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Unaccounted for Costs and Burdens of the U.S. Department of Labor's (DOL) Proposed Rule, DOL Docket No. ETA-2023-003, "Improving Protections for Workers in Temporary Agricultural Employment in the United States"

Costs of Understanding the Rule and Required Contract Changes

Concern: DOL estimated that it would cost employers one hour to familiarize themselves with the new rule at the expense of $54.04. This is a gross underestimation. The proposed rule, when printed from the *U.S. Federal Register*, is 154 pages long. Universally, H-2A employers the Northwest Horticultural Council (NHC) consulted stated that they, or multiple human resources (HR) staff (depending on the size of the operation) would not only have to review the rule in detail, but they would also consult with legal counsel to ensure compliance with the new regulation. While it is difficult to project exact costs, below are estimates by several Pacific Northwest tree fruit growers who are users of the H-2A program.

In the case of one large grower, two senior managers spent 30 hours reviewing the proposed rule in order to advise NHC staff on proposed comments. Once a final rule is published, three members of their HR team – in addition to the same two senior level staff – will need to review the rule, go through scenarios, and make sure all necessary staff fully understand its provisions. This is estimated to be between 120 and 200 hours of staff time. Estimating the salary of the two senior managers at $85.93 per hour, based on the HR manager code within the Occupational Employment and Wage Statistics (OEWS) program, and the HR salary estimate used by DOL of $54.04 for the other three employees, the total cost would be between $8,015.52 and $13,359.20. Implementation would take an estimated additional 60-80 hours in training 12 area managers and their teams. Assuming a farm manager salary of $26.90 as indicated in the OEWS, this would cost an additional $1,614-to-$2,152. **Total Cost Estimate:** $9,629.52 - $15,511.20
A second large grower estimated a cost of $45,000 in internal staff time to understand the rule and how to implement it on their farm. Legal counsel would be retained in order to ensure the grower is in compliance, with the cost of hiring a local agricultural labor attorney reported at $375-$425 per hour. As this is a new regulation, the grower estimated it would take 200 hours for the attorney to review the rule and advise the grower – costing approximately $75,000 to $85,000. **Total Cost Estimate:** $130,000
A small grower noted that they would likely rely on a trade association to retain legal counsel at approximately $500 per hour, with it taking an estimated 8-10 hours for the attorney to create a summary of the required changes. The trade association's staff would then need to review the material from the attorney and turn it into a resource for the grower community, costing an estimated $5,400 (three staff spending 40 hours, at a wage rate of approximately $45/hour). These costs would all be passed on to grower-members of the association.

Individual growers would then need to read, interpret, and implement the rule – estimated at 20 hours, with an hourly wage estimate at $45 per hour – equating $900 total. **Total Cost Estimate:** $11,300
Another small grower estimated that it would take $5,000-$6,000 in manager time to understand the new rule, plus $3,000 in attorney fees. **Total Cost Estimate:** $8,000-$9,000
An H-2A agent estimated that it would take several members of their staff (including directors, mid-managers, and frontline staff) approximately 200 hours to review the rule and develop resources for growers – spending a minimum of $10,000 in staff time. This cost would be passed on to the agent's members. Legal expertise will be sought, at the approximate additional cost of $16,000. **Total Cost Estimate:** $26,000

Discontinuation of Employment Services

Concern: DOL did not account for the considerable costs that discontinuing employment services would pose to growers if imposed while the grower is applying for – or during the first half – of an H-2A contract. This proposal will cause a significant financial impact on growers, considering the minor nature of some labor law violations (i.e., a missing screen door or eggs left on the counter at farmworker housing, following Internal Revenue Service guidance regarding the use of Employment Identification Numbers, etc.) triggering penalties, and the fact that these penalties are proposed to be imposed on growers even in cases where they themselves are guilty of no violations. It is clear that this provision drastically increases growers' uncertainty by threatening access to timely workers, would impose costs that far exceed the benefits (in some cases driving the grower out of business), and is not appropriately tailored to achieve the agency's requirement to provide alternatives proposals to ensure that the least amount of burden is placed upon stakeholders. The following input provided by Pacific Northwest tree fruit industry assumes that a discontinuation of services lasts for 20 days while a grower is applying for the H-2A program. This is a best-case scenario, as it assumes the discontinuation occurs during the application process instead of when workers are already in-country and is the ***minimum*** amount of time that it would take to get services reinstated.

A large grower noted that a delay in workers arriving for pruning would require their workforce to complete the same amount of work in a condensed timeframe. Washington state's overtime law requires agricultural workers to be paid 1.5 times the hourly wage for any hours worked over 40 hours – increasing costs substantially when workers need to unexpectedly work more hours. **Total Cost Estimate:** Difficult to quantify, but includes a 50 percent increase to wage costs for hours worked over 40 hours per week for growers in Washington and Oregon – which would be significant
Another large grower noted that a 20-day delay in worker arrival for thinning could impact fruit size at harvest time. Smaller fruit receives a lower price in the marketplace. For example, a grade A conventional Honeycrisp may receive a price of $32.18 per (40-pound) box, while a grade B conventional Honeycrisp would receive roughly $27.76 per box. Depending on the

size of the grower’s operations, this could cost thousands, tens of thousands, or hundreds of thousands of dollars.

The cost of a 20-day delay in arrival of workers for thinning does not stop there. Too heavy of a blossom load while a tree is also trying to grow leaves and shoot extensions (which are needed for the following year’s bud development) will stress the tree and cause a smaller crop the following year. This could cost hundreds of thousands, or even millions, of dollars depending on the size of the block and the severity of the lower production levels in the following year.

A 20-day delay in arrival of workers for cherry harvest could lead to a portion of the crop being deemed unharvestable –a total loss. Once the fruit has begun to ripen, it must be harvested in a timely manner in order to maintain fruit quality. That window can be as short as 2-3 days, depending on the weather. For this large company, this would cost millions of dollars in lost revenue. If peak harvest is reached early in the season and workers have not arrived, the loss would be multi-millions and threaten the ability to adequately supply retail customers, potentially losing business that will be difficult and costly to get back in future years.
Total Cost Estimate: Thousands to millions of dollars, depending on size of operation and activity to be performed on arrival

A small grower who only uses H-2A workers to harvest pears notes that the total harvest window is 23-to-27 days. Therefore, a 20-day delay to arrival would make the grower miss their deadline for delivering the fruit to the packinghouse – resulting in a rejection of roughly two-thirds of the crop. Based on the last crop year’s revenue, this would equate to roughly $1.65 million.
Total Cost Estimate: $1.65 million – two-thirds of grower revenue

Another small grower has experienced a 20-day delay to worker arrival. This increased their fixed costs of the contract by 25 cents per hour, or $250 per worker, for the season. He estimates that delays to pruning cost about $75 per worker per day.

If a worker were to arrive late for harvest, it negatively impacts the grower’s ability to harvest their fruit when fruit maturity is optimal. This grower estimates that shifting harvest back 10-15 days could cost growers $15,000-$20,000 per acre for Honeycrisp apples, $10,000-$15,000 per acre for cherries, and $3,000-$8,000 per acre for pears.

Total Cost Estimate: Thousands, tens of thousands, or millions of dollars, depending on size of the operation and timing of activities to be performed on arrival

It must be emphasized that the proposed rule was written in a manner that extends penalties to growers if an agent – or another grower that agent is working with – is faced with a discontinuation of services. In the case of an agent in the Pacific Northwest, approximately 200 growers would have their access to timely arrival of H-2A workers jeopardized.
Total Cost Estimate: Multiply all of the costs noted earlier in this section by the number of growers served by an agent. For the purposes of this real-world example, multiply those costs by 200.

Requirement to Offer, Advertise, and Pay the Highest Applicable Wage Rate:

Concern: If implemented as proposed, this provision would restrict the ability of growers to protect the safety of their workers, result in mandated operational changes that will reduce revenue, and would require either hiring many more employees or investing in expensive software solutions that may not exist yet to track worker productivity on an hourly basis. DOL failed to consider any of these substantial costs or identify any quantifiable benefits from adopting this proposal.

The purpose of paying a worker a piece rate wage is to incentivize the worker to conduct an activity (like harvesting an apple) more efficiently. This provides value to both the grower and the worker. There are times when growers need workers to take more care with an activity, due to safety or operational concerns. For example, if it is raining or an abnormally hot day, growers will want to remove the incentive for workers to work quickly to protect them from ladder accidents or heat illness. Additionally, there are operational factors that require the ability to be flexible to set method of payment. For example, if a worker is picking a particularly sensitive variety – such as a Rainier cherry or a Honeycrisp apple – growers will want the worker to take particular care with the fruit to prevent bruising. Bruising requires fruit be sold as a cull instead of a higher grade. This will result in pennies on the dollar grower returns – far below the cost of production.

In short, the costs of this proposed provision are significant while DOL failed to quantify any benefit. Its impact will be incredibly broad and burdensome.

If a worker is injured or must miss work as a result of sickness, that will result in lost wages (at least $19.25 per hour for however many hours that worker must miss). It will also cost the grower in lost productivity of the worker (while still paying all benefits required by the H-2A program) and may result in a fine from state labor agency or increase in workers compensation premiums as a result of such injury/illness. **Total Cost Estimate:** Difficult to quantify, but includes lost salary for worker, lost worker productivity for grower, and possible fine from state regulatory agency for grower
If a grower faces a scenario – like an anticipated freeze that will end apple harvest early – the grower is no longer able to pay a premium to incentivize workers to get fruit off as quickly as possible. This reduces potential income for farm workers. **Total Cost Estimate:** Situation-specific, and therefore difficult to quantify
Multiple growers reported that this year, a difference between the highest two grades of Honeycrisp and a Honeycrisp that would be sold as a cull (i.e., the processing market, like juice) is roughly 97 percent. This is a difference between $27-$32 as compared to 80 cents per a 40-pound box, or – said another way – 75 cents as compared to 3 cents per pound. **Total Cost Estimate:** 97 percent of the grower's revenue for bruised apples – costing growers thousands, tens of thousands, or millions of dollars based on size of operation and number of apples affected.
DOL makes the false assumption that processes are already in place to track a worker's productivity on an hourly basis. Growers currently evaluate productivity of workers for the purposes of paying piece rate (or hourly plus bonus) wages on a daily, weekly, or bi-weekly

basis (depending on pay period and payroll system capabilities) in order to comply with existing regulatory requirements.

With one potential exception that is used by a single grower and is prohibitively expensive for most, the NHC and our industry advisors are aware of no software options that are capable of tracking a worker's productivity on an hourly basis as required by the proposed rule. Until such software could be developed, all growers would be required to hire additional staff to visually track and record individual workers' productivity. There would need to be at least one additional staff person in each orchard row. Each person must receive at least the H-2A wage (2024 AEWR is $19.25 per hour for Washington and Oregon), plus benefits.
Total Cost Estimate:
An additional $770 per week in wages for each employee plus additional benefits, resulting in tens of thousands to hundreds of thousands in additional costs over the term of the worker's contract.

Current tracking and payroll software estimates from growers:

- Fixed cost investments of $5,000 plus $24-$27 per worker per month, and $850 per year in annual maintenance
- $200,000 in upfront costs, plus $20,000 per month for continued hosting

A software system sophisticated enough to do what DOL is asking will be more than existing software options outlined above. A large grower estimated that, should a software system be developed, with an estimated $100,000-$200,000 in initial costs, plus ongoing subscriptions of $30-$40 per worker, per month. Additional changes would need to be made to existing payroll systems, which are estimated at $10,000-$20,000.
Total estimated costs would be $110,000-$220,000 in initial investment, plus $30-$40 per employee, per month.

Single Employer Test

Concern: DOL's proposed regulatory approach will result in unnecessary and unavoidable Notices of Deficiency (NOD), which will impose additional costs on growers to respond to, and lead to costly delays in worker arrivals.

DOL is proposing a momentous change from the long-standing codified practice in determining if two employers are distinct for purposes of the H-2A program. The NHC concurs that growers should not be permitted to establish a certain corporate structure for the purposes of avoiding certain H-2A program requirements, such as seasonal employment needs and corresponding employment provisions. However, the factors that DOL proposes are unnecessarily vague and open-ended and will result in intrusive inquiries into private business operations outside of the agency's authority. Complex ownership structures are prevalent within the agricultural industry because of farms' often multi-generational family ownership, as well as due to legitimate business considerations such as risk management. In addition, just because two people are related, does not mean that their farms' operations are interrelated in terms of setting and enforcing employment terms and conditions.

We are concerned that many growers will face unnecessary and costly NODs in spite of doing everything right – namely providing all required information to federal agencies in applying for the H-2A program and complying with the seasonal need and corresponding employment requirements. This will create more uncertainty for growers, creating additional costs and unjustified burdens without a quantifiable benefit.

In terms of the process itself, when a grower receives a NOD, a grower must obtain legal counsel to assist with an appeal. In the tree fruit production area of the Pacific Northwest, estimated hourly rates of attorneys working in agricultural employment law range from \$375 per hour to \$500 per hour. A large grower with experience fighting NODs provided a range of \$5,000 to \$100,000 in costs, depending on the complexities involved. It should be noted that, with the single employer test being a new provision, it will likely take attorneys longer initially to assess the new provision and determine how best to respond to DOL – resulting in a higher cost to the grower. **Total Cost Estimate:** Varies, at least \$5,000 per NOD
NODs delay the H-2A application process and risk costly delayed worker arrival. Examples of these costs are detailed above under "Discontinuation of Employment Services." **Total Cost Estimate:** Thousands to millions of dollars, depending on size of operation and activity the worker is scheduled to do upon arrival

<u>Disclosure of Information on Owners, Operators, and Managers to DOL</u>

<u>Concern:</u> DOL fails to consider the high burdens and liabilities this proposal would place on H-2A users and fails to justify why this provision is necessary. With no quantifiable benefit, this proposed provision would create uncertainty, impose additional costs, and represents a broad-based approach to a problem better suited to a more tailored approach (i.e., asking for the contact information for a manager or owner if needed as a part of an investigation or for enforcement purposes).

Several growers indicated that they would need to consult with an attorney regarding requirements in order to protect employees' privacy, assess whether consent would be needed to share this information, etc. One small grower with ten domestic employees, and the addition of 32 H-2A employees during harvest, indicated that they would need to hold a staff meeting to inform their employees. That alone would cost all workers' hourly wages for one hour. This grower estimated that then it would take an additional three hours of their time to collect the data. Her total estimate of implementation was \$4,635. A second small grower estimated the cost at \$2,500. A large grower indicated that the cost of maintaining this information across all of their farming operations could reach six figures. **Total Cost Estimate:** \$2,500 – more than \$100,000

Universally, growers expressed concerns that they expect some managers to be uncomfortable with the disclosure of this data and may leave their positions. It was noted that this would be especially problematic, considering that growers are finding it increasingly difficult to fill these positions considering domestic labor shortages. One grower raised the concern that some employees in agriculture may be undocumented or have undocumented family members and be especially concerned if immigration enforcement is a particular focus of an Administration.
Total Cost Estimate: The loss of farm managers and supervisors is difficult to quantify, but has direct financial impacts on farm productivity and labor costs

Disclosure of Information on All Employees to Labor Organizations

Concern: DOL fails to consider the high burdens and liabilities this proposal would place on H-2A users and fails to justify why this provision is necessary. Like the owner/operator/manager recordkeeping provision, this proposed provision has no quantifiable benefit while creating uncertainty and imposing additional costs.

The burden of maintaining an accurate list of all employees at all times was not accounted for in the proposed regulation. In operations of all sizes, domestic workers come and go throughout the year. A large operator growing several diverse types of crops over multiple growing regions estimated the cost of developing and maintaining this list throughout the year at roughly $109,000-$136,000 per year. A second large grower said that the data collection would be difficult to quantify based on existing information, but that they would need to rely on their H-2A agent to assist, which could increase agency fees.

A small grower indicated that he would need to consult an attorney regarding privacy concerns, at an estimated cost of $2,000-$3,000, with the added maintenance of information estimated at $2,500 annually. Another small grower provided an hourly estimate of ten hours to collect the information and three hours to compile it into a shareable form.
Total Cost Estimate: $2,000-$136,000

Several growers expressed concern that employees may be uncomfortable with the sharing of this information, and unless this becomes standard industry practice, some domestic employees may choose to work for a non-H-2A employer to avoid unwanted contact from a labor organization at their home.
Total Cost Estimate: Difficult to quantify, but losses of employees to H-2A employers – who already have proven that they face worker shortages – is significant.