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

Director DeBischop, Administrator Pasternak, and Administrator Vitelli,

The California Farm Bureau (CAFB) appreciates the opportunity to comment in response to the Department of Labor's (DOL) notice of proposed rulemaking (NPRM) on improving protections for temporary agricultural workers.

For background, CAFB is a voluntary, non-profit organization made up of nearly 29,000 members across 53 counties and is the largest farm organization in the state. Established in 1919, we work for the betterment of family farmers and ranchers in California and help support up to 2.5 million jobs and over $56 billion in crop value. As a significant provider to hundreds of commodities distributed across the US and world, our members have always understood the importance of keeping farming economically sustainable.

In order to ensure that communities continue to have access to these commodities, farmers and ranchers rely heavily on a steady supply of workers to help meet these goals. While many industries have no doubt faced challenges in recent years on hiring and retaining employees, the agricultural industry has uniquely faced declining domestic worker shortfalls for several decades now. As such, we have come to rely more heavily on guest worker programs such as the H-2A visa program to help cover these gaps.

In reading through this NPRM, CAFB has significant concerns about the legality and practicality of this rulemaking. Given the robust requirements and details laid out in this NPRM—and the lack of time for agricultural stakeholders to fully vet it on top of several other impactful proposed rules currently facing on our industry—these suggestions are not exhaustive in nature. We have worked with other partners and ag organizations to try and fully cover these concerns.

Labor Organizations & Private Data

Fundamentally, the DOL seems to be attempting to take provisions from the National Labor Relations Act (NLRA) and apply it to seasonal workers (such as H-2A). As the DOL notes, the NLRA specifically excludes agricultural workers. Instead, protections are provided through the Fair Labor Standards Act (FLSA) and the Migrant & Seasonal Agricultural Worker Protection Act (MSPA). It is our belief that these proposals circumnavigate existing law and would instead require Congressional and Presidential approval to be adopted.

A good example of this NLRA-inspired requirement is the DOL's proposal which grants access to employer-provided housing to "labor organizations." The NPRM does not make much attempt to identify or put limits on what constitutes a labor organization—simply that it may not be "dominated, interfered with, or supported by employers…" We believe this would effectively provide inspection powers to vaguely identified labor groups. In addition, it also permits them the ability to collect private data from H-2A employees.

Per section IV.C.1.a, the NPRM will require employers to provide worker contact information to any requesting labor organization. Without approval from an employee, this would give these groups full access to all applicable employees': full name, date of hire, job title, work location address and ZIP code, and (if available to the employer) personal email, personal cellular number and/or profile name for a messaging application, home country address with postal code, and home country telephone number. CAFB finds this to be an extreme violation of employees' privacy and risks dissolving trust between workers and employers. CAFB highly encourages the DOL to drop such recommendations.

Justifiable Termination for Cause

The DOL is also proposing to adjust the way in which employers are permitted to fire workers. This new definition of "termination for cause" places a needlessly burdensome six-step process in place by which an employer can consider firing a worker. While the DOL suggests that employers will benefit from this system, it will likely have the opposite effect. The NPRM effectively places additional burdens of proof on employers to provide cause for termination, while also implying that most employers are actively seeking to avoid paying H-2A workers altogether.

Per the DOL's own data, only a small fraction of H-2A employers (as an example) are responsible for the overwhelming majority of violations. CAFB certainly believes that violators of these requirements should be liable for damages; however, by no means do we think that most employers are in violation of the law. Employers are also not looking for excuses to fire workers in today's worker-needy environment. When we polled over a thousand of our members in 2022, we found that roughly half of employers do not have the adequate labor force to meet the demands of their farms and ranches. Rather, we are looking for ways to expand the current pool of H-2A and other temporary workers to help cover the increasing gaps both in California and around the country.

It is mistaken to believe that most ag employers are looking for ways to skirt paying or retaining workers. Applying this new termination process on businesses not only suggests this is in fact the case, but it adds new regulatory hoops for them to jump through. Given these new requirements, it is our belief that many employers will need to rely on outside legal counsel to help determine whether they are justified in firing an employee that has not adequately performed their contractual duties.

Immediate Effective Date for Updated AEWRs & Disclosure Updates

Another concerning provision is NPRM's provision on the removal of the two-week implementation period for employers to comply with updated Adverse Effect Wage Rates (AEWRs). As written, the expectation is that employers would immediately need to adopt the new wage rates, with no grace period and no consideration on the size of a business. As it currently stands, most H-2A utilizers already have significant trouble with the unpredictable nature of the AEWR.

In 2014, the California AEWR stood at $11.01 per hour. For 2023, that rate is now $18.65. This represents nearly a 70% increase in the hourly rate in less than a decade. Per the DOL's own Bureau of Labor Statistics data, the average hourly earnings for all private employees have gone up 40% during this time. If we applied that same rate to our 2014 AEWR, we'd currently be at $15.37 an hour in California. Notably, these wages are entirely "take home" pay. H-2A users cover the full costs of employer-provided housing, transportation, and meals.

Even if you ignore the inherent flaws within its current calculation structure and its unsustainable rise, it can hardly be denied that it is inherently unfair for a business to lack the ability to plan ahead for future labor cost increases in such a manner. We are not familiar with any other private industries where employers are beholden to annual wage increases that are controlled by federal agencies and forced to be adopted overnight without any advanced notice. While many states—including California—have adopted minimum wage increases in recent times, they are typically implemented over a period of many years and various intervals. In effect, businesses have years to plan ahead for the expected growth of their payroll budgets.

It is also important to note that many agricultural businesses simply lack the size and funds to have a dedicated human resources lead. As with most farmers across the country, owners and managing staff are required to wear many hats in order to keep their businesses operating. Given that the rule also proposes to impose new disclosure requirements on H-2A postings, these two proposals are particularly unfair to smaller farming and ranching operations. As such, CAFB recommends the DOL drop these proposed changes.

Conclusion

In summation, we find these proposals to be substantially burdensome for a system that is already severely hampered by regulatory complexity, high costs, and unpredictability. By nature, it is not easy to own and operate a business, particularly when the rules by which one is governed seemingly never stop changing. Several NPRMs and final rules within the past year have done little to stem this growing frustration surrounding temporary visa programs. Meanwhile, the economical sustainability of these programs continues to decline.

As the country's largest agricultural producer, California producers know very well just how important our food, dairy, and other agricultural products are to the health and well-being of communities in every corner of the nation. With over $22 billion in agricultural exports annually, we also know just how important these commodities are to other countries as well.

The habitual increases and added complexity to the H-2A and other visa programs continue to make it less and less sustainable. Given that it is quite often the last option for many farmers and ranchers looking to avoid insolvency, it is difficult to stomach adding on new burdens such as those proposed here by the DOL. The end result will be detrimental to more than just the agricultural industry. Closing farms and ranches means less food being sent around the US and globe. It also means more reliance on commodities produced elsewhere—often with far less food safety requirements and worker protections.

We encourage the DOL to drop this proposed rulemaking and engage directly with the agricultural industry on finding ways to ensure the safety and wellbeing of our workers. They provide the critical backbone to keeping this country well fed and food secure. CAFB and many other ag stakeholders are more than happy to work with the Department on ways to address some of these challenges. In the interim, we strongly believe that this proposal and others are sending our guest worker program backwards, with American farming and families losing as a result.

Thank you for the opportunity to provide these comments—and please don't hesitate to reach me directly at either (916) 561-5612 or mviohl@cfbf.com if you believe we can be of additional assistance.

Regards,



Matthew Viohl
Director, Federal Policy
California Farm Bureau Federation