NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

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BY ELECTRONIC SUBMISSION

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In re: *RIN 1205-AC12*
Improving Protections for Workers in Temporary Agricultural Employment in the United States
[Federal Register 88 FR 63750-63832]
Docket No. ETA-2023-0003

To whom it may concern:

This letter presents the comments of the National Council of Agricultural Employers on the Notice of Proposed Rulemaking (NPRM).

The National Council of Agricultural Employers (NCAE) is the national association focusing on agricultural labor issues from the employer's viewpoint. Established in 1964, NCAE members are farmers and ranchers involved in labor intensive agricultural production, associations, agents, farm labor contractors and others whose business interests revolve around agricultural employer issues. NCAE advocates legislation, regulation, and federal policies to keep agricultural employers ethically and economically sustainable in the global marketplace.

NCAE's members employ and pay approximately 85 percent of all H-2A Temporary Agricultural Workers in the United States and about 80 percent of all domestic agricultural workers in the United States.

NCAE and our members work tirelessly in compliance with federal and state labor laws and regulations. We hold webinars, seminars, and annually hold a sold-out Forum where experts coach members on the best human resource practices. These sessions often include outreach from representatives from the Department of Labor's Office of Foreign Labor Certification and the Wage and Hour Division, Commissioners from the Equal Employment Opportunity Commission, the State Department, Department of Homeland Security, and the Department of Justice's Immigration and Employee Rights Division.

General Comment

NCAE appreciates the opportunity to comment on this NPRM. NCAE opposes many of the modifications in the proposed *Improving Protections for Workers in Temporary Agricultural Employment in the United States* as they are neither improvements to the regulations nor protective of workers in temporary agricultural employment in the United States.

Some of the proposed modifications are violative of the intent of existing laws passed by the Congress of the United States and signed by the President, violative of recent Supreme Court precedent, violative of Due Process contained in the Fifth Amendment to the Constitution, constitute an Uncompensated Taking under the Fifth Amendment to the Constitution, are contrary to commonsense, and offensive to public policy. The proposal would also violate

worker privacy by requiring employers to collect and turn over to potentially malign actors, the personal information of their workers.

The proposal notes that the current regulatory framework was strengthened by the Department's "Program Rule", presently being challenged in Federal District Court. However, as the Department well knows, that rule did not strengthen the program but did make the program much more costly and confusing.

That rule destroyed any statistical integrity in the development of prevailing wage surveys for determining wage rates rather than having "modernized" them. It also jeopardized the ability of farm and ranch families to stay in business through "enhanced" surety bonds for farm labor contractors they may need to hire. The rule added nonsensical additional hurdles to the regulations while undermining U.S. competitiveness in the global marketplace and jeopardizing national security. Any suggestion the Department's "Program Rule" strengthened the H-2A Temporary Agricultural Program is belied by those nagging things called facts.

The pejorative tenor of this rulemaking that runs throughout makes it appear that much of it was developed from the fantasies of anti-farmer activists and union bosses, rather than by public servants committed to an oath to protect and defend the Constitution of the United States of America. That unmistakable taint was demoralizing to the overwhelming number of employers who abide by and properly utilize labor laws and regulations. In fact, the Department's own data indicates that 95% of the violations uncovered by the Wage and Hour investigators are committed by 5% of employers. NCAE's goal, consistent with the Department's, is to have no violations. Sadly, this NPRM throws the diligent good actors under the proverbial bus.

The preamble notes that the Department determined that the proposed revisions would prevent exploitation and abuse of workers. It further suggests the use in the program has surged, underscoring the need to strengthen protections for a vulnerable population.

However, at the same time the rule asserts to protect individuals they claim to be vulnerable, it would attempt to subject farmworkers to the exploitation of unions and the union's constant threats, intimidation, coercion, harassment, bullying, and misrepresentation. And that is of course to say nothing of the union's attempts to part farmworkers from their hard-earned wages, in a fashion not too different from that of *"El Sindicato"*, a cartel, or a coyote, with no benefit to the workers resulting from their extortive behavior, since wages and working conditions are already established by Federal law.

Further, the fact that the Department of Labor would not extend the period for making comments, taking into consideration the tsunami of new rules thrust onto farm and ranch families by this Administration, was unconscionable. However, perhaps it was the intent of the crafters of this NPRM that the voices of family farm and ranch operations with a vested interest in these rules, be chilled.

Due to the foregoing, the Acting Secretary should withdraw this rule from consideration.

Specific Comments

The NPRM would adjust Section 655.135 allegedly expanding and explicitly to protect the advancing of worker voice and empowerment. The proposal would permit workers to "invite guests" to employer-provided housing and provide labor organizations a "narrow right of access" to worker housing.

It appears that this aspect of the NPRM is little more than a thinly disguised effort by the Department to thumb its nose at the U. S. Supreme Court and the Constitution of the United States.

In 2021, the U.S. Supreme Court found that a California regulation that allowed unions a "right to take access" to a farmers' property for unionization activities was a *per se* physical taking of the farmers' property under the Fifth and Fourteenth Amendments. The case, known as *Cedar Point, et al, v. Hassid, et al*, was a 6 to 3 decision by the Court, in favor of the farmers who had objected to this unconstitutional activity.

Following that ruling in June 2021, California farmers rejoiced. At the same time the farmworkers who had been the targets of the union's threats, coercion, misrepresentation, and harassment, rejoiced as well. The ruling was seen as a respite from the intimidation routinely employed by union organizers anxious to snag farmworkers' funds.

Apparently enraged by the Court's turning back of this unconstitutional activity in California, anti-farmer union activists seem to have persuaded the U.S. Department of Labor that the Supreme Court has no clue when it comes to interpreting the Constitution and an end run around the Court and the foundational law of our Republic, was in order.

Even though the Department makes an exceptionally weak attempt to distinguish this NPRM from the deemed unconstitutional regulation found in *Cedar Point*, this proposed regulatory

scheme would allow for and constitute an unlawful taking in violation of the Fifth Amendment.

The Fifth Amendment states that, "...nor shall private property be taken for public use, without just compensation." This proposed regulation explicitly contemplates allowing anti-farmer union activists to take access to a non-unionized employer's property.

This NPRM would create an access regulation that, as Chief Justice Roberts explained in *Cedar Point*, "appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude".

The Chief Justice continued that because the "...regulation appropriates a right to physically invade the growers' property-to literally 'take access'-it constitutes a *per se* physical taking under the Court's precedents." Pointedly, the *Cedar Point* Court declined, "...to adopt the theory that the access regulation merely regulates, and does not appropriate, the growers' right to exclude. The right to exclude is not an empty formality that can be modified at the government's pleasure."

Similarly, regarding this NPRM, the employer's right to exclude the union and protect the employer's workers from these potentially or even likely bad actors, "…is not an empty formality that can be modified at the government's pleasure."

Apparently, the drafters of this NPRM must think the Chief Justice and the majority of the Court were just joking.

Furthermore, the relatively unfettered access without compensation to the grower that the NPRM would allow is likely to conflict with the farm's or ranch's food safety protocols adopted under the *Food Safety Modernization Act* signed into law in 2011. If the Department wishes to continue down this slippery slope, perhaps it should turn to the Congress which has the authority to pass and change laws under Article I as the Congress has that jurisdiction under our Constitution as opposed to the Executive Branch.

The NPRM seeks to codify and "clarify" justifiable termination for cause and would establish six criteria which must be satisfied at Section 655.122 (n). It is odd that the Department would suggest there are but two situations for which termination for cause could be appropriate.

The first would be due to a failure to meet productivity standards defined in the job order and the second would be due to a failure to follow an employer's policies and procedures. The Department in attempting to explain this arbitrary limit on the causes for termination, suggests that somehow this would remedy a preposterous assertion that most terminations for cause are due to an employer's desire to not pay the three-quarters wage guarantee, instead of performance or behavioral reasons. It ignores completely those causes related to work quality that can lead to that termination and would seem to require an employer retain a poorly performing worker who not only reduces the overall quality of a crew's work but may also threaten the physical safety and well-being of fellow workers.

The Department should reconsider this change.

This NPRM would, at 655.120 (b) (2) and 655.120 (b) (3), require an immediate effective date for payment of Adverse Effect Wage Rates (AEWRs) as of the publication date in the Federal Register. This proposal would abandon the longstanding avoidance in the regulations of changing pay rates in the middle of a pay period.

However, and so continually fatally flawed, the Department incessantly mandates wage rates disconnected from the market for agricultural labor anywhere in the world using methodology completely unsupported by any economic data or any indication that the employment of H-2A workers has or could have an adverse effect on domestic workers similarly employed. The Department not only continues to misuse the USDA's Farm Labor Survey, which as USDA has pointed out was never intended to be used as a wage discovery mechanism in a temporary farm labor program but instead intended to count the number of workers in the U.S. But under the new AEWR rule which is presently being challenged in Federal District Court, the Department added another set of nonfarm wages to the mix.

So, consequently, instead of the wages to be paid that are negotiated and contained within the four corners of the contract, referred to as *"What Would Judge Judy Do? (WWJJD)"*, the Department now changes wage rates twice a year. So, under this part of the NPRM, the farmer or rancher would be required to violate that basic principle of contract law (WWJJD) not just once each year, but now twice, and do that upon publication in the Federal Register and typically in the middle of a pay period.

The Department should reconsider this change.

The NPRM asserts that it desires enhanced transparency for job opportunity and foreign labor recruitment and proposes new Sections 655.135 (p) and 655.137. Ironically, the Department suggests this is an effort to protect "vulnerable agricultural workers from exploitation and abuse", while in other sections of the proposal the Department would subject workers to the exploitation of labor organizers.

The Department in this area of the proposal seems to have determined that as a new arbiter of privacy rights, that privacy rights should not exist for employers and supervisors of H-2A workers and would make their names, dates of birth, addresses and telephone numbers publicly available. Rather surprisingly, the Department does not request that the social security numbers of these individuals nor their shoe size be collected and made publicly available. Privacy rights still exist in the U.S. as opposed to countries like Russia and they should be respected by the Department.

The Department should reconsider the intrusive nature of this change.

The Department in this NPRM proposes to revise Sections 655.122 (b), (l) and (n), as well as 655.120 (a). These changes would require disclosure of minimum production standards (which is typically already done), applicable wage rates (which is already done), and overtime opportunities (also already done). This proposal would require employers to offer, advertise and pay any prevailing piece rate.

Curiously, this proposal appears in some respects to be like a case in the Federal District Court in Washington that has now been appealed to the 9th Circuit after a finding in favor of the Acting Secretary. In that case, *Torres Hernandez, et al v. Su, et al*, the defendant Acting Secretary was defended by the Department of Justice. In that case, anti-farmer activists sued the Acting Secretary because there was no "prevailing piece rate" required to be paid as an AEWR.

Of course, the plaintiffs there, like the defendant Acting Secretary here, failed to recognize that whereas productivity incentive pay may be available with some employers, there is no "prevailing piece rate". So effectively, the NPRM is seeking to create a new wage mandate to impose on farmers and ranchers and require them to disclose that which does not exist.

Further, these regulations would require employers to disclose any overtime rates that may be applicable in jurisdictions that have been hoodwinked by activists to implement. Any overtime rates that are applicable are already disclosed so this is redundant.

Interestingly, emerging research utilizing survey data collected by the National Agricultural Worker Survey (NAWS), indicates in those jurisdictions where state legislatures have been bamboozled by activists to implement overtime for agricultural workers, worker take home pay declines just as the farmworkers and farmers jointly testified against implementation in those areas told the legislatures' would occur. In fact, public reporting suggests that farmworker family incomes have been devastated by these thoughtless regulations as hours have been cut to comply. Apparently, some of these farmworker families exploited by the state legislatures' anti-farmer activist regulations have had to start receiving SNAP benefits, gone from purchasing health insurance to Medicaid, and moved their families to lower cost neighborhoods.

The Department should reconsider the changes proposed and make them fit with reality.

This NPRM suggests that it seeks to require new enhanced transportation safety requirements and require the provision, maintenance, and wearing of seatbelts in most employer provided transportation. Worker safety in employer transportation is critical and employers do provide seatbelts in employer provided transportation wherever mechanically feasible. However, in certain cases with older transportation used solely on farms, this cannot be achieved; unique situations the Department has previously recognized.

A challenge with this proposed legislation is the requirement for the workers to use the seatbelts provided and the Department's vagueness of enforcement of this mandate. Employers can require seatbelt use, but the challenge is how to get the workers to constantly comply.

It is easy to envision an employer enforcing this requirement, and a worker refusing or forgetting the employer's requirement. The employer then counsels the worker repeatedly that seatbelt wearing is required and documenting this, but the requirement is still ignored by the employee. The employer then seeks to terminate the employee for cause for failure to abide by the employer's policy but running afoul of the Department's new criteria for termination for cause.

The Department should reconsider this regulation and its interplay with other aspects of the NPRM.

The NPRM proposes a new Section 655.135 (o) that would protect against passport and other document withholding. This rare occurrence should never happen.

Since this new regulation is redundant with existing regulation, NCAE supports this.

The NPRM suggests changes to what transpires in the event of a minor delay in the start of work in a proposed new Section 655.175. This proposal would limit minor delays to 14 days or less and would require an employer to notify each worker and the State Workforce Agency (SWA) of any delay in start. The regulation will also require the employer to pay the workers for not working if the employer fails to provide adequate notice of delay.

Whereas we support the Department's attempt at clarifying post-certification modifications to the agreement, we would oppose a requirement to pay for work not performed. We would recommend the Department add some flexibility to this requirement.

For instance, assume a circumstance where a hurricane has devastated an orange grove. Fruit still hangs on the trees, but the storm surge has pushed alligators and other dangerous critters out of their normal habitat and into the grove. The employer will notify the SWA, and the workers of the delay created by the hurricane but does not adequately anticipate the time it will take to dry the grove enough for work to take place nor clear it of the varmints that may harm the workers. Under this proposal, due to this "Act of God", the employer would be required to make payment for work that was never performed. This may jeopardize the enterprise.

The Department should reconsider this proposal.

Under Section 655.190, the Department would implement a severability clause as if each part of this proposed regulation could stand on its own. This is a ridiculous assertion as the Congress that passed the enabling legislation, the President who signed it, and the iterative Administrations which have heretofore enforced the regulations as a comprehensive set, have had no intention to do so.

The Department should withdraw the proposed severability clause.

Under a portion of the NPRM called "Enhanced Integrity and Enforcement Capabilities", the Department proposes to reduce time periods for appeal requests, debarment matters, and provision of rebuttal evidence to OFLC. In addition to increasing the speed for debarments, the NPRM would amend Sections 655.182 (f) (1) and (2) to decrease the time to submit rebuttal evidence to OFLC and decrease the time to appeal debarments.

NCAE does not support bad actors' involvement in the H-2A Temporary Agricultural Worker program. However, consistent with our concerns expressed regarding other egregious violations of the Fifth Amendment contained in this NPRM and previously discussed, we would caution

that the Department tread carefully here so that the Due Process rights of the accused are not violated.

The NPRM proposes a new Section 655.104 which would clarify the liability of successors in interest for debarment purposes. The NPRM would also make conforming changes to several other regulations. Again, as noted above, consistent with our concerns expressed regarding other egregious violations of the Fifth Amendment contained in this NPRM and previously discussed, we would caution that the Department tread carefully here so that the Due Process rights of the accused are not violated.

The Department proposes to define the term of a single employer with a new Section 655.103 (e) and lays out factors to determine if multiple employers are acting as one. The NPRM explains that this is meant to address applications for temporary or seasonal need with different employers which are in fact a single employer with year-round need. The proposal also would seek to address situations where domestic workers are under one Company and H-2As are hired under another Company to avoid circumstances of the domestic workers being in corresponding employment with the H-2A workers.

Again, as noted above, consistent with our concerns expressed regarding other egregious violations of the Fifth Amendment contained in this NPRM and previously discussed, we would caution that the Department tread carefully here so that the Due Process rights of the accused are not violated.

The NPRM proposes revisions to Employment Service Regulations that appear in many respects to be violative of Due Process rights under the Fifth Amendment. Additionally, many of these proposed changes also appear to simply be arbitrary and capricious.

For instance, whereas present regulations would allow an employer to provide evidence upon a SWA's notice to discontinue service, the proposed revisions to Sections 658.502 would only allow a hearing after a SWA issues a final decision on a complaint. It would also remove the opportunity for a pre-discontinuation hearing. Once a bell is rung, even if mistakenly rung by the SWA, how can the bell be unrung?

Similarly, Section 658.504 would be revised to require that employers who request a hearing regarding the discontinuation of services do so within 20 working days of the date of discontinuation.

Due to the Due Process procedural defects and the arbitrary and capricious nature of these proposed changes, this aspect of the NPRM should be completely withdrawn.

The NPRM makes many unfounded and ludicrous claims that defy logic, sensibility, economics, and the Department's own data.

For instance, an assertion is made at pages 63787 and 63788 that the use of the H-2A program has grown dramatically while agricultural employment has remained stable. This assertion is then "explained" that the Department believes this is because of the dangers and physical hardships inherent in agricultural employment combined with lack of protections for worker organizing and bargaining power. They also go on to say that the Department believes fear of retaliation combined with lack of clear protections has led to low union density in the agricultural workforce.

These assertions are laughable but also frightening, when you realize that someone thought enough of the assertions that they allowed them to be published in this NPRM.

The Department of Labor performs the National Agricultural Worker Survey (NAWS) every two years. The crafter of many of these ridiculous assertions should read the survey results to illuminate their thinking.

Workers are aging out of the workforce and the agricultural workforce like the immigrant nature of the history of our nation, is aspirational. Few parents encourage their children upon their graduation from high school to consider finding temporary or seasonal employment in agriculture. Instead, those parents, like many others, encourage their children to go to college and find a full-time career.

Furthermore, regarding the asserted "low union density" in agriculture, a read of the Los Angeles Times expose' on the United Farm Workers' union from 2006 would be instructional. This is likely exacerbated as well by those nagging little things called facts, in that agricultural unions deliver nothing of value to the workers. Another consideration for this situation is that farmworkers do not appreciate being terrorized, threatened, coerced, or intimidated, by union organizers misrepresenting the fact that the union is only interested in separating the workers from their money.

Sadly, through what can only be generously attributed to thinking that is convoluted, someone asserted these proposed regulations will not be preempted by the National Labor Relations Act.

Seriously? But at least that thinking is consistent with the delirium which must exist in the belief that the Supreme Court was ignorant of the Constitution of the United States in deciding *Cedar Point*.

For these reasons, and so many others not specifically laid out, the Acting Secretary should withdraw this NPRM from consideration. We would also suggest that the Acting Secretary escape from what appears to be the cacophony of an echo chamber of nonsense that exists under her and engage with the regulated community to collaboratively discover means to bring about needed changes to the H-2A regulations that would be beneficial to both farmworkers and the farm and ranch families who hire them.

Very truly yours,



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