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RE: DOL Docket No. ETA-2023-0003, RIN 1205-AC12 – Improving Protections for Workers in Temporary Agricultural Employment in the United States

Comments submitted via https://www.regulations.gov.

Dear Ms. Vitelli, Mr. Pasternak, and Ms. DeBisschop:

Thank you for accepting these comments.

Wafla is a non-profit 501(c)(6) membership association comprised of nearly 800 agricultural and seasonal employers. Wafla was formed to make labor stability a reality for all agricultural employers and for farmers and farmworkers to be treated with dignity and respect. We offer

ways for our members to access several federal visa programs and receive assistance complying with state and federal labor standards.

In 2022, wafla filed H-2A applications for approximately 250 member employers who collectively were certified for more than 17,000 H-2A positions. In addition, wafla employer members employed more than 20,000 U.S. workers. We assist farmers with their workers' housing needs and offer human resource training and advice.

We have seen interest and participation in the H-2A visa program grow over the past decade, as our members, agricultural employers, have found it increasingly hard to fill agricultural jobs. Their only option to help remedy this labor shortage under current law is the H-2A program. Without this program, farmers of labor-intensive commodities would not currently be able to grow those crops, which are vital components in our national food security system.

Agriculture is unlike many other industries because it involves multiple production variables and requires flexibility in work schedules. The success of agriculture is completely reliant on weather patterns, much more so than any other industry. Due to the nature of the national and increasingly international agricultural marketplace, farmers are severely limited in their options to pass on increased costs to consumers. Increases in input costs such as labor can squeeze these family businesses perilously close to the edge of going out of business. Higher labor and regulatory costs, such as those included in these proposed regulations, contribute to jeopardizing the continued viability of agricultural employment and hampering domestic food production.

Our country needs a robust food supply and needs farmers and farmworkers to produce that food. As such, it is imperative that the H-2A guestworker program work efficiently and without artificial barriers. Unfortunately, this Notice of Proposed Rulemaking (NPRM) erects more barriers, adding more costs and confusion to the hiring process for both employers and workers. This proposal attempts to protect workers by imposing additional regulations on users of the H-2A program, but this idea is unnecessary and counterproductive. The H-2A program is already a labyrinth of rules, and the federal government already has authority to enforce those rules. The existing regulations already provide for sufficient worker protections. All that is required is robust federal and state enforcement of the current rules.

Wafla has long been an advocate for workers and for our member farmers. Workers coming to the United States on a temporary visa should be a fair deal for all involved. This is why farmers receive a steady, legal supply of labor while the workers receive free housing, free transportation, guaranteed contracts, and high hourly wages set by the government.

This fair deal between employers and H-2A workers could be in jeopardy. Implementing these rules will drive an unnecessary wedge between good employers and employees and will endanger the viability of family farms that grow labor-intensive crops. This proposal is anything but fair. Instead, it is full of heavy-handed enforcement and regulatory overreach. If there are current problems in H-2A, it is because of lack of enforcement—not because the current rules are insufficient. These new rules are unbalanced and have brutal enforcement provisions.

The Department of Labor's (DOL) purpose for this NPRM is apparent. According to the Department's own words, the desired outcome of this NPRM is to solicit and find "comments that cite evidence of the need to remedy through this rulemaking ongoing violations, worker abuse or exploitation, coercion, employer or agent subterfuge to avoid the law or other ways the Department's enforcement of the law may be hindered to the detriment of H-2A workers and workers in the United States impacted by the program and the Department's ability to fulfill its statutory responsibilities" (*Federal Register*, p. 63753). The Department has developed a rule proposal and now asks the public to provide the justification for the Department's beliefs, words, and possible regulatory actions. This tortuous reasoning undermines the Department's proposal and exposes it as a regulatory witch-hunt, the object of which are participants in the necessary H-2A program.

Moreover, the Department has released this NPRM for public comments during the autumn months of 2023. These months of September through November tend to be the busiest months for the agricultural industry because of crop harvest. As such, stakeholders have had limited time and resources to review, analyze, and comment on this proposal. The limited time period and time of year has not allowed for proper vetting and response by stakeholders. A fair proposal would have taken this timing into account and allowed for a longer public review process at a more convenient season for the affected industry.

While there are a handful of acceptable ideas in this proposal, the vast majority of it is problematic for the agricultural industry, and it goes way beyond just making sure U.S. farmworkers are not adversely affected by the program and establishing baselines standards which already exist on non-H-2A farms. The NPRM is an attempt by the Department through rulemaking to raise the labor law bar for U.S. farmworkers via the H-2A program above and beyond what is currently in place by federal statutes, which is a clear overreach of the Department's authority. We urge you to discard this NPRM, enforce the current regulations, and adopt more efficiencies into the H-2A program so that farmers in the United States can be paired with available domestic farmworkers and necessary foreign farmworkers to continue vital domestic food production.

Comments

Below are our comments on the details of the NPRM. For the Department's convenience, we have listed the original heading from the proposed rules followed by our comments on that section or subsection.

III. Discussion of Proposed Revisions to Employment Service Regulations

B. Discussion of Proposed Revisions to 20 CFB Part 651

We have concerns with the Department's proposal to expand discontinuation of Wagner-Peyser Employer Services (ES) services to agents and attorneys, as well as the actual employer, joint employers, farm labor contractors, agricultural associations, and any successor in interest. If ES services need to be discontinued, only the employer should be the target of that action.

Attorneys, agents, associations, joint employers, farm labor contractors, and any other entity that is not the principal employer to H-2A workers and that had nothing to do with the potential rule violation should not be subject to discontinuation of services. In practice, a State Workforce Agency (SWA) could issue a discontinuation of service to an agent effectively stopping every client of that agent from using the H-2A program. This liability is extremely concerning for our association with the potential for perceived rule violations as part of master application filings. Use of such a restriction is unjustifiably overbroad.

C. Discussion of Proposed Revisions to 20 CFR Part 653

The Department would like to add to paragraph 653.501(b)(4)(iii) additional entities, such as agents, attorneys, and associations, and not just employers to the list of entities that can have ES services discontinued. Consistent with our position above, we believe only the principal should be subject to possible discontinuation of services. Moving beyond the employer-employee relationship broadens penalties to third parties that may have had no fault to cause the discontinuation of services, and other innocent, unrelated clients of those third parties may unjustifiably also be the recipient of effects from the discontinuation of services. Discontinuation of services needs to be used sparingly, not broadly.

The Department proposes to revise 653.501(c)(3)(i) (*Federal Register*, p. 63759) in such a way that the employer must notify the SWA and workers 10 business days before the original start date if a minor change occurs to the certified start date of work. Currently the SWA notifies the workers. We support this proposed change. Given the variability of crops, crop maturation, weather, work schedules, or over-recruitment in agriculture, the employer knows the conditions on the ground and is capable and should be empowered to make this decision and provide the proposed notification.

With one exception, we agree with the proposed modification of 653.501(c)(5). If an employer fails to notify workers prior to the 10 business days, then the employer must pay wages for a period of up to two weeks (currently one week) starting with the originally anticipated date of need. We agree the employer should pay housing and subsistence to all workers already traveling to the place of employment under these conditions. However, we disagree that an employer should be required to pay workers' wages when they do not meet the 10-business-day notice provision. There are times when a surprise event, like an unexpected, unforeseeable weather storm or an act of God, occurs and could substantiate an employer's reason for not being able to notify employees prior to the 10 working days. Such an event must be considered as a valid reason for delaying notification of workers after the 10 business days and requiring an employer to pay potential missed wages.

We have concerns with one part of the proposal on this point. The proposal says that the required wages would need to be hourly, piece rate, or any prevailing rate that was listed in the job order. This requirement makes no sense. How can the employer pay a piece rate to a worker when work has not yet started, and no piece rate has been established? This provision should simply require payment of the hourly rate listed in the job order and nothing more.

D. Discussion of Proposed Revisions to 20 CFB Part 658, Subpart F

It is clear from this NPRM that the Department wants to increase enforcement on employers through discontinuation of services and debarments. DOL indicates that SWAs must initiate discontinuation of services when the Department or a SWA receive notification from an "appropriate enforcement agency of a final determination that includes a violation of an employment-related law" (*Federal Register*, p. 63761). The tone of this section makes it sound as if DOL is unhappy about the low number of service discontinuations by SWAs over the past several years. Perhaps the low number is due to SWAs working with employers to resolve issues at the lowest level rather than immediately resorting to a heavy-handed remedy, which to an H-2A employer is discontinuation of services. No government agency should take pleasure in not taking enforcement actions against enough people.

The Department proposes to provide additional guidance to SWAs as to when to discontinue services and how to go about it. This additional guidance contains problematic aspects that we object to.

Regarding enforcement actions by SWAs, this proposal generally shifts language from the permissive "may" to a mandatory "must," consequently removing authority from SWAs to exercise judgment on a local, case-by-case basis. We are concerned with this change, such as what is contemplated in the revisions to section 658.501, will result in SWAs having less flexibility to address situations and remedy them at the lowest possible level, and consultation services by SWAs should always be an option before resorting to compliance actions.

As stated above, we object to expanding definitions in section 658.500(b) to add agents, associations, farm labor contractors, joint employers, and successors in interest to the definition of "employer" so that all are subject to discontinuation of services. Often the entities under this expanded definition do not have clear direction or control of day-to-day workplace conditions and should not be held liable for an issue that may result in discontinuation of services. Also, these entities may have other clients that are not related to the cause of the discontinuation of service and yet would suffer negative impacts from discontinuing services. If a SWA or DOL finds a problem with an attorney or filing agent, all of that person's H-2 clients may be debarred from the program. For example, an agent may have more than one farmer as clients. If the agent were to suffer discontinuation of services because of something one client did wrong, the other clients would unjustly feel the effects of the discontinuation of services on the agent despite the clients having done nothing wrong. Thus, this expanded definition is overbroad and effects of it are potentially harmful to innocent third parties. We oppose this change and urge the Department to continue using the current definition of "employer."

We also have grave concerns about the proposal to allow SWAs to issue a discontinuation of services if an employer receives a final of any violation employment-related laws. Read literally, and thus broadly, a minor paperwork violation such as no FEIN on a pay stub or lack of documented safety meeting records could result in discontinuation of services.

Taken together, these topics result in a deprivation of due process on the part of the H-2A employer. The proposal rule would make it easier for SWAs to discontinue services to employers even for perceived labor violations and any violation of even minor, unintentional employment-related laws. Deputizing SWAs to enforce unclear, subjective standards that they may not have the technical knowledge to enforce is fundamentally unfair to all parties involved. SWAs can already discontinue services to an employer for certain reasons, but this proposal would mean they would cease helping employers who violate any employment-related law. As a result, employers could be banned from using H-2 programs because of a simple paperwork error. The language used in this section is not merely about having reasonable rules and enforcement. Rather than assisting employers to navigate a complex, legal program to achieve legal employment of guestworkers benefitting those workers and our country, the Department seems poised to flex its regulatory muscles and pound employers into submission at the first sign of a minor error.

The Department proposes to revise section 658.501(a)(1) to state that the SWA must discontinue services to employers who refuse to correct or withdraw job orders with terms and conditions contrary to employment-related matters. We have seen the SWA regularly misstate employment-related laws in the adjudication of the job order, so what will the repercussions be when an employer refuses to correct a job order based on misstatements of the law? How would we resolve this situation? What recourse does the employer have? This revision seems to mean the employer would face discontinuation of services for attempting to state what is legal and correct in a job order. It also seems to This seems to also contradict 20 CFR 655.121(e)(3), which allows employers to appeal an adverse decision from the SWA to the DOL Certifying Officer (CO).

We object to proposed changes to section 658.501(a)(2) whereby the SWA must discontinue services for a "failure to provide any required assurance," not just for lack of compliance with employment-related laws. The Department is not only broadening the scope of discontinuation of services beyond employment-related law violations. Under this proposal, discontinuation of services can be for any H-2A assurance violation.

Regarding the revisions to section 658.502 (a)(1) through (7), the employer will no longer be allowed to have a pre-discontinuation hearing. Rather, a hearing will be provided only after a final determination has been made. Given the time-sensitive nature of agricultural seasonal employment, procedural delays can be costly. While the employer is still given the ability to overcome the discontinuation of service through presenting evidence, the wait for a hearing could be disruptive to the employer, the workers, and the agricultural commodity being produced. We object to this change and request that the Department return to the practice of allowing pre-discontinuation hearings.

In the proposal for a new section 658.501(a)(8), the Department allows SWAs to issue a discontinuation if an employer "repeatedly requires the initiation of discontinuation of services." The employer's only rebuttal in this situation is to demonstrate that the previous initiations of discontinuation of services were unfounded. We understand the Department

wants to have an enforcement tool against alleged repeat violators, but this provision places too much power in the hands of the SWA and curtails the rights of the employer too much. The SWA can already issue a discontinuation based on many different situations, and discontinuation is already a stiff penalty for an employer in the H-2A program. There is no justified reason to impose what amounts to a death penalty against an employer's participation in the H-2A program without the employer being able to present sufficient evidence in the employer's defense. Limiting the employer's defense options deprives the employer of basic justice.

In the proposal for new language in section 658.502(b), the Department institutes immediate discontinuation of services if there is "substantial harm to workers." This change from the previous "significant numbers" could mean discontinuation of services if even one worker is allegedly being harmed. When immediate discontinuation of services is determined, a request for hearing will not stay the discontinuation. We object to these provisions. This proposal allows the SWA to discontinue services without full due process, and if an immediate discontinuation is issued, it remains in effect until overturned on appeal. We object to these provisions on due process grounds.

Finally, the new language in section 658.503(e) would clarify that an employer's loss of access to ES services applies in all locations throughout the country where such services may be available. If a SWA finds a problem with and discontinues service to a multi-state employer, other SWAs must follow suit in other states – even without their own investigations. This change would put state government agents on one coast automatically in charge of a different state government's actions on the other coast – raising questions of due process. Enforcement could be uneven and subjective across states. In addition, there are times in multi-state organizations where a perceived violations may occur due to an employer's frontline supervision or rogue individual management. An employer may not be aware of all of the actions by multiple supervisors across a national company. If a violation is found in one state related to a rogue supervisor or manager, the employer should be afforded the opportunity to evaluate their entire management enterprise in different states without fear of one bad actor ruining access to H-2A for the entire company. It is completely rational to recognize that there is a lone rogue supervisor and that the rest of the company's management is acting correctly. This type of enforcement would not just be discontinuation of services. It is essentially debarment at the national level. For these reasons, we object to these proposed changes.

IV. Discussion of Proposed Revisions to Employment Service Regulations

A. Introductory Sections

1. Section 655.103(e), Defining Single Employer Test

a. Definition

The Department in this proposal attempts to codify its debatable "single employer" test that has been extensively challenged at the Board of Alien Labor Certification Appeals (BALCA). The

Department claims it has used this single employer test for a decade, but BALCA criticizes and inconsistently applies it. In fact, the BALCA ALJ rulings in *Mid-State Farms*, 2021-TLC-00115, and *Overlook Harvesting*, 2021-TLC-00205, both ruled that the existing codified joint employer test was enough to satisfy whether employers were related or not. The Department disagrees saying that the current codified "joint employer" test determines the relationship of the employer with their employees, but the new "single employer" test determines the relationship between two potential employers themselves.

The proposed single employer test is faulty and should not be included in this rulemaking package. Similar employers are not a single employer because they have the same or similar addresses, have overlapping employer contacts, share some resources, or are in similar industries.

Adding new text to section 655.103(e) to define "single employer" and thus a "single employer test" is not appropriate, especially because this test (sometimes referred to as integrated employer test) was originated by the National Labor Relations Board (NLRB). It is well known that Congress exempted agriculture from the National Labor Relations Act (NLRA). Definitions and tests that stem from the NLRA and NLRB cannot be applied to agriculture and were not intended to be applied to agriculture unless directly adopted by Congress into ag-related statutes. This NPRM proposes that DOL use rulemaking to create new laws. This "typical" four-factor test, which includes common management, interrelation between operations, centralized control of labor relations, and a degree of common ownership and financial control, may be typically used in other non-agricultural industries governed by the NLRA, but it should not be used by DOL for agricultural employment purposes.

b. Temporary or Seasonal Need

The new proposed definitions for "single employer" and the "single employer test" have ramifications on temporary or seasonal needs. The Department attempts to determine if H-2A job certifications for the same or similar occupations in the same Area of Intended Employment overlap enough by joint employers to constitute year-round employment.

COs under the new rule could require via a Notice of Deficiency (NOD) additional information to run the single employer test. As part of an NOD, the CO could request corporate structure information; names of directors, officers, managers, and job descriptions; incorporation documents; documents identifying where same individual(s) have ownership interest and control; reasons for the business authorizing one person to sign contracts and applications; if money is intermingled; where workspaces are shared; and where similar products and services are provided. These questions are intrusive, and it appears that the Department is trying to pry into business dealings without identifying a bona fide problem at the outset. In addition, the volume of information that the CO could request during a NOD as part of this proposal could easily take 40 to 100 hours or more to compile and respond accurately to the CO request. Given that the NOD allows for a response window of 5 business days or 12 calendar days (depending on whether it's an original certification or an opportunity to correct before denial), if the

information requested is not organized in such a way the CO agrees they can identify the answers to their questions, the labor certification is at great risk of being denied.

We are concerned that the effect of this proposal, if adopted, will make employers in a single Area of Intended Employment lose seasonality. The Department also proposes that the single employer test will apply to determinations made during Wage and Hour Division (WHD) investigations, which means that even if the Office of Foreign Labor Certification (OFLC) did not believe two entities were "single employers," WHD could subsequently find that they are and enforce it during an investigation. These proposed changes have ramifications for both "seasonality" determinations and for workers in corresponding employment during a WHD investigation. For all of these reasons, we believe the proposed definition of "single employer" and the new "single employer test" need to be withdrawn and not used by the Department.

c. Enforcement

The Department claims that WHD already uses the revised test but wants to codify it. We object to the codification. If further clarification is needed on this topic, Congress should address it through amendments to statute.

2. Section 655.104, Successors in interest

We have concerns about the proposal to broaden the definition of "successor interest" to include "an entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity." This new definition binds a new employer to the decisions of the previous employer even if the new employer wants to comply with the law in ways the previous employer did not. This automatic assumption of guilt and automatic debarment under new language in section 655.104(c) would force a legitimate employer to prove its innocence in order to receive equal treatment under the law. This idea violates a basic tenet of American justice and jurisprudence. Instead, the Department should step back from such a broad definition of "successor interest" and recognize that successor interests can be new entities with full rights and privileges. If those successor interests violate provisions of the H-2A program, then DOL can commence the proper enforcement procedures. But an assumption by DOL that a successor interest is in violation of program rules is not sufficient evidence for limiting, disciplining, or debarring the successor employer.

3. Section 655.190, Severability

We object to the inclusion of a severability clause in these proposed rules. The topics covered by this rule proposal are linked together, and the concepts proposed are built upon each other. This NPRM is not a collection of individual, unrelated changes to the H-2A program. Instead, every provision is tied to the stated overall goal of "improving protections for workers in temporary agricultural employment in the United States." Everything in these proposed regulations carries with it that theme. These rules should stand together and not be allowed to be severed.

B. Prefiling Procedures

1. Section 655.120(b), Offered Wage Rate

The Department proposes to revise section 655.120(b)(2) to require the paying of an updated AEWR immediately upon publication of the new AEWR in the *Federal Register*. This change would remove the current 14-day window for employers to get their payroll systems updated. This proposed rule is not practical or realistic for employers because updating payroll systems cannot necessarily be done overnight. Not every employer in the country is automatically and instantaneously aware of every change in the Federal Register. Some time is needed to disseminate these announcements and information to employers. We suggest leaving the 14-day window in place. If DOL wishes to shorten this time period, perhaps the Department could make the updated AEWR effective at the first day of the employer's next pay period.

2. Sections 655.120(a) and 655.122(l), Requirement to Offer, Advertise, and Pay the Highest Applicable Wage Rate

The Department seeks to add in section 655.120(a)(1)(vi) that the employer must also list "any other wage rate the employer intends to pay." Section 655.120(a)(2) would include an explicit requirement that states, "where the wage rates in paragraph (a)(1) are expressed in different units of pay, the employer must list the highest applicable wage rate for each unit of pay in its job order and must advertise all of these wage rates in its recruitment." We have concerns with these changes. The Department admits that "it is usually not possible to determine until the time work is performed whether the prevailing piece rate will be higher than the highest of the applicable hourly wage rates as this will depend on worker productivity" (p. 63774 of the Federal Register), yet under this proposed language, the Department would ask employers to foresee all future wage rates before market and crop conditions are even known. If employers were able to divine this information, they would almost assuredly also divine the winning numbers to the next Powerball lottery. Setting a requirement to list the highest wage rate possible could harm workers and employers in one of two ways. The first is by setting unreasonable expectations for higher wages when the crop and market conditions do not dictate that a higher wage is economically feasible. The second is by setting a top wage rate that cannot be surpassed in season for when the crop and market conditions dictate a higher wage that is beneficial to the worker and employer. In some cases, this second scenario may depress the wages of U.S. workers when their employer cannot pay them more money so as not to violate the contract. Since we are bounded by time and cannot accurately predict the future, the Department's proposed requirement for the employer to list "any other wage rates the employer intends to pay" is an impossibility and not based in economic realities before market and crop conditions are more accurately known.

The Department seeks to add new language at section 655.122(l)(1) that would state "the employer must always calculate and pay workers' wages using the wage rate that will result in the highest wages for each worker, in each pay period." In addition, new language at 655.122(l)(2) would mean an employer must, when both hourly and non-hourly wages rates are listed on the job order, determine what type of pay for every individual employee would result

in the highest amount earned for that pay period. DOL claims that section 655.122(j) already requires the employer to keep field tallies, which is why calculating the highest rate owed to the worker make sense and claims it would not be an administrative burden on the employer.

We are opposed to the Department's proposal to take away the ability for an employer to choose the best pay method for the relationship between farmers and farmworkers under the proposed updates to section CFR 655.120(a) and 655.122(l). There are many factors that go into determining a fair balance between what the employer can afford and what is beneficial for the employees when it comes to determining wage rates paid. Variable factors such as crop quality and density, weather, availability of employees to perform jobs, and market conditions at the time a crop is produced are just some of the factors that a farmer must consider when deciding how and what to pay an employee. For example, a farmer may determine that a crop is best suited for an hourly wage rate. Yet the rule proposes if there is a published piece rate, the employer who wants to choose to pay an hourly rate will be forced to calculate on a per-day-per-worker basis what the piece rate wage could have been and pay the higher of the wage rates.

We completely oppose this idea that an employer would be required to supplement a worker's pay when a worker who is paid by the hour does not earn enough at the hourly rate to meet the applicable prevailing piece rate. This proposal is more than just trueing up hourly wages to the minimum wage whenever workers are paid on piece rate. If workers are paid hourly but could have earned more at piece rate, then the employer would have to true up to piece rate earnings for a paid period. But what if an employer chooses to pay hourly for that pay period but has piece rates also listed in the job order for a particular variety? This provision would eliminate the ability of the employer to decide week-to-week and day-to-day what should be paid for each type of work depending on market and crop conditions. If even one piece rate is listed but the employer pays by the hour for any given job task in a pay period, this proposal would force the employer to supplement by paying the higher prevailing piece rate wage even if market and crop conditions do not indicate piece rate pay is appropriate or possible.

Also, employers now must take on the additional burden of keeping individual employee field tallies for groups of employees that they would not normally have kept field tallies for when paid an hourly rate. For example, the employer may keep track of production on a whole group of employees or field by day, not on an individual basis when paying hourly. MSPA rules specifically state that field tallies are only needed when an employer chooses to pay piece rate. If the employer does not keep a bin count when paying the worker hourly for a chosen day, how can the employer calculate what the employees would have earned with prevailing piece rate? Establishing rules that dictate to a farmer how and what they must pay removes the employer's ability to adapt to every-changing business conditions and decide on what best suites the employer's relationship with their employees. We oppose these proposed ideas on wage rates and urge the Department to not consider these ideas and this language further.

3. Section 655.122, Contents of Job Offers

a. Paragraph (h)(4) Employer provided transportation

This proposal would require the provision, maintenance, and wearing of seat belts in most employer-provided transportation. The employer will be prohibited from operating any employer-provided transportation that is required by the U.S. Department of Transportation National Highway Traffic Safety Administration regulation to be manufactured with seat belts unless all passengers and the driver are properly restrained by seat belts.

How is an employer supposed to enforce the wearing of seatbelts? The employer can agree to have seatbelts installed and maintained, but requiring employers to police whether employees use their seatbelts at all times and not operate a vehicle unless the employer verifies all employers are buckled up creates an undue hardship on the employer and friction waiting to occur with employees. The Department is misguided in claiming that mostly supervisors are driving employer-provided vehicles like vans and trucks. Many times, the drivers of these on-farm vehicles are co-workers who have no supervisory authority within the business. When employees are transported by vehicles the employer provides, state laws require the use of seatbelts, and employers have already trained employees on their use and requirements.

However, this proposed new rule would require employers to supervisor the entirety of a vehicle trip in a company vehicles or fear citation from the Department for an employee choosing not to use a seatbelt. The Department admits that "workers do not use seat belts even when they are provided" (*Federal Register*, p. 63778), so now employers will have to spend thousands of dollars in supervision or technology to police this new requirement.

Workers already have a duty to follow laws and rules they are trained on, and this proposal goes too far. The Department claims the employer can instruct drivers to not move the vehicle until ensuring all passengers are wearing the seatbelt. The Department acknowledges that all states, except New Hampshire, require passengers in vehicles to wear their seatbelts. MSPA does not mandate seatbelt use. Because of all of this failure, the Department now expects H-2A employers to police the use of seatbelts. On this topic of seat belt use, we agree that there should be parity on this topic between MSPA and H-2A regulations. But the requirement for constant employee use of seatbelts is overly burdensome, and we oppose it.

b. Paragraphs (i)(1)(i) and (ii) Shortened work contract period

We support the proposed changes regarding the requirements to shorten a contract period and CO approval.

c. Paragraph (l)(3) Productivity standards as a condition of job retention

The Department proposes new language at section 655.122(l)(3) to require all employers with minimum productivity standards as a condition of job retention to disclose such standards in the job offer, regardless of whether the employer pays on a piece rate or hourly basis. Section

655.122(n) would mean that an employee can only be terminated for minimum productivity standards if the standard is communicated in the job order, is reasonable, and is applied consistently. DOL asserts that productivity standards must be static, quantified, and objective, and per section 655.122(1)(2)(iii), productivity standards "must be no more than those normally required by employers for the activity in the intended area."

We oppose this proposed change. Currently, productivity standards are *only* required when paying piece rate, and we believe that standard should remain in place. If an employer establishes their productivity standards, it appears DOL will not allow them to change those standards to a higher standard without OFLC's approval even though conditions on the ground require such a change. What happens when a SWA and/or DOL cannot establish a verifiable productivity standard through wage surveys? What will be the basis for determining a productivity standard and if that standard is "reasonable"? What if a verifiable production standard cannot exist? Would an employer be required to use productivity standards derived from other employers' practices as a basis for paying their own workers? This proposed change in language leads to more questions and fewer answers. We ask the Department to drop the proposed language and maintain the current regulatory language regarding production standards.

d. Paragraph (l)(4); 655.210(g)(3) Disclosure of Available Overtime Pay

The Department proposes language in section 655.122(l)(4) that states, "whenever overtime pay is required by law or otherwise voluntarily offered by an employer, an employer would be required to disclose in the job order: the availability of overtime hours; the wage rate to be paid for any overtime hours; and the circumstances under which overtime will be paid; and, where the overtime is required by law, the applicable Federal, State, or local law governing the overtime pay."

We have concerns with the way this proposal is worded. This provision would be required whenever overtime is required by law or voluntarily offered. If a worker will be paid hourly, the wage rate can be disclosed. However, if the worker is paid on a piece rate at any time during the future work week where overtime may be paid, it is highly likely the exact piece rate that will be paid is not yet known because no one knows what the worker's output will be, when breaks will occur, how much downtime there will be, and how many hours will be worked in the future. It is impossible to know what the calculated weekly regular rate of pay will be for some estimated time in the future.

This rule is not necessary. It is enough to simply state overtime will be paid at 1.5 times the regular rate of pay per law. Having a rule that mandates a complex "what-if" scenario is administratively overburdensome, and the resulting wage calculation will not be accurate.

The Department references that this overtime disclosure is used in H-2B (US DOL WHD Field Assistance Bulletin No. 2021-3, Overtime Obligations Pursuant to the H-2B Visa Program, Dec. 7, 2021). In this bulletin, the example disclosures simply list the threshold number of hours at

which overtime premiums will kick in during a pay period and what will be the rate of pay. There is no reference to an actual "wage rate."

The proposed language is problematic for employers because requiring some actual calculation of the wage is impossible and not accurate particularly when considering piece rate. We ask the Department to consider adopting language that would work for employers. An example would be, "Overtime will be paid at 1.5 times the weekly regular rate of pay for any hours exceeding 40 hours."

e. Paragraph (n) Termination for cause or abandonment of employment

The Department proposes revisions to section 655.122(n) governing employee termination for cause or abandonment. At section 655.122(n)(2)(i) the Department proposes a six-factor test for "for cause" termination of H-2A workers and workers in corresponding employment. Wafla is a proponent of employers using the practice of progressive discipline when needed. However, the progressive discipline proposal offered by DOL in this NPRM is too inflexible to be used in everyday employment scenarios. As such, we oppose what the Department has suggested on this topic.

Proposed section 655.122(n)(2)(i)(A) would "require that the employees were informed (in a language they understood) of, or reasonably should have known of, the policy, rule, or productivity standard that is the basis for termination." Many employers in agriculture and in many other industries still do not have formal, robust human resource policies and procedures that are documented. This statement is particularly true in states that allow for at-will employment. If these provisions will now be required as a condition of for-cause termination, employers will need to invest many hours and thousands of dollars to create HR policies and procedures. We estimate that a small employer who needs to implement full HR policies and procedures to meet this law would need at least 80 hours to develop, train, and implement these employment law concepts.

Propose section 655.122(n)(2)(i)(B) states, "If termination is for failure to meet a productivity standard, such standard must be disclosed in the job offer." The proposal expressly states that vague standards such as, must work at a diligent pace or keep up with the crew, are not sufficiently defined, the standards must have objectivity, quantification, and clarity. Again, how is a valid and verifiable productivity standard determined?

In addition to the productivity standard being sufficiently described and understood, according to proposed section 655.122(n)(2)(i)(C), the failure to meet the policy, rule, or productivity standard must be under the employee's control. We appreciate the Department's apparent intent, but conditions in the real world may necessarily dictate a more practical course of action. If the employer is required to include a productivity standard in the job order, what happens when field conditions change and the productivity standard cannot be met?

Proposed section 655.122(n)(2)(i)(D) mandates that "termination for cause would apply only where the policy, rule, or productivity standard is reasonable and applied consistently," and

proposed section 655.122(n)(2)(i)(E) stipulates that "termination for cause would only apply where the employer undertakes a fair and objective investigation into the job performance or misconduct." What will be the threshold for "reasonable"—DOL field bulletins, SWA staff opinions, or employment case law? Again, many hours will need to be spent by a business to answer these crucial questions and establish procedures for dealing with this rule language if it is adopted.

Proposed section 655.122(n)(2)(i)(F) "would require the employer to engage in progressive discipline to correct the worker's performance or behavior terminating that worker for cause." Proposed section 655.122(n)(2)(ii) would define "progressive as a system of graduated and reasonable responses to an employee's failure to meet productivity standards or failure to comply with employer policies or rules." We object to these proposals. Employers have the right and ought to have the right to terminate employees because they are not a good fit with the work culture or team environment, which happens frequently in many industries.

Prior to each disciplinary measure, the employer must notify the worker of the infraction and allow the worker and opportunity to present evidence in their defense to dispute the accuracy of the employer's description of the infraction or failure to meet productivity standards. After imposing any disciplinary measure, the employer will be required to prior to termination, provide relevant and adequate instruction to the worker, the worker must be afforded reasonable time to correct the behavior or meet the productivity standard following instruction. What is the measure for "reasonable," especially since DOL says the time afforded to fix the issue may vary depending on the misconduct or performance issue? Who defines how much time it ought to take for the worker to correct the behavior? Again, employers will have to spend more time and expense to get familiar with employment case law and government interpretations.

Employers will have to keep detailed files on each termination, and proposed section 655.122(n)(2)(iv) "would require the employer to bear the burden of demonstrating to the Department that any termination for cause meets the requirements of proposed 655.122(n)(2)." Even the location of "where an employer constructively discharges a worker" will be considered a factor in a prohibited termination.

Finally, in section 655.122(n)(4) are the recordkeeping requirements for employers to keep related to termination for cause. We find it interesting that these proposed rules regarding H-2A workers also include a mandate in (iii) to keep records indicating the reason(s) for termination of any employee. So DOL clearly intends to regulate recordkeeping pertaining to H-2A workers, U.S. workers in corresponding employment, and possibly other U.S. workers.

When rolled together, this proposed progressive discipline process is complex and costly. Employers ought to adopt progressive discipline policies voluntary, but this mandatory proposal is an administrative burden on employers at a time when we need additional agricultural employment, not more roadblocks and unnecessary, baleful regulatory oversight.

C. Application for Temporary Employment Certification Filing Procedures

1. Section 655.130, Application Filing Requirements

a. The Department Proposes to Require Enhanced Disclosure of Information about Employers: Owners, Operators, Managers, and Supervisors

The Department wants additional disclosure of information from employers that employ H-2A workers, including the operators of the place(s) of employment in the job order and the managers/supervisors of the workers. DOL claims it needs this information for investigation purposes. We disagree. If DOL commences an investigation of an employer, it can ask for this information at that point. There is no need for the Department to have this information provided on an employer's application, and providing this information up front is an additional and unnecessary burden and cost on the employer. Until an investigation begins, this information is not necessary for DOL to have, and even when DOL has this information, it should be used only for the purposes specified in this section, not other sections of this NPRM.

The proposal to provide full names, dates of birth, addresses, telephone numbers, email addresses, and other personal, professional, and location information raises issues of individual privacy. If this information is disclosed, all of it becomes a public record. There is currently a big problem with employers who list their contact information on the "employer information" section of the application being inundated by job seekers from outside the United States, especially with the help of bots, once DOL publishes the information on seasonaljobs.dol.gov. This disclosure opens individuals up to harassment, stalking, and other negative contact. If the Department collects this information, it should not be disclosed to the public and should only be kept and used by SWAs, ETA, and WHD for certification or compliance purposes.

The new proposed language in section 655.130(a)(3) would require disclosure of all persons or entities who are the operators of the place(s) of employment listed on the job order (if different from (a)(2)). The problem with this proposal is that if a fixed-sited agricultural operator hires a H-2ALC (farm labor contractor), the person or entity owning the fixed site where H-2A workers will be provided by the H-2ALC will now be disclosed. Also, this new language would require disclosure of all managers and supervisors of H-2A workers and workers in corresponding employment. All of these new disclosure requirements will be a costly and sizeable recordkeeping burden on farm labor contractors and fixed-site growers alike. We object to the routine, unnecessary, unjustified disclosure of employee information to the Department.

2. Section 655.135, Assurances and Obligations of H-2A Employers

b. Section 655.135(h), (m), and (n), section 655.103(b), Protections for Workers Who Advocate for Better Working Conditions

The Department proposes that H-2A workers and workers in corresponding employment, who have traditionally been exempt from the National Labor Relations Act ("NLRA") provisions

surrounding engaging in activities related to self-organization, are now proposed to be protected by a quasi-NLRA that is completely regulatorily derived.

This idea is regulatory overreach. It goes far beyond describing how to enforce legislative decrees. This proposal is a blatant attempt at circumventing Congress to create new laws. Congress specifically exempted farm workers from the National Labor Relations Act, the federal law governing collective bargaining. The Department may not agree with the determination of Congress, but through these rules DOL seeks to substitute its own will for that of the national legislative body. This quarrel over separation of powers can and ought to end with congressional authority rightly prevailing over a regulatory agency's overreaching interpretation. If the Biden Administration and DOL want to extend collective bargaining rights to farmworkers, it can work with Congress to do so. But overstepping Congress and directing DOL to impose NLRA-type mechanisms on an exempt industry is blatant encroachment on the constitutional separation of powers.

The Department claims it has the authority to make these radical changes under the auspices that the agency is charged with making sure U.S. workers are not adversely affected by below-minimum working conditions. DOL says it has a charge to establish "acceptable" baselines standards for working conditions of U.S. workers through the H-2A program. For this claim to be true, DOL must show that non-H-2A agricultural workers in the United States (i.e., domestic workers or U.S. workers) have been granted collective bargaining rights as a minimum labor standard or working condition under federal law. Using that as the baseline, DOL could attempt to recognize the same right among H-2A workers. Of course, DOL cannot truthfully make this claim because Congress exempted agriculture from the NLRA. The baseline is an absence of collective bargaining rights in agriculture. Parity between H-2A and U.S. domestic workers must recognize that federal law has not extended collective bargaining rights to agricultural workers (guest workers and domestic workers). DOL's attempted foray into an expansion of collective bargaining rights for H-2A and corresponding workers has no basis in history, law, or logic.

DOL makes claims and cites labor advocate information claiming farmworker conditions are "worsening working conditions in agricultural employment—a lowering baseline—leading to a decreasing number of domestic workers willing to accept such work" (*Federal Register*, p. 63788). Yet USDA's Economic Research Service, the source cited in footnote 58 on page 63787 of the *Federal Register*, says farmworker wages have steadily increased since 2010 by 12 percent. It is also well documented that the H-2A program has raised the bar on the quality and quantity of farmworker housing since that housing needs to meet OSHA standards and be licensed annually. Outreach to farmworkers is the highest it has ever been with SWAs and other government agencies routinely reaching out to farmworkers to hear complains and offer information about employment rights. For example, see the activities of the Agricultural and Seasonal Workforce Services Office in Washington state. This experience runs counter to DOL's description that workers are isolated geographically, the work is seasonal, and employees are tied to a single employer.

DOL claims the lack of clear protections for H-2A workers and corresponding workers to self-organize and advocate on their own behalf "has contributed to low union density in the agricultural workforce" (*Federal Register*, p. 63788). From this point, DOL assumes that unionization is the answer to additional worker protections, and the agency cites union activity in North Carolina as a successful example. However, unions are not the only way to secure additional worker protections. The practice of guestworkers legally, legitimately, and voluntarily entering the United States on work contracts dates to the 1800s. (See page 5 of the Agricultural Labor Working Group, House Committee on Agriculture, Interim Report, Nov. 7, 2023.) The existing H-2A rules provide for higher wages, free transportation, and free housing for H-2A workers. They also provide enforcement mechanisms that DOL and SWAs have not routinely availed themselves of to enforce those rules. The Department's job is to objectively enforce labor laws – not to watch union trends and attempt to increase union participation.

The NLRA explicitly exempts "any individual employed as an agricultural worker," yet the Department claims the proposed regulations would not be preempted by the NLRA. The Department attempts to argue—unimpressively and implausibly—around this fact and even U.S. Supreme Court rulings, one of which held that the NLRA preempts regulation of employer or worker conduct that Congress intended to leave unregulated "to be controlled by the free play of economic forces" (*Federal Register*, p. 63789). We believe the Department's legal footing for its assertions is weak, awkward, lackluster, problematic, and certainly open to challenge.

DOL claims it can skirt the NLRA because its proposal does not involve "economic weapons," and nothing prohibits "states" from being free to legislate as they see fit (*Federal Register*, p. 63789). However, DOL, as a federal agency, is responsible for enforcing federal – not state – law. What states choose to do regarding agricultural collective bargaining rights apply to those states and do not create a national baseline for minimum labor standards. The Department is wrong in its assertion that it can now set and enforce a national baseline based on differing baselines in a handful of states. DOL must respect our system of federalism.

The Department also claims its "proposed rule could not frustrate the effective implementation of the NLRA's processes, because the relevant portions of the proposal would apply exclusively to a set of H-2A agricultural workers to whom the NLRA's processes do not apply" (*Federal Register*, p. 63789). Here, DOL attempts to sidestep the NLRA by claiming that law's agricultural exemption does not apply to H-2A workers, thus DOL can assert collective bargaining rights to H-2A workers. However, by doing so, DOL's proposed rules grant more rights to H-2A workers than are granted by federal law to other U.S. workers in agriculture. This situation is different from other H-2A program features such as the AEWR. DOL can create minimum wage rates for H-2A because Congress has recognized agriculture as an industry governed by the Fair Labor Standards Act and its minimum wage. There is a basis in history and federal law for the federal government to set wage rates. In contrast, DOL attempts to create collective bargaining rights for H-2A workers out of whole cloth. There is no historic or legal basis in federal law for collective bargaining rights in agriculture. Using this NPRM, DOL tries to create a new minimum workplace standard (agricultural collective bargaining) with no basis or precursor in federal law.

It is an effort derived from the Department's own public policy objectives and created solely by its own whims—not statutory authority or Supreme Court opinion.

We urge the Department to reverse course on its arguments in favor of collective bargaining, to remove these ideas from this proposal, and to respect the will of Congress and wisdom of the Supreme Court on the NLRA.

iii. Section 655.135(h) No Unfair Treatment

The Department proposes to expand 655.135(h)(1) through (5) to (h)(1)(i) to (h)(1)(vii), from a total of five to seven parts. Among other things, DOL proposes a "no unfair treatment" provision that makes it a violation of the program to in any manner discriminate against any person engaged in agriculture as defined by the FLSA. We believe in ensuring that all employers are treating their employees fairly, we are concerned that these broad-ranging definitions will lead to unfounded accusations, as they have done in the past. Besides, all of these topics are already protected by both the H-2A rules and other rules. This section is redundant and unnecessary.

vii. Prohibitions on seeking to alter or waive the terms and conditions of employment, including the right to communicate with the Department.

The content of this subsection is already protected by both the H-2A rules and other rules. This subsection is redundant and unnecessary.

viii. Section 655.135(h)(2) Activities Related to Self-Organization and Concerted Activity

In this section, the Department again attempts to extend certain rights to agricultural workers (both H-2A and workers in the United States) that have been explicitly exempted by Congress. Whether it is self-organization, secondary boycotts, or other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions, this proposal is an authorized regulatory overreach by the Department into an area of statute already determined by Congress. The Department's justification is that "these proposed protections are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed" (*Federal Register*, p. 63793). The Department's reasoning on this point is faulty. If Congress has exempted agricultural workers from coverage by the National Labor Relations Act, extending additional protections to H-2A workers beyond what Congress has authorized does not level the playing field between H-2A workers and workers in the United States. Instead, it allows, invites, and results in disparity between groups of workers – a condition contrary to the stated goal of the Department's proposal. This language is a specious attempt at applying expressly unrelated portions of the NLRA to H-2A and workers in corresponding employment. It is an unmitigated end run around Congress and congressional authority by the current presidential administration.

Including language in this section to prohibit employers from intimidating, threatening, restraining, coercing, blacklisting, or in any manner discriminating against workers is redundant.

Multiple state and federal laws already protect workers from these threats. This language in this subsection is unnecessary and should be removed.

DOL proposes that "concerted activity" include any employee activity "engaged" in with or on the authority of other employees, and not solely by and behalf of the employee himself. We are concerned that the Department will interpret this provision like many NLRB cases where two or more employees claim they represent all other employees without explicit consent from other employees. Worker rights can be protected and respected, but we are concerned that this idea will morph from employee discussions among themselves into activity by labor union officials and labor advocates who, according to other provisions of this NPRM, would freely show up at worker housing and say they are representing workers without explicit consent of workers.

ix. Section 655.135(m) Worker Voice and Empowerment

A. Section 655.135(m)(1) Employee contact information

The Department mandates employers to provide worker contact information to a requesting labor organization. This mandate would require information for both H-2A and U.S. workers in corresponding employment. The information to be made available periodically to requesting labor organizations includes workers' full names, dates of hire, job titles, work location address and ZIP code, person email addresses, personal cell phone numbers and/or profile names for messaging applications such as WhatsApp, home country addresses with postal code, and home country telephone numbers.

These proposed rules endanger worker data privacy. We are not aware of any other industry that is required to turn over workforce contact information to a private third party without explicit consent from an employee. There are also no indications of what this information is needed for or how it is not an invasion of the worker's privacy. Even if the employer has a good working relationship with workers and no one wants to unionize, a union can still demand workers' private information. DOL is mandating that an unrecognized, unrequested, unrelated third party have free, unrestricted access to employee contact information. Information that hospitals and schools must keep private would be given out to any requesting labor organization. DOL is considering a worker "opt out" provision, which we would support. But the best course of action is to protect worker privacy by not including this mandate in the final rules. If workers want to unionize, they have every right to do so. They do not need to have their personal contact information given to an unrelated, unsolicited third party.

B. Section 655.135(m)(2) Right to Designate a Representative

The proposed rule language would allow a worker to designate a representative to be present during a meeting between the employer and the worker in which the worker reasonably believes that the meeting may lead to discipline, to allow the designated representative to provide active advice, and to participate during the meeting. DOL will interpret this provision

more broadly than what may arise during an "investigatory interview" under section 7 of the NLRA.

Again, this is an NLRA principle that is erroneously begin ported over to agriculture, an industry Congress intentionally excluded from the NLRA. This idea has no justifiable place in H-2A regulations. This provision takes a concept that would be outlined in a typical collective bargaining agreement and makes it part of the H-2A regulations.

The designated representative could be a co-worker, friend, relative, labor advocate, labor union, or possibly even an attorney. Are there no restrictions? Not all meetings happen at a scheduled time in an office. Is the employer required to wait for a designated representative when coaching, mentoring, correction, and possible discipline occurs verbally in the field? On page 63797 of the *Federal Register*, DOL recognizes that conversations about work performance and disciplinary actions may happen in the field. Having a worker say they need to wait for a representative adds a level of complexity and impracticality to address issues in real time. Addressing issues quickly is imperative in agriculture, given the nature of the short growing season.

We urge the Department not to adopt these provisions into the final rules.

C. Section 655.135(m)(3) Prohibition on Coercive Speech

DOL would prohibit H-2A employers from coercing and/or requiring workers to listen to or attend an employer's speech or meeting concerning the exercise of their rights to engage in activities related to self-organization, including any effort to form, join, or assist a labor organization or engage in other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions.

This proposed section silences employer free speech rights. Employers have a perspective in these conversations that needs to be heard. For the government to silence one side in favor of another unbalances the equation and puts the government into a biased position. If workers do want to unionize, the rules prohibit employers from saying anything about it – pro or con. The proposed rules, taken as a whole, are hypocritical because they recognize employee association and speech rights while gagging employers' free speech rights.

D. Section 655.135(m)(4) Commitment to Bargain in Good Faith over Proposed Labor Neutrality Agreement

The Department has proposed requiring employers to attest whether they will bargain in good faith over the terms of a proposed labor neutrality agreement with a requesting labor organization or whether they will not. Under proposed 655.135(m)(4)(ii), employers that choose not to bargain over labor neutrality agreements must state that they are not willing to do so and disclose their reasons for making that choice. DOL would further mandate that this decision by the employer will need to be disclosed in the job order.

We strongly oppose this idea and its inclusion in the proposed rule package. It is totally inappropriate to require an employer to disclose their hypothetical position on labor organizing. For example, an employer who has operated within the rules, never had any violations, has a happy (non-union) workforce, and has dealt constructively with issues between employee and the employer in-house would now be required to make a public statement on their stance on labor unions. This proposed rule would force the employer to take a stance on a "what-if" scenario—agreeing not to take a position for or against a labor organizing effort—and would make that opinion available to the public. This type of mandate is compelled speech, a violation of the employer's free speech rights.

Since the Department has called out the topic of bargaining in good faith over proposed labor neutrality agreements, it is apparent that the Department is more focused on creating rules for unionizing agricultural workplaces than it is on drafting rules that create a fair balance between employers and workers. The inclusion of the mandate that H-2A employers state their position on labor neutrality agreements gives the appearance that DOL is assisting in union organizing efforts. As a regulatory agency, DOL ought to and needs to remain unbiased and objective on union matters in workplaces, and employers should not be forced to disclose their opinions on this topic.

x. Section 655.135(n) Access to Worker Housing

New language at section 655.135(n)(1) would provide that workers residing in employer-furnished housing must be permitted to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of workers' workday and subject only to reasonable restrictions designated to protect worker safety or prevent interference with other workers' enjoyment of these areas. Furthermore, DOL seeks to add language at section 655.135(n)(2) that would provide a "narrow" right of access of labor organizations, which have an incentive to report concerns of labor exploitation to the Department or other law enforcement agencies, as well as provide information to workers on their rights under the H-2A program and to engage in self-organization. These same labor organizations would be permitted to enter common areas or outdoor spaces near worker housing up to 10-hours per month outside of workers' workday. Finally, revisions to section 655.132(e)(1) would require fixed-site growers where H-2ALC use the grower housing to also comply with this requirement.

We have significant concerns with these housing proposals, and we oppose including these provisions in the rules, which would allow labor organizations to have a right to access workers without explicit invitation by those workers. Employers would no longer have control over who is on their own property.

The Department seems to thumb its nose at the U.S. Supreme Court's 2021 decision in *Cedar Point Nursery v. Hassid,* which found that a regulation providing union activist's access to farms and ranches was an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. This NPRM is an undisguised end run around the opinion of the Supreme Court and the U.S. Constitution. Employees may not want to be vulnerable to uninvited union

organizing tactics or unsolicited advice from advocates or other outside entities. This proposed regulation would attempt to make unconstitutional trespassing the norm.

Employers must allow labor organizations (even if no collective bargaining agreement is in place) to spend up to 10 hours per contract per month in common areas of farmworker housing. Any labor union can demand to set up office on private property and talk to whoever they want to, whenever they want to for up to 10 hours. A regional farmworker housing hub could have unions at the housing all month, depending on the number of contracts running concurrently. Also, this provision would violate food safety regulations governed by the Food Safety Modernization Act, which requires farmers to control access to farm sites to protect the safety of our national food supply.

In addition, we oppose the Department's attempt to force employers to attest that they allow labor organizations access to employer-provided worker housing if it is located on property or facility not readily accessible to the public. Owners and operators of worker housing should be allowed to set reasonable rules and limits regarding visitors on the property, including rules governing sleeping hours and locations of visits (sleeping quarters, living rooms, and common areas). Workers, if they want to meet with other parties, could work within site visitation rules or visit with those parties off-site.

xi. Section 655.135(o) Passport Withholding

We agree that the employer should not withhold employee passports. But section 655.135(e) and other federal laws already require an employer to comply with laws combatting human trafficking. This language is duplicative and not necessary to be included in this NPRM.

3. Section 655.137, Disclosure of Foreign Worker Recruitment

We agree with the current practices for H-2B on the topic of foreign recruiters. We support the requirement that the employer list the foreign recruiter or entity on the certification application. Simply listing the recruiter's company and owner gives sufficient information to the federal government of the legitimacy of such a business. We are opposed to the proposed requirements that go beyond this requirement.

The proposed language at sections 655.137(a) and 655.135(p) would require the employer and its attorney or agent to provide a copy of all agreements with any agent or recruiter that the employer engages or plans to engage in the recruitment of prospective H-2A workers, regardless of whether the agent or recruiter is located in the United States or abroad. A copy of the agreement would be filed with certification application. The agreement may include trade secrets, pricing information, or other unique information that cannot be made public. If an agreement is redacted, then who has authority to determine what is allowed to be redacted versus disclosed? If the Department suspects an issue, we suggest that ETA or WHD request a copy of the agreement from the employer during a post-certification inspection.

New 655.137(b) and 655.135(p) require employer to disclose name and geographic location of persons or entities hired by or working for foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2A workers for the job opportunities. Putting this requirement on the employer creates a huge burden of recordkeeping and liability. How far reaching does this list need to be? If the information provided by the foreign recruiter is false, must the H-2A employer vet the information? Must the H-2A employer travel to a foreign country to verify the information or risk some type of liability or penalty? If an H-2A employer does not know or cannot know everything about the employees of a recruiter in a foreign country, why does the Department propose to hold them accountable? Is the Department going to assist in prosecuting foreign recruiters in other countries? Some recruiters have 10-100 employees. If the Department requires H-2A employers to gather that amount information and type it into FLAG, each filing could take two to three hours of additional preparation time.

We understand the Department's desire is to end the payment of illegal fees in the H-2 programs, and we support that goal. However, the mechanisms put in place by this proposed section raise more questions than they answer. They do not help solve the problem, and they increase employer liability for information they have zero control over, such as all names of potential third-party agents and employees that a recruiter may hire. We oppose these additional requirements, but we can support taking the current H-2B disclosure requirements and porting them over to H-2A. In H-2B the disclosure form only requires that the employer list the name of the recruitment company and the main principal owner. It does not require the employer to list every employee or sub-agent that recruiter hires.

Finally, the Department is considering sharing foreign recruiter information, the agreements, and other information with foreign governments. Any such information should be shared with foreign governments only if the U.S. federal government suspects a possible violation of international law. Otherwise, the information contained in these agreements needs to remain confidential.

D. Labor Certification Determinations

1. Section 655.167, Document retention requirements of H-2A employers

This section provides technical updates to document retention requirements for the new requirements of this proposal, such as progressive discipline and termination for cause, foreign labor recruiters, and retaining evidence for unforeseen minor start date delay to notify the SWA and each worker. All records to be kept for a 3-year period. We are opposed to this section because we oppose the new requirements for progressive discipline and termination for cause and some of the requirements around foreign labor certification and start date changes.

E. Post-Certification

1. Section 655.175, Post-Certification Changes to Applications for Temporary Employment Certification

The Department proposes a new provision at section 655.175 that will address an employer's obligations in the event of a post-certification delay in the start of work to be consistent with the new proposed start delay procedures in New 653.501(c). Generally, we are supportive of this idea.

The proposed changes will separate the procedure that is followed when there is a request to make minor changes to the period of employment during processing the H-2A application and changes requested after certification. We support this idea. Defining "minor delay" in the start date as a delay of 14 calendar days or fewer, which also aligns with "short-term" extensions of two weeks, is a concept we can support. It is also a good idea to not require the employer to request to OFLC for CO approval for a "minor delay" and to state that employer notification needs to be to the SWA and each worker at least 10-days before the certified start date.

The new language at section 655.145(b)(1) would require employers with a minor start date delay to provide to all workers who are already traveling to the place of employment, upon their arrival and without cost to the workers until work commences, except for which the worker receives compensation under proposed paragraph (b)(2)(ii), daily subsistence in the same amount required during travel under 20 CFR 655.122(h)(1). The employer must pay this no later than the first date the worker would have been paid had they begun employment on time. This provision would also remind the employer they still have to provide housing to the worker, even under the delayed start date. This idea is fair to the workers, and we support it.

We have suggestions regarding the proposed new language for section 655.145(b)(2)(ii). According to the proposal, when the employer fails to timely notify workers (a 10-day notice before the start date), the employer will be required to compensate workers for each hour of the offered work schedule in the job order at the wage rate, for each day that work is delayed, for a period up to 14 calendar days, starting with the certified start date. If employer fails to timely notify, not only would they owe the wages to the workers, but the hours paid would not be counted against meeting the three-fourths guarantee obligation.

We believe workers should be paid under this scenario (unless it is an act of God or unavoidable weather-related delay that could not have been foreseen), but the pay should be at the hourly AEWR rate, and the time should count against the three-fourths guarantee. Employers have two options for paying workers – hourly or piece rate. Since there is no way of knowing exactly what piece work would have been missed due to the delayed start date, there is no way to calculate a piece rate for each worker. As a result, the only option for payment is the hourly AEWR, and workers should just be paid an hourly compensation for the hours not worked. Since the worker has already been paid for hours offered, then the employer should be able to use those paid hours against the three-fourths guarantee obligation. The worker is not being

harmed further since they were paid wages for those hours. We ask the Department to make these changes.

F. Integrity Measures

1. Section 655.182, Debarment

b. OFLC Debarment Actions

The Department has a goal of speeding up the effective date of debarments by amending sections 655.182(f)(1) and (2) to reduce the period to file rebuttal evidence or request a hearing of a Notice of Debarment from 30 calendar days to 14 calendar days. If the party being debarred has not filed rebuttal evidence or requested a hearing, the Notice of Debarment will take effect at the end of the 14-calendar-day period unless a special circumstances extension is granted by the Administrator.

Likewise, the idea to amend sections 655.182(f)(1), (2), (3), and (5)(i) to shorten the timeframe to request an appeal of the OFLC Administrator's final determination of debarment. Under this proposal, a request for Administrative Review Board (ARB) review would drop from 30 days to 14 calendar days.

Are the Department and the ARB prepared to respond to these requests within the shorter timeframes? Are they prepared to proffer swifter adjudication, or will cases and appeals leave the employer in limbo even longer?

We doubt that this change will result in a speedier decision-making process, and even if it does, it comes at the expense of employers having their time to file evidence reduced from the current standards. We oppose this provision in this proposal because it restricts the employer's due process rights by reducing by half the current time available to an employer to file rebuttal evidence and appeals.

VI. Administrative Information

The analysis by the Department of Labor lacks a proper estimation of the volume of these proposed rules and the time it takes to study and implement the changes considered. The department seems to believe that all farms employ human resources professionals, and those employees can easily familiarize themselves with the new rules. The Department has generously recognized that this familiarization will take one hour of an agricultural HR specialist's time – approximately $54 worth of time (*Federal Register*, p. 63812). This estimation is laughable. Our experts at wafla have easily spent more than 100 hours and thousands of dollars in payroll reviewing and analyzing this rule proposal, followed by communicating and educating our members on the proposed changes, and we read technical labor laws daily.

Some farms have HR specialists on staff who can perform this work, but a mere one hour of time is hardly enough to learn about these significant, substantive changes. Other farms, especially small to mid-sized farms, may not have the finances available to hire an HR

professional. As such, the farmer at these one-person shops will spend countless more hours becoming familiar with this proposal and stumbling their way through the complex implementation.

Furthermore, the Department's estimate that it will take a farm's human resource specialist only two hours to gather and enter information on a yearly basis (*Federal Register*, p. 63812) is equally ludicrous. Documenting one instance of the six-step progressive disciplinary process required by these rules to terminate an H-2A worker for cause will easily take one to two hours by itself. And that is one instance of one part of this massive package of proposed rule changes. We see the administrative burden to understand and implement these proposed rules to be in the thousands to tens of thousands of dollars, depending on the size of the farm, farm staff, and the farm workforce.

Concluding Remarks

Thank you for accepting our comments.

We are disheartened by the language the Department has chosen to use to describe current users of the H-2A program. We find the pejorative nature and tenor of this NPRM alarming and biased. The Department makes the radical claim that one reason for these proposed regulations is that there are "worsening working conditions in agricultural employment—a lowering baseline—leading to a decreasing number of domestic workers willing to accept such work" (*Federal Register*, p. 63788). If this statement is true—and we staunchly disagree it is—then the Department's efforts in this NPRM do nothing to address this claim, and conditions will only continue to get worse.

The Department's creation of more H-2A rules through this NPRM do not directly and necessarily remedy the workplace issues the Department falsely believes are at the center of domestic agricultural employment. If the goal is to improve working conditions for workers, further regulation of H-2A will not bring about the Department's expected results, and this NPRM is a regulatory overreach into an area governed by Congress, not the Department of Labor.

No one can make an honest claim that working conditions for farmworkers are worse in 2023 than they were in 2022, 2010, or any year prior to now. The current standards in the H-2A program have increased wages and housing conditions in U.S. agriculture directly for guest workers and domestic workers in corresponding employment and indirectly for other farmworkers in the United States. This proposal is far from being fair and objective, and its verbiage is disrespectful toward everyone—farmers and farmworkers—who work to produce a domestic food supply for the United States.

We urge the Department to strike this proposal and begin working will all stakeholder groups—workers and employers—to find ways to reform the H-2A system, enforce current rules, and develop and promote food production that is fair for producers, workers, agencies, and consumers. Wafla stands ready to engage in that type of constructive dialogue with the

Department and other stakeholders. We would appreciate the opportunity to work with you to craft H-2A reforms that meets the needs of the government, farmers and farmworkers, visa applicants and visa holders, and our nation.

Sincerely,

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