AMERICAN FARM BUREAU FEDERATION®
600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024

ph. 202.406.3600
f. 202.406.3602
www.fb.org

November 14, 2023

Kimberly Vitelli, Administrator
Office of Workforce Investment
Employment and Training Administration,
Department of Labor
200 Constitution Avenue NW, Room C–4526
Washington, DC 20210

Brian Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue NW, Room N– 5311
Washington, DC 20210

Amy DeBischop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
Department of Labor, Room S–3502
200 Constitution Avenue NW
Washington, DC 20210

RE: ETA-2023-0003 Improving Protections for Workers in Temporary Agricultural Employment in the United States

Dear Administrator Vitelli, Administrator Pasternak, Director DeBischop:

On behalf of its nearly 6 million members involved in American agriculture, the American Farm Bureau Federation (AFBF) presents comments on the Notice of Proposed Rulemaking (NPRM) entitled *Improving Protections for Workers in Temporary Agricultural Employment in the United States* (RIN 1205-AC12).

AFBF represents farmers and ranchers throughout the United States, specifically all fifty states and the territory of Puerto Rico. It is the largest general farm organization in the country. Since its inception in 1919, AFBF has been on the frontlines of advocacy for our members who represent every commodity from aquaculture to zucchini, stretching from Maine to Hawaii. Permeating the history and diversity of our membership is the undisputed reliance on a healthy and sustainable labor force. Farmers and ranchers readily recognize their employees as the industry's greatest asset and the lifeblood of the farming enterprise. Over the decades, the H-2A program has grown in usage to reflect a shrinking domestic agricultural workforce. Despite the substantial costs, administrative hurdles, and regulatory burdens imposed on users of the program, U.S. farm families have increasingly relied on H-2A workers on a seasonal, temporary basis to plant, harvest, and maintain their operations. Many AFBF members relay the strong

bonds that their families form with these workers. For longtime participants in the program, some cite the same returning workers for as long as twenty years. This is a testament to the mutual respect and trust that defines many working relationships between farmer and H-2A employee.

In short, DOL's proposal does not reflect that reality. The approach and direction of this rulemaking adopts a "guilty-until-proven-innocent" premise toward that sets a misguided precedent. A high bar should be set for any federal regulatory actions. Respectfully, AFBF does not believe that bar is reached to justify this rulemaking. AFBF opposes this rulemaking for the reasons explained in this document.

It is also important to note that this rulemaking conspicuously attempts to apply several National Labor Relations Act (NLRA) provisions to agricultural employers. The NLRA explicitly exempts agriculture. Congress assigned a separate set of legislative standards to agricultural workers via the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Therefore, the Department's attempts to disregard congressional intent and current law to apply NLRA provisions to exempt industries should be corrected prior to final rulemaking. AFBF strongly encourages the Department to reevaluate its proposal to ensure it aligns with relevant acts of Congress.

Denied Extension Request for Public Comment

Before addressing the substance of the proposed rule, AFBF wishes to address the Department's denial of comment period extension requests.

AFBF, along with many individual organizations and coalitions representing the regulated community, submitted timely requests to extend the comment period. In fact, a bipartisan group of 28 U.S. Senators even took the rare step of submitting a joint request to extend the comment period for their constituents to properly supply comment. These requests highlighted the flurry of recent administrative actions, chiefly by U.S. Department of Labor, which has created an unusually challenging environment to respond to the NPRM.

In its response denying the extension, Assistant Secretary Nayak defended the 60-day comment period for this NPRM as "reasonable and adequate," citing the similar comment period for the more expansive H-2A program rule finalized in 2022. Assistant Secretary Nayak's conclusion seems to ignore the number of concurrent rulemakings in play at this time, including DOL's concurrent rulemakings on amending the worker walkaround representative designation process, addressing overtime thresholds for certain salaried workers, and exploring a federal heat illness standard, along with the Department of Homeland Security's rulemaking on similar worker protection standards. Evaluating these competing proposals has cumulatively stretched the regulated community's bandwidth.

The Department's disregard for the totality of ongoing agency rulemaking efforts in favor of its own self-imposed timelines is particularly unfortunate, given that the Agency claims it "takes seriously" its solicitation and review of public comment. In the absence of any clear rationale

for its decision, it instead foregoes the best opportunity for meaningful stakeholder feedback that is necessary to strengthen its own public policy.

Wage Rate Provisions

The NPRM conveys the Department's intention to implement adjustments to wage rate implementation and calculations. These proposed adjustments are unmindful of the everyday realities confronting the agricultural sector and would be particularly burdensome to small farmers and ranchers.

First, the Department suggests the discontinuation of the 14-day implementation window for H-2A employers to adjust their payroll to reflect the annual update to the Adverse Effect Wage Rate (AEWR). This change will require the employer to apply the rate change effectively on the date of publication in the Federal Register. Such a change removes a necessary grace period for all employers to make the necessary cash flow decisions to ensure their employees are paid timely and appropriately. This provision particularly threatens the small farmer and rancher who may need this time to secure funds, shift assets, and/or employ other means to take care of their valued workers. If the Department moves forward with this misguided change, AFBF suggests enforcement waivers, for a two-week period succeeding the Federal Register notice, for employers who may need that period to adjust their payroll, contingent upon full back pay for affected employees.

The Department also wishes to require the employer to disclose all rates of pay on the job order in addition to the rates that the employer may intend to pay. A common practice among H-2A users in the specialty crop industry is paying employees "by the piece," which is a rate tied to the worker's per-unit productivity at harvest. As a result, there are many factors that affect this rate that could vary by climatic conditions, commodity, equipment, and others. Such a requirement leads to tedium in the application process and places a nearly impossible task upon those preparing the job orders.

External Organization Engagement and Access

AFBF opposes the multiple concerning proposals within the rulemaking that permit uninvited organization access to worker housing, surrender worker information to these types of organizations, and drive greater legal exposure for family farms.

To begin with, the Department endows labor organizations with a newfound right to access the employer-owned housing, or areas near this housing, of H-2A employees. This access is granted for up to 10 hours per month, but it does not place any limitations on the number or potential overlap of organization access. AFBF raises severe concerns with such access. First, the H-2A employer assumes expanded liability with increased likelihood of non-employees on site. This includes general legal risks in terms of insurance exposure and potential employee disturbances. It also implicates food safety protocols, which require certain farmers to register site visitors

under the Food Safety Modernization Act. Collectively, these risks introduce untenable levels of exposure for the employer and could jeopardize the integrity of the entire operation – in other words, the workers' and farm family's livelihood.

Next, the Department proposes to require employers to supply, within one week of a labor organization's request and without the consent of the workers, a list of H-2A employees and their personal information, to include full names, job title, work location, hire date, personal email, cell phone number, profile name for a messaging application, home country address, and telephone number. This is an egregious violation of privacy for the H-2A employees and strains the trust embedded in the H-2A employer-employee relationship. Perhaps even more disturbing, there are no helpful details or standards that may define a "labor organization." Given this, employers will likely be forced to supply sensitive information about their employees to unknown, or sparsely vetted, organizations. Forcing the distribution of workers' private data violates the government's own personnel policies and flies in the face of the Department's espoused motivation of "improving protections for workers in temporary agricultural employment."

Attestations of good faith negotiations regarding labor neutrality agreements upon the request of a labor organization are also proposed in this notice. The employer does have the right to decline, but must provide an explanation. AFBF questions the viability and purpose of such a provision. Further, should an employer decline, AFBF is concerned with a farmer or rancher's risk of retaliation or increased enforcement measures as a direct result of its intentions. The Department should provide guarantees to the regulated community that this will not occur.

These provisions, and others included not specifically addressed, expand on-farm access to individuals unaffiliated with the farming operation. The rule disturbingly holds farmers and ranchers accountable to organizations with no rightful oversight authorities. In doing so, it greatly exposes the farm and ranch family to additional risks and disruptive conditions. Therefore, AFBF opposes.

"Termination for Cause" Provisions

Essentially, the Department seeks to establish a six-step process to be followed by an employer in order to terminate an employee. Because of the rigidity and impracticality of this provision for farmers and ranchers, AFBF opposes. Farmers and ranchers as employers must have flexibility to coach, correct, and terminate employees, as appropriate, in their place of business.

Furthermore, such requirements and burdens on employers will likely provide a practical necessity - if not, a strong incentive - to consult attorneys or experts in employment law to assist in the development of these human resources plans and procedures. This will introduce a new attorney-client relationship for some, create even higher attorney fees for those who may already have a relationship with one, and add onerous administrative costs across the board for all. The recordkeeping mandates accompanying this provision alone will be extensive. Once again, while all H-2A employers will be adversely affected, small employers will be affected

disproportionately so because these employers cannot absorb these additional burdens through an office staff. This runs counter to stated goals of the Biden Harris administration to level the playing field for small and medium sized farms.

AFBF would understand and support such requirements of this criteria and "progressive discipline" if applied to those employers with a record of violations and penalties. However, to broadly paint all farmers with a brush of worker mistreatment falsely assigns an automatic presumption of guilt to the employer and does not accurately portray the employer-employee relationship on the farm. On behalf of its members, AFBF takes particular umbrage with the insinuation that employers should bear the burden of proof for a "for-cause" termination due to the exemptions from certain commitments, such as the three-quarter guarantee, it may afford to the employer. The Department wrongly assumes that attaining these exemptions somehow drives an employer's decision to terminate an employee. Farmers and ranchers do not take a termination decision lightly. Agriculture is a high stakes enterprise and often requires narrow production windows and high efficiency periods at different stages of production, especially for specialty crop producers with a highly perishable crop. DOL fails to consider that every farm employee is considered important to the function of the farm; terminating an employee is usually a last resort because it places more burdens on the other employees in their daily tasks, as well as on the employer to incur additional costs to secure, train, and devote resources to another employee.

In sum, this proposal unnecessarily muddles the decision-making authority of farmers and ranchers over their own workforce. AFBF opposes.

Other Provisions

The proposed rule further impacts farmers' and ranchers' rights to meaningfully address government oversight and enforcement actions.

For one, the proposed rule simultaneously extends the bases under which a State workforce agency (SWA) shall discontinue services to employers and curtails the rights of employers to meaningfully address allegations of substantial harm. Current regulation strikes the right balance by allowing for a hearing before a punishment is imposed in the form of discontinuation of services. Under the proposed rule, such hearings are available only *after* the discontinuation of services, regardless of the breadth of the alleged harm. Failing to afford an employer the opportunity to a hearing before imposition of such a penalty is burdensome and disruptive to the operation of any business, but it would be particularly injurious to America's farmers and ranchers.

For another, the proposal would reduce the employers' rights to respond to potential debarment proceedings. Under the proposed rule, employers' rights to offer rebuttal evidence is reduced from 30 to 14 calendar days, absent an extension. The period to request an initial hearing by or appeal the decision of the OALJ is similarly condensed. These changes materially impact an employer's ability to meaningfully address a potentially existential risk to its business, and they

are most likely to have the greatest impact on small businesses, including small farms and ranches.

AFBF recognizes the need for worker safety protections. We support fair and appropriate protections. But the government has an obligation to also respect employers' rights to meaningfully rebut allegations of wrongdoing. The provisions of the proposed rule referenced above reflect a substantial and improper impingement on employers' rights of redress, under the Constitution and otherwise, when accused of violations. Accordingly, AFBF opposes the imposition of these provisions of the proposed rule.

Economic Analysis

The following section addresses the fundamental flaws in the Department's economic analysis, which resultantly understates the cost impacts of this proposed rule to farmers and ranchers who use the H-2A program.

Issues with Number of Positions Projections

DOL uses an artificially low growth rate of 6.3 percent for the H-2A program based on the assertion that "comparing BLS 2030 projections for combined agricultural workers (SOC 45–2000) with a 17.9 percent growth rate of H–2A workers yields estimated H–2A workers that are about 127 percent greater than Bureau of Labor Statistics (BLS) 2030 projections." Revising the growth rate so significantly based solely on BLS 2030 projections is concerning, given what should be low confidence in those projections. BLS's Employment Projections matrix, which is utilized to create the 2030 employment projections, uses the Occupational Employment and Wage Statistics (OEWS) survey, the Current Employment Statistics (CES) survey, and the Current Population Survey (CPS) as primary sources. However, two of the three of these sources exclude or largely excludes the agricultural sector. BLS notes that "the OEWS survey excludes the majority of the agricultural sector, with the exception of logging (NAICS 113310), support activities for crop production (NAICS 1151), and support activities for animal production (NAICS 1152)." BLS also notes that agricultural jobs are excluded from the CES. Given that two of the three primary sources exclude the agricultural sector, agricultural employment projections should be viewed with a grain of salt and shouldn't serve as justification for reducing sectoral employment projections.

Indeed, the difficulty BLS faces in forecasting agricultural employment is on full display when comparing the differences in the agency's projection for agricultural employment over two years. BLS's projection for 2020 agricultural employment, released in October 2021, was 918.1 thousand. BLS's current projection for 2022 agricultural employment is 848.8 thousand. We simply have not seen a 7.5% contraction in agricultural employment in two short years. This significant variation in short-year projections leaves us to seriously question the ability of the BLS to project employment ten years into the future. As a result, it is inappropriate to revise down the H-2A growth rate for H-2A certified workers projection so dramatically, from 17.9

percent to 6.3 percent, based on BLS projections for agricultural employment. This serves to significantly underestimate the total costs of this rulemaking.

Issues with Employer Characteristics and Projections

DOL utilizes data on unique employers curbed from H-2A application submissions. While knowing the overall number is useful, including and ultimately utilizing stratified employer data based on the number of positions requested by the employer, would have led to a much more meaningful analysis. AFBF's experience is that while some applicants apply for a large number of positions, a large percentage of farmers that utilize the program are significantly smaller in scale and request only a few positions. Data from the Farm Labor Survey (FLS) supports the assertion that the difference in hired workers by number of workers on farm is significant. For example, in the latest FLS, conducted in April 2023, 38 percent of farms hired 10 workers or fewer, 12 percent of farms hired 11-20 workers, 16 percent of farms hired 21-50 workers and 34 percent of farms hired 51 or more workers.

Utilizing a one-size-fits-all average significantly underestimates the cost of complying with new regulations such as the one DOL proposes here. While a larger operation that employs several hundred H-2A workers might have a full-time human resources (HR) specialist, a small farm with only a few seasonal employees would not. In the case of the small farm, HR duties would fall to the farm operator. In this case, it would take the farm operator far longer than one hour to familiarize themselves with, and implement the changes dictated by the new rule. A compensation rate associated for a manager of an agricultural operation is more appropriate than an HR specialist for smaller operations. Further, DOL employs the use of a national average wage rate to calculate compensation costs, despite dictating that state and regional wage rates be utilized by users of the H-2A program and having access to state-level data. Finally, the opportunity costs of the operator spending multiple hours understanding and implementing the new rule are not insignificant, though they are completely left out of DOL's analysis.

Small Business Fairness

DOL's analysis by NAICS code is inconsistent with both reality and DOL's own findings. In DOL's final rule revising the Adverse Effect Wage Rate (AEWR) methodology, the Department attested that 98% of H-2A positions would not be impacted by the new methodology. This was based on DOL's assertion that 98% of H-2A job opportunities have in the past and into the future will be classified under the following SOC codes:

* 45-2041—Graders and Sorters, Agricultural Products
* 45-2091—Agricultural Equipment Operators
* 45-2092—Farmworkers and Laborers, Crop, Nursery, and Greenhouse
* 45-2093—Farmworkers, Farm, Ranch, and Aquacultural Animals
* 53-7064—Packers and Packagers, Hand
* 45-2099—Agricultural Workers, All Other

However, in the Number of Small Entities section of the proposed rule, DOL seems to ignore its own analysis. In the Number of Small Entities analysis, DOL used a data mining exercise "to identify the number and type of small entities in the H–2A certification data as well as their annual revenues" by NAICS code. Despite the fact that DOL identified 9,927 unique employers from the H-2A data (excluding labor contractors), it was only able to "obtain data matches of revenue and employees for 2,615 H–2A employers in the FY2020 and FY2021 certification data"; a match rate of only 26 percent. A significant reason that DOL was unable to get a match is likely due to the fact that more than 98 percent of farm and ranches operate as "pass-through businesses": sole proprietorships, partnerships and Subchapter S corporations. If DOL knew the agricultural sector, it would know that because so many farms and ranches are pass-through businesses, business-to-business data, like what DOL utilized, often does not pick up farms and ranches accurately.

The inappropriateness of the analysis is highlighted when the analysis is further evaluated. DOL determined that 2,105 of the 2,615 employers were small (80.5 percent). Of these small unique entities, 2,085 of them had revenue data available and thus served as the basis for DOL's analysis of the impact of this proposed rule on small entities. However, based on the NAICS codes, these businesses are likely not representative of the majority of businesses that utilize the H-2A program. The top four business types identified in this analysis, based on the number of employees, are not likely to have H-2A job opportunities that fall within the six SOC codes that DOL contends makes up 98% of H-2A positions. For example, NAICS code 4442220 – Nursery, Garden Center, and Farm Supply Stores – are unlikely to have H-2A job opportunities that would be classified as 45-2041, 45-2091, 45-2092, 45-2093, 53-7064 or 45-2099.

This is relevant because DOL concludes that based on the evaluation of the 2,085 businesses, the proposed rule would not have a significant economic impact, defined as total cost estimate of 3% of revenue as the threshold, on a substantial number of small H–2A employers. We contend that DOL has not accurately identified the majority of small entities that utilize the program. The majority of small entities that utilize the H-2A program are those that would have 4-digit NAICS codes of 1112, 1113, 1114, 1121, 1122, 1123, 1124, 1125 or 1129. This assertion is supported by USDA NASS's Farm Labor Survey, which is sourced heavily by DOL in recent rule makings. The latest FLS, dated May 24, 2023, reveals that 86% of the 651,000 workers hired directly by farm operators on the nation's farms and ranches had titles that fell within the six-SOC codes referenced above.

If DOL would have not artificially suppressed projections for H-2A position growth, utilized stratified employer data, acknowledged that most businesses that hire H-2A employees do not HR specialists, but instead HR duties fall to the proprietor and surveyed businesses that actually represent producers of crops and livestock, we believe that the impact on small entities would be significantly greater. A large portion of users of the H-2A program would exceed a threshold of 3 percent of revenues that has been used in prior rulemakings for the definition of significant economic impact. Additionally, excluding farm labor contractors is in and of itself a significant omission, given the fact that DOL acknowledges in the Adverse Effect Wage Rate Methodology

for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States final rule that H-2A Labor Contractors (H-2ALCs) represented approximately 16 percent of all certified H-2A applications in FY 2020 and 42.6 percent of all H-2A worker positions certified by DOL for employment in non-range occupations was with employers qualifying as H-2ALCs. H-2ALCs will certainly incur additional costs as a result of this rule, which will in turn be passed along to farmers. The inaccurate estimation for costs for farmers and ranchers, combined with the omission of costs to labor contractors, gives us very little confidence that the costs of this rule would be as small as DOL contends.

Conclusion

If the Department is truly concerned with improving the working conditions of agricultural workers, an ongoing dialogue between DOL officials and agricultural employers would be welcomed. It seems, through the volume and content of its latest proposals, that DOL has a fundamental mistrust and misunderstanding of the motivations of U.S. farm and ranch families and how they treat the people – the human beings – they employ. AFBF welcomes a chance to inform and educate the Department to correct its misconceptions and build trust.

The American Farm Bureau Federation values any opportunity to engage with the U.S. Department of Labor on issues affecting the agricultural labor force, including this rulemaking. AFBF stands ready to aid the Department in smart and reasonable policymaking that recognizes and assists farmers and ranchers in protecting their employees while avoiding the villainization, implicitly or explicitly, of an industry that indisputably supports, values, and appreciates its workforce.

In the meantime, AFBF opposes this far-reaching and ill-considered rule.

Regards,



Samuel A. Kieffer
Vice President, Public Policy