



FARMWORKER JUSTICE

The Farm Workforce Modernization Act: A Bipartisan Bill that Would Provide a Path to Immigration Status for Agricultural Workers and Revise the H-2A Program

In March 2021, Reps. Zoe Lofgren (D-CA) and Dan Newhouse (R-WA), re-introduced the “Farm Workforce Modernization Act of 2021.” The Farm Workforce Modernization Act (FWMA), HR 1603, is bipartisan immigration legislation that would provide undocumented farmworkers and their family members with a path to legal immigration status and citizenship, revise the H-2A agricultural guestworker program to address some employer and worker concerns, and impose mandatory employment verification (“E-verify”) in agriculture. The legislation represents the culmination of difficult, months-long bipartisan negotiations that included the United Farm Workers, UFW Foundation, and Farmworker Justice, as well as agribusiness representatives. During the last Congress, the FWMA was passed in the House by a vote of 260-165, including 34 Republicans and almost all Democrats, but was not considered by the Senate.

A path to immigration status and citizenship for undocumented farmworkers is critically important to our nation’s food and agriculture system. A majority of the nation’s roughly 2.4 million farmworkers are undocumented and living with the fear of deportation. If enacted, this legislation would alleviate that fear by providing farmworkers and their families with an opportunity to earn legal immigration status. Farmworkers would be better able to improve their wages and working conditions and challenge labor abuses. This would result in a more stable farm labor force, and greater food safety and security to the benefit of employers, workers, and consumers.

The bill also would revise the H-2A visa program. Farmworker advocates have pressed for reforms to reduce widespread abuses under this flawed program, while agricultural employers have lobbied heavily to remove most of its modest labor protections. The bill contains compromises regarding the H-2A program as well as the earned legalization program in order to gain the bipartisan support needed to pass the bill in both the House and the Senate.

Who would qualify for the bill’s earned legalization program, and what is the process?

The bill’s earned legalization program includes the process described below.

Application for “Certified Agricultural Worker” Status: Qualifying farmworkers could apply for “CAW” status—granting temporary residency—during the 18-month application period, which would begin after the publication of regulations. To qualify, workers would be required to:

- prove employment in U.S. agriculture for at least 180 work days over the two years prior to the bill’s introduction (the bill creates flexibility in this requirement for workers who had reduced hours due to the COVID-19 pandemic);
- be an undocumented immigrant in the U.S. on the date of introduction of the bill;
- have been “continuously present” in the U.S. since the date of the introduction of the bill and until the date on which they are granted CAW status;
- not be ineligible because of certain criminal convictions (the bill waives certain immigration law barriers to adjusting status);
- pass security and law enforcement background checks; and
- pay an application fee.

Farmworkers granted “CAW” status would have employment authorization to work in any industry, although to qualify for renewal of CAW status and for lawful permanent residency they would need to work in agriculture at least 100 days per year. CAW workers would also have the ability to travel outside of and return to the United States.

A farmworker’s spouse and children would be eligible for CAW dependent status with the same protections, including the right to work in the United States without restriction on the type of work they could do. CAW status and dependent status would last for five and one-half years and would be renewable indefinitely.

Path to Legal Permanent Resident (“Green Card”) Status: To earn lawful permanent residency (a “green card”), the CAW worker would be required to:

- perform agricultural work for at least 100 work days per year for each of the next:
 - 4 years—for those who have worked in agriculture for 10 years or more prior to enactment; or
 - 8 years—for those who have worked in agriculture for fewer than 10 years prior to enactment of the bill;
 - DHS may credit work days lost due to illness, pregnancy, COVID-19 restrictions, severe weather, and other causes.
- pay an application fee and a \$1,000 fine;
- pay any applicable federal taxes; and
- continue to meet other admissibility requirements.

Lawful permanent residents will be eligible to apply for citizenship if they maintain US residence for five years after receiving their green card.

How would the bill modify the current H-2A agricultural worker visa program?

The bill maintains many of the existing components of the current H-2A program, including preserving the Department of Labor’s (DOL’s) role as the administrator of the program, as opposed to previous compromises that moved its administration to the Department of Agriculture (USDA). The bill also maintains the fundamental premise that DOL cannot approve a labor certification for H-2A workers if there are available, willing, and qualified U.S. workers or if doing so would adversely affect the wages and working conditions of U.S. workers. Many of the current key H-2A worker protections only exist in regulations. The legislation moves these protections into the statute where they would be protected against a hostile Administration’s rulemaking.

These protections include:

- Workers’ compensation coverage (even if a state law excludes farmworkers);
- “¾ minimum work guarantee”;
- Employer-provided housing;
- Transportation cost reimbursement (for those within 50 miles of the consulate, the reimbursement would be limited to travel from the consulate);
- Employers petitioning for H-2A workers would continue to be required to conduct various types of recruitment of U.S. workers, including posting the job opportunity on an online registry, contacting former workers, conducting positive recruitment required by DOL, and maintaining a recruitment report. However, the “50% rule” requiring the hiring of qualified U.S. workers during the first half of the season would be reduced to the greater of 33% of the season or 30 days after the season begins for all employers except farm labor contractors (FLCs), who must continue to offer jobs to U.S. workers through 50% of the contract; and
- The FLC bond requirement. The requirement is strengthened by requiring that the bond be annually updated based on the number of workers and required wages.

However, the bill would also modify the current H-2A program in significant ways, including by adding many important new worker protections and making changes sought by employers and their allies in Congress.

- For the first time, H-2A visa workers and their employers would be covered by the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), the principal federal employment law for farmworkers.
- To address the dangers of heat stress, H-2A employers would be required to maintain a heat illness plan, including appropriate training, access to water and shade, and emergency response plans. This occupational safety protection, which federal OSHA has been unwilling to adopt, is vitally important to reduce deaths and injuries in the fields.
- The bill would provide a path to immigration status and citizenship for a limited number of H-2A workers, something that does not exist now. Every year, a total of 40,000 green cards would be available for agricultural workers, including recent H-2A temporary foreign workers and others available to perform year-round agricultural work. H-2A workers could self-petition upon showing that they had worked as H-2A workers for 10 years. Employers could sponsor agricultural workers for green cards in year-round work at any time.
- New rules would provide H-2A workers some increased flexibility for their work arrangements. Most H-2A jobs would still be seasonal or temporary, but H-2A workers would receive 3-year visas. Workers would have the option of a 45-day period to seek new H-2A employment at the end of their contracts. Further, H-2A workers would have the ability to access information about their own visa at DHS, which is currently not possible, leaving workers dependent on their employers for that information.
- The bill includes new foreign labor recruitment requirements that would put into place protections against recruitment fees, fraud and misrepresentation; a mechanism for oversight and transparency; and enforcement provisions. The provisions would require foreign labor contractors to register with the U.S. government, creating a national registry of registered foreign labor recruiters and debarred recruiters that would be publicly available in the U.S. and abroad for both workers and employers to access.
- The bill would ensure greater oversight of FLCs by creating statutory language for a bond that would be annually updated based on the number of workers and required wages and by amending AWPA to put into place stronger protections to prevent debarred FLCs from continuing to operate through third parties.
- The wage system would be revised as follows:
 - H-2A employers would still be required to pay the highest of the “Adverse Effect Wage Rate” (AEWR), the local prevailing wage for the particular job, the agreed upon collective bargaining wage, or the federal or state minimum wage.
 - The bill would temporarily freeze the AEWR at 2021 wage levels for a one-time, one-year period. DOL sets the annual AEWR for each state based on USDA farm labor surveys of field and livestock workers combined. For 2021, they range from \$11.81 per hour to \$16.34 per hour.
 - After the first year, the AEWRs would be based on more specific job categories rather than the average hourly wage for field and livestock workers combined. The consequences of this change vary because some job categories’ wages are higher and some are lower than the current average. The bill includes limits on both potential increases and potential decreases for the AEWR in a single year.
 - After the first ten years, the Secretaries of Labor and Agriculture would engage in rulemaking, based on a study and report on the impact and need for the AEWR, to set the wage rate for 2031 and beyond.
- The bill addresses employer interest in “streamlining” the H-2A program in several ways: by creating a single point-of-access online portal for employers to file all petition information and to improve communication; by allowing 3-year visas in order to reduce the employer cost of

obtaining visas (employers would still need to file a petition for labor certification); and by allowing staggered entry for no more than 10 start dates in a 120 day window in the same area of intended employment (note that recruitment requirements and protections for U.S. workers would apply at each start date and with additional requirements for FLCs).

- The bill would also allow a limited number of H-2A visas for year-round jobs—up to 20,000 per year in the first three years—with adjustments to the cap through ten years, followed by an assessment each year thereafter of whether there should be a cap and what it should be, based on specified factors. Employers seeking to access the H-2A program for year-round employment, however, would be required to provide additional protections, including family housing and an annual paid trip home. In addition, dairy farms—where year-round jobs are common—would be required to report injuries and deaths to OSHA, regardless of the dairy size, and to establish a workplace safety plan, including protections against sexual harassment.
- The bill would create a 6-year pilot program of up to 10,000 “portable” H-2A visas, allowing workers to move freely between registered agricultural employers. At the end of the 6-year period, DOL, USDA, and DHS would be required to issue a report and decide whether to extend, expand, or discontinue the program.

Provisions regarding housing supply

The bill seeks to address the lack of affordable housing for farmworkers in rural communities. The legislation takes steps to increase government funding for the USDA Section 514 and 516 farm labor housing development programs. The bill would allow some owners of farmworker housing to receive operating assistance for properties whose occupants include H-2A workers; however, the bill would limit the amount and would strengthen requirements to ensure domestic workers are not displaced by H-2A workers. Moreover, the bill contains requirements to ensure that the new housing built is suitable for families.

How would the bill’s E-Verify provisions apply to agricultural employers?

E-Verify is a program in which employers electronically verify the employment eligibility of workers through DHS and the Social Security Administration. The bill would institute mandatory E-verify for agricultural employers (but not other sectors) after the legalization program for undocumented farmworkers has been implemented. The E-verify provisions in the bill address some of the current flaws in the system and strengthen protections against discrimination; however, there continues to be a need for greater worker protections.

Conclusion:

The essential work of farmworkers for our nation’s agriculture and food systems was recognized formally by the federal and state governments in the responses to the COVID-19 pandemic. Our broken immigration system for many years has been harming farmworker families, agricultural businesses, rural communities, and the economy. Achieving immigration reform in Congress is fundamental to the ability of farmworkers to improve their living and working conditions and to the health and well-being of their families. The Farm Workforce Modernization Act is an important and realistic step toward winning needed reform. If enacted, the legislation would enable hundreds of thousands of farmworkers and their family members to obtain a lawful immigration status, maintain important protections under the H-2A agricultural guestworker program, help provide a stable workforce for agricultural employers, and support our nation’s food security. Because the bill, if passed, would improve significantly the lives of hundreds of thousands of farmworkers and their family members, Farmworker Justice supports the Farm Workforce Modernization Act of 2021.