



State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

November 14, 2023

Via Electronic Submission (Regulations.gov)

The Honorable Julie A. Su
Acting Secretary, United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

RE: DOL Docket No. ETA-2023-0003 - Notice of Proposed Rulemaking, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*

Dear Acting Secretary Su and Director DeBisschop:

We write on behalf of the states of California, Colorado, Connecticut, Delaware, Illinois, Michigan, New Jersey, New York, Pennsylvania, Vermont, and Washington to support the proposed rulemaking by the U.S. Department of Labor (“the Department”) to implement regulatory changes to the H-2A guest worker program. *See Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 88 Fed. Reg. 63,750 (September 15, 2023) (“Proposed Rule”). The Department proposes several changes to current regulations that will strengthen and improve protections for H-2A workers as well as U.S. resident workers, and enhance the Department’s enforcement capabilities.

The experiences of the undersigned state Attorneys General (the “signatory States” or the “State AGs”) in enforcing labor laws and protecting agricultural workers make clear that adopting the Proposed Rule would much improve a program that is rife with worker exploitation and labor violations. The Proposed Rule seeks to address

several issues of concern associated with the program, including pervasive employer noncompliance, a lack of transparency in the recruitment chain and regarding H-2A employers, and insufficient protections for H-2A workers. The State AGs believe that, if finalized, the Proposed Rule would implement changes that make meaningful progress in combating these issues, thereby strengthening the integrity of the program and better protecting marginalized workers.

For the reasons set forth below, the signatory States strongly support the adoption of the Proposed Rule. We also highlight specific areas of interest and offer recommendations to further strengthen and clarify the Proposed Rule.

I. The State AGs Are Interested Parties with Expertise in Labor and Employment Issues.

The State AGs enforce laws that protect workers' economic security, health, and welfare. This includes protection of farmworkers in the agricultural industry who make up a significant part of the States' workforces and economies. For example, California, the country's largest producer of agricultural products,¹ accounts for one-third of U.S. farmworker employment.² Washington is the country's largest producer of apples, blueberries, hops, pears, and sweet cherries,³ and accounts for ten percent of U.S. farmworker employment.⁴ In addition, the signatory states represent some of the top recipients of H-2A farmworkers.⁵ Use of the program across the country and in the States has grown rapidly, and is likely to continue to grow.⁶

¹ USDA, Agricultural Production and Prices, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/agricultural-production-and-prices/> (last updated Feb. 22, 2023) (see graphic entitled, "U.S. agricultural production occurs in each of the 50 States").

² Philip Martin, *A Look at H-2A Growth and Reform in 2021 and 2022*, Wilson Center (Jan. 3, 2022), <https://www.wilsoncenter.org/article/look-h-2a-growth-and-reform-2021-and-2022>.

³ Washington State Dept. of Agriculture, *Agriculture: A Cornerstone of Washington's Economy*, <https://agr.wa.gov/washington-agriculture> (last visited Nov. 9, 2023).

⁴ Martin, *supra* note 2.

⁵ According to the latest data for 2023, California is currently the second largest user of the H-2A program, Washington is third, and Michigan is eighth. See Philip Martin, *H-2A Program Expands in 2023*, Wilson Center (Aug. 25, 2023); see also H-2A Temporary Agricultural Program – Selected Statistics, Fiscal Year (FY) 2022, U.S. Dep't of Labor (Sept. 30, 2022), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2022_Q4.pdf (New York was the tenth largest user of the program in 2022).

⁶ Daniel Costa, *Second-Class Workers: Assessing H-2 Visa Programs' Impact On Workers*, Economic Policy Institute (July 20, 2022), <https://www.epi.org/publication/second-class-workers-assessing-h2-visa-programs-impact-on-workers/> (report found that while temporary work visa programs expanded during the Trump administration, the growth of the programs represented a continuing long-term trend).

The State AGs therefore have a vested interest in enforcing rules protecting all farmworkers, including both participants in the H-2A program and U.S. resident agricultural workers. This interest is heightened due to the labor violations that are rampant in the agricultural industry.⁷ These violations raise additional concerns for the State AGs as an issue of racial justice that disproportionately burdens immigrants and people of color: as of 2020, approximately three-quarters of U.S. farmworkers were born outside the United States, mainly in Mexico,⁸ and 93 percent of all H-2A workers are from Mexico.⁹

Monitoring and enforcing the requirements of the H-2A program is challenging due to the complex delegation of authority and overlapping jurisdiction between multiple federal and state agencies. At the federal level, the Department processes job orders for the H-2A program and enforces employment contracts and the federal laws meant to protect guest workers. At the same time, various state agencies may also enforce H-2A rules and other state regulations affecting H-2A workers, including, for example, the state workforce agencies that inspect and certify H-2A worker housing.¹⁰ The involvement of

⁷ See Daniel Costa, Philip Martin, & Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture*, Economic Policy Institute (December 15, 2020), <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/> (finding that the agricultural industry accounts for a much higher share of investigations and violations than its share of total U.S. employment).

⁸ *Id.*

⁹ Martin, *supra* note 2.

¹⁰ For example, in California, the California Division of Occupational Safety and Health (Cal/OSHA) enforces workplace safety rules, while inspections of employer-provided H-2A housing are either performed by California's Employment Development Department (EDD) or the Department of Housing and Community Development (HCD). In addition, the California Agricultural Labor Relations Board (ALRB) investigates possible abuses such as retaliation for labor organizing in the agricultural industry. Finally, the California Department of Justice investigates and prosecutes employers who violate minimum labor standards or otherwise subject workers to unlawful working conditions. Similarly, in New York, the state Department of Health (NYSDOH) inspects and issues permits of employer-provided housing, while the Public Employees Relations Board (PERB) investigates unfair labor practices. The state Department of Labor Division of Labor Standards (NYSDOL) enforces labor protections for farmworkers, such as overtime pay, required written work agreements, and rest time. In New Jersey, the New Jersey Department of Labor (NJDOL) has jurisdiction over some aspects of the working conditions of H-2A workers, including wage and hour enforcement, housing inspections, labor recruiter registration, but certain aspects of enforcement, including investigation housing violations, are referred to the Department. Finally, in Washington, the state workforce agency (Washington State Employment Security Department) and other agencies enforce a host of agricultural worker protections that apply to H-2A workers and provide other services such as community outreach and language access. Washington's Department of Labor & Industries Division of Occupational Health also conducts numerous investigations in the agricultural industry for compliance with safety & health laws.

numerous agencies in H-2A oversight has contributed to gaps in coordination, oversight, and enforcement. The State AGs welcome a proposed rule that will aid enforcement at all levels and increase H-2A program compliance.

II. The State AGs' Experiences Demonstrate that the Proposed Rule is Needed to Strengthen Essential Protections for Agricultural Workers.

As State AGs who enforce and defend workplace protections, we understand that farmworkers face unique threats to their economic security, health, and safety, and these systemic issues frequently subject them to exploitation.¹¹ Aspects of the H-2A program exacerbate this existing power imbalance between farmworkers and employers. As the Proposed Rule recognizes, strengthening protections for H-2A workers, enhancing the Department's enforcement capabilities, and promoting worker self-advocacy will help improve the integrity of the H-2A program and prevent some of the current abuses of the program, to the benefit of all agricultural workers.

The foundational structure of the H-2A program—which gives employers control of workers' visa status—exposes participating workers to myriad forms of potential abuse. In addition to depending on their employers for their visas, workers also must rely on their employers for access to wages, housing, and even future employment, among other benefits.¹² As a result, H-2A workers often live in isolated environments, and rarely speak out about workplace issues for fear of retaliation or termination by their employer.¹³ For this reason, and because farmworkers are excluded from the protections of the National Labor Relations Act and state law protections in most jurisdictions, most farmworkers are not members of labor unions.¹⁴ At the same time, effective monitoring and enforcement of the H-2A program by governmental agencies has been hampered due to resource challenges and difficulties coordinating across various federal and state

¹¹ See Costa, *supra* note 7 (report found that seven in 10 farms investigated by the Department were found to have committed labor violations); see also 88 Fed. Reg. at 63,753 fn. 8 (noting that “workers in agriculture, particularly H-2A workers, remain highly vulnerable to workplace abuses”).

¹² Centro de los Derechos del Migrante, *Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program* 4 (2020), <https://cdmigrante.org/ripe-for-reform> (hereinafter CDM Report).

¹³ Costa, *supra* note 6. For example, after complaining about unsafe working conditions, H-2A workers in Sonoma County, California, were not asked to return for the following season, even though their employer promised them future jobs. See Carlos Cabrera-Lomeli, *Blacklisted for Speaking Up: How California Farmworkers Fighting Abuses Are Vulnerable to Retaliation*, KQED (June 30, 2022), <https://www.kqed.org/news/11918317/blacklisted-for-speaking-up-how-california-farmworkers-fighting-abuses-are-vulnerable-to-retaliation>.

¹⁴ See Andrew Kreighbaum, *Worker 'Self-Advocacy' Key to Labor Department's H-2A Proposal*, BLOOMBERG LAW (Sept. 15, 2023), <https://news.bloomberglaw.com/daily-labor-report/worker-self-advocacy-key-to-labor-departments-h-2a-proposal>.

agencies.¹⁵ In general, a farm employer's probability of being investigated by the federal government is only 1.1%, meaning the labor violations uncovered thus far likely only represent the "tip of the iceberg" of the full universe of wrongdoing in the agricultural industry.¹⁶

Thus, with insufficient resources allocated to governmental oversight and minimal accountability to workers or labor advocates, H-2A employers can often act with near total impunity to flout program requirements, suppress wages, and violate a host of federal and state worker protections.¹⁷ In a recent nationwide survey of H-2A participants, the transnational migrant workers' rights organization Centro de los Derechos del Migrante (CDM) found that every worker interviewed experienced at least one serious legal violation, and the overwhelming majority of workers experienced multiple serious legal violations.¹⁸ Federal and state investigations and enforcement actions in the signatory States have also exposed the detrimental impact of H-2A program violations on farmworkers.¹⁹ These compliance issues and the resulting harm to workers

¹⁵ See H-2A Guest Worker Fact Sheet, National Center for Farmworker Health, <https://www.ncfh.org/h-2a-guest-workers-fact-sheet.html> (last updated Oct. 2020) ("Multiple governmental agencies are involved in enforcement of H-2A regulations and screening of H-2A employers, which has been documented to cause confusion among workers and lead to a lack of coordinated enforcement action between agencies.") (citing U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* 40 (Reissued May 30, 2017) (GAO-15-154), <https://www.gao.gov/products/GAO-15-154> (finding that federal agencies do not consistently share information with state agencies that also screen H-2A employers)).

¹⁶ See Costa, *supra* note 6.

¹⁷ See *id.*

¹⁸ CDM Report, *supra* note 12, at 18.

¹⁹ See, e.g., Press Release, U.S. Dep't of Labor, *US Department of Labor Recovers \$225k in Back Wages for Agricultural Workers in California, Assesses Five Farms \$54k in Penalties* (May 16, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220516> (The Department's investigations of farms in California between 2020 and 2022 found five employers failing to meet their responsibilities under the H-2A program); see also Press Release, California Agricultural Labor Relations Board, *Mauritson Farms, Inc. Agrees to Pay \$328,077 to Settle Unfair Labor Practice Complaint that Workers Hired Through the H-2A Visa Program Were Refused Rehire Because They Complained about Dirty Restrooms, Denial of Rest and Meal Breaks and Supervisor Mistreatment* (July 24, 2023), <https://www.alrb.ca.gov/project/july-24-2023-mauritson-farms-inc-agrees-to-pay-328077-to-settle-unfair-labor-practice-complaint-that-workers-hired-through-the-h-2a-visa-program-were-refused-rehire-because-they-complained-about/> (ALRB filed complaint against employer that refused to rehire H-2A workers who complained about working conditions); Press Release, Washington State Dept. of Labor & Industries, *Yakima orchard owners pay half-million dollars in back wages, settling lawsuit* (July 12, 2023), <https://lni.wa.gov/news-events/article/23-016> (The Washington State Department of Labor & Industries and Attorney General's Office investigated two orchards and found the employers failed to meet their wage obligations under the H-2A program along with other violations); *In the Matter of Confidential Consumer Protection Investigation, King Fuji Ranch, Inc., et al. v. Washington State Office of the Attorney General*, 512 P.3d 904, 907, 910 (Wash. Ct.

are not limited to a certain set of bad actors, but are rather “systemic and structural” aspects of the H-2A program.²⁰

In addition to the labor and employment violations H-2A workers confront, they also face significant health and safety risks. The agricultural industry is one of the most hazardous industries in the United States.²¹ The dangers of agricultural work have increased, and will continue to do so, due to the effects of climate change, such as extreme heat, which has an outsized impact on farmworkers.²² Farmworkers also regularly face pesticide exposure which can lead to chronic health problems such as cancer and respiratory conditions.²³ Even more concerning, workers trapped in abusive or coercive environments are less likely to take rests or complain about lack of adequate environmental protections, which enables dangerous health and safety violations to persist.²⁴

The prevalence and persistence of substandard conditions in H-2A employer-provided housing are a clear example of this phenomenon and its harmful effects in the H-2A context. Employer-provided H-2A housing is often overcrowded and lacks fans or air-conditioning, putting workers at additional risk outside the working environment.²⁵ It

App. 2021) (affirming order enforcing a civil investigative demand issued by the Washington Attorney General’s Office to an H-2A employer under Washington’s Consumer Protection Act in an investigation concerning misrepresentations to U.S. farmworkers regarding agricultural job opportunities that “have the potential to harm Washington farmworkers and the state labor market”); Press Release, U.S. Dep’t of Labor, *Department Of Labor Recovers \$37k in Back Wages Owed to 86 Workers Employed In Western New York by 3 Agricultural Companies* (July 15, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230615> (Department investigation found employer of H-2A workers on New York fruit farm violated H-2A program requirements and state worker protections, resulting in loss of wages and overtime pay).

²⁰ See Costa, *supra* note 6.

²¹ National Institute for Occupational Safety and Health, Agricultural Safety (Mar. 3, 2023), <https://www.cdc.gov/niosh/topics/aginjury/default.html>.

²² Farmworkers die of heat-related causes at 20 times the rate of the rest of the U.S. civilian workforce. See Union of Concerned Scis., *Farmworkers at Risk*, 4 (2019), <https://www.ucsusa.org/sites/default/files/2019-12/farmworkers-at-risk-report-2019-web.pdf> (citing Heat-Related Deaths Among Crop Workers—United States, 1992–2006, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (last updated June 19, 2008)).

²³ See Farmworker Justice, *Exposed and Ignored: How Pesticides Are Endangering Our Nation’s Farmworkers* (2013), <https://www.farmworkerjustice.org/wp-content/uploads/2013/07/Exposed-and-Ignored-by-Farmworker-Justice-email-version.pdf>.

²⁴ Liza Gross, *For Farmworkers, Heat Too Often Means Needless Death*, INSIDE CLIMATE NEWS (July 9, 2021), <https://insideclimatenews.org/news/09072021/for-farmworkers-heat-too-often-means-needless-death/>.

²⁵ See Union of Concerned Scis., *Farmworkers at Risk*, *supra* note 22, at 5; see also 29 C.F.R. §§ 654.404 & 1910.142 (federal housing standards that do not require cooling mechanisms). By way of example, the aforementioned H-2A workers in California who were

is typically located in isolated areas, and employers set the rules for when workers and their guests can come and go, making it difficult for workers to access health services, as well as connect with other service providers to address health and safety issues.²⁶ Despite these conditions, workers do not speak out because, with very few other options for housing and inadequate labor protections, they are at risk of not only termination but also homelessness.²⁷ Simultaneously, the federal and state agencies tasked with inspecting H-2A housing are under-resourced, meaning uneven government inspections also allow violations to go unchecked.²⁸

The experience of H-2A workers in the COVID-19 pandemic further demonstrates the potential ripple effects of the substandard health and safety conditions these workers endure. Incidence of the disease and death, for which farmworkers generally faced greater risk,²⁹ was reported as even worse for H-2A workers because they share housing and transportation with other workers and face additional barriers to accessing healthcare, such as lack of personal transportation, language barriers, and limited knowledge of the U.S. healthcare system.³⁰

The use of foreign recruiters and the increasing prevalence of farm labor contractors (FLCs) in the H-2A program have also contributed to worker exploitation while posing additional enforcement challenges. The lack of oversight of recruiters has allowed them to charge workers illegal fees, saddling them with debt even before they arrive in the U.S.³¹ Recruitment fees can cost upwards of \$2,000, which amounts to what some Mexican workers make in a year, and recruiters threaten to “blacklist” workers who

fired after complaining to their employer were speaking out about inadequate heat protections. See Cabrera-Lomelí, *supra* note 13.

²⁶ CDM Report, *supra* note 12, at 27.

²⁷ See Tyche Hendricks, ‘We Have a Moment Here’: An Urgent Push for Farmworker Housing in Wake of Half Moon Bay Tragedy, KQED (Feb. 24, 2023), <https://www.kqed.org/news/11941716/we-have-a-moment-here-an-urgent-push-for-farmworker-housing-in-wake-of-half-moon-bay-tragedy> (discussing how Mandarin-speaking farmworkers in California endured deplorable conditions in employer-provided housing because they were afraid to risk their housing).

²⁸ *Id.* In particular, funding for state agencies to conduct housing inspections has not kept up with the exponential growth of the H-2A program. See Suzy Khimm & Daniella Silva, *Lured to America—then Trapped*, NBC NEWS (July 29, 2020), <https://www.nbcnews.com/specials/h2a-visa-program-for-farmworkers-surg-ing-under-trump-and-labor-violations>.

²⁹ University of California, Merced, *Farmworker Health in California*, 54 (2022) (hereinafter UC Merced Report) (citing Ranveer Chandra & Jayson L. Lusk, *Farmer and Farm Worker Illnesses and Deaths from COVID-19 and Impacts on Agricultural Output*, PLOS ONE (2021) (study finding that farmworkers nationwide were at heightened risk from COVID-19)).

³⁰ H-2A Guest Worker Fact Sheet, National Center for Farmworker Health, <https://www.ncfh.org/h-2a-guest-workers-fact-sheet.html> (last updated Oct. 2020).

³¹ *Id.*; see also CDM Report, *supra* note 12, at 20-21.

speak out from future employment opportunities.³² Similarly, problems stem from the proliferation of FLCs, or intermediary employers that act as staffing firms for farm employers, which account for a significant portion of U.S. agricultural employment and comprise a majority of H-2A applications in some states.³³ FLCs are among the worst violators of labor laws, with one recent report finding that they account for one-quarter of all federal employment law violations in agriculture.³⁴ The largely opaque dealings of these third parties in the H-2A employment market has led to an increase in worker protection violations by separating farmworkers from farm operators, further eroding workers' ability to influence their working conditions, and preventing enforcement agencies from identifying and prosecuting those responsible for violations.³⁵

These employer abuses of the H-2A program not only harm H-2A workers, but also worsen conditions for all agricultural workers. The lack of accountability for violations has created contradictory incentives among farm employers to prefer H-2A workers over other farmworkers, directly undermining the program's express prohibition on such preferential treatment. *See* C.F.R. § 655.122(a). For example, a 2020 investigation by the Department into a California vineyard management company found that the company gave better wages and hours to H-2A workers compared to residential workers, while also pushing the H-2A workers to work faster and longer hours.³⁶ Similarly, the Attorney General of Washington obtained a \$3.4 million settlement and injunctive relief in 2023 against a mushroom farm that discriminated against female and

³² Tina Vásquez, *Human Trafficking or a Guest Worker Program? H-2A's Systemic Issues Result in Catastrophic Violations*, PRISM (April 14, 2023), <https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/>.

³³ Costa, *supra* note 6 (FLCs accounted for 53% of U.S. crop support services employment in 2019). FLCs dominate H-2A hiring in certain states like California and Florida. *See* Philip Martin, *The H-2A Farm Guestworker Program Is Expanding Rapidly*, Economic Policy Institute: Working Economics Blog (April 13, 2017), <https://www.epi.org/blog/h-2a-farm-guestworker-program-expanding-rapidly/>.

³⁴ *See* Costa, *supra* note 7.

³⁵ *See, e.g.*, Vásquez, *supra* note 32 (labor recruiter who took recruited H-2A workers to work in North Carolina forced workers to lie to the U.S. Consulate about the illegal recruitment fee they were charged); Press Release, U.S. Attorney's Office, Central Dist. of California, *Three Indicted in Immigration Fraud Scheme that Exploited Immigrant Farmworkers by Charging Prohibited Fees for Visas, Living Expenses* (May 17, 2018), <https://www.justice.gov/usao-cdca/pr/three-indicted-immigration-fraud-scheme-exploited-immigrant-farmworkers-charging> (California-based recruiter traveled to Mexico to recruit H-2A workers and charged almost \$3,000 for visas and made false promises about wages and housing).

³⁶ Press Release, U.S. Dep't of Labor, *US Department of Labor Finds California Grape Grower Illegally Gave Wage, Hour Preference To H-2A Visa Holders at Expense of US Workers* (Oct. 18, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221018>; Jess Lander, *Federal Investigation Reveals Tension Across California Vineyards Over Visa Program for Farmworkers*, S.F. CHRONICLE (Oct. 21, 2022), <https://www.sfchronicle.com/food/wine/article/vino-farms-labor-violations-visa-program-17523193.php>.

Washington-based workers in favor of male H-2A workers, and retaliated against workers who spoke out against such discrimination.³⁷ Wide-ranging reform of the H-2A program is necessary to restore the integrity of the program and improve working conditions for H-2A and resident workers alike.

III. The State AGs Support the Promulgation of the Proposed Rule.

a. The Proposed Rule will strengthen protections for workers and the Department's enforcement capabilities.

The State AGs commend the Department's efforts in this Proposed Rulemaking to strengthen protections for H-2A workers by improving and clarifying existing regulations, and introducing new regulations that seek to address major shortcomings with the program. As state law enforcement agencies generally concerned with the rights and protections afforded to agricultural workers in our states, we strongly support the significant aims of the Proposed Rule to bring more clarity, transparency, and accountability into the H-2A program.

The proposed changes will enable the Department and other enforcement agencies to better protect H-2A workers and to ensure that the program is being utilized appropriately only where resident employees are not available. For example, codifying the single employer standard, accelerating the debarment process for violators, and other legal reforms aimed at strengthening employer compliance and accountability are important steps in ensuring that employers are not simply using the program to obtain an easily exploitable workforce. Moreover, the Proposed Rule also sets forth important protections that will promote the ability of H-2A workers to access information about their rights and advocate for themselves.

Collectively, the breadth of these changes represent substantial progress in reforming some of the most challenging aspects of the H-2A program in the experience of the State AGs. We fully support the Proposed Rule and urge the Department to adopt it.

In addition, we offer these comments to highlight issues of particular importance to the signatory States, along with certain recommendations to further strengthen and clarify the Proposed Rule.

³⁷ Press Release, Washington State Office of the Attorney General, *Sunnyside Mushroom Farm Will Pay \$3.4 Million for Violating the Civil Rights of Its Workers* (May 17, 2023), <https://www.atg.wa.gov/news/news-releases/sunnyside-mushroom-farm-will-pay-34-million-violating-civil-rights-its-workers>.

b. Promoting workers' access to information and ability to advocate for themselves will improve conditions for all farmworkers and aid law enforcement.

Several changes set forth in the Proposed Rule aim to empower workers to advocate on their own behalf for better working conditions by improving their access to information and strengthening organizing protections. Specifically, the Proposed Rule requires employers to provide worker contact information to a requesting labor organization, which will enable labor advocates to conduct outreach to workers to inform them about their rights under the law. 88 Fed. Reg. at 63,812. In addition, the rule would also require the disclosure of information about employers that have chosen not to bargain over labor neutrality agreements on job order forms, enabling workers to use this information as they assess job opportunities. *Id.* at 63,799. Finally, the rule would prohibit coercive speech that occurs in the form of “captive audience meetings,” in which employers require workers to attend meetings about the exercise of their rights to organize, which the Department finds are inherently coercive. *Id.* at 63,797. Under the proposed regulations, an employer cannot hold these kinds of meetings unless the meetings are voluntary and the employer is clear about the intent of the meeting, provides workers with information about their rights, and reiterates that there will be no adverse consequences for not attending. *Id.* All of these provisions would thus connect workers to important information about their employers and their rights, and protect them from misinformation and coercive speech that hinders self-advocacy and organizing.

To further protect workers' ability to exercise their right to organize, the rule proposes several changes, including broadening existing anti-retaliation provisions to any effort to form, join, or assist a labor organization, and other concerted activities aimed at improving working conditions. 88 Fed. Reg. at 63,793, 63,830-831. Another proposed change also seeks to empower workers and protect them from potential retaliation by requiring employers to permit workers to designate a representative of their choosing to attend any meeting between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline. *Id.* at 63,796.

The States believe that these proposals promoting H-2A workers' access to information about their rights and preventing employers from suppressing the exercise of those rights will positively impact H-2A workforces. These protections are critically important for H-2A workers, who often live in isolated environments where their access to information and resources is limited, as they are particularly at risk of coercion and abuse by employers.³⁸

³⁸ See, e.g., Teresa Cotsirilos, *The Dark Side of America's Sheep Industry*, HIGH COUNTRY NEWS (Oct. 2, 2023), <https://www.hcn.org/issues/55.10/labor-the-dark-side-of-americas-sheep-industry> (explaining how H-2A workers in isolated environments rely not only on their employers for their basic needs, but frequently employers are additionally “the only way that you can communicate with the outside world”).

c. Protection from arbitrary or retaliatory termination will further empower workers to advocate for better working conditions.

The State AGs also wish to highlight their endorsement of the Proposed Rule’s inclusion of a clear definition of what constitutes termination for cause under the regulations. Specifically, the Proposed Rule clarifies that a worker is terminated for cause only when the employer terminates the worker for failure to meet productivity standards or failure to comply with employer policies or rules. 88 Fed. Reg. 63,823. The rule further proposes that an employer may terminate a worker only if six conditions are met, which collectively serve to ensure that termination for cause exists only where disciplinary or termination processes are justified and reasonable, and does not exist where rules, policies, and standards are arbitrary, unknown, or selectively enforced. *Id.*

As noted by the Proposed Rule, a termination for cause carries with it severe consequences for workers, including absolving employers from the obligations to pay for outbound transportation and to offer employment to H-2A workers that equals at least 75% of the workdays in the employment contract (known as the three-fourths guarantee). 88 Fed. Reg. 63,780. The current lack of clear regulatory guidelines dictating under what circumstances an H-2A worker can be terminated contributes to the stark power imbalance between H-2A workers and their employers.³⁹ This imbalance has contributed to a system where workers feel unable to complain or assert their rights without risking the substantial financial and legal penalties that come with termination.⁴⁰ For example, one study found that of California farmworkers who reported being unwilling to file a

³⁹ Rare examples of enforcement exemplify how employers use retaliation to silence and chill complaints. *See, e.g.*, Press Release, U.S. Dep’t of Labor, *CORRECTED: US Department of Labor Investigations of Labor Contractors, Vineyard Yield \$231K in Penalties, Recover \$129K in Back Wages for 353 Agricultural Workers* (June 1, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230601-0> (An investigation by the Department revealed that in addition to various other violations of the H-2A requirements, Noble Vineyards Management, Inc., which provides workers to growers in Sonoma and Mendocino Counties in California, retaliated against H-2A employees who asked about their unpaid wages by sending them back to their home countries before the end of their contracts. *See also Rosas v. Sarbanand Farms, LLC*, 329 F.R.D. 671, 690 (W.D. Wash. 2018) (holding that employers’ threats to send H-2A workers who “asked questions, complained or did not meet Growers’ production standard back to Mexico” supported claims under Trafficking Victims Protection Act, and that “[t]hreats of deportation may constitute an abuse of the legal process”).

⁴⁰ *See Costa, supra* note 6, at 13-14 (noting that “temporary migrant workers have good reason to fear retaliation and deportation if they speak up about wage theft, workplace abuses, or other working conditions like substandard health and safety procedures on the job... because their visas are almost always tied to one employer that owns and controls their visa status...; if they lose their job, they lose their visa and become deportable.”); CDM Report, *supra* note 12, at 37 (“Because their visas are tied to their employers, workers face the difficult decision between remaining with an abusive employer or returning home to lost opportunities and insurmountable debt.”)

report against an employer, about two-thirds cited fear of retaliation or job loss.⁴¹ The Proposed Rule thus addresses the need for a statutory definition of “for cause” termination to mitigate the largely unchecked ability of employers to engage in unlawful and retaliatory terminations. 88 Fed. Reg. 63,780-81.

The signatory States echo the need for this clarity especially in order to identify terminations for retaliatory reasons, where workers are terminated after complaining or otherwise advocating for better working conditions. 88 Fed. Reg. 63,782. The signatory States represent states with strong labor and employment laws and each has several agencies charged with the enforcement of such standards.⁴² However, these state and local agencies are often unable to enforce the applicable labor standards when workers remain too intimidated to speak out for fear of illegal retaliation by their employers.⁴³ *Id.* at 63,788. Further, the fear of sudden early termination causes workers to wait until the end of the harvest season to complain. But by this time, the options for meaningful recourse are diminished, since many workers have to leave the U.S. soon after the season ends, leaving government agencies and advocates with minimal time to collect evidence and mount cases.⁴⁴

The Department’s proposed statutory definition of termination for cause, if coupled with adequate oversight and enforcement and properly communicated to H-2A workers, may embolden workers to voice their concerns to their employers, government enforcement agencies, and advocates without the often paralyzing fear of sudden adverse consequences. The State AGs strongly support this much needed protection of H-2A workers.

d. Foreign labor recruiter disclosure requirements will improve transparency and lead to greater accountability for unlawful recruitment practices.

The signatory States also approve the Department’s proposed regulations enhancing transparency in the foreign worker recruitment chain. The Proposed Rule aims to shed light on the foreign recruitment chain by requiring submission of the written

⁴¹ UC Merced Report, *supra* note 297, at 7.

⁴² *See* note 10, *supra* (summarizing some of the relevant enforcement agencies of the signatory States).

⁴³ *See* Costa, *supra* note 6, at 14 (“The specter of retaliation makes it understandably difficult for temporary migrant workers to complain to their employers and to government agencies about unpaid wages and substandard working conditions.”)

⁴⁴ The State AGs note that the Notice of Proposed Rulemaking issued by the Department of Homeland Security on September 20, 2023, aimed at improvements in both H-2A and H-2B programs, could also afford protections to workers who complain about their working conditions, including providing workers with “whistleblower protection” comparable to the protection offered to H-1B workers. *See Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, 88 Fed. Reg. 65,040 (September 20, 2023).

contract(s) between H-2A employers and foreign labor recruiters, requiring the disclosure of any registration or license number used by the recruiter's home country, and the disclosure of the identity and location of persons and entities working for the recruiter, including any agents or employees who will engage in recruitment activities. 88 Fed. Reg. 63,803. The Proposed Rule further provides for the Department's public disclosure of the agents and recruiters, as well as the identities and locations of all agents, entities or employees engaged in recruiting. *Id.* at 63,804.

The States recognize that abusive and illegal practices among foreign labor recruiters are a major contributing factor to the high incidence of labor trafficking and exploitation among the H-2A workforce. 88 Fed. Reg. 63802. Advocates have noted that recruiter abuses that occur even before H-2A workers enter the United States are a root cause of the power imbalance and resulting exploitation experienced by workers. *See* section II at p. 6. It is also commonly known that recruiters often blacklist workers who speak up about abuses to their employer, thus adding an additional layer of fear and intimidation that silences worker complaints.⁴⁵ Recruitment abuses that occur in other countries are especially difficult to address because of the jurisdictional limitations of the Department as well as the agencies of the States.⁴⁶ The States thus affirm the importance of introducing these disclosure requirements to foreign labor recruiters in the H-2A context to match the existing regulations in the H-2B program.

Recognizing these issues, some states have passed legislation in order to better regulate the actions of foreign recruiters. For example, California law requires the Labor Commissioner to enforce and administer a program to register and supervise foreign labor contractors and imposes specific requirements relating to recruitment or solicitation for employment and relating to work contracts. *See* Cal. Bus. & Prof. Code §§ 9998-9998.11; Cal. Code Regs. §§ 13850-13874. Critical provisions of California's law include requiring that foreign labor recruiters establish a California agent for service of process, purchase a surety bond to ensure accountability for violations, and create a complaint mechanism for workers who suffer violations.⁴⁷ Other signatory States have state laws generally regulating labor recruiters that also apply to foreign recruiters who

⁴⁵ *See* Cabrera-Lomelí, *supra* note 13 (noting that “[t]hese recruiters, which range from informal one-person operations to multinational corporations, usually work for several employers spread out across the U.S. So when recruiters blacklist a worker, they’re not just doing so for one employer but potentially for whole sectors of the agriculture industry”).

⁴⁶ *Id.* (noting that regional enforcers for both the California ALRB and the Department of Labor recognize the difficulty in holding third-party recruiters in other countries accountable for their unlawful actions).

⁴⁷ In 2014, California passed SB 477 to create better oversight for foreign labor contractors. The law became effective in 2016 but was interpreted to only apply to the H-2B program. Attempts by advocates to extend such protections to the H-2A program have been unsuccessful thus far. *See* Coalition to Abolish Slavery and Trafficking (CAST), *Protect Migrant Workers from Exploitation* (Feb. 3, 2020), <https://www.castla.org/protect-migrant-workers-from-exploitation/>.

bring H-2A workers to the states.⁴⁸ In Washington, for instance, although there is no statute specifically governing foreign labor contractors, the state's general Farm Labor Contractor Act (FLCA), Wash. Rev. Code § 19.30.010 *et seq.*, has been held to apply to foreign labor contractors even if their activities were conducted entirely in a foreign country, if the result of those activities was to supply H-2A workers to a Washington employer.⁴⁹

While the States recognize the Department's acknowledgment that there are limits to the liability the Department can impose on employers for the actions of recruiters abroad (88 Fed. Reg. 63802), we nonetheless welcome and encourage more regular and rigorous enforcement of the existing regulations by the Department. Further, stronger regulations and oversight may be necessary to ensure that recruiters comply with the existing regulations. By way of example, the State AGs recommend that the Department consider whether it could require that employers only use certain legitimate recruiting agencies that are subject to registration and oversight processes in their home countries, or whether the Department could require that employers only contract with recruiters that register with the Department. Further, to aid in any enforcement efforts of the signatory States, the State AGs also respectfully request that the Department consider a provision which would permit sharing foreign worker recruitment information with state agencies for investigative and enforcement purposes.⁵⁰

Based on the foregoing, the signatory States support the DOL's efforts to bring further scrutiny and transparency to the role of foreign labor recruiters within the H-2A program.

⁴⁸ In New York, any individual who charges a fee to recruit, transport, supply, hire, or supervise farm or food processing workers on behalf of a third party is an FLC and must register with the state. 12 N.Y. Comp. Codes R. & Regs. tit. 12, § 197.4(b)(1). The NYSDOL may revoke, suspend, or refuse to issue or renew an FLC certificate for various reasons, including if they are found to have violated the law or have given false or misleading information to workers, and the FLC may not submit an application for a new certificate for 2 years. *Id.* § 197.4(e). Similarly, in New Jersey, recruiters are subject to regulations which require them to register as "crew leaders" with the state. N.J. Stat. Ann. §§ 34:8A-7 *et seq.* (defining "crew leader" as including "any person who transports, recruits, supplies or hires farm or food processing laborers and who, for any money or other valuable consideration paid, anticipated or promised to be paid, directly or indirectly by any farm operator or laborer," and subjecting crew leaders to certain requirements including registration).

⁴⁹ See, e.g., *Rosas v. Sarbanand Farms, LLC*, No. C18-0112-JCC, 2019 WL 2477381, *4-5 (W.D. Wash. June 13, 2019).

⁵⁰ See 88 Fed. Reg. 63,804 (noting "the proposed regulatory text includes a provision stating that the 'Department may share the foreign worker recruitment information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose'" and is "considering making further revision to this regulation to allow the Department to share the foreign worker recruitment information it receives with the foreign government that has territorial jurisdiction over the recruiter for investigative or enforcement purpose.")

IV. The States Support the Promulgation of the Proposed Rule.

If finalized, the Department's Proposed Rule would institute significant improvements and reforms to the H-2A program. Unscrupulous employers should not be able to use the H-2A program to bypass resident U.S. workers and exploit guest workers. The signatory States have confidence that the Proposed Rule, by empowering workers to advocate for themselves and enhancing the capabilities of enforcement agencies to ensure compliance, will improve working conditions for all farmworkers. The undersigned State Attorneys General thus urge the Department to adopt the Proposed Rule.

Respectfully submitted,



ROB BONTA
California Attorney General



PHILIP J. WEISER
Colorado Attorney General



WILLIAM TONG
Connecticut Attorney General



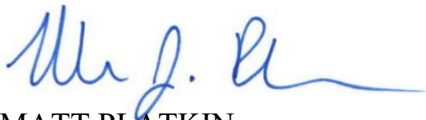
KATHY JENNINGS
Delaware Attorney General



KWAME RAOUL
Illinois Attorney General



DANA NESSEL
Michigan Attorney General



MATT PLATKIN
New Jersey Attorney General



LETITIA JAMES
New York Attorney General

The Honorable Julie A. Su
Amy DeBisschop
November 14, 2023
Page 16



MICHELLE HENRY
Pennsylvania Attorney General



CHARITY CLARK
Vermont Attorney General



BOB FERGUSON
Washington Attorney General