



U.S. Department of Labor Enforcement in Agriculture: More Must Be Done to Protect Farmworkers Despite Recent Improvements

A Report by Farmworker Justice



Summary

Farmworker Justice obtained data from the U.S. Department of Labor (DOL) to evaluate the DOL's enforcement of the minimum wage and other basic labor protections applicable to agricultural workers on farms, ranches, and dairies. Farmworker Justice and many other organizations have observed persistent and widespread violations of the limited protections afforded to farmworkers under federal law. Such violations harm workers as well as inflict competitive disadvantage on employers that pay the costs of complying with employment laws.

This report reviews enforcement data under the two principal employment laws in agriculture, the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), as well as under the H-2A agricultural guestworker program. Congress delegated to the DOL authority and responsibility to investigate and remedy violations under these laws and to encourage compliance by employers. The DOL's role is especially important in agriculture because of obstacles farmworkers face in seeking enforcement on their own.

The DOL data reveal high rates of violations of workers' rights found in the agency's investigations. From our analysis, Farmworker Justice concludes that there has been improvement in some areas of DOL's

enforcement activities in agriculture over the past few years, but that the DOL should continue to strive for greater quantitative and qualitative improvement. Our review compared two four-year terms. While the number of investigations in agriculture stayed fairly consistent, DOL made significant progress as evidenced by hours invested in investigations, number of employees in the investigated businesses, and the financial penalties and back wages assessed.

We recommend further increases in the numbers of investigations and improvements in the quality of enforcement. Such improvements would provide hard-working, low-wage farmworkers with remedies for violations of minimum standards required by law and deter more employers from committing wage-hour violations, which are widespread in agriculture.

Introduction

Americans depend on the hard work and sacrifices of farmworkers and their families for their food supply. Farmworkers spend grueling days engaged in tedious, back-breaking and often dangerous labor in exchange for which they are paid poverty-level wages. Agricultural employers are exempted from many employment law protections applicable to other occupations; yet violations of those few protections that do apply to agriculture, including the federal minimum wage, are widespread.

Farmworkers face obstacles enforcing employment laws. Due to their low wages, farmworkers often live paycheck to paycheck. This dependence on their weekly wages to meet basic needs, combined with their fear of retaliation, inhibits many farmworkers from asserting their basic workplace rights. The majority of farmworkers are undocumented immigrants, many of whom fear that challenging illegal practices will result in loss of their job and deportation. Few attorneys are available to help poor agricultural workers; legal aid programs are prohibited from representing undocumented immigrants, the majority of the farm labor force.

Under these circumstances, effective oversight and enforcement by DOL are critically important to ensuring compliance with employment protections in agriculture.

In 2009, Farmworker Justice and Oxfam America published a report, [Weeding out abuses: Recommendations for a law-abiding farm labor system](#), which described life in the fields for farmworkers, including the many labor law violations they suffer.¹ Our recommendations called on the DOL to help bring an end to the rampant violations of labor law protections for farmworkers, including by increasing and improving its enforcement of employment law protections for farmworkers.

Five years later, Farmworker Justice undertook an analysis of the DOL's enforcement activity in agricultural workplaces to determine whether there had been improvement or other observable trends. From data obtained from the DOL in response to Freedom of Information Act requests,² we compiled and analyzed measures of

***“They paid us very little.
It just wasn’t enough....
It wasn’t a legal wage.
We had to accept what they
gave us, even though it was
only enough to cover food.
It wasn’t even enough to
cover the rent.”***

- Teresa, Washington farmworker

¹The report can be found at: http://farmworkerjustice.org/sites/default/files/documents/7.2.a.7_weeding-out-abuses.pdf

² DOL's Wage and Hour Division enforcement data was produced by U.S. Department of Labor, July 9, 2009, December 1, 2011, April 13, 2012, and December 30, 2013 in response to requests of Farmworker Justice under the Freedom of Information Act. Data was included for investigations at businesses falling under the North American Industry Classification (NAICS) codes for agriculture, which include crop production (111), animal production & aquaculture (112), forestry & logging (113), fishing, hunting & trapping (114), support activities for agriculture & forestry (115). Because of the broad classification for agricultural categories, there may be some overinclusion of employers in industries not traditionally considered agricultural, such as hunting; however, the number of employers in nontraditional agriculture are likely to be minimal.

performance with respect to investigations under the Fair Labor Standards Act (FLSA), the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA), and the H-2A temporary foreign agricultural worker program over the past ten years.

We compared data over two time periods: the four most recent years of the Obama Administration for which we had data, 2010-2013,³ and the last four years of the Bush Administration, 2005-2008. We were especially interested in the potential impact of the hiring of an additional 300 Wage and Hour Division investigators (nationwide and for all sectors) beginning in 2009.⁴ While we were able to observe trends and patterns and analyze important information on DOL activities, there were significant limitations on our ability to provide answers to a number of questions we sought to answer due to the manner in which data was collected and reported.

Overall DOL Enforcement

The DOL's strategic priorities identify agricultural workers as among the most vulnerable workers.⁵ DOL notes that agricultural workers, along with other vulnerable workers, are "often at risk of experiencing labor violations" and share a "common thread [of] ... reluctance to voice concerns to authorities when they are the subject of violations. Many lack knowledge of or the opportunity to exercise their rights in the workplace."⁶ DOL concentrates its compliance programs on ensuring fair compensation for these vulnerable workers.⁷ DOL investigates potential violations either in response to complaints from farmworkers themselves (or from others), or by conducting a "directed investigation," which DOL initiates in the absence of a complaint, based on its assessment of where violations are likely to be found.⁸ Under both time periods, the vast majority of investigations were directed, with only about 17% of investigations resulting from complaints.

This section discusses the DOL's overall enforcement in agriculture under the FLSA, AWPA, and the H-2A agricultural guestworker program. Later sections discuss enforcement under each of these laws separately.

The enforcement data reveal largely, but not uniformly, favorable trends, and less progress than we had anticipated.

As the table below shows, the number of agricultural investigations during the two time periods was about equal - a total of 6,125 cases during the last four years of the Bush Administration and 6,119 cases during four years of the Obama Administration, an average of roughly 1,530 cases per year. In the past, however, the number of investigations conducted by DOL has been much larger. For example, for AWPA alone, in FY 1986, the Reagan Administration's DOL reported 3,706 investigations and higher numbers through FY 1989, after which it gradually declined.⁹

We had hoped for an appreciable rise in the number of investigations during the time period of the Obama Administration that we analyzed, 2010-13, especially given the hiring of 300 additional investigators. Unfortunately, the data does not reflect such an increase.

The DOL found violations of these laws in 63% (3,852) of the 6,125 agricultural investigations during the Bush

³ We did not include data for FY 2009 in our analysis because the Obama Administration had just taken office in that year and would have initially spent time and attention to transitioning operational policies and priorities from the previous administration. The transitional activities may well have impacted levels of performances as measured in the enforcement statistics for that year.

⁴ U.S. Department of Labor, November 2009, "Statement by US Secretary of Labor Hilda L. Solis on Wage and Hour Division's increased enforcement and outreach efforts" <http://www.dol.gov/opa/media/press/whd/whd20091452.htm>

⁵ U.S. Department of Labor, *Department of Labor's FY 2014-2018 Strategic Plan*, <http://www.dol.gov/sec/stratplan/FY2014-2018StrategicPlan.pdf>

⁶ Id. at 59.

⁷ Id. at 39.

⁸ The statistics do not contain any information about litigation activity by DOL, only investigative activity. The majority of violations from investigations are resolved short of litigation, with the employer undertaking corrective action (i.e paying back wages and/or penalties). Relatively very few cases ever go to court.

⁹ Farmworker Justice analysis of DOL AWPA enforcement data for fiscal years 1998, 1999, 2000, and 2001 from a request through Freedom of Information Act in 2002; available upon request.

Administration and in 69% (4,231) of the 6,119 investigations during the Obama Administration. This statistic, though it may include minor and well as major violations, reveals a troubling high rate of violations that is consistent over time.

The data reveal several more marked upward trends, as shown in the chart below. The total number of employees at the establishments covered by DOL’s investigations increased by over 37%, with more than an additional 150,000 workers covered by DOL inspections during the 2010-2013 time period. There was an even greater percentage increase in the number of assessed back wages, an increase of about 67%. And while the number of overall investigations did not increase, the time DOL spent on investigations in agriculture did – by an increase of roughly 40%, from about 35 hours per investigation to about 50 hours per investigation.

Enforcement Activity in Agriculture	2005-08	2010-13	Change
Total number of cases	6,125	6,119	-0.1%
Cases with violations	3852	4231	+9.8%
Total number of case hours	215,399	304,116	+41.2%
Total number of employees in establishment	407,113	559,028	+37.3%
Total assessed civil money penalties	\$4,671,207	\$14,907,703	+219.1%
Total collected civil money penalties ¹⁰	\$2,724,649	\$6,053,394	+122.2%
Total assessed back wages	\$8,324,982	\$18,929,086	+127.4%
Total collected back wages	\$6,960,664	\$15,647,703	+124.8%
Total employees assessed back wages	21,021	35,158	+67.3%

Various provisions of the FLSA, AWP, and H-2A laws authorize the DOL to assess and collect back wages and civil money penalties (CMPs) from employers when violations of these statutes are found. If DOL resolves investigations merely by allowing an employer to pay what was owed to workers in the first place, or even less, employers may well conclude that it is financially worthwhile to violate the law, take the risk of getting caught, and suffer no worse consequences than having to comply with the law only if it is caught. Since the employer is unlikely to be investigated each time it breaks the law, it may save money by breaking the law. For this reason, assessment of CMPs in addition to back wages is a very important tool to prevent law-breaking from being profitable.

The total CMPs and back wages assessed against agricultural employers were substantially higher in the later time period than in the earlier period. CMP assessments increased by 219%, an increase of more than \$10 million. Back wage assessments were over \$10 million higher — an increase of 127%. During the recent time period, the assessed back pay per worker increased from an average of \$396 during the Bush Administration to an average of \$538 per worker during the Obama Administration.

The data do not allow us to determine the degree to which workers are receiving all money owed to them or whether the level of civil money penalties is sufficient to deter future wrongdoing. DOL resolves most investigations through settlements, often arrived at by way of compromise with the employer without a lawsuit. Thus, the amounts assessed by DOL for back wages and CMPs may not be the amount that DOL and the

¹⁰ DOL’s data on collected backwages and civil money penalties do not allow us to analyze compliance with assessed backwages and penalties as it is not possible to correlate the money collected from year to year to the money assessed in that year.

employer agreed to in a settlement.

Although the total dollar amount of CMPs *assessed* increased by 219%, the total amount of CMPs *collected* increased by only 122%, reflecting a decrease to 42% in the rate at which the assessed CMPs were collected from the Bush to the Obama Administrations. Due to the limitations on data, we cannot draw a conclusion about employers' compliance with CMPs by comparing the amount assessed to the amount collected. Nonetheless, the data reflect a broad enough trend to raise a question about the DOL's follow-through when employers do not comply with CMPs. The data highlight the need to ensure that DOL has the capacity, as well as the commitment, to seek legal recourse against employers that do not comply with settlement agreements.

While the increases in hours, workers covered, and assessed back wages and penalties are moving in a positive direction, the data demonstrate a continued need for greater enforcement for at least two reasons. First, although there are about 566,469 farms with hired labor, there were just 6,119 total investigations during the most recent four-year period analyzed in this report. Moreover, those investigations included not only farm operations but also a broader universe of businesses included in the agricultural industry code, such as forestry, fishing and hunting.¹¹ The percentage of farms facing DOL enforcement was miniscule, resulting in limited deterrent effect.

Second, as the Obama Administration's DOL invested additional resources in investigations, it found more violations. In the last year analyzed, the percentage of investigations in which DOL found violations rose to 70% in 2012 and 74% in 2013. The level of violations found may result partly from DOL targeting of investigations to achieve compliance where violations are suspected. The data are consistent with observations of extensive non-compliance with labor laws in agricultural workplaces.

Despite the improvements noted above, current enforcement levels do not appear to be deterring many agricultural employers from violating the law. Additional resources are needed to create a credible threat of enforcement and realize the deterrent effect of DOL investigations.

Enforcement of the Fair Labor Standards Act

The FLSA sets the federal minimum wage, overtime pay, child labor rules, and payroll recordkeeping requirements. The FLSA excludes farmworkers from overtime protections and allows agricultural employers to hire children at younger ages than employers in other, less dangerous occupations. It does require most agricultural employers to pay at least the federal minimum wage of \$7.25 per hour.¹² In 29 states (and the District of Columbia), the state minimum wage exceeds the federal minimum wage, making violations of FLSA all the more egregious in those states.¹³ In several states with large agricultural workforces, farmworkers may be entitled to up to \$9.00 or more per hour.¹⁴

The DOL enforcement data reveal an increase in the number of overall FLSA violations found among agricul-

¹¹ U.S. Department of Agriculture, 2012 Census of Agriculture: United States Summary and Data, May 2014, Page 300. http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_1_US/usv1.pdf The USDA defines a farm as "any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year." DOL's investigations reported here encompass entities covered under the Ag NAICS code, which is broader than the USDA's definition of farm.

¹² See 29 U.S.C. 213 (2014). Small farms also have a special exemption from the FLSA minimum wage and recordkeeping requirements that is not applicable to other sectors' small businesses. 29 U.S.C. § 213(a)(6)(A).

¹³ DOL Consolidated State Minimum Wage Update Table (Effective Date: 02/25/2015), <http://www.dol.gov/whd/minwage/america.htm#Consolidated> (last visited 3/6/15).

¹⁴ For example, Washington's minimum wage is \$9.47, <http://www.lni.wa.gov/workplacerrights/wages/minimum/>; Oregon's minimum wage is \$9.25, http://www.oregon.gov/boli/TA/Pages/T_FAQ_Minimum-Wage.aspx; and California's minimum wage is \$9.00, <http://www.dir.ca.gov/lwc/MW-2014.pdf>

tural employers.¹⁵ As the DOL has invested more hours in their investigations, more investigations with FLSA violations in agriculture have been found.

Enforcement Activity in Agriculture	2005-08	2010-13	Change
Total number of investigations with FLSA violations in agriculture	1,414	1,901	+34.4%

Unfortunately, we cannot determine the percentage of investigated employers that violated FLSA’s minimum wage provisions. This difficulty arises in part due to the manner in which the data is reported.

Anecdotally, violations of farmworkers’ minimum wage protections are rampant. A survey conducted by Pineros y Campesinos Unidos del Noroeste (“PCUN,” Oregon’s farmworker union) of approximately 200 Marion County, Oregon farmworkers paid by “piece-rate” in the 2009 berry harvests revealed widespread violations of the state’s minimum wage law. Ninety percent of workers reported that their “piece-rate” earnings consistently amounted to less than minimum wage, with an average hourly yield of about \$5.30 – 37% below the hourly minimum wage at the time—and an average daily underpayment of about \$25.00 per worker. In New Mexico, a survey of farmworkers revealed the abusive conditions in the fields, including extremely low wages and high levels of wage theft.¹⁶ Sixty-seven percent of field workers were victims of wage theft in the year prior to the survey; 43% of respondents stated that they never received the minimum wage and 95% were never paid for the time they waited each day in the field to begin working. These examples are consistent with the high frequency with which the DOL finds FLSA violations.

Enforcement of the Migrant and Seasonal Agricultural Worker Protection Act

AWPA is the principal federal employment law for farmworkers, who are excluded from labor protections that cover most other occupations.¹⁷ Like FLSA, AWPA does not apply to smaller employers. In addition, AWPA does not cover H-2A guestworkers nor many year-round workers on farms.

AWPA includes the following requirements: 1) agricultural employers must disclose terms of employment at the time of recruitment and comply with those terms, pay workers’ wages when due, and keep payroll and other employment records; 2) employers, when using farm labor contractors (“FLCs” or “crewleaders”) to recruit, supervise or transport farmworkers, must confirm that the FLCs are registered with and licensed by the U.S. Department of Labor; 3) providers of housing to farmworkers must meet local and federal housing standards; and 4) transporters of farmworkers must use vehicles that meet basic federal safety standards and are insured. As many states have set a higher minimum wage than required by the FLSA, it has become increasingly important to enforce AWPA’s requirement that employers pay the promised wage.

In contrast to the gains in FLSA enforcement, DOL’s performance in enforcing the AWPA is less clear. The total number of cases with AWPA violations was 2,789 during the Bush Administration, increasing insignificantly to 2,860 cases during the Obama Administration (3% increase), despite the overall increase in case hours spent on agricultural investigations.¹⁸ The total assessed civil money penalties under the Obama Administration’s 4-year period, however, increased by about 10%, approximately \$300,000, as compared to the four-year Bush

¹⁶ New Mexico Center on Law and Policy, Human Rights Alert: New Mexico’s Invisible and Downtrodden Workers (2013), <http://nmpovertylaw.org/WP-nmclp/wordpress/WP-nmclp/wordpress/wp-content/uploads/2013/07/Report-FINAL-2013-07-23.pdf>.

¹⁷ For more information on AWPA, read FJ’s report “Unfinished Harvest: The Agricultural Worker Protection Act at 30.” <http://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeUnfinishedHarvest.pdf>

¹⁸ As stated in fn. 15, the data do not allow us to state the number of investigations investigated under AWPA.

Administration period. While it is difficult to draw a conclusion, DOL may have increased its use of CMPs recently, which could have a helpful deterrent effect.

The chart below illustrates the findings of violations for various categories under AWPA. As the data demonstrates, there is a mix of findings regarding compliance with protections afforded by AWPA. There are increased findings of violations under some categories, such as employers failing to pay wages when due (a 76% increase) and failure of employers to make and keep employer records, to maintain those records and to provide the records (increases of 34, 65, and 16%). There are also decreased findings of violations for some protections, such as those related to the transportation protections and housing requirements.

Enforcement Activity in Agriculture	2005-08	2010-13	Change
Cases with AWPA violations	2,789	2,860	+2.6%
Dollar amount of civil money penalties assessed under AWPA	\$3,145,365	\$3,472,837	+10.4%
Number of employers who failed to provide wage statements	974	1,085	+11.4%
Number of employers who failed to pay wages when due	415	730	+75.9%
Failure to pay wages when due (for workers)	7,024	15,694	+123.4%
Number of employers who failed to disclose conditions to workers	1,420	1,566	+10.3%
Number of employers who misrepresented conditions to workers	54	80	+48.1%
Number of employers who failed to post MSPA poster at worksite	594	646	+8.8%
Number of employers who failed to make/keep employer records	767	1,029	+34.2%
Number of employers who failed to provide records	181	209	+15.5%
Number of employers who failed to maintain records provided by FLC	54	89	+64.8%
Number of employers who failed to provide safe transport vehicles	405	349	-13.8%
Number of employers who failed to ensure driver has valid license	309	264	-14.6%
Number of employers who transported workers without certificate of authorization	385	349	-9.4%
Number of employers who failed to ensure housing safety and health	998	810	-18.8%
Number of employers who failed to post housing conditions	491	460	-6.3%
Number of employers who housed workers without certificate of authorization	181	143	-21%
Number of employers who failed to obtain prescribed insurance coverage	444	359	-19.1%

Given DOL’s own observations about the rampant violation rate in agriculture and the poor conditions of much farmworker housing and transportation vehicles, this data raises questions as to why there are decreases of findings of violations in a time period in which there was a greater investment of resources in investigations. There may be complex reasons for this statistical result. For example, unlike years ago, many farm operators do not provide farmworkers with housing or transportation. Nonetheless, the decrease in DOL’s findings of violations of transportation and housing protections raises concerns as to the effectiveness of DOL’s enforcement performance for these protections.

The DOL should increase and improve its enforcement of AWPA to reduce violations of workers’ rights and promote a law-abiding farm labor sector.

Enforcement of the H-2A Program

The H-2A guestworker program permits employers who face labor shortages for seasonal farm jobs to apply to hire foreign workers on temporary work visas. To bring in H-2A guestworkers, employers must show that they have tried and are unable to find U.S. workers to meet their labor needs. Employers must offer certain minimum job terms to demonstrate that bringing in guestworkers will not displace U.S. workers or adversely affect their wages and working conditions. Such employers must hire qualified U.S. workers who apply and must pay both the U.S. workers and the H-2A guestworkers the required wages and comply with other program requirements.

Despite the program's protections and oversight, workers –both foreign and domestic – at H-2A employers all too often suffer violations of the law's requirements. H-2A workers typically are ill-informed of the law's protections and poorly positioned to complain or seek redress when violations occur. They are exclusively dependent on their employers to sponsor them for the H-2A visas that allow them employment in the United States. Thus, workers who complain about wage violations or unlawful working conditions risk losing their visas and ability to remain and work in the United States, and jeopardize their opportunities for visas in future seasons. Because of these factors and others, many employers prefer to hire guestworkers rather than U.S workers (citizens and permanent resident immigrants), and act on that preference through discrimination in hiring.¹⁹ DOL's H-2A enforcement responsibilities extend not only to dealing with violations of the law's wage and other worker protections, but as importantly, to ensuring that U.S. workers are not unlawfully discouraged or displaced from employment at H-2A employers.

“The H-2A agricultural guestworker program is growing and replacing other migrant workers in New York State. The H-2A workers fear speaking out when things are not right because the employer may not hire them the next season. The abuses do not end, whether the farmworkers are documented, undocumented or H-2A. Enough of these abuses. Let us change conditions for the better for our agricultural workers.”

- Librada Paz, Rural and Migrant Ministry

DOL's enforcement record, summarized in the table below, shows a dramatic increase in enforcement activities of labor protections under the H-2A temporary foreign worker program from the Bush to the Obama Administrations. The increased enforcement includes a 113% increase in the number of H-2A-related investigations during the relevant time periods and a 236% increase in the number of hours spent on H-2A investigations.

Over the eight years under consideration (2005-2013), usage of the H-2A program grew, from 48,336 agricultural positions certified to 98,813, an increase of 104%.²⁰ Increased enforcement activity over this time period may correlate at least partially to the program's robust expansion.

DOL's investigations have found high numbers of H-2A violations. From 2010-2013, there were 935 cases registered under H-2A and 718 cases with H-2A violations; and from 2005-08, there were 439 cases registered under H-2A and 368 cases with H-2A violations. During the 2010-2013 time period, DOL assessed \$10 million in civil money penalties on H-2A program employers, an increase of 1,104% from the 2005-08 time period. The large increase in total CMPs assessed during this time may be due in part to increases in the maximum allowable CMPs for violations of the H-2A program protections in both the 2009 and 2010 regulations. Still, this huge increase in CMPs is significant and sends a clear message to employers in the H-2A program.

¹⁹ For detailed information about the H-2A program, please read FJ's report No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers. <http://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6.No.Way.To.Treat.A.Guest.H-2A.Report.pdf>

²⁰ U.S. Department of Labor, Office of Foreign Labor Certification, Employment & Training Administration, "H-2A Temporary Agricultural Labor Certification Program – Selected Statistics" for FY 2005- 2013

Enforcement Activity in Agriculture	2005-08	2010-13	Change
Investigations registered under H-2A ²¹	439	935	+113%
H-2A case hours	22,798	76,694	+236.4%
H-2A civil money penalties assessed	\$861,721	\$10,377,304	+1,104.3%
Cases with H-2A violations	368	718	+95.1%

Other Indicators of Performance: Improving Quality to Maximize Impact

In addition to requesting quantitative increases in enforcement of workers’ rights, Farmworker Justice and others have urged DOL to maximize its limited resources by engaging in more effective enforcement.

DOL investigators face challenges uncovering violations as a result of many factors, including high use of labor contractors, workers paid by piece rate, missing or manipulated wage records, the payment of multiple workers on one account, worker fear of retaliation for speaking out about violations, and the fear of deportation among undocumented immigrants. Improving methods to overcome such obstacles to enforcement of the FLSA is vital for guaranteeing the minimum wage of farmworkers.

One of the most important steps to better enforcement is to ensure that employers reimburse victimized farmworkers for all their lost wages whenever possible. Not only do the workers deserve and need the back pay, but employers that violate the law should not be permitted to benefit financially by their misdeeds. To prevent employers from profiting by their illegal conduct, DOL must utilize its authority to seek full back pay, “liquidated damages” (the FLSA allows collection of double the illegally unpaid wages) and levels of civil money penalties that punish and deter misconduct.

In addition, to improve DOL’s performance, we and others have recommended that DOL increase its use of the joint employer concept to hold farm operators jointly liable with farm labor contractors for FLSA and AWPAs violations on their farms;²² that DOL more frequently inform employers of its intent to seek a “hot goods” injunction in court and to do so unless a prompt settlement can be reached;²³ and that DOL increase cooperation and collaboration with farmworker legal assistance and worker advocacy groups to more effectively uncover violations, target abusive employers, and optimize investigative efforts.

Hot Goods Provision of the Fair Labor Standards Act of 1938

Under the so-called “hot goods” provisions of the FLSA, goods produced in violation of the Act’s minimum wage, overtime and child labor provisions are considered to be tainted by the labor violations and to pollute the

²¹ We use investigations registered under H-2A as a proxy for number of number of investigations covering H-2A because H-2A workers are covered by the higher adverse effect wage rate --and excluded by AWPAs. This may not include some investigations registered under AWPAs or FLSA, particularly those addressing the conditions for US workers.

²² “Joint employer” liability refers to holding both the farm operators and their labor contractors to be “employers” of the farmworkers, and jointly responsible for violations of labor rights. Please read FJ’s report, “Weeding out abuses: Recommendations for a law-abiding farm labor system,” for more information. http://farmworkerjustice.org/sites/default/files/documents/7.2.a.7_weeding-out-abuses.pdf

²³ For more information about “hot goods injunctions,” read FJ’s fact sheet, “The Fair Labor Standards Act’s Hot Goods Orders: An Important Protection for Farmworkers.” http://www.farmworkerjustice.org/sites/default/files/Hot_Goods_Factsheet.pdf

channels of interstate commerce to the detriment of workers and law-abiding businesses.²⁴ The FLSA makes it illegal for anyone to transport, ship, deliver, or sell in interstate commerce these “hot goods.”²⁵

FLSA permits the DOL to file a lawsuit in which it requests a federal court to enjoin the sale or shipment of goods that have been produced in violation of the FLSA. The injunction can apply, for example, to car parts, clothing or food products that have been sent from the producer to a warehouse for later delivery to wholesalers or retailers.²⁶ DOL’s statutory authority to seek a hot goods injunction provides the agency with an effective law enforcement tool that should be used whenever necessary to provide workers with a prompt remedy, which is especially important for low-wage workers and seasonal workers who leave the geographic area when the job ends.

Various administrations have used “hot goods” injunctions to prohibit the shipment or sale of tainted agricultural commodities and other products. Though a single FLSA violation can make goods “hot,” the DOL has typically used the “hot goods” injunctions in cases that involve more systemic abuse. A few examples from recent administrations include the following: the Clinton Administration’s DOL sought a hot goods order in 1998, in lettuce, onions, tomatoes, cucumber and garlic produced in Texas; that same year it threatened the use of hot goods before settlement in a Louisiana strawberry case; the George W. Bush Administration’s DOL sought and received a court order in 2001 against a Washington cherry and apple grower for violations of the minimum wage of 600 workers; and in the following year, the DOL threatened the use of hot goods orders for wage violations at a California blueberry farm, but settled before a court order was issued. According to a 2014 article in the news source Fair Warning, since 2010 DOL has used its hot goods authority more than 4,000 times overall in a wide range of industries, but only in 20 cases against agricultural employers.²⁷

Farmworker Justice is pleased at the Department of Labor’s indications that it is committed to using its authority to request “hot goods” injunctions to obtain compliance with the minimum wage and child labor in agriculture.

Unfortunately, there are challenges to DOL’s use of its authority. In response to DOL’s enforcement of FLSA protections for farmworkers, including its use of its “hot goods” authority, some agribusiness groups, legislators and pundits have attacked DOL’s efforts. Some grower groups and their Congressional allies are pressing to exclude perishable agricultural products from coverage under the FLSA’s hot goods provisions. In 2014, a House Agriculture subcommittee held a hearing regarding the use of the “hot goods” injunction.²⁸ The subcommittee was led by members from farming districts: Chairman Austin Scott (R-GA) and ranking member Kurt Schrader (D-OR). The hearing was plainly intended to send a message to the Obama Administration to curtail use of the provision in perishable agriculture.

We support DOL’s stated intention to continue to carry out its responsibilities using all available tools, including the longstanding and effective hot goods provision. We encourage DOL’s continuing effort to educate policymakers and the public about the purpose of the hot goods provision and its benefits to both low-wage workers and law-abiding employers.

²⁴ 29 U.S.C. §§ 201–219.

²⁵ Common carriers are exempt from the hot goods provisions. There is also a good faith exception for purchasers who rely in good faith on written assurances from the producer that no violation has occurred and have no notice of any violations. 29 USC § 215(a)(1); 29 USC § 212(a).

²⁶ 29 USC § 217.

²⁷ Heat Rising Over ‘Hot Goods’: Growers Accused of Wage Violations Fight Labor Department’s Tactic of Halting Farm Shipments, Bridget Huber, October 13, 2014, Fair Warning, <http://www.fairwarning.org/2014/10/hot-goods-story/>

²⁸ House Committee on Agriculture, Subcommittee on Horticulture, Research, Biotechnology, and Foreign Agriculture, “To review the impact of enforcement activities by the Department of Labor on specialty crop growers.” July 30, 2014 <http://agriculture.house.gov/hearing/review-impact-enforcement-activities-department-labor-specialty-crop-growers>

Joint Employer Responsibility to Address Labor Contracting Abuses

A substantial number of farmworkers are hired or supervised through farm labor contractors. In many instances the farm operator claims it does not “employ” the farmworkers on its farm and therefore is not responsible for ensuring that workers are paid the minimum wage under the FLSA or other labor protections under AWPA. Generally, the farm operator engages in the typical activities of an “employer” and under the broad definitions of employment relationships in the FLSA and the AWPA, such growers clearly are employers and should not be permitted to escape responsibility. Unfortunately, DOL’s commitment to implementing the law’s broad definition of employment relationships has wavered under some administrations.

Recently, DOL has evidenced an interest in applying the joint employer concept, as it should, to stop abuses. It is important that DOL send the message publicly to employers that they should not seek to escape their responsibility and that there will be serious consequences for their efforts to shield themselves from liability and foist all liability on farm labor contractors. As an example of this enforcement, in 2013, DOL conducted an investigation of two farms and one farm labor contractor in South Carolina, recovering thousands of dollars in back wages and civil money penalties for unsafe housing conditions and transportation.²⁹ This investigation sends a signal to employers that DOL is willing and able to utilize joint employer liability and will pursue employers who fail to pay wages and penalties owed. In this way, DOL’s impact can have repercussions beyond the immediate employers it is investigating and suing.



Photo Credit South Carolina Legal Services

Unsafe housing conditions in South Carolina. Windows were covered with tarps & tape instead of having panes of glass.

Perceptions from the Field

Farmworker Justice conducted an informal survey of local farmworker legal advocates around the country to obtain their perception of the DOL’s wage-hour enforcement. While the responses we received are anecdotal, several themes emerged that deserve more attention.

First, the assessments of the effectiveness of the DOL’s efforts varied based on geography; this may reflect differences in approach across DOL regional offices. Second, the majority of the respondents – though not all – expressed criticism of the quality of the investigations and the results achieved. Some advocates asserted that the DOL investigators did not conduct adequate interviews with their clients and otherwise failed to build a strong evidentiary record to maximize the likelihood of obtaining a just settlement or building a winnable case

²⁹ U.S. DOL, Wage and Hour Division, April 4, 2013, Press Release Number: 13-146-ATL (71), “US Labor Department’s investigation uncovers unsafe housing and transportation, wage violations at two South Carolina farms.” Located at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20130404.xml> (last accessed 12/2/14)

in court. While most investigations result in settlements, and it is recognized that settlements usually require parties to compromise, advocates nonetheless said that often their clients did not receive adequate compensation for violations of their rights. Most respondents said that they had been in communication with the DOL to provide information about their clients and violations of the law and to recommend how DOL could achieve greater compliance by employers. However, most advocates indicated that DOL usually refused to discuss information about individual cases, even when the advocates represented the workers who filed complaints, and that DOL did not wish to collaborate effectively.

While farmworker advocates in the field have generally expressed disappointment with the effectiveness of DOL's law enforcement efforts on behalf of their clients, many agribusiness representatives have been very critical of the DOL for its enforcement efforts. For example, Frank Gasperini, president of the National Council of Agricultural Employers, recently stated "Our current concern has been that this administration may actively, or by allowing agencies to liberally interpret their rules and enforcement priorities, continue to add regulations, enforcement actions, and reporting requirements that will make U.S. domestic food production increasingly less competitive."³⁰ As noted above, at the request of agribusiness, legislation was introduced last Congress to limit DOL's authority to enforce the Fair Labor Standards Act in perishable agriculture.

It has been difficult to discern from the DOL's statistics whether the agency has increased efforts to work collaboratively with worker advocates, seek joint employer liability, exercise its hot goods authority or otherwise seek to maximize the quality of its enforcement. Farmworker Justice has observed in the WHD's public statements and in meetings with officials an increased emphasis regarding the value of using certain tools that can be effective in securing remedies and deterring violations. Public statements can be helpful in warning employers of the enforcement risks they face, but if the reality on the ground does not match the warnings, there will be little change in employer behavior. There is some evidence that DOL has not only publicly announced its commitment to using these tools but has increased its use of these tools. We will continue to monitor the WHD's performance, attempt to measure improvement in enforcement, and assess its impact on the ground.

Conclusion

Overall, DOL's data show an effort to increase enforcement of labor protections in agricultural employment. While the number of investigations of agricultural employers remained largely consistent with the previous Administration, the data reflect significant increases in the hours spent on the investigations, back wages assessed and civil money penalties assessed, and number of workers covered. There also appear to have been an increase in the number of violations found, reflecting that with rampant violations of workers' rights, additional investigatory resources uncover more cases of non-compliance.

There remains a need for greater enforcement of farmworker protections, particularly in the enforcement of the Migrant and Seasonal Agricultural Worker Protection Act. There is little indication that DOL's enforcement of AWPA has increased or that its enforcement has been successful in uncovering many AWPA violations. Additional efforts are needed under the Fair Labor Standards Act as well. The increased attention to labor rights compliance in the H-2A temporary foreign agricultural worker program is a welcome development that should continue.

DOL must send a strong message that employers will pay heavily for violating the law. It must use its admittedly limited resources effectively, including by increasing the number of investigations and ensuring that violations are remedied and deterred by maximizing back pay awards, seeking liquidated damages and assessing and collecting civil money penalties.

³⁰ Gasperini, Frank, "Growing Regulatory Burden Coming for Agricultural Employers?" Core Report, September 2014, Page 6. <http://www.nyapplecountry.com/files/core-report/2014-Sept.pdf>

Further, DOL must continue to build upon its avowed ongoing efforts to improve the quality of its enforcement efforts, through continued and increased use of requests for “hot goods” injunctions, joint employer liability for growers that use farm labor contractors, and improved collaboration with on-the ground groups.

Wage-hour enforcement not only helps farmworkers obtain the minimum wage and other basic standards; it also protects the many law-abiding businesses against competitive disadvantage caused by unscrupulous employers. Unfortunately, violations of wage-hour laws in agriculture continue to be widespread. Farmworker Justice urges the DOL to redouble its enforcement efforts to fulfill the promise of basic labor protections under the law for those who work in the fields to put food on the nation’s tables.