



## **DOL H-2A Proposed Rule Protects Workers' Rights to Safe Working Conditions, Transparent Recruitment Practices, and Effective Enforcement**

On September 12, 2023, the Department of Labor (DOL) published a notice of proposed rulemaking (NPRM), [\*Improving Protections for Workers in Temporary Agricultural Employment in the United States\*](#) (the "2023 Proposed H-2A Rule"), amending regulations of the H-2A temporary agricultural worker visa program. The revisions in the 2023 Proposed H-2A Rule expressly focus on strengthening basic protections for agricultural workers and enhancing DOL's capabilities to monitor program compliance and take necessary enforcement actions. Comments are currently being accepted on the 2023 proposed rule and are due by November 14, 2023.

### **Which changes are important for farmworkers?**

The 2023 Proposed H-2A Rule would make substantial changes to the program and certification process. Many of these changes would better enable workers to secure decent working conditions and assert their legal rights. These changes include the following:

- **Collective Action and Labor Organizing Activities:** Would expand H-2A workers' access to labor unions by giving labor organizations a narrow right of access to employer-provided housing. It would also require employers to provide a list of workers to a requesting labor organization, permit workers to designate a representative to attend any meeting between a worker and the employer where the worker reasonably believes that the meeting may lead to discipline, and prohibit employers from holding captive audience meetings unless the employer provides certain information to ensure that such meetings are not coercive.
- **Right to Guests:** Would explicitly allow workers the right to invite or accept guests, including key service providers, into worker housing with reasonable restrictions. Key service providers include health care providers, community health workers, legal services providers, government officials, and clergy.
- **Clarification of "For Cause" in Terminations:** Would define "termination for cause" by proposing six criteria that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable, and that disciplinary actions are documented. These proposed changes will help to ensure employers do not arbitrarily and unjustly terminate workers whose visa is tied to their employment.
- **Adverse Effect Wage Rates (AEWR):** Clarifies the effective date of updated AEWRs as the date of publication in the Federal Register. DOL publishes annual updates to the AEWR for field

and livestock workers in January and for all other non-range occupations in July. It also requires additional disclosure of non-hourly wages along with the hourly wage rates. This change helps ensure workers are paid at least the current AEWR, for all work they perform, which helps ensure the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States.

- **Enhanced Job Opportunity and Recruitment Transparency:** Would require an employer and its attorney or agent, as applicable, to provide to DOL a copy of all agreements with any agent or recruiter used in the recruitment of prospective H-2A workers, regardless of whether the agent or recruiter is located in the United States or abroad. The proposed rule would also require the employer to disclose the identity and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2A workers. This increased transparency would enhance DOL's ability to enforce its prohibition against recruitment fees, prevent fraud in recruitment, and effectively enforce the regulations
- **Transportation Safety:** Would require the provision, maintenance, and wearing of seat belts in some employer-provided transportation, which would reduce the hazards associated with agricultural worker transportation. Essentially, if the vehicle is manufactured with seat belts, the proposed rule would require the employer to retain and maintain those seat belts in good working order and ensure that each worker is wearing a seat belt before the vehicle is operated.
- **Passport and Document Withholding:** Would directly prohibit an employer from confiscating and holding a worker's passport, visa, or other immigration or government identification documents. This change would better protect workers from potential labor trafficking.
- **Job Listing Disclosures:** Would require employers to disclose any minimum productivity standards they will impose as a condition of job retention, regardless of whether the employer pays on a piece rate or hourly basis. Would also explicitly require the employer to specify in the job order any applicable premium wage rate(s) for overtime hours worked and the circumstances under which the wage rate(s) for such overtime hours will be paid.
- **Protections Against Delays:** Would require the employer to pay workers the applicable wage rate for each day that the start of work is delayed, for a period of up to 14 calendar days, starting with the certified start date, if the employer fails to provide adequate notice of the delay. This change will promote use of accurate start dates and protect U.S. workers placed on job orders.
- **Debarment and Successors-In-Interest:** Would clarify the liability of successors in interest to debarred employers and would streamline the Department's procedures to deny labor certifications filed by or on behalf of successors in interest, agents, and attorneys. DOL proposed a broader definition of successors-in-interest, including entities controlling or carrying on the business of a previous employer, agent, or farm labor contractor. This change would prevent bad actors from continuing to use the H-2A program.
- **Single Employer Test:** Would establish factors to determine if multiple nominally separate employers are acting as one for the purposes of enforcement and debarment proceedings.

## **How does the 2023 Proposed H-2A Rule differ from the 2022 Final Rule?**

On October 12, 2022, the Department of Labor (DOL) published a final rule amending the regulations of the H-2A temporary agricultural work visa program (the “2022 H-2A Rule”). It finalized portions of an H-2A rule proposed by the Trump Administration in 2019. The 2022 H-2A rule made limited improvements to worker protections, including rental housing, meal reimbursements, labor contractor bonds, and debarment.

As initially proposed, the Trump Administration’s rule included numerous harmful changes to the H-2A program, along with a few minor improvements. That proposed rule was later broken into two separate rules in 2020, when DOL finalized proposed changes to the methodology for the H-2A program’s Adverse Effect Wage Rate (AEWR) that would have resulted in significant wage cuts for farmworkers. That final AEWR rule was blocked in 2021 and ultimately vacated earlier this year in a lawsuit brought by the United Farm Workers, who were represented by Farmworker Justice and WilmerHale.

The Biden Administration faced strict legal limits in this rulemaking; the 2022 H-2A Rule could not make changes to the H-2A program that were not contemplated in the 2019 proposed rule. As a result, the remainder of the Trump Administration’s 2019 proposed rule was the basis of this 2022 H-2A Rule. FJ’s fact sheet on the 2022 rule can be found [here](#).

## **Will there be other changes to the H-2A program?**

On September 18, 2023, the Department of Homeland Security (DHS) published a notice of proposed rulemaking (NPRM), [Modernizing H-2 Program Requirements, Oversight, and Worker Protections](#). The proposed rule aims to improve the H-2 programs (H-2A and H-2B) by providing greater flexibility and protections for participating workers, and improving the program’s efficiency. The proposed changes include enhanced penalties for employers who charge prohibited recruitment fees, new whistleblower protections for H-2 workers, extended grace periods for workers, and visa portability. FJ will be working with Centro de los Derechos del Migrante, Inc. (CDM) to draft and submit comments. Comments are due by November 20, 2023.

The H-2A visa puts a worker's legal status under the control of their employer, creating a power imbalance that too often results in exploitation and the violation of workers’ rights. Farmworker Justice welcomes the 2023 Proposed H-2A Rule’s improvements to worker protections and the standards that prospective H-2A employers must meet to obtain DOL certification. The proposed regulations are a vital step towards increasing protections for farmworkers and discouraging bad actors within the H-2A program. We will continue to work with the Department of Labor to ensure the provision of adequate protections for farmworkers and enforcement of those protections.

FJ will be sharing comments for organization sign-on. For more information about the proposed rule, contact Alexis Guild, Vice President of Strategy and Programs, at [aguild@farmworkerjustice.org](mailto:aguild@farmworkerjustice.org).