



Trump Department of Labor Proposes Harmful Changes to H-2A Agricultural Guestworker Program

On July 26, 2019, the U.S. Department of Labor formally announced plans to make sweeping revisions in the H-2A agricultural guestworker program. The proposed changes to the program's regulations would weaken key protections for farmworkers, reducing the ability of U.S. workers to obtain employment with H-2A employers and exposing H-2A workers to greater vulnerability and costs. The proposal is intended to make it even easier for agribusiness to hire hundreds of thousands of guestworkers, who are denied the rights and freedoms of immigrants and citizens. The public may comment on the proposed revisions for a 60-day period. The Labor Department will then review the comments and issue a final version of the H-2A regulations.

The Trump Administration seeks to guarantee agribusiness unlimited access to a captive workforce that is deprived of economic bargaining power and the right to vote. The proposal epitomizes the Trump Administration's hostility to immigrants. At the same time that the Administration seeks to transform the farm labor force of 2.4 million people into a workforce of 21st-century indentured servants, it is demonizing hard-working immigrants and ratcheting up cruel, heartless and counterproductive arrests and deportations, targeting many of our nation's current experienced and valued farmworkers.

The Trump Administration hides behind the rhetoric of protecting American workers to try to justify many of the proposed changes to the H-2A regulations, but if finalized, the rule would reduce labor protections for both U.S. workers and H-2A temporary foreign workers in a variety of ways. While the proposal does make a few modest improvements to the H-2A program, it generally fails to address many of the program's failures and abuses, including rampant recruitment fees and exploitation, discrimination against U.S. workers in hiring, wage theft, unhealthy housing, and unsafe working conditions. In fact, some of its provisions likely will exacerbate these existing problems by, among other things, expanding the scope of the program, weakening recruitment protections, shifting more costs onto workers and reducing housing inspections.

The H-2A temporary foreign agricultural worker program, which originated during World War II, is intended to allow agricultural employers to hire foreign citizens on temporary work visas for temporary or seasonal agricultural work under certain conditions. The law requires employers to demonstrate a shortage of labor and that the wages and working conditions will not "adversely affect" the wages and working conditions of U.S. workers. These safeguards are necessary to maintain job opportunities for U.S. workers, prevent U.S. workers' wages from stagnating or sliding downward, and protect foreign workers, who, out of desperation, may be

willing to accept substandard wages and working conditions. Over the decades, a series of modest protections, based on lessons learned from past abuses, have been built into the H-2A guestworker program to protect the domestic labor force from unfair competition and to protect vulnerable foreign workers from exploitation. Now, the Trump Administration seeks to reverse several of these key protections.

The H-2A program has been growing rapidly recently, from 139,832 approved H-2A jobs in 2015 to over 242,000 in 2018. There is no annual cap on the number of H-2A visas. The rapid growth in the program undermines the Administration's and employers' claims that it is too burdensome and expensive. Rather than capitulate to the employers' demands for easier access to exploitable guestworkers, the Administration should support legislation to grant immigration status to the many undocumented immigrants who are laboring on our farms and ranches to produce our food. Employers should compete for farm labor by improving wages and working conditions. Congress and state legislatures also should end the discrimination in many labor laws that deprive farmworkers of the same rights as other workers. The H-2A program should be a last resort, not the model for the farm labor force. This is a nation of immigrants, not a nation of guestworkers.

DOL's proposal is far too detailed and complex to comment on completely here, but we did want to draw attention to a few examples of how the changes would harm workers.

The Proposed H-2A Regulations Would Deny U.S. Workers Access to Needed Jobs by Reducing Growers' Obligations to Recruit and Hire U.S. Workers.

The law protects U.S. farmworkers' job opportunities against discrimination by employers who often prefer to employ exploitable guestworkers from poor countries. For decades, the H-2A program's regulations have included certain protections to ensure U.S. workers' access to jobs at H-2A employers. These protections include recruitment of farmworkers inside the U.S. before employers receive approval to hire H-2A workers.

One of the most important protections has been the "50% rule," giving U.S. workers preference for these jobs for the first half of the work contract period. A Congressionally-required study found the 50% rule to be valuable to U.S. workers and not costly to employers. The DOL proposes to eliminate the "50% rule." The proposal would replace the 50% rule with a requirement to hire U.S. workers only for the first 30 days of a contract. This change means that U.S. workers applying for work at an H-2A employer with jobs lasting multiple months would be ineligible for the job after the first 30 days. For many farms, hiring continues past the first day of season; this proposal would enable employers to deny U.S. farmworkers jobs and fill the positions with guestworkers. For employers that choose to bring in their H-2A workers under the proposed "staggered entry" basis, U.S. workers, including those who have worked seasonally for the same employer for many years, would be granted a preference only until the last date of staggered entry, but could be denied a job after that date.

Staggered entry is a new proposal that would allow employers to bring in their H-2A workers at any time up to 120 days after the advertised date of need. The recruitment of U.S. workers is supposed to be timed in such a way as to ensure that workers are recruited close to the

time of need and given clear notice of the date of need. Allowing H-2A workers to come in after the date of need would undermine the labor market test. U.S. farmworkers would lack clear information about work availability and start dates. Low-wage workers need to work and cannot wait to begin work. Moreover, H-2A workers often accrue debt because of illegal recruitment fees and other costs and need to work to be able to pay off their debt. If employers have a subsequent need for extra workers, they should submit an additional labor certification application.

There are other provisions regarding the recruitment process that would negatively impact U.S. workers' access to jobs at H-2A employers and deter them from even applying. For example, the DOL proposal would allow mid-season changes to job terms. It has long been understood that U.S. and foreign workers need to know the job terms before accepting an H-2A job, including the location of worksites. However, the proposal would allow employers to amend their initial applications and job terms to add additional work sites, even after the positions have already been reviewed and certified.

The Proposed H-2A Regulations Reduce and Eliminate H-2A Workers' Benefits

Reducing transportation reimbursement: The proposed regulations would shift H-2A program costs from employers onto the backs of H-2A workers, who are predominantly from poor countries. The H-2A program for decades has required employers to reimburse workers for their long distance travel costs to the place of employment upon completing the first half of the season, and then to pay their way back home if they complete the season. DOL proposes to only require employers to pay the costs of transportation for H-2A workers to and from the U.S. consulate or embassy, rather than their homes. Yet 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. A 2008 Bush rule made a similar change and the costs shifted to workers during 2009 was about \$4.7 million; a cost that would be much higher today. The notice itself calculates that during the next ten years workers would lose, and employers would gain, \$789.6 million, for an average of almost \$80 million per year because of the changes to the transportation and subsistence requirements.

Changes to wage rates: The rule proposes significant changes to the wage rates required under the H-2A program. Under the H-2A program, wages must be at least the higher of: (a) the local "prevailing wage;" (b) the state or federal minimum wage, (c) the agreed-upon collective bargaining rate; or (d) the "adverse effect wage rate" (AEWR). The proposal includes changing the methodology for the AEWR. The AEWR is intended to ensure that the hiring of guestworkers does not undermine ("adversely affect") the wage standards for U.S. farmworkers. The proposal also would undermine the longstanding requirement that employers must offer a local prevailing wage if it is the highest wage rate by eliminating the requirement to conduct prevailing wage surveys, making it optional instead.

The proposal would perpetuate a basic problem in the H-2A program wage system that will likely get worse as the program grows and continues to expand geographically. Guestworkers generally lack bargaining power to demand higher wages, due to their restricted

non-immigrant, temporary status and other factors, including the debt they often owe upon arriving in the U.S. As guestworkers become concentrated in a sector, the wages can tend to stagnate and in real terms become depressed. The system permits H-2A employers to reject as “unavailable” for work those U.S. farmworkers who seek jobs but are unwilling to accept the allowable H-2A wage rate, even if it is depressed. Moreover, H-2A employers tend to offer the minimum allowable H-2A wage.

The AEW is critically important in protecting domestic workers’ wages and jobs and preventing exploitation of vulnerable foreign workers. Currently, the DOL sets an AEW for each state based on the USDA’s Farm Labor Survey (FLS) of employers’ payrolls; the AEW is based on the state’s or region’s average hourly wage for nonsupervisory field and livestock workers combined. The new AEW proposal is complex in that DOL proposes to set the AEW using the annual average hourly gross wage for numerous standard occupational classifications (SOC) in the State or region and would use varying data sources to do so, depending on the available data. The first source for the AEW would be USDA’s FLS; however, if the FLS does not report an annual average hourly gross wage for the SOC in the state or region, the AEW would be the statewide annual average hourly wage for the SOC reported by the Bureau of Labor Statistics’ Occupational Employment Survey (OES). If the state or regional survey from FLS or OES is not available, the wage would be the FLS national wage for the SOC. Finally, if the FLS national wage is not available, the national average hourly wage the OES survey for the SOC would be the AEW. DOL’s explanation shows that if its new methodology had been used in 2018, some workers at H-2A employers, though not all, would have earned lower wages. While in some states the new methodology would have resulted in somewhat higher wage rates, the outcomes over the long run are difficult to predict.

In the past, some agricultural employer groups have sought the disaggregation of the USDA Farm Labor Survey into more specific job categories because they thought that certain higher-paying farm jobs were skewing upward the average wage used for the AEW. Although they hoped the disaggregation would lower the wage rates for their jobs, the results are not consistent among occupations. The proposal adds complexity to a system DOL is claiming it wishes to simplify.

Further, as DOL itself acknowledges, the OES performed by the Department’s Bureau of Labor Statistics does not even survey farms, but rather surveys establishments that support farm production, such as farm labor contractors, who are among the lowest paying employers of farmworkers. Thus, the OES should not be used as a source of the AEW.

Elimination of prevailing wage guarantees: The H-2A proposed rules further undermine farmworker wages by including changes to the prevailing wage requirement that would make difficult to ensure a prevailing wage is even determined, resulting in large wage cuts for some farmworkers. Under the H-2A program, there are supposed to be surveys of the prevailing wage for U.S. workers for particular jobs in local labor markets (while the AEW measures wages in a broader set of jobs and wider geographic area). DOL would only require consideration of a prevailing wage rate if the DOL OFLC Administrator issued a prevailing wage, which would be based on the state workforce agency (SWA) submitting a wage survey that must meet a number of challenging requirements. In some jobs, the local prevailing wage

rate for particular jobs – such as picking apples in Washington’s Yakima Valley -- is a piece rate that yields a significantly higher wage than the state AEW. For low-wage farmworkers these would be very harmful pay cuts. In the absence of the prevailing wage determination, H-2A employers could lawfully offer below-market wage rates and the required efforts to recruit available U.S. farmworkers would be destined to fail.

Allow housing without needed inspections: Despite high profile stories of dangerous and substandard housing, the proposed regulations would allow housing to be provided to farmworkers without annual inspections by government agencies. If a state workforce agency (SWA) notifies the DOL that it lacks resources to conduct timely, preoccupancy inspections of all employer-provided housing, DOL would allow housing certifications for up to 24 months. Further, following a SWA inspection, DOL would also permit employers to “self-inspect” and certify their own housing. Given the high rates of violations of the minimal housing standards that apply, it is deeply troubling that DOL could allow vulnerable H-2A workers to live in housing that has not been inspected annually by a responsible government entity.

The proposed changes do include modest improvements to address some health and safety concerns regarding housing that must be provided to H-2A workers and long-distance migrant U.S. farmworkers. Some H-2A employers that lack housing have been housing workers in motels or other rental or public accommodations housing. Under the proposal, where there is a failure of the applicable local or state standards to address issues such as overcrowding, adequate sleeping facilities, and laundry and bathing facilities, among others, DOL would require that the housing meet certain OSHA standards addressing those issues. While this is a step in the right direction, greater protections, including improved standards are needed for H-2A housing.

Expansion of work eligible for the H-2A program: The Trump administration seeks to include two additional categories of work in the H-2A program: reforestation activities and pine straw jobs. (Pine straw jobs are those in which pine needles that have fallen from pine trees are collected for use as mulch and groundcover.) Workers in these sectors currently are categorized as “non-agricultural” and therefore are covered by the H-2B temporary worker program. Because the number of H-2B visas is limited by a cap, which employers in those and other sectors have been seeking to raise, the DOL apparently seeks to relieve some of that pressure by moving these jobs to the uncapped H-2A program. While H-2A requirements would apply to these job categories, there is a significant downside to this program. The Migrant and Seasonal Agricultural Worker Protection Act (AWPA), which is the principal federal employment law for farmworkers, specifically excludes from coverage H-2A workers and the H-2A workers in these categories would then lose important labor rights and access to the federal judiciary to enforce them. The H-2A program should not be expanded to additional categories of work without addressing the H-2A program’s many flaws.

Modest Improvements to H-2A Labor Contractor Bonds: One modest improvement in the proposal is an increase in the bond amounts required to be posted by H-2A labor contractors (H-2ALCs). This is important because H-2A labor contractors are often undercapitalized and unable to pay back workers for labor violations. DOL has recognized the need for higher surety bonds, but the increases are too modest. DOL proposes annually adjusting

the required bond amounts proportionally to the extent the nationwide average AEWR exceeds \$9.25, as well as increasing the bond amounts required for certifications covering 150 or more workers. However, improvements are also needed to help victimized workers access the bonds. Finally, the Administration fails to address the number of other significant challenges workers face with H-2ALCs, and the already troubling lack of transparency with H-2ALCs will be exacerbated by the proposed changes. Too often farm operators seek to keep their labor costs low by hiring H-2ALCs and seeking to use the H-2ALCs as a shield to escape responsibility.

Conclusion

Farmworker Justice, in collaboration with other farmworker advocates, will prepare extensive comments on the proposed changes to the H-2A regulations. The Trump Administration's actions under the H-2A program will have profound, long-term effects on the future of the farm labor force and our food system.

The Trump Administration is doing nothing to deal responsibly with the most basic challenge for agricultural labor: that the majority of the current farm labor force – at least one million farmworkers – is undocumented. The Administration's immigration enforcement actions and threats against undocumented immigrants and their communities are harming farmworker families and undermining the agricultural sector. Given the reality that immigrant labor is what feeds this country, the workers on our farms and ranches should have the opportunity to do their jobs and contribute to our communities without fear for their basic safety and freedom. The Trump Administration should not be making it easier for employers to bring in captive visa workers to displace current farmworkers and drive down their labor standards. Instead of further expanding and weakening worker protections in existing guestworker programs, the Administration should strengthen labor protections, improve enforcement of farmworkers' limited labor rights, and seek legislation in Congress that grants undocumented farmworkers and their family members the opportunity for immigration status and a path to citizenship.