Comments of the Attorneys General of Minnesota, New York, Washington, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, and Rhode Island

on

the Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States

September 2, 2025

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Secretary Lori Chavez-DeRemer
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking, *Rescission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 90 Fed. Reg. 28919 (July 2, 2025) (DOL Docket No. ETA-2025-0007, RIN 1205-AC25)

Dear Secretary Chavez-DeRemer,

We, the undersigned Attorneys General of Minnesota, New York, Washington, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, and Rhode Island (the "State AGs"), submit this Comment in opposition to the proposed rulemaking by the Department of Labor ("DOL" or "the Department") entitled *Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States* (the "Proposed Rule"). The Proposed Rule would largely rescind the final rule published by DOL on April 29, 2024, ("2024 Final Rule") which aimed to strengthen protections for temporary agricultural workers. The Proposed Rule, if adopted, would roll back protections for agricultural workers as well as remove or severely restrict important tools to enforce those protections. The State AGs urge DOL to withdraw the Proposed Rule.

With the growth of the H-2A program in the states represented by the State AGs, H-2A workers are an increasing portion of the states' agricultural labor force. The use and regulation of the H-2A program likewise affects an increasing number of corresponding U.S.-based workers[1] who reside in our states and contribute seasonally or year-round to our agricultural economies and communities. However, the structure and nature of the H-2A program presents challenges that have been exacerbated with the growth of the program. H-2A workers face an increased likelihood of exploitation, which affects the opportunities and working conditions for U.S-based workers as well. The 2024 Final Rule consciously addresses these issues. The 2024 Final Rule makes it easier for H-2A workers to speak out regarding violations of the law or poor working conditions and to track and enforce violations of the law against unscrupulous bad actors. The 2024 Final Rule also includes critical mechanisms to protect the wages and working conditions of U.S.-based corresponding workers. These protections further the statutory aims of the H-2A program—which is intended to only be available where there are insufficient U.S.-based workers to do the work and under conditions that do not undercut U.S.-based workers. Without these protections, all parties

[1] "U.S.-based workers" and "corresponding workers" are used throughout this comment to refer to farmworkers in the United States similarly employed to H-2A workers.

suffer. Good faith employers may also be undercut by bad actors willing to take advantage of the system.

We as a nation suffer when we choose to ignore the exploitation of any among us. It is foundational for our society to be a place where all workers who contribute to our economy are revered and protected, not denied equal dignity.

For all of these reasons, the State AGs oppose the Proposed Rule and its efforts to roll back protections for H-2A workers and tools for enforcing existing protections that benefit everyone. We urge DOL to withdraw the Proposed Rule.

I. BACKGROUND

A. H-2A Visa Program

There has been a significant increase in the use of H-2A visas in recent years. In fiscal year 2023, the U.S. issued more than 310,000 H-2A visas, over 50%more than in fiscal year 2018.[2] More than 80% of the jobs were in the farmworkers and laborers, crop, nursery, and greenhouse occupation category, and more than 50% of the jobs were located in five states: California, Florida, Georgia, North Carolina, and Washington.[3]

The structure of the H-2A visa program, as well as inadequate government oversight, results in workers who are particularly vulnerable to exploitation.[4] Many H-2A visa workers arrive to the U.S. with pre-employment debt either through unlawful recruitment fees, lawful pre-employment expenses like travel expenses and visa or passport fees, and other factors.[5] Additionally, they are often isolated, both physically—living in employer housing in remote locations and without access to transportation—and oftentimes by language differences with the local community, in addition to lacking job mobility due to their status being tied to their employer.[6] These factors and others have led to shocking instances of labor trafficking.[7]

The program also affects corresponding U.S.-based workers, who in some locations and industries have been displaced due to the growth of the program and employers' preference for an H-2A workforce that may be easier to exploit.[8] U.S.-based workers' wages and terms of

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[2] U.S. Government Accountability Office, GAO-25-106389, *H-2A Visa Program: Agencies Should Take Additional Steps to Improve Oversight and Enforcement* (Nov. 14, 2024), https://www.gao.gov/products/gao-25-106389.
[3] *Id.*
[4] *E.g.*, Sylvia Woodmansee, *Invisible Hands: Forced Labor in the United States and the H-2 Temporary Worker Visa Program*, 111 Calif. L. Rev. 1223 (2023); Isabella J. Cheng, *Reforming H-2A: Protecting Migrant Workers Before Arrival on U.S. Farms*, 74 Duke L. J. 1485 (2025).
[5] Woodmansee, *supra* at 1231–32; Cheng, *supra*.
[6] Woodmansee, *supra* at 1222–23.
[7] *See* Lautaro Grinspan, *Georgia modern-day slavery: Alleged traffickers sued by workers*, The Atlanta Journal-Constitution (May 5, 2023), https://www.ajc.com/news/georgia-news/georgia-modern-day-slavery-alleged-traffickers-sued-by-workers/D6JJEDC5RVC67BPJNPYRKLKMXU/; Tina Vasquez, *Human trafficking or a guest worker program? H-2A's systemic issues result in catastrophic violation*, Prism (April, 14, 2024), https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/.
[8] *See, e.g.* 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-

employment are increasingly tied to H-2A employers and regulations as H-2A employers dominate certain industries and crops, making regulatory changes to the H-2A program critical to the entire agricultural labor force.

B. The 2024 Final Rule

On April 29, 2024, following a robust notice-and-comment process, DOL issued the 2024 Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*.[9] The rule revises various regulations and aims to "further strengthen protections for agricultural workers and enhance the Department's enforcement capabilities."[10] These changes further the underlying requirements of the H-2A program—that H-2A visas are only available where U.S.-based workers are unable to fill the positions and under conditions that would not undercut U.S.-based workers in similar positions. Specifically, DOL sought to:

> prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not financially gain from their violations or contribute to economic and workforce instability by circumventing the law, both of which would adversely affect the wages and working conditions of workers in the United States similarly employed, and undermine the Department's ability to determine whether there are, in fact, insufficient U.S. workers for proposed H-2A jobs.[11]

Overall, the changes in the 2024 Final Rule work toward a more secure H-2A workforce that would benefit the workers themselves, as well as U.S.-based workers and employers who would be less likely to be disadvantaged by unscrupulous bad actors who may attempt to game the system or exploit the H-2A workforce.

II. COMMENTS OPPOSING THE PROPOSED RULE

On July 2, 2025, DOL issued the Proposed Rule, which aims to rescind most of the 2024 Final Rule, claiming that it "adopted a number of unnecessary burdensome, and costly requirements on employers."[12] The Proposed Rule relied upon several district courts that had issued preliminary injunctions for portions of the 2024 Final Rule, as well as the Administration's policy to reduce private expenditures, in deciding to revisit the 2024 Final Rule.[13]

The Proposed Rule's focus on employers' burdens ignores the risk of exploitation for H-2A workers and the subsequent effect on the U.S.-based workforce. As discussed more fully below, the Proposed Rule does not adequately consider the particular vulnerabilities and the additional

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releases/sunnyside-mushroom-farm-will-pay-34-million-violating-civil-rights-its-workers (more than 170 Washington-based farmworkers discriminated against by employer who replaced them with H-2A workers in violation of the Washington Law Against Discrimination).

[9] Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024) (to be codified at 20 C.F.R. §§ 651, 653, 655, 658 and 29 C.F.R. § 501).

[10] *Id.* at 33900.

[11] *Id*.

[12] Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States, 90 Fed. Reg. 28919 (July 2, 2025) (to be codified in 20 C.F.R. §§ 651, 653, 655, 658 and 29 C.F.R. § 501).

[13] *Id.* at 28921.

hurdles that H-2A workers face when advocating for their rights compared to U.S. workers. Because of these differences, additional worker protections are necessary to protect H-2A workers, corresponding workers, and farmers from bad actors willing to take advantage of the H-2A program.

A. Rescission of the "Worker Voice and Empowerment" provisions of the 2024 Final Rule will hinder enforcement at all levels and decrease H-2A program compliance, adversely affecting U.S.-based workers

We urge DOL to withdraw the Proposed Rule, because it will make H-2A regulations less clear and hinder their enforcement. The Proposed Rule would rescind the 2024 Final Rule's clarified and expanded categories of protected activity at 20 C.F.R. §§ 655.135(h)(1)–(2) and 29 C.F.R. § 501.4 and added definition of "key service provider" at 20 C.F.R. § 655.135(h). These changes are arbitrary and capricious, because they hinder H-2A workers' access to information about their rights, discourage workers from assisting regulators, and enable employers to suppress the exercise of those rights. This regression will harm not only H-2A workers, but the entire agricultural workforce and the industry it supports.

As State AGs who enforce and defend workplace protections, we believe that the 2024 Final Rule effectively addresses the unique threats H-2A workers face to their economic security, health, and safety, as well as their heightened vulnerability to exploitation.[14] H-2A workers live and work in remote areas that lack public transportation, internet, and cell phone coverage.[15] Consequently, they are susceptible to exploitation and abuse. They also have limited access both to information about their rights and to key service providers who can help improve their living and working conditions and ensure their rights are protected. And H-2A workers are especially vulnerable to retaliation, whether through discharge, deportation, or denial of future employment, because they are dependent on their employers for both housing and legal immigration status.[16]

As a consequence of these dynamics, legal violations are common in the H-2A program, and legal enforcement is limited. The H-2A program is rife with labor trafficking, worker exploitation, and other Federal, State, and local violations.[17] 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 agencies.[18] In

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[14] 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 7 in 10 farms investigated by the DOL were found to have committed labor violations); *see also* 88 Fed. Reg. 63750, 63753 n. 8 (Sept. 15, 2023) (noting that "workers in agriculture, particularly H-2A workers, remain highly vulnerable to workplace abuses").

[15] Costa*, supra.*

[16] Costa, *supra*; Thomas A. Arcury et al., *Job Characteristics and Work Safety Climate among North Carolina Farmworkers with H-2A Visas*, 20(1) J. Agromed. 64, 65 (2015).

[17] Polaris Project, *Labor Trafficking on Specific Temporary Work Visas, A Data Analysis 2018-2020,* 13–18 (May 2022), https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf

[18] *See* National Center for Farmworker Health, *H-2A Guest Worker Fact Sheet* (last updated Oct. 2020), https://www.ncfh.org/wp-content/uploads/2025/04/h2a_fact_sheet_10.2020.pdf ("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.

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.[19] Worker complaints are especially crucial to enhancing enforcement efforts, because they result in more thorough in-person investigations, as compared to office audits.[20]

In promulgating the "Worker Voice and Empowerment provisions, DOL found that:

> the H-2A workforce is uniquely vulnerable, and as a result, H-2A workers are less able and less likely to advocate on behalf of themselves or their coworkers to seek compliance with the terms and conditions of H-2A employment that the Department has determined are necessary to prevent adverse effect on the wages and working conditions of workers in the United States similarly employed.[21]

As DOL recognized in the 2024 Final Rule and as commented by many of the undersigned,[22] strengthening anti-retaliation protections for H-2A workers and promoting worker self-advocacy will help improve the integrity of the H-2A program and prevent some of the current abusers of the program from violating the regulations, to the benefit of employers and all agricultural workers.[23]

Simply put, rescinding the worker voice and empowerment provisions will decrease legal compliance. Making protections narrower and less clear will discourage H-2A workers from complaining about workplace and living conditions and assisting Federal, State, and local regulators in enforcement actions. At the same time, H-2A employers will be emboldened to flout program requirements and violate a host of worker protections. This will not only harm H-2A workers but also, in contrast to the program's purpose, facilitate a race to the bottom that worsens conditions for other agricultural workers and undermines law-abiding employers who devote resources to respecting their workers' rights.[24]

Government Accountability Office, GAO-15-154, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers,* 40 (reissued May 30, 2017), 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)).

[19] Costa, *supra* note at 44.

[20] U.S. Government Accountability Office, GAO-25-106389, *supra* at 32.

[21] 89 Fed. Reg. at 33990.

[22] Attorney Generals of California, Colorado, Connecticut, Delaware, Illinois, Michigan, New Jersey, New York, Pennsylvania, Vermont and Washington, Comment Letter on *Improving Protections for Workers in Temporary Agricultural Employment in the United States* (Nov. 14, 2023), https://www.regulations.gov/comment/ETA-2023-0003-0310.

[23] *See generally,* 89 Fed. Reg. at 33898, 33900–33901, 33904–33905, 33952, 34041, 34045.

[24] Illustratively, one reason for employers' increased use of the H-2A program is "employer preference for H-2A workers over domestic workers." *See* U.S. Government Accountability Office, GAO-25-106389, *supra* note 2 at 11.

1. The 2024 Final Rule provided clarity to preexisting protections and rescinding 20 C.F.R. § 655.135(h)(1)(vii) is arbitrary and capricious

Since at least 2010, H-2A employers have been prohibited from treating workers unfairly for filing a complaint related to the program.[25] Employers must assure that they have not and will not "intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against" because of a complaint.[26] The promulgated 2024 Final Rule importantly clarified that workers are protected from unfair treatment for complaints to Federal, State, or local regulators regarding the H-2A program and other safety and health, employment, and labor laws. By retaining 20 C.F.R. § 655.135(h)(1)(vii) and 29 C.F.R. § 501.4(a)(1)(vi), employers and workers alike are provided with the wide-ranging assurances and obligations in one place rather than spread across several, State, or local rules and laws, while posing no additional burden on employers.

DOL proposes rescinding 20 C.F.R. § 655.135(h)(1)(vii) because it is "duplicative of other rights under the H-2A regulations and other Federal, State, and local laws."[27] This reasoning is arbitrary and capricious: explicit and broad anti-retaliation protections generally covering Federal, State, and local laws and regulations are necessary due to the diverse legal violations H-2A workers experience. The 2024 Final Rule was issued to provide clarity on the current protections already guaranteed to H-2A workers by standardizing the regulations to mirror the protections also provided in other Federal, State, and local laws and regulations. This was meant to "reduce the fear of retaliation and other barriers currently faced by the H-2A workforce when seeking to advocate on behalf of themselves and their coworkers regarding their working conditions or violations of their rights, if they so choose."[28] By contrast, the rescission of 20 C.F.R. § 655.135(h)(1)(vii) and 29 C.F.R. § 501.4(a)(1)(vi) will lead to confusion for both employers and workers and will not combat the widespread workplace and housing violations.

As discussed above, DOL is dually responsible for ensuring that there are indeed insufficient U.S.-based workers and that these workers will not be adversely affected by the hiring of H-2A workers. In fulfilling its obligations, DOL may issue rules related to "the filing and consideration of an application for a labor certification." 8 U.S.C. § 1188(c). In *Barton v. U.S. Department of Labor*, 757 F. Supp. 3d 766, 780 (E.D. Ky. 2024), the court recognized that § 1188 "explicitly envisions [DOL] implementing regulations that will clarify the meaning and application of its provisions." With the 2024 Final Rule, DOL did just that—it clarified and updated the meaning of pre-existing requirements.[29] Here with the Proposed Rule, DOL's only argument for rescinding 20 C.F.R. § 655.135(h)(1)(vii) and 29 C.F.R. § 501.4(a)(1)(vi), that they are duplicative, relies on an error in judgment and fails to consider the Department's own obligations. U.S.-based workers are at a disadvantage when they compete with a labor force that is less legally protected.

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[25] 20 C.F.R. § 655.135(h)(1) (2010); *see also,* 90 Fed. Reg. at 28920 ("Prior to publication of a final rule in 2024, the majority of the Department's regulations governing the H-2A program were published in 2010[.]")

[26] 20 C.F.R. § 655.135(h)(1) (2010); *see also*, 29 C.F.R. § 501.4(a)(1) (2010) ("A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has: (i) Filed a complaint under or related to 8 U.S.C. 1188 or the regulations in this part[.]").

[27] 90 Fed. Reg. at 28923.

[28] 89 Fed. Reg. at 33991.

[29] *Id.* at 33904.

If the Proposed Rule proceeds, DOL will effectively be working against U.S. based workers. DOL fails to consider the rampant abuse of the program towards H-2A workers because of lack of protections and how those abuses adversely affect U.S.-based workers, thus the rescissions should be withdrawn.

2. The expanded protected activity for H-2A workers consulting with key service providers is in fact specific and necessary for the isolated workforce

Prior to the 2024 Final Rule, the H-2A regulations narrowly prohibited employers from unfairly treating workers who "consulted with an employee of a legal assistance program or an attorney on matters" related to the H-2A program.[30] The regulations preceding the 2024 Final Rule also did not include a definition for "key service provider."[31] We disagree that the newly included definition of "key service provider" at 20 C.F.R. § 655.103(b) as ''a healthcare provider; a community health worker; an education provider; a translator or interpreter; an attorney, legal advocate or other legal service provider; a government official, including a consular representative; a member of the clergy; an emergency services provider; a law enforcement officer; and any other provider of similar services'' is vague, overly broad, or lacks constraints or limits.

Moreover, the expanded definition does not impermissibly expand "the universe of protected activity a person can engage in"[32] because it is within the Department's congressionally designated rulemaking authority.[33] DOL does not provide support for how the expanded protections are impermissible, the Proposed Rule is therefore arbitrary and capricious. As explained in the Proposed Rule, this provision "is not directly related to self-organization and collective action, it is not implicated by the court decisions weighing the effect of the NLRA and was not addressed in the decisions" cited by the Department.[34]

The key service provider definition lists the diverse types of service providers H-2A workers critically need to access. Likewise, the inclusion of the catchall "any other provider of similar services" is necessary to ensure coverage of all services temporary workers may need while they are in the United States. There are ten illustrative examples employers and workers can reasonably rely on to understand the service providers that workers may likely need to consult with during their employment. Further, the protected activity is indeed limited because it relates to consulting with a key service provider on matters related to the H-2A program. The 2024 Final Rule provides employers with specific and clear behavior that is unlawful. Thus, the promulgated rule does not "create[] a regulatory environment in which an employer has no reasonable understanding of when a person is engaging in protected activity."[35] And while the Proposed Rule correctly states that anti-retaliation provisions exist in many other laws and regulations already, this only suggests that a general retaliation provision located in the H-2A regulations themselves would pose no additional burden on employers.

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[30] 20 C.F.R. § 655.135(h)(4) (2023).
[31] 20 C.F.R. § 655.103 (2023).
[32] 90 Fed. Reg. at 28923.
[33] *See Barton*, 757 F. Supp. 3d at 782 ("'In sum, '§ 1188 affords the DOL considerable latitude to promulgate regulations that protect American workers from being adversely affected by the issuance of H-2A visas.'") (quoting *Kansas v. Department of Labor*, No. 2:24-cv00076-LGW, 2024 WL 3938839, at *6 (S.D. Ga. Aug. 26, 2024)).
[34] 90 Fed. Reg. at 28922.
[35] *Id*. at 28923.

The 2024 Final Rules enhanced clarity and increased awareness of anti-retaliation protections for both H-2A workers and employers and imposed no new burdens including, but not limited to, spending time with "rule familiarization."[36] DOL claims rescission of the 2024 Final Rule would result in an estimated "net effect… [of] a reduction of three hours of rule familiarization costs in FY 2026-2034," which would produce an estimated "annualized net costs savings over the 10-year period of $73,188" in costs associated with an HR Specialist.[37] As detailed above, the anti-retaliation provisions promulgated in the 2024 Final Rule are not newly granted protections, but already existing legal safeguards that are in desperate need of strengthening and clarifying and would not impose new burdens on employers.

Further, the inclusion of "key service provider" in the 2024 Final Rule, codified at 20 C.F.R. § 655.135(h)(1)(v), is imperative and should be retained as protected activity under the program. H-2A workers face substantial barriers when it comes to accessing the key service listed at § 655.103(b). Without these protections, H-2A workers will likely be unable to access critical services. As discussed, workers are isolated and vulnerable to experiencing multiple program violations and labor exploitation—without this protection, regulators can be certain the program will continue to be abused. Significantly, if U.S.-based workers are generally permitted to consult with whomever, but H-2A workers are only permitted to consult with legal services providers, employers will turn to the workforce that has less protection thereby eliminating employment opportunities for U.S. workers.

H-2A workers face serious barriers to accessing key service providers. H-2A workers often live in isolated environments where their access to information and resources is limited. Typically, H-2A workers live in remote employer-provided housing, creating several barriers to key service providers. Workers often lack internet access and/or cell service. They rely not only on their employers for their basic needs, but frequently employers are additionally the only way that they "can communicate with the outside world." 38 Similarly, though there are requirements for Department of State consular officers to provide H-2A visa applicants with a "Know Your Rights" pamphlet,[39] it is likely the information will not make it into the hands of H-2A workers because recruiters often do not pass on the pamphlet when they pick up passports on the workers' behalf.[40]

Many comments submitted to the 2024 Proposed Rules included examples of how it is common practice for workers to be prohibited from accessing key service providers.[41] Employers also often fire workers for consulting with service providers because of the appearance that they are complaining about the work conditions.[42] This can create an atmosphere of secrecy and fear, an atmosphere that is ripe for exploitation. Workers need access to key service providers because of the unique circumstance they live in. It is essential that the H-2A regulations make clear workers must be permitted the ability to consult key service providers. On average H-2A workers spend

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[36] *Id*. at 28933.
[37] *Id*. at 28935.
[38] 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.
[39] *See* U.S. Government Accountability Office, *supra* at 28.
[40] *Id.*
[41] 89 Fed. Reg. at 33999.
[42] *Id*. at 34000.

twenty-four weeks employed in the United States;[43] during their time they will undoubtedly need access to key services.

Access to services, such as healthcare, is critical to H-2A workers during their time in the United States. H-2A workers face exposure to several health and safety hazards, including extreme heat and pesticide exposure, in part because most workers live near their worksites. Workers are at high risk for cancers.[44] Further, H-2A workers face high likelihoods of chronic health conditions such as diabetes, high blood pressure, and high cholesterol.[45] Many workers have shared they do not complain about health concerns because of fear of retaliation.[46] Additionally, the nature of agriculture requires long work hours making it difficult for workers to meet with services provider during normal business hours. Many H-2A workers also do not earn sick leave and fear requesting a sick day off.[47] Losing protections for seeking health care services not only affects individual workers but can also compromise the health of other workers who share tight living spaces and may possibly be exposed to illnesses.

The recission of the Final 2024 Rules may cause further confusion for both employers and workers alike; there may be interpretations that there are no protections, including even for consulting a legal services provider. Currently, key service providers conduct outreach at employer owned housing to provide H-2A workers with necessary services such as programs like the Federally Qualified Health Clinics (FQHC) that provide services specifically designed for H-2A workers. These services may be inadvertently prohibited from reaching workers.[48]

We oppose the recission of key service providers. If ultimately DOL determines the provision is too vague, then "any other provider of similar services" could be removed. By expanding protections and making employer obligations clear and explicit, this may ensure workers actually receive necessary services. This benefits both employers and workers because workers may be less likely to fall ill or return to their home country and more likely to apply to return because they can be assured they will have access to key service providers. A provision that would prevent access to key service providers "would offend public policy, affronts the sense of decency and would be unconscionable."[49]

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[43] Marcelo Castillo, *Charts of Note: H-2A seasonal worker program has expanded over time,* Economic Research Service, U.S. Department of Agriculture., (Oct. 3, 2022), https://www.ers.usda.gov/data-products/charts-of-note/chart-detail?chartId=104874.

[44] *See generally*, Candace Kugel and Claire H. Seda, *Migrant and Seasonal Farmworkers: Cancer Risks, Barriers to Care, and Ways to Overcome Them*, 25(2) Clin. J. Oncology Nurse 219 (April 1, 2021).

[45] Don Villarego et al., *The health of California's immigrant hired farmworkers*, 53(4) Am. J. Ind. Med. 387 (2010).

[46] Kugel, *supra*.

[47] *Id*.

[48] Jane Flocks, *The Potential Impact of COVID-19 on H-2A Agricultural Workers*, 25(4) J. Agromedicine 367 (2020).

[49] *See generally, Opn. No. F91-7* (Ops. N.Y. Atty. Gen. Nov. 25, 1991) (New York State Attorney General opining that a policy limiting farmworkers the right to have guest in employer owned housing "would constitute an unconscionable contract provision.").

B. DOL offers no reasonable rationale for eliminating a consistent standard allowing workers to invite guests into worker housing

The State AGs oppose DOL's proposal to rescind the 2024 modifications to 20 C.F.R. § 655.135(n)(1) and 655.135(n)(2) which protect the rights of workers in employer-furnished housing to invite guests to their residence and nearby common areas, and an additional narrow right of access to labor organizations. DOL does not offer any reasonable rationale for eliminating these protections for workers which were deemed necessary after thorough notice and comment rulemaking. As DOL explained in its 2024 proposal, the new provision at 20 C.F.R. § 655.135(n) protects "workers' rights to association and access to information both to make them less susceptible to labor exploitation, including trafficking, and to interrupt factors that impose barriers to workers advocating…regarding working conditions."[50] Now, in its proposed elimination of 20 C.F.R. § 655.135(n), DOL fails to explain how it will address the concerns addressed by the 2024 Final Rule, particularly the concerns related to labor trafficking and substandard working conditions, which affect H-2A workers and corresponding workers alike.[51] Furthermore, DOL fails to consider the importance of workers' ability to have guests to meet their basic needs—workers typically reside in isolated rural areas without access to reliable transportation and rely on visits from churches, food banks, educators, and medical providers.[52]

Without federal law governing access rights, the right to guest access for temporary workers is "an uneven and patchwork system of state statutes, judicial opinions, and administrative guidance."[53] Some states have protective landlord-tenant law that recognizes the importance of a tenant's right to have guests in their homes without interference from a landlord. For example, Minnesota has a longstanding history of expansive tenant rights, including granting tenant agricultural workers the right to guests in their homes.[54] Similarly in New York, agricultural workers, even those in employer-provided housing, retain the same rights as tenants under New York common law and as such "have the common law right to receive guests of their choice."[55] But despite these protections, because landlord-tenant law varies among states, H-2A workers are vulnerable to misunderstandings regarding their right to guest access.[56] And the lack of clarity and

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[50] 89 Fed. Reg. at 34017.

[51] *Id.* (noting that the harms from limiting workers' rights to association and access to information similarly have an adverse effect on U.S.-based workers).

[52] *Id.* at 34019.

[53] Legal Aid of North Carolina, *On International Migrants Day, migrant farmworker advocates release video "Isolated by Force: Denying Migrant Farmworkers Access to Services*" (Dec. 2, 2019), https://legalaidnc.org/2019/12/02/on-international-migrants-day-migrant-farmworker-advocates-release-video-isolated-by-force-denying-migrant-farmworkers-access-to-services/.

[54] *State of Minnesota v. Hoyt*, 304 N.W.2d 884 (Minn. 1981).

[55] *Opn. No. F91-7, supra* (quoting *Thousand Island Park Ass'n v. Tucker*, 173 N.Y. 203 (1903)); *Colbee 52nd Street Corp. v. Madison 52nd Corp.*, 8 Misc. 2d 175 (NY Co. 1957), *aff'd*, 5 A.D.2d 971 (1st Dep't 1958).

[56] 89 Fed. Red. at 34019; *see* National Center for Farmworker Health, *H-2A Guest Worker Fact Sheet* (2020), https://www.ncfh.org/wp-content/uploads/2025/04/h2a_fact_sheet_10.2020.pdf ("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, GAO-15-154, *supra* at 40 (finding that federal agencies do not consistently share information with state agencies that also screen H-2A employers)).

consistency, especially without sufficient enforcement, allows employers to "regularly deny workers access to medical, legal, and other social service providers."[57]

Given the patchwork of state law tenant protections for workers in employer-furnished housing, rescission of 20 C.F.R. § 655.135(n) will generate uncertainty among advocates across the country. New York agricultural worker advocates have shared reports of employers asking visitors to leave the homes of H-2A workers or threatening to have visitors prosecuted for trespassing.[58] Similarly in North Carolina, even where migrant workers are legally allowed to receive visitors, employers regularly deny workers access to guests.[59]

A national standard regarding corresponding workers' rights to guests is critical. As noted in the comments to the 2024 Final Rule, "relying on workers' right to extend invitations alone would be insufficient because workers are often unaware of their rights or the available services and agencies, or are afraid to exercise their rights due to a fear of retaliation," a risk which is even greater when the right at issue varies so drastically between states.[60] Given the variations in state housing laws, workers might be more reluctant to work with advocates and governmental agencies, particularly if the workers experienced retaliation by employers in the past. This hinders states' ability to ensure housing providers and employers comply with state laws, particularly given reports of employers' use of isolation and monitoring "as a means of controlling workers and forcing them to accept substandard and illegal working conditions."[61] A national standard regarding workers' right to guests assists with meeting workers' essential needs and ensures employers comply with federal, state, and local laws regarding housing and working conditions, including reducing labor exploitation and trafficking.

C. Eliminating the requirement to offer, advertise, and pay prevailing piece rate wages is contrary to law, arbitrary and capricious, and will harm U.S. farmworkers and state enforcement efforts

The State AGs oppose DOL's proposal to rescind the 2024 modifications to 20 C.F.R. § 655.120(a) and 655.122(l) that clarified the longstanding regulatory requirements that employers offer, advertise, and pay the highest of the prevailing piece rate, the Adverse Effects Wage Rate (AEWR), or other wages. DOL's Proposed Rule fails to offer any reasoned justification for its intent to then interpret and enforce the pre-July 2024 version of 20 C.F.R. § 655.120(a) and 655.122(l) inconsistently throughout the United States and in conflict with congressional intent, well-established law, and DOL's own previous position. This proposal for patchwork enforcement both violates the law and will create significant confusion for workers, employers, and state agencies. Further, DOL completely fails to grapple with evidence that the Proposed Rule will

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[57] Legal Aid of North Carolina, *supra*.
[58] *See* Reena K. Shah and Lauren E. Bartlett, *Human Rights in the United States: Legal Aid Alleges that Denying Access to Migrant Labor Camps is a Violation of the Human Right to Access Justice,* 20(1) Hum. Rts. Br. 15 (2012), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1851&context=hrbrief (documenting incidents in which agricultural employers and law enforcement prevented legal aid workers from conducting outreach to migrant farmworkers).
[59] Legal Aid of North Carolina, *supra.*
[60] 89 Fed. Red. at 34019 (one organization also noted that workers they work with believe "Private Property" or "No Trespassing" signs on gates means they are not permitted to have guests.)
[61] *Id*. at 34017.

adversely affect the wages of U.S. farmworkers and the available labor supply in direct opposition to Congress' intent. Finally, the State AGs are concerned that the Proposed Rule will make it more difficult for State Workforce Agencies (SWAs) to enforce H-2A regulations.

1. The Proposed Rule violates court rulings on the meaning of the regulation and departs from DOL's previous position without justification

DOL's proposal to rescind the requirement that employers offer, advertise, and pay a prevailing piece rate is contrary to Congress' intent, well-established law, and its own position. It is Congress' intent that an employer's use of the H-2A program "will not adversely affect the wages and working conditions of workers in the United States similarly employed."[62] In order to do so, regulations both before and after June 28, 2024, require that "an employer must offer, advertise in its recruitment, and pay a wage that is at least the highest of: [t]he AEWR; [a] prevailing wage rate…; [t]he agreed upon collective bargaining wage; [t]he Federal minimum wage; [or] [t]he State minimum wage."[63] The Ninth Circuit held that the previous versions of 20 C.F.R. § 655.120(a) and 655.122(l)—to which DOL proposes to revert—require that employers list the prevailing-wage piece rate on job orders.[64] This has also been DOL's position: that the regulations in effect before July 28, 2024, required employers to offer and advertise in their recruitment the highest of the AEWR, prevailing wage rate, or other wage.[65] DOL affirmed that any confusion created by the trio of BALCA decisions[66] "did not negate the clear regulatory requirement that an employer 'offer, advertise in its recruitment, and pay' the highest of the wage rates enumerated in § 655.120(a), including any applicable prevailing piece rate."[67] The 2024 version of the regulation was adopted only to clarify "the clear regulatory requirement" that the employer offer and advertise prevailing wages.[68] DOL offers no justification for failing to require employers to list applicable prevailing

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[62] 8 U.S.C. § 1188(a)(1)(B).

[63] 20 C.F.R. § 655.120(a) (internal numbering omitted) (quoting language consistent in the versions in effect before and after June 28, 2024).

[64] *See e.g. Hernandez v. Su*, No. 23-35582, 2024 WL 2559562, at *1 (9th Cir. May 24, 2024) ("The DOL regulation at issue [pre-July 28, 2024 version] requires that an employer seeking to hire temporary foreign agricultural workers under the H-2A visa program 'offer, advertise in its recruitment, and pay a wage that is at least the highest of' various listed wages. 20 C.F.R. § 655.120(a) . . . . When the prevailing wage is a piece-rate, § 655.120(a) requires that an H-2A employer offer it.").

[65] 89 Fed. Reg. at 33956, 33959 ("As the Department explained in the NPRM, the current regulations [in effect before July 28, 2024] at §§ 655.120(a) and 655.122(l) require an employer to 'offer, advertise in its recruitment, and pay' the highest of the AEWR, prevailing wage rate, collective bargaining agreement (CBA) rate, or Federal or State minimum wage . . . . the clear regulatory requirement that an employer "offer, advertise in its recruitment, and pay" the highest of the wage rates enumerated in § 655.120(a), including any applicable prevailing piece rate.").

[66] As DOL has previously explained, though three decisions of the Department's Board of Alien Labor Certification Appeals (BALCA) construing earlier versions of the regulations "restricted OFLC from requiring employers to include an applicable prevailing piece rate on the job order on the ground that OFLC does not (and cannot) know at the certification stage whether a prevailing piece rate will be higher than the hourly wage and, as a result, also limited WHD's enforcement abilities, these decisions did not negate the clear regulatory requirement that an employer "offer, advertise in its recruitment, and pay" the highest of the wage rates enumerated in § 655.120(a), including any applicable prevailing piece rate." 89 Fed. Reg. at 33959.

[67] *Id.*

[68] *Id.* ("[T]he Department adopts with certain modifications the proposed revisions to §§ 655.120(a) and 655.122(l) to clarify that where there is an applicable prevailing piece rate, or where an employer intends to pay a piece rate or other non-hourly wage rate, the employer must include the non-hourly wage rate on the job order along with the highest hourly rate, and must pay workers' wages using the wage rate that will result in the highest wages for each worker in each pay period.") (emphasis added).

piece rates in violation of legal authority. Nor does it offer any reasoned explanation for departure from its position that § 655.120(a) *requires* employers to list applicable piece rates on job orders. DOL's failure to justify this change in its position or any justification for enforcing the rule in an unlawful manner is arbitrary and capricious.

DOL also fails to justify its intention to enforce the regulation in a patchwork manner, contrary to the established meaning of §§ 655.120(a) and 655.122(1). In fact, DOL explicitly acknowledges that "the intended effect of the proposed rescission will be to clarify that employers seeking to employ H-2A workers outside of the Ninth Circuit are not required by § 655.120(a) to list applicable prevailing piece rates on job orders."[69] The Ninth Circuit clearly held that the previous versions of §§ 655.120(a) and 655.122(1) require that employers offer, advertise, and pay the piece rate wage when it is the prevailing wage.[70] The court further noted that allowing employers or DOL to ignore this provision would also nullify § 655.120(c), which defines the procedure for determining prevailing wages and "repeatedly notes that prevailing wages are denominated in 'the unit of pay used to compensate the largest number of U.S. workers.'"[71] DOL's proposal to enforce the regulations contrary to this holding outside of the Ninth Circuit is contrary to law—the regulation cannot have one meaning in one region and another meaning elsewhere. And DOL offers no explanation for its position that is incompatible with the legal interpretation and plain meaning of the regulation. DOL's reference to the *Barton* litigation to claim that the question of whether an employer is obligated to disclose and pay a piece rate "remains contested and is actively being litigated" cannot plausibly explain their intended enforcement plan. The *Barton* decision did not address the versions of §§ 655.120(a) and 655.122(1) in effect before July 28, 2024, and DOL itself has clarified that employers' requirements to offer and pay the prevailing piece rate when it is the highest of the listed wages has remained unchanged.[72]

Furthermore, irregular enforcement of §§ 655.120(a) and 655.122(1) throughout the country will create confusion for workers and employers. Employers and farm labor contractors who operate in multiple states with different enforcement schemes will face conflicting standards, increasing the likelihood of intentional and unintentional noncompliance. Corresponding U.S.-based workers who migrate to work for employers in different states will be uncertain of their rights to be advised of and paid a prevailing piece rate.

2. The proposal fails to consider evidence that eliminating prevailing piece rate work will reduce wages of U.S.-based farmworkers

DOL offers no explanation or discussion of how they will avoid depressing the wages of U.S.-based agricultural workers. Elimination of the obligation that employers list the prevailing piece rate wages on job orders will depress wages for U.S.-based workers too because piece rate

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[69] 90 Fed. Reg. at 28925.

[70] *Hernandez*, 2024 WL 2559562, at *1 ("The DOL regulation at issue requires that an employer seeking to hire temporary foreign agricultural workers under the H-2A visa program 'offer, advertise in its recruitment, and pay a wage that is at least the highest of' various listed wages. 20 C.F.R. § 655.120(a). Those wages include the 'Adverse Effect Wage Rate' ('AEWR'), which is always an hourly wage, and the 'prevailing wage,' which sometimes is a piece-rate wage tied to a worker's productivity. *Id.* § 655.120(a)-(c). When the prevailing wage is a piece-rate, § 655.120(a) requires that an H-2A employer offer it.").

[71] *Id.*

[72] *Barton,* 757 F. Supp. 3d.

wages offer workers the opportunity to earn more than the AEWR. If piece rate wages are not listed in the job order, employers essentially avoid the requirement to pay them even if they would be higher than the AEWR because DOL's ability to enforce piece rate wages not identified in the job order is limited.[73] Workers will also be unaware of the piece rate wages to which they should have been entitled and will have limited means to enforce their right to these wages. Because the terms of a job order apply equally to H-2A workers and all corresponding U.S-based workers, this has the effect of reducing wages for U.S-based agricultural workers who would also not be paid prevailing piece rate wages that offer them the opportunity to earn more than the AEWR or other listed wages.[74]

Federal courts in Washington have found that "Washington farmworkers earn more wages when working at a piece-rate pay system versus an hourly pay system, and . . . these workers rely on these wages to survive."[75] An expert report found that at least 70% of piece rate harvest workers in the Northwest and 61% in California had hourly earnings that were higher than the AEWR.[76] Between 2011 and 2020, these workers earned an average of 41% more per hour than harvest workers paid on an hourly basis in the Northwest and 24% more in California.[77] Allowing employers to choose whether or not to offer and pay piece rate wages is detrimental for wages of U.S-based agricultural workers, a workforce already vulnerable due to low wages and reliance on seasonal employment. It also contributes to a compounding wage depression. The lack of piece rate pay will be incorporated into wage surveys and will establish lower prevailing wages in the future.

DOL has previously and repeatedly recognized that the requirement that employers offer, advertise, and pay the highest of these wages "ensures that domestic workers receive the greatest potential protection from adverse effects on their wages and working conditions."[78] DOL further noted that use of the AEWR rather than a higher alternative would disadvantage U.S-based workers.[79] In 2023, DOL reiterated that prevailing wages "continue to serve as an important protection for workers in crop and agricultural activities that offer piece rate pay or higher hourly rates of pay than the AEWR."[80] As DOL noted, "[p]ermitting employers unfettered flexibility to

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[73] 89 Fed. Reg. at 33959 (restricting DOL from requiring employers to include an applicable prevailing piece rate on the job order "also limited WHD's enforcement abilities").

[74] *Hernandez,* 2024 WL 2559562, at *1 ("When the prevailing wage is a piece-rate, § 655.120(a) requires that an H-2A employer offer it. Such a wage is always 'at least the highest of' the listed wages because a piece-rate wage offers workers the opportunity to earn more than they might under an hourly wage.").

[75] *Familias Unidas por la Justicia, AFL-CIO v. U.S. Dep't of Lab.*, No. 2:24-cv-00637-JHC, 2024 WL 3276419, at *8 (W.D. Wash. July 2, 2024), *opinion clarified*, No. 2:24-cv-00637-JHC, 2025 WL 963246 (W.D. Wash. Mar. 31, 2025).

[76] Decl. of Zachariah Rutledge, *Familias Unidas por la Justicia, AFL-CIO v. U.S. Dep't of Lab.*, No. 2:24-cv-00637-JHC, 2024 WL 5346964 (W.D. Wash. May 10, 2024).

[77] *Id.*

[78] 75 Fed. Reg. 6884, 6893 (Feb. 12, 2010) ("The requirement that imported foreign temporary workers be paid no less than the highest of the AEWR, the local prevailing wage, the collectively bargained wage, or the applicable legal minimum wage ensures that 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.").

[79] *Id.* ("In cases in which the AEWR is not higher than the prevailing wage…incumbent domestic workers would be disadvantaged by the use for the AEWR instead of the higher alternative…").

[80] 88 Fed. Reg. 12760, 12775 (Feb. 28, 2023) ("The Department notes that prevailing wages for particular geographic areas and agricultural activities, determined using State-conducted prevailing wage surveys, will continue to serve as

pay wages rates not listed in the job order similarly undermines the Department's labor market test and its ability to prevent an adverse effect on the wages or working conditions of similarly employed workers in the United States."[81]

DOL offers no explanation for reversing its position nor grapples with how failing to enforce prevailing piece rate wages will avoid the detrimental effect it previously foreshadowed on the wages of local workers. Furthermore, DOL offers no explanation for how it will comply with its congressional mandate to ensure that use of the H-2A program does not adversely affect U.S. workers if it is unable to enforce the payment of prevailing piece rate wages for corresponding U.S-based workers.[82]

3. The Proposed Rule fails to consider the negative impact on available U.S.-based labor supply

DOL's proposal also fails to consider how its proposal will artificially decrease the U.S. agricultural labor supply. In Washington State, the growth of the H-2A program has been accompanied by displacement and discrimination against U.S-based workers. Washington has seen a 420% increase in requests for H-2A workers since 2013, when DOL certified 6,349 H-2A workers requested by Washington employers, compared to 33,049 in 2022.[83] At least some of this H-2A program growth has caused displacement of local workers. Washington's Office of the Attorney General has brought enforcement actions against employers for discriminating against and displacing U.S-based workers in their use of the H-2A program.[84] This displacement and discrimination of local workforces in favor of H-2A workers is often fueled by employers failing to offer local workers the terms and conditions of employment that are typical in the agricultural industry, such as piece rate wages and full-time work during harvest. When local agricultural workers are unable to earn enough at their employer to support themselves and their families, they are forced to find employment elsewhere. Thus, by allowing H-2A employers to choose not to offer prevailing piece rate wages, employers can make their employment less desirable and create a manufactured labor shortage because they can no longer attract local workers.

A critical aspect of ensuring that employers' use of the H-2A program does not adversely affect local workers is enforcement of prevailing wages, including prevailing piece rate wages, because it allows agricultural workers the opportunity to earn more during distinct seasons, such as harvest. The requirement to advertise, offer, and pay the higher of the prevailing wage or AEWR

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an important protection for workers in crop and agricultural activities that offer piece rate pay or higher hourly rates of pay than the AEWR.").

[81] 89 Fed. Reg. at 33959.

[82] 89 Fed. Reg. at 33957 ("[B]ecause the prevailing piece rate is not included on the job order, in most such instances, WHD is not able to enforce the prevailing piece rate.").

[83] JLARC, *ESD Administration of the H-2A Temporary Worker Visa Program, 24-03 Final Report* (April 2024), https://leg.wa.gov/jlarc/reports/2024/H2AVisa/f_c/default.html.

[84] *See* Press Release, Washington State Office of the Attorney General, *Sunnyside mushroom farm*, *supra*; Press Release, Washington State Office of the Attorney General, *AG's civil rights, consumer protection investigation results in $180,000 payment from agricultural grower King Fuji Ranch* (April 22, 2025), https://www.atg.wa.gov/news/news-releases/ag-s-civil-rights-consumer-protection-investigation-results-180000-payment; Press Release, Washington State Office of the Attorney General, *AG Brown sues Toppenish grower for discriminating against Washington farmworkers and women* (June 20, 2025), https://www.atg.wa.gov/news/news-releases/ag-brown-sues-toppenish-grower-discriminating-against-washington-farmworkers-and.

ensures that DOL is able to fulfill its statutory duty to protect U.S.-based workers by ensuring employers are offering prevailing wages necessary to recruit and retain U.S-based workers.

4. The proposal to rescind requirements to offer prevailing piece rate wages will make it more difficult for state enforcement agencies

DOL's Proposed Rule will force state agencies to shoulder the burden of enforcing wages and working conditions for U.S-based workers. In addition to not requiring employers to list the prevailing piece rate wage outside the Ninth Circuit, DOL provides no assurance that it will enforce violations of employers' requirements to pay the prevailing piece rate wage in the Ninth Circuit or otherwise. Thus, enforcement of the requirement that employers pay the highest of the prevailing piece rate wage will be left to state agencies enforcing wage laws, while at the same time, a failure to list a prevailing piece rate wage in the job order diminishes state's enforcement capabilities. For example, Washington law makes it a crime for an employer to "pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract[.]"[85] If DOL abandons its obligation to require H-2A employers to list the prevailing piece rate wages in job orders, it denies H-2A and corresponding U.S-based workers the contract obligation of payment for those wages and impedes state agencies charged with enforcing employment laws for workers.

D. DOL fails to grapple with loss of wages to U.S-based workers caused by delay of AEWR effective date

The State AGs oppose DOL's proposal to rescind the 2024 H-2A Final Rule provisions at § 655.120(b)(2)-(3) and revert to allowing employers up to 14 days to pay updated AEWR rates. The Department's proposal will negatively affect the wages of corresponding U.S-based workers as they lose up to two weeks of higher wage rates. DOL's Proposed Rule asserts a "transfer" of $12.66 million annually and $88.92 million over ten years from H-2A *employees* to H-2A *employers* which "are the results of the elimination of the immediate effective date for the updated AEWRs[.]"[86] Because under the new rule employers will not have to pay workers updated AEWR rates for up to two weeks, DOL calculates that H-2A workers will lose $12.66 million in wages annually, saving employers those $12.66 million.

Significantly, though DOL acknowledges that elimination of the immediate effective date for updated AEWRs "will also result in wage transfers from [U.S.] workers in corresponding employment to U.S. employers,"[87] the Department fails to make any attempt to value or quantify the loss of wages to corresponding U.S. workers. In Washington State, for example, state agency enforcement actions involve employers that employ equal if not more corresponding U.S. farmworkers than H-2A workers. Thus, the transfer of wages owed to U.S-based workers who reside permanently in Washington and invest their wages in local communities to employers is likely equal to or greater than the transfer in Washington of wages from H-2A workers to employers. DOL acknowledges that its purpose in passing the 2024 version was "to ensure H-2A

[85] RCW 49.52.050.
[86] 90 Fed Red. 28919, 28933.
[87] *Id.* at 28936 n.45.

and corresponding workers receive the most current AEWR at the time work is performed,"[88] but offers no explanation for abandoning this method of ensuring the program has no adverse impact on U.S-based worker wages.

The Proposed Rule also fails to consider alternative options, such as allowing employers a delayed period of enforcement to address concerns with the logistical challenges of immediately updating payroll systems but requiring the employers to pay the backpay amount earned under the updated AEWR since the date of its publication within the 14-day period. This would give employers reasonable time to adjust their systems, while not depriving both H-2A and U.S.-based workers of the wages they are owed.

E. DOL's proposed rule limiting requirement to specify productivity standards harms workers, burdens state agencies, and fails to prevent employer abuses

The State AGs oppose DOL's Proposed Rule to rescind current 20 C.F.R. § 655.122(l)(3) and reinstate the 20 C.F.R. § 655.122(l)(2)(iii). DOL's proposal will omit the requirement that employers not paying by the piece rate specify in their job offer any minimum productivity standards required as a condition of job retention. In the experience of State AGs, some H-2A employers attempt to unlawfully use productivity standards to terminate and push out U.S.-based workers in favor of hiring H-2A workers. Arbitrary productivity standards have also been used by unscrupulous employers as a tool to retaliate against workers who have made complaints about working conditions or otherwise attempted to protect their rights as employees. The current 20 C.F.R. § 655.122(l)(3) that requires all employers to specify any productivity standards that are a condition of job retention in the job offer is valuable to avoid such abusive and unlawful uses of productivity standards. It further provides the benefit of ensuring H-2A and corresponding U.S.-based workers are clearly informed about the terms and expectations of the job. Rescission of this requirement will put a greater a burden on state agencies enforcing anti-discrimination laws on behalf of H-2A and U.S.-based workers, as productivity standards will continue to be available as a tool for unscrupulous employers to wield to displace or retaliate against workers.

F. DOL fails to consider the inefficiency for state agencies and risk of increased worker abuses in its proposal to revoke the nationwide effect of discontinuation

The State AGs oppose rescinding provisions of the 2024 Final Rule in 20 C.F.R. § 653.501(b)(4) and §§ 658.502–658.504 that strengthened the ability of SWAs to discontinue Wagner-Peyser Act Employment Services to employers. The SWA's ability to discontinue services is a powerful tool—and the *only* tool many states can use to bring employers into compliance with the H-2A program requirements. The Proposed Rule will rescind a nationwide list of state discontinuations and revoke a state's authority to discontinue services based on findings in another state. This will make it more difficult for SWAs to discontinue services for employers that have abused the H-2A program in other states, incentivize bad actors to simply relocate to a new state to continue violating the H-2A program, and most concerning, increase the risk of violations and abusive working conditions for both H-2A and U.S.-based workers.

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[88] *Id.* at 28925.

H-2A employers often operate across state lines, and, over the last decade, the rate of employers seeking H-2A workers in multiple states has increased.[89] In 2020, almost 50,000 H-2A jobs were for employment in a different state from the H-2A employer's home state.[90] The vast majority—85%—of H-2A employers who seek to fill H-2A jobs outside of their home state are farm labor contractors.[91] In 2020, farm labor contractors accounted for 44% of H-2A jobs certified, and over one-third of farm labor contractors contracted H-2A workers across state lines.[92] And farm labor contractors who flout H-2A requirements often bring workers to multiple states, allowing them to evade state enforcement.[93] Revoking the ability of SWAs to hold employers accountable from state to state while interstate H-2A employment is rising hobbles SWAs' ability to protect H-2A and U.S-based workers.

SWA enforcement varies across the states. For example, Washington State's SWA issues several notices of discontinuance to employers each year. In some instances, employers provide additional information to demonstrate their compliance with the H-2A program. But these notices also result in final discontinuances, often for employers that have subjected H-2A and U.S.-based workers to egregious working conditions, unsafe housing, and labor trafficking. One such employer was Global Horizons, a farm labor contractor based in California who recruited H-2A workers from Thailand to work in Hawaii, California, and Washington. Global failed to provide worker agreements; housed workers in unapproved, unsafe, and unsanitary housing; and underreported the number of workers it brought to Washington; among many other violations.[94] Washington's SWA investigated and settled with Global, though ultimately discontinued Global from employment services after it breached the settlement agreement.[95] Despite this, DOL spent years litigating against Global before debarring Global from the H-2A program based on conduct in California and Hawaii.[96] Similarly, blueberry grower Munger Bros. LLC and related companies engaged in numerous H-2A violations in Washington, Oregon, and California.[97] The companies

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[89] Marcelo Castillo et. al, *The H-2A Temporary Agricultural Worker Program in 2020*, Economic Research Service, U.S. Dep't of Ag., August 2022, at 2, https://doi.org/10.22004/ag.econ.329068.
[90] *Id.* at 26.
[91] *Id.* at 2.
[92] *Id.*
[93] *See, e.g.*, Larissa Babiak, *Tri-Cities farm labor group fined $252K, banned for mistreating workers, moldy housing*, Tri-City Herald (Oct. 13, 2024), https://www.tri-cityherald.com/news/business/agriculture/article293784374.html (noting that farm labor contractor Harvest Plus LLC housed workers in both Washington and Oregon).
[94] Senate Bill Report, SB 6352, Senate Comm. on Labor, Commerce, Research & Development, at 2 (Jan. 26 2006), https://lawfilesext.leg.wa.gov/biennium/2005-06/Pdf/Bill%20Reports/Senate/6352.SBR.pdf?q=20211211124443; U.S. DOL News Release, *Judge Orders Repayment of $347,000 in Back Wages and Penalties, 3-Year Debarment of Global Horizons from H-2A Agricultural Program* (May 19, 2011), https://www.dol.gov/newsroom/releases/whd/whd20110519.
[95] *Glob. Horizons, Inc. v. Dep't. of Lab. and Indus.*, 157 Wash. App. 1066 (2010) (unpublished opinion).
[96] *Administrator, Wage and Hour Division, USDOL v. Global Horizons Manpower, Inc.*, ARB No. 09-016, ALJ No. 2008-TAE-3 (Dec. 21, 2010), https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/TAE/09_016.TAEP.PDF; U.S. DOL News Release, *Judge Orders Repayment of $347,000 in Back Wages and Penalties, 3-Year Debarment of Global Horizons from H-2A Agricultural Program*, (May 19, 2011), https://www.dol.gov/newsroom/releases/whd/whd20110519, (May 19, 2011).
[97] Columbia Legal Services, *Class Action Filed Against Munger Brothers and Sarbanand Farms for Pattern of Threats and Intimidation That Violated Federal And WA State Labor Laws* (Jan. 25, 2018), https://columbialegal.org/class-action-filed-against-munger-brothers-and-sarbanand-farms-for-pattern-of-threats-and-intimidation-that-violated-federal-and-wa-state-labor-

were eventually debarred from the H-2A program in 2019.[98] The Proposed Rule will make it more difficult for SWAs to prevent employers like Global and Munger from abusing workers in their states until those employers are debarred, even when those employers have been previously discontinued in a different state.

The Proposed Rule fails to provide a colorable explanation, much less one supported by facts, for DOL's change in position. In 2024, the changes in the Final Rule were "designed to increase the reach and utility of the discontinuation of services regulations" given the fact that SWAs have infrequently used these regulations "relative to the number of complaint and apparent violations."[99] Now, the Proposed Rule states that it is rescinding provisions of the Final Rule that "are not necessary for the efficient functioning of the ES."[100] DOL takes the position that it is "appropriate" for the discontinuation of services to be "effective only in the States in which they are issued" but offers no explanation for this shift in its position. Further, DOL fails to consider the facts and realities of the H-2A program described above: employers often operate in multiple states, and cross-coordination *increases* efficiency to hold employers accountable regardless of state lines.

The Proposed Rule would dramatically reduce the ability of SWAs to limit abuse of the H-2A program in multiple ways. First, the Proposed Rule eliminates the Department's Office of Workforce Investment discontinuation of services list, which would have provided a nationwide list of employers discontinued in any state and rescinds the requirement that SWAs must consult this list prior to placing a job order into intrastate or interstate clearance.

Second, the Proposed Rule rescinds the ability of SWAs to withhold approval of a clearance order for placement into intrastate or interstate clearance even if the SWA is aware that the employer has been discontinued in another state. The 2024 Final Rule stated that if an employer requesting access to the clearance system is currently discontinued from receiving ES services *by any state*, the SWA must not approve the clearance order. But the Proposed Rules would eliminate "by any State" to instead say "by the order-holding SWA," which would mean that SWAs can only rely on previous discontinuances in their own state. This has the effect of forcing SWAs to approve a clearance order that is otherwise qualified even if the SWA is aware that the employer has been discontinued in another state. The result of this information loss and decreased authority for SWAs will increase costs to the state agencies, given that a state is more likely to approve a clearance order without knowing the employer was discontinued previously in another state, makes enforcement more difficult, and increases violations and abuses of the H-2A program. Not only is this an inefficient use of state resources, it puts workers at risk and encourages employers to simply relocate operations to a second state when they are discontinued in the first state. The H-2A program is a national one—a piecemeal approach to enforcement only serves to reward bad actors and increase violations at the expense of vulnerable workers.

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laws/#:~:text=SEATTLE%20%E2%80%93%20Today%2C%20H%2D2A%20farmworkers%20who%20picked,last%20year%20filed%20an%20employment%20rights%20class.

[98] Consent J. and Order, *Scalia v. Munger Bros, LLC et al*, No. 2:19-cv-02329 (Nov. 19, 2019), https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2019/11/WHD20192089.pdf.

[99] 89 Fed. Reg. at 33903.

[100] 90 Fed. Reg. at 28931.

State SWAs are, in many instances, in the best position to review and manage H-2A compliance given their unique role under the Wagner-Peyser Act. Without the ability to know whether an employer has been discontinued in another state, and without the authority to discontinue services based on that information, states are left without the ability to enforce the H-2A program, putting both H-2A workers and U.S.-based workers at risk.

G. Proposed changes to employers' hearing rights do not consider the burden on state agencies

DOL's Proposed Rule would allow employers to request a hearing earlier and more frequently, resulting in inefficiencies and investigative challenges for state SWAs charged with administering compliance with H-2A regulations. In 2024, the Final Rule allowed an employer to seek a hearing at the end of the discontinuation process. After a final determination, employers had an opportunity to submit rebuttal evidence or appeal and stay the discontinuance. This made more sense sequentially, removed the burden on the SWA at the beginning of the process to track the 20-day deadline, and allowed a complete record of decision-making on appeal. Now, the Proposed Rule would allow employers to request a pre-final discontinuation hearing within a 20-day period to "provide maximum process to employers"—leaving the state agencies to bear the costs of defending a discontinuance with limited information.[101]

H. The Proposed Rule's recission of the requirement to collect and disclose foreign labor recruiter information is arbitrary and capricious and limits law enforcement's efforts to prevent human trafficking

The State AGs oppose DOL's Proposed Rule to rescind 20 C.F.R. § 655.137, § 655.135(p), and § 655.167(c)(8). Under the Proposed Rule, DOL would "rescind all regulatory and related data collection requirements requiring employers to identify any foreign labor recruiters, and to provide copies of the agreements between the employer and such recruiter(s) at the time of filing."[102] DOL justifies this recission because of "the time and burden to collect this information; the need for employers to understand their information disclosure, retention, and production obligations; the ability to access this information and the timing of the collection, including the obligation and burden to update the information."[103] However, this burden is balanced against the pervasive presence of human trafficking that permeates the H-2A program and DOL's efforts at prevention. State AGs oppose the recission of these sections because the burden to employers is outweighed by the benefit provided to enforcement efforts to protect vulnerable workers from exploitation and abuse.

Numerous commentators and studies have identified that the H-2A program has struggled to stop worker abuse during the recruitment process.[104] According to Guidance provided by DOL, the U.S. Department State, and the U.S. Agency for International Development, the recruitment

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[101] 90 Fed. Reg. at 28932.
[102] *Id*.
[103] *Id.* at 28928.
[104] 89 Fed. Reg. at 34026; *see* U.S. Department of Labor, U.S. Department of State, and U.S. Agency for International Development, *Guidance on Fair Recruitment Practices for Temporary Migrant Workers*, 1 (2022), https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/06/ILAB20220565.pdf; Grinspan, *supra*; Tina Vasquez, *supra*; Polaris Project, *supra* at 13–18.

of H-2A workers can lead to abuse, including "labor exploitation, human trafficking, and gender-based violence."[105] In fact, in a survey conducted with 16,000 victims of human trafficking, more than half "were foreign nationals holding legal visas of some kind, including temporary work visas."[106] It is under these circumstances that DOL has proposed limiting an information gathering tool in the regulation.

The State AGs are firmly committed to fighting trafficking in all forms, and this issue presents an area of potential bipartisan consensus. This uncommon opportunity for bipartisanship underscores the problem at hand and leaves the State AGs to question why DOL would now limit our common efforts by determining that the documentation of foreign worker recruitment is too burdensome on employers of H-2A workers. While it may create some additional burdens for employers, they do not compare to the magnitude of the challenge we face with human trafficking. The expectation that a business should collect and maintain records to protect their workers from criminal exploitation is far from lofty. And even if that the burden does pose challenges, the role of an enforcement agency like DOL supersedes the interests of individual employers if it can help prevent human trafficking.

Furthermore, the decision to rescind 20 C.F.R. § 655.137 defies logic when the justification for this recission is viewed against the requirements for employers of H-2B workers. As noted in the 2024 Rule, employers of H-2B workers are likewise required to "provide copies of their agreements with foreign labor recruiters and disclose information about the foreign labor recruiters that have or will be engaged in the recruitment of H–2B workers in connection with the employer's applications."[107] The proposal to rescind the 2024 requirement for H-2A workers while leaving the H-2B requirement is not only illogical, it is arbitrary and capricious.

Given the prevalence of human trafficking throughout the H-2A program, the bipartisan desire for a solution, and the indistinct requirements for employers of H-2B workers, this recission is arbitrary and capricious.

I. Recission of termination for cause and progressive discipline definitions will harm workers and fails to account for vulnerabilities of the H-2A workforce

The State AGs oppose the proposed rescission of the 2024 Final Rule's definition of "termination for cause" and related progressive discipline requirements at 20 C.F.R. §§ 655.122(n)(2), (n)(4)(ii) and (n)(4)(iii). DOL reasoned that the protection was not necessary to protect U.S. workers similarly employed because the protection "is generally not explicitly required by law" for U.S. workers.[108] Yet, DOL fails to grapple with the particularly vulnerable nature of H-2A workers whose employment is tied to a single employer and their related need for additional protections to avoid the risk of exploitation. DOL further fails to address the benefits for workers of increased transparency about the terms of employment, which will be lost with the Proposed Rule. The 2024 Final Rule provided clarity for employers and protection for workers, given the stark consequences of a termination for cause—after which a worker is no longer entitled

[105] U.S. Department of Labor, U.S. Department of State, & U.S. Agency for International Development, *supra* at 1.
[106] Polaris Project, *supra* at 13–18.
[107] 89 Fed. Reg. at 34025.
[108] 90 Fed. Reg. at 28928.

to payment for outbound transportation, the three-fourths guarantee, or, if a domestic worker, to be contacted for work in the next year.[109] Rescission of this definition is not rational and contrary to the aim of protecting a vulnerable workforce.

J. Recission of new delayed start date procedure fails to protect workers and DOL offers no justification for the change in its position that the measures were necessary to protect workers

The State AG's oppose the Proposed Rule's elimination of the new delayed start procedure in the 2024 Final Rule at § 655.175.[110] The 2024 Final Rule revised the procedure for minor delays in start date, requiring up to two weeks of pay where the employer failed to give 10 business days of notice of a delay in start date.[111] DOL found the prior regulation's "one week of wages is insufficient to protect workers from the financial hardship associated with a delayed starting date when such delays were not communicated."[112] The 2024 Final Rule discussed H-2A worker experiences with delayed start dates.[113] In contrast, DOL provides no reasonable justification for this change in position nor any explanation for why one week of wages is no longer insufficient to protect workers. The Proposed Rule improperly focused on the burden on employers.[114]

III. CONCLUSION

The Proposed Rule seeks to rescind key protections and enforcement mechanisms from the 2024 Final Rule. The 2024 Final Rule changes furthered the H-2A programs statutory requirements—that the H-2A program applies only where U.S.-based workers are unable to fill the need and under conditions that will not undercut U.S.-based workers. By dismantling these protections and enforcement mechanisms, the Proposed Rule risks further exploitation of H-2A workers and the related harm to the U.S.-based workforce. Based on the real risk of harm to all workers, and for the reasons above, the State AGs ask DOL to withdraw the Proposed Rule.

Respectfully submitted,

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[109] 89 Fed. Reg. at 33969
[110] 90 Fed. Reg. at 28929–30.
[111] 89 Fed. Reg. at 33903.
[112] *Id.* at 33915–16.
[113] *Id.* at 33915.
[114] *Id.*

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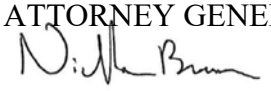

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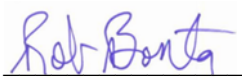

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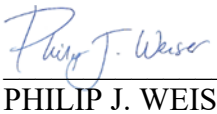

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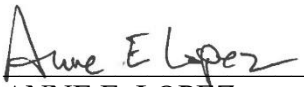

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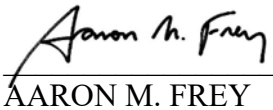

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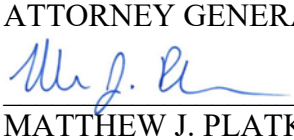

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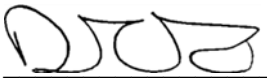

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