



DOL H-2A Final Rule Takes Important Steps to Protect Workers Rights to Safe Working Conditions, Transparent Recruitment Practices, and Self-Advocacy

On April 26, 2024, the Department of Labor (DOL) published its final rule "[Improving Protections For Workers in Temporary Agricultural Employment in the United States](#)" (the "2024 Final Rule") amending regulations of the H-2A temporary agricultural worker visa program. DOL had published its [notice of proposed rulemaking](#) (NPRM) on September 12, 2023 (the "2023 Proposed H-2A Rule"). Farmworker Justice, along with 40 signatories, provided an extensive [comment](#) on the 2023 Proposed H-2A Rule. The 2024 Final Rule focuses on strengthening needed protections for agricultural workers and enhancing DOL's capabilities to monitor program compliance and take necessary enforcement actions.

Which Final Rule provisions are important for farmworkers and their advocates?

The 2024 Final Rule makes important changes to the H-2A program and certification process. Many of these changes will have a significant impact on workers and their ability to assert their legal rights. These changes include the following:

- **Right to Guests:** Allows workers the right to invite or accept guests, including key service providers, to worker housing. Key service providers include health care providers, community health workers, legal services providers, government officials, and clergy.
- **No Unfair Treatment or Retaliation:** Adds consulting with a key service provider and refusing attendance to captive audience meetings to protected activities. Provides explicit protections for complaints, proceedings, and testimony under any applicable labor- or employment-related Federal, State, or local law or regulation, including those related to health and safety. Creates a new category for self-organization for workers under FLSA agriculture.
- **Clarification of "For Cause" in Terminations:** Defines "termination for cause" by outlining five criteria that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable. These changes help to ensure employers do not arbitrarily and unjustly terminate workers.
- **Adverse Effect Wage Rates (AEWR):** Designates 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. This change helps to ensure workers are paid at least the updated AEWR, as soon as it is published, for all work they perform, and thereby helps to 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:** Requires 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 final rule also requires 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 enhances DOL's ability to enforce its prohibition against recruitment fees.

- **Transportation Safety:** Requires the provision, maintenance, and wearing of seat belts in most employer-provided transportation, which reduces the hazards associated with agricultural worker transportation. Essentially, if the vehicle is manufactured with seat belts or the vehicle is required by the Department of Transportation to have seat belts, employers are required 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:** Directly prohibits an employer from holding or confiscating a worker's passport, visa, or other immigration or government identification documents. This change better protects workers from potential labor trafficking.
- **Job Listing Disclosures:** Requires 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. Also explicitly requires 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. The employer must also now include a non-hourly rate along with the highest hourly rate in the job order where there is an applicable prevailing piece rate, or where an employer intends to pay a piece rate or other non-hourly wage rate.
- **Protections Against Delays:** Requires the employer to pay workers the applicable wage rate for each day 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 (10 business days) to workers of the delay. In response to FJ's comments on the proposed rule, DOL also added a further revision requiring notification to be provided in the employee's preferred language. DOL also added a provision requiring that, if a worker provides electronic contact information (such as an email address or telephone number) the employer shall send notice using one of the electronic contact methods provided
- **Debarment and Successors-In-Interest:** Clarifies the liability of successors in interest for debarment purposes and streamlines the Department's procedures to deny labor certifications filed by or on behalf of successors in interest to debarred employers, agents, and attorneys. DOL will apply 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 helps prevent bad actors from continuing to use the H-2A program.
- **Single Employer Test:** Establishes factors to determine if multiple nominally separate employers are acting as one for the purposes of enforcement and debarment proceedings.

When does the Final Rule go into effect?

The Final Rule goes into effect on June 28, 2024. There is a transition period for H-2A applications and clearance orders. Applications submitted before 7:00pm EDT on August 28, 2024 will be not subject to the Final Rule provisions, but applications submitted thereafter must comply.

Which proposed provisions were not finalized in the 2024 Final Rule?

After considering comments made on the 2023 Proposed H-2A Rule, DOL did not finalize all of the proposed provisions. It modified many provisions, and chose to omit or not ratify others.

- **Captive Audience Meeting Prohibition:** DOL initially proposed to prohibit employers from engaging in “coercive employer speech intended to oppose workers’ protected activity” (sometimes referred to as “captive audience meetings” or “cornering”). However, DOL declined to adopt the prohibition on this activity and the 2024 Final Rule instead prohibits employers from *retaliating or discriminating* against a worker for refusing to attend a “captive audience” meeting.
- **Designated Representatives:** The 2024 Final Rule omits the original proposed provision that would have required employers to permit third-party designated representatives to physically access the worksite for investigatory interviews. Instead, where a designated representative is present at the worksite, the employer must permit them to attend the interview in-person; but when not present at the worksite, the employer must permit the representative to attend the investigatory interview remotely, and provide reasonable delay so as to enable their attendance.
- **Appeals Timeline:** In response to grower concerns, DOL elected to keep the appeals timeline for debarment appeals at 30 days, rather than shortening it to 14 days as it had proposed.
- **Worker Contact List:** DOL elected not to finalize the proposed provision that would require employers to provide the requesting labor organization an electronic list of employee contact information for all H-2A workers and workers in corresponding employment engaged in agriculture as defined under the FLSA.
- **Good Faith Bargaining:** DOL originally proposed a requirement that employers attest in their job orders either: 1) that they will bargain in good faith over the terms of a proposed labor neutrality agreement with a requesting labor organization, or 2) that they will not bargain, and provide an explanation for why they have declined to do so. DOL ultimately declined to adopt this provision in its entirety.
- **Labor Organization Right of Access:** DOL proposed a provision that would require a labor organization to be permitted access to the common areas or outdoor spaces near employer-provided worker housing, for the purposes of meeting with workers outside of work hours for up to 10 hours per month. DOL ultimately declined to adopt this provision.

Were there any other recent 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 temporary non-agricultural worker program) 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.

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 violation of workers' rights. Farmworker Justice welcomes the 2024 Final Rule's improvements to worker protections and the standards that prospective H-2A employers must meet to obtain DOL certification. It is a vital step towards increasing protections for farmworkers and discouraging bad actors within the H-2A program. We will work with advocates and DOL to support its successful implementation

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