Wage and Hour Division

H-2A Employer's Guide to the Final Rule "Improving Protections for Workers in Temporary Agricultural Employment in the United States"

The U.S. Department of Labor (Department) has published the final rule, "Improving Protections for Workers in Temporary Agricultural Employment in the United States" (the "Farmworker Protection Rule"). The Farmworker Protection Rule is effective June 28, 2024. On August 26, 2024, the United States District Court for the Southern District of Georgia issued a preliminary injunction order ("Order") in the case *Kansas, et al. vs. U.S. Department of Labor* No. 2:24-cv-00076-LGW-BWC (S.D. Ga., Aug. 26, 2024) (*"Kansas"*) prohibiting DOL from enforcing the Farmworker Protection Rule in certain states and with respect to certain entities. The preliminary injunction specifically prohibits DOL from enforcing the Farmworker Protection Rule in the states of Georgia, Kansas, South Carolina, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, and Virginia, and against Miles Berry Farm and the members of the Georgia Fruit and Vegetable Growers Association as of August 26, 2024. DOL is complying with the preliminary injunction. For more information on the certification process, please visit https://www.dol.gov/agencies/eta/foreign-labor.

On April 26, 2024, the Department of Labor announced a final rule, "Improving Protections for Workers in Temporary Agricultural Employment in the United States" ("Farmworker Protection Rule"), strengthening protections for agricultural workers. This page summarizes important changes to H-2A program obligations for employers and will be updated as additional resources become available. The Farmworker Protection Rule also made changes to the regulations governing the Wagner-Peyser Employment Service, which are summarized here.

This page is not a comprehensive list of your obligations in the H-2A program. We recommend that you visit the Wage and Hour Division's website here for more information on H-2A compliance and the Office of Foreign Labor Certification's website here for more information on H-2A certification.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to assist the public regarding existing requirements under the law or agency policies.

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Applicability of this Farmworker Protection Rule

- **When is the Farmworker Protection Rule effective?**
  The Farmworker Protection Rule will go into effect on June 28, 2024. However, as described below:

  New worker protections that must be incorporated into job orders filed in connection with H-2A Applications (criteria clearance orders) will apply to workers employed under any criteria clearance orders and associated H-2A applications submitted on or after 12:00AM Eastern Daylight Time on August 29, 2024. These new worker protections supplement and enhance existing protections and include the following employer obligations and assurances:

  - disclosure of all applicable wage rates, including prevailing piece rates, as well as any other wage rate the employer intends to pay;
  - requirement to permit workers to invite or accept guests to their employer-furnished housing;
  - prohibition on operating vehicles that were required to be manufactured with seat belts unless all occupants and the driver are wearing such seat belts;
  - disclosure of any productivity standards as a condition of job retention;
  - clarification on the criteria necessary to terminate a worker for cause;
  - agreement that workers may designate a representative in certain circumstances;
  - disclosure of the owner of each employer, operator of each place of employment, and the managers and supervisors of workers; and
  - disclosure of foreign worker recruitment.

  These new provisions are reflected in the Form ETA-790A, "H-2A Agricultural Clearance Order," and Form ETA-9142A "H-2A Application for Temporary Employment Certification," which are pending OMB approval.

  In addition, through August 28, 2024, the Department will continue to enforce the anti-retaliation provisions in effect as of June 27, 2024. The Department will begin to enforce the anti-retaliation provisions as revised by the Farmworker Protection Rule only with respect to conduct or actions occurring on or after August 29, 2024. The revised anti-retaliation provisions explicitly prohibit retaliation because a person has:

  - Consulted with a key service provider on a matter related to the H-2A program; or
  - Filed a complaint, instituted or caused to be instituted any proceeding, or testified, assisted, or participated (or is about to testify, assist or participate) in an investigation, proceeding, or hearing under any applicable Federal, State, or local law.

  Additionally, for any person engaged in agriculture as defined by the Fair Labor Standards Act, the revised anti-retaliation provisions prohibit retaliation because a person has:

  - Engaged in self-organization and/or other concerted activities for the purpose of mutual aid or protection related to wages or working conditions, or refused to engage in these activities; or
  - Refused to attend a "captive audience" meeting, or listen to or view communications that have the primary purpose of communicating the employer's opinion on protected activity.
- **Which workers are covered by the Farmworker Protection Rule?** Generally, the Department's regulations governing the H-2A program apply to H-2A workers and other workers engaged in corresponding employment. Corresponding employment is any work performed for the employer of H-2A workers when included in the ETA-approved job order or in any agricultural work performed by the H-2A workers during the period of the job order.

  Some of the obligations in the Farmworker Protection Rule apply only to those workers engaged in agriculture as defined by the Fair Labor Standards Act (FLSA). Both the Farmworker Protection Rule and this page will identify when a specific right applies only to workers engaged in agriculture as defined by the FLSA.
- **What is agriculture as defined by the Fair Labor Standards Act (FLSA)?** Agriculture is defined by the FLSA as farming in all its branches, including, among other activities: the cultivation and tillage of soil; the production, cultivation, growing, and harvesting of agricultural or horticultural commodities; and the raising of livestock. Agriculture also includes any activities performed on a farm or by a farmer in connection with farming activities. Because the H-2A program defines "agricultural labor or services" more broadly than only agriculture as defined by the FLSA, workers employed under the H-2A program sometimes work in areas that are *not* agriculture as defined by the FLSA, including, among other activities:

- Packing fruits or vegetables, some of which were grown by farmers that are not the worker's employer. For example, if Farm A employs workers under the H-2A program who pack fruit grown both by Farm A and Farm B, the workers are not engaged in agriculture as defined by the FLSA.
- Transporting agricultural products off a farm, if some of those products were grown by a farmer who is not the worker's employer. For example, if Farm A employs workers under the H-2A program who transport fruit grown both by Farm A and Farm B, the workers are not engaged in agriculture as defined by the FLSA.
- Logging employment performed off a farm.

Protection from Retaliation

The H-2A program has long prohibited employers from retaliating against workers for exercising their rights and engaging in certain protected activities. The Farmworker Protection Rule expands and clarifies the protected activities that workers must be allowed to perform without fear of intimidation, threats, and other forms of retaliation.

Retaliation occurs when you take an adverse action against an employee because they engaged in a protected activity. In the H-2A program, a person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against a person who has engaged in a protected activity.

- **What are the protected activities in the Farmworker Protection Rule?** The Farmworker Protection Rule protects the following activities:
  - Filing a complaint or instituting a proceeding about any matter involving the H-2A program.
  - Testifying or being about to testify in any such proceedings.
  - Consulting with an attorney or legal assistance program about H-2A protections.
  - Consulting with a key service provider about any matter involving the H-2A program.
  - Exercising or asserting, on behalf of themselves or others, any H-2A right or protection.
  - Filing a complaint, instituting a proceeding, or testifying or assisting in an investigation, proceeding or hearing under any applicable Federal, State, or local law or regulation, including safety and health, employment, or labor laws.

  Additionally, if the worker is working in agriculture as defined by the Fair Labor Standards Act, the Farmworker Protection Rule also protects the following activities:

  - Engaging in self-organizing, such as forming, joining, or assisting a labor organization, or refusing to do so.
  - Engaging in other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions, or refusing to do so.
  - Refusing to attend a "captive audience" meeting, or to listen or view the employer's opinion on protected activities.
- **What is a key service provider?** A key service provider is a person or organization that a worker may consult with and rely on to receive necessary services. Key service providers include:
  - Health-care providers
  - Community health workers
  - Education providers
  - Translators or interpreters
  - Attorneys, legal advocates and other legal service providers
  - Government officials, including consular representatives
  - A member of the clergy
  - Emergency Service providers
  - Law enforcement officers
  - Any other provider of similar services
- **When is a worker engaged in concerted activities for the purpose of mutual aid or protection relating to wages or working conditions?** Concerted activities are activities in which workers join together with or on behalf of other workers for the purpose of mutual aid and protection. A worker's individual actions may be "concerted" when they seek to initiate, induce, or prepare for group action, or when a worker brings shared complaints to the attention of management or an enforcement agency. "Activities for the purpose of mutual aid or protection" may include any action taken by a worker seeking to improve or enforce required wages or working conditions in the workplace, or affecting the workers' interests as employees. Examples of concerted activities for the purpose of mutual aid and protection relating to wages and working conditions include:

- One worker speaking up for another, or two workers approaching their employer jointly, to complain about a lack of clean drinking water or inadequate or unsanitary toilet facilities in violation of OSHA field sanitation standards.
- Workers who band together to protest unsafe housing or transportation, lack of clean drinking water or bathroom facilities, lack of accessible kitchen facilities, unfair or undisclosed deductions for food and beverages, or being offered poor quality or spoiled food.
- Workers who jointly discuss their wages, harassment, or an employer's failure to comply with health and safety laws.

- **When can a worker engage in organizing activities or concerted activities for the purpose of mutual aid or protection?** Generally, you must not prohibit workers engaged in agriculture as defined by the FLSA from engaging in activities related to self-organization or other concerted activities for the purpose of mutual aid or protection that occur during nonproductive time. Nonproductive time includes:
  - Lunch breaks
  - Rest breaks
  - While workers are riding as passengers in a vehicle when being transported between worksites
  - Noncompensable time, such as time after the end of the worker's workday
- **Where can a worker engage in organizing activities or concerted activities for the purpose of mutual aid or protection?** You must permit workers engaged in agriculture as defined by the FLSA to gather and converse for the purpose of mutual aid or protection in nonwork or common areas during nonwork hours, even if such areas are on your premises. For example, workers should generally be free to meet with one another after the end of their workday to discuss wages or working conditions in:
  - Parking areas
  - Common areas of worker housing, such as indoor or outdoor eating areas
  - Recreational facilities
  - Other locations on the premises where workers would otherwise typically gather after work

  In addition, although you may establish reasonable work rules that limit discussions or meetings unrelated to the job while the worker is actively performing work, you may not apply or enforce work rules selectively to discourage worker self-organization or other concerted activities. For example, you may place reasonable restrictions on employees' use of personal devices while in the field but may not apply such restrictions only to certain individuals who you suspect are engaged in organizing or other concerted activities, or only to those text messages or phone conversations that you think are related to worker self-organization or other concerted activities. Similarly, you may establish reasonable work rules limiting personal conversations during productive working hours when such conversations would affect productivity, but may not selectively enforce such rules against workers for conversing about self-organization or other concerted activities. Depending on the facts, these types of selective restrictions may be unlawful retaliation.
- **What is a "captive audience" meeting?** A "captive audience" meeting is a mandatory employer-sponsored meeting that has the primary purpose of communicating your opinion regarding protected activities. For example, such a meeting may feature you or someone representing you talking about your opinions on:
  - Labor unions
  - Workers coming together to complain about health and safety issues
  - Whether workers should communicate with government investigators

  Mandatory meetings on subjects other than those involving workers' exercise of protected rights will generally not be considered "captive audience" meetings. For example, meetings on the following topics would not be "captive audience" meetings:
  - Work assignments for the day
  - Job training
  - Safety instructions

  If the primary purpose of a regular 30-minute daily meeting is to discuss work assignments, but you change topics and instead devote the last 15 minutes to discussing whether workers should engage in certain protected activity, a worker must have the choice to leave that meeting at that point without retaliation. You may choose to minimize any disruption by, for example, announcing that the last 15 minutes of the meeting will be about organizing, and allowing workers who object to leave at that time. Alternatively, you could choose to allow any objecting workers to wait elsewhere while you address certain topics, then invite them into the meeting when the topic turns to making work assignments.

Guest Access to Worker Housing

Workers employed under the H-2A program may invite, or accept at their discretion, guests to their employer-furnished housing.

- **Where are guests permitted to enter and be present at employer-furnished housing?** Guests may be present in workers' living quarters, as well as the common areas and outdoor spaces near such housing. However, you may implement reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas, including limitations on where guests may be present.
- **When are guests permitted to be invited or accepted to enter employer-furnished housing?** Guests may be present any time that is outside of the workers' workday. However, you may implement reasonable restrictions designed to protect worker safety and prevent interference with other workers' enjoyment of these areas, including limitations on when guests may visit.
- **Who is permitted to be invited to enter and be present at employer-furnished housing?** The term "guest" is broad and is not restricted to any definition or type of person. Guests may include family members, friends, key service providers, representatives of labor organizations, or others.
- **As an employer, what are reasonable restrictions that I may place on workers inviting and accepting guests into the housing?** You may implement reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of the housing and its surrounding areas. Whether such restrictions will be considered reasonable will depend on how these impact workers' rights of association and access to information in light of all the available facts. For example, under many circumstances, an employer policy prohibiting overnight guests would be reasonable. Similarly, a restriction on bringing guests into shared sleeping quarters may be reasonable where there are alternate spaces in the housing area in which to have a private conversation, but may not be if a worker were forced to meet with a service provider in a crowded common area where the conversation could be overheard. Any restriction of the access of emergency medical personnel is not reasonable.

Right to Designate Representative

If a worker is engaged in agriculture as defined by the FLSA, the Farmworker Protection Rule requires you to permit that worker to invite a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action. Additionally, you must permit the representative to advise and assist the worker during the investigatory interview.

- **What is an investigatory interview that a worker reasonably believes may result in discipline?** This is any situation where you seek to question a worker and the worker reasonably believes that questioning may result in discipline. An investigatory interview does *not* include situations where you or a supervisor simply give instructions, provide training, or correct work techniques. Additionally, a meeting where you merely announce a disciplinary decision that you have already made, or tell the worker that they will not face discipline, is *not* an investigatory interview. Ultimately, whether the meeting is an investigatory interview hinges on whether the worker reasonably believes that discipline can result from their responses in that meeting.
- **How must a worker request a representative?** The worker's request for a representative need not take a particular form or incorporate any particular words, so long as the request is sufficient to place you on notice that they want a representative.
- **When must a worker request a representative?** A worker may make a request for a representative at any point during an investigatory interview. Before the interview, you must inform the worker about the subject matter of the interview and must permit the worker to consult with the representative.
- **Who may act as a representative?** The worker must be permitted to have a representative of their choice. For example, a worker may designate a coworker, interpreter, legal aid advocate, or whomever else they chose.
- **Must I permit the representative to attend the investigatory interview in person?** Where the representative is present at the worksite at the time of the investigatory interview (for example, if the representative is a coworker), you must permit the representative to attend the investigatory interview in person. Where the representative is not present at the worksite at the time of the investigatory interview (for example, if the representative is a member of the clergy and works in a nearby city), you must permit the designated representative to "attend" an investigatory interview remotely, by telephone or videoconference.
- **How long must I wait for the representative?** If a worker requests a representative, you must allow a reasonable delay for that representative to join the investigatory interview either in person or remotely. When determining what constitutes a reasonable delay, you should consider whether the designated representative is engaged in time-sensitive work that cannot be paused, is assigned to work in a different location, or cannot readily be contacted due to lack of telephone service in remote areas, as well as the time sensitivity of your need to conduct the investigatory interview. You should take into account all facts of the particular situation in determining how long of a delay is reasonable.

Termination for Cause

For many years, the Department's H-2A regulations have explained that if workers are terminated without cause, they are owed the three-fourths guarantee, housing and meals until the worker leaves, and outbound transportation. Additionally, in the case of a U.S. worker who is terminated without cause, the employer must contact them for employment the next year. The Farmworker Protection Rule clarifies that a worker is not "terminated for cause" unless the worker is terminated for failure to comply with your policies or rules or for failure to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer. The Farmworker Protection Rule also identifies five conditions that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable. These five conditions are listed below.

The Farmworker Protection Rule also outlines some procedural steps that must be followed in the employer's progressive discipline system, and records that must be maintained.

"Termination for Cause" in General

Condition 1: The worker has been informed, in a language understood by the worker, of the policy, rule, or performance expectation.

Condition 2: Compliance with the policy, rule, or performance expectation is within the worker's control.

Condition 3: The policy, rule, or performance expectation is reasonable and applied consistently to the your H-2A workers and workers in corresponding employment.

Condition 4: You undertake a fair and objective investigation into the job performance or misconduct.

Condition 5: You correct the worker's performance or behavior using progressive discipline.

Recordkeeping and Other Obligations for "For Cause" Termination

Seat Belts

The Farmworker Protection Rule requires you to maintain seat belts in good working order if that vehicle was manufactured with seat belts. If the vehicle was manufactured with seat belts, you may not drive that vehicle, or allow anyone else to drive that vehicle, unless all passengers and the driver are wearing seat belts.

- **What resource should I review to determine if a vehicle is manufactured with seat belts?** The U.S. Department of Transportation's National Highway Transportation Safety Administration publishes Federal Motor Vehicle Safety Standards (FMVSS) establishing which vehicles must be manufactured with seat belts at 49 CFR 571.208 for most vehicles, and 49 CFR 571.222 for school buses.
- **What vehicles commonly used in the H-2A program are manufactured with seat belts?** Generally, the U.S. Department of Transportation establishes standards for vehicle manufacture based on type of vehicle, Gross Vehicle Weight Rating (GVWR), and date of manufacture.
    - Passenger cars and light trucks and vans have been manufactured with seat belts since the 1970s.
    - Buses (excluding school buses) with a GVWR under 10,000 pounds have been manufactured with seat belts since 1991. **Fifteen passenger vans fall into this category**.
    - Buses (excluding school buses) with a GVWR over 26,000 pounds have been manufactured with seat belts since 2016.
    - School buses with a GVWR under 10,000 pounds have been manufactured with seat belts since 1976.
- **What vehicles commonly used in the H-2A program are not required to be manufactured with seat belts?** School buses with a GVWR exceeding 10,000 pounds are not currently required to be manufactured with seat belts.
- **What types of employer-provided transportation require seat belts?** Any employer-provided transportation must have seat belts if the vehicle was manufactured with seat belts. This includes transportation between worksites, inbound/outbound transportation, and interstate and intrastate transportation between job sites. If you contract with

another entity, such as a farm labor contractor, to provide transportation that is your responsibility, such as transportation between the living quarters and worksite or inbound/outbound transportation, that transportation continues to be employer-provided and is subject to all the vehicle safety standards, including the seat belt standards.

Rate of Pay

Adverse Effect Wage Rates (AEWRs) are the minimum hourly wage rates that must be offered and paid by employers to workers employed under the H-2A program. AEWRs are adjusted annually and, under the Farmworker Protection Rule, become effective immediately upon publishing the Federal Register Notice updating the AEWRs. As an employer seeking to employ workers under the H-2A program, you are required to offer, advertise in your recruitment, and pay a wage that is at least equal to the AEWR when it is the highest applicable wage rate among the wage sources applicable to your job opportunity.

For **non-range** occupations, you must offer and pay at least the hourly AEWR, the prevailing wage rate (if available), the Federal minimum wage, the State minimum wage, the agreed-upon collective bargaining rate, or any other wage rate you intend to pay, whichever is highest.

For **range** occupations, you must offer and pay at least the monthly AEWR, the agreed-upon collective bargaining wage, the applicable minimum wage imposed by Federal or State law or judicial action, or any other wage rate you intend to pay, whichever is highest.

You must disclose any applicable prevailing piece rates or other rates that you intend to pay to workers. You also must disclose any overtime pay required by law or that you voluntarily intend to pay.

- **What are my obligations regarding offering, advertising, and paying piece rate or other non-hourly wage rates?** Where there is an applicable prevailing piece rate or where an employer intends to pay a piece rate or other non-hourly wage rate, you are required to include both the non-hourly wage rate and the highest hourly rate in the job order, so that both rates are included in the job order and recruitment.
- **What are my responsibilities regarding disclosing overtime pay?** If you are required by law to pay an overtime rate or otherwise choose to pay an overtime rate, you must state in the job order that overtime hours may be available, the wage rate(s) to be paid for any such overtime hours, the circumstances under which the wage rate(s) for overtime hours will be paid, including, but not limited to, after how many hours in a day or workweek the overtime wage rate will be paid, whether overtime wage rates will vary between places of employment), and, if overtime pay is required by law, the applicable Federal, State, or local law.
- **When do I have to implement the new AEWRs when they are updated annually?** You must pay the updated AEWR when DOL's Office of Foreign Labor Certification publishes the Federal Register Notice updating the AEWRs. The AEWR which covers most H-2A jobs is based on the United States Department of Agriculture's Farm Labor Survey (FLS) and is typically published in December of each year. For some job opportunities, the AEWR is based on the Bureau of Labor Statistics Occupational and Employment Wage Statistics (OEWS) survey; those AEWRs are published in June. For employers whose job opportunity may be covered by both AEWRs, they must check with each AEWR publication whether the FLS or OEWS wage is higher and must be paid as the AEWR.
- **What if an AEWR update falls in the middle of my pay period?** You are required to pay the updated AEWR as soon as it becomes effective. However, DOL will not take enforcement action against you if you can demonstrate it was impossible to update payroll before the next scheduled pay date and you provide retroactive pay for the difference in the following pay period.

Passport Withholding

The Farmworker Protection Rule clarifies that you are prohibited from holding or confiscating a worker's passport, visa, or other immigration or government identification documents.

- **What is an example of other immigration documents?** Other immigration documents include, among other documents, USCIS Form I-94, new arrival and departure record, that you may receive after petitioning to extend an H-2A workers period of authorized employment.
- **The worker asked me to hold their passport for safekeeping – what do I do?** You may hold onto a worker's passport only if the following conditions are met:
    - **The worker voluntarily requests that you keep these documents safe.**
    - **You return the documents to them immediately upon their request.**
    - **You have not directed the worker to submit this request.**
    - **The worker states, in writing, that the three conditions listed above have been met.**

- You allow the worker **ready access to their passport or other documents**, at least during regular business hours and at a location that does not meaningfully restrict the worker's ability to access the passport or other documents.

- **Can I accept a worker's passport or other identification documents to provide to the consulate during the H-2A visa process?** You or your agent may help a prospective H-2A worker with the submission of their passport, visa, or other identification documents to the U.S. Government for purposes of visa application, processing, or entry to the U.S., provided that the worker voluntarily requests your assistance in these processes and that the documents are returned to the worker immediately upon return by the U.S. Government.

Employer Obligations in the Event of a Delayed Start Date

If you have a certified H-2A application but need to delay the start of work by up to 14 calendar days due to circumstances that could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period, you must notify the state workforce agency (SWA) and each worker you intend to employ under the job order associated with the application of the delay at least 10 business days before the original start date. If you do not provide timely notice to a worker, you must compensate the worker at the required rate included in the job order for each hour of the offered work schedule in the job order, for up to 14 calendar days. Please see the Department of Labor's Office of Foreign Labor Certification H-2A web page for more information on the H-2A application process.

- **How should I contact workers in the event of a delay?** You must contact the worker in writing, using the information that the worker has provided to you. If the worker has provided an email and phone number, you must contact the worker by email and by phone. You must retain evidence of the notification.
- **When do I need to compensate the worker?** You must provide compensation to the worker no later than the first day that the worker would have been paid had work started on time.
- **What else do I need to do during a delay?** You must continue to comply with all requirements of the certified H-2A application. You must offer to workers all the terms and conditions included in the job order, including housing free of cost. If a worker was already traveling or had already arrived at the jobsite when you provided notification, you must provide daily subsistence to the worker in the same amount required during travel until work starts, except for days on which you compensate the worker at the rate included in the job order for the work schedule in the job order.

Side Agreements

The Farmworker Protection Rule clarifies that you may not ask workers employed under the H-2A program to sign any side agreements relating to their rights under the program. These include, for example, arbitration agreements that were not disclosed in the job order, and forms that purport to add or waive terms and conditions of employment, such as the right to the three-fourths guarantee or outbound transportation.

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