

Postmarked July 6, 2020

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210



Mr. Bruce Goldstein
President
Farmworker Justice
1126 16th Street NW, Suite LL-101
Washington, D.C. 20036

Dear Mr. Goldstein:

Thank you for your letter addressed to Secretary of Labor Eugene Scalia, Secretary of State Mike Pompeo, and Acting Secretary of Homeland Security Chad Wolf expressing your concerns about the safety of agricultural workers during the COVID-19 pandemic. This letter responds to your concerns that fall within the jurisdiction of the Department of Labor (the Department). The Department defers to the Departments of State and Homeland Security for any additional information regarding concerns that may fall within their respective jurisdictions.

The Department's Wage and Hour Division (WHD) is responsible for administering and enforcing some of our nation's most comprehensive labor laws for agricultural workers, including the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and an employer's contractual obligations under the H-2A program as provided in Section 218 of the Immigration and Nationality Act, as amended. WHD's enforcement of these labor provisions continues and reflects our commitment to safeguard American jobs, level the playing field for law-abiding employers, and protect workers from being paid less than they are legally owed or otherwise working under substandard conditions. The Department's Employment and Training Administration (ETA) carries out responsibilities under the Immigration and Nationality Act to administer the Department's foreign labor certification programs through its Office of Foreign Labor Certification (OFLC). OFLC provides adjudication services and determines, on a case-by-case basis, whether the admission of foreign workers into the United States will adversely affect the job opportunities, wages, and working conditions of American workers. The Department's Monitor Advocate System is a federal/state monitoring system that ensures migrant and seasonal farmworkers (MSFW) receive services and protections in a way that is qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs.

The Department agrees that farmworkers, both those from inside the United States and those from abroad, perform critical services during these challenging times. The Administration issued guidance in March clarifying the essential nature of farmworkers' functions. The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency published an "Essential Critical Infrastructure Workforce" advisory list to guide federal and state decisions on health and safety.¹ We recognize that farmworkers, like other essential workers, may be exposed to COVID-19 in the performance of their essential duties. The Department has implemented

¹ The guidance includes farmworkers and is published at <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

numerous measures and published guidance to protect farmworker health during the pandemic. These measures include the publication of COVID-19 related guidance and regulations, the enforcement of existing safety-related laws and regulations, and planning for future pandemic-related resources, guidance, and recommendations. Further details about the Department's actions are included below.

Publication of pandemic-related regulations and guidance

The Department has addressed the COVID-19 pandemic by implementing a new temporary rule addressing paid sick leave and issuing pandemic-related guidance to assist employers and employees in navigating today's challenging landscape.

On April 1, 2020, the Department, through the WHD Administrator, published a temporary rule implementing certain provisions of the Families First Coronavirus Response Act (FFCRA), including the Emergency Paid Sick Leave Act (EPSLA). Generally, employers are covered by the FFCRA if employing fewer than 500 employees.² The EPSLA requires covered employers to provide up to 80 hours of paid sick leave to employees who need to take leave from work for certain specified reasons related to COVID-19. The term "employee" under the FFCRA has the same meaning as under the Fair Labor Standards Act (FLSA). If a farmworker, including an H-2A worker, is employed by a covered employer, he or she is entitled to up to 80 hours of sick leave for qualifying reasons.³ The WHD worked diligently to quickly provide guidance related to the FFCRA, which is posted on our website.⁴ The website provides information regarding compliance, exemption, employee rights, employer requirements, and the regulations implementing the EPSLA and the Emergency Family and Medical Leave Expansion Act (EFMLEA) under the FFCRA. We encourage you to monitor this website for the most up-to-date guidance.

In addition, the Department also published guidance via Frequently Asked Questions (FAQs), outlining communication protocols and other administrative flexibilities for employers whose business operations may be temporarily impacted by COVID-19, including those applicable to employers participating in the H-2A Program. The FAQs allow for additional social distancing-related flexibilities in the H-2A program to safeguard farmworker health.⁵ For example, the FAQs clarify that H-2A employers seeking to institute social distancing measures to slow the spread of COVID-19 may, in certain circumstances, employ H-2A and corresponding workers in agricultural job duties and at worksites outside those included on the H-2A job order.⁶

² However, employers with fewer than 50 employees may, in certain circumstances, be exempt from the Act's requirements to provide paid sick leave and expanded family and medical leave to employees whose need for leave is based on the employee's need to provide care for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19.

³ The FFCRA also implemented the EFMLEA, which requires that covered employers provide up to 10 weeks of paid, and 2 weeks unpaid, emergency family and medical leave to eligible employees (those who have been employed for at least 30 days) if the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19.

⁴ <https://www.dol.gov/agencies/whd/ffcra>.

⁵ <https://www.foreignlaborcert.doleta.gov/>.

⁶ The FAQs clarify that the job duties must constitute agricultural labor or services, as defined at 20 CFR 655.103(c), and must be performed at worksite locations covering the same area of intended employment as certified by the Department. See COVID-19 Frequently Asked Questions, Round 2, published April 1, 2020.

Additionally, the FAQs guide H-2A employers in how to certify alternative housing for workers when social distancing measures or quarantine periods reduce the maximum housing occupancy.⁷

Finally, the Department, through the Occupational Safety and Health Administration (OSHA), is working proactively to assist employers seeking information to protect workers from COVID-19. On March 9, 2020, the agency issued a guidance document, “Guidance on Preparing Workplaces for COVID-19,” which details steps employers can take to reduce workers’ risk of exposure.⁸ This publication encourages employers to plan for the COVID-19 pandemic by developing an infectious disease preparedness and response plan, emphasizing basic infection prevention measures, and developing policies and procedures for prompt identification and isolation of sick people. In addition, OSHA, in conjunction with the Centers for Disease Control and Prevention, recently issued agriculture-specific guidance that includes numerous recommendations for protecting agriculture workers from COVID-19.⁹ Additional information is available at OSHA’s Coronavirus Safety and Health Topics page on its website.¹⁰ The website provides guidance for a number of different industry sectors and also includes a host of other information, such as information on hazard recognition and applicable standards. OSHA continues to update the webpage as new information about the virus becomes available.

Continuing enforcement of existing safety-related laws and regulations

The Department continues to enforce the laws within its purview, many of which directly affect farmworker health and safety. WHD conducts investigations for a number of reasons, all having to do with enforcement of the law and assuring an employer’s compliance, and continues to take complaints from the public and conduct enforcement actions.

For example, WHD enforces certain housing standards that may be applicable to housing for H-2A or other farmworkers, and that are specified in 29 CFR 1910.142 and 20 CFR 654.404 through 654.417. Notably, 29 CFR 1910.142 requires the camp superintendent to report communicable diseases to the local health officer. WHD also enforces the field sanitation provisions of the Occupational Safety and Health Act in certain states, which includes health-related provisions such as access to handwashing facilities.

Additionally, the H-2A program requires that covered employers comply with all applicable federal, state, and local laws and regulations, including health and safety laws.¹¹ Similarly, the MSPA regulations clarify that the federal regulations are intended to supplement, not replace, state law.¹² State and local governments are best suited to know and understand the pandemic

⁷ In such situations, the employer may place the workers in other housing that complies with applicable local, State, or Federal housing standards and must promptly notify the State Workforce Agency of such a change. *See* COVID-19 Frequently Asked Questions, Round 3, Published April 9, 2020.

⁸ <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁹ This guidance is available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>.

¹⁰ <https://www.osha.gov/SLTC/covid-19>.

¹¹ *See* 20 CFR 655.135(e) and 29 CFR 500.2.

¹² *See* 29 CFR 500.2.

and appropriate response at their level, and federal laws protecting agricultural worker safety and health do not excuse noncompliance with these state and local laws and regulations.

Moving forward: future publication of guidance

The Department, through ETA, plans to issue guidance to states and National Farmworker Jobs Program grantees on health and safety practices for MSFWs and agricultural employers during the COVID-19 pandemic.

The Department will also continue to support State Workforce Agencies as they facilitate labor exchange functions between farmworkers and agricultural employers, so that farmworkers can obtain jobs in safe environments while employers can find needed workers.


Pursuant to an agreement with the U.S. Department of Agriculture (USDA), the Department will continue to work with USDA to help facilitate the identification of foreign and domestic workers that may be available and eligible to transfer to other U.S. agricultural sector employers to fulfill critical workforce needs within the United States under existing regulatory authority during the COVID-19 pandemic.

In your letter, you suggested numerous enhancements to the H-2A program to address safety and health concerns related to housing, transportation, social distancing at work, paid medical treatment, and specific disclosure requirements related to COVID-19. Many of these suggestions are beyond the scope of the Department's authority. The Department will continue to closely monitor the COVID-19 pandemic as it relates to farmworkers, issue guidance, and promulgate regulations, as appropriate, if Congress enacts new legislation.

The Department defers to our colleagues at the Department of Homeland Security to address questions related to entry into the United States and the Department of State to address questions related to the processing of visa applications.

Thank you for sharing your concern for farmworker protections. The Department takes these matters very seriously and is committed to ensuring that employers are aware of their obligations and workers are aware of their protections. We hope this information is helpful to you. Please let us know if we may be of further assistance.

Sincerely,



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Whitney Ford
Director, Division of Immigration and Farm Labor