



The Bush Administration's Shameful Legacy for Farmworkers: Midnight Regulations on the H-2A Agricultural Guestworker Program

Shortly before leaving office, the Bush Administration finalized midnight regulation changes to the H-2A agricultural guestworker program. The changes are devastating for farmworkers and contravene our nation's most basic labor and immigration policy concepts. The changes went into effect on January 17, 2009.

The H-2A guestworker program allows agricultural employers to hire temporary foreign workers only if they can prove there is not a sufficient supply of U.S. workers and that the wages and working conditions they are offering will not adversely impact U.S. workers. These safeguards are necessary because foreign workers, out of desperation, may be willing to accept substandard wages and working conditions. U.S. workers cannot effectively compete against foreign workers willing to work for any wage, under any conditions. Over the years, modest protections were built into the H-2A program to protect the domestic labor force from unfair competition and adverse impacts on wages and working conditions and vulnerable foreign workers from exploitation. Now, the Bush Administration's midnight changes to the H-2A program reduce these worker protections, including by slashing farmworker wages, limiting the ability of U.S. farmworkers to obtain needed jobs, permitting the discriminatory treatment of U.S. farmworkers in wages and benefits, and dramatically reducing government oversight and enforcement.

DOL's final H-2A rules contain pages of detailed regulatory changes and ineffectual attempts to justify the harmful contents. Following are examples of some of the worst provisions.

The new rules violate the H-2A statute by eliminating labor certification, which is required by the statute, and replacing it with "attestation." The H-2A statute requires an employer seeking to bring in temporary foreign labor to obtain from DOL a certification that there is a shortage of U.S. workers and that the employer offered competitive wages and working conditions. Instead, DOL allows a labor attestation, which means that the employer need only check off a few boxes on the application and promise to comply with the law. DOL will not engage in any meaningful up-front review of the wages or working conditions or recruitment of U.S. workers. This illegal reduction in government oversight invites abuse. Workers' rights in the H-2A program are already routinely violated—greater enforcement is needed, not less.

The New H-2A Regulations Slash Farmworker Wages and Reduce and Eliminate Other Benefits.

- Under the previous regulations, DOL required H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey. Although this survey's results were low because of the presence of a large number of undocumented workers, DOL lowers the wage rates even further by switching to the Bureau of Labor Statistics' Occupational Employment Survey, which does not even survey farms, but farm labor contractors, the lowest paying employers of farmworkers. DOL also allows employers to pay one of four "wage levels"—most employers will likely pay the lowest level, which is the average wage received by the lowest-paid one-third of farmworkers in a geographic area (i.e., the 16th percentile). The only real floor is the state or federal minimum wage even though many farmworkers currently earn more.

- The H-2A program for decades has required employers to reimburse the workers for their long distance travel costs to the place of employment upon completing the first half of the season, and then pay their way back home if they complete the season. DOL now will only require employers to pay the costs of transportation for H-2A workers to and from the U.S. consulate or port of entry, even though workers often live far from these locations and are recruited where they live, not near these locations. This change will only drive foreign workers further into debt and make them more vulnerable to exploitation than they already are.
- For the first time since the program's creation, U.S. workers could be paid less and receive fewer benefits than the H-2A workers with whom they work side-by-side, if the grower says they were hired before the H-2A workers. Allowing such disparate pay and benefits undermines the law's goal of ensuring that U.S. workers are not adversely affected by the presence of temporary foreign workers.
- The H-2A law requires that the housing provided to H-2A workers by a grower be inspected prior to DOL's approval of the grower's application for workers. DOL's new rules include two gaping loopholes. One creates an exception to the statutory requirement that housing must be inspected before certification can be made. The second will permit substitution of rental or public accommodations for certified housing in the event that housing becomes unavailable through no fault of the employer. This allows employers to claim that they face an emergency unavailability of housing and must put the farmworkers up in a decrepit former motel or substandard mobile homes.

The New Rules Deny U.S. Workers Access to Needed Jobs by Minimizing Growers' Obligations to Recruit and Hire U.S. Workers Despite Staggering Unemployment Rates in Agriculture.

- DOL changed the recruitment requirements so that employers claiming a labor shortage will not have to engage in meaningful recruitment of U.S. farmworkers and the state job service agencies will not be permitted to be effective in referring job applicants to H-2A employers. DOL is withdrawing the obligation to engage in the same kind and degree of recruitment for US workers as employers do for foreign workers. This allows employers to claim that they can't find any US workers without making any real effort, while at the same time engaging in huge recruitment campaigns in Mexico and other nations in the effort to find guestworkers. Further, DOL has decided that H-2A employers need not engage in positive recruitment in known areas of farm labor supply if those areas have other agricultural employers looking for farmworkers to do comparable work.
- For years, the H-2A program has protected the rights of US workers to H-2A jobs by giving them preference to these jobs for the first 50% of the contract period. DOL guts this protection by eliminating it over a five-year period, during which time workers will only have a 30-day preference. This change means that US workers applying for an H-2A job lasting 10 months will be ineligible for the job after the first 30 days, even if they have always worked for that employer. Many agricultural jobs have peak seasons and a need for increased numbers of workers long after the initial 30 days.

The Bush Administration's changes to the H-2A program are illegal and morally wrong. DOL should be protecting workers' rights, not terminating them, especially in this time of economic crisis. Congress must act immediately to stop these harmful changes before the H-2A program is expanded under these damaging new rules.

A solution to the farm labor crisis already exists. The AgJOBS farmworker immigration bill is a bipartisan, labor-management compromise which would provide an earned legalization program and reform the H-2A program in balanced and fair ways that workers and employers agreed to after years of conflict.