

**Wage and Hour Division**

# Frequently Asked Questions – Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States

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## 1. What regulations is the Department revising through the final rule (“Farmworker Protection Rule”)?

The Farmworker Protection Rule revises the Department of Labor’s (“DOL” or “the Department”) H-2A regulations at 20 CFR part 655 subpart B and 29 CFR part 501. The Farmworker Protection Rule also revises Wagner-Peyser Employment Service (ES) regulations under 20 CFR parts 651, 653, and 658 regarding the Agricultural Recruitment System and discontinuation of ES services.

## 2. What is the H-2A nonimmigrant visa program?

The H-2A nonimmigrant worker visa program, authorized by the Immigration and Nationality Act, enables U.S. agricultural employers to employ foreign workers in the U.S. to perform temporary or seasonal agricultural labor or services under certain conditions. Employers who wish to hire agricultural workers from outside the U.S. must first obtain from DOL a “temporary labor certification.” Specifically, employers must show, and the Department must certify:

1. there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and
2. the employment of the foreign workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

In order to obtain a temporary labor certification from DOL, the employer must recruit U.S. workers, including through state Employment Service offices. After obtaining a temporary labor certification, an employer must submit a visa petition to U.S. Citizenship and Immigration Services (USCIS). If the petition is approved and the workers are outside the U.S., the workers must obtain visas from the State Department.

### 3. Why is the Department revising the regulations?

The Farmworker Protection Rule focuses on strengthening protections for agricultural workers and enhancing the Department's capabilities to monitor H-2A program compliance and take necessary enforcement actions against program violators.

Agricultural workers are among our nation's most vulnerable to workplace abuses. Based on the Department's enforcement experience, workers employed under the H-2A program are uniquely vulnerable to abuses, in part, because of the temporary nature of the work, frequent geographic isolation, and dependence on the petitioning employer. In FY 2022, DOL conducted 421 investigations of H-2A agricultural employers and assessed more than \$3.6 million in back wages and more than \$6.3 million in civil money penalties. Evidence revealed in recent investigations demonstrates that H-2A workers continue to be vulnerable to human trafficking. H-2A workers also continue to be vulnerable to retaliation when asserting their rights or engaging in self-advocacy. Additionally, recent vehicle crashes involving agricultural workers demonstrate the need for transportation safety reform.

Meanwhile, the demand for H-2A workers has increased significantly in recent years. DOL certified over 378,000 temporary H-2A jobs in FY 2023 – over 6 times the number certified in 2006 and three times the number certified 10 years ago (FY 2014).

One of DOL's key roles in the H-2A program is to ensure that **hiring H-2A workers does not adversely affect the wages and working conditions of similarly employed workers in the U.S.** The Farmworker Protection Rule adopts new and expanded worker protections to better prevent these “adverse effects,” particularly in light of the growth of the H-2A program.

The Department is amending its regulations governing the H-2A temporary agricultural labor certification program to strengthen worker protections and prevent adverse effects by adding and revising provisions related to, among other topics: anti-retaliation and other protections so that workers can better advocate on behalf of themselves and their coworkers; seat belt safety; termination for cause; and program integrity. The Farmworker Protection Rule will support and amplify worker voice and empowerment, enhance existing enforcement and disclosure provisions, and revise provisions that are outdated, unclear, or subject to misinterpretation in the current regulations. The rule also strengthens and clarifies ES regulations related to the Agricultural Recruitment System and discontinuation of ES for noncompliant employers.

### 4. When is the Farmworker Protection Rule Effective?

The Farmworker Protection Rule is effective on June 28, 2024. To ensure an orderly transition to this rule, the Department will process clearance orders and associated H-2A applications filed before 7:00 PM Eastern Daylight Time on August 28, 2024, in accordance with 20 CFR part 655, subpart B in effect as of June 27, 2024. The Department's case processing system, the Foreign Labor Application Gateway, will then be updated to accept applications filed under the Farmworker Protection Rule. Applications submitted on or after 12:00 AM Eastern Daylight Time on August 29, 2024, will be processed in accordance with the provisions of the Farmworker Protection Rule tied directly to a temporary labor certification.

### 5. What is the Department of Labor's role in the H-2A program?

One of DOL's key roles in the H-2A program is to ensure that employers only hire H-2A workers when there are not enough able, willing, and qualified U.S. workers to perform the work, and that hiring H-2A workers does not adversely affect the wages and working conditions of similarly employed workers in the U.S. DOL performs this role through the Department's Employment and Training Administration's (ETA) labor certification process and through the Department's Wage and Hour Division's enforcement of H-2A program requirements.

Three different agencies within the Department of Labor are involved in the administration of the H-2A program and enforcement of its worker protections.

ETA's Office of Foreign Labor Certification (OFLC) is responsible for reviewing temporary labor certification applications and, if applicable, certifying that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the labor or services and that the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed workers in the United States.

ETA's National Monitor Advocate, along with Regional Monitor Advocates, monitor State Workforce Agencies (SWAs) to ensure migrant and seasonal farmworkers (MSFWs), including H-2A workers, can file complaints about wages and working conditions. State Monitor Advocates also monitor the SWAs to ensure they comply with MSFW-related ES regulations, including the Agricultural Recruitment System through which employers using the H-2A program must file clearance orders to seek U.S. workers.

The Wage and Hour Division has responsibility for investigating and enforcing worker protections in the H-2A program. The Wage and Hour Division conducts investigations to ensure that employers comply with the minimum wages and working conditions disclosed in the job order and required by the H-2A program and regulations. The Wage and Hour Division also ensures that the employer has properly recruited and hired any U.S. workers who are able, willing, qualified, and available to perform the work before employing H-2A workers.

## 6. **What does a state's Employment Service do?**

A state's Wagner-Peyser Act ES brings individuals who are seeking employment together with employers who are seeking workers, including farmworkers. Agricultural employers may find workers through word-of-mouth, contacting previous workers, asking for help from the ES and its Agricultural Recruitment System, or seeking to hire foreign workers through the H-2A program. All employers seeking to use the H-2A program must first recruit workers through the state's ES, overseen by a SWA and delivered through American Job Centers across the country. State Monitor Advocates monitor and advocate within their states to help ensure that migrant and seasonal farmworkers have equitable access to ES and workforce protections.

## 7. **Does the Farmworker Protection Rule change agricultural worker wages?**

No, the Farmworker Protection Rule does not change the methodology for calculating agricultural worker wages, but it does make important updates to the timing and circumstances when workers are paid. The Farmworker Protection Rule revises 20 CFR 655.120(b) to require employers to pay updated Adverse Effect Wage Rates (AEWRs) immediately upon publication of the new AEWR in the Federal Register, rather than up to 14 days after publication. Setting the effective date of updated AEWRs as the date of publication in the Federal Register is a return to longstanding prior practice. This will help to ensure workers are paid at least the updated AEWR for work performed after publication of the updated AEWR, and thereby help to ensure that the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S. OFLC will post on its website when new AEWR calculations are released so that employers continue to receive advance notification of changes to the AEWR.

The Farmworker Protection Rule also creates new obligations and procedures in the event an employer must briefly delay the start of work. The final rule limits minor delays on H-2A related clearance orders to 14 calendar days or less and requires H-2A employers to notify each worker to be employed under the clearance order, including H-2A workers and workers in corresponding employment, and the SWA of any delay in the start of work. As under the current rule, the Farmworker Protection Rule requires the employer to provide subsistence to all workers who are already traveling to the worksite at the time of the delay. If the employer fails to provide 10 business days' notice of the delay, the rule requires the employer to compensate workers at the applicable hourly wage rate for each day work is delayed, for a period of up to two weeks, starting with the certified start date.

Similarly, the Farmworker Protection Rule revises current regulations, which apply to all clearance orders, including those that are not placed in connection with H-2A applications, and which specifically relate to workers who were placed by the SWA on the order. If the employer fails to provide the requisite 10-day notice of a delayed start date to all workers that the SWA placed on the clearance order, the employer must provide housing to migrant workers already traveling to the place of employment and, for each day work is delayed up to 14 calendar days, must pay such workers for the hours listed on the clearance order and provide or pay all other benefits and expenses described on the clearance order, or provide alternative work.

## 8. **How does the Farmworker Protection Rule support transparency in the international labor recruitment of H-2A workers?**

The Farmworker Protection Rule includes new disclosure requirements to enhance foreign worker recruitment chain transparency and bolster the Department's capacity to protect vulnerable agricultural workers from exploitation and abuse. Similar to the current requirements in the H-2B program, the new provisions will require employers and an employer's attorney or agent to:

- Provide a copy of all agreements with any agent or recruiter that the employer engages or plans to engage in the recruitment of prospective H-2A workers, regardless of whether the agent or recruiter is located in the U.S. or abroad; and
- Disclose the identity (i.e., name and, if applicable, registration and license numbers) and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2A workers.

The Department will gather this additional recruitment chain information when the employer files an H-2A application. The employer must continue to keep the information up to date until the end of the work contract period, and must make the updated information available in the event of a post-certification audit or upon request by the Department. As in the H-2B program, the Department will publish this information in a public recruiter list but will not disclose contracts between agents/foreign labor recruiters and employers unless required by law. These new disclosure requirements will increase transparency in the international recruitment chain and enhance the Department's ability to better protect agricultural workers from abuse and exploitation stemming from unscrupulous recruitment practices.

## 9. **What other changes did the Department make to increase transparency in the H-2A labor certification program?**

The Farmworker Protection Rule also requires the employer to provide the identity, location, and contact information for the owner(s) of each employer, any person or entity who is an operator of the place(s) of employment, and any person who manages or supervises the workers employed under a job order associated with the H-2A application. In addition, the Farmworker Protection Rule requires the employer to disclose prior trade/DBA (Doing Business As) names used in the 3-year period immediately preceding the filing of the H-2A application. These additional disclosures will provide a more accurate and detailed understanding of the scope and structure of the employer's agricultural operation and will enhance the Department's investigative and enforcement capabilities by helping the Department identify, investigate, and pursue remedies from program violators; ensure that sanctions such as debarment or civil money penalties are appropriately assessed and applied to responsible entities, including individuals and successors in interest when appropriate; and determine whether an H-2A employer under investigation has been previously investigated under a different name.

## 10. **What changes is the Department making to the Employment Service regulations?**

Current regulations require the state ES to discontinue employment services to employers that have violated employment-related laws or ES regulations. The Department is making revisions to clarify and strengthen the reasons and processes for SWAs to discontinue ES services provided to employers, agents, farm labor contractors, joint employers, and successors in interest who have failed to meet ES requirements or are debarred from the H-2 programs.

Under the Farmworker Protection Rule, ES staff must consult H-2A and H-2B debarment lists, before placing a job order into intrastate or interstate clearance. States must also notify the Department when they discontinue services, the Department will centralize this information in an ETA Office of Workforce Investment discontinuation of service list, and ES staff must consult this list before placing a job order into intrastate or interstate clearance. These changes require that SWAs initiate discontinuation of services if the employer seeking placement of a clearance order is on a debarment list, and that SWAs may not approve clearance orders where services to that entity under the ES have been discontinued by any state.

## 11. **How does the Farmworker Protection Rule improve workers' access to safe transportation?**

The Farmworker Protection Rule includes a seat belt requirement to reduce the hazards associated with the transportation of agricultural workers. For vehicles that are required by Department of Transportation regulations to be manufactured with seat belts, the Farmworker Protection Rule requires the employer to retain and maintain those seat belts in good working order and prohibits operation of a vehicle unless each worker is wearing a seat belt.

## 12. **Does the Farmworker Protection Rule provide any protections for workers to advocate regarding their working conditions?**

The Farmworker Protection Rule expands existing provisions and adds new protections to better empower workers to advocate on behalf of themselves and their coworkers regarding working conditions. These protections will help fulfill the Department's obligation to ensure that the H-2A program does not have an adverse effect on the working conditions of

similarly employed workers in the U.S. Specifically, DOL is expanding and clarifying the range of activities that are protected by the anti-retaliation provisions to include: consulting with key service providers; filing a complaint related to any applicable Federal, State, or local law or regulation; and, for workers not protected by the National Labor Relations Act (NLRA), engaging in self-organization or certain other concerted activities and leaving or declining to attend employer-sponsored “captive audience” meetings. The Farmworker Protection Rule also provides that workers are permitted to invite and accept guests, including friends and family, key service providers, labor organizations and others, to employer-furnished housing. Additionally, for workers not protected by the NLRA, the rule requires employers to permit workers to designate a representative to attend certain meetings where an employer seeks to gather information which may result in discipline.

### 13. **Does the Farmworker Protection Rule provide any protections for workers who are terminated without cause?**

Workers employed under the H-2A program have the right to payment for three-fourths of the hours offered in the work contract even if the work ends early, housing and transportation until the worker leaves, payment for outbound transportation, and, if the worker is a U.S. worker, to be contacted for employment in the next year, unless they are terminated for cause. The Farmworker Protection Rule clarifies that an employer may only terminate a worker “for cause” when the employer demonstrates that the worker has failed to comply with employer policies or rules or to satisfactorily perform job duties. Additionally, a worker is only terminated “for cause” after the transparent application of a system of progressive discipline unless the worker has engaged in egregious misconduct. The rule establishes five conditions that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable. Those five conditions are:

1. That the worker has been informed, in a language understood by the worker, of the policy, rule, or performance expectation.
2. Compliance with the policy, rule, or performance expectation is within the worker’s control.
3. The policy, rule, or performance expectation is reasonable and applied consistently to the employer’s H-2A workers and workers in corresponding employment under the H-2A program.
4. The employer undertakes a fair and objective investigation into the job performance or misconduct.
5. The employer corrects the worker’s performance or behavior using progressive discipline, unless the worker has engaged in egregious misconduct.

These clarifications will help to ensure that workers are not arbitrarily and unjustly terminated under the pretense that the termination was “for cause” in order to strip them of essential rights to which they would otherwise be entitled. It will also assist the Department in determining whether an individual worker was terminated for pretextual reasons.

If the Department determines that a worker has been terminated without cause and the employer has not complied with its obligations to pay at least three-quarters of the hours disclosed in the work contract, provide housing and meals until the worker leaves, and outbound transportation, the Department will seek appropriate remedies, including back wages, on behalf of that worker. Additionally, if a U.S. worker is terminated without cause and the employer does not contact the worker for employment in the next year, the Department may seek appropriate remedies for that worker.

### 14. **How does the Farmworker Protection Rule help ensure that workers are fully apprised of the material terms and conditions of employment?**

The Farmworker Protection Rule requires employers to disclose any minimum productivity standards that are a condition of job retention, regardless of whether the employer pays on a piece rate or hourly basis. Additionally, 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 Farmworker Protection Rule expressly requires employers to include the non-hourly wage rate on the job order along with the highest hourly rate so that both rates are included in the recruitment disclosures and job order. The Farmworker Protection Rule also clarifies that, if the employer offers overtime pay voluntarily or pursuant to Federal, State, or local laws, then the employer must disclose on the job order any applicable overtime premium wage rates and the conditions for such overtime payment.

### 15. **Does the Farmworker Protection Rule provide any measures against the withholding of workers’ travel documents to**

# better protect workers against potential labor trafficking?

Consistent with existing laws prohibiting passport confiscation, the Farmworker Protection Rule clarifies and expressly prohibits an employer from taking or confiscating workers' travel documents, such as passport, visa, or other immigration or government identification documents, against the workers' wishes. Even where the worker has voluntarily requested that the employer safeguard such documents, the worker must be able to readily access the document(s).

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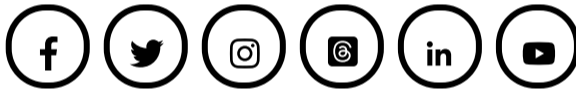
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