment to maintain minimum standards.

DOL has already recognized that range housing is generally mobile housing, capable of being moved from one location to another. However, given the technology and range of options available to provide power for such housing, there is no justification for continuing to allow employers to provide housing with no power source. Solar heaters are easily available and range workers have been known to purchase their own. Long-life LED lights and batteries provide very good lighting. There is no need to resort to kerosene lanterns, which give off fumes and create an additional fire hazard. Propane stoves can be safely used by storing the propane outside the camper/trailer/tent and ensuring that installation properly seals off openings, and stoves are safely installed with nonflammable materials.

Propane generators, refrigerators and heaters are now available that locate the propane outside the unit. Battery packs and solar equipment for heating, refrigeration and other appliances, as well as recharging cell phones, flashlights and other equipment should be required whenever possible instead of the use of combustible fuels. A broad range of available solar equipment is cost-effective, and constantly improving, including solar tents, panels, chargers, and generators. Solar kits are available for campers and RVs and are frequently used for open range workers.

Following are recommendations for improving the range housing regulations in key areas.³⁸²

(1) *Heat Standards Must Be Based on Maintaining a Reasonable Temperature Inside the Housing as well as Safety Standards.* The Department has not taken into account the higher technology and heating methods available for campers/RV's, as well as tents.³⁸³ Overall, safety standards for the use of combustible fuel are inadequate. To prevent fire hazards and dangerous concentrations of gases or fumes, the Department should require use of non-combustible means of providing heat. If the use of combustible fuel is permitted, standards should require that the fuel source is stored outside the unit, and that the heating unit is installed by a professional and is maintained in good working order with no defects or alterations that make it unsafe. The heating unit should also be inspected annually by the fire department or heating equipment professional. Bedding and other flammable material must be capable of being used and stored a minimum safe distance from the heating unit. Proper ventilation needs to be provided and smoke detectors should be required and kept in workable condition with battery replacement required every six months. Fire extinguishing equipment providing protection equal to a 2A:10BC rated extinguisher must be stored in a readily accessible place and checked annually.

(2) *Adequate Toilets Must be Required.* At the very minimum, workers should be provided with a "camp toilet" (portable toilet), a toilet system for proper carry-out disposal of solid waste. (This is a common requirement by the BLM of river runners when applying for permits.³⁸⁴) The waste could be collected by the employer upon each weekly visit to replenish the worker's food and water supply. In the event workers are stationed at or near permanent or quasi-permanent structures (corrals), a portable toilet or outhouse should also be provided at such locations.³⁸⁵

(3) *Stoves or hotplates for cooking should be required.* Given these workers are required to cook their own food, there is no reason not to require a stove or hotplate within these standards. In addition, current

³⁸² Many of these recommendations were provided by worker advocates on June 1, 2015 in regard to the NPRM for changes made to the H-2A regulations to incorporate range workers. The June 1, 2015 Comments Submitted by a similar group of worker advocates are hereby incorporated by reference. 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. (June 1, 2015), <https://www.regulations.gov/document?D=ETA-2015-0004-0514>, Exhibit J-1.

³⁸³ See Exhibit J-2 (photo of wood-burning stove used in herder mobile housing unit for heat).

³⁸⁴ See, e.g., Bureau of Land Mgmt., *Permit Regulations*, <https://www.blm.gov/or/permit/info/regulations> (last visited Sept. 24, 2019).

³⁸⁵ See Exhibit J-3 (photo of "toilet" made by workers stationed in one area for a long period of time).

practice that most employer provided range housing includes stoves for cooking.

(4) Bathing, Laundry and Hand Washing Facilities Must Be Improved.

Employers should be required to provide workers with sun-shower type camping equipment during warm seasons when not near a location where they can shower. Employers should also be required to provide workers with biweekly (or at minimum once per month) access to hot showers and laundry machines. Devising a schedule so that workers can be rotated out periodically in order to allow them to take a shower and wash their clothes is not too burdensome given the importance of providing such services to the workers.

(5) Modern Lighting Requirements Should Be Established and Electricity should be provided.

The Department continues to state that kerosene lanterns are acceptable to provide lighting. Kerosene lanterns present several entirely unnecessary safety and health hazards. Fire hazards are apparent: sufficient kerosene has to be stored for ongoing use, kerosene spills while filling lanterns are likely, and lit lanterns may be knocked over. As noted above, solar units and battery operated LED units with long-lasting lights and batteries are efficient, affordable, and safe, while providing much better lighting than kerosene lanterns.

(6) First Aid Supplies Should Be Specified. The Department's current regulation only specifies that a first aid kit be available. The regulations should require that the first aid kit be kept fully stocked and easily accessible in the mobile housing. Regulations should further specify the type of first aid kit required based on OSHA recommendations for first aid kits for use away from home, and with specific consideration for possible illnesses related to exposure to cold temperatures as necessary.

(7) Bed and Mattress Standards Should be Established. Standard for beds and mattresses need to be more specific and inadequate that the bedding provided be clean and sanitary. If foam pads are provided, they must be thicker than 2 inches and covered completely with a washable material. Mattresses and pads must not sit on the floor.

(8) Food Storage/Refrigeration Standards Should Be Updated and Clarified. The refrigerator referenced in 20 C.F.R. § 655.235(h) must be capable of keeping food at or below 45° F.³⁸⁶ Given current methods of providing power, as noted above, a refrigerator is entirely feasible and alternative methods, such as dehydrating and salting should not be considered an acceptable substitute unless it is shown safe refrigeration is not possible using available methods.

³⁸⁶ 21 C.F.R. § 110.80(b)(3)(i).

(9) Hand-Cranked Generators Should be Required. Every unit should be required to have a hand-cranked generator for emergencies.

(b) Range Housing Units Should Be Inspected More Frequently

The proposed regulations do not, as they should, include any changes to the longstanding practice of requiring the SWA to inspect these range mobile housing units only once every three years. Instead, they continue to merely supplement these inadequate inspections by allowing the employers to provide self-inspection certifications each time an H-2A certification is sought.

In the course of its investigations in response to complaints about the housing conditions, the Department has been made aware of the poor quality and deplorable condition of many of the mobile housing units provided to workers by some of these employers.³⁸⁷ Many of these housing units are deteriorating rapidly not only because they are old, but because they are also moved around mountainous and rugged terrain and forced to withstand severe rain, snow and heat and do not appear to receive regular and necessary maintenance despite these conditions.³⁸⁸

Given that the extremely low standards for the range mobile housing units only marginally provide protections to ensure the health and safety of these workers, it is even more important to require frequent and effective SWA housing inspections as a condition of getting each of the H-2A certifications, just as is required for fixed housing sites for workers in the larger H-2A program under Subpart B, 20 C.F.R. § 654.403. An alternative could be for the Department to implement a requirement for annual inspections of all of the employers' mobile housing units in accordance with a specific inspection schedule that correlates with those time periods when the housing units will be at or near a fixed location for an extended period of time and can be made available for inspection.³⁸⁹ At that time, the SWA could inspect and identify (with tracking numbers) those units that pass the inspection and those that do not and maintain the records for enforcement purposes.

Imposing the requirement for more frequent inspection of all mobile housing units would also assist in addressing the concerns that employers may be selecting certain housing units for inspection by the SWA while placing the workers in other housing units that were not properly inspected. Currently, there is no way for the SWA to ensure that those mobile housing unit(s) inspected will be the mobile housing unit(s) provided to the incoming worker(s). When the Department receives complaints from herders and range workers regarding the condition of their housing, its investigators may not be able to visit that particular housing unit depending on the season and the location of the worker.³⁹⁰ If, however, the Department requires the SWAs to inspect and track all of the employers' housing units on a regular basis, there will be records indicating which units have and have not passed the SWA inspections. The Department could either visit the employer's fixed location to verify the presence of those housing units previously

³⁸⁷ See DOL Wage and Hour employer investigations, Exhibit J-4.

³⁸⁸ *Id.*; see also Range housing photos, Exhibit J-5; Declaration of Tom Acker, Exhibit J-6.

³⁸⁹ Federal OSHA and many state OSHA programs use such an inspection schedule to attempt to make the most efficient use of inspection opportunities.

³⁹⁰ See DOL Wage and Hour employer investigations, Exhibit J-7 (investigator was not able to inspect housing due to location of housing unit and weather conditions).

identified as “not in compliance or use” and/or simply request that the worker provide them with the “tracking number” of their housing unit to compare against the SWA records.

Furthermore, allowing employers to self-certify housing in the interim of the three-year period is not an adequate safeguard. A simple statement of compliance is often a check-the-box exercise of paperwork that encompasses little, if any, actual evaluation of housing conditions. Routine inspections by the SWA, on a yearly basis at a minimum, are necessary to ensure the basic minimum safety and health standards for mobile housing on the open range. In the event self-certifications continue to be permitted, the self-certification should, at a minimum, include a detailed checklist, a certification that the employer personally examined each item on the checklist, and submission of detailed photographs showing the conditions to be as they are required for certification.

It is crucial that the Department and SWAs regularly visit herders on the range. Herders tend to be very isolated and are in quite vulnerable positions. There should be a provision requiring that a monitor advocate from the SWA periodically visit herders to check on how they are doing and ensure that they receive the provisions and attention they need. Ideally, an ombudsman position could be created to be responsible for such field and site checks. As a practical matter, none of the protections recommended in these comments will matter if no one follows up to see if, and how, they are being respected.

G. Payment for Travel Time of Shearers and Combine Workers Pursuant to the FLSA

Those employed as animal shearers and custom combine workers are often required to travel to distant locations on assignment that require them to be absent overnight from their home. Pursuant to the FLSA, travel time from one jobsite to another during the course of a workday is compensable.³⁹¹ Worker advocates have received numerous complaints from H-2A animal shearers and custom combine workers that they are not properly compensated for said travel time.³⁹² Given that this appears to be a frequent occurrence, we propose additional provisions be included in this proposed subpart to protect workers from further violations.

XII. International Recruitment

U.S. employers that hire guestworkers often rely on labor recruiters to find and recruit workers in the sending countries. Under the current H-2A regulations, employers and their agents are prohibited from seeking or receiving payments from employees for activities related to obtaining H-2A labor certification.³⁹³ Further, employers must contractually forbid foreign labor contractors or recruiters whom they have engaged in the international recruitment of workers from seeking or receiving fees.³⁹⁴

³⁹¹ See 29 C.F.R. §§ 785.38 and 790.7.

³⁹² See *Chuquichaico Damian v. Argy Georgiou*, No. 13-cv-01418 (D. Colo. May 31, 2013).

³⁹³ 20 C.F.R. § 655.135(j).

³⁹⁴ *Id.* § 655.135(k).

Unfortunately, the prohibition on recruitment fees has not protected workers from recruitment fees. Even though recruitment fees are prohibited under the H-2A program, labor recruiters often charge guestworkers for the opportunity to obtain work under an H-2A visa. Instead of protecting workers, the prohibition on recruitment fees can serve to insulate the employer from liability, often resulting in employers who “look the other way” to intentionally remain ignorant about the recruitment process that supplies their workers. Moreover, the administration of the visa system fails to provide an incentive for workers to come forward and disclose recruitment violations.

In fact, the current regulations and administration of the H-2A program has created has created a disincentive for workers to come forward and disclose having paid illegal recruitment fees. Workers who disclose to the U.S. consulate that they have paid illegal recruitment fees risk being denied a visa to the United States.³⁹⁵ As a result, recruiters often coach workers not to disclose recruitment fees during their consular interviews. Loss of a visa is potentially catastrophic for workers who are already indebted from recruitment, are desperate to work to repay their debt, and do not want to risk reporting the fees if they will be denied a visa. Finally, workers who disclose recruitment fees or violations face retaliation and blacklisting from employers and recruiters for reporting violations.

Depending on their country of origin, workers pay anywhere from hundreds to thousands of dollars in recruitment fees. In addition, workers are sometimes required to leave collateral, such as a property deed, with recruiters to ensure that workers will complete their contract. False promises of potential earnings, misleading or undisclosed contract terms, excessive recruitment fees, and increasing involvement of organized crime in countries of origin often lead to cases of debt bondage and human trafficking in the United States. The anti-trafficking organization Polaris recently released a report covering human trafficking in temporary work visa programs during the period from 2015 to 2017, which showed that the category with the most reported trafficking cases—over 300—was the H-2A program.³⁹⁶

Despite existing H-2A regulations that prohibit the collection of recruitment fees, examples abound of H-2A recruiters charging illegal recruitment fees year after year.³⁹⁷ At times, the collection of recruitment fees has been so egregious that it has resulted in criminal convictions.³⁹⁸

³⁹⁵ See 8 C.F.R. § 214.2(h)(6)(i)(B); see also 9 FAM 402.10-10(C), *Prohibited Fees* (June 3, 2019), <https://fam.state.gov/FAM/09FAM/09FAM040210.html>.

³⁹⁶ Polaris, *Human Trafficking on Temporary Work Visas, A Data Analysis 2015–2017*, at 7 (Apr. 2018), <https://polarisproject.org/sites/default/files/Human%20Trafficking%20on%20Temporary%20Work%20Visas%20A%20Data%20Analysis%202015-2017.pdf>.

³⁹⁷ See, e.g., *Ulloa v. Fancy Farms, Inc.*, 762 F. App'x 859 (11th Cir. 2019); *Ojeda-Sanchez v. Bland Farms, LLC*, No. 608-CV-096, 2010 WL 3282984 (S.D. Ga. Aug. 18, 2010); *Morales-Arcadio v. Shannon Produce Farms, Inc.*, No. 605-CV-062, 2007 WL 2106188 (S.D. Ga. July 18, 2007); *Avila-Gonzalez v. Barajas*, No. 2:04-CV-567, 2006 WL 643297 (M.D. Fla. Mar. 2, 2006); *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002).

³⁹⁸ See, e.g., *United States v. Bart*, 888 F.3d 374 (8th Cir. 2018) (upholding the conviction of an H-2A labor recruiter for conspiracy to commit visa fraud, conspiracy to commit fraud in foreign labor contracting, and conspiracy to commit mail and wire fraud).

Two recently decided H-2A cases vividly demonstrate the coercive effect of recruitment fees. In *Arreguin v. Sanchez*, an H-2A recruiter charged migrant workers “substantial recruitment fees knowing that they would have to keep working for him to try to pay off the loans.”³⁹⁹ Upon arrival to the United States, these H-2A workers experienced “deplorable housing, little food, and cold temperatures.”⁴⁰⁰ If they complained, the H-2A recruiter threatened to deport them and prevent them from ever participating in the H-2A visa program again.⁴⁰¹ “In these circumstances, where Plaintiffs as foreign immigrants were in an unknown location with significant debts incurred as a result of Defendant's pre-employment fees, Defendant's threats of deportation or losing H-2A privileges were used to coerce Plaintiffs into continuing to work for him, despite their terrible working and living conditions. In other words, Plaintiffs were at Defendants' mercy and had no choice but to continue to work for him without pay or risk being deported as Defendant threatened.”⁴⁰²

In *U.S. Equal Employment Opportunities Commission v. Global Horizons, Inc.*, H-2A recruiters charged a group of Thai workers between \$9,500 and \$26,500 in recruitment fees.⁴⁰³ After incurring large debts to pay the recruitment fees, these H-2A workers endured egregious discrimination and abuse.⁴⁰⁴ For example, Thai workers were paid less than other workers and experienced paycheck deductions, paycheck delays, and minimum wage violations.⁴⁰⁵ They were subjected to unsafe transportation and unsanitary and overcrowded housing and lacked access to food and bathrooms.⁴⁰⁶ Additionally, their passports were confiscated, they were threatened with a gun, and were constantly surveilled.⁴⁰⁷ Despite such working conditions, these H-2A workers were financially compelled to continue working in a bid to recoup their losses.⁴⁰⁸

In three recently settled cases, the allegations tell a similar story of the coercive effect of recruitment fees. In *Alonso-Miranda v. Garcia-Pineda*, the exorbitant recruitment fees that H-2A labor contractors charged a group of Mexican workers were the first step in an alleged pattern of systemic rights violations.⁴⁰⁹ When this group of Mexican H-2A workers arrived in the United States, their employers allegedly stole their wages and failed to reimburse their visa and travel-related expenses; provided unsafe and unsanitary housing; deprived them of workers' compensation coverage; impeded their access to medical care; retained their Social Security cards; and publicly threatened workers with violence for attempting to assert their rights.⁴¹⁰ Yet because their pre-employment debt exacerbated their existing vulnerability as temporary foreign workers, these H-2A workers had no choice but to continue working in unsafe and exploitative conditions.⁴¹¹

³⁹⁹ No. 2:18-cv-133, 2019 WL 3502536, at *6 (S.D. Ga. July 31, 2019).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ 915 F.3d 631 (9th Cir. 2019); *EEOC v. Global Horizons*, No. CV-11-3045-EFS, 2014 WL 11429300 (E.D. Wash. Mar. 27, 2014).

⁴⁰⁴ *Global Horizons*, 2014 WL 11429300, at *4–5.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ No: 5:17-cv-00369-BR (E.D.N.C. June 5, 2019).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

In *Cruz-Cruz v. McKenzie Farms*, H-2A workers were allegedly charged illegal recruitment fees not only in Mexico, but again in the US.⁴¹² Namely, when they arrived in the US, they were allegedly told they owed additional fees to stay for the season and must pay still more to have the chance to return the following year.⁴¹³ Due to this ballooning debt burden, these H-2A workers were compelled to endure numerous violations of their rights: wage theft; illegal deductions; unsanitary housing.⁴¹⁴ Moreover, these H-2A workers were allegedly urged to lie to US government officials about their recruitment; were directed to lie to US Department of Labor investigators about their working conditions; and were threatened with jail time, deportation, and blacklisting if they failed to cooperate or repay their alleged debts.⁴¹⁵ Despite these escalating indicators of trafficking, these workers continued working in the hopes they could recoup their debts.⁴¹⁶

Finally, in *Gutierrez-Morales v. Planck*, H-2A workers were allegedly required to pay illegal recruitment fees to obtain visas.⁴¹⁷ Like other cases, these recruitment fees were the first of many alleged violations, including wage theft, illegal deductions, and unsanitary and inhumane living conditions.⁴¹⁸ Additionally, H-2A workers were allegedly forced to surrender their passports to ensure that they would not quit.⁴¹⁹ Despite these mounting labor abuses, workers continued their employment due to intensifying financial pressures.⁴²⁰

As these examples demonstrate, recruitment fees are common in the H-2A guestworker program and impact every aspect of the workers' experience. These recruitment abuses harm not only guestworkers, but U.S. workers as well. In these circumstances, U.S. workers are often viewed as insufficiently compliant and as a result suffer discrimination from employers who prefer the more desperate-to-please foreign workforce. Failure to prevent and punish recruitment abuses will not only harm workers, but will also disadvantage recruiters and employers that pay the cost of treating workers with respect and face unfair competition.⁴²¹ Further, such abuse damages the integrity of the H-2A visa program.

Increased enforcement of the ban on recruitment fees is greatly needed. DOL must use this rulemaking opportunity to increase transparency in the recruitment process and to send a clear message to employers that such fees are prohibited and that employers have a responsibility to ensure their H-2A workforce is not being charged prohibited fees.

The proposed regulations would continue the requirement that an employer enter into a contract with a foreign labor contractor forbidding payments from prospective employees. The

⁴¹² No. 5:15-cv-00157-DCR (C.D. Ky. Sept. 5, 2017).

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ No. 5:15-cv-00158-JMH (C.D. Ky. Jan. 23, 2017).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ See Farmworker Justice and United Farm Workers of America, Comment Letter on Notice Regarding Immigration Policy 4 (Jan. 29, 2015), <https://www.regulations.gov/document?D=USCIS-2014-0014-1299>.

addition of the language to be included is welcomed, as is the use of the word “must.” However, as discussed above, this requirement has proven ineffectual in the actual prevention of prohibited recruitment fees.

In order to truly address recruitment abuse, we recommend that the following changes be undertaken:⁴²²

1) Create a publicly searchable database that includes recruiters.

Improve transparency within international labor recruitment and prevent recruitment fraud by making employer applications for internationally recruited workers publicly available online permanently and searchable. The searchable database should include information about employers and employers’ agents (including both principal recruiters and their agents). The database should include the countries where recruitment is taking place and the numbers of workers authorized. This database would create transparency in the recruitment process and help employers and workers verify legitimate recruiters and job opportunities.

2) Transparency regarding recruitment.

Issue guidance requiring consulates to require employers to provide a description of the services for which the foreign labor contractor and chain of subcontractors are being used, whether the foreign labor contractor(s) are to receive any economic compensation for the services, and, if so, the amount being paid for the services and the identity of the person or entity who is paying for the services.

3) Improve Enforcement.

Improve human trafficking prevention mechanisms by leading the vigorous enforcement of labor laws to remedy labor trafficking abuses. Specifically, provide training to trafficking survivors for labor law oversight jobs, recognizing that previous exploitation may provide a unique insight. Develop a curriculum for DOL personnel that emphasizes that workers from outside the United States can also be exploited and/or trafficked and that U.S. citizens can be trafficked for labor as well as sex. U.S. Government agencies should share information on abusive recruiters. The U.S. government should also encourage the Mexican government to take enforcement actions against recruiters who charge illegal fees and otherwise defraud workers. Enforcement actions should encourage better recruitment practices.

4) Address economic coercion.

Mitigate the causes of economic coercion by promulgating regulations requiring that all costs be borne by the employer, unless otherwise expressly authorized by statute. Correct the disincentive for workers to report recruitment fees by including specific whistleblower protections.

⁴²² See Int’l Labor Recruitment Working Grp., *Preventing Human Trafficking and Recruitment Abuse of Internationally Recruited Workers, Comprehensive Recommendations for Agencies* (2016), Exhibit J-1.

5) Protect workers from discrimination and retaliation.

Prohibit discrimination and retaliation by protecting workers who denounce or seek to denounce abusive or illegal employment or recruitment practices. H-2A workers should not fear reprisals from employers or labor contractors for reporting abuse. Provide whistleblower and immigration protections for workers seeking re-recruitment. Inform employers and workers about anti-retaliation provisions and the consequences of any violations. The DOL should prioritize complaints that allege retaliation.

6) Debar noncompliant companies and support workers who disclose violations.

DOL should improve enforcement mechanisms and ensuring access to justice by debarring noncompliant companies. Increase enforcement of illegal recruitment practices, both while workers are in the U.S. and after they have returned to their countries of origin. Assist workers when their employment does not meet minimum standards or they are recruited in a noncompliant manner, to find suitable substitute employment or secure the worker's return home, at the worker's option. Moreover, DOL should seek restitution for payment of recruitment fees.

7) Support DOL investigations and enforcement actions for international workers.

Enable regional and local offices of the Wage and Hour Division to make international calls in furtherance of investigations. When recruitment fees or back pay are recouped for international workers, DOL needs a practical mechanism for workers to collect. The current practice of mailing U.S. checks to foreign workers is ineffectual. In many countries, cashing these checks is virtually impossible (Mexico is an example where DOL's current practice does not work.) Support workers' requests for deferred action (including employment authorization) from DHS when workers seek to enforce labor or civil rights protections. The DOL should create an expedited investigation process for workers on temporary work visas to ensure that all witness testimony and evidence is preserved given the short-term nature of the visas.

8) Ensure protections for workers who are victims of crime or trafficking.

Ensure U and T visa training is mandatory for all federal Wage and Hour inspectors, and make efforts to train state-level inspectors in every state. Increase certification of U and T visa for the underlying crime of fraud in foreign labor contracting. Clarify situations where the recruiter may be considered an employer, for example, when the employer performs foreign labor contracting activity wholly outside of the United States, and clarify the definition of foreign labor contracting for these purposes. Ensure enforcement of violations when they occur in the country of origin and consider cooperating with governments in countries of origin to encourage additional legal action.

The proposed regulations must do more to protect H-2A workers. The preceding recommendations are needed to protect internationally recruited workers from the abuse and exploitation, including human trafficking, common in the program. The protections will also

improve protections for U.S. workers by ensuring that unscrupulous employers do not discriminate against U.S. workers in favor of vulnerable H-2A workers.

XIII. Conclusion

The DOL and other government agencies are regulated in their operation of the H-2A program by important statutory requirements that many of these proposed regulations would either weaken or contravene. DOL's proposed regulations would create policies and procedures that will likely exacerbate many of the violations that currently exist in the program. Instead of addressing the current lack of enforcement of program violations, the DOL seeks to eliminate, weaken or reduce many program protections. An objective review of the historical and legal record reveals that the proposed changes are arbitrary and capricious. If the proposed rule is adopted as drafted, many workers will suffer increased debt, lower wages, worse housing conditions, and more uncertainty regarding job terms. Additionally, even though the proposal states that one of its main objectives is to protect U.S. workers, it does exactly the opposite by reducing U.S. workers' recruitment protections and failing to address H-2A employers' history of discrimination against U.S. workers in violation of the statute. A few changes offer modest improvements to the H-2A program but do not adequately address the serious problems identified by DOL. Overall, the proposed changes to the regulations would be harmful to many agricultural workers.

Sincerely,

Alianza Nacional de Campesinas, Inc.
California Rural Legal Assistance, Inc.
Centro de los Derechos del Migrante, Inc.
Coalition of Immokalee Workers (CIW)
Colorado Legal Services
Columbia Legal Services (WA)
CRLA Foundation (CA)
Economic Policy Institute
Farm Labor Organizing Committee, AFL-CIO (FLOC)
Farmworker Justice
The Farmworker Association of Florida
Farmworker and Landscaper Advocacy Project
Farmworker Legal Services – Michigan
Florida Legal Services
Florida Rural Legal Services, Inc.
Justice at Work (Pennsylvania) - Formerly Friends of Farmworkers, Inc.
Justice in Motion
La Union del Pueblo Entero (LUPE)
Legal Aid of North Carolina – Farmworker Unit
Legal Aid Justice Center (VA)
Legal Aid Services of Oregon, Farmworker Program
MAFO, Inc.
Michigan Immigrant Rights Center

Michigan Migrant Legal Assistance Project Inc.
Migrant Legal Aid
Mixteco Indigena Community Organizing Project
New Mexico Legal Aid – Centro Legal Campesino
North Carolina Justice Center
Northwest Justice Project
Northwest Workers' Justice Project
Oregon Law Center
Organizacion en California de Lideres Campesinas, Inc.
Pennsylvania Farmworker Project of Philadelphia Legal Assistance
Pineros y Campesinos Unidos del Noroeste (PCUN)
Public Citizen
Rural Coalition
Southern Poverty Law Center
Texas RioGrande Legal Aid, Inc.
Towards Justice
UFW Foundation
United Farm Workers
United Migrant Opportunity Services (UMOS)

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