November 13, 2023

Julie A. Su
Acting Secretary of Labor
United States Department of Labor

AIHA’s Recommendations on DOL’s Proposed Rule on Improving Protections for Workers in Temporary Agricultural Employment in the United States

Agency/Docket Number: ETA-2023-0003
RIN: 1205-AC12

Dear Acting Secretary Su:

AIHA, the association for scientists and professionals committed to preserving and ensuring occupational and the United States Department of Labor’s (DOL) proposed rulemaking on improving protections for workers in temporary agricultural employment in the United States. We hope you find our feedback useful and are happy to answer any questions you may have.

The Department seeks comments on whether the requirement to list the highest applicable wage rate for each unit of pay on job orders placed in connection with an H–2A application renders unnecessary the requirement at 20 CFR 653.501(c)(2)(i) that an employer that pays by the piece or other non-hourly unit calculate and submit an estimated hourly wage rate with the job order. Under the proposed rule, the job order in such cases should guarantee payment of the highest of the applicable hourly or non-hourly wage rates. The Department welcomes comment on whether the calculation of an estimated hourly wage would still be necessary to prevent adverse effect on similarly employed workers in the United States and/or on agricultural workers generally. AIHA believes that regardless of whether or not the contract is for payment on a piece-work basis, there should be a limit on the number of working hours per day.
The Department seeks comment as to whether, and how, it should require employers to enforce the wearing of seat belts, or whether it should require employers only to provide seat belts.

The experience of some AIHA members who assisted in drafting these comments indicates that making seat belts available without a requirement around enforcement of use leads to low adoption of the practice of wearing them, especially in rural areas where the use of seat belts is historically lower than in more urban settings (MMWR Sept, 22, 2017 Beck et al). If the goal of the DOL is to decrease incidents of injury associated with transportation of H2-A workers, then required enforcement is one of the best ways to increase the use of seat belts, unless exempted by the current regulatory framework.

The Department seeks comment as to how this requirement for seat belts should interact with vehicles subject to the limited exemption from seat requirements found in MSPA regulations at 29 CFR 500.104(l), which is also applicable to some H–2A employer-provided transportation. Transportation subject to this exemption is limited to those vehicles that are subject to the vehicle safety standards in 29 CFR 500.104 when those vehicles are primarily operated on private farm roads when the total distance traveled does not exceed 10 miles, so long as the trip begins and ends on a farm owned or operated by the same employer. As a vehicle without seats cannot be equipped with seat belts, the Department is considering whether vehicles subject to this limited exemption also should be exempted from seat belt requirements during these same trips, or, alternatively, whether this exemption should be inapplicable to H–2A employers.

Worker transport provided by the employers should mandate the provision of seatbelts for all vehicle occupants. For vehicles without seats, regular maintenance of vehicles and roads is necessary both inside and outside agricultural land. In addition to seat belts, regulatory and legal frameworks should exist for regular maintenance of the transport vehicles, tractors, and other farm equipment to prevent accidents and air pollution.

The Department seeks comment on this issue, including the circumstances in which employers use the limited exemption from seats found in 29 CFR 500.104(l) and the import of this limited exemption to business practices.

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maintenance of the transport vehicles, tractors, and other farm equipment to prevent accidents and air pollution.

The Department seeks comment on proposed changes to E. Paragraph (N) Termination for Cause or Abandonment of Employment. Specifically, the Department seeks comment on these reasons for termination excluded from termination for cause, and whether any other reasons should explicitly be included in this list. Advance notice with pay for a minimum number of days should be given before the termination of a worker for any reason before the contract is finished. For abandoning the work or leaving the job by the worker the same rules can be applied and the amount can be reduced from the payment.

The Department seeks comments on their proposed changes to iv. Section 655.135(h)(1)(v). Workers’ compensation for occupational injuries and illness should be included in the policy.

The Department welcomes comments on their proposed changes to D. Paragraph (L)(4); 655.210(G)(3) Disclosure of Available Overtime Pay. Calculating wages as per the hours worked should be continued, otherwise, there may be a risk of exploitation and workers being made to work for more hours in a day. Overtime working with payment should require sufficient resting time between working hours and starting work the next day.

The Department welcomes comments on whether, in fact, foreign workers employed under the H–2A program are more vulnerable to labor exploitation than similarly employed domestic workers, due to the temporary nature of the work; frequent geographic isolation of the workers; dependency on a single employer for work, housing, transportation, and necessities, including access to food and water; language barriers; possible lack of knowledge about their legal rights; or other factors.

The H-2A Temporary Agricultural Workers Program has grown substantially in the last decade, with H-2A certified positions increasing more than sevenfold between 2005 and 2022, and visas being issued following close behind the number of positions certified (United States Department of Agriculture, Mar 13 2023, Castillo). However, protections that
have been designed for migrant and seasonal farmworkers through the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) are seemingly not keeping up with the sharp growth of the population it aims to protect, with the implementation of these protections, including a comprehensive reporting system for work-related injuries being “irregular at best” (Castillo et al. 2021). Migrant farmworkers employed through the H-2A program face a myriad of unique psychological and sociological stressors that exacerbate the adverse health impacts of existing hazards in a uniquely dangerous industry of agriculture (National Institute of Occupational Safety and Health, Mar, 3, 2023) including, language and cultural barriers to communication, family separation, housing and food insecurity, and more as shown by Castillo et al. (2021).

On the question of whether migrant workers, either employed through the H-2A program or unauthorized, are more vulnerable to labor exploitation than similarly employed domestic workers, the research, data, and anecdotal evidence is unequivocally “yes” (Castillo et al. 2021; Nadas & Rathod, 2018; Costa et al. 2020; Ramchandani 2018; Centro De Los Derechos Del Migrante, Inc. [CDM] 2020; Sainato, 2021; Dreier, 2023; Moyce, S & Schenker, M, B, 2018; Liebman et al. 2013). One such report on the H-2A visa program that interviewed 100 H-2A workers found that “100% of respondents experienced at least one serious legal violation of their rights, and 94% experienced three or more”; “86% said that women were either not hired or were offered less favorable pay or less desirable jobs than men”; “45% experienced overcrowded and/or unsanitary housing conditions”; “35% did not have the necessary safety equipment to do the job”; and “43% were not paid the wages they were promised” (CDM, 2020).

It is important to understand the root causes of this increased likelihood of exploitation, however. There is a significant power imbalance between employee and employer in favor of the employer in the H-2A visa program because the visa itself is tied to a single employer. Employees through the program may only work for that specific employer through their issued visa, which places all of the bargaining power in the hands of the employer, leaving the employee completely at their mercy (CDM, 2020). Workers are further deterred from speaking up, reporting, or raising concerns about working conditions and violations of their rights due to the fear of job loss, and the loss of the job typically means the loss of housing, the right to remain in the U.S., and the loss of future job opportunities (CDM, 2020; Moyce, S & Schenker, M, B, 2018; Liebman et al. 2013). The prevalence of language and cultural barriers also form significant challenges for H-2A workers when discussing potential exploitation. In the study conducted by CDM (2020), of the 100 H-2A workers surveyed 0% reported receiving a written contract in their native language, making the ability to understand their rights under their agreement with the employer impossible for non-English speakers. It is also noteworthy that financial exploitation is another significant factor that deters H-2A workers from reporting violations due to the debt they often accrue after paying recruiting fees or travel costs to work in the U.S. (CDM, 2020). H-2A workers take on this debt because economic opportunities in their home countries are not as lucrative as the opportunities here in the U.S. (CDM, 2020).
Similarly employed domestic workers do not face these challenges and threats to their rights because they are domestic rather than migrant agricultural workers and are not tied to a single employer or under threat of deportation upon termination of employment. They are also more likely to be English-speaking, less likely to depend on the employer for housing, and less likely to lose future job opportunities.

**The Department welcomes evidence or experience regarding, or refuting, the unique vulnerability of these workers, and whether existing worker protections are adequate to prevent violations of H–2A program requirements, dangerous working conditions, retaliation, and labor trafficking, or to promote H–2A workers' ability to advocate or organize to seek better working conditions.**

Enforcement of existing migrant worker protections is the most critical need of this worker population. Migrant worker protections have been well studied, and there is evidence that the frequency of enforcement has not kept up with the explosive growth of both the unauthorized and H-2A worker populations (Nadas & Rathod, 2018; Costa et al. 2020; Castillo et al. 2021; Sowerwine et al. 2015). Existing protections, when properly enforced, are effective in protecting the migrant working population, and further strengthening these protections through this rulemaking is a welcomed step towards further protecting this vulnerable population. However, an expanded frequency of enforcement for these provisions is required to adequately protect this working population from labor exploitation. Without more vigorous enforcement of these provisions, there is little deterrence to committing violations of the established labor rights for migrant workers.

The Economic Policy Institute (EPI) provides policy reform recommendations for farm employers and specifically for Farm Labor Contractors (FLCs), who represented 24% of all agricultural labor violations from 2005 to 2019 despite only representing 14% of agriculture employment during that time (Costa et al. 2020). Increasing fines to shift attitudes towards fines in the industry from a “cost of doing business” to becoming a deterrent to committing violations, and making employers aware of them, would be a welcomed change to increase compliance with regulations (Costa et al. 2020). EPI also recommends that repeat violators of employment laws should be required to submit certified payroll data to the Wage and Hour Division and be subjected to random audits. The Wage and Hour Division should also incorporate statistical analysis of labor standards enforcement data to more quickly detect irregularities in payroll data and use technology to inform migrant farmworkers of their rights and reporting processes. Finally, it is recommended that there be increased enforcement of the joint employment standard under the Fair Labor Standards Act to encourage farms and employers to ensure FLCs who bring workers to their farms are in compliance with the law (Costa et al. 2020).
The Department also seeks comments on whether domestic agricultural workers have greater voice and empowerment at work generally than foreign agricultural workers, despite the fact that they are not covered by the NLRA, due to their established presence in the United States, their domestic network of family and friends, their greater familiarity with services and supports available to workers in the United States, and their ability to find alternative employment.

There is scant peer-reviewed data specific to domestic agricultural workers, and whether or not they have “greater voice and empowerment at work”. Based on the data collected about the labor conditions and rights of migrant farm workers, and the unique pressures on migrant farmworkers participating in the H-2A visa program, there is a higher likelihood that domestic workers have greater empowerment in agricultural workplaces compared to H-2A workers (CDM, 2020; Moyce, S & Schenker, M, B, 2018; Liebman et al. 2013). Evidence indicates that domestic agriculture workers, unlike H-2A migrant farm workers who are tied to a single job through a visa, are less dependent on employer-provided housing and are not in danger of losing their right to remain in the U.S. if terminated. They are also more likely to be fluent in English, giving them a greater ability to understand their work contract and their employee rights (CDM, 2020; Moyce, S & Schenker, M, B, 2018; Liebman et al. 2013). These factors combined give domestic workers employment mobility and lower employer dependencies, placing domestic agriculture workers in a stronger position for self-advocacy employers, and the ability to assert their rights under the law. While H-2A workers are incentivized to continue employment even when presented with working conditions and labor standards violations that are hazardous to their health and safety (Moyce, S & Schenker, M, B, 2018; Liebman et al. 2013).

The Department also seeks comment on how to increase, or increase awareness of existing, protections for workers advocating for better working conditions and to help prevent adverse effects on workers in the United States, without infringing on employers' rights to manage their workplaces.

Advocates and researchers on the issue of migrant farm labor have identified that requiring contracts and information on safety procedures, labor rights, and reporting, to be available in the worker’s native language is a critical need in the agriculture industry (CDM, 2020; Sowerwine et al. 2015). The Economic Policy Institute recommends leveraging technology to inform farm workers of their rights through methods such as mobile phone apps and other technologies (Costa et al. 2020).
Conclusion
If you have any questions about AIHA’s comments on this proposed rulemaking or other matters, please contact me at mames@aiha.org or (703) 846-0730. Thank you for your time and consideration.

Sincerely,

Mark Ames
Director, Government Relations
AIHA

About AIHA
AIHA is the association for scientists and professionals committed to preserving and ensuring occupational and environmental health and safety in the workplace and community. Founded in 1939, we support our members with our expertise, networks, comprehensive education programs, and other products and services that help them maintain the highest professional and competency standards. More than half of AIHA’s nearly 8,500 members are Certified Industrial Hygienists, and many hold other professional designations. AIHA serves as a resource for those employed across the public and private sectors as well as to the communities in which they work. For more information, please visit www.aiha.org.

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